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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 10 OF 14

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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 E*x 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.

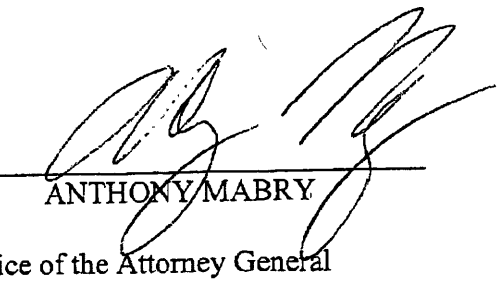
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Senior Assistant Deputy Attorney General

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Assistant Attorney General

By: 
ANTHONY MABRY

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ATTORNEYS FOR RESPONDENT

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.

ANTHONY MABRY
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)) COUNTY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022, Applicant,	)	Case No. 2014-CP-26-035
vs.	)	
State of South Carolina, Respondent.	)	**RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO UNSEAL *EX PARTE* FUNDING REQUESTS AND ORDERS REGARDING THE SAME**

FILED
2015 JAN 16 PM 2:34
BLANE 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

Exhibit F

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Jeffrey P. Bloom, who appeared personally before me, affirms and states the following:

1. I, Jeffrey P. Bloom, am a licensed member of the following Bars: S.C.; N.C.; and N.Y. Currently, I am engaged in the private practice of law and have been so since April 1999. From 1992-1999, I was the Chief Public Defender for Richland County, Columbia, S.C. (This was prior to the establishment by the Legislature of a Circuit Defender system). From 1985-1992, I was with the Horry County Public Defender Office, Conway, S.C., and during that time was the Chief Public Defender for that County from 1988-1992. I also serve in the honorary position of Assistant Clinical Professor of Neuropsychiatry and Behavioral Science with the University of South Carolina School of Medicine, and have so served in that capacity since 1998.

2. I have served as counsel of record in more than 50 capital cases. This includes more than 15 capital jury trials, as well as numerous cases in state capital post-conviction and appeals.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding in capital post-conviction proceedings in South Carolina.

4. In the capital and non-capital cases I have worked on at the trial and post-conviction levels in South Carolina, I have obtained literally hundreds of orders authorizing funding for investigators and experts to aid in the development of trial or post-conviction claims. At no time was I able to guarantee or establish to the trial or PCR court in advance that the expert or investigator whose professional services I sought to retain through court approval per the statute, would be beneficial to the case or actually be used in the case. The purpose of obtaining approval and payment for such services is to in fact investigate the case, including factual investigation, mental health investigation, and similar avenues.

5. In my experience, I have never had a judge interpret the "reasonably necessary" standard of South Carolina Code § 16-3-26(C)(1) to require demonstration of a beneficial result in order to authorize funding for investigative or expert services. Nor have I known a judge to interpret the standard to require a showing that the information obtained through investigative or expert services will actually be used in the case in order to authorize funding.

6. For example, in both non-capital and capital cases in General Sessions Court and with PCR's in Common Pleas Court, I have had Circuit Court Judges authorize funding for an investigator to assist with the interviewing of witnesses and collection of records, without knowing in advance if I would actually use the witnesses or records in the case. Similarly, I have had Circuit Court Judges

authorize funding in both trial and PCR cases for mental health professionals and/or other experts in both non-capital and capital cases, without knowing in advance if the information or opinion by said professional or expert would be useful to the case.

7. In every capital PCR case I have litigated, I did not know in advance if an investigator or expert would uncover something beneficial for actual use in court. There is no way for an attorney to know what an investigator or expert will discover. The best an attorney can do is explain why he or she believes, based on his or her review and assessment of the facts of the case, that investigative or expert services are needed. It is not uncommon for PCR counsel to invoke trial counsel's failure to investigate as a reasonable basis for funding to conduct the very investigation that trial counsel failed to perform. In fact, this is PCR counsel's very role pursuant to applicable South Carolina and United States Supreme Court precedent in capital jurisprudence, as set forth below and herein.

8. PCR counsel is required to conduct an independent investigation into all issues relevant to guilt or punishment, as well as make an assessment about whether the applicant received ineffective of assistance of counsel at trial. If PCR counsel has reason to believe that trial counsel failed to investigate a potential area of mitigation or unreasonably curtailed their mitigation investigation, this may form the basis of a valid claim of ineffective assistance of counsel. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 40 (2009) (trial counsel "ignored pertinent avenues for investigation of which he should have been aware"); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel were deficient because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2009) ("Even the limited information obtained should have put counsel on notice that [defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence."). Accordingly, PCR counsel will often explain that trial counsel failed to investigate something as a reason to support a request for funding for expert and/or investigator assistance with exploring and investigating that particular issue.

9. My experience working with investigators and experts is that they will not conduct their investigation or evaluation without an order from the court authorizing funding for their services. Nor do I know of any investigator or expert who would provide their services on the chance they will receive payment if their services create a beneficial result for the client.

10. Finally, I would respectfully submit that denial of funding for expert and/or investigative assistance in a capital case could likely be construed as reversible error where the denial was based upon a trial court's interpretation that PCR counsel could not show in advance that the professional services sought would be beneficial to the case. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985) (Court reversed death sentence where trial court denied funding for independent psychiatrist).

I affirm, under the penalty of perjury, that the foregoing is true and correct.

JEFFREY P. BLOOM

Sworn to and subscribed before me
This 13th day of October, 2014

Notary Public for the State of South Carolina
My commission expires: 2/21/2024

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Diana Holt, who appeared personally before me, affirms and states the following:

1. I, Diana Holt, have been licensed to practice law in South Carolina since November of 1994. My practice is dedicated to representing indigent people sentenced to death or facing a possible death sentence at trial. I worked for non-profit agencies in Texas, South Carolina and Georgia from 1992, first as an intern, and from 1994 to 1998, when I entered private practice.

2. I have been court-appointed to serve as counsel of record in approximately ten death penalty cases at the trial level, none of which resulted in a death sentence. I am certified to serve as lead counsel in death penalty trials. I have served as counsel of record in approximately fifteen capital Post Conviction Relief actions. I have served as a mitigation investigator/counsel in more than ten capital cases, both pre-trial and at trial level post-conviction.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding and my services as a mitigation investigator in trial level post-conviction proceedings in South Carolina.

DH 1 of 2

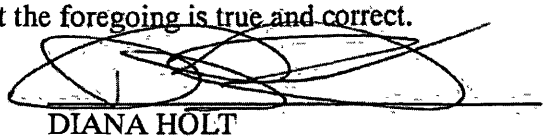
4. In the capital post-conviction cases I have worked on, I have never been denied funding for investigative or expert services because I did not know at the outset what the investigation and expert evaluation would uncover or if that information would ultimately form the basis of a successful claim for post-conviction relief.

5. In cases where I have been retained to serve as a mitigation investigator, funding for my services has always been authorized by the post-conviction court prior to my commencing an investigation. Payment for my services as a mitigation investigator has never been contingent on the information uncovered during my investigation being used in a claim for post-conviction relief or on a beneficial result being obtained for the client.

6. In my experience, there is no way to know at the outset of a mitigation investigation what the investigation will uncover. It is further impossible to know at the outset if the information to be uncovered during a mitigation investigation will be used in a claim for post-conviction relief.

7. When I serve as a mitigation investigator, my role is to compile a social history of the client by conducting interviews and collecting records relating to the client and his or her family. I present my findings to the attorneys appointed and experts retained on the case. To present a social history to a court, the typical practice in capital cases is to retain a testifying social worker who has experience in analyzing and presenting a social history.

I affirm, under the penalty of perjury, that the foregoing is true and correct.



DIANA HOLT

Sworn to and subscribed before me
This 13th day of October, 2014

Notary Public

Commission Expires: 2/21/2024

DH
2 of 2

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Teresa L. Norris, who appeared personally before me, affirms and states the following:

1. I, Teresa L. Norris, worked at what is currently known as the Death Penalty Resource and Defense Center ("the Center"), from November 1994 until March 2006. I was the Senior Staff Attorney until April 1996 and thereafter served as Acting Director and then Director. As Director—and throughout my time at the Center—I attempted to monitor all capital post-conviction cases in the State of South Carolina. When I left the Center in 2006, I went into private practice where I continue to work almost exclusively on capital cases in South Carolina and other states.

2. I have served as counsel of record in approximately 42 capital cases in South Carolina, North Carolina, Mississippi, Texas, Virginia, the federal system, and the United States military system. My experience has included all stages of the proceedings from trial to clemency proceedings. I have served as counsel in at least twelve capital post-conviction proceedings in South Carolina. I have also served as a consultant, both pro bono and retained, in numerous other cases.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding in capital post-conviction proceedings in South Carolina.

4. I do not recall ever being denied funding for a testifying social worker or for mental health experts. In virtually every case I have had, I have been allowed funding, at minimum, for a mitigation investigator, forensic psychiatrist, and a neuropsychologist. In a number of cases, I have also obtained funding for other additional mental health experts. I do not recall even hearing of a capital post-conviction relief case in South Carolina where the court did not authorize funding for at least one mental health expert when a request was submitted by defense counsel.

5. In every capital case, defense counsel requires assistance from investigators and experts to investigate, evaluate and prepare potential claims for relief. No attorney has the necessary skills and training to independently assess all potential areas of mitigation. That is, of course, precisely why funding for expert assistance is authorized and required to be disbursed prior to any evidentiary hearing or trial. The American Bar Association Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases (2003) have been cited with approval and repeatedly referenced as relevant guidelines by the Supreme Court of the United States, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams*, 529 U.S. at 396, and by the South Carolina Supreme Court, *see Council v. State*, 380 S.C. 159, 172-73, 670 S.E.2d

356, 363 (2008); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007). Guideline 10.7(A) provides that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The commentary to Guideline 10.7 explains that "[c]ounsel's duty to investigate and present mitigating evidence is now well established" and includes an obligation to investigate, among other things, medical history, family history, educational history and social history. Similarly, Guidelines 10.11(A) and (F) instruct that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty" and that counsel should carefully consider presenting expert testimony "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)."

6. Regardless of whether one views the Guidelines as binding, in my own practice, I have had post-conviction relief granted to clients by the South Carolina Supreme Court because, at least in part, prior counsel did not adequately investigate and present mitigation through lay witnesses and experts. . *See, e.g., Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006); *Von Dohlen v. State*, 360 S.C.598, 602 S.E.2d 738 (2004). In each of those cases, I could not have predicted what my court-authorized investigators and experts would find, but I could and did establish that the investigators and experts were reasonable and necessary, which is all that is required under the statute in order to obtain court approval for the funding necessary.

7. There is no way for an attorney to know what an investigator or expert might uncover, or if that information will create a claim for post-conviction relief, until after the investigation or evaluation is complete. I have never had a court deny funding for an investigator or expert because I could not foresee what the investigator or expert would find but I could point to "red flags" that clearly indicated the need for the investigator or expert; nor has a court ever denied funding on the basis that it could not deem investigative or expert services reasonably necessary until a beneficial result was obtained.

8. In my experience, investigators and experts generally will not conduct an investigation or evaluation in a post-conviction case or even begin to do so without an order from the court authorizing funding for the investigator or expert's services.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Teresa L. Norris
TERESA L. NORRIS

Sworn to and subscribed before me
This 9th day of October, 2014

Jill A. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA
In The Supreme Court

IN ITS ORIGINAL JURISDICTION

HORRY COUNTY
Court of Common Pleas
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Case No. 2014-CP-26--0035

APPELLATE CASE NUMBER 2015-_____

STEPHEN C. STANKO, ... PETITIONER,

v.

STATE OF SOUTH CAROLINA, ...RESPONDENT.

RESPONSE TO PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar # 5758

J. ANTHONY MABRY
Assistant Attorney General
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ATTORNEYS FOR RESPONDENT

The Respondent State of South Carolina makes a Response to the extraordinary "Petition for Court Oversight of Capital PCR Action" dated February 3, 2015. Petitioner seeks this Court's extraordinary supervisory authority of this capital post-conviction relief action pursuant to Section 17-27-160 (C) ("hearing must be scheduled within one-hundred and eighty days from the date of the status conference, unless good cause be shown") and *In re Stays of Execution*, 321 S.C. 544, 471 S.E.2d 140 (1996). The post-conviction relief application was initially filed January 6, 2014 and is set to be heard pursuant to the scheduling order of Judge Benjamin H. Culbertson, as amended, on March 2, 2015.

In the Petition, the Petitioner seeks to have this Court mandate the assigned post-conviction relief judge, the Honorable Benjamin H. Culbertson to perform certain acts which are within his judicial discretion. Petitioner requests the Court to direct that Judge Culbertson continue the state PCR case scheduled for March 2, 2015.[1] The Petitioner further seeks the Court to mandate Judge Culbertson to rule favorably on an unserved "*Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for Hearing" apparently made on October 14, 2014. [Respondent have no knowledge of the particulars of the funding motions or

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1 The Petitioner, on January 8, 2015 had made an "Applicant's Motion for Continuance" requesting a continuance due to the Motion to Continue requesting Judge Culbertson to continue the case set for March 2, 2015 "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." Applicant's Motion for Continuance, p. 1. Within the Applicant's January 8, 2015 motion, he requests a nine month continuance because the experts they consulted indicate six to nine months is the minimum time it will take to prepare for a hearing. Motion for Continuance, p. 2, ft. 1.

orders other than what Petitioner has set forth in the "Motion for Continuance" or this Petition.[2]].

In the Petition before this Court, Stanko asserts that the Respondent has taken no position on the motions in the lower court, except for making a request that the funding motions and orders denying the request be unsealed. Petition, p. 1. To be clear, the Respondent has been unable to respond or take a position to whether a continuance is appropriate or whether the hearing judge applied appropriate standards because Respondent has no knowledge of the basis of the requests or denials because they were done without service upon the State, without knowledge of the purpose, or basis of the reasoning in granting or denying requests. To be more clear, we still are unable to take a position because we have not been provided access to those motions and orders between counsel and Judge Culbertson except through the characterizations in Applicant's pleadings. The Petitioner's reliance on his unserved motions and unserved orders in this Petition again is troubling without being served with the documents.

Respondent respectfully requests this Court to either provide or require disclosure to the State of the *ex parte* requests and orders between Petitioner's counsel and the fact-finder in this action in order to allow the Respondent to take an informed position on the requests. Respondent submits this information is necessary and proper for an understanding of the basis of continuance requests and denials, particularly where Petitioner characterizes that the respective denials by Judge Culbertson involve a consideration of the merits of potential issues before the Court in their pleadings before this Court. 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 because they do not know what the judge was advised and the particular reasons for his actions based upon the

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2 Respondent was provided by the Clerk with a Form 4 denial of an Order for Transport of the inmate but was not aware of the motion or purpose or requested date underlying the order or request for transporting the inmate.

information he received.

It is unclear why the Court should be called upon to intervene in the action at this time, particularly when the pleadings and orders have not been provided to the Court of Respondent These general requests concerning a continuance or appointment of experts are matters that generally fall within the hearing court's discretion under Section 17-27-160 (C) ("hearing must be scheduled within one-hundred and eighty days from the date of the status conference, unless good cause be shown") and *In re Stays of Execution*, 321 S.C. 544, 471 S.E.2d 140 (1996).

A.

On January 9, 2015, the day after receipt of the continuance motion in the lower court, Respondent made a "Motion to Unseal Ex Parte Funding Request and Orders Regarding Same" for the primary purpose to address the motion for continuance, but also because Respondent was not aware of the specific requests being made, granted or denied up to that point of time. This disclosure issue had not been addressed in the lower court.

In the Respondent's pending motion to unseal and disclose before the lower court and here, Respondent asserts the following salient points for this Court or the lower court to issue an Order unsealing to the extent to make available to Respondent any and all *ex parte* expert witness or investigative funding requests and Orders regarding the same. This request is supported so Respondent may adequately and properly respond to Applicant's current Petition before this Court and pending continuance motion.

B.

In order to respond to the Petition, Respondent should be allowed access to the underlying motions and orders that Petitioner's pleading addressed. First, there is no statutory or a

constitutional right to be heard on funding requests *ex parte*[3] and *in camera*[4] in this civil post-conviction relief settings. Respondent acknowledges, however, the right of the Court to determine that some matters may be held *ex parte* under certain discrete circumstances as authorized under the Code of Judicial Conduct.[5] 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 appointment and funding of expert witnesses or investigative witnesses and services in capital post-conviction relief actions. PCR applicants typically argue there is a statutory right by virtue of Section 17-27-160 for the non-disclosure of investigative and expert witness requests made to the fact-finder PCR judge, 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). *Thames* addressed that such matters in PCR actions are not subject to being done *ex parte*.

The petitioner relies upon and references to Section 16-3-26 are in the second paragraph in Section (B) of S.C. Code § 17-27-160 to support non-disclosure of any funding requests or orders to the Respondent. However, that provision only addresses the appointment, qualification, and

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3 "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)).

4 "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 Dictionary at 684 (5th ed. 1983)).

5 However, it also would suggest that discussions on or about the merits of an action or issues should not be done ex parte with the fact-finder.

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.[6] This speaks of counsel's compensation - a matter not at issue in these proceedings. Contrary to what Petitioner implies, 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 in S.C. Code § 16-3-26(C)(1).[7] 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.[8]

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6 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.

7 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 capital trial.

8 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).

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated into the PCR Act. 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 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 through 17-27-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing an Applicant is not directly raising issues related to guilt or sentence.[9] 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

9 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).

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."). [10]

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. 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

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10 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")).

preparation for the criminal trial. *Thames*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1. 11 Consequently, Applicant has failed to show a statutory right to *ex parte* proceedings.[12]

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 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

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11 In *Thames,* the Court stated:

> When a defendant requests expert services for a criminal trial, the request is determined by the judge in ex parte proceedings. S.C.Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp.1995); Ex parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.
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> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

Thames, 325 S.C. at 11, 478 S.E.2d at 682 n. 1

12 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.").

party bringing the suit in this instance.[13] 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 are 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 constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a

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13 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 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.[14]

Whether funding for any particular expert is necessary or authorized, 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 had 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.[15]

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.[16]

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14 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.

15 "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.").

16 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.").[17] 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

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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.

17 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.

regarding any matter, not privileged, which is 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).[18] 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 limited 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:
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> (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.

(emphasis added). 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

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18 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").

court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[19] The party communicating in 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

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19 Ex *parte* funding requests are neither provided for nor mandated. The better course, and 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).

material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

Notably, concerning Applicant's *ex parte* funding requests, it is unclear if a full recitation of background was provided to the PCR judge.[20] 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 the court for the ability to start completely fresh or simply "expert shop" most likely is not necessary in a capital case or a non-capital case. *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.").[21] For example, a request for a mental health expert in this case should be examined in

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20 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.

21 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").

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. *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."). Counsel had no duty to contact other experts when he thought those consulted were well qualified and counsel has no duty to ensure the trustworthiness of an expert's conclusions. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998). See *Philmore v. McNeil*, 575 F.3d 1251, 1263 (11th Cir 2009)(counsel has no duty to present all psychiatric evidence, and not calling one was reasonable where the opinion conflicted with Reasonable counsel need not "shop" for contrary expert opinions. *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995); *Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008), Moreover, counsel has no duty to pursue neurological experts when experts consulted indicated no additional testing was required, *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998), or found no evidence of brain damage. *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998). At any rate, these are the types of facts that the PCR court should have before deciding on funding expert witness requests in the PCR setting.

Furthermore, Applicant has waived any confidentiality by the filing of this Petition before this Court and 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 makes response to the Petition. Respondent submits, for all the foregoing reasons, this Court my issue an Order unsealing the *ex parte* funding requests and Orders regarding the same, in order that Respondent may properly respond to the merits of the Petition before this Court and the Motion for a Continuance before the hearing judge should this Court deem its supervisory authority of the stay of execution to empower this acts over the hearing judge's discretion.

Respectfully submitted,

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By: _____
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ATTORNEYS FOR RESPONDENT

February 13, 2015
Columbia, South Carolina.

*counsel of record

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, certify that I have served Respondent's RESPONSE TO PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION by depositing one copy to his counsel of record, postage prepaid, addressed as follows:

Emily Paavola
Lindsey Vann
Death Penalty Resource Center
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This 13th day of February, 2015.

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ATTORNEY FOR RESPONDENT

RECEIVED

FEB 18 2015

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

Capital PCR Case Number: 2014-CP-26-00035

STEPHEN C. STANKO, SK 6022 ..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

PETITIONER'S REPLY
REGARDING PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION
(Expedited Consideration Requested)

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I. INTRODUCTION.

Undersigned counsel were appointed to represent petitioner, Stephen C. Stanko, in his capital post-conviction relief proceedings on February 4, 2014. Counsel immediately began working on the case and requested that the PCR judge, the Honorable Benjamin H. Culbertson, authorize payment for attorneys' fees. Judge Culbertson initially denied that request, and did not ultimately agree to authorize counsel to receive payment for any work on the case until March 27, 2014. Counsel then requested funding for the assistance of expert services, first on April 1, 2014, and again on July 28, 2014. Judge Culbertson refused to approve funding for any testifying expert and also denied two subsequent motions to reconsider these denials, based on his erroneous reading of S.C. Code § 17-27-160, which authorizes a PCR court to grant funding when such funds are "reasonably necessary" for a PCR applicant to investigate and present his claims for post-conviction relief. Judge Culbertson has concluded that no expert services can be deemed reasonably necessary until after the services are performed and a beneficial result obtained. Counsel have repeatedly tried to explain to the PCR court that no reasonable, credible or ethical expert would agree to condition payment of their fees on a guarantee of a "beneficial result" before even beginning their work on this case.

On October 14, 2014, undersigned counsel filed a third motion to reconsider regarding the funding denials and requested that Judge Culbertson hold a hearing on all funding denials. Judge Culbertson refused to hold a hearing and has not ruled on this motion. Given that counsel cannot prepare petitioner's claims for post-conviction relief without the assistance of expert services, counsel filed – on January 6, 2015 – a motion for a continuance of the PCR hearing currently scheduled to begin on March 2, 2015. Judge Culbertson has not ruled on this motion. In response to the motion for a continuance, respondent moved to unseal all of petitioner's *ex parte* funding

requests, and petitioner filed a response in opposition. Judge Culbertson has not ruled on this matter either.

The parties are therefore scheduled to begin an evidentiary hearing on Petitioner's PCR claims on Monday, March 2, 2015, at which undersigned counsel cannot possibly effectively represent petitioner's interests. *See Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012) (observing that just as a prisoner whose direct appeal counsel is ineffective is "denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims," a prisoner lacking the assistance of an "adequate attorney" in post-conviction proceedings "will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim."). In other words, undersigned counsel fully believe that if they are forced to go forward with an evidentiary hearing on March 2, 2015, without access to the tools, resources and time typically available to PCR applicants in this State for developing the factual bases of their claims, undersigned counsel's representation will be ineffective. *See Strickland v. Washington*, 466 U.S. 668 (1984).

This Court's has historically exercised supervisory authority over capital PCR cases. *See In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). This Court has also previously intervened via an extraordinary writ in cases involving novel questions of law where the interests of judicial economy weigh in favor of expedited relief. *See e.g., Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009); *Bennett v. State*, 380 S.C. 215, 669 S.E.2d 594 (2008); *Porter v. Jedziniak*, 334 S.C. 16, 512 S.E.2d 497 (1999); *In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). Petitioner asks this Court to: (1) provide guidance to the PCR court on the proper interpretation of the statutory funding provision contained in S.C. Code § 17-27-160; (2) require a continuance of the PCR hearing to allow petitioner

adequate time to prepare for a hearing with the assistance of expert services; and, (3) provide any other relief the Court determines necessary in the interests of justice.

Petitioner is not asking this Court to review the underlying merits of each of petitioner's individual requests for expert services, nor does he believe that such a review is necessary since all of Judge Culbertson's funding denials turn on his consistent misinterpretation of the funding statute. However, petitioner has already stated that if this Court deems it necessary to review the *ex parte* funding pleadings and orders filed below, then those pleadings should be provided to the Court for its consideration under seal. *See* Petition for Court Oversight of Capital PCR Action at p.3 n.4. Respondent argues instead that this Court should require petitioner to disclose the *ex parte* pleadings *to the State* so that it can scrutinize the funding request and weigh in on whether the State agrees that petitioner actually requires the expert services. Respondent then argues at length that capital PCR applicants are not entitled to be heard on funding requests in *ex parte* proceedings. Respondent is incorrect.

II. Capital PCR Applicants Are Entitled to Ex Parte Funding Proceedings.

Contrary to Respondent's assertion, capital PCR applicants are entitled to *ex parte* proceedings for the consideration of 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), on which respondent heavily relies, 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 psychiatrists prior to her guilty plea. *Id.* at 11, 478 S.E.2d at

[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.

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 ex parte funding pleadings in this case remain under seal. 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 Court of the United States and this Court 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, petitioner 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. Petitioner 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 an applicant 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 petitioner'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 petitioner's indigency.[3] As this 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 petitioner 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 petitioner is indigent and was required to present information to the PCR 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 petitioner'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 petitioner access to expert and investigative services that could lead to success in these proceedings. Due Process would further be violated because petitioner 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 petitioner'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 petitioner 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. Response at 13. 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 petitioner 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, petitioner 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 petitioner 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.

CONCLUSION

In any event, the issue presented in the Petition for Court Oversight of this capital PCR action is not whether petitioner is entitled to the specific funding requested, nor is the question about whether capital PCR applicants are generally entitled to seek funding in *ex parte* proceedings (as they clearly are). Rather, the issue is whether this Court will intervene to address a series of problems that, if not addressed now, will inevitably lead to reversal at some point in the future of this litigation either in state or federal court. To avoid the unnecessary waste of judicial time and resources, petitioner believes this Court should grant his petition and address these problems now rather than later.

Respectfully submitted,

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February 18, 2015.

RECEIVED

FEB 18 2015

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

Capital PCR Case Number: 2014-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 Petitioner's Reply Regarding Petition for Court Oversight of Capital PCR Action was served by first class United States mail, postage prepaid, this 18th day of February 2015, upon the following:

Anthony Mabry
SC Attorney General's Office
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Columbia, SC 29211

Jill A. Rider

Jill A. Rider

The Supreme Court of South Carolina

Stephen C. Stanko, SK 6022, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-000212

ORDER

Counsel for petitioner have filed a "Petition for Court Oversight of Capital PCR Action" in which they essentially ask this Court to review the circuit court's rulings on *ex parte* motions regarding funding for experts filed in this matter. The State has filed a return in which it requests this Court issue an order unsealing the *ex parte* funding requests and orders so that it may properly respond to the merits of the petition before this Court.[1] The petition and the State's request are denied.[2]

C.J.

J.

J.

J.

J.

[1] The State currently has such a motion pending before the circuit court, where it can be ably addressed.

[2] We note, however, that the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1986) and such proceedings were found to be improper.

Columbia, South Carolina

February 25, 2015

cc:
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Lindsey Sterling Vann, Esquire
J. Anthony Mabry, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire

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.)	**APPLICANT'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT ON GROUNDS 10&11(b)(3) and 10&11(h)**
)	
State of South Carolina,)	
)	
Respondent.)	
)	

Applicant, Stephen C. Stanko, is a death-sentenced inmate. His Final Amended Application for Post-Conviction Relief is pending before this Court. An evidentiary hearing on the grounds for relief presented in that application is currently scheduled to begin on March 2, 2015. For the reasons that follow, however, Stanko is entitled to summary judgment with respect to Grounds 10&11(b)(3)[1] and 10&11(h),[2] because S.C. Code Ann. §16-3-20 (2003), as amended by the Legislature, and construed and applied by the South Carolina Supreme Court, fails to genuinely narrow the class of individuals eligible for a sentence of death as mandated by the Eighth Amendment. Accordingly, South Carolina's death penalty statute is unconstitutional, and Stanko is entitled to summary judgment.

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[1] This ground alleges that trial counsel was ineffective for failing to move, pre-trial, for the trial court to find that South Carolina's death penalty statute, S.C. Code § 16-3-20, is unconstitutional, and thus bar the State from seeking a death sentence against Stanko, 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).

[2] This ground alleges a free-standing claim that Stanko'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.

South Carolina Rule of Civil Procedure 56(c) provides, in pertinent part, that upon a motion for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Additionally, upon the filing of this motion for summary judgment and the supporting documentation, respondent "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SCRCP 56(e). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

As demonstrated below, there is no genuine issue of fact concerning Grounds 10&11(b)(3) and 10&11(h). These issues turn on purely matters of law. Stanko hereby moves for summary judgment on these grounds as follows.

ARGUMENT

I. RELEVANT LEGAL BACKGROUND.

Prior to 1972, states were free to make capital punishment available as a sentencing option for any murder or other "capital" offense, and to leave the determination whether to actually impose a death sentence entirely to the discretion of jurors in individual cases. *See generally McGautha v. California*, 402 U.S. 183 (1968). Although juries exercising this unbridled discretion were thus free to impose death sentences in large numbers of cases, they actually

imposed it in only a small fraction of the cases in which they could have done so. *Id.* at 202-04. Over time, the infrequency and randomness with which juries were imposing the death penalty raised concerns that it was being administered arbitrarily, and that jurors' determinations of whether a defendant would live or die were turning on discriminatory factors such as race, religion and economic or social standing.

These concerns over arbitrariness and discrimination in the administration of the death penalty culminated in *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), where the Supreme Court held that sentences imposed under the standardless, entirely discretionary statutes then in use across the country "constitute[d] cruel and unusual punishment under the Eighth and Fourteenth Amendments." *Id.* at 239. Although *Furman* resulted in separate opinions from all nine justices, the risk of arbitrariness and discrimination inherent in a system with no mechanism for objectively separating those who should suffer death from those who should not was a central consideration for each of the justices who voted to strike down the existing statutes.[3] As the Court

[3]*See Furman*, 408 U.S. at 255 (opinion of Douglas, J.) ("Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."); *id.* at 256-57 ("Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."); *id.* at 294 (opinion of Brennan, J.) ("When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison."); *id.* at 309-10 (opinion of Stewart, J.) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. ... [I]f any basis can be discerned for the selection of these few ..., it is the constitutionally impermissible basis of race. ... I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the

later observed, "[a] fair statement of the consensus expressed by the Court in *Furman* is 'that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia,* 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

Some states addressed the problems identified in *Furman* by crafting new capital punishment procedures designed to limit and guide the discretion of decision makers in capital cases.[4] The first such procedure to be reviewed and endorsed by the Supreme Court was Georgia's. *See Gregg*, 428 U.S. 153. The Georgia statutory scheme included three features that proved critical to its acceptance in *Gregg*. First, it worked to "narrow the class of murderers subject to capital punishment by specifying ten (10) statutory aggravating circumstances, one of

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infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (footnote omitted); *id.* at 313 (opinion of White, J.) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."); *id.* at 365 (opinion of Marshall, J.) ("Racial or other discriminations should not be surprising. In *McGautha v. California*, 402 U.S. at 207, this Court held 'that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution.' This was an open invitation to discrimination.") (modification by Marshall, J.).

[4]Other states, including South Carolina, responded to *Furman*'s concerns over sentencer discretion by simply eliminating that discretion altogether in favor of mandatory death sentences for certain classes of offenders. These statutes, however, were quickly rejected as incompatible with "contemporary standards," and as inadequate "to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences." *Woodson v. North Carolina*, 428 U.S. 280, 301-02 (1976); *see also State v. Rumsey*, 267 S.C. 236, 238, 226 S.E.2d 894, 895 (1976) (striking down South Carolina's mandatory death penalty statute as "constitutionally defective" in light of *Woodson*).

which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed." *Id.* at 196-97. Second, it required particularized consideration of "the circumstances of the crime and the criminal" before the jury was permitted to make its sentencing recommendation. *Id.* at 197; *see also id.* ("No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die."). And third, the Georgia scheme included the "important additional safeguard" of an "automatic appeal," under which the state supreme court was required to determine whether a sentence had been "imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Id.* at 198. "On their face," the Court observed, "these procedures seem to satisfy the concerns of *Furman*." *Id.*

After *Gregg*, the Supreme Court continued to refine and add meaning to the principles upon which it had relied in upholding Georgia's sentencing scheme. Among the most prominent of those principles has been the requirement that a state's capital sentencing statute "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Gregg*, 428 U.S. at 196 n.47) (modification by the Court). In *Godfrey*, enforcement of this principle required reversal of a Georgia death sentence based solely on the statutory aggravating circumstance that the offense had been "outrageously or wantonly vile, horrible and inhuman." *Godfrey*, 446 U.S. at 426. The Court reasoned that the language of the aggravating circumstance was so broad and vague that a "person of ordinary sensibility could fairly characterize almost every murder as" falling within it, and

therefore qualifying the defendant for a death sentence. *Id.* at 428-29. The Court went on to conclude that reversal of the defendant's death sentence was required because "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433.

In *Zant v. Stephens*, 462 U.S. 862 (1983), the Court considered a claim that Georgia's capital sentencing scheme was inconsistent with *Furman* because, under Georgia law, "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Id.* at 874. After emphasizing once again that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *id.* at 877, the Court held that Georgia's decision to have its aggravating circumstances perform only that function was acceptable:

> Our cases indicate ... that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime. ... ¶ The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage.

Zant, 462 U.S. at 878-79 (footnote omitted); *see also id.* at 879 (noting that the two aggravating circumstances found by Stephens' jury "adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the

death penalty may not be imposed.").

Over the nearly three decades since *Godfrey* and *Zant*, the Supreme Court has consistently adhered to and reinforced the constitutional requirement that statutory aggravating circumstances meaningfully narrow the class of murder defendants eligible for a death sentence. *See, e.g.*, *Spaziano v. Florida,* 468 U.S. 447, 460 (1984) ("If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"); *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion."); *Arave v. Creech,* 507 U.S. 463, 474 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) ("As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder."); *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) ("In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances."); *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) ("[A] state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.").[5]

[5]Even strong supporters of capital punishment recognize the importance of applying it narrowly

II. SOUTH CAROLINA'S CAPITAL SENTENCING STATUTE, AS WRITTEN BY THE LEGISLATURE AND CONSTRUED BY THE SOUTH CAROLINA SUPREME COURT, DOES NOT PERFORM THE CONSTITUTIONALLY MANDATED NARROWING FUNCTION.

As described in the preceding section, a state's capital sentencing scheme is constitutional only if its statutory aggravating factors genuinely and objectively narrow the class of murder offenders eligible for a sentence of death. South Carolina's scheme was constitutional at the time of its adoption in 1977, and likely remained so for some time thereafter. More recently, however, dramatic legislative expansion of the list of aggravating factors that make a murder death-eligible, and sweepingly broad judicial constructions of several of those factors, have combined to yield a set of death-eligibility criteria that can be met in nearly all murder cases. The result is that South Carolina's scheme for determining death eligibility today bears a much closer resemblance to the standardless regime outlawed in *Furman* than to the guided discretion approach accepted in *Gregg*.

A. Legislative adoption and expansion of South Carolina's capital sentencing scheme.

After South Carolina's post-*Furman* mandatory death penalty statute was struck down in the wake of *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Legislature responded in 1977 with a new statutory scheme "patterned after the death penalty statutes of our sister state Georgia." *State v. Shaw*, 273 S.C. 194, 199, 255 S.E.2d 799, 802 (1979). Like Georgia's system, South

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through eligibility criteria designed to objectively identify only the most deserving cases. *See, e.g.*, Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 29 (1995) ("Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts, and expanding the population of death rows will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society--those who, by their heinous and depraved conduct have relinquished all claim to human compassion--are put to death."); *id.* at 31 (criticizing "the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random").

Carolina's capital sentencing mechanism purports to perform the constitutionally mandated narrowing function by conditioning a murder defendant's eligibility for a death sentence on the finding of at least one statutory aggravating factor. *Shaw*, 273 S.C. at 201, 255 S.E.2d at 802.

The original statute contained seven statutory aggravating factors. 1977 S.C. Acts 177. The first of these aggravating factors included a list of subparts making a murder death-eligible if it occurred during the commission of any one of eight different offenses: rape, assault with intent to ravish, kidnapping, burglary, robbery while armed with a deadly weapon, larceny with use of a deadly weapon, housebreaking, and killing by poison. The remaining six statutory aggravating factors were: the murder was committed by a person with a prior conviction for murder; the offender "knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person"; the murder was committed for the purpose of receiving money or a thing of monetary value; the murder of a judicial officer, solicitor, or other officer of the court (current or former) during or because of the conduct of his or her official duties; the offender either committed or caused to be committed murder-for-hire; and, the murder of a peace officer, corrections officer, or fireman while engaged in the performance of his or her official duties. *Id.*

In the three decades since the original death penalty statute was passed, the Legislature has expanded the list of aggravating factors on numerous occasions:[6]

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[6]This steady expansion is precisely the opposite of what the Supreme Court envisioned when it upheld Georgia's statutory response to *Furman* in *Gregg*. *See Zant*, 462 U.S. at 877 n.15 (recalling Justice White's concurring opinion in *Gregg*, which "asserted that, over time, as the aggravating circumstance requirement was applied, 'the types of murders for which the death penalty may be imposed [would] become more narrowly defined and [would be] limited to those which are particularly serious or for which the death penalty is particularly appropriate.'") (quoting

- In 1978, physical torture was added to the list of concomitant crimes that made a murder death-eligible. 1978 S.C. Acts 555 § 1.

- In 1986, the Legislature added two more aggravating factors: "[m]urder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct," and murder of a child eleven years old or younger. 1986 S.C. Acts 462 § 27.

- In 1990, the list was again expanded to include murder during the commission of drug trafficking, and murder of a family member of a judicial officer, a peace officer, a corrections officer, or a fireman with "intent to impede or retaliate against the official." 1990 S.C. Acts 604 § 15.

- In 1995, dismemberment of a person was added as an aggravating factor. 1995 S.C. Acts 83 § 10.

- In 1996, the Legislature added an entirely new aggravating factor: "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." 1996 S.C. Acts 317 § 1.

- In 2002, the factor covering peace and correction officers was expanded to include "[t]he murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties." 2002 S.C. Acts 224 § 1.

- In 2006, as part of the "Sex Offender Accountability and Protection of Minors Act of 2006," the Legislature expanded the list again to make sexually violent predators death penalty eligible. 2006 S.C. Acts 342 § 2.

- In 2007, the Legislature added arson in the first degree to the list of concomitant crimes that make a murder death eligible. 2007 S.C. Acts 101 § 1.

- And in 2010, the Legislature acted again, adding trafficking in persons to the list of concomitant crimes that make a murder death eligible. 2010 S.C. Acts 289 § 4.

Gregg, 428 U.S. at 222 (White, J. concurring)).

Thus, as it currently stands, the South Carolina death penalty statute enumerates twelve statutory aggravating factors, the first of which includes eleven individual subparts, for a total of twenty-two circumstances that can make a murder death-eligible. S.C. Code Ann. §16-3-20. On its face, such a broad array of death-eligible circumstances would have difficulty passing muster under *Gregg* and its progeny. In practice, however, the situation is even worse than the statute suggests, as South Carolina's gradual but steady drift toward a pre-*Furman* death penalty scheme has been substantially exacerbated by the state judiciary's broad constructions of several of the statute's aggravating factors.

B. Judicial expansion of death-eligibility in South Carolina.

As is true with regard to virtually any statutory provision, the scope of S.C. Code Ann. § 16-3-20's aggravating factors is subject to judicial interpretation. *See, e.g., In re Amir X.S.*, 371 S.C. 380, 384-85, 639 S.E.2d 144, 146 (2006) (recognizing judicial authority to impose "limiting construction" on statute); *Bell v. Cone*, 543 U.S. 447, 453 (2005) (noting that *Proffitt v. Florida*, 428 U.S. 242 (1976), rejected challenge to statutory aggravating factor "on the express ground that a narrowing construction had been adopted by that State's Supreme Court"). The more narrowly a state's statutory aggravating factors are construed, the more likely its scheme as a whole is to satisfy the requirements of the Eighth Amendment. Conversely, the more broadly aggravating factors establishing death-eligibility are construed, the greater the likelihood that the state's capital sentencing scheme will violate the requirements established in *Gregg*. *See Zant*, 462 U.S. at 876 ("To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.").

In South Carolina, the Legislature's steady expansion of the class of death-eligible murders, described *supra*, has been matched – if not surpassed – by the South Carolina Supreme Court's sweeping construction of several statutory aggravating factors. Four examples are described below.

1. Physical torture.

Pursuant to S.C. Code Ann. § 16-3-20(c)(1)(h) (1978), a murder is death-eligible if it occurs during the commission of "physical torture." The statute does not define the conduct or circumstances which constitute "physical torture." In 1983, the South Carolina Supreme Court adopted Georgia's definition of that term, holding that "'Torture occurs when the victim is subjected to serious physical abuse before death,'" or "'when the victim is subjected to an aggravated battery ....'" *State v. Elmore*, 279 S.C. 417, 422-23, 308 S.E.2d 781, 785 (1983) (quoting *Hance v. State*, 245 Ga. 856, 861, 268 S.E.2d 339, 345 (1980), and citing *Hardy v. State*, 247 Ga. 235, 275 S.E.2d 319 (1981)).

Since *Elmore*, the South Carolina Supreme Court has carried out a significant expansion of what was already a very inclusive definition of physical torture. For example, in *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992), the court endorsed the following description of "aggravated battery" constituting physical torture:

> What is aggravated battery? An aggravated battery is an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of a dangerous, or deadly, object; the infliction of serious bodily injury with intent to commit a felony; a great disparity between the ages and physical condition of the parties; a difference in the sexes.

Davis, 309 S.C. at 349, 422 S.E.2d at 147. On its face, this definition encompasses – and therefore renders death-eligible – the vast majority of murders committed with weapons, and all murders

involving defendants and victims of opposite sexes.

Additionally, in *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519 (2000), the court further expanded the circumstances in which physical torture can be found, this time to include cases in which the victim had no conscious awareness of pain. According to the court, "[p]hysical torture is not predicated upon the amount of pain suffered by a murder victim. Although conscious awareness of pain may buttress the conclusion that the victim was subjected to serious physical abuse before death, its absence does not foreclose a finding of physical torture." *Johnson*, 338 S.C. at 128, 525 S.E.2d at 526.

2. Kidnapping.

Under South Carolina law, a murder is death-eligible if it occurs during the commission of a kidnapping. S.C. Code Ann. § 16-3-20(c)(1)(b) (1976). As with "physical torture," the statute is silent with respect to the definition of kidnapping. The South Carolina Supreme Court filled this definitional void by reference to South Carolina's kidnapping statute, S.C. Code Ann. § 16-3-910 (1976), which provides that "[w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law" is guilty of kidnapping. *See, e.g.*, *State v. Copeland*, 278 S.C. 572, 577, 300 S.E.2d 63, 66 (1982).

In *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1999), the court expanded the definition of kidnapping when it accompanies a murder. In *Tucker*, the defendant challenged the trial court's finding of kidnapping based on evidence that he duct-taped the victim to a bed while he searched for things to steal, then shot and killed the victim while packing to leave. *Id.* at 13, 512 S.E.2d at 105. Relying on a non-murder case, the South Carolina Supreme Court explained that, "[k]idnapping is a continuing offense. The offense commences when one is wrongfully deprived

of freedom and continues until freedom is restored." *Id.* (quoting *State v. Hall*, 310 S.E.2d 429 (1983)). Applying this view to the facts in *Tucker*, the court concluded that "[the victim] was unquestionably deprived of her freedom once appellant bound her with the duct tape," and added that "restraint constitutes kidnapping within the meaning [of the statute], regardless of the fact that the purpose of this seizure was to facilitate the commission of a [crime other than murder]." *Id.*

In *State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001), the court utilized the kidnapping statute's references to inveigling and decoying to further expand the range of conduct satisfying § 16-3-20(C)(a)(1)(b). Relying on the New Webster's Dictionary and Thesaurus, the court defined "decoy" as "'to lure successfully,'" and defined "inveigling" as "'enticing, cajoling, or tempting the victim, usually through some deceitful means such as false promises.'" *Stokes*, 345 S.C. at 373, 548 S.E.2d at 204. Based on these definitions, the court concluded that the defendant kidnapped the victim by luring her into the woods for the ostensible purpose of facilitating her willing participation in the killing of a third party. *Id.*

This expansive definition of kidnapping created by the South Carolina Supreme Court has substantially broadened the range of conduct capable of elevating a murder to death-eligibility. *See, e.g., State v. Kelly*, 343 S.C. 350, 356, 540 S.E.2d 851, 853 (2001) (murder during commission of kidnapping found where defendant duct-taped victim's hands behind her back); *State v. Vazsquez*, 364 S.C. 293, 297, 613 S.E.2d 359, 361 (2005) (murder during commission of kidnapping found where defendant locked two people in restaurant freezer, from which they escaped five minutes later and fled the scene unharmed); *State v. Cheeseboro*, 346 S.C. 526, 534, 552 S.E.2d 300, 304 (2001) (kidnapping found where defendant forced victims to walk from back of a barbershop to front, then back again, during holdup).

3. Attempted Armed Robbery.

South Carolina also provides for death-eligibility where a murder takes place while in the commission of an armed robbery. S.C. Code Ann. § 16-3-20(c)(a)(1)(d) (1976). In *State v. Humphries*, 325 S.C. 28, 33, 479 S.E.2d 52, 55 (1996), the South Carolina Supreme Court construed the statutory phrase "while in the commission of" to encompass any "acts that are concurrent with the murder." *See also id.* ("That the murder may occur before an armed robbery actually is completed does not mean that a robbery was not taking place."). Consequently, both uncompleted attempts to commit accompanying crimes, and accompanying crimes completed only after the murder, are sufficient to elevate a murder to death-eligible offense under § 16-3-20(C)(a)(1).

4. Prior Conviction for Murder.

South Carolina also recognizes prior murder convictions as aggravating circumstances. S.C. Code Ann. § 16-3-20(c)(2) (1976). This provision, too, has been construed expansively by the South Carolina Supreme Court. In *State v. Locklair*, 341 S.C. 352, 368-70, 535 S.E.2d 420, 428-29 (2000), the court held that "prior," as set forth in South Carolina's death penalty statute, means "prior to trial, rather than prior to the time of the crime." As a result, death-eligibility can be established on the basis of a murder conviction that did not exist at the time of the murder for which the death sentence is sought.

C. THE RESULT OF SOUTH CAROLINA'S LEGISLATIVE AND JUDICIAL EXPANSION OF STATUTORY AGGRAVATING FACTORS IS THAT NEARLY ALL MURDER OFFENDERS ARE LEGALLY ELIGIBLE FOR A DEATH SENTENCE.

The transformation of South Carolina's capital sentencing scheme from one designed to objectively distinguish the few cases in which death could be sought from the many in which it

could not, to one in which death is almost always legally available, is illustrated by data collected in multiple counties across the State. First, using court files, contemporary news accounts and other publicly available information, researchers assembled profiles of all 151 homicides that occurred in Charleston County between 2002 and 2007. John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479, 499 (2010). These profiles included relevant facts about the circumstances of the offense, the characteristics of the defendants and victims, and whether or not the State chose to seek the death penalty. *Id.*

Analysis of the Charleston County data in light of S.C. Code Ann. §16-3-20 and the judicial decisions interpreting it indicates that of the 151 cases identified, 115 – fully 76% – involved facts that would support the existence of at least one statutory aggravating circumstance sufficient to render them eligible for capital prosecution. Of those 115 death eligible cases, only five – a mere 4.3% – were actually prosecuted as capital cases.[7] These results confirm that South Carolina's present day capital sentencing scheme possesses the same combination of defining characteristics that *Furman* condemned: widely applicable death-eligibility (76% of cases), and narrow actual application of death (3.5%) to eligible cases. *Id.*

Strikingly similar results were obtained in Richland County. Using the same methods described above for the Charleston County data collection, researchers assembled profiles on 152

[7]Only one of the five capitally prosecuted cases -- *State v. Dickerson* -- resulted in a death sentence, and that outcome was made possible only by the defendant's rejection of a life sentence offered by the prosecution. Dickerson was not "the worst of the worst"; if he were, there would have been no offer to reject. Rather, as the lone recipient of a death sentence from a pool of 115 eligible candidates and five actual capital defendants, Dickerson was simply the rare defendant "struck by lightning ..." *Furman*, 408 U.S. at 309 (opinion of Stewart, J.).

total homicide cases that occurred in Richland County between 2000 and 2008. *Id.* at 499-500. Of those 152 cases, 117 – or 77% -- involved facts that would render them death-eligible under South Carolina's current death penalty statute as interpreted and applied. Id. at 500. Out of the 117 legally death-eligible homicides, only 4 – a mere 3.4% of the death-eligible cases – were actually prosecuted as a capital case. *Id.* Consistent results were obtained from data collection in several other counties across the state.

As a practical matter, § 16-3-20's statutory aggravating circumstances can no longer be relied upon to "adequately differentiate [a capital case] in an objective, evenhanded, and substantively rational way from the many [South Carolina] murder cases in which the death penalty may not be imposed." *Zant*, 462 U.S. at 879. Instead, with 77% of all homicides to choose from, the task of selecting who will live and who will face the prospect of dying rests exclusively with the prosecutors who make the charging decisions[8] – decisions which are as

[8] That prosecutorial discretion plays a disproportionate role in determining which eligible defendants will be sentenced to death is confirmed by the substantial disparities in death sentencing among South Carolina counties. *See* John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 298-99 (2002) ("There is wide variation from county to county, and from judicial circuit to judicial circuit, in whether the death penalty will be sought, or obtained. Ten of South Carolinas forty-six (22%) counties have never produced a death sentence. Other counties, even though they are relatively large and have, at least comparatively speaking, significantly more murders, produce very few death sentences. By contrast, more than one-third of the death sentences imposed in the last ten years arose from two of the state's sixteen Judicial Circuits. Twenty-four of the sixty-two (39%) persons sentenced to death from January 1993 to the present came from either the First Judicial Circuit (Calhoun, Dorchester, and Orangeburg counties) or the Eleventh Judicial Circuit (Edgefield, Lexington, and Saluda counties). However, these counties do not have higher homicide rates than other counties. ... Lexington County's death sentencing rate of 11% is approximately five times greater than the national average and seven times the South Carolina average of 1.6%. Based on currently available data, Lexington County has the highest death sentencing rate of any large county in the United States.").

inscrutable, unreviewable, and susceptible to arbitrariness and bias as those *Furman* found to be intolerable. As the jurisprudence described above makes clear, this is decidedly *not* what the Supreme Court envisioned when it upheld the statutory scheme challenged in *Gregg*. *See, e.g.*, *Godfrey*, 446 U.S. at 433 ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.").

This constitutional defect on the "front end" is further exacerbated by the South Carolina Supreme Court's failure to adequately monitor and regulate the capital sentencing scheme on the "back end." The most notable defect in the state supreme court's appellate review of cases is its failure to engage in anything resembling meaningful proportionality review of death sentences – a failure the Court has recently noted with concern. *State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (2011) ("we note our concern that restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional.").

CONCLUSION

As demonstrated above, there is no genuine issue of fact concerning Stanko's Grounds 10&11(b)(3) and 10&11(h) because S.C. Code Ann. § 16-3-20 is – on its face – unconstitutional. South Carolina's capital sentencing statute does not genuinely narrow the class of individuals eligible for a sentence of death as mandated by the Eighth Amendment. Trial counsel can have no valid, objectively reasonable strategic reason for failing to argue that South Carolina's capital sentencing statute is unconstitutional. Even viewing "the evidence and its reasonable inferences" in favor of respondent, *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115,

410 S.E.2d 537, 545 (1992), Stanko has met his burden of "clearly establishing by the record properly before the Court the absence of a triable issue of fact," *Owens v. Magill*, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992), and has done so with "plain, palpable and indisputable facts . . . on which reasonable minds cannot differ." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 367-88 (1991); *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). Thus, "inquiry into the facts is not desirable to clarify the application of the law." *Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 421-22, 392 S.E.2d 460, 462 (1990).

Because the facts relevant to Grounds 10&11(b)(3) and 10&11(h) are beyond dispute, and because those facts warrant relief under the Eighth Amendment to the United States Constitution, Stanko is "entitled to judgment as a matter of law." *Sullivan Company, Inc. v. New Swirl, Inc.*, 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993).

WHEREFORE, for the foregoing reasons, Stanko respectfully submits that he is entitled to summary judgment on Grounds 10&11(b)(3) and 10&11(h) of his final amended application for post-conviction relief.

February 16, 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 Motion for Summary Judgment was mailed today by first class United States mail, postage prepaid, this 16th day of February, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Lindsey S. Vann

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,	)	**MOTION *IN LIMINE***
	)	
Respondent.	)	
	)	

Applicant, Stephen C. Stanko, through undersigned counsel makes the following Motion *in Limine* in preparation for his post-conviction relief ("PCR") hearing, currently scheduled to begin Monday, March 2, 2015.[1] Applicant specifically asks this Court to rule *in limine* that Applicant is entitled to call two witnesses at the PCR hearing who are experts in the development and presentation of mitigation evidence and who will be asked to testify to the professional standards for the performance of defense counsel in death penalty cases at the time of Applicant's trial. *See Bobby v. Van Hook*, 558 U.S. 4 (2009) (indicating evidence of "professional norms prevailing when the representation took place" is relevant to the determination of whether trial counsel's performance was deficient). Specifically, Applicant intends to call as witnesses, Russell

[1] Undersigned counsel object to going forward with a merits hearing on Applicant's PCR application as currently scheduled. As detailed in Applicant's Motion for Continuance, filed on January 6, 2015, counsel have not been able to investigate and prepare for presentation of several of Applicant's claims for relief due to this Court's denial of all requests for funding for expert services. Applicant also filed a Petition in the South Carolina Supreme Court on February 3, 2015, detailing counsel's inability to prepare for a hearing and asking that court to order this Court to grant a continuance. Nevertheless, in light of the fact that neither this Court nor the South Carolina Supreme Court has ruled on Applicant's motions seeking a continuance, undersigned counsel are preparing for the PCR merits hearing in the limited ways they can and file this Motion *in Limine* accordingly. Undersigned counsel continue to assert that they cannot adequately prepare for Applicant's PCR hearing given this Court's denials of funding and failure to rule on the Motion to Reconsider Denial of Funding.

Stetler,[2] the National Mitigation Coordinator for the Federal Death Penalty Resource Counsel Project, and Jeffrey P. Bloom, a South Carolina criminal defense attorney, with extensive experience in capital cases.[3]

I. RELEVANT PROCEDURAL BACKGROUND

In response to Respondent's interrogatories, Applicant informed Respondent that he intended to call Mr. Stetler and Mr. Bloom as "[e]xpert[s] in the development and presentation of mitigation evidence and professional standards for the performance of defense counsel in death penalty cases at the time of Applicant's trial." Respondent subsequently noticed discovery depositions with Mr. Stetler and Mr. Bloom, which were held on February 10, 2015. At the outset of each deposition, counsel for Respondent stated that if the testimony of the experts was presented at the PCR hearing, Respondent objected to the testimony on the basis of *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), and *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). Respondent asserted those cases stand for the proposition that an attorney may not be called to testify that trial counsel's performance was deficient. Respondent further objected to the experts' testimony on the basis of *Van Hook*, 558 U.S. 4, *Hawkins v. Hargrave*, No. 1:11cv600, 2014 WL 5106319 (2014), and *State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (2013), asserting these cases stand for the proposition that the American Bar Association ("ABA") guidelines are not the standard for ineffective assistance of counsel. In light of Respondent's objections, Applicant moves for an *in limine* ruling that expert testimony

[2] Mr. Stetler works and resides in California. In order to testify at Applicant's PCR hearing, he will have to take leave from his job and travel to South Carolina. Undersigned counsel, therefore, ask this Court to rule on the admissibility of Mr. Stetler's testimony in advance of the hearing to avoid unnecessary travel by Mr. Stetler should the Court rule his testimony is inadmissible.

[3] CVs for both Mr. Stetler and Mr. Bloom are attached to this motion. Both Mr. Stetler and Mr. Bloom have agreed to prepare and present their testimony without compensation.

regarding the standards for representation and the "professional norms prevailing when the representation took place" is admissible at Applicant's PCR hearing. *See Van Hook*, 558 U.S. at 7.

II. LEGAL BASIS

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. A claim of ineffective assistance of counsel requires the Applicant to demonstrate (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Counsel's performance is deficient when it falls "'below an objective standard or reasonableness' in light of 'prevailing professional norms.'" *Van Hook*, 558 U.S. at 7 (quoting *Strickland*, 466 U.S. at 686). Evidence of professional standards, including restatments of those standards, "can be useful as 'guides' to what reasonableness entails." This is true to "to the extent [the evidence] describe[s] the professional norms prevailing when the representation took place." *Id.*

South Carolina Rules of Evidence Rule 702 allows the admission of expert testimony where the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. However, the South Carolina Supreme Court has held that is was not an abuse of discretion for a PCR court to exclude expert testimony "amount[ing] to a case-specific application of the *Strickland* test that . . . was a legal argument as to why the PCR court should rule that [] trial counsel was ineffective." *McKnight*, 378 S.C. at 57, 661 S.E.2d at 366; *see also Green*, 351 S.C. at 198, 569 S.E.2d at 318 (finding expert testimony "on whether trial counsel's performance had been deficient . . . falls outside of Rule 702, SCRE"). Thus, in PCR proceedings, an expert's

testimony on the ultimate legal question of whether trial counsel's performance was deficient may not be admissible, but nothing prohibits the testimony of an expert to generally describe the standards for representation prevailing at the time of the representation. *See McKnight*, 378 S.C. at 57, 661 S.E.2d at 366; *Green*, 351 S.C. at 198, 569 S.E.2d at 318.[4]

While they are not determinative, the ABA guidelines[5] have long been considered important guides in determining the reasonableness of counsel's actions. *See Strickland*, 466 U.S. at 688. The Supreme Court continues to affirm the use of that ABA Guidelines in examining *Strickland* claims so long at the courts consider the guidelines that were in effect at the time the representation occurred. *Van Hook*, 558 U.S. at 7. Courts have cautioned that the guidelines cannot be considered as "establishing a minimum constitutional floor of 'prevailing professional norm,'" but nevertheless recognize that they can be "considered as a part of the overall calculus of whether counsel's representation fell below an objective standard of reasonableness." *Yarbrough v. Johnson*, 520 F.3d 329, 339 (4th Cir. 2008); *see also Blakely*, 402 S.C. at 664, 742 S.E.2d at 36 ("Though the ABA standards for criminal justice are a useful point of reference, these standards

[4] Respondent also cited *Dawkins*, 354 S.C. 58, 580 S.E.2d 433, in objecting to the expert testimony. *Dawkins*, however, does not bar testimony on the prevailing professional norms in a PCR hearing. *Dawkins* relied on *Green* in finding that an expert's testimony in a civil case was properly exclude because it "primarily contained **legal** arguments and conclusions," which "inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." *Id.* at 65, 580 S.E.2d at 437.

[5] The term "ABA guidelines" as used in this motion refers to several different ABA publications, which have been considered by courts in determining the reasonableness of counsel performance in death penalty case. The guidelines applicable at the time of Applicant's trial include (1) the ABA Standards for Criminal Justice, considered in *Strickland*, 466 U.S. at 668-89; (2) the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases published in 1989 and updated in 2003, considered in *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); and (3) the Supplementary Guidelines for the Mitigation Function published in 2008. The ABA Guidelines have been cited with approval by the South Carolina Supreme Court on numerous occasions. *See, e.g., Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2009); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007).

are only guides."); *Hawkins*, 2014 WL 5106319, at *14 (finding the ABA Standards for Criminal Justice provide guidance as to professional norms, but do not control).

III. ARGUMENT

Applicant intends to call Mr. Stetler and Mr. Bloom to testify in accordance with the legal principles outlined above. The experts will be called to testify about the standards applicable to the performance of trial counsel in capital cases at the time of Applicant's trials. They will not be asked to opine on the ultimate legal conclusion of whether trial counsel's performance in Applicant's trial was deficient under *Strickland*, instead they will testify to assist the Court "to understand the evidence or to determine a fact in issue." Rule 702 SCRE. Namely, the experts will assist the Court by presenting information regarding the standards for performance for the Court to consider in determining whether counsel's performance fell below the prevailing professional norms and was therefore deficient under *Strickland*.

At his deposition, Mr. Stetler informed counsel for Respondent that the testimony he was asked by undersigned counsel to provide falls into four broad areas: (1) the standard at the time of Applicant's trial for the investigation and presentation of mitigation and mental health evidence; (2) what special considerations arise when the same defendant is involved in a successive sentencing proceeding; (3) whether a defense theory of psychopathy is mitigating; and (4) considerations related to raising an insanity defense in a capital trial. All of Mr. Stetler's anticipated testimony within these areas falls within the allowed testimony of an expert under Rule 702, SCRE and South Carolina Supreme Court precedent.

Mr. Stetler's first main area of anticipated testimony relates to the standards for the investigation and presentation of mitigation evidence at the time of Applicant's trial. Mr. Stetler's knowledge and testimony regarding these standards is drawn from his extensive experience in

developing and presenting mitigating evidence in capital trials since the 1980s. Mr. Stetler bases his testimony on his years of teaching continuing legal education ("CLE") programs directed toward lawyers and mitigation specialists working on capital case, including CLEs taught in South Carolina; the ABA guidelines; and his direct involvement in over one hundred capital cases during his career.

Mr. Stetler's anticipated testimony on the standards at the time of Applicant's trial will be that counsel in a capital case is required to conduct a thorough mitigation investigation, which must be started early on in the representation of the client. This mitigation investigation includes thoroughly investigating the client's social history and using the information gathered to inform the defense team in retaining expert assistance and developing the mitigation theory to present at trial. The investigation of a client's social history is also necessary in order for a mental health expert to conduct a competent mental health evaluation. Mr. Stetler will further testify that the ultimate responsibility for the mitigation investigation lies with trial counsel, even if counsel hires a mitigation specialist to assist with the mitigation investigation.

Mr. Stetler will also testify about the importance of trial counsel developing an integrated mitigation theory. An integrated, or uniform, mitigation theory is one that is consistent throughout both stages of the defendant's capital trial to avoid losing credibility or creating confusion among the jury. It further requires that the witnesses called by the defense present consistent testimony and evidence on behalf of the defendant for similar reasons.

Mr. Stetler is also anticipated to testify regarding special considerations for a defense team preparing for a successive sentencing proceeding. Applicant was sentenced to death in Georgetown County in 2006 and then was tried for a separate capital crime in 2009 in Horry County. Thus, the Horry County death penalty trial was the second capital sentencing proceeding for Applicant. Mr.

Stetler will testify that, in a situation where counsel are faced with a successive sentencing proceeding, counsel must rethink the mitigation strategy between the two trials. The professional norms require counsel to learn from the things that did not work during the first proceeding and develop a new strategy for the second proceeding.

With regard to the areas of psychopathy and the insanity defense, Mr. Stetler is anticipated to testify as follows. Mr. Stetler will testify that a defense theory that the defendant is a psychopath is never mitigating and actually serves as aggravating evidence against the defendant. Defense experts testifying that a defendant is a psychopath or having antisocial personality disorder ("ASPD") actually serves to dehumanize the defendant in the eyes of the jury as the terms psychopath and ASPD have negative connotation. Mr. Stetler will testify that none of the mitigation training and consulting he has taken part in, including in South Carolina, has advised defense counsel to use a theory of psychopathy. Instead, the trainings consistently advise defense counsel against using a diagnosis of psychopathy or ASPD.

Mr. Stetler will also testify that the trainings and consultation in which he has participated have not advocated for pursuing an insanity defense in a capital trial. This is so because, in Mr. Stetler's experience, insanity defenses are rarely successful, especially if the defendant had not been previously hospitalized as a result of a serious mental illness. Studies also show that insanity defenses are less likely to succeed in a capital cases. Further, the use of an insanity defense in a capital trial inhibits counsel's ability to present a unified defense theory because the insanity defense seeks to excuse the crime altogether during the guilt phase, but in a sentencing phase defense counsel would seek only to offer evidence mitigating the defendant's crime for which the jury rejected the insanity defense.

Mr. Bloom's anticipated testimony will be in the same vein as Mr. Stetler's testimony. Mr. Bloom will testify based on his years of experience in litigating capital cases in South Carolina, including his practice at the time of Applicant's trial, and his knowledge of capital litigation training gained through attending and teaching at various CLE programs. Mr. Bloom will testify to the practice of South Carolina practitioners in preparing the mitigation evidence for a capital trial in South Carolina at the time of Applicant's trial. He is also anticipated to testify that capital defense attorneys in South Carolina have never deemed it a reasonable strategy to present evidence that a defendant is a psychopath as a mitigation theory in a capital case.

As described above, both experts' testimony is admissible under Rule 702, SCRE and South Carolina Supreme Court precedent. *See McKnight*, 378 S.C. at 57, 661 S.E.2d at 366; *Green*, 351 S.C. at 198, 569 S.E.2d at 318. Neither expert will be asked to opine whether he believes counsel's performance in Applicant's case was deficient, and thus, will not "attempt to usurp the [PCR] court's role in determining whether" petitioner is entitled to relief. *See Dawkins*, 354 S.C. at 65, 580 S.E.2d at 436.

CONCLUSION

For the reasons stated above, Applicant asks this Court to make a pre-trial determination that expert testimony regarding the standards for development and presentation of mitigation evidence at the time of Applicant's capital trial is admissible under Rule 702, SCRE and South Carolina Supreme Court precedent. Applicant respectfully requests this Court make its ruling in advance of the beginning of his PCR merits hearing, currently scheduled to begin on March 2, 2015, in order for his experts (one traveling from California) to avoid any unnecessary travel and expenses.

February 16, 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 Motion *in Limine* was mailed today by first class United States mail, postage prepaid, this 16th day of February, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Lindsey S. Vann

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.)	**RESPONSE TO MOTION IN LIMINE**
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This is a capital post-conviction relief (PCR) case in which Applicant has filed a *Motion in Limine* asking this Court to allow it to call two (2) witnesses, one (1) an attorney and one (1) a mitigation investigation coordinator, at the PCR hearing to testify to the standards of practice of attorneys in capital cases and to testify in their opinion defense counsel in the present case was deficient or ineffective.[1] The *Motion in Limine* should be denied for the reasons stated below.

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1 In Applicant's Supplemental Responses to Interrogatories, Applicant stated as follows as to these two (2) witnesses:

Russell Stetler - Expert in the development and presentation of mitigation evidence and professional standards for the performance of defense counsel in death penalty cases at the time of Applicant's trial.

Jeff Bloom – Expert in the development and presentation of mitigation evidence and professional standards for the performance of defense counsel in death penalty cases at the time of Applicant's trial. (Supplemental Responses to Interrogatories, dated January 27, 2015).

At their discovery depositions, both Mr. Stetler and Mr. Bloom testified if called as expert witnesses they proposed to testify to what the standard of care was for trial counsel in investigating and presenting mitigation evidence, and that counsel was deficient in presenting the defense and mitigation evidence they did present in the Horry County trial of Mr. Stanko, and Mr. Stetler proposed to testify counsel was deficient in their mitigation investigation or presentation; however, he admitted he had not reviewed trial counsel's file and as a result did not know what trial counsel had or had not investigated except for limited information provided by PCR counsel and reviewing the transcript of the mitigation portion of the Horry County trial.

The South Carolina Supreme Court has repeatedly rejected the attempt to call an attorney, much less a mitigation investigator, as a witness or expert witness to testify to the standard of care of attorneys in South Carolina and that trial counsel was deficient or ineffective in their representation in a particular case. McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008); Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002). As the South Carolina Supreme Court stated in McKnight:

> In the instant case the PCR court rejected McKnight's proffer of expert testimony on the prevailing professional standards for South Carolina defense attorneys based on Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002). In Green, this Court reviewed a defendant's claim that the PCR court erred in excluding opinion testimony from a criminal defense attorney as to acceptable legal standards of defense practice. Id. at 198, 569 S.E.2d at 325. Acknowledging that expert testimony designed to assist the PCR court to understand certain facts was admissible, the Court found that the expert offered no factual evidence, but rather, assumed certain facts in arriving at his conclusion that trial counsel's performance was deficient. Id. Accordingly, the Court held that the PCR court properly excluded The testimony because it was merely a legal argument as to how the PCR court should rule on the issue. Id.
>
> Turning to the instant case, we hold that the PCR court properly excluded the testimony of McKnight's expert. Although McKnight offered the expert to provide factual testimony on prevailing professional standards of South Carolina defense attorneys, PCR counsel's questions consistently inquired into how a lawyer practicing in accordance with the prevailing standards in South Carolina would handle certain factual scenarios derived directly from this case. As a result, the expert's opinion, amounted to a case specific application of the Strickland test that was not designed to assist the PCR court to understand certain facts, but rather, was a legal argument as to why the PCR court should rule that McKnight's trial counsel was ineffective. Accordingly the PCR court did not abuse its discretion in excluding the expert testimony in the context that the testimony was offered.

McKnight, 378 S.C. at 56-57, 661 S.E.2d at 365-66. Likewise, in Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003), the South Carolina Supreme Court held as follows:

> Green is instructive to the instant case. Here, Professor Freeman's affidavit reads as if it could have been respondent's oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual

> information, [footnote omitted] the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise. *See* Green, *supra*; O'Quinn, *supra*

Dawkins, 354 S.C. at 66-67, 580 S.E.2d 437. *See* Jackson v. United States, 2010 WL 2775402 (W.D.N.C. 2010)(*Unpublished*)(an expert's opinion on an issue of law, in this case whether capital counsel were ineffective, may be excluded from consideration of the merits of an issue), *citing* United States v. McIver, 470 F.3d 550, 562 (4th Cir. 2006), *cert. denied* 550 U.S. 936 (2007); Noland v. French, 134 F.3d 208, 217 (4th Cir. 1998), *cert. denied* 525 U.S. 851 (1998). *See also* Newland v. Hall, 527 F.3d 1162, 1209 (11th Cir. 2008)(statements of other attorneys about their views of effective assistance are not dispositive and, indeed, have little weight because the issue is one of law to be decided by the court); Heishman v. Ayers, 621 F.3d 1030, 1041-42 (9th Cir. 2010)(no error to deny Strickland expert on standard of care in death penalty case, court could decide that issue). As a result, Mr. Bloome cannot testify to what the standard of care was for trial counsel or whether he was deficient, and certainly a mitigation investigator or coordinator cannot testify to what the standard of care was for trial counsel or whether he was deficient. McKnight; Dawkins; Green.

Moreover, to the extent counsel made strategic decisions, "the reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof. Jackson, *supra*, *citing* Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998), *rehearing denied*, 162 F.3d 100 (11th Cir. 1998).

Further, any attempt to have these witnesses testify that the ABA's 2003 Guidelines for Performance of Counsel in Death Penalty Cases ("2003 ABA Guidelines") or the Supplementary Guidelines for The Mitigation Function of Defense Teams, 36 Hofstra L. Rev. 677 (2008)("2008

ABA Supplementary Guidelines) are the standard of care of attorneys in death penalty cases is simply incorrect. Our Supreme Court has analyzed claims of failure to investigate, discover, and present mitigation evidence under Strickland v. Washington, Wiggins v. Smith, 539 U.S. 510 (2003) and its progeny. *See* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008)(relying on Wiggins and Rompilla v. Beard, 545 U.S. 374 (2005), finding counsel deficient and defendant prejudiced by failure to investigate, develop, or present any mitigation evidence regarding defendant's violent upbringing, abuse at home, and mental illness other than limited testimony by his mother); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006)(citing Wiggins and concluding counsel should have investigated and presented evidence of adaptability to prison and mitigating social history evidence outlining defendant's troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004)(concluding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at time of murder given counsel failed to provide expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant's mental condition to the jury); Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR court's conclusion capital defendant suffered prejudice from failure to offer sufficient social history evidence in mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); Jones v. State, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998)(fancier mitigation case does not establish ineffective assistance of counsel).

To establish deficient performance, a person challenging a conviction or sentence must show that "counsel's representation fell below an objective standard of reasonableness."

Strickland, 466 U.S. at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. Id. at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Id. at 689-90. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. at 690. Strickland does not guarantee perfect representation, only a "reasonably competent attorney.'" Id. at 687; Harrington v. Richter, 131 S.Ct. 770 (2011).

This standard is necessarily a general one. Bobby v. Van Hook, 558 U.S. 4 (2009). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688-689. "Restatements of professional standards, we have recognized can be useful 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." Bobby v. Van Hook; Strickland, at 688. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases are not the definition of what reasonableness means under Strickland, and they are not "inexorable commands with which all capital defense counsel

must comply." Van Hook, *supra.*[2] In fact, as Justice Alito pointed out in his concurring opinion in Van Hook:

> I join the Court's *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)(2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.[3]

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they are not minimum constitutional standards, which defense counsel must follow or they are ineffective. Yarborough v. Johnson, 520 F.3d 329 (4th Cir.

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2 As the U.S. Supreme Court pointed out in Bobby v. Van Hook, the original ABA standards were very brief and described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms. However, the 2003 ABA Guidelines were quite different; they were *131 pages long*, were directives that expanded what had been a broad outline of counsel's duties in all criminal cases into detailed prescriptions for legal representation of capital defendants. They discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin. They include, for example, the requirement that counsel's investigation cover every period of the defendant's life from the moment of conception and that counsel contact *virtually everyone* who knew the defendant and his family and obtain records concerning not only the client, but also his parents, grandparents, siblings and children.

3 Chief Justice Toal and Justice Burnett noted similarly in their dissenting opinion in Ard, the ABA Guidelines are not the standard for ineffective assistance of counsel, but the standard remained reasonableness under Strickland. Their position has been supported by recent decisions of the United States Supreme Court. *See also generally* State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013), *citing* Rompilla, 545 U.S. at 400, *citing* Strickland. *See also* Medlin v. State, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981)(Littlejohn and Gregory, JJ, concurring in part and dissenting in part)(ABA Standards are not controlling or dispositive of an issue).

2008)("Recognition of the ABA Guidelines as the minimum prevailing community standard would transform defense lawyers' judgments into mindless defensive reactions to a potential habeas claim, divorced from the individualized needs of professional representation"); Walker v. True, 401 F.3d 574, 583 n. 7 (4th Cir. 2005)(the Strickland inquiry "does not entail the application of *per se* rules derived from ABA standards), *vacated on other grounds*, 546 U.S. 1086 (2006); Hawkins v. Hargrave, 2014 W.L. 5106319 (M.D. N.C. 2014)(same holding as to ABA Standards for Criminal Justice) *only Westlaw citation currently available. See* Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000); Strickland, 466 U.S. 688-89 (cautioning against the fallacy of treating guidelines as a "checklist for judicial evaluation of attorney performance").

Subsequent to Van Hook, the U.S. Supreme Court handed down Cullen v. Pinholster, 131 S.Ct. 1388 (2011) in which the Court reiterated the determination of whether counsel's performance was deficient and ultimately ineffective cannot be made based on specific guidelines. Id. In fact, the Court pointed out in Pinholster that "[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate.'" Id., *citing* Strickland at 688. The Pinholster Court went on to state: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions..." Id., *quoting* Strickland, at 688-89. The Pinholster Court went further in stating:

> Strickland itself rejected the notion that the same investigation will be required in every case. Id., at 691, 104 S.Ct. 2052 ("Counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary" (emphasis added)). It is "[r]are" that constitutionally competent representation will require "any one technique or approach." Richter, 562 U.S. at ___, 131 S.Ct. at 779. The Court of Appeals erred in attributing strict rules to this Court's recent case law. [FN 17 The Court of Appeals was not necessarily wrong in looking to other precedents of this Court for guidance, but "the Strickland test 'of necessity requires a case-by-case examination of the evidence.'" Terry Williams,

529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed. 389 (2000)(*quoting* Wright v. West, 505 U.S. 277, 308, 112 S.Ct. 2482, 120 L.Ed. 225 (1992)(KENNEDY, J., concurring in judgment).]

As a result, it is clear that since the decisions by the U.S. Supreme Court and the S.C. Supreme Court referencing the ABA guidelines, the U.S. Supreme Court has made clear that the mere fact that an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel's performance was deficient in performing a mitigation investigation in a capital case. Pinholster; Van Hook; Strickland. What the Sixth Amendment requires is counsel in a capital case conduct a reasonable and thorough investigation into mitigation evidence. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362, 296 (2000); Strickland, 466 U.S. 668 (1984). As a result, the testimony of an attorney or mitigation investigator on these issues is irrelevant and inadmissible.

WHEREFORE, Respondent submits, for all the foregoing reasons, this Court must deny applicant's *Motion in Limine*.

Respectfully submitted,

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Columbia, South Carolina.

CERTIFICATE OF SERVICE

I, Donna D'Alessio, certify that I have served Respondent's RESPONSE TO MOTION IN LIMINE by depositing two copies to his counsel of record, postage prepaid, addressed as follows:

Emily Paavola, Esq.
Lindsey Vann, Esq.
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201

This 20th day of February, 2015.

Donna D'Alessio

Donna D'Alessio, Legal Assistant to
ANTHONY MABRY
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,))	Case No. 2014-CP-26-035
Applicant,)) vs.)) State of South Carolina,)) Respondent.))	**REPLY TO RESPONSE TO MOTION *IN LIMINE***

Applicant, Stephen C. Stanko, through undersigned counsel makes the following Reply to Respondent's Response to Motion *in Limine*. Respondent's opposition to Applicant's Motion *in Limine* is based on two misstatements of Applicant's motion and the scope of the testimony Applicant asks the Court to rule admissible. Respondent incorrectly asserts (1) Applicant intends to call the expert witnesses to testify to their opinions regarding trial counsel's performance in Applicant's trial, and (2) the experts will testify that the American Bar Association Guidelines are the standard for attorney performance in the *Strickland* context.

Respondent bases its opposition primarily on the belief that Applicant proposes to call experts to testify to their opinions on whether trial counsel's performance in this case was deficient or ineffective. This statement is simply incorrect. As applicant stated in his Motion *in Limine*, the proposed experts will be called to testify to "the professional standards for the performance of defense counsel in death penalty cases at the time of Applicant's trial." Motion *in Limine* 1. Applicant's motion further explicitly informed the Court the witnesses "will not be asked to opine on the ultimate legal conclusion of whether trial counsel's performance in Applicant's trial was

deficient under *Strickland*."[1] Motion *in Limine* 5. The proposed testimony of the experts is instead intended to aid the Court in understanding the standards for performance and the professional norms existing at the time of Applicant's trial. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). Given the limited scope of the experts' proposed testimony, the evidence is admissible in a PCR hearing.[2] *Bobby v. Van Hook*, 558 U.S. 4, 7 (finding evidence of professional standards "can be useful as 'guides' to what reasonableness entails"); *see also McKnight v. State*, 378 S.C. 33, 56, 661 S.E.2d 354, 366 (2008) (finding the PCR court did not abuse its discretion when excluding expert testimony that "amounted to a case-specific application of the *Strickland* test."); *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (finding the PCR court properly excluded expert testimony "not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence.").

Respondent further misrepresents Applicant's motion by asserting the experts proposed by Applicant cannot testify the ABA Guidelines for the Performance of Counsel in Death Penalty

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[1] Undersigned counsel also explicitly informed counsel for Respondent at the discovery depositions that Applicant does not intend to call the experts to testify to their opinions regarding the performance of counsel in this case.

[2] Respondent's objection to the expert testimony of Russell Stetler because he is not a lawyer, rather "a mitigation investigator or coordinator," is without merit. Mr. Stetler's CV, attached to Applicant's Motion *in Limine*, clearly demonstrates Mr. Stetler's knowledge and expertise in the development and presentation of mitigation evidence in death penalty cases. Mr. Stetler expertise is demonstrated by the fact that he (1) has been involved in the development and mitigation evidence in capital cases since 1980; (2) currently serves as the National Mitigation Coordinator for the Federal Death Penalty Resource Counsel, advising and consulting with attorneys presenting mitigation in federal death penalty cases; (3) has been an instructor at numerous training seminars, for attorneys and mitigation specialists, focused on death penalty litigation; and (4) was on the committee that developed the Supplementary Guidelines for the Mitigation Function of Defense Teams in 2008.

Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams are the standard or care for attorneys in death penalty cases. Applicant does not assert the ABA guidelines are the standard of care for attorneys in death penalty cases. As stated in the Motion *in Limine*, Applicant merely asserts that the ABA guidelines are to be considered as "important guides in determining the reasonableness of counsel's actions." Motion *in Limine* 4. All cases cited by Respondent actually support Applicant's argument that the ABA guidelines, while not determinative, are to be considered in determining the standards applicable to counsel's performance at the time of Applicant's trial. *See Van Hook*, 558 U.S. at 7 ("Restatements of professional standards, we have recognized, can be useful as 'guides' to what reasonableness entails."); *Yarbrough v. Johnson*, 520 F.3d 329, 339 (4th Cir. 2008) (finding the guidelines cannot be considered as "establishing a minimum constitutional floor of 'prevailing professional norm,'" but nevertheless recognizing that they can be "considered as a part of the overall calculus of whether counsel's representation fell below an objective standard of reasonableness."); *Hawkins v. Hargrave*, No. 1:11CV600, 2014 WL 5106319, at *14 (M.D.N.C. 2014) (finding the ABA standards for criminal justice provide guidance as to professional norms, but do not control); *State v. Blakely*, 402 S.C. 650, 664, 742 S.E.2d 29, 36 (2013) ("Though the ABA standards for criminal justice are a useful point of reference, these standards are only guides.").

Thus, neither of Respondent's arguments in opposition to Applicant's Motion *in Limine* require the Court to deny the motion. In this PCR action, Applicant bears the burden of proving trial counsel's performance was deficient and prejudiced the outcome of his case. *Strickland*, 466 U.S. at 687. In order to prove counsel's performance was deficient, Applicant must prove the standards against which the Court should measure counsel's performance. To allow for such proof, this Court should rule *in limine* that Applicant may present the testimony of Russell Stetler and

Jeffrey Bloom on the standards for the development and presentation of mitigation evidence at the time of Applicant's trial.[3]

February 23, 2015

Respectfully submitted,

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[3] Undersigned counsel ask this Court to rule on this Motion in advance of the hearing currently scheduled to begin on March 2, 2015 in order to avoid unnecessary expenses and travel by the experts if the Court rules the expert evidence is not admissible at Applicant's hearing.

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:

Applicant's Motion to Reconsider Denial of Funding for Expert and Investigative Services and Request for Ex Parte Hearing filed 10/14/2014 is DENIED.

Applicant's Motion for Continuance filed 1/6/2015 is DENIED.

Applicant's Motion in Limine filed 2/16/2015 is DENIED. See page 2.

Applicant's Motion for Summary Judgment filed 2/16/215 is DENIED.

(*These motions are decided without oral arguments.)**

2015 FEB 27 PM 1:01

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: 4161

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	Feb. 27, 2015
	Judge Code	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the 27 day of Feb, 2015 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	Anthony Mabry Jimmy A. Richardson
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

Melanie Huggins-Ward
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.

In their briefs, the parties differ as to the proposed testimonies of Russell Stetler and Jeffrey P. Bloom. The court does not know which party's recitation of the testimonies is accurate and, therefore, is unable to rule as a matter of law in this Motion In Limine whether such testimonies are admissible or not. Therefore, the Motion In Limine is denied. The court will rule on the admissibility of such testimonies at trial. Respondent may challenge the admissibility of these testimonies when, and if, presented at trial.

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

HORRY COUNTY
FILED
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CLERK OF COURT

MEMORANDUM IN SUPPORT OF APPLICANT'S OBJECTION TO THE EVIDENTIARY HEARING

I. INTRODUCTION

Applicant, Stephen C. Stanko, has presented a number of claims, through his Final Amended PCR Application, that his conviction and death sentence were obtained in violation of the United States Constitution, including: (1) claims 10&11(b)(1) and (2), regarding trial counsel's failure to properly litigate and support a change of venue motion; (2) claim 10&11(d), regarding the State's use of false and misleading evidence of a PET scan analysis at trial; and, (3) claims 10&11(e)(1) through (4), regarding trial counsel's ineffective assistance during the penalty phase of his capital trial. To adequately investigate and prove these claims at an evidentiary hearing, Applicant requires the assistance of expert services. Applicant repeatedly requested that this Court authorize funding for: (1) a forensic psychologist; (2) a licensed, testifying social worker; and, (3) a media expert.[1] This Court has consistently denied those requests based on its erroneous

[1] On April 1, 2014, Applicant filed an *Ex Parte* First Motion to Authorize Funding for Expert and Investigative Services, requesting funding for a forensic psychologist. That request was denied on April 29, 2014 in the Court's *Ex Parte* Order Authorizing Funding for Expert and Investigative Services. Applicant moved for reconsideration of the denial in his May 8, 2014 *Ex Parte* Motion

conclusion that the funding standard set forth in S.C. Code §§ 16-3-26(C)(1), 17-27-160(B) requires the Court to deny funds unless Applicant can first demonstrate what the outcome of the requested expert's services will be and that that outcome would result in a successful PCR claim. *See e.g.*, Applicant's Motion for Continuance, filed January 6, 2015 (describing the funding litigation history in greater detail).

If this Court plans to properly and fairly resolve the merits of Applicant's constitutional claims, the Court must adhere to the federal substantive rules that govern federal claims and to the procedures applicable to informed and reasoned resolution of federal constitutional questions. Compliance with federal law, both substantively and procedurally, is the only manner in which state courts can reasonably adjudicate the merits of federal claims. As this Court has already recognized in its Orders denying respondent's requests for summary dismissal, a state court may not summarily dismiss a well-pleaded federal claim. *See, e.g.*, *Herman v. Claudy*, 350 U.S. 116, 119 (1956); *Coleman v. Alabama*, 377 U.S. 129, 133 (1964); *Palmer v. Ashe*, 342 U.S. 134, 137-138 (1951). A claim is well-pleaded if the facts alleged "point to a 'real possibility of constitutional

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to Reconsider Order Authorizing Funding for Expert and Investigative Services. The Court denied the reconsideration request regarding the forensic psychologist in its June 3, 2014 *Ex Parte* Order Partially Granting Applicant's Motion to Reconsider and Supplemental Order Authorizing Funding for Investigative Services.

On July 28, 2014, Applicant filed an *Ex Parte* Second Motion to Authorize Funding for Expert Services, requesting funding for a licensed testifying social worker and a media expert. The Court denied both requests on September 25, 2014 in its *Ex Parte* Order Denying Applicant's Second Motion to Authorize Funding for Expert Services. On October 14, 2014, Applicant moved this Court to reconsider all funding denials regarding a forensic psychologist, a licensed social worker, and a media expert and requested a hearing on the matter in his *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services and Request for *Ex Parte* Hearing. The Court denied Applicant a hearing and, on February 27, 2015, summarily denied Applicant's October motion for reconsideration.

error'" and the allegations are not "so 'patently frivolous or false' as to warrant summary dismissal." *Blackledge v. Allison*, 431 U.S. 63, 75–76 (1977).[2]

Applicant has presented well-pleaded federal claims for relief. For each claim contained within his PCR Application, Applicant has plainly stated the constitutional right he believes was violated. He has also identified clearly established federal law relevant to each claim, and asserted all factual elements necessary, if taken as true, to affirmatively satisfy the applicable constitutional test. Whenever possible, Applicant has supported these allegations with facts contained within the record or uncovered through reasonable investigation. Where it has not been possible for Applicant to obtain factual support through reasonable investigation, his allegations are supported by facts he reasonably believes will be uncovered through further investigation. Thus, the PCR Application presents well-pleaded federal claims for relief. Therefore, this Court should not summarily dismiss Applicant's claims, nor should this Court dismiss them without affording Applicant the basic evidentiary tools necessary to prove them.

II. THIS COURT MUST AFFORD APPLICANT ACCESS TO AVAILABLE EVIDENCE AND A MEANINGFUL OPPORTUNITY TO PRESENT THAT EVIDENCE.

In *Coleman v. Alabama*, the petitioner moved for a new trial in state court claiming that, based on a long standing practice in the county where he was convicted, African-Americans were arbitrarily and systematically excluded from both the grand jury that true billed his indictment and the petit jury that convicted him. 377 U.S. 129, 129–30 (1964). The state court held a hearing on

[2] This standard does not require that a PCR applicant present the state court with all facts to support all of his allegations, but rather only that he plead facts where reasonably available, and that he provide the court with reason to believe the allegations will be supported when the facts are fully developed. *See Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("But where 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.")

the motion, but sustained all objections to petitioner's counsel's questions regarding the jury discrimination claims. *Id.* at 130. Following the hearing, the court denied the petitioner's motion and the state supreme court affirmed the conviction, holding that the petitioner's federal jury discrimination claims were not supported by the evidence. *Id.* The Supreme Court granted certiorari, and held the state adjudication process was defective because the state courts had not provided the petitioner an opportunity to obtain and present evidence to support his claim. *Id.* at 133 ("[T]his Court must reverse on the ground that the defendant offered to introduce witnesses, to prove the allegations and the court declined to hear any evidence upon the subject.") (internal quotations omitted). Thus, *Coleman* establishes not only a right to a hearing, but the right to present evidence relevant to Applicant's federal claims. To give effect to this right, the Court must grant Applicant funding for a reasonable investigation to obtain evidence available to support his allegations.

Meaningful access to evidence and a fair opportunity to present all relevant evidence necessarily includes adequate funding for investigative and expert assistance. 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).[3]

In sum, if this Court does not permit adequate factual development or provide Applicant a meaningful opportunity to present the facts in support of his claims, then it will necessarily lack the information required to fairly adjudicate the merits of Applicant's federal claims in an informed, objectively reasonable manner. *See, e.g., Moore v. Dempsy,* 261 U.S. 86, 92 (1923) (holding that the federal court should examine the facts and determine the truth of petitioners' allegations, given that "the [state court] corrective process afforded to the petitioners . . . does not seem sufficient"); *Ex Parte Hawk*, 321 U.S. 114, 118 (1944) ("where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . a federal court should entertain his petition for habeas corpus, else he would be remediless.").

III. THE NEED FOR PROCESS, INCLUDING FACT DEVELOPMENT AND CAREFUL, SYSTEMATIC DISPUTE RESOLUTION IS ESPECIALLY ACUTE WITH RESPECT TO THE CLAIMS FOR RELIEF PRESENTED IN THIS CASE.

As stated above, Applicant's Final Amended PCR Application raises seven (7) federal constitutional claims that he cannot prove without the assistance of expert services: claims

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[3] The Supreme Court of the United States is poised to further address this issue in the context of an *Atkins v. Virginia*, 536 U.S. 304 (2002), claim raised in state post-conviction. *See Brumfield v. Cain*, 135 S. Ct. 752 (2014) (granting certiorari). The *Brumfield* case presents the Court with an alleged error resulting from the state postconviction relief court's denial of Brumfield's intellectual disability claim before addressing his request for expert assistance. The question presented to the Court, therefore, is

> Whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his intellectual disability has denied petitioner his "opportunity to be heard," contrary to *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), and his constitutional right to be provided with the "basic tools" for an adequate defense, contrary to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Brief of Petitioner, *Brumfield v. Cain*, No 13-1433.

10&11(b)(1), 10&11(b)(2), 10&11(d), 10&11(e)(1), 10&11(e)(2), 10&11(e)(3), and 10&11(e)(4). These claims allege ineffective assistance of counsel for trial counsel's failure to properly litigate and support a change of venue motion; ineffective assistance of counsel in the penalty phase of Applicant's capital trial, and prosecutorial misconduct regarding the State's use of false and misleading evidence of a PET scan analysis. In order to prove these claims, Applicant requires, at a minimum, the assistance of a forensic psychologist, a testifying social worker, and a media expert. Applicant has provided the Court with detailed explanations regarding the legal and factual bases for these requests multiple times over the course of the funding litigation.[4]

As this Court is aware, many federally based claims, such as claims of ineffective assistance of counsel, arising under *Strickland v. Washington*, 466 U.S. 668 (1984), and prosecutorial misconduct, arising under *Brady v. Maryland*, 373 U.S. 83 (1963), have multiple elements that must be answered before the claim can be adjudicated. Additionally, each of these elements frequently gives rise to several subsidiary factual questions that will need to be answered before the Court can make a determination regarding that prong. Where a PCR applicant has asserted a well-pleaded federal claim, these subsidiary components are likely to be disputed. In order to answer these questions, this Court must receive evidence on each issue and then make a determination regarding that question.

Claims of ineffective assistance of counsel, arising under *Strickland v. Washington*, 466 U.S. 668 (1984), present two legally significant questions: (1) whether counsel's performance was deficient; and, (2) if so, whether the petitioner was prejudiced by that deficient performance. *Id.* at 688, 694. In a case where the petitioner claims that his trial counsel was ineffective for failing

[4] See *supra* note 1.

to present mitigating evidence, for example, the petitioner and the court must address the following questions regarding deficient performance:

- Did counsel have a strategic reason for their challenged act(s) or omission(s)? *See, e.g., Wood v. Allen*, 130 S. Ct. 841, (2010) (the state court was not unreasonable in determining that counsel had a strategic reason for failing to pursue and present evidence of the petitioner's mental deficiencies in light of the evidence presented).

- What was counsel's purported strategic reason? *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 526-28 (2003) (noting that although counsel's post-trial explanation for their failure to investigate the petitioner's life history was desire to re-try guilt, the record of the sentencing proceeding and counsel's statements indicated that they intended to present mitigation evidence the entire time leading up to the sentencing phase).

- Was that strategy actually applied at trial, or has it been offered as a post-trial explanation for otherwise deficient performance? *Id.*

- Did counsel conduct an investigation prior to adopting the purported strategy? *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 396 (2005) (counsel's failure to obtain and review the case file regarding the petitioner's prior convictions was unreasonable when he was on notice that the prosecution intended to use the details of these crimes in its case for aggravation); *Wiggins*, 539 U.S. 510, 523-28 (2003) (counsel's failure to investigate beyond three basic sources fell short of applicable professional standards and resulted in deficient performance).

- If counsel did engage in investigation, were they reasonable in discontinuing it at the point they did? *Id.*

- Based on all of these considerations, was counsel's performance reasonable? *Strickland*, 466 U.S. 668.

Similarly, in order to determine whether trial counsel's deficient performance prejudiced the petitioner, several additional questions must be answered, including:

- What mitigating evidence was presented at trial?

- What aggravating evidence was presented at trial?

- Was additional mitigating evidence available?

- If so, what form(s) did that evidence take?
- Is the additional evidence similar to or different from evidence presented at trial?
- Is the additional evidence facially plausible, such that a jury could credit it?
- How does the totality of the mitigating evidence weigh in comparison to the aggravating evidence?
- How does this new presentation of aggravating evidence versus mitigating evidence compare with the presentation the jury or the judge received at trial? *See e.g., Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *Wiggins*, 539 U.S. at 536; *Rompilla*, 545 U.S. at 393; *Porter v. McCollum*, 130 S. Ct, 447, 453-54 (2009) (citing *Williams*, 529 U.S at 397-98).

No court – state or federal – can apply the *Strickland* test in an objectively reasonable way without first considering the evidence regarding each part of the claim and each factual question relevant to those parts.[5] Only after the court receives evidence – often supplied by additional documentary evidence, testimony by lay witnesses, and testimony by expert witnesses – is it able to reasonably dispose of the claim in accordance with federal law. If this Court plans to reasonably and adequately adjudicate the federal questions raised by Applicant's PCR Application, then the Court is obligated to adjudicate those questions according to a process sufficient *both* to permit

[5] Claims of prosecutorial misconduct are similarly complex. To show that a *Brady* violation has occurred, the petitioner must first show that there was evidence that was not disclosed to him. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 283–89 (1999) (non-disclosure occurred when the prosecutor maintained an open file policy and invited the petitioner to rely on it, but did not include the evidence in question in the files available to the petitioner). He must also show both that the non-disclosed evidence was exculpatory or favorable. *See, e.g., Strickler*, 527 U.S. 263, 289–96 (1999) (evidence that was not disclosed to the petitioner was favorable, but was not material and thus he was not entitled to relief). Additionally, he must show that the undisclosed evidence was material. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995) (granting relief because favorable, material evidence was withheld from the petitioner and it was "reasonably probable" that there would have been a different result had the evidence been disclosed).

legitimate fact-finding *and* to inform appropriate application of the constitutional rules implicated by Applicant's claims. If, instead, this Court forces Applicant to an evidentiary hearing without any funding for any testifying expert of any kind, then this Court will be denying Applicant sufficient process. Applicant objects to proceeding with an evidentiary hearing under these conditions.

The Supreme Court recently reiterated this point in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) in the context of collateral challenges to state court convictions. In *Martinez*, the Court held 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. 132 S. Ct. at 1320. In this case, Applicant faces an evidentiary hearing (scheduled to begin on Monday, March 2, 2015), at which undersigned counsel cannot possibly effectively represent Applicant's interests. *See id.* at 1317 (observing that just as a prisoner whose direct appeal counsel is ineffective is "denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims," a prisoner lacking the assistance of an "adequate attorney" in post-conviction proceedings "will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim."). In other words, undersigned counsel fully believe that by being forced to go forward with an evidentiary hearing without access to the tools, resources and time typically available to PCR applicants in this State for developing the factual bases of their claims, undersigned counsel's representation will be ineffective. *See Strickland*, 466 U.S. 668.

CONCLUSION

Undersigned counsel accordingly object to going forward with an evidentiary hearing under the current circumstances. However, should the Court insist on holding an evidentiary hearing while adhering to its refusal to provide access to essential fact development tools, this Court should enter an order declining to reach the merits of any of the affected claims on the ground that the record is/will be insufficient to facilitate their informed resolution in accordance with the substantive standards prescribed by federal law.

Respectfully submitted,

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Counsel for Applicant

February 27, 2015.

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.	)	
	)	

HORRY COUNTY
FILED
MAR -2 PM 2:
CLERK OF COURT

The undersigned certifies that a copy of the Applicant's Memorandum in Support of Applicant's Objection to the Evidentiary Hearing was mailed today by first class United States mail, postage prepaid, this 27th day of February, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Lindsey S. Vann

Lindsey S. Vann

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2014-CP-26-35
Stephen C. Stanko,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	March 2-3, 2015
	)	
The State,	)	PCR Hearing
	)	
Defendant.	)	

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

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Circuit Court Reporter

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(All pre-marked prior to hearing by Applicant Counsel.)

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(On the record, March 2, 2015.)

THE COURT: Let me see the attorneys for a second.

(Whereupon, a bench conference is held.)

THE COURT: All right. This is case number 2014-CP-26-35, Stephen C. Stanko, Number 6022 versus State of South Carolina. The matter is before the Court pursuant to Mr. Stanko's application seeking post-conviction relief. We're here today for the trial. If I could ask all the attorneys to please stand and give the court reporter your names and who you represent.

MS. PAAVOLA: Good morning, Your Honor. I'm Emily Paavola, and I'm here representing the Applicant, Stephen Stanko.

THE COURT: All right.

MS. VANN: Good morning, Your Honor. I'm Lindsey Vann. I'm also representing the Applicant, Stephen Stanko.

MR. ZELENKA: Your Honor, I'm Don Zelenka with the Attorney General's Office representing the Respondent, State of South Carolina.

MS. SCRANTOM: Caroline Scrantom with the Attorney General's Office representing the Respondent, State of South Carolina.

THE COURT: All right. And Ms. Scrantom, if you could spell your last name. You're the only one I didn't have.

MS. SCRANTOM: S-C-R-A-N-T-O-M, as in monopoly.

THE COURT: All right. Thank you, ma'am. All right. Anything preliminary before we get started?

MS. PAAVOLA: Yes, Your Honor. The Applicant has a couple of preliminary matters.

THE COURT: All right.

MS. PAAVOLA: First, we would like to note for the record that we are prepared to drop three of the claims currently contained in the final amended PCR application.

THE COURT: All right.

MS. PAAVOLA: Those claims are 10 and 11 (B)(4), ineffective assistance of counsel for failure to voir dire potential jurors regarding any knowledge of the Ling victims from the previous trial in Georgetown. That's 10 and 11 (B)(4). We are dropping that allegation.

THE COURT: All right.

MS. PAAVOLA: We are also dropping claim 10 and 11 (C)(1), ineffective assistance of counsel for failure to adequately impeach Dr. Pamela Crawford. That's 10 and 11 (C)(1).

THE COURT: All right.

MS. PAAVOLA: And finally, we are dropping claim 10 and 11 (G), Applicant was denied an impartial jury under the Sixth and 14th Amendments. That's claim 10 and 11 (G).

THE COURT: All right.

MS. PAAVOLA: In the final amended application.

THE COURT: All right. All right. Anything further the State wants placed on the record in regard to that?

MR. ZELENKA: Not about those.

THE COURT: Okay.

MR. ZELENKA: We understand they are being dropped with prejudice?

THE COURT: That's correct?

MS. PAAVOLA: Yes, Your Honor. We're dropping those claims.

THE COURT: All right. Being voluntarily dismissed with prejudice.

MR. ZELENKA: Thank you, Your Honor.

THE COURT: All right. Anything else?

MS. PAAVOLA: Yes, sir. Secondly, we would just like to note for the record our objection to the hearing regarding claims that we feel we cannot prove without the assistance of experts for which we do not have funding. We have filed a pleading regarding this, but I would just like to state which claims are effected by that issue for the record, please.

THE COURT: All right.

MS. PAAVOLA: Those claims are 10 and 11 (B)(1) and (2), claim 10 and 11 (D), and claims 10 and 11 (E) subsections one through four. So those are seven claims that we feel are affected by this issue, and we would like to note for the record that we are prepared to call witnesses to testify

today, but we do feel that there are witnesses that we'll be calling today that we won't necessarily be able to question about all of those claims because they are not to -- those claims are not developed.

THE COURT: Okay. And I want to make sure we get on the record, too, so I understand that, you know, whatever happens we have it preserved on the record. There was ex parte applications for fundings for experts in this regard, which I denied. I have since gotten an order from the Supreme Court that basically inclinates, I know there's a contrary argument, but it, it kind of implies that there is no ex parte or right to ex parte funding in PCR cases. I denied that not based upon the fact that it was made ex parte. I denied it based upon the fact that I didn't find them reasonable and necessary, so that we preserve that issue if there's any appeal on that issue. Those requests for ex parte funding I denied because I found that they were not reasonable and necessary, but since then we have gotten something that says that you can't grant ex parte requests anyway, that there has to be a full motion hearing or input from the State in that regard. Anything further you want placed on the record in that regard, Ms. Paavola?

MS. PAAVOLA: No, Your Honor. I don't -- I think, obviously, we object to the Court's order unsealing those requests and we, you know, we've already asserted the contrary

argument. I understand the Court's ruling, and we just wanted to note that. When we filed those motions ex parte we fully believed we were permitted to do that and that was consistent with both the statute and previous practice in capital post-conviction cases.

THE COURT: All right.

MS. PAAVOLA: Finally, Your Honor, for scheduling purposes, I would like to note for the record that we are prepared to call four witnesses today. We do not anticipate that those witnesses will require the entire business day. We have two witnesses who had a conflict with today's hearing, and they are prepared to be here at 9:30 tomorrow morning. We hope that doesn't pose any scheduling difficulties for the Court or for opposing counsel. It's my understanding that opposing counsel presently does -- does not have any witnesses to call.

THE COURT: Okay. Well, we'll let it go. I can tell you right now scheduling purposes, I've got this whole week devoted to this case. Now, there's other stuff I can do, but if it winds up early, that's fine, but don't feel guilty if you use the whole week because I can certainly accommodate you in that regard.

MS. PAAVOLA: Thank you, Your Honor. We are prepared to call our first witness.

THE COURT: All right. You can call your first witness.

MS. PAAVOLA: The Applicant -- I'm sorry. Oh, I'm sorry. One more item which we discussed off the record before the proceedings began regarding Mr. Stanko's ability to take notes, it's my understanding that security is fine with removing one of his hands to take notes. Could they do that, please?

THE COURT: That's what they told us at the bench. Is there any objection to -- your client is -- writes with his right hand?

MS. PAAVOLA: Yes, sir.

THE COURT: Okay. Any -- I understand that there would not be a problem if we released his right hand so he could take notes; is that correct?

OFFICER: Yes, sir.

THE COURT: All right. If we can go ahead and do that.

(Complies with request.)

MS. PAAVOLA: Thank you, Your Honor.

THE COURT: All right. Anything from the State before they call their first witness?

MR. ZELENKA: Nothing, Your Honor.

THE COURT: All right. You can call your first witness.

MS. PAAVOLA: The Applicant calls William Diggs.

THE COURT: All right.

Whereupon, William Isaac Diggs is called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: Please have a seat. State your name for the Court, please.

MR. DIGGS: My name is William Isaac Diggs. I go by Bill, and you're welcome to call me Bill or William, whatever you prefer.

DIRECT EXAMINATION (BY MS. PAAVOLA)

Q Thank you, sir. If you could speak up just a bit. I'm having a little trouble hearing you.

A Okay. Is that better?

Q That is. Thank you.

A Okay.

Q Good morning, Mr. Diggs?

A Good morning.

Q I understand that you represented Mr. Stanko at both his Georgetown and Horry capital trials?

A Yes. Correct.

Q Could you please state your previous capital defense experience for the Court?

A The first one -- there were a number of Appellant Defendants that I represented when I was at Appellate Defense. The first actual trial that I was involved in was Rebecca Smith. Ricky George followed that, Rebecca Smith again, Marion Smith in Georgetown. That actually was an acquittal, and Stephen. There may be another one or two that I can't recall at this point.

Q Okay, sir. And those were Defendants that you represented as a defense attorney in capital cases?
A Right.
Q Is that right?
A Yes.
Q How did you first become involved in Mr. Stanko's case?
A I was appointed by Judge Jefferson out of Charleston. She was the Judge assigned to the case, and she did a canvas of attorneys in the area and she picked -- well, she picked me and Gerald Kelly at that time. This was, of course, for the Georgetown case, but that's how I became involved in the case.
Q Do you recall approximately when you were appointed by Judge Jefferson?
A It was maybe nine months before the trial. I mean, I'm going way back, and I haven't looked at the timeline in that matter, but it was a few months prior to the trial.
Q All right. Sir, I'd like to hand you what's been pre-marked as Applicant's Exhibit Number One.
MS. PAAVOLA: If I may approach the witness, Your Honor?
THE COURT: All right.
BY MS. PAAVOLA:
Q Mr. Diggs, do you recognize this document?
A It appears to be a document that I generated at my office during the representation of Mr. Stanko.
Q What is it, sir?

A It's a Defendant -- a defense of indigent's voucher --
Q And this is for your --
A -- with a time record.
Q I'm sorry. This is for your time on the Georgetown trial; is that correct?
A It appears to be.
Q If you would turn, please, to page number one of that document?
A Yep.
Q If you see at the very top left-hand corner there it says Gerald Allen Kelly?
A Right.
Q I just want to be sure the record is clear, sir. This is a copy of your timesheet?
A Right.
Q Do you know why it says Gerald Kelly at the top?
A I guess I typed it up there.
Q Okay. Okay. I understand.

MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit Number One.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: Applicant's Exhibit One admitted into evidence without objection.

(Applicant's Exhibit Number One [Diggs Timesheet]

admitted into evidence and appropriately marked.)
BY MS. PAAVOLA:
Q Mr. Diggs, at the time of your appointment on Mr. Stanko's case, had you ever previously attended any training programs specifically about capital defense?
A I had done a couple of those as I recall, one up in Virginia and one here, I believe, a number of years ago. I don't recall. It was up at North Myrtle Beach, I think.
Q Do you know when the training program in Virginia might have taken place?
A It took place right -- would've been the early 80s probably '84 to '86, somewhere in there.
Q Do you know who sponsored that program or who was in charge of putting that program on?
A I don't recall.
Q What about the one that you may have attended in Myrtle Beach?
A I think that occurred probably in '94, thereabouts. I'm trying to remember if it was before I opened my last office. It was sometime in the -- in that timeframe, '94, '95, I would guess.
Q And do you know who was responsible for putting on that program?
A No.
Q Were you familiar with the ABA Guidelines for the

appointment and performance of defense counsel in capital cases?

A I don't think so.

Q Do you know if you might have ever referred to the ABA Guidelines during your trial preparations?

A Not that I'm aware of. I mean, I might have, you know, come across, but not specifically. I don't recall any specific attention devoted to it.

Q Were you aware at that time the United States Supreme Court has repeatedly cited the ABA Guidelines with approval when assessing counsel's performance in death penalty cases?

A Am I aware of it or was I aware of it?

Q Were you aware of it at the time of your representation?

A Probably. Yeah.

Q Were you familiar with Williams versus Taylor?

A Maybe if you would tell me about the facts of the case.

Q Well, it was a 2000 case in which the United States Supreme Court found trial counsel ineffective in the penalty phase of that capital.

A Was that down in Texas?

Q I don't recall, sir.

A You don't know?

Q I do not.

A I think I was familiar with that case if that's the one the counsel slept through. I might be.

Q Were you familiar with Wiggins versus Smith?
A I don't recall.
Q What about Rompilla versus Beard?
A I don't recall.
Q I think you said earlier that Mr. Gerald Kelly was appointed to serve as your co-counsel in the Georgetown trial?
A Right.
Q Do you know how Mr. Kelly became to be involved in that case?
A No. I don't.
Q Did you suggest Mr. Kelly?
A I did not know him. I didn't suggest him.
Q So you had never previously worked with him?
A Never worked with him.
Q Which of you was appointed to serve as lead counsel?
A I was.
Q Did you specifically request that you be appointed as lead counsel?
A No.
Q Did you and Mr. Kelly have any kind of agreement regarding the division of labor in the case?
A Not really. I think we both generally approached the case from our perspectives. We didn't do any division of labor. There were certain goals, maybe, objectives that Mr. Kelly wanted to achieve or work on. I felt that was fine. It

was consistent with the approach I wanted to take with the case, but I didn't specifically get involved with it, in those areas that he wanted to work in.

Q What were those areas?

A Oh, it, you know, it had to do with calling Irby Walker and some of the Solicitor people, had to do with that type of testimony.

Q And what were the areas that you were focused on?

A I was focusing on why Mr. Stanko committed these acts.

Q And what do you mean by that?

A I wanted to know why he did them and that's the approach I took to the case. Stephen did some pretty terrible things. He didn't seem to be the kind of person that would intentionally just do that. So I wanted to explain why, you know, what happened, what was going on in his mind that doesn't go on in other people's minds, and I felt like, you know, given the evidence in the case that that would be the best way to defend him.

Q So, you were focused on working with the mental health experts?

A Yeah. Because I think that was the way to defend the case.

Q Did Mr. Kelly have any responsibility for dealing with those experts?

A I don't recall. He, I mean, he had freedom to do that.

I didn't say, "Okay, Gerald, do this or do that." You know, that wasn't the type of relationship that he and I had. At that time Gerald and I both had defended capital cases and achieved an acquittal. You know, as far as I know, we were the only two attorneys in South Carolina in the modern era to have done that. I think David Bruck did it back in the early 80s, but it was -- that was different, I think, because the Solicitor became a witness in the case, and I think the jurors didn't like his participation to that extent, but based on what I know about South Carolina, the death penalty since it was reinstated in the late 70s, Gerald and I were the only ones who had done that, and so we didn't -- I didn't say, "Gerald, I want you to do this," and he didn't say, "Bill, I want you to do that." We just kind of both contributed what we thought was expertise to the case in providing a defense.

Q And can you explain in a little more detail what it was that Gerald was focused on? You said something about Irby Walker and the Solicitors?

A Well, he's -- I'm not saying he was focused on that. He did that on his own -- of his own accord. I didn't say, "Look, go and do that." He just came and said, "Bill, I think this would be good in the case," and I agreed with him, and so he did it. In terms of, of what he focused on, I think that he focused on the case, on the defense.

Q Do you know if Mr. Kelly had any meetings with your

mental health experts where you were not present?
A I don't know.
Q Did Mr. Kelly serve as your co-counsel on the second trial, the one in Horry County?
A No. He didn't.
Q Was there any particular reason for that?
A I'm not aware of any reason. I don't think the Judge at that time -- well, I don't know. I have no idea.
Q Ms. Brana Williams was your co-counsel for that second trial; right?
A Correct.
Q How was she selected?
A I don't know.
Q And again, on the second trial was your role to act as lead counsel?
A Correct. Yes.
Q After you became familiar with the facts of the case and the evidence against Mr. Stanko regarding the murders of Ms. Ling and Mr. Turner, was there ever any question in your mind that Mr. Stanko was factually guilty of these crimes?
A Was there ever any question in my mind?
Q Yes. Do you --
A Not really.
Q Do you think it's fair --
A I thought he probably did it.

Q I'm sorry?
A I thought that he probably did it.
Q Do you think it's fair to say that the evidence against him was overwhelming?
A Well, you had an eyewitness, victim, pretty strong.
Q Do you agree that in a typical death penalty case when there is powerful evidence of guilt trial counsel's primary responsibility is to attempt to avoid a death sentence?
A I think that's in every case, situation.
Q Was avoiding a death sentence your primary goal in this case?
A No. Because I thought he was insane, and I think that achieving a guilty verdict was the primary, I mean, a not guilty verdict was the primary objective based on the facts of the case. I mean, he was in a -- he was unconscious basically.
Q So your primary objective was to obtain a not guilty verdict?
A I, I don't think it's fair to say primary objective. That was the primary objective in the first phase of the trial, and of course, you always want to avoid a death sentence in the second phase of the trial if there's a conviction. So I don't think it's fair to say, oh, the primary objective was to do one thing or the other. In Stephen's case, it was to get a not guilty verdict based on by

reason of insanity.
Q Did you have any concerns that attempting to obtain a not guilty by reason of insanity verdict would be in conflict with your goal of obtaining something less than a death sentence?
A No. Because you don't throw out the evidence. It becomes more obvious in the sentencing phase why this conduct occurred. So there's no conflict, you know, in terms of having to choose one over the other, certainly not in this case to my way of thinking.
Q If the jury rejected your theory for obtaining a not guilty by reason of insanity defense, were you concerned that they would then use the evidence that you had offered in the first phase as a reason to sentence Mr. Stanko to death
A Why -- no. To answer your question, no.
Q At some point during your trial preparations you did develop a theory that Mr. Stanko is a psychopath.
A Depending, depending on --
Q How did that idea first come about?
THE COURT: Wait a minute. Wait a minute. You all were talking at the same time. I didn't hear the answer.
MS. PAAVOLA: I'm sorry.
A I don't recall me developing that as a theory of the case. I think Mr. Stanko has a defect in the frontal lobe that interferes with his ability to evaluate and control

limbic system impulses. I don't know how -- I don't know what a psychopath is because I haven't read that definition in a long time.

Q Well, do you agree that your experts testified at trial that Mr. Stanko is a psychopath?

A I haven't read the transcript, but it, it may be they may have said that, but I would want to look at the context of the wording.

Q Let's talk about the experts that you did hire for the case?

A All right.

Q If you would look at page two of your timesheet, which is Applicant's Exhibit Number One. If you look at the top of that page on November 10th, 2005, your timesheet indicates that you had a meeting with Dr. Albiniak, is that how you pronounce that?

A Yes. Albiniak.

Q Who is Dr. Albiniak?

A He's a witness over -- a professor, instructor over at Coastal Carolina. I had used him in prior cases, and I thought he would be able to discuss with me in an intelligent fashion about how to go about putting together a defense for Mr. Stanko in the case.

Q What's Dr. Albiniak's area of expertise?

A I don't recall. He is -- he does a number of things,

but I don't want to say. I can't, I can't recall specifically what it was at that time.

Q Is he a clinician, someone who treats patients on a regular basis?

A I think he teaches on a regular basis.

Q Did --

A He may, he may treat people. I don't -- I'm not aware of that.

Q Did he ever meet with Mr. Stanko?

A I don't recall.

Q Did he conduct an evaluation of Mr. Stanko?

A I don't think that was his role in the case. So I doubt he did.

Q What was his role supposed to be at trial?

A To advise me on how, you know, what areas I should focus on in constructing the type of defense that might be called for in the case, and just -- he was someone that I had known and developed a rapport with, and so I went with -- went over there and began to discuss the case with him to just get some ideas. Later if he felt like some issue came within his area of expertise, you know, he was willing to testify in the case. I don't recall specifically the discussions I had with him at that time, but I'm sure the record would reflect what he did.

Q What -- so you don't recall what he advised you to focus on?

A I don't think he's -- I didn't ask him to advise me what to focus on.
Q Oh. I'm sorry.
A Okay.
Q I thought you said you discussed with him what areas you should focus on for the defense?
A Well, if I said focus on I probably misspoke. It was to throw out some ideas, use him kind of as a sounding board as to how we might want to develop the defense in the case and potential witnesses that would be available to help us do that.
Q What ideas did you discuss with him?
A Say again?
Q What ideas did you discuss with him?
A I don't recall specifically.
Q All right. Further down on the same page, page two, on November 14th, 2005, your time indicates that you contacted Dr. Tora Brawley. Do you recall what kind of expert she is?
A Maybe a psychologist. I'm not sure.
Q And also on page three in about the middle of the page on January 30th, 2006 --
A Okay.
Q -- your time indicates that you contacted Dr. Donna Schwartz-Watts?
A Okay.

Q Do you recall that?
A I kind of do.
Q Do you -- did either Dr. Brawley or Dr. Schwartz-Watts end up performing any work on the case?
A No. And, and the, and the reason I think was because they really weren't prepared to go in the direction that we wanted to go, I wanted to go in, and so as it turned out, I don't recall if there was some other reason, but we just made a decision not to use them.
Q What do you mean they weren't prepared to go in the direction you wanted to go in?
A To show the type digital imagery that we were able to develop. They were more like -- let me just say it, I don't think that they were -- I don't think they were able to go specifically in the, in the direction that we wanted to go in. I just, at this time, I have to leave it at that.
Q And by the direction you wanted to go in, do you mean the strategy to show that Mr. Stanko was not guilty by reason of insanity?
A No. At that time it would have been to try to explain what the heck was going on in his brain, in his mind at the time these acts were committed.
Q And you didn't think they were capable or on board with that?
A You know what, they're capable. That's not what I'm

saying at all. It's just that for some reason the decision was made not to use them. It may have been that they backed out. I don't, I don't recall.

Q Okay. So you just don't know?

A I don't recall.

Q If you look further down on page -- I'm sorry. If you turn to page four, if you would refer to the entry on March 14th, 2006. The -- this -- I'm sorry. There are multiple entries on that date, but --

A There are.

Q -- the third one down indicates that you met with Dr. Thrasher?

A Right. Right.

Q Who is Dr. Thrasher?

A He was a psychiatrist practicing in Myrtle Beach at that time. I had also used him previous, on previous occasions. So I went and talked to him about the case and told him what I told you earlier, "I want to know what was going on in Stephen's brain, what -- how did this, you know, the motivation to do these things originate in his brain. I want to be able to explain that," and Thrasher, Dr. Thrasher said, "Well, I know a guy that can explain it and who can give you pictures," and he recommended Dr. Thomas Sachy, and so, I mean, I clearly recall that meeting with Dr. Thrasher.

Q Okay. And if you look at the top of the page on the

first entry from March 14th that same day you prepared and faxed a motion to be relieved as counsel in the case?
A Yeah.
Q Why did you do that?
A Because Stuart had -- Axelrod had met with the client, and I, I think I've got the timing right on this, and indicated he wanted to work on the case, and I think that's when I filed the motion to be relieved.
Q Did Mr. Stanko request that you file that motion?
A I don't recall if he did or not.
Q And you had a hearing on this motion on March 17th; is that correct, according to your timesheet?
A Yes.
Q And obviously Judge Jefferson ruled that you would remain as counsel at that time?
A Right.
Q And on that same day you met again with Dr. Thrasher and it indicates from your timesheet that he gave you some expert recommendations?
A Right.
Q So I understand from your previous testimony that at that meeting he recommended Dr. Sachy?
A He might have because we're talking within a two or three-day span here. I was thinking he had met -- he had mentioned Sachy the first time I met with him, but it could've

been the second time. I don't recall.
Q Okay. Do you know -- I'm sorry. Did Dr. Sachy, I mean, Dr. Thrasher prepare a report for you for his ultimate conclusion in the case?
A I don't recall.
Q I'd like to hand you what's been pre-marked as Applicant's Exhibit Number Two.
MS. PAAVOLA: If I may approach the witness, Your Honor.
THE COURT: All right.
BY MS. PAAVOLA:
Q Mr. Diggs, do you recognize this document?
A You know, it may be I've seen it before. I don't recall.
Q Does it purport to be a report to you from Dr. Thrasher?
A Well, I, I assume it was for me because of the reference, you know, the references he makes inside the document.
Q Yes. It refers to Mr. Stanko; correct, and it says he is represented by William I. Diggs and Gerald Kelly?
A Right. Right.
Q And it's signed Dr. Thrasher on page nine?
A You know, he probably did do this for me. I just can't specifically recall it, but, you know, it's -- it probably is something he did for me as a result of my request that he do it.

Q All right.

MS. PAAVOLA: Your Honor, we would to admit Applicant's Exhibit Number Two.

THE COURT: Any objection?

MR. ZELENKA: No objection, Your Honor.

THE COURT: All right. Applicant's Exhibit Number Two admitted into evidence without objection.

(Applicant's Exhibit Number Two [Thrasher Report] entered into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q According to this report, Mr. Diggs, Dr. Thrasher met with Mr. Stanko on July 7th, 2006. That's stated in the first line under setting?

A Okay.

Q Do you, do you agree?

A That's what it says.

Q At the time of your meeting, whether it was the first meeting on March 14th, 2006, or the second meeting on March 17th, 2006, when Dr. Thrasher recommended Dr. Sachy to you, had Dr. Thrasher ever previously met with Mr. Stanko?

A I don't -- I doubt it. I don't think so.

Q All right. According to your timesheet on page five on March 20th, 2006, you contacted Dr. Thomas Sachy?

A Yes.

Q And your entry states, "He will be our expert"?

A It does say that. Yes.
Q And according to your time that was approximately a 30-minute entry?
A Yes.
Q So I assume that was a phone call?
A It probably was.
Q Do you recall what you discussed with Dr. Sachy during that phone call?
A It would have been -- I don't specifically recall it, but it would have had to do with Dr. Sachy's area of expertise and how it might be appropriate to use it in this case at, you know, on behalf of the defense. I had -- I'm sure that I told him what Dr. Thrasher had said about the possibility of getting photographs or images, things of that nature, to show what was -- how -- what was working in the brain at that time and how the brain was functioning, probably would have been that type of discussion.
Q What is Dr. Sachy's areas of expertise?
A He's a psychiatrist. I don't know what his area of expertise. I know he operates a pain management center, but he also, I know he does testify from time to time in criminal cases. So I would imagine he is -- has offered opinions on sanity and insanity and that issue with respect to criminal prosecutions.
Q Did Dr. Sachy discuss with you his prior court testimony

in the Rivera case in Georgia?
A He had mentioned it, but we didn't go into a lot of detail about it. He did mention it though.
Q What did he tell you about that case?
A Just as, as I recall, if I recall correctly at all, it had to do with hypofrontality, inability of the frontal area of the brain to function in this type of a situation, but we didn't discuss the facts of the case that I recall.
Q What was, backing up just a little bit, what was Dr. Thrasher's role supposed to be versus Dr. Sachy? Are they both psychologists?
A They're psychiatrists.
Q Okay. And how -- was there any difference between what their -- the goals of their testimony was supposed to be?
A Dr. Thrasher was, at this time, Dr. Thrasher was a local. I thought that the jurors would be more receptive to him than some expert hired outside of the state, but they both -- they were, in my opinion, what we were trying to do is put the testimony of both of those experts together. Dr. Thrasher -- and, and you might recall, Dr. Thrasher probably was at Guantanamo when Stephen was born. So and at least in Georgetown he, you know, it just fit really well, you know, into the defense because we were thinking possibly there might have been some oxygen deprivation at the time of Stephen's birth and, you know, it just kind of added some credibility in

my opinion that Dr. Thrasher might have been there during that timeframe, you know, at the time Stephen was actually born.

Q Do you recall if Dr. Sachy prepared a report for you prior to the first trial?

A He probably did. I, you know, I think he did.

Q If I could hand you what's been marked as Applicant's Exhibit Three.

MS. PAAVOLA: If I may approach the witness, Your Honor.

THE COURT: All right.

BY MS. PAAVOLA:.

Q Mr. Diggs, do you recognize this document?

A Yes. I do recognize it.

Q Is this the report that Dr. Sachy prepared for you?

A Well, it probably is. It looks like it.

Q All right.

MS. PAAVOLA: We would move to admit Applicant's Exhibit Three, Your Honor.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: Applicant's Exhibit Three admitted into evidence without objection.

(Applicant's Exhibit Number Three [Sachy Report] admitted into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q All right. Mr. Diggs, you also hired an expert named Dr.

Wu; is that correct?
A Yes.
Q What is his area of expertise?
A Brain injury and scans.
Q I'm sorry. Did you say scans?
A Scans, PET, CT scans.
Q Like the PET scan?
A Yes.
Q Can you, can you say what a PET scan is?
A What does the P-E-T stand for?
Q Yes.
A Positron emission tomography or something like that.
Q And what was Dr. Wu's role supposed to be at trial?
A He could explain because when you take these images of the brain you get a lot of numbers, and what he was able to do was put together the numbers produced, images from them so that you could see the workings of the brain at the time of the scan. Now, Dr. Wu did that. He's with -- he's an expert that is used by the National Institute of Health and was at that time and probably still is in my opinion the leading expert in the world concerning this type of technology and the use of it in a criminal setting or a judicial setting.
Q He was supposed to explain the analysis of the PET scan, is that basically the gist of it?
A He was -- he could get us there from the scan and, and

explain what it was we were looking at in the visual images and explaining how that affected one's conduct.

Q How did he become involved in the case?

A It might have been Dr. Sachy that had recommended him.

Q Do you know if he worked with Dr. Sachy on the Rivera case?

A He may have.

Q Did he ever meet with Stephen?

A I don't recall. I doubt it.

Q Did he ever conduct any kind of clinical evaluation?

A Not unless it would have been, you know, he lives in California. He did not come here to personally meet with Stephen unless it was just to meet him prior to testimony in the case.

Q Did he prepare a report for you prior to trial?

A I don't recall.

MS. PAAVOLA: Your Honor, may I approach the witness, please?

THE COURT: Yes, ma'am.

BY MS. PAAVOLA:

Q Mr. Diggs, do you recognize this document?

A Well, it could be something that Dr. Wu generated for me. I don't recall at this time that --

Q All right. Does it, does it purport to be about Mr. Stanko?

A It does.

MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit Number Four.

THE COURT: Any objection?

MR. ZELENKA: No objection, Your Honor.

THE COURT: Applicant's Exhibit Four admitted into evidence without objection.

(Applicant's Exhibit Number Four [Wu Report] admitted into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q All right. Mr. Diggs, you also had another expert named Dr. Einhorn; is that right?

A Yes.

Q What is his area of expertise?

A I don't know.

Q Do you know how he became involved?

A Dr. Sachy wanted to use him to go in and perform the test, what was called a continuous performance test at the time of the scan at MUSC. Dr. Einhorn went over from Atlanta to administer that test during the scan. Okay. It's something that was important that had to be done in order for Dr. Wu to be able to put the data from Stephen's scan against a database that he had formulated, put together out at the University of California at Irvine, I believe.

Q Do you know if Dr. Einhorn had worked with Dr. Sachy on

the Rivera case?
A I think he did, but I don't know.
Q Okay. And finally, you had Dr. Ruben Gur. Do you recall him? Who is he?
A He's a psychologist, I believe, from Pennsylvania. He did not testify at the first trial. He did produce a chart that we used at the first trial. The first trial took place when Israel was at a war. So Gur had to go to Israel during that timeframe, but during the trial here, he did come and he testified. He testified about the volume data that was exhibited on the graph that he drew and he testified as to the discrepancies or the difference between Stephen's brain structure and a normal brain structure.
Q Did Dr. Gur ever meet with Mr. Stanko?
A I don't know that he had to because, I mean, I don't know. I can't answer that question but that's not what he -- his role in the case was. Okay?
Q Did -- so --
A It was to do measurements on, on the brain sides.
Q So his role was not to conduct a clinical evaluation?
A It was to develop information about physical structures within Stephen's brain and any deviations that might exist from the standard brain structure.
Q Did Dr. Gur prepare a report showing his analysis?
A I think he did because I certainly remember the chart

that he did. So there may have been a report associated with it.

MS. PAAVOLA: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MS. PAAVOLA:

Q Mr. Diggs, this document has been marked as Applicant's Exhibit Number Five. Do you recognize this document?

A Yes.

Q Is this report from Dr. Gur's office?

A Yes. It's my understanding it is.

MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit Number Five.

THE COURT: Any objection?

MR. ZELENKA: No objection, Your Honor.

THE COURT: All right. Applicant's Exhibit Number Five admitted into evidence without objection.

(Applicant's Exhibit Number Five [Gur Report] admitted into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q All right. Mr. Diggs, do you think it's accurate to say that you were primarily responsible for supervising the mental health experts in the case?

A Yeah. It was my responsibility since we had made the decision to go with the defense that was presented.

Q Did you and Mr. Kelly make that decision together?

A What decision?
Q The decision to go with that defense?
A No. I, I think that was my decision. I think if Gerald that or if Mr. Kelly had objected strongly to it, we would -- we still would have presented this defense, and I would have been agreeable to letting him produce some other kind of defense that was consistent.
Q You hired two investigators, Dale Davis and Vicki Childs; is that right?
A Yes.
Q Who is Dale Davis?
A It's an expert Gerald Kelly had used in the past. She did -- put together a story about Stephen's family life and upbringing, that kind of thing.
Q She's a mitigation investigator; is that right?
A She is.
Q And --
A And Vicki Childs was an investigator.
Q Vicki Childs was a fact investigator?
A Yes.
Q Whose idea was it to hire Ms. Davis and Ms. Childs?
A Mr. Kelly.
Q Was it Mr. Kelly's job to supervise their work?
A He did. I think both of us supervised what they were doing. I mean, we both had input into what they were asked to

do.
Q Now, Ms. Childs continued to work on the second trial in the Horry County case; is that right?
A Right. Right.
Q Did Ms. Davis also continue on the case?
A She chose not to.
Q Do you know why she chose not to do that?
A She never, she never discussed it with me.
Q Did you hire another mitigation investigator to replace her?
A I think we hired Evelyn Califf.
Q Is Evelyn Califf a mitigation investigator?
A She was qualified to do the type of review of Stephen's life that we wanted done. I don't know if you would call her a mitigation specialist expert or whatever, but I think she was qualified to do what she did in the case.
Q Do you know if she did any investigation to prepare for the second trial?
A I don't -- I think she did a good amount of work on the case, you know, and specifically what she did in order to present her testimony, I'm not -- I don't recall specifically, but I think she did a good job with respect to the role she played in the case and what she did. I think she presented some good testimony at the trial of the case.
Q Now, Ms. Califf worked on the first trial as well; is

that correct?
A I don't recall. She may have come in at the last minute.
Q So you don't recall when she first became involved?
A If -- no. If she testified at the first trial, it, it was a situation where she came in fairly late.
Q And why was that?
A There was no specific reason for it. It was because if, if it happened that way it would have been because we felt like she had an ability to do something that we needed to have done during the trial.
Q If you would refer to page nine of your timesheet, which is Applicant's Exhibit Number One.
A Okay.
Q In the middle of the page there on July 1st, 2006, your entry indicates that you had a meeting with Dr. Califf to discuss her potential testimony?
A Uh-huh. Okay.
Q Do you agree that according to your timesheet, anyway, that appears to be your first meeting with Dr. Califf?
A Yes.
Q Do you recall when she testified at the first trial how long she said she had been working on the case?
A I don't recall.
Q Mr. Diggs, I would like to show you a page from the

Record on Appeal from the Georgetown County trial.
A Okay.
MS. PAAVOLA: If I may approach the witness, Your Honor.
THE COURT: All right.
BY MS. PAAVOLA:
Q I'm referring to page 3296. Mr. Diggs, if you could look at that highlighted portion there. Do you see where Ms. Califf testifies about how long she has been working on the case at the time of her testimony?
A She says two and a half weeks.
Q In your view, is two and a half weeks sufficient time for a social historian to prepare to testify in a capital case?
A I think it, it wouldn't be if that was your sole defense, but I think she did a good job in this case, and given the time that she had, you know, that's -- you do the best you can do, and so I think she did a good job.
Q And by not your sole defense you mean because you were focused on a not guilty by reason of insanity defense?
A Absolutely, and the fact that he had a brain defect, and I don't think that we should execute people who have brain defects.
Q So did you not think it was important to have a thorough social history presented?
A I didn't know -- it assumed -- I had assumed probably at

this point looking back on it that Dale Davis was working on it and, I mean, that's my recollection at this point. So how it was decided that Dr. Califf would get involved in the case, I don't recall.

Q When you say you assume that Ms. Davis was working on putting it together, did -- does that mean you didn't know what she was doing?

A I don't recall, you know, at this point. I can't recall what she was doing, and I don't recall specifically, you know, the specifics about what she was doing. It was a part of the defense that I didn't devote a lot of attention to.

Q Did Ms. -- I'm sorry?

A So, I, I, I don't know.

Q Did Ms. Davis --

A I don't know how else to answer the question.

Q Did Ms. Davis suggest that you should hire a social worker to testify?

A I mean, she might have. I don't know. I don't recall.

Q Were you reluctant to hire a social worker to testify?

A No.

Q All right. If I understand from your earlier testimony your strategy at the guilt or innocence phase was to try to show that Mr. Stanko is not guilty by reason of insanity?

A Yes.

Q And if I -- I understood maybe you don't recall from the

record, but if the record reflects that Dr. Sachy testified that Mr. Stanko is a psychopath, do you have any reason to disagree with that?

A Well, it doesn't -- you mean disagree with his testimony, you know, that he said that or disagree with his assessment?

Q Well, he said that? Right?

A I'm not a -- yeah. I'm not a psychiatrist.

Q Did you know he was going to say that?

A I don't recall. I don't think so.

Q Based on the information that you had at the time that you first decided to advance that strategy, was it your understanding that this idea was fairly novel?

A Pretty much so. Yes. But it was also my understanding that the technology wasn't novel because I think the pharmaceutical industry had used it for a number of years to test how various medications affected the brain and its activity. So, I mean, there's no doubt that the technology was there. Why it wasn't been used -- being used in the criminal defense arena, I don't know.

Q Other than Dr. Sachy's previous work on the Rivera case, were you aware of any other capital case in which this kind of testimony was offered?

A I don't know. It was pretty new. At that time it wasn't being offered a lot, but it was available to us, and we

were able to use it.
Q Were you aware that the outcome in the Rivera case was that the jury rejected this defense and sentenced Mr. Rivera to death?
A I don't think it matters what the outcome of that case was.
Q Why not?
A Because we were dealing with Stephen's case. I didn't have any -- I didn't look at the evidence in the Rivera case. I don't know how strong it was, and it's a new -- at that time it was a new theory in the criminal arena, and I felt that it was the best defense because it was true as to what was happening in the Stephen Stanko case, and I just I feel fortunate that we learned about it and were able to use it.
Q Did you talk to any other experienced capital defense lawyers before you decided to do something like the strategy in this case?
A I discussed it with members of the bar here. In terms of who and when, I don't, you know, I can't give you a precise list of who and when, but it was a difficult case in terms of what the facts were, and it called for some kind of credible explanation for what was going on other than the fact that he was just a mean, horrible person. Okay. That didn't fit in my mind why he would do this. Okay. And I think the experts who testified in Stephen's case explained why he did it and I

think you know that's why he did it. Okay. So did I call around the country to talk to people, no.

Q So is your testimony that you did not talk to anyone else or that you did talk to someone else?

A I would discuss it with attorneys in, in passing, but I didn't talk a lot about the case because you just don't do that. In terms of calling people around the country, talking to them about what they thought about the theory of the case, I did not do that.

Q Who did you talk to about it in passing?

A I just said I don't remember. I might have talked to Stuart.

Q Did you do any research for Law Review articles or any other academic publications about whether this strategy would be a good idea in a capital case?

A Not that I recall.

Q Did any of your defense team members ever tell you that they thought your strategy was a bad idea?

A Not in those words. No.

Q What do you mean by that?

A They never did.

Q Did anybody ever suggest that it might not be a good idea?

A Not -- that it might be a good idea?

Q Yes, sir.

A Would you rephrase?
Q That it might be a bad idea? Did anybody say they had doubts or questions or concerns about advancing this kind of theory in this case?
A They didn't tell me about it.
Q Did Ms. Davis ever tell you that?
A She didn't.
Q Did you ever consider conceding guilt and offering the evidence of brain damage as mitigation?
A I never did that.
Q Why not?
A Because I didn't think it was appropriate in the case. Stephen was -- I'm going to put up witnesses that say he was in a trance, that he had -- it was in a blacked out state, but yet not say he was insane? That to me lacks credibility. Okay. So if you've got witnesses who are saying he, he doesn't recall this. He doesn't recall it because he was blacked out. This is what happens. You don't lay down memory, memories when your brain is, you know, has that type of inability to function. You don't attack your own credibility by not going with what the evidence shows, and so, you know, it, it is totally inappropriate to present that kind of testimony at any stage without arguing simultaneously or with, with the presentation of the evidence that the Defendant was insane.

Q Did Ms. Davis ask you to attend a capital defense training program in Charleston in February of 2006?
A I don't recall.
MS. PAAVOLA: Your Honor, may I approach the witness, please?
THE COURT: Yes, ma'am.
BY MS. PAAVOLA:
Q Mr. Diggs, I would like to refer you to what's been marked as Applicant's Exhibit Six and Applicant's Exhibit Seven. If you would take a look at Number Six, please. Do you recognize this document?
A No. I don't recall it.
Q Does this purport to be an e-mail from Ms. Davis to you dated January 18th, 2006?
A It says it is.
Q Do you agree that in this e-mail she asks if you would be willing to attend a seminar with her in Charleston?
A Okay. What's your question?
Q Do you agree that in this e-mail Ms. Davis asks if you would be willing to attend a seminar with her in Charleston?
A She says that she thinks we could attend if we wanted.
Q Yes. And did she attach a number of documents to this e-mail?
A I don't know.
Q If you would look at the attachment line at the top, do

you see that there is an attachment it's called ABA Guidelines 2003?

A I see it.

MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit Number Six, please.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: Applicant's Exhibit Number Six admitted into evidence without objection.

(Applicant's Exhibit Number Six [E-Mail, Mitigation Seminar] admitted into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q Mr. Diggs, if you could look also at Applicant's Exhibit Number Seven which is another e-mail from Ms. Davis, this one dated January 24th, 2006?

A Okay.

Q Do you recognize this e-mail?

A No. I don't.

Q Do you agree that it purports to be from Ms. Davis to you?

A It purports to be that. Yes.

Q And in this e-mail she says she did not hear back from you about the program but she would, nonetheless, like to attend?

A Are you asking me does it say that?

Q Do you agree that it says that? Yes.
A Seems to say that she wants to attend and to -- for me to let her know. Why couldn't Mr. -- did she do Mr. Kelly as well? I mean, do you have any information that this was only sent to me and not Mr. Kelly?
THE COURT: Just stick with the questions. Just let her ask the questions.
A I, I don't recall the e-mail.
MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit Number Seven.
THE COURT: Any objection?
MR. ZELENKA: Where did it come from?
MS. PAAVOLA: It came from this.
MR. ZELENKA: Foundation for it. He denied receiving it.
MS. PAAVOLA: Well, Mr., Mr. Diggs agrees that he -- his e-mail address is listed right there?
A Well, it doesn't, it doesn't list an e-mail address.
Q Mr. Diggs, do you agree that in this e-mail she asks for your permission if she may take the Stanko case to this training program?
A I don't recall.
THE COURT: Wait a minute. We, we -- you've tendered it. Is there an objection to it coming into evidence?
MR. ZELENKA: My objection is he didn't recall seeing it.
THE COURT: All right. State's objection sustained.

BY MS. PAAVOLA:

Q Mr. Diggs, did you attend this training program in 2006?

A I don't think so.

Q Do you think you would remember if you had?

A I would, but I don't remember getting the e-mail either so. I, I -- no. I did not attend.

Q Would it be fair to say that Dr. Sachy was your primary witness for advancing your theory of the case?

A No. I think Wu and, and Thrasher and Sachy played an equal role, as did Gur, Dr. Gur.

Q During the second trial, the trial in the Horry County -- the trial here in Horry County regarding the murder of Mr. Turner --

A Right.

Q -- other than Dr. Sachy, did you have any other expert witness who was prepared to testify that Mr. Stanko was insane at the time of the crime?

A No. Dr. Sachy was the only one that was going to --

Q And Dr. Thatcher --

A -- offer that testimony.

Q I'm sorry. I didn't mean to interrupt you. Dr. Thrasher testified during the Georgetown trial that Mr. Stanko is insane during the Ling incident?

A Right. Right.

Q But he wouldn't -- he did not testify about that -- he

did not reach that same conclusion regarding the murder of Mr. Turner?

A Right. Correct.

Q Do you know why that was?

A I think that in his mind, based on my conversations with him, he thought it was an easier call in Georgetown, but based on my interviews with Mr. Stanko, I think he was undergoing this, this -- the identical brain activity that he experienced when he was in Georgetown in that incident. So based on that, it did not -- I wish Dr. -- let me put it this way. I wish Dr. Thrasher would've said insane here as well, but he wasn't willing to go that far. He didn't say he thought he was sane if I recall correctly. He just wasn't willing to go to the extent of saying he was, he was -- he was not willing to go to the extent of saying he was insane during Mr. Turner's incident. He did, however, feel like there were similarities in Mr. Stanko's brain activity at the time of the second killing.

Q Why do you think Dr. Thrasher found it a more difficult call for the Turner crime?

A Because it wasn't as prolonged, I don't think, but I, I, I would really be speculating about it. There's hard evidence from Stephen himself that he did not remember Laura Ling, the Laura Ling incident. Stephen, I'm not sure he was truthful with Dr. Thrasher in terms of relating what happened at the

Turner residence. I, I don't know, but for whatever reason Dr. Thrasher did not feel comfortable saying he felt that Stephen was insane at the time of the Turner incident.

Q Do you agree that legally a criminal Defendant's conduct is one of the relevant things a jury can consider when deciding an insanity issue?

A Conduct?

Q Yes.

A I think so.

Q In your view, did Mr. Stanko's action during the Turner murder suggest a lot of preplanning?

A Preplanning?

Q Yes, sir.

A No.

Q You don't view any of the actions that he took as indicating preplanning?

A Not that I recall. I don't think he went there to kill Roger or Mr. Turner, not really.

Q Well, do you recall that after the Ling murder he took money out of Laura Ling's bank account?

A I think so.

Q Then he called Mr. Turner and told Mr. Turner that his father had died and he needed to speak with Mr. Turner?

A It may be.

Q Then he called Laura's place of employment and said that

she would not be in the next day because she was sick?
A Okay.
Q Do you agree that that happened?
A I think I remember that happening.
Q Do you remember that he used a pillow in an attempt to muffle the shot of Mr. Turner?
A I think so.
Q Then he took Mr. Turner's truck and cash and drove to Columbia and so forth?
A Right.
Q And none of those actions to you suggest that he was sane or planning or anything like that?
A Not in the context of Stephen's case. Okay. When he killed Laura Ling he walked through the house, took a shower and cleaned up. He did all of those things when he was still in a blackout state, and I think a lot of those events or incidents that you just mentioned are a similar kind of thing. Now, whether -- you know, this is not a situation where Stephen went insane in Georgetown and it continued for a couple -- several hours and then he came out of it. Okay. It's a situation where the frontal lobe was working at times, it was not working. I do not think when he did these things necessarily he would've been insane, I'm talking about making phone calls and that kind of thing, but at the time he pulled the trigger on Mr. Turner, I don't think his brain was working

to analyze what acts were being committed at that time and to assess whether they were right or wrong. I don't think that happened.

Q When Dr. Thrasher told you that he would not testify that Mr. Stanko was insane during the Turner murder, I'm specifically asking now about the Turner murder --

A Right. Right.

Q -- did he mention any of these factors as reasons why he would not be comfortable drawing that conclusion?

A Might have. I, I don't recall. He probably did.

Q Did you think the jury would be concerned about those facts?

A I thought that the jury would be concerned about what was going on in Mr. Stanko's mind at the time he pulled the trigger.

Q For the second trial you had an expert named Brent Turvey who was from Alaska. Do you recall him?

A Yes.

Q What is his area of expertise?

A Crime scene reconstruction.

Q What did you hope to accomplish with his testimony at trial?

A It wasn't what I had hoped. I know Brana Williams was behind getting Mr. Turvey here. She came to me and said, "Look, I think it would be good to have him testify," and so,

basically, I went along with it, and he came and testified.
Q What do you mean it wasn't what you had hoped?
A Say again.
Q What did you mean by it wasn't what you had hoped?
A When did I say that? How did I say it?
Q Just now, sir.
A In what context?
Q I asked you what was the goal of his testimony at trial, and I believe you said it was not what you had hoped.
A Well, it's not -- I don't think that's what I meant.
Q Well, what did you mean?
A I wasn't going to call this type of expert. Brana Williams suggested that we do it.
Q I see.
A And so she made contact with him, got him down here. I felt like, okay, it fits it. Okay. And I went along with it. Initially, I might have said something to the effect it's not the type of thing that I personally plan to do, but when Brana suggested it and I met Mr. Turvey, I thought, "Okay. It's consistent."
Q Okay. So when --
A Seemingly consistent, and, and I went along with it.
Q So when Brana suggested it --
A Right.
Q -- what was the goal supposed to be?

A To explain specifically what had happened in the case, who was where when certain things happened.
Q For what purpose?
A Shedding light on what happened, explaining for the jury where the actors were and what was happening in, in sequence.
Q Did you do any research into Dr. Sachy's background or qualifications or previous experiences as an expert witness before you called him to testify in the first case?
A What do you mean by research?
Q Well, did you research your own experts? Did you find out what his qualifications were?
A Yeah.
Q What his previous testimony was?
A Yeah. Yep.
Q Did you review any of his testimony from the Rivera trial?
A Maybe. I think he maybe sent me some of it.
Q Do you recall if he sent -- what portions he might have sent to you?
A No.
Q Were you aware at the time of his testimony in the Rivera trial that this type of defense had never previously been presented in Georgia?
A I knew it was fairly new. I think that was the first time it had been presented.

Q Do you know if Dr. Sachy had ever previously published any research on the subject of insanity?
A I don't. I don't recall.
Q Do you know if he had ever previously published any research on the issue of using brain scans to diagnose psychopathy or insanity?
A Did he ever --
Q Publish any documents?
A -- articles -- I don't think I checked on it.
Q I'm sorry?
A I don't recall checking to see what he had published in that regard.
Q Did you know that Dr. Sachy contacted Rivera's defense team after he read about the case on Court TV online?
A No. Not that I recall.
Q Were you aware that he testified at that trial that he told Defense counsel what he expected to find with the brain scans before he ever met Mr. Rivera?
A I'm not surprised by that if he did.
Q Why not?
A They -- everybody opined about what the brain scans would show with Stephen, not only Dr. Sachy but Dr. Wu and I think Dr. Thrasher as well. So if, if, I mean, these, these doctors knew what scans looked like with the potential or with the problem that Stephen had. They knew what those scans

would look like, and when they said, "This is what we expect to see in Stephen's case," that's what eventually appeared.

Q So did Dr. Sachy --

A They were correct.

Q I'm sorry?

A They were correct.

Q Did Dr. Sachy tell you what he expected to see in Mr. Stanko's case before he met Mr. Stanko?

A I don't recall. I think he did, and he, he said, "I predict this is what we're going to see," as did Dr. Wu, and what they produced showed that was, indeed, the case.

Q Were you aware that Dr. Sachy testified in the Rivera trial that he hoped to publish something after his testimony in that case?

A No.

Q Did he ever tell you whether he planned to publish anything about Mr. Stanko's case?

A No. He didn't.

Q He --

A He might have talked, he might have talked to Stephen about it, but we didn't discuss that during the trial preparation or during the trial.

Q Did he ever tell you that he wanted to co-author a book with Mr. Stanko?

A I think I knew that they were talking about that. It

was not a big issue. It wasn't something that was diverting attention away from the case. Okay. It was just, "Hey, we might do this in the future because we, we believe that it needs to be done in criminal cases when you have Defendants that engage in behavior that just doesn't make sense."

Q How many times did Dr. Sachy meet with Mr. Stanko before he testified at the first trial?

A I don't know.

Q If you would look, please, at your timesheet on page nine?

A Okay.

Q If you see on the June 24th entry there near the top of the page?

A Okay.

Q It indicates that you took a trip with Dr. Sachy?

A Right.

Q To visit the client?

A Right.

Q As far as you know is that Dr. Sachy's first meeting with Mr. Stanko?

A Yeah. That was -- I think that was the first time he came to town and met with Mr. Stanko.

Q Prior to advancing the insanity theory at trial, did you do any legal research regarding the likelihood of success of an insanity claim?

A Probably. What, what do you mean by legal research regarding likelihood?
Q Well, were you generally aware with --
A Worked at Appellate Defense for eight years. I was aware of the difficulties that came with that type of defense.
Q Were you aware --
A But it fit, you know, it fit the facts of Stephen's case.
Q Were you aware of any previous cases in South Carolina where a criminal Defendant obtained an NGRI verdict at a contested trial before a jury?
A No. Because usually the State does not prosecute the case that's obvious. Okay. And I've had a couple of Defendants, clients myself who were never prosecuted because the State knew they were insane. The State, to my knowledge, doesn't choose to prosecute insane Defendants when there's no question about the mental state. When there is question about the mental state, as in Stephen's case, they chose to prosecute and seek the death penalty. So by my definition, based on my experience, the difficult cases are the ones that are prosecuted. Okay.
Q Did you do any --
A But it doesn't mean that they're not insane.
Q Did you do any research in Law Review articles or any other scholarly publications about how jurors typically view expert testimony regarding an insanity defense?

A Probably. I don't know if I did specifically for this case, but I'd read articles before in the past. I practiced law for 25 years or so before I represented Mr. Stanko, and so those kinds of things I had been familiar with.

Q What's your general understanding based on that experience about how jurors tend to view this kind of defense?

A Well, I think the jurors will be fair when they begin to understand and trust the evidence. I, I think it hurts when the State uses experts like the ones they used in this case that deny the advancements in the technology that's available. So I think it's not something that static jurors are going to become receptive to insanity case evidence when they become more accepting and become -- they become more familiar with this being the case. Okay. And that's not going to happen unless people advance the theory, unless the case facts when they deserve that type of testimony and it's presented in that situation. So whether -- when Stephen's case came along it was very unique. It was a strange case, and maybe the approach that we've taken in the past in the law to defending that kind of situation has not been adequate. Okay. And maybe it needs to change, and Stephen's case is an important step, I think, that would possibly shed light on that evolution, that evolutionary process. Okay. Because, you know, historically when we talked about sanity and malice and those kinds of things, we didn't have technology, PET scans

and things of that nature to see what's happening in the brain when certain thought processes are taking place, and inevitably, invariably, things are going to change when the -- when it, when it -- that change is prompted by the evolution in technology, the advancement in technology.

Q So did you view this defense as cutting-edge or somehow blazing new ground?

A Only with respect to the use of the PET scans, CT scans.

Q Did you ever describe it that way to other people?

A I don't recall saying that.

Q I assume you're familiar with South Carolina's definition of insanity. Do you agree that it specifically excludes evidence of a mental disease or defect that is manifested only by repeated criminal or antisocial conduct?

A Yeah. Yes, ma'am.

Q And if the record reflects that your experts testified that Mr. Stanko has a pattern of repeated antisocial conduct.

A That's not -- you know, they're not mutually exclusive. Simply because he was insane when he was in this blacked out period doesn't have anything to do with what he was doing on, on other occasions. Although, I would liken Stephen's conduct in that area to telling someone who's born with a birth defect in their arm, they're never going to be a good pitcher, you know, of a baseball. Stephen, Stephen is going to have problems, in my opinion, such as those that he's had in life

because of the inability of the brain to work properly. Okay. He just doesn't have the ability to do that. Doesn't have anything to do with how smart he is. Okay. But to my way of thinking the problems that Stephen's had in the past are related to his brain defect. Okay. Not all times in that can we say that Stephen was insane. That's not what I ever said, but what he did, you know, a con game here, a con game there is not inconsistent with the insanity defense that we presented based on the blackouts that Stephen was experiencing at the time of these incidents.

Q Mr. Diggs, my question is if the law explicitly excludes a condition that your own experts were going to testify to and rely on, how is it going to be legally possible for the jury to accept your theory of the case?

A I don't accept your question. That's not correct. Okay. Nobody argued these things, and I certainly didn't argue that these other incidents made him insane. Okay. He was insane because he blacked out at that moment. You know, what he was doing at the bank on other occasions has nothing to do with the defense in this case.

Q Did your experts --

A I don't think our Defense, I don't think our Defense experts said that.

Q Did they testify to any mental disease or defect other than antisocial personality disorder or psychopathy?

A His inability -- the, the blackout period that he suffers when the impulse comes that's too great for him to control up here. You know, that renders him insane. They testified to that.
Q You mean, they testified --
A If I understand your question correctly.
Q They testified that he had brain damage?
A Right.
Q Yes. Do you agree that they testified that the brain damage proved that he is a psychopath?
A Well, it, it might. I don't, I don't know, you know, I don't know anything about being a psychopath. Okay. It may be that that's what psychopaths are. Okay. It -- I don't know.
Q Are you saying you didn't --
A Maybe you could rephrase the question. I'm not sure I understand what you're getting at.
Q Did you know that Dr. Sachy was going to say Mr. Stanko was a psychopath before the Georgetown trial?
A I don't specifically recall knowing that. I, you know, I remember thinking I wish he hadn't said that. Okay. But he did and --
Q Did you ask him not to say that for the second trial?
A I don't recall.
Q Do you know if that's what he testified to at the second

trial?
A I don't remember. I haven't seen the transcript.
Q I'd like to ask you some questions about your closing argument in the guilt or innocence phase of the Horry County trial.
A Okay.
MS. PAAVOLA: Your Honor, may I approach the witness, please?
THE COURT: Yes.
BY MS. PAAVOLA:
Q Mr. Diggs, if you would look on page 2462 and 2463, which I believe is probably in volume five or six of the Record on Appeal that I have handed you.
A Five or six?
Q Yes, sir. It's near the end of five carrying over, I believe.
A All right. Tell me the number again, the page number?
Q 2462, which and I'm referencing the larger numbers that are there at the top.
A Okay. Okay. Where are, where are we?
Q 2462.
A I mean, is this in the sentencing phase?
Q Yes, sir. If you will back up to page 2448, you will see there where your closing argument begins.
A Okay. Got you.

Q Sorry. Just a minute. I have to get there myself. All right. Mr. Diggs, on page 2463 --
A Okay.
Q -- you argued in closing that, "Insanity is the only reasonable conclusion when someone kills a friend with no reason," and on the previous page, 2462, you argued that, "When we look out there and see an empty courtroom with no family members here because of his lifetime of deceit, lying and abuse with family members, and we see the killing of a friend for no reason, that's insanity." Do you recall that argument?
A I don't recall it, but I see it in the page.
Q Were you concerned at all that the jury would reject this argument because if they accepted it it would essentially mean that anyone who kills someone for no reason is insane?
A No. You have to look at the closing argument in the context of the evidence. Okay. So that's the context of those statements.
Q What do you mean by that?
A I mean, it's in the context. Those statements are made in the context of the evidence of the case. You know, these, these two people were the only friends the man had in his life. Okay. And he killed them.
Q Uh-huh.
A Okay. For no reason and, and against that backdrop, you

know, you have this argument. You can't take the argument out, and generally, you know, put it in a general, as a general statement the way you're doing in your question.

Q Well, was the general gist of your argument that, "Look at what he did, he must be insane"?

A Well, yes, because of the fact that it doesn't make any sense. It's completely contrary to his interests, and there's no justification for doing it other than the -- I mean, no sane person would do it. Okay. Under the facts of this case. This man had just gotten out of prison. He had nowhere to live, and these are the only two people that took him in and tried to help him and he killed them.

Q Okay. Given that that is the general gist, were you concerned that that argument in that context would be rejected by the jury because if they accepted it they would basically have to be saying that anybody who kills anyone for no reason is insane?

A That's not what I -- that's, that's -- of course not what I was saying. I made this argument in the context of the facts of this case. So, no, I wasn't -- to answer your question. No. I wasn't afraid the jury would reject the argument as being too broad. I think that's what you're saying.

Q You also repeatedly told the jury that Mr. Stanko's family did not like him. Do you remember making those

statements?
A I don't remember making the statements.
Q If you look at page 2450.
A I'll take your word for it. Do you want me to go there?
Q All right. Sure. You made a number of arguments along these lines, that he has four siblings.
A Right. Right.
Q None of them are here. He's alienated all of his family. They won't even come to see him in his trial. What was the purpose of making those statements?
A To show that Stephen has a problem. Okay. He's not a normal rational thinking person. He has a problem.
Q Did you have any concerns that if the jury rejected your insanity defense at this stage of the case they would later view these arguments as a reason to sentence Mr. Stanko to death?
A I didn't have any concern about that because it doesn't -- it doesn't make -- it's not a logical extension of the argument given the facts of the case and the context that they're made in. Okay. So in terms of did -- was I afraid that they were going to kill him because of these arguments? No. I didn't believe that was reasonable.
Q Why not?
A Because I don't. I don't think it's reasonable. I think it shows something's going on with Steve that's not normal.

Okay. We can start there. The jury sees that, and I don't think the jury in either case thought that we had just a, a rational healthy person who chose to do bad things. I don't think the jury -- either jury looked at the case in that light. I think they were trying to follow the law as was instructed and didn't feel comfortable giving Stephen the benefit of the doubt that should have been given in the case. It doesn't make sense. So --

Q So you don't think that if the jury rejected your insanity defense it would necessarily mean that they had also rejected the idea that Mr. Stanko does have a problem?

A All right. Rephrase the question.

Q You weren't concerned that if the jury had rejected your insanity defense it would mean they did not believe your evidence that he had a problem?

A No. I think -- I don't think the jury lacks that type -- that they don't have common sense to that extent, that degree. I think the jury in this case, in both cases could see there's a problem. It, it shows up in every aspect of Stephen's life, but in these situations where that impulse comes off, it, it allows him to go into an extreme mode of behavior, but you know, in terms of rejecting the defense, rejecting the evidence, you know, I don't think the jury looked at those experts and said, you know, they're wrong. We don't -- the evidence, the quality of evidence in my opinion was better

than the State's evidence. Pam Crawford, for example, testified she's not familiar with the scans and all of that. She'd rather stick to the book, you know, and read about personality disorders. I just don't know if the jurors felt like they could give some kind of decision, render some decision in this case that would be beneficial to Stephen Stanko and, you now, remain in the community where they were going back to.

Q So what in your view was your strategy for the penalty phase of the trial?

A It was a brain problem that made it impossible for Stephen to be a normal, live a normal life, and whether it rendered him insane was a separate question, but I think that the U.S. will eventually agree that along with mentally retarded individuals and juveniles, we're not going to execute individuals with brain defects that are demonstrable to the extent that Stephen's is, and I think that that's a reasonable argument to make to the jury that we do that, too, as a -- an extension of, you know, you can vote for life for any reason or no reason. That's certainly a justification for giving a life sentence in the case, even if it's rejected as evidence of insanity.

Q Do you mean you think that eventually the United States Supreme Court will hold that like people with mental retardation and juveniles, people who have brain damage are

exempt from the death penalty?
A I would hope they do.
Q But, of course, that was not the law that you had to work with at the time of Mr. Stanko's trial.
A A lot of times, a lot of times, you know, when people made the argument that juveniles shouldn't be executed, it wasn't the law of the U.S. Supreme Court that they should be, I mean, that they shouldn't. It -- every area of the law that evolves have -- every area has case with facts, has a case with facts that justify reexamination of the law, how should it apply to the facts, you know, based on the constitution that we have, and you know, that -- the U.S. Supreme Court does that. They do that in many different areas, and I, I would expect them to do that in, in a case with a mentally defective, a brain defect Defendant in Stephen's case, for example, where the Eighth Amendment will just -- it would be arbitrary and egregious to execute somebody with that kind of defect.
Q Mr. Diggs, the result of the Georgetown trial was, of course, that Mr. Stanko was convicted and sentenced to death. Yes?
A Right.
Q Do you agree then that your first attempt with this theory did not work?
A Well, I didn't have a lot of opportunity to talk to the

jurors about the case. They sentenced him to death. That's not a justification for abandoning, you know, the type of expert testimony that is out there that can help him and help explain why he did these things.

Q Did, did you consider changing the strategy at all for the second trial?

A No.

Q You said you did not have an opportunity to speak with the jurors. Did you make any attempt to interview them?

A We might have had -- I didn't personally make an attempt to interview them. Some of the people did, I believe.

Q Who?

A I don't recall. I remember some comments being in the newspaper, for example.

Q During the first trial, 48 Hours did a story on Mr. Stanko's case. Do you recall that?

A Yes.

Q Did you agree to participate in that story?

A Well, we agreed to do it. So to answer your question, yes. We did.

Q Were you concerned at all that participating in that story might be damaging to Mr. Stanko at his second trial?

A No.

Q Were you concerned that it might be damaging to him at the first trial?

A Well, it wasn't going to be publicized until after the trial was concluded. So, no. It didn't -- I didn't have any feelings that it would be damaging one way or the other.
Q When did that episode air?
A I don't know.
Q Do you recall if it was before the Turner trial started, the Horry County trial started?
A No. I don't.
Q Were you -- did you watch the episode when it aired?
A I was given a DVD of it. So I did see it.
Q So you were aware that the 48 Hours producers did interview some of the jurors from the first trial?
A I didn't know it was 48 Hours people. No, to answer your question.
Q Well, you watched the episode. Is that, is that right?
A I -- if I recall correctly, I did see it. I don't recall the portion of the juror interviews though.
Q So you, you were not aware that some of the jurors said during that episode what they thought about your defense?
A I don't know. If you would refresh my memory what was said.
Q Do you remember one juror explaining that they thought the insanity defense that you had offered was like being dazzled with brilliance and baffled with BS?
A I took that as a, as a compliment.

Q Do you recall when you were officially appointed to work on the Horry County trial?
A Yes.
Q Approximately when was that?
A I don't know. I just remember being appointed.
Q If I could hand you -- I don't know what exhibit number that is. Hold on.
MS. PAAVOLA: Your Honor, may I approach the witness, please?
THE COURT: Yes.
BY MS. PAAVOLA:
Q Mr. Diggs, I'm going to be handing you what's been marked as Applicant's Exhibit Number Eight.
A All right.
Q Mr. Diggs, if you look at the -- do you recognize this document?
A No.
Q Does it purport to be a record of your time?
A Yes. I mean, it, it does, and the reason I might not recognize it is because the font's been changed or the size. You understand what I'm saying?
Q Sure.
A So it certainly appears to be a list of the activity that I had had in the, in the case or undertook in the case.
Q All right.

MS. PAAVOLA: Your Honor --
A I do recognize it from that standpoint.
Q Okay. Thank you.
MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit Number Eight.
THE COURT: Any objection?
MR. ZELENKA: No objection.
THE COURT: Applicant's Exhibit Eight admitted into evidence without objection.
(Applicant's Exhibit Number Eight [Diggs Horry Timesheet] admitted into evidence and appropriately marked.)
BY MS. PAAVOLA:
Q And according to this, Mr. Diggs, you were appointed approximately on November 15th, 2006, for the Horry County trial according to the first entry there?
A Yes.
Q At some point after your appointment to this second trial, did you become aware that Mr. Stanko had filed a PCR application raising claims of ineffective assistance of counsel regarding the first trial?
A Well, I think we had talked about it at some point. Everybody knew that was going to have to happen, you know, because it's part of the process. It's required if you want to try to attack this sentence and the conviction. So we discussed it, but we never discussed it in any detail, you

know, in terms of like what issues should be raised.
Q Did you consider that a conflict?
A Oh, of course.
Q And according to the record, Judge Baxley held a hearing regarding Mr. Stanko's desire for the appointment of PCR counsel. Were you present for that appointment hearing?
A I think so.
Q If I could refer you to page 2929 of the Record on Appeal. You may already have it up there. Mr. Diggs, I'm going to hand you volumes seven and eight of that record as well. You may already have the volume containing page 2929.
A I have it.
Q Are you with me?
A Uh-huh. Yeah.
Q Do you agree this appears to be the first page of the hearing where Judge Baxley appointed PCR -- well, discussed Mr. Stanko's desire for appointed PCR counsel?
A Yes.
Q All right. And then if you'll flip further to page 2955. This is a hearing --
A What page?
Q 2955.
A We're still looking at the beginning of the hearing before Judge Baxley?
Q Yes. I'm sorry.

A 29 --
Q 2955.
A Okay. Yes, ma'am.
Q This is a hearing held on March 4th, 2009. Is that correct?
A Yes.
Q And this was held before Judge John.
A Okay.
Q And if you will flip to page -- three or four pages further on page 2948.
A Okay. 29 --
Q I'm sorry. 2958.
A Yes.
Q Yes. If you see there in the middle where you are speaking you say that you and Mr. Stanko have talked about it on a number of occasions, but that you had not seen the PCR application.
A Correct.
Q Did you ever see the PCR application?
A Not until well after the trial here had taken place.
Q Okay. What did you and Mr. Stanko talk about?
A During the second trial?
Q Well, when you -- when you indicated to Judge John that you and Mr. Stanko had -- this hearing is about the potential conflict. Do you agree with that?

A Probably.
Q And you tell Judge John that you and Mr. Stanko had talked about it on a number of occasions, but you had not seen the PCR application.
A Right.
Q What had you and Mr. Stanko talked about in terms of the conflict?
A We didn't talk about any details. We did not talk about the issues that would be raised in the case, in the PCR case. We talked about whether he wanted me to continue on in my representation of him, which, which I did, and which he wanted at the time. So that's basically what we discussed. We never went into any details about what the issues might be in the first case. Steve liked the defense that we presented. He wanted to pursue that in Conway as well, and we were willing to do that.
Q All right, sir. If you will turn, please, to page 2971.
A Okay.
Q This is another hearing that Judge John held after the State filed a motion to review your status as counsel. Do you remember them filing that motion?
A I -- my -- it's -- I have a vague recollection of it. Yes.
Q All right. And if you'll flip to page 2981 and 2982.
A Okay.

Q Do you see there at the bottom of that page Mr. Stanko indicates that the final PCR application has not yet been filed but it will be soon?
A You're talking about line 22?
Q No, sir. I'm on page 2981.
A Yeah. Me, too. Line 22.
Q Oh, yes. Yes.
A Stephen's talking about maybe a supplemental application?
Q Yes, sir.
A Yes, ma'am.
Q All right. And if I understood your testimony earlier, you did not see that, that amended application before the trial started.
A Not, not until, not until a long time after the case, the trial had taken place here.
Q Do you agree that as a matter of law in order for Mr. Stanko to make a valid waiver of his right to conflict free counsel he has to make a knowing, intelligent and voluntary waiver?
A Yeah. It -- at that stage it would have been a critical stage. He would have to -- that would be the standard, I think, of waiving the right to counsel.
Q If you did not review the PCR applications, how would you have been able to give Mr. Stanko adequate advice about what he would be giving up if he made that waiver?

A Because I assumed the worst case scenario. I assumed it would be -- it would contain allegations of ineffective assistance of counsel that was me, you know, directed at me and that there would be various allegations that would have to be made. I understood that fully.
Q But you didn't know what any of those allegations were.
A Well, I mean, I'd probably represented -- we used to do post-conviction relief application appeals. I mean, I know what kind of allegations have to be made in that setting. Again, I was a chief attorney at the Appellate Defense Office so.
MS. PAAVOLA: Your Honor, may I approach the witness, please?
THE COURT: Yes.
BY MS. PAAVOLA:
Q I'd like to hand you what's been marked as Applicant's Exhibit Nine and Ten. Mr. Diggs, I've handed you Applicant's Exhibits Nine and Ten, which are certified copies of the initial and amended PCR applications from the Georgetown County matter.
A Okay.
Q And if I understand your testimony, you did not review these documents before the Horry County trial started?
A Correct. I did not.
Q Do you agree that if you had wished to review them you

could have obtained a copy to look at them?
A I didn't want to because I didn't want to further, you know, I didn't want to create more of a problem than we needed to have if we were going to have one. I thought, you know, the Judge had monitored, had looked at this, given Stephen an opportunity in court to make a decision that he wanted me to remain on the case. I didn't see a need to bring in, try to stir up a problem when there wasn't one. So I didn't seek to look at the, to look at the application or even to know about what was in it.

MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibits Nine and Ten.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: All right. Applicant's Exhibits Number Nine and Ten admitted into evidence without objection.

(Applicant's Exhibit Number Nine [Initial PCR Application - Georgetown] and Applicant's Exhibit Number Ten [Final Amended PCR Application - Georgetown] admitted into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q Mr. Diggs, were you concerned about the amount of media exposure the case had generated?
A I think anybody would be concerned about it. Yeah. I was.

Q And did you have a plan to move for a change of venue in the Horry County trial?
A I didn't -- I think we did file a motion. I don't recall.
Q Yes. If the record reflects that you --
A I would preferred, I would preferred that we had been able to go somewhere else. I did not like the jury that we had here. I felt like the jury knew too much about the case. We argued that during the selection of the jury, but we ended up with the jury that we had. I would have preferred to get another jury, but you know, from another location, but we didn't.
Q Okay. So if the record reflects that you did make a change of venue motion you -- it sounds to me like you agree with that.
A Yeah. Whatever the record shows.
Q Right.
A I don't think there's been any manipulation of it.
Q Did you ever consider hiring a change of venue expert to conduct a media saturation study to support that motion?
A No.
Q Do you recall that you ultimately agreed to postpone argument regarding your change of venue motion until after the jury was seated?
A If that's what occurred. I mean, I don't specifically

recall doing that, but if that's what the record shows that's what we did.
Q Why did you do that?
A Why did I agree to do that?
Q Yes, sir.
A Probably because I didn't think we would be able to seat a jury anyway, a jury that would be acceptable or fit to hear the case. I think Judge John's argument was, "Well, let's wait and see if we can qualify the jury, and then if we're not able to do that, we'll address the change of venue at that time."
Q In support of the change of venue motion you offered testimony from Dr. Albiniak. Do you remember that?
A Right.
Q Why did you decide to do that?
A Why did I decide to do it?
Q Yes, sir.
A To help us with the change of venue motion. I thought Dr. Albiniak would be able to offer evidence to show that jurors oftentimes did not -- weren't completely truthful at the time when they would say things like, "We can put this aside and not let it affect our determination in the case." So I think for that reason we put up the testimony of Dr. Albiniak to suggest that's probably human nature.
Q Do you recall when you decided to ask him to give that

testimony?
A No. I don't.
Q Did Dr. Albiniak tell you he was not comfortable with giving that testimony?
A No. I don't recall him telling me that.
Q Did he seem uncomfortable to you?
A He seemed like himself.
Q Did you feel that the media exposure of the case affected your strategy for how you planned to exercise your jury strikes?
A It had to, you know, it had to -- that was the backdrop against which strikes were used. So yes.
Q How did it affect your strategy?
A We tried to eliminate people who knew about the case, who had formed an opinion about the case, and to the extent we had strikes available to us, that's the way we used them.
Q Prior to the start of the Horry County trial, you filed a number of pretrial motions.
A Right.
Q Do you agree that many of those motions were various motions to declare South Carolina's death penalty statute unconstitutional?
A Yes.
Q Did you ever consider raising an argument that South Carolina's death penalty statute is unconstitutional because

it does not sufficiently narrow the pool of death eligible offenders?
A I don't think so.
Q If there had been a way that you could have successfully raised a constitutional attack against South Carolina's death penalty statute would you have had any strategic reason for not making that argument?
A No. I'd want to go back and look at the motions that we filed.
Q They're in volume eight on page 3512 through 3531 if you would like to refer to them. It's that very small volume right there in front of you.
A Okay. Bear with me a second. All right. Rephrase your question for me, please, ma'am. I forgot.
Q If there had been another constitutional argument that you could have raised successfully, would you have had any strategic reason for not making that argument?
A I don't think so.
Q Do you agree that if the death penalty statute is unconstitutional on its face Mr. Stanko could not be sentenced to death under that statute?
A Right.
Q Do you know how much your expert witnesses and investigators were paid for their work on these cases?
A No. I don't.

Q Were you responsible for reviewing their timesheets and submitting them for payment?
A To a certain extent, yes.
Q For the timesheets that you did submit for payment, did you review them before you submitted them?
A Yes.
Q If you had an expert who was not doing something that you had asked them to do or thought they should have been doing, would you have been aware of it?
A I don't know. Probably, but I can't say for sure.
MS. PAAVOLA: Your Honor, may I approach the witness, please?
THE COURT: Yes, ma'am.
BY MS. PAAVOLA:
Q I would like to hand you what's been marked Applicant's Exhibits 11 through 17. Mr. Diggs, do you recognize these documents as vouchers that you submitted for payment with your signature on the cover pages?
A They appear to be vouchers that were submitted.
MS. PAAVOLA: The Applicant moves to admit Exhibits 11 through 17.
THE COURT: Any objection?
MR. ZELENKA: No objection.
THE COURT: All right. Applicant's, Applicant Exhibits 11 through 17 admitted into evidence without objection.

(Applicant's Exhibits Numbers 11 through 17 [Vouchers] admitted into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q Mr. Diggs, are you currently practicing law?

A No.

Q Were you suspended from the practice of law in September of 2014?

A Yes.

Q Is that suspension temporary pending the outcome of an investigation by the Office of Disciplinary Counsel?

A I don't know. I assume it is.

Q Do you know if they have completed their investigation?

A No. I don't.

Q Have you made any admissions during the course of that investigation that were to impact your representation of Mr. Stanko at his Horry County trial?

A No.

Q Have you made any public admissions during those proceedings that would reflect on your general character for truthfulness?

A No.

Q Have you pled guilty to any of the charges that that office has made against you?

A I don't know if they've made charges against me.

MS. PAAVOLA: May I have one moment, Your Honor?

THE COURT: Yes, ma'am.

MS. PAAVOLA: Mr. Diggs, I have no further questions. Thank you.

THE COURT: Let's take a break right quick. All right. We're going to take about a 10, 15-minute break. Mr. Diggs, we're still in the middle of your testimony; and so please do not discuss your testimony with anyone, whether it be what you've testified to thus far or anticipate testifying to in the future.

All right. Anything from the Applicant before we take a break?

MS. PAAVOLA: Nothing, Your Honor.

THE COURT: Anything from the State?

MR. ZELENKA: Nothing, Your Honor.

THE COURT: All right. Let's take about a 10, 15-minute break.

***** OFF THE RECORD *****

(On the record.)

THE COURT: All right. Mr. Zelenka, cross examination.

MR. ZELENKA: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ZELENKA:

Q Mr. Diggs, let's, let's go back a few years. When you were practicing law with the South Carolina Commission on Appellate Defense, generally, what was your role during that

timeframe and what was your responsibility?
A Initially I went to work there in 1981. I was staff attorney. We were called assistant appellate defenders. In 1984, I became an acting chief attorney, maybe before that I was deputy, then became acting chief attorney in '84 for a couple of years, and became the chief attorney at the Office of Appellate Defense from roughly -- for almost five years.
Q Okay.
A Approximately five years.
Q And, and in your role as the chief attorney with the South Carolina Office of Appellate Defense, did you review death penalty trials which had occurred --
A Yes.
Q -- previously in the state and resulted in a conviction or sentence of death?
A Yes.
Q Did you handle some of those cases?
A Some of them. Yes.
Q Approximately how many did you handle?
A Maybe half a dozen.
Q Okay.
A Personally handled and --
Q And in your handling of those cases during that timeframe, were you required to familiarize yourself with precedent coming out of the South Carolina Supreme Court?

A Yes, sir.
Q And the United States Supreme Court?
A Yes.
Q Did the handling of those cases include matters not only on direct appeal, but did you also review claims, post-conviction relief claims of ineffective assistance of counsel?
A Yes.
Q And were those in death penalty cases, also, or were those limited to non-capital cases?
A Mostly non-capital, but some death penalty cases.
Q Okay. So you were arguing before the Supreme Court of South Carolina the standards of competence required for lawyers practicing criminal law in this state; is that correct?
A Yes.
Q Did that give you a general understanding of, of what was expected of lawyers who handle death penalty cases?
A Yes.
Q Before you ever tried a case?
A Yes.
Q Did you have an understanding at that time of the ability or the requirements or the possibility to present mitigating evidence beyond the mere statutory mitigating circumstances?
A Yes.
Q And what was your understanding and, basically, where did

you develop that understanding?
A We developed the understanding during the representation of our clients. Basically in a death penalty case, you can present any kind of evidence that might, that a juror might consider to be mitigating and justification for a life sentence even though they don't have to have that justification. We had a chance to argue the Gathers case in Washington I think in 1989 that had to do with victim impact statements. That was somewhat, I mean, it allowed us -- allowed me to focus on appropriate considerations in a death penalty, what, what were appropriate, what were not appropriate at least at that time.
Q Okay. And, and --
A Go ahead.
Q In the case you're referring to Demetrius Gathers versus South Carolina --
A Yeah.
Q -- was a case that my office took on certiorari to the U.S. Supreme Court; correct?
A Correct. Right.
Q The South Carolina Supreme Court had ruled in your client's favor --
A Correct.
Q -- that the, the argument which was done by the Solicitor in the admission of evidence violated the Eighth Amendment;

correct?
A Correct. Yes.
Q And on certiorari you argued it in the United States Supreme Court.
A I think you and I both were there. You argued that case as well.
Q That's correct. And you were successful in sustaining the decision of the South Carolina Supreme Court.
A It was a strange opinion, too. It was like five, four, one or five, three, one. It was, it was an odd opinion.
Q Okay. And, and your subsequent --
A And of course, it was over --
Q -- to that that was based on Booth v. Maryland.
A Yes. Correct.
Q The U.S. Supreme Court basically overruled --
A They overruled that.
Q -- that that opinion as well as Booth in part.
A Yeah. And, and one of the last opinions that Justice Marshall wrote was a fairly scathing opinion in the case in the Payne versus Tennessee case that overruled the Gathers case.
Q Okay. In, in your practice in South Carolina, did you ever raise with the South Carolina Office of Appellate Defense, are you aware of a claim that the South Carolina death penalty statute is unconstitutional under the Eighth

Amendment because it doesn't narrow?
A I'm sure that we did. Now, in terms of what cases, I don't, I don't recollect or recollect.
Q Okay. Were, were those cases related more to the definition of kidnapping and more to the definition --
A Oh, absolutely. Yes. Yeah.
Q -- of physical torture?
A Yes. Yes. Absolutely.
Q And was there physical torture as an aggravating circumstance in this case presented by the State, and I'm talking about the Horry County case.
A Mr. Turner. I, I can't recall.
Q There was not a statutory aggravating circumstance according to the record.
A Oh, oh, was torture a circumstance in this case? No.
Q Okay. So that argument that you were aware of previously was not available in this case --
A Correct.
Q -- and you did not make it; is that correct?
A Right. Correct.
Q And the arguments that you made as set forth in volume eight --
MR. ZELENKA: The Court's indulgence one moment.
THE COURT: All right.
BY MR. ZELENKA:

Q -- were to declare the death penalty unconstitutional essentially on the lines of the -- his mental illness; is that correct?
A Correct.
Q That was the focus of each of those --
A Correct.
Q -- motions that you made whether malice aforethought could have been present --
A Correct.
Q -- as well as his inability to differentiate between moral and legal right and wrong?
A Right.
Q Correct?
A Yes.
Q And, and that was also based upon the volume studies of the brain which you had Dr. Wu and Dr. Gur complete; is that correct?
A Yes. Absolutely.
Q In your review as a lawyer practicing law in South Carolina, and particularly capital cases, have you seen a case where the South Carolina Supreme Court has ever concluded that the death penalty in South Carolina is unconstitutional because it simply does not narrow the class of offenders?
A No.
Q Were you given -- provided or did any other lawyer

suggest to you prior to the trial in the Horry County case to make that argument?
A I don't recall anyone advising me to make the argument.
Q Okay. Now, at the time you became appointed in the Horry County death penalty case, had your client already been convicted and sentenced to death --
A Yes.
Q -- for the Georgetown case?
A Yes.
Q And when did you become aware of the pending application for post-conviction relief concerning the Georgetown case?
A Well, I don't recall when it was exactly. I know we had a hearing here, you know, where that was discussed, and I knew that it was going to have to be done and I knew it was going to have to be done within a year of the case concluding, but in terms of when did I become aware that Stephen was going to file or had filed, you know, it's just -- I have no recollection of it. It's, it's not something that I focused on. It's not something I paid a lot of attention to. I knew it was -- he was going to have to do it, and we had a job to do in this case, and so I, I didn't let it interfere because I understood it was something he had to do.
Q Okay. At, at some point in time did you become aware that Judge Baxley was also assigned the Georgetown death penalty post-conviction relief case?

A I, I don't know if I ever became aware of that or not. It, it may have been mentioned. So I don't recall --
Q Okay. And at one point in time --
A -- having been made aware.
Q -- was Judge Baxley in the Horry County case?
A Yes.
Q Okay. And he stayed the post-conviction relief for the Georgetown case until completion of the Horry County case. Do you recall that?
A Yes.
Q As part of the resolution over the potential conflict, was that --
A Yes. Correct. Yes.
Q Okay. In your discussions with Mr. Stanko about the conflict of interest, essentially, what did Mr. Stanko tell you about his awareness of the application that he had filed and signed and swore under oath and his desire to have you continue?
A Stephen always wanted me to continue on the case. He let me know other attorneys were advising him on how to handle the PCR issue, you know, and how to proceed on that, but I don't recall ever having a discussion with Stephen about any specific issue other than the general issue of ineffective assistance of counsel. Of course, I knew that was going to have to be the basis more than likely for any application.

Now, in Stephen's case he had -- he has other issues that might not rely on that, that particular issue, but I knew he was going to have to raise it. I let him know I was aware that was going to have to be raised. I also let him know it wasn't going to affect any representation that we provided, that I provided for him at the second case.

Q Okay.

A That I did not take it personally, I wasn't going to get angry with him or anything of that nature for making the allegations.

Q With respect to your discussions about the presentation of a similar type of defense he had presented in the first case, did Mr. Stanko indicate to you a desire that he thought that was wrong and he wanted to go a different direction?

A No. I always understood Stephen to be happy with the defense because it explained to him why he did these things. You know, for the first time I think he understood what was happening and what was occurring that would allow him to do these things. It wasn't his nature, you know, ordinarily to be an aggressive, angry, malicious, hurtful, spiteful person, that something was going on up there that most people didn't experience, and he liked -- I think he was somewhat at, at comfort with that because he understood now how this could happen, maybe it explained how it could happen.

Q Okay. In the first trial, one of the differences was you

did not present the crime scene reconstructionist.
A Right.
Q Or a similar type of testimony --
A Right.
Q -- that was presented by Mr. Turvey; is that correct?
A Yes.
Q Why was that done in the second trial and not the first trial?
A Well, I think the -- there were no witnesses at the second trial, and it was -- I think a reconstruction person was more called for in that case as opposed to the first case. Secondly, Brana Williams knew of Mr. Turvey or knew him, had met him, had been impressed with the work he had done and thought it would be a good thing for this case in Horry County to have such an expert in the case, and I, you know, I, I agreed with her. I let -- I said, "Well, you know, go with that if you feel like that it would be helpful to us."
Q Okay.
A And she did.
Q How did that prepare or assist in your theme concerning the mental illness that Mr. Stanko was suffering under?
A I think it was consistent with the mental illness, the defect. I don't think Stephen recalls what happened, to be honest with you, regarding Mr. Turner, and I think it was a very similar situation where he just -- there was a blackout.

He didn't realize what was going on, you know, in the actual -- at the actual time the killing occurred, and I, I think Mr. Turvey's testimony assisted the Defense in explaining the events that happened because I don't, I don't think Stephen understood himself fully what happened.

Q Okay. And, and with respect to, to that insanity defense you, you called Thomas Sachy again as you did the first trial; correct?

A Yes.

Q And Mr. Sachy gave an opinion in that case that he met insanity under his understanding of South Carolina law; correct?

A Yes.

Q And prior to presenting that testimony there was an in-camera matter with Dr. Sachy; correct?

A Are you talking about in Georgetown or here?

Q In the Horry County case.

A An in-camera?

Q Where the State objected.

A Yeah. I think so.

Q Okay. And --

A It's also -- they made the same objection in Georgetown.

Q Right. And they sought to preclude his testimony.

A Right.

Q Based upon what they believed he did not understand the

law in South Carolina; correct?
A Right. Right.
Q And is it correct that Judge John then overruled the State's objection and allowed him to testify on insanity?
A Yes. Yes.
Q And resulted in an instruction on the possibility of not guilty by reason of insanity --
A Yes.
Q -- being given to a jury?
A Correct. Correct.
Q In addition to that, do you recall if Mr. Sachy on your direct examination discussed psychopathy in the Horry County case?
A I can't recall specifically --
Q Okay.
A -- at this time. Maybe if, you know, if I had a transcript.
Q Okay. With respect to the other witnesses who testified, Dr. Thrasher, Dr. Ruben Gur, Dr. Mark Einhorn and Dr. Wu, in addition to Dr. Sachy, what was the theme that you were trying to present about your client for the guilt phase of that trial?
A The guilt phase of the Horry County case?
Q Yes, sir.
A That it was a similar blackout experience that occurred

because of an apparent, I'm not saying it was, but an apparent threatening move by Mr. Turner that put Stephen in this state of mind that resulted in the killing. We wanted to show that to the jury here that he not only was he insane, he had -- he was not, in effect, conscious at the time of the shooting, that the frontal lobes weren't functioning, he wasn't experiencing those events, and thus, was insane because he didn't understand the nature of what he was doing at all. You know, he wasn't conscious of it.

Q Okay. And with respect to Dr. Albiniak and Dr. Thrasher, in your examination there was reference made to, to birth records and potential impact that that may have had?

A Right.

Q Why did you do that in the guilt phase of the trial?

A To explain why this defect might be there. Okay. There were a couple of different explanations possibly for it, and one was the lack of oxygen at birth, and the other one was that bottle being hit, when it hit either a beer or a soft drink of some kind in a bottle that was thrown and hit Stephen in the back of the head, that it could have happened at that point, but because of that injury, whether it happened at the time of his birth or later years as a teenager, it affected these, this part of his brain, so there's just not any activity going on there when it should be in order to regulate one's response to the limbic system impulse.

Q Okay. And, and with respect to the beer bottle --
A Yes.
Q -- incident, is it correct to say that the State was questioning the validity of the existence of that at some point of time?
A Yeah. Yes, sir.
Q And is it also correct to say that you presented Bryan Wilson --
A Yeah.
Q -- who was a witness to that incident occurring --
A Right. That's correct.
Q -- according to his testimony?
A Yes.
Q And you did that in the guilt phase of the trial?
A Yes.
Q Correct? In the Georgetown case, you did not call Dr. Ruben Gur, yet you did in the Horry County case.
A Yes.
Q Why was there a difference in your presentation?
A Dr. Gur, Dr. Gur was out of the country at the first time -- at the first trial. It's when a flare-up had occurred between Israel and Hezbollah or some organization there. Dr. Gur had to go to Israel during that timeframe and that's when the trial occurred. Now, we -- even with him not here, we were able to use the graph that's been admitted into evidence

here to show his analysis, volumetrically speaking, with respect to the structure of Stephen's brain. He was in the country during the second trial, and he did come and testify in that second trial.

Q Okay. Were you aware of the skepticism the Prosecution would have, certainly in the Horry County case, to the presentation of the brain imaging and the broken brain concept that, that you were presenting in this matter?

A Yes. You know, the Prosecutors and I know them very well and, and there's not any bad -- I don't attribute bad motive to it, but I've never had a case where the Solicitors did not scoff at the defense, you know, that was going to be presented in the case. I mean, that's just part of the job. In every case I've ever worked on, that's been the case, the reaction from the Solicitors with respect to a couple of occasions when my clients were insane and the Solicitor's Office recognized that and agreed and the cases were handled in a, in a proper fashion, but I didn't notice any more skepticism in Stephen's case, Mr. Stanko's case than in most others. Okay.

Q Okay. And just to, to ask follow-up question, is it your personal opinion that you believe that your client was insane at the time?

A Yeah. I do. Yes.

Q Okay.

A And for me it explains why, I mean, you can sit down and, and days on end have normal conversations with Stephen and you would never expect him to be capable of doing these things, and I, I think I, along with, and I know Stephen wanted to know why he did it, and I think that the doctors that we have in this case explained why he did it. Now, you know, it's not the type of -- well, let me just say, I, I think, I agreed with the evidence that the Defense presented. I was not persuaded by Dr. Spicer or Pam Crawford, Dr. Crawford, you know, in their testimony on behalf of the Prosecution.

Q Okay. And, and Dr. Crawford questioned, a forensic psychiatrist retained by the State, questioned --

A Yes.

Q -- the insanity issue and questioned the existence of a mental disease or defect; correct?

A Correct. But she also acknowledged in her testimony she wasn't up to speed with the technology that was used in our defense.

Q Okay.

A She wasn't familiar with it and didn't know about it.

Q And there was Dr. Brannon?

A Well, Dr. Brannon was good but he was older. He was not involved in the type of technology, with the use of the technology that we were using. He had been the White House

doctor for President Ford, I think. So he was, he was an older gentleman and wasn't up to speed with respect to the technology that the Defense used. If you go back and technically look at it, in Georgetown I'm not sure that they provided evidence in the case in chief that showed Stephen was not insane. I mean, it's, it's very close. You know, it's almost a case where they could have argued a directed verdict motion at the appellate level because of the State's witnesses refusal to -- especially Dr. Crawford -- to talk about the technology and be able to shoot down the reliability of the technology.

Q Okay.

A You understand what I'm saying?

Q And Dr. Spicer had testified and critiqued the use of the PET scan at the Georgetown trial?

A But -- yes.

Q And he did the same thing in the Horry County case?

A He did, but he had never heard of a continuous performance test. In other words, he was using PET scans of people --

Q At rest?

A -- halfway asleep, yeah, at rest in a dark room, and they -- they were comparable with Stephen's scan when his, his brain was fully, you know, at full throttle thinking, and it was, it was still turning up, no, you know, a reduced,

significant reduction in the level of activity in his brain, and Dr. Spicer didn't understand that difference, and I don't think it was a, in my opinion, it wasn't sufficient, you know, to get over the hurdle to say, "Oh, oh, Stephen's saying look at this PET scan, it's -- or the scan it's perfectly normal," but it wasn't. You know, there were completely different scans, people at rest versus Stephen fully engaged.

Q Okay.

A Stephen was -- he looked like he was at rest.

Q Mr. Diggs, the difference in the Georgetown case was when Dr. Spicer testified and you had to call Dr. Wu back?

A Yeah. In effect, called him a liar, and Dr. Wu had already gone back to California. So we had to bring him back just to get, get on the stand and say, "Look, this is what we do. You know, I'm not lying about it," because even Dr. Spicer said, "Look, if his testimony is correct, the man's got -- he's not sane."

Q Okay. And in the Horry County case how did you address that potential that you now knew that Dr. Spicer was going to do with Dr Wu?

A I didn't think Dr. Spicer would go to the extent that he did, but he still denied Dr. Wu's technology and the approach that Dr. Wu used, and he just kind of like dug in his feet. I -- if -- it looked like he felt like he was personally being attacked when we weren't, but I, I was, I was just surprised

at the extent it appeared to me that Dr. Spicer went to in order to, to stand his ground and, and redouble his efforts with respect to his first trial, you know, the first trial that he participated in.

Q Okay. In the second trial, did you have Dr. Wu criticize the critique that he was about to have?

A Yeah. Yes.

Q In his direct examination?

A Yes. I think so.

Q Did you also use Dr. Einhorn to explain --

A Yes.

Q -- part of that difference, too?

A Absolutely. Yes.

Q And why did you do that? Why did you think that was important?

A It was important because the at rest, you know, when people are at rest and trying to go to sleep, in effect, they're not going to have a lot of -- they're not calculating mathematical equations in their mind at the time. That's the type of activity that Stephen was going through in his mental -- in his testing when the scan was done. He was engaged being asked questions and being tested at the time, and his, his scan was right there as though it were taken at a time when he was at rest, you know, with the other people that Dr. Spicer used to say this was a normal PET scan from Mr.

Stanko, when obviously it was under certainly different circumstance.

Q In the Horry County case Dr. Thrasher was called in the guilt phase of the trial, but was not asked a question by you or by the State on his opinion concerning criminal responsibility with respect to the death of Mr. Turner?

A He was more -- he wasn't quite convinced that Stephen was insane during the second incident and didn't feel comfortable saying that. He did offer testimony, I think, that still was favorable to the Defense. We still had another psychiatrist that testified that Stephen was insane at the time of Mr. Turner's killing.

Q Okay. So the jury only heard, am I correct, from Dr. Thrasher in the guilt phase of the case about the low oxygen level of the birth records?

A Yes.

Q Correct?

A That's correct.

Q You called him in the penalty phase of the case. What was your purpose in doing that?

A Mitigating evidence to establish a defect that would justify sentencing Stephen to life.

Q Did he also testify about his opinion generally about insanity related to the Ling matter? Do you recall?

A I don't recall right off the top of my head. I don't

recall.
Q Okay. Do you have an opinion as to whether with the information you developed from Dr. Wu, Dr. Gur, Dr. Einhorn, Dr. Sachy that you had any other choice as a lawyer --
A No.
Q -- as to whether you should present this in the guilt phase of a case?
A No. It needed to be presented because I believe it's the truth of the -- what happened in the incidents. You know, I believe Stephen has this defect. I understand, the doctors made me -- helped me to understand what was going on in Stephen's brain at the time of these incidents, and I believe he was unconscious, that he had blacked out at both of these incidents and that's why the things happened that did happen, and you, you -- even if you go back and look at Ms. McClendon, I think that was her testimony from the young lady from Moncks Corner or Charleston, you know, the incident that sent Stephen to jail, to prison the first time, she said he was walking through the house, you know, dragging her down the hallway by the head -- by her hair, and, and kind of singing to himself, you know, like he was totally unaware of the circumstances, totally inappropriate, you know, to be in that mindset when he was about, probably about to kill her, although he ended up just tying her to the chair there in the home, but if you look at her testimony it supports that he wasn't in his right mind

during that incident, and it, you know, it further corroborates in my mind the two incidents that occurred here.
Q Were you using this theme to try to mitigate her testimony also?
A Using who?
Q The theme of mental illness?
A Yeah. Absolutely. We shouldn't -- Stephen, I think everybody agrees that he has a problem, whether it's a personality disorder or Dr. Wu and Dr. Sachy's description, but I, I would submit it's certainly a sufficient reason not to put him to death, you know, with this circumstance going on in his brain, and he, he doesn't have what most of us have in terms of our ability to interact with people, just the, the lack of the activity in the frontal lobe during these confrontational encounters puts him at a disadvantage. He's going to do things that he cannot help or he can't prevent and we shouldn't execute that kind of person. That's what I was arguing to the jury, and I think it's a reasonable argument.
Q With respect to the penalty phase, in addition to the mental disturbance defect that you were pushing, what other themes were you trying to get across to the Horry County jury, if you can recall?
A There were things, you know, his dad had been a military, a strict military person. Now, see, Steve was -- he was a great student in school. He's very smart. When he was

growing up he was an A student. You go back and look at the high school reunion, not, not the reunion but the prom events, he was, he was very popular. He had promise, you know, for the future. These things didn't start developing in Stephen's behavior, I find it curious, until he had matured, you know, well into his mid-20s, which is when, when the brain, the human brain stops maturing, and I thought, you know, it's, it's funny because when teenagers do these stupid things that we all know teenagers do, it's because their brain isn't working like an adult brain. So they do stupid things. Stephen's unfortunately got a problem that doesn't begin to manifest until he's of mature age, and he continues to do stupid things that you used to dismiss because he was a teenager, you know, and that's why nobody -- he was popular, he, he was smart and talented and these things began to manifest themselves when he couldn't keep up with the normal mature adult, you know, because he didn't have the ability here to analyze, make decisions like most of us have.

Q Is, is that the reason why you put in testimony from Wanda Brooks again, the neighbor --

A Yes. Yes.

Q -- about how the family generally was unfriendly but Stephen was much different?

A Yes.

Q Clarissa Wenz, a teacher at Goose Creek High School --

A Yeah. Because --
Q -- about the manner of student that he was at that time?
A Right. Correct. And there was -- there really seemed to be, in my opinion, something going on that occurred between the time Stephen was, let's say 15, 16 years old until his mid-20s, 10 years later. He wasn't the same person. You know, he just changed. He didn't mature like everyone else, and he's continued to make these mistakes, these stupid things, con games, lying and things like that he didn't do 10 years earlier when he was a teenager.
Q What were your reasons for calling the employees of the Department of Corrections or the retired warden at corrections? What point were you trying to get across to the jury at that time?
A That he would be a good inmate, adaptable to the circumstances of imprisonment life, structured nature of imprisonment.
Q In reviewing records from the capital cases that you had done, had you ever had this type of positive testimony about an intimate that was presented to you?
A Not -- sometimes, okay, sometimes it's not possible, but I'm trying to think of a time when we had that kind of testimony. I'm not sure that I did. Maybe Rebecca Smith we brought in that type of Department of Corrections witness, but I, I knew it was something that was normally done in a capital

case just to show someone had been, had, had been a, a good prisoner, you know, in confinement so that they could demonstrate an ability to adapt to prison life and do what was expected of them.

Q Okay. Did, did you learn of these factors, the school teachers, the neighbors, the correctional officers through your mitigation investigation that was done in the case?

A Yes. Yes.

Q In your prior cases did you retain mitigation investigators if you recall?

A I think I had used Dr. Thomasko at one point. I don't know if you recall. She was a local psychologist, I believe. She passed away in early 90s, perhaps, and I had used her. I don't know of any other specific people I had retained to, to assist in, in that area, but it was always an area that we looked to to try to prepare for. I don't -- I'm just not sure we went -- that I went to the extent of hiring an expert in that area.

Q Was this the first case or was the Georgetown case the first case you worked with Dale Davis?

A Yes. I did not know her. I met her through Gerald Kelly.

Q Okay. Would it surprise you that she hasn't been complimentary towards you?

A I'm not surprised about it. I think she was upset that

Gerald was not lead counsel. They were friends, you know, before, acquaintances before. So I'm not surprised.
Q Okay. Do you think that, that relationship that you had impacted upon your ability to present mitigating evidence in this case?
A No. Absolutely not.
Q Why is that?
A Because I would make a decision to put evidence in the case that was going to be helpful for the Defense. I would be -- it would be strange to discard evidence simply because Dale Davis had generated, you know, leads to discover the evidence.
Q Okay.
A No. She was part of the Defense. I, I think she did a good job.
Q And what was the difference between Ms. Davis's role and Ms. Childs' role?
A Vicki Childs did more of a factual investigation. Dale focused on family setting and school, those areas that were personal to Stephen that kind of showed who he was as an individual, as a human being.
Q Okay.
A And that was basically the difference.
Q An issue, an issue has been made about the fact that Stephen's family members were not present in court during the Horry County case.

A They weren't in court either, either time.
Q And, and what were the reasons, one, for their nonparticipation or non-presence in the case if you can recall?
A We tried to get the family to come and they wouldn't. Up until the last minute here in Horry County I think the sister was going to come, could have been the Georgetown trial, but in the, in the end, no one would, would come from the family, and we tried very hard to get them to come, but they just would not.
Q Do you recall Mr. Stanko's statement to the jury in the Horry County case that he didn't want his family there?
A Well, he might, if he did make that. I don't recall him saying that, but if he did make the statement, I'm sure Stephen was trying to cover for the fact they weren't there.
Q Okay. Do you know why you brought that out to the jury that there weren't any family members present?
A Because I think in my opinion, based on my experience, when a family refuses to come and support a family member in that kind of situation, there's a problem that, you know, has caused a schism to develop between the family and the accused Defendant, and it indicates, you know, there's a justification for that, an anger, some disappointment to, to an extreme degree. So I thought it would help illustrate to the jury just one more area in Stephen's life why he couldn't function

like a normal person. This was certainly abnormal that no one in the family would come, and I felt like that was consistent with what the core evidence in the case was.

Q Okay. You spoke about this mental illness, mental defect developing as he matured?

A Yes.

Q Yet in the testimony presented by the correctional officers, it appeared that they considered him, I think one of the words was an extraordinary inmate, a model inmate. How within your mitigation phase over people who had been spending significant periods of time with him were you able to explain that dichotomy?

A I think he was in a structured environment. I think, you know, he's told what to do and when to do it, and because of that structure he is a model prisoner. He's not -- my understanding he's not given a lot of freedom to roam and do things as he chooses. So he -- but he's a nice individual. You know, when you get to know him one-on-one he's a nice person. If he's not in a situation where that threat occurs, then he's, he's not going to have the, the problem, but in life in general, I can see, you know, when he's outside of the cell walking down the street, then things are going to happen that don't happen in that structured prison environment that he's been in for the last 10 years or 18 years.

MR. ZELENKA: The Court's indulgence.

THE COURT: All right.
BY MR. ZELENKA:
Q Mr. Diggs, an issue has, has been raised concerning the preparation and presentation and essentially the investigation and mitigation that was done for purposes of the Horry County case and the presentation of the social worker, Ms. Califf. Were you satisfied based upon the work that you had done with her that she was prepared to present the information that you wanted to develop from her?
A I think certainly prepared by the Horry County case.
Q Do you have the exhibits in front of you?
A Yes.
Q Could you look at Applicant's Exhibit Number 12 which is her voucher?
A Her what?
Q Her, her -- the statement of her voucher?
MR. ZELENKA: May I approach, Your Honor?
THE COURT: Yes.
A I don't believe I have that.
Q Let me provide you Applicant's Exhibit 12 and ask you to review the pages, particularly the statement of her work from October 9th, 2009, through the completion of the trial.
A Okay.
Q In preparation for this trial, she, she did a number of things, presumably at your direction and request. Is that

true?
A Yes.
Q In the Horry County case were you supervising her or was Ms. Williams primarily supervising her?
A I think that it would have been Brana Williams and myself both doing that and just telling her to do, you know, we're not experts. I don't, I don't feel qualified to tell an expert what they need to do in their area of expertise in order to present evidence on that subject, but we were, I'm sure, communicating about it, what she was doing, what she was -- what kind of determinations were being made based on her work and letting us know that and I, I, I remember we had a good, a good working relationship during her participation in this case. So I thought she did a good job at the trial.
Q And for purposes of this trial, according to her voucher, she did make renewed contact to the Defendant's family.
A Right. Yes.
Q Isn't that correct?
A Yes.
Q Visited with the individuals at Lieber Correctional Institution; is that correct?
A Absolutely. I, I think she did about everything that was reasonable.
Q Assimilated --
A The ability to do.

Q -- assimilated some evidence for presentation --
A Yes.
Q -- in --
A Absolutely.
Q -- the mitigation phase?
A Yes.
Q Were there matters that you sought for her to present that she failed to do so in the presentation that you gave?
A No. Not that I recall.
Q Did you desire or did you consider retaining other social workers or forensic social workers to testify in the second trial?
A No.
Q And why is that?
A I didn't think they were necessary.
Q Pardon me?
A I didn't think it was necessary.
Q Did you -- did anybody suggest other individuals to you to, to start anew?
A No. I asked Dale initially to work on the case, and she refused saying that she was going to retire, but that's, that's the extent of any request that I made, and no one else suggested any other people. Okay.
Q Okay. Concerning your change of venue motion, are you familiar with the -- a general law in South Carolina since

State versus Truesdale to attempt to select a jury before a court --
A Yes.
Q -- essentially changes venue?
A Yes.
Q Were you aware of that at the time this case was tried in 2009?
A I was Truesdale's appellate counsel at one point working on that case.
Q So and you were unsuccessful on that issue when you attempted to, to raise it; is that what you're saying?
A Yes.
Q And the South Carolina Supreme Court said the decision was correct?
A Right.
Q And basically did a strong recommendation -- is that correct -- towards both the bench and the bar on how to expect that normally to be done?
A Yes.
Q Did you see anything in this case that would have suggested to you that this case was a little more unique based upon the other death sentence that he had received to frontload that change of venue issued?
A It was a little more -- it was some national coverage in Stephen's case, but it was basically, I mean, we have a lot of

pretrial publicity in every capital case, as you might imagine. I don't know that Stephen's was any more than other capital cases that I had worked on, but I, I felt like we were stuck, pretty much, in that mode of having to listen to the jurors' responses, you know, and just live with what they said.

Q Okay. The Horry County case, how many years after the Georgetown trial do you recall was this case tried?

A I cannot recall specifically.

Q Okay. But it had been --

A I mean, I'm drawing a blank on it right now when the trial actually was.

Q That's okay. It, it had been a number of years between both those trials; correct?

A Yes. Yes.

Q Is that a factor that Judges look to towards pretrial publicity and the effect it has on a community?

A Yes.

Q Did you see any factor that caused publicity or unique factors to build up before this case was tried in 2009?

A No. I think most, most of the publicity surrounded that first trial, and I don't know of any factors that I'm aware of that occurred. A lot of -- see, we had difficulty selecting a jury in Georgetown, and I remember Fran Humphries coming up to me at one point even kind of conceding, "Well, you know,

there's a good chance we're going to have to, we're going to have to change the venue in the case," because, because we really did have a difficult time getting qualified jurors. We had that problem in the second trial, but not as much. It doesn't seem that I know when you look at, you know, the way the Court discusses juror examination in the opinion, but it, it was more difficult in my opinion to get that first jury selected than the second one.

Q But you still made the change of venue motion?

A Yes. Yes.

Q And what was the reasoning for calling Dr. Albiniak again concerning the makeup of the potential jurors?

A Well, I wanted him to reinforce my argument that jurors feel a little bit of pressure when they're up in examination in a death penalty case. They're expected -- I think they have expectations of -- I mean, they know what they're expected to say, and I think sometimes some jurors can give in and say things that they think the Court or the attorneys want to hear, and it's really not trust -- you can't trust them in that respect, that it's a chance we don't need to take. Let's just change the venue. It'd be safer to do that, but, I mean, I've never been a Judge, of course. I don't know the difficulties involved in those mechanics, you know, and why a Judge would be reluctant to grant a change of venue. I mean, I can just imagine.

Q Do you recall that Dr. Albiniak was impeached because he wasn't present during the jurors' questioning?
A Yeah. I think he didn't need to be there though in my opinion because he was testifying generally, you know, and not based on any particular response from a juror. He was, he was testifying more toward human nature.
Q So was that a strategic decision on your part not to have him there?
A Yes. It's -- in my opinion it wasn't necessary based on the general nature of the testimony we were seeking to -- I mean, how is he going to be able to judge any better than the Judge or to weigh a juror's response any better than the Judge, you know, or the attorneys engaging in the, in the examination. The way I remember it, we wanted him to talk about human nature, pressures, conforming and those kinds of considerations, ultimately to an end of not being able to trust the jurors when they testify, "Yes. I can put that aside and make a decision based on the evidence."
MR. ZELENKA: The Court's indulgence.
THE COURT: All right.
BY MR. ZELENKA:
Q You made mention of in your direct examination at one point that Stuart Axelrod had somewhat intervened as a potential Defense lawyer in the case and there was a hearing before Judge Jefferson --

A Yes.
Q -- on the Georgetown case --
A Right.
Q -- concerning who should represent the Defendant.
A Yes.
Q Mr. Axelrod's involvement, was that done at the request of Mr. Stanko at that time?
A I don't, I don't think so. It's my understanding Stuart went to see Stephen, and that's how it, that's how it arose. I never heard that Stephen had asked Stuart to come in and do that. So I, I think it was at Stuart's -- I think Stuart was the one behind that encounter.
Q And are you aware that Mr. --
A At least I think that's what Stephen, what Stephen told me.
Q Okay. And are you aware that Mr. Axelrod is now representing Mr. Stanko --
A Yes.
Q -- concerning the Georgetown conviction?
A Yes.
Q Have you had conversations with Mr. Axelrod concerning the issues we've talked about today?
A Very --
MS. PAAVOLA: Objection. Hearsay.
THE COURT: I'll allow it but don't get into anything

that Mr. Axelrod might have said.
A Just, yeah, just in a general sense. We've not discussed the facts of the case at all.
Q Okay. At the time of this trial had you had any conversations with the lawyers who were representing the Defendant on his Georgetown PCR at that time --
A I don't --
Q -- concerning the issues?
A No. I can answer that no and I'm not sure.
Q That would be Bill Godfrey?
A I've never spoken to him to my knowledge.
Q Okay.
MR. ZELENKA: One brief indulgence, and I think we're through. No further questions, Your Honor.
THE COURT: Let me see the attorneys for a second.
(Whereupon, a bench conference is held.)
THE COURT: All right. Redirect.

REDIRECT EXAMINATION

BY MS.PAAVOLA:
Q Mr. Diggs, you testified on cross that at the Horry County trial you wanted the jury to believe that Mr. Stanko was under a blackout at the time of the crime. Were you present in the courtroom when Brent Turvey testified?
A I think so.
Q Did you hear him testify that he essentially agreed with

the State's version of the crime and how those events transpired?
A Well, I don't know, if, if I could look at what he said specifically.
Q Uh-huh.
A Are you talking about in terms of the sequence of events?
Q Yes. Well, maybe I can clear it up this way. I'll just ask it a different way.
A Okay. Okay.
Q Did Mr. Turvey testify that he believed that Mr. Stanko approached Mr. Turner and shot him in the back?
A I don't, I don't recall.
Q Do you recall if he testified that he also believed that Mr. Stanko had used a pillow to try to silence the shot?
A Kind of remember it.
Q Do you recall he also testified that he believed that after that happened Mr. Turner did not die immediately, so Mr. Turner -- Mr. Stanko shot him in the chest as well?
A Yeah.
Q He also testified that he agreed with all of the subsequent events that the State had offered evidence about how he stole Mr. Turner's money, he stole Mr. Turner's truck, etcetera?
A Yes. I think so.

Q You filed a number of pretrial motions to declare the death penalty unconstitutional. That's those motions in volume eight we've been referring to?
A Right.
Q Do you agree that the majority of those, if not all of them, are addressed at various -- at overturning various aspects of the insanity rule?
A Kind of. It, it, it relates to that, but I think it goes to the inadequacy of the insanity concept, you know, that we currently apply. You know, it's a little bit different in Stephen's case from what we normally think of as an insanity situation, but the facts here, the expert testimony that we have were being controlled by the statute that we have, and the statute didn't take into account the problems that we have here, and so that's why we made the motions to challenge the constitutionality, the adequacy of the statute.
Q Because you did not believe that the statute as it is written adequately covered the facts that you were about to offer?
A Right.
Q I assume you are familiar with the standard of Strickland versus Washington?
A Yeah.
Q Do you agree that under that standard even alleged strategic reasons must be objectively reasonable?

A Of course.
Q You testified that your understanding of the standard for South Carolina in a death penalty case was that Defense counsel should offer anything that a jury might consider mitigating in the penalty phase?
A Yes.
Q Did you think it was mitigating for your experts to testify that Mr. Stanko is a psychopath who cannot help killing people?
A Well, I, I would object. I wouldn't want them to use that word psychopath, but in effect, it's kind of an accurate way to describe Stephen when he's in that state.
Q Did you think it --
A You know, it's unfortunate but that's what happens.
Q Did you think it would be mitigating for your experts to compare him to Ted Bundy and Jeffrey Dahmer?
A I don't remember the context in which those comparisons were made, but I don't think it would be mitigating to do that in the fashion that you've set forth.
Q Did you think it was mitigating for your experts to testify that he lacks a part of his brain that makes him human?
A All right. Say it again. I didn't understand.
Q Did you think it would be mitigating for your experts to testify that Mr. Stanko lacks the part of his brain that makes

him human or that area of his brain does not function?
A Yes.
Q Did you think it would be mitigating for them to compare him to a great white shark?
A I think the way that the experts chose to describe him were descriptions that they chose based on their training and understanding, but in effect, you know, that's what the problem is with Stephen. We've seen what he does because of this defect. You know what I mean?
Q Thank you, Mr. Diggs. We have no further questions.
A All right. Thank you.
MR. ZELENKA: I've, I've got a question for the Court or for counsel. Where in the Horry County record is a reference made to Dahmer or Ted Bundy?
MS. PAAVOLA: Your Honor, those references are in the record either in the Georgetown or the Horry County. I don't have them right here in front of me, but I'd be happy to provide them if the Court wishes to know what page numbers those are on.
THE COURT: All right. We'll --
MS. PAAVOLA: Oh, we have -- I'm sorry. We have it right here. Sure. The Ted Bundy comparison, this is on page 2232, the Jeffrey Dahmer comparison also on page 2233. I didn't ask him about that one. Are those the only questions or were there others?

MR. ZELENKA: No, those.

THE COURT: All right. You may step down.

A May I be excused?

THE COURT: Any objection to Mr. Diggs being excused?

MS. PAAVOLA: Your Honor, we have no objection other than our original position that there may be lines of questioning that we have not been able to ask him because of the claims that are not developed.

THE COURT: Okay. Any objection from the State with Mr. Diggs being excused?

MR. ZELENKA: No objection.

THE COURT: You're free to go. Thank you very much.

A Thank you.

THE COURT: All right. It's a little after one. Let's go ahead and we'll break for lunch. We'll be in recess until 2:15. Okay. Give us a little bit, a little bit more than an hour. I mean, is that adequate?

MS. PAAVOLA: Yes, Your Honor. That's, that's fine. We have Mr. Stetler is planning to go up next, and he has a flight leaving from Myrtle Beach at to 6 p.m. So, I believe, I believe that's adequate time. I don't think he'll be very long.

THE COURT: All right. Sounds good. We'll be in recess till 2:15. Thank you.

OFF THE RECORD

(On the record.)

THE COURT: Thank you very much. Please be seated. All right. Anything from the Applicant before we resume?

MS. PAAVOLA: Nothing, Your Honor.

THE COURT: All right. Anything from the State?

MR. ZELENKA: Nothing, Your Honor.

THE COURT: All right. You can call your next witness.

MS. VANN: The Applicant calls Russell Stetler.

THE COURT: All right.

Whereupon, Russell Stetler was called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: State your name for the court and spell your last name.

MR. STETLER: My name is Russell Stetler, Russell is with two Ss and two Ls, Stetler, S-T-E-T-L-E-R.

DIRECT EXAMINATION

BY MS. VANN:

Q Good afternoon, Mr. Stetler.

A Good afternoon.

Q Let's start by summarizing your background. How are you currently employed?

A I'm the national mitigation coordinator for the Federal Death Penalty Projects.

Q And could you describe the Federal Death Penalty Projects?

A Yeah. They provide assistance to lawyers who have capital cases in federal court, either direct prosecutions under the Federal Death Penalty Act or cases that originated either in state or federal court and are in federal court on habeas corpus.
Q And what are your duties and responsibilities in that position?
A I consult on cases all over the country both pretrial cases and habeas corpus cases. I organize training and I consult with lawyers, mitigation specialists and experts and sometimes try to assist the teams in getting their personnel squared away.
Q Do you yourself provide direct representation or --
A No.
Q How long have you been in your current position?
A Since 2005.
Q Before your current position, did you have any other positions that were related directly to death penalty cases?
A Yes.
Q What were those?
A From 1995 to 2005 I was the director of investigation and mitigation at the New York State Capital Defender Office. That office was created by statute when New York reinstated the death penalty in 1995, and we had a mandate to ensure effective representation at the trial and appellate level. So

my duties were, again, to consult with lawyers, investigators, mitigation specialists, experts. The office did both direct representation and assistance to the private bar.

Q And were you involved in getting that office operational?

A Yes. Absolutely. I was one of the first people hired and helped with the initial staffing decisions, and we, you know, we, we staffed the, the office accordingly. As of 1995 investigators and mitigation specialists were widely recognized as critical parts of the capital defense team. So we had pretty much an equal ratio of lawyers and non-lawyers for the trial teams.

Q Did you hold any other positions before your current position involving death penalty cases?

A Yes. The five years before that, from 1990 to '95, I was the chief investigator at the California Appellate Project, which was a nonprofit that coordinated the representation of all the California prisoners under sentence of death, provided assistance to private lawyers handling those cases either on appeal or in state post-conviction or federal habeas corpus.

Q Are you yourself a lawyer?

A No.

Q When did you first begin working on death penalty cases?

A 1980.

Q And what capacity were you working in that -- at that time?
A I was in a private capacity in the investigation of capital cases.
Q Can you estimate how many capital cases you have worked on personally?
A You know, it's hard to put a number on it, but it's, you know, something in the, in the hundreds. In New York we had in the ten-year life of the statute over 800 death eligible cases, and we provided either direct representation or assistance in all of those. I wasn't involved in all 800 but of the cases that were more, more likely to be authorized and go forward I had considerable involvement, and that's either directly, personally or supervising staff that were involved.
Q At the time of Mr. Stanko's capital prosecutions, which were between 2005 and 2009, what position were you in?
A I was finishing up at the Capital Defender Office in New York for the first eight or nine months of the year, and then the rest of the year I was in my current position.
Q Have you attended continuing legal education programs dedicated to death penalty litigation?
A Yes. Since 1980.
Q Approximately how many?
A Something around 400.
Q Have you also served as faculty at the continuing legal

education relating to capital cases?
A Yes. I've done a lot of that over the last 25 years, something in excess of 350 programs.
Q And were those trainings national or local or regional in scope?
A All, all three. There are a few national programs that have been going for a long time. The National Legal Aid and Defender Association has a program called Life in the Balance, National Association of Criminal Defense Lawyers has one called Making the Case for Life. I've been involved in those, and sometimes in the planning of the programs, but I've also been involved in, you know, regional programs. I've been the co-chair of the California Capital Case Defense Seminar for the last five years and much earlier served on the planning committee.
Q And you say you've helped plan continuing legal education programs?
A Yes. And that's, that's part of my current position.
Q Have you served as faculty in CLEs in different jurisdictions?
A Yes. Almost all of the death penalty jurisdictions in fact, all but Montana, New Hampshire, Nebraska, and another one slipping my mind.
Q Who are the attendees --
A South Dakota.

Q -- of these trainings?
A They're, typically, lawyers and mitigation specialists, sometimes also investigators or experts, but those are the two core groups.
Q Have you ever taught any CLECs in South Carolina related to capital cases?
A Yes. I think three times.
Q What years were those?
A I think the first one was in the, in the mid-90s, around 1995, and then the others were 2006, 2007.
Q At the time of Mr. Stanko's capital prosecutions, again that's 2005 to 2009, were there publications on the mitigation -- on the function of mitigation investigation?
A Yes.
Q Have you written or had you written any within that timeframe related to mitigation investigation?
A Yeah. Within that timeframe I had an article in the University of Pennsylvania Journal of Law and Social Change called the "Mystery of Mitigation", which is kind of just an overview of mitigation evidence in capital cases, and I wrote a couple of articles for the National Association of Criminal Defense Lawyers' magazine *The Champion*. Again, they're always about mitigation issues.
Q Have you published anything specifically addressing the prevailing norms in mitigation investigation in capital cases?

A Yes. I have an article that I wrote with Professor Brad Wendel of Cornell published in *Hofstra Law Review* in 2013 on the ABA Guidelines and prevailing norms of capital representation and another in -- on capital mental health assessments. That was published last year in the University of Missouri Kansas City Law Review.

Q At this time I'd like to show you what has been previously marked as Applicant's Exhibit 18. Do you recognize that document?

A Yes.

Q Could you describe what it is?

A Yeah. That's a copy of my CV.

Q Is that an accurate copy of your current CV?

A Yes.

MS. VANN: We'd move to admit that as Applicant's Number 18.

THE COURT: Any objection?

MR. ZELENKA: No objection to the CV.

THE COURT: All right. Applicant's Exhibit Number 18 admitted into evidence without objection.

(Applicant's Exhibit Number 18 [CV of Russell Stetler] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q Does the CV provide a full list of your publications on the mitigation function?

A Yes.
Q You also said that part of your duties is consulting on cases. What types of cases have you consulted on?
A I've consulted on both pretrial and post-conviction cases all over the country. I mean, my official duties are restricted to cases that are in federal court and that's what I've done over the last 10 years. The 10 years before that, I was consulting on trial level cases in New York, and the five years before that consulting on post-conviction and federal habeas cases in California.
Q Have you previously been qualified to testify as an expert in any court regarding the standards and practices and prevailing norms in death penalty cases specifically with reference to the mitigation function?
A Yes. In the area of investigation and presentation of mitigation.
Q About how many times have you been qualified as an expert in that area?
A A little over 20 times.
Q In multiple jurisdictions?
A Yes. I think Alabama, Arizona, Arkansas, California, Colorado, Iowa, Louisiana, Missouri, Nevada, Pennsylvania, Tennessee, Texas, Wyoming.
Q What types of proceedings have you testified in?
A Some are pretrial proceedings where the issues often

concern funding or, or the -- what, what, what kind of funding will be reasonably necessary in the circumstances for a particular case. Some of the pretrial proceedings have focused on access to witnesses and some have been post-conviction proceedings either in state court or on federal habeas corpus.

Q So you've testified in post-conviction proceedings like this one?

A Yes. I have.

Q Were you permitted to testify as an expert in each of those courts?

A Yes.

Q Is testifying a major part of your current position?

A No. You know, again, it's something over, over 20 times in the last decade. So it comes up from time to time, but it's not, not a major part of my duties.

Q Has any court ever found you not qualified as an expert?

A No.

Q And is your testimony in this case a part of your official duties at the Federal Death Penalty Project?

A No. In fact, I'm, I'm here on my own time. I had to take annual leave to come here.

Q And are you being paid for your testimony in this case?

A No.

MS. VANN: Your Honor, at this time I would like to

tender Mr. Stetler as an expert in the investigation and presentation of mitigation evidence in capital cases.

THE COURT: All right. Let me get that. Investigation and what?

MS. VANN: And presentation of mitigation evidence.

THE COURT: All right. Any challenges or questions by the State?

MR. ZELENKA: My challenge, Your Honor, is to relevance of the qualification. If I could have some voir dire questions about his educational background.

THE COURT: All right. I'll allow that.

EXAMINATION (RE: QUALIFICATIONS)

BY MR. ZELENKA:

Q Mr. Stetler, are you a lawyer?

A No. I'm not

Q What's your educational background?

A Bachelor's Degree and a little bit of graduate school without a, without a postgraduate degree.

Q Bachelor's Degree in what?

A In philosophy.

Q Philosophy. Did you ever attend law school?

A No.

Q Do you have a graduate degree?

A No. I do not.

MR. ZELENKA: I have no further voir dire questions.

THE COURT: All right. Any challenges to him being tendered?

MR. ZELENKA: Your Honor, we -- our objection is, first, that under -- as we asserted in our response to the motion in limine, expert testimony concerning the competency of another lawyer it is not appropriate in post-conviction relief. We've cited McKnight versus State in our motion in limine which I incorporate, too, by reference. I know you've already seen it. At the time you deferred ruling ultimately on the motion in limine. We also cite another case of Roderick Green versus State in which expert opinion on the standards like the McKnight case were found to not be an abuse of discretion to disqualify that evidence in an appeal before a South Carolina Supreme Court. We submit as we cited in the memorandum in Bobby versus Van Hook it noted that the, the issue of expert testimony and the issue is to what the standards are is essentially a matter of law for the Judge to take cognizance over, and we submit under the expert opinion rules that it would not assist the trier of fact. Your Honor already has before you what they have submitted as material that went to Mr. Diggs, the ABA standards for the representation in capital cases, the 2003 version, and we don't dispute that those are matters which may be informational to the Court, but they speak for themselves, and we would submit that further evidence, further testimony based upon what they assert to be

his intended testimony, mitigation investigation, presentation of mitigation, goes to the core of what a lawyer does in a case and goes to the core as to why the alleged asserted expert opinions in McKnight was found not to be an abuse of discretion to disqualify him.

THE COURT: Okay. What -- and I'm -- I qualify him as an expert in the field of investigation, of mitigation evidence, but as far as presentation, what is, what is his projected testimony? I mean, is this just a title that's all encompassing or is there a distinction that's going to be brought out in this testimony between investigation and mitigation evidence and presentation of mitigation evidence?

MS. VANN: Well, it kind of refers to the whole mitigation function of how do you develop mitigation, how do you develop a theory of what you will be presenting at a trial, and then ultimately what are the standards for mitigation presentation at trial. So it kind of is the whole range of a lawyer's responsibilities for performance in a capital case.

THE COURT: Okay.

MS. VANN: With regard to the mitigation function.

THE COURT: All right. Well, I'm going to go ahead and I'm going to find him -- I'm going to qualify him as an expert over State's objection. All right. Go ahead.

MS. VANN: Thank you, Your Honor.

A Thank you, Your Honor.
Q When were you first contacted about Mr. Stanko's case?
A In September of 2014.
Q Have you subsequently had an opportunity to review any materials relating to Mr. Stanko's case?
A Yes. I have.
Q What have you reviewed?
A Reviewed the direct appeal opinions in both the Georgetown and Horry County cases, a summary which you provided of the full testimony in the Georgetown case and the -- and a summary of what was presented in, in this county as well, then I read the whole of the Defense testimony both in the guilt phase and penalty phase of the prosecution here, also saw the 48 Hours episode that was discussed this morning, and I reviewed the billing records of Mr. Diggs; the mitigation specialist, Dale Davis; the fact investigator, Vicki Childs; and the social history presenter, Dr. Califf.
Q You talked a little bit about the standards and that you've written about the standards and norms for capital defense. How are those standards determined?
A Well, they evolve directly out of the, out of the practice. I think there are really two, two components. There's a bit of social science research that also informs what the norms are. There's been a massive study of how capital jurors process mitigation information. There's a --

the group that begin work with a National Science Foundation grant in 1991 called the Capital Jury Project that's interviewed 1200 actual jurors in death penalty cases and they've written up dozens of articles about how jurors make their decisions, how they respond to mitigation evidence, but the main thing is, you know, what kind of practice has been effective, and the people who are invited to present at training programs are by and large the people who have pioneered the work in the field, and, and they present what, what they have learned from lots of successful practice.

Q And are the ABA Guidelines reflective of those norms?

A Yeah. They grew out, directly out of that experience. You know, they really were -- first drafted by the public defenders, the National Legal Aid Defender Association published the original draft in the 1980s of what eventually was submitted to the American Bar Association and then vetted through their various committees and published in 1989 as the ABA Guidelines for the defense function in capital cases, but it came directly out of the Public Defender practice all over the country. I mean, the National Legal Aid and Defender Association, again, has been having this annual death penalty training program since the 1980s, and so they circulated their drafts at those training programs, got feedback from the people that were actually doing the work in the courts all over the country.

Q How many publications of the ABA Guidelines or revisions have there been?
A Well, the death penalty guidelines there are just two, 1989 and a revision in 2003, but they relate back to ABA standards for the criminal defense function that were published originally around 1980.
Q Were you subsequently involved in developing the supplementary guidelines for the mitigation function of defense teams in death penalty cases?
A Yes. I was.
Q What was your role in the development of those guidelines?
A I was just one of the people on the, on the committee that organized that effort. The main sort of chair of the committee was Professor Sean O'Brien at the University of Missouri, Kansas City Law School. He had a small grant to survey practices around the country, but then drafts were circulated at training programs, and so wherever I went in, in the, in the timeframe when these guidelines were being developed I circulated drafts, got feedback from the participants, invited their comments, and it was a long three or four-year process that ultimately then resulted in their publication in 2008.
Q Which versions of the ABA Guidelines were in circulation at the time of Mr. Stanko's trial?

A The 2003 guidelines.
Q According to the standards for a capital defense representation, who should be on the team for a capital defense team?
A They discuss a, a four-member core team, two lawyers qualified to handle capital cases, a fact investigator and a mitigation specialist, with the understanding that somebody on that team, either one of those four or somebody in addition to those four should be qualified by training and experience to screen for mental disorders and impairments.
Q Are the mitigation investigator and or mitigation specialist and the fact investigator necessarily two different individuals?
A Yes. Because they're really different, different skill sets, and I actually wrote about that in one of the articles that was published in this timeframe. Essentially, you know, both are demanding jobs. You want a fact investigator who understands the sources of wrongful convictions and can conduct a full investigation of the factual allegations, has expertise with forensic evidence, for example, and then the other skill set of mitigation specialist is somebody who understands the capital defense function, the presentation of mitigation, how to gather documentary evidence, how to analyze records to identify themes and hypotheses, and also the ability to conduct sensitive interviews about a client's life

history.
Q We've been talking a lot about mitigation. What exactly constitutes mitigating evidence?
A Well, it's very broad. It's, it's whatever the defense can proffer that may inspire compassion, empathy, mercy and inspire a juror to vote for a sentence less than death.
Q Would you say that the purpose of presenting mitigation is to encourage the jury to vote for a sentence of less than death?
A Yes. It's precisely the function, and that means, you know, humanizing, you know, presenting evidence that will make some kind of human connection between the capital Defendant and the members of the jury, make them feel that he is part of their human community.
Q How should a defense team go about developing a mitigation theory to present at trial?
A Well, I guess the first point is you want to put the team together as early as possible. You want a team that functions as a team, so meets regularly, shares information, and the contribution of the mitigation specialist is going to be to track down all those life history records, not only of the client but other members of the family, the sort of social world in which he grew up and then there's an interplay between records and interviewing so you'll be conducting multiple in person face-to-face interviews with key family

members and then spreading out beyond that to neighbors, classmates, coworkers, professionals who encountered the client in his developmental years. It's really got no, no limit to where it ends.

Q Would that be what makes up a social history evaluation?

A Exactly.

Q And when should that social history evaluation begin?

A As soon as counsel is appointed.

Q And why should it start so early on in the representation of the client?

A Well, basically because it's a long process. You're going to need to build a relationship of trust and rapport with -- not only with the client himself but with family members. You're going to be seeking records which often just take a long time to retrieve. You're dealing with bureaucracies that are often understaffed. Records may be stored in archives. So you don't just send a release and, and get them the next day. You often have to follow up. Sometimes you have to go to the institutions themselves to pursue the records, and again, you want to get records not only about the client but also from, from family members and because records will reveal things that family members are reluctant to talk about, things that they don't want to share with you necessarily, and sometimes they'll also reveal things that they just don't know, don't remember, but they're created

by objective third parties outside the family. So they have inherent credibility, and the records will then identify the people who created them who may also be valuable witnesses. The report cards will identify teachers, for example.

Q At the time of Mr. Stanko's trials, 2005 to 2009, were training -- were there training programs that were focused on this procedure for developing a mitigation theory?

A Yes. Absolutely.

Q And when should a Defense team start looking for experts?

A Well, you want to conduct enough of your social history investigation first so that you can identify what kind of expert you need and what sort of questions you want the expert to address. For example, if your social history investigation reveals head injuries, then that's going to point you towards a neuropsychologist. If your life history investigation indicates exposure to trauma, then you want somebody who's got experience in, in that area. So it, it really helps you identify the sort of expert who's going to be appropriate to the needs of the individual case.

Q When did capital CLEs begin instructing on the importance of a thorough mitigation investigation?

A Well, you know, the, the need for a mitigation investigation has been around as long as I have been doing this work. So back in the 1980s there were already always

going to be lectures on the importance of life history investigation, developing mitigation evidence and integrating it into your overall defense concept.

Q And when did these trainings first recognize that a key member of the core defense team would be a mitigation specialist?

A Well, you know, I don't know exactly when the term was coined, but sometime in the 1980s and it wasn't invented in one jurisdiction as opposed to another. I think everybody who is doing capital work in that period came to the conclusion that you needed somebody who was dedicated to that function. In, in California one of the earliest examples was a, a lawyer who found an ex-New York Times reporter who had written a book about a murder case that she covered, and so the lawyer hired that person from the journalism school, and said, you know, "I want you just to do nothing else but investigate the life of this capital Defendant," and then when she had done all that and the case came out successfully she wrote about it, wrote about the experience, and if you look at the magazines of the criminal Defense bar in the 1980s there are multiple articles talking about the importance of non-lawyers for conducting this investigation. Some of the social workers who were early practitioners wrote about their experiences in the, in the mid to late 1980s, and by the late 1980s there was an article in *The Champion* magazine saying, "Look, this is part of what

every, every lawyer needs in a capital case.
Q Whose responsibility ultimately is the mitigation investigation?
A Well, it's, it's lead counsel.
Q Even when you hire or when counsel hires a mitigation specialist?
A Yes. I mean, that's -- it's important that the lead counsel does that, but ultimately it's, it's the captain of the ship who has the responsibility for the guiding hand.
Q You may have described this earlier, but why exactly is the social history investigation so important?
A Well, again, you're trying to humanize the, the client for the jurors. You want them to understand that this is an individual who had hopes, dreams, aspirations, shortcomings, as well as strengths, somebody that they can identify with and so that they can then begin to understand where did things unravel, what went wrong here, how did this circumstance come about that places this person in the dock as a capital Defendant.
Q Could you describe the relationship between a thorough mitigation investigation or social history evaluation and a reliable mental health evaluation?
A Well, they're very closely connected. The social history investigation it provides hard data independently corroborated that did not come from the mouth of the, the

client. Experts are often going to be very vigorously cross examined if their sole source of social history information is what the client told them. So independently corroborated social history is going to inform and provide a foundation for a reliable assessment.

Q And should that social history evaluation be provided to the mental health experts involved in the case?

A Yes. Your experts, you know, should be given as much information as possible that is well documented about the client's life, particularly in the developmental years.

Q Can you describe what would be, what the terms integrated or unified mitigation theory mean?

A I think the unified theory refers to integrating the mitigation into the whole defense theory of the case. I mentioned earlier the Capital Jury Project was -- which has interviewed a lot of real jurors who have served in capital cases, and one of their findings is that a lot of jurors make their decision about punishment during the first phase, and so one of the practical conclusions from that research is that you need to start propounding your mitigation theory early on in the voir dire and in the, in the first phase of the case, not just wait until conviction to present that evidence because some jurors have already made up their mind.

Q Does some of that involve that the theory should be consistent across different witnesses?

A Yes. I mean, that's another conclusion that kind of accords with common sense. You can't just present contradictory theories between the first and second phase. If, if you put up a defense in the first phase that says, "I didn't do it," and then you come in in the second phase and say, "Well, yes, actually he is guilty and here's an explanation of why it happened," then the, the -- you have no credibility with, with jurors. If they've rejected what you've offered in the first phase, then you're starting in a much deeper hole in the second phase. So you want as much as possible a consistent and unified theory, and this is not a new idea. It's something that, you know, I was hearing at training programs from the very beginning.

Q You've mentioned a couple of times the Capital Jury Project. When was that research conducted?

A It started out in 1991, and they were funded by the National Science Foundation. They do structured interviews with jurors who have served in real cases, some that resulted in death sentences, some that resulted in life sentences. The structured interviews take three or four hours. They're conducted by different academics all over the country, and then each, each one writes up individual findings and they're all on the website of the, of the project at the State University of New York at Albany.

Q When did the Capital Jury Project start reporting

findings?
A By the mid, mid-90s, '95, '96.
Q We've talked about a mitigation theory. Is it mitigating or is it a mitigation theory to present that the Defendant is a psychopath or a person with antisocial personality disorder?
A No.
Q Is that true in any court?
A From the mitigation perspective it is not mitigating evidence.
Q In any of the trainings where you have been an instructor or you have attended, has anyone ever advocated for using psychopathy or antisocial personality disorder as a mitigating theory?
A No. On the contrary, you're usually concerned about that evidence being offered by the Prosecution, and so there's been a lot of training addressing the issue in that context, but it's, it's pretty well-established that it's, it's in itself not going to be mitigating and you would never urge Defense lawyers to use it.
Q Is it actually considered aggravating?
A Yes.
Q Why is that?
A Well, the whole -- let me, let me separate the, the two. First of all, antisocial personality disorder is generally

viewed as the broader construct, that's actually recognized in the diagnostic and statistical manual, and in general, there's an assumption that if the construct of psychopathy exists, if it's, if it's real, it's a subset of that, of that larger group, but in both cases they enumerate traits of the individual that are, you know, lawbreaking, callousness, lack of empathy, all the sorts of things which are not going to evoke empathy on the part of jurors.

Q Are there any particular reasons why a defense theory of psychopathy related to an insanity defense would be a concern at a capital trial?

A Yes. I mean, you do not want the words psychopathy attached to your capital client. It has popular connotations of Hannibal Lecter. It really is a dehumanizing concept, and it's also putting the individual into a particular category and saying he's just like all the other people in that category rather than looking at him as an individual who is complex, who is not just somebody who can be labeled in that fashion.

Q In your experience are insanity defenses usually successful?

A They are very rare and rarely successful.

Q Why is that?

A Well, again, both from my own experience and my review of the literature they, they are empirically very, very rare,

something under one percent, maybe nine cases out of a thousand was the figure quoted in, in one *Law Review* article, but the people who are found not guilty by reason of insanity is a very small subset, and usually it's people who have previously been hospitalized for major clinical disorders and in many cases actively psychotic. So if you look at the, you know, what empirical literature there is in this area, you're going to find that there are very, very few successful insanity defenses other than those involving people with long, well-documented histories of major mental illness.

Q Does that hold true in capital cases as well?

A You know, if anything, even more so.

Q And why is that?

A Well, you know, there was actually a study in Florida, the -- in 2006 that compared the attitudes towards an insanity defense of regular jurors and capitally qualified jurors, and it found that capital jurors were even more skeptical of, of an insanity defense.

Q Are there any other particular concerns with raising an insanity defense in a capital trial as it relates to the integrated theory of mitigation?

A Well, yes. Like I said, the issue of the integrated theory relates specifically to having an insanity defense in the first phase, saying to the jury, "Ladies and gentlemen, this is a complete affirmative defense. It is an excuse," and

if the evidence is rejected for that purpose, if you then turn around in the second phase and say, "Okay. It's not an excuse. It's just a reason to spare the individual's life," the evidence has been rejected probably for all purposes. So it really is just like any other kind of denial defense. It's just like saying, "I didn't do it", in the first phase. It's inconsistent.

Q How should a defense team approach a mitigation investigation in creating a mitigating theory in a second trial for the same Defendant?

A Well, I think in a second trial it's very, very important to have completely fresh thoughts, reinvestigation, new strategy and that's, that's regardless of the outcome of the, of the first trial. You all, I'm sure, remember the Oklahoma City bombing trial of Terry Nichols which was first in federal court in Denver, came back with a life sentence, and then Mr. Nichols was brought back to Oklahoma to face similar charges in state court. They didn't just use the same mitigation evidence that had been presented in the, in the federal trial. They had a completely new set of themes. They understood the importance of expanding their investigation, and that's in a case where, where the first jury returned a sentence of life. We often have the situation of a case that comes back for re-sentencing as a result of a successful appeal or a post-conviction application, and again, you can't

just then reuse the same evidence that got a death sentence the first time or even just recycle the evidence that was effectively presented in the post-conviction proceeding because now all of that is well known to your adversaries in, in the litigation. They're going to be ready for it, ready to cross examine, and you just need a fresh look. So where you'll come out is a whole separate question, but you have to start with the assumption that it's important to, you know, give this individual a full re-examination of potential mitigation.

Q What should the makeup of the defense team be for a second trial for the same Defendant?

A Well, the same core team should, should be there, two lawyers, a fact investigator and a mitigation specialist. In other words, you're not just reusing what's in the box from the first trial. You're putting together a new team and conducting a new investigation.

Q For a second trial would it be appropriate to have a factual investigator and a mitigation specialists be the same person?

A No. For the same reasons that I indicated earlier. It's a different skill sets. There's plenty of work for each one to do, and the reality is very, very few people are going to have both sets of appropriate skills.

Q You mentioned that you taught some continuing legal

education related to capital cases in South Carolina. Was the information that you've discussed today presented at those CLEs?

A Yes. I mean, in fact, this is one of the topics that I frequently present on.

Q And in 2006 you said you did a CLE in South Carolina. What was that?

A That was a -- what we call a bring your own case capital program and that was in Charleston in early 2006.

Q And what does the bring your own case seminar involve?

A Well, it's different from most of the programs that I mentioned earlier, the typical CLEs that have just a series of lectures. The bring your own case programs instead invite capital defense teams to present their cases. So there'll be a series of lectures as usual, but then small group discussions to brainstorm those issues in the context of the individual case. So if I gave a lecture on social history investigation, mitigation investigation, then there would be a follow-up discussion with the defense team saying, "Well, what are the problems that you're encountering in your case? What are the obstacles to disclosure of sensitive information? What barriers are you having to overcome to establish a relationship of trust with the family?" If somebody else gives a lecture on mental health, then the brainstorming session will have faculty and other teams sharing ideas about

the mental health ideas in the case.
Q And when you say the defense team, does that mean everyone that you've previously mentioned, the two attorneys and both the mitigation specialists and investigator?
A Yeah. Ideally we encourage the four members of the core team to attend.
Q And was this geared toward state or federal practice?
A This was in -- exclusively for state court practitioners. It was based on a, on a grant from the Bureau of Justice Assistance, and the terms of the grant was that it was for state court practitioners.
Q Do you know what specific session you taught at that seminar?
A Yes. I believe I did the lecture on social history investigation.
Q Are you aware of whether any members of Mr. Stanko's defense team attended that bring your own case in 2006?
A Yes. I checked the attendee list, and Ms. Childs and Ms. Davis were both registered.
Q And --
A I don't, I don't think I personally interacted with them there, but they were both listed on the attendee list.
Q Do you know they specifically brought the Stanko case?
A Yes.
Q And --

A Would have been the, the Georgetown case at that point.
Q Uh-huh.
A And you fill out forms that describe the case that you're bringing and, you know, what, what's the, the nature of the evidence, what, what are the allegations, what mitigation themes have you already identified, that the sort of thing.
Q Do you remember what the charge was for people to attend that seminar?
A There was no charge at all. In fact, all expenses were paid. I mean, that was -- because it was funded through this Bureau of Justice Assistance grant.
Q At the time of Mr. Stanko's second case in Horry County in 2009, if someone on the trial team had contacted you about identifying a mitigation specialist, would you have been able to help them with that?
A Sure. I mean, those, those sorts of questions came up all the time. You know, and, and that was, you know, not as part of my, my job, but just as, as, as somebody with experience in this area, happened, you know, much, much longer than I, than I've had my current job, get those phone calls and e-mails.
Q Uh-huh. What are post-conviction counsel's duties with regard to investigation?
A Well, in order to prevail on an ineffective assistance claim in the area of failure to conduct thorough mitigation

investigation, you've not only got to establish the deficiencies in the, in the work at trial, but you have to show prejudice. So you have the same obligations to conduct a thorough mitigation investigation.

Q And are attorneys always equipped to investigate mental health issues without the assistance of experts?

A No. I'd say they're always not, not qualified.

Q Thank you. No further questions.

THE COURT: All right. Cross examination.

CROSS EXAMINATION

BY MR. ZELENKA:

Q Mr. Stetler, in September 2014 you state that you were retained or became involved in Mr. Stanko's case?

A Yes.

Q And you were provided a summary of the facts on both the Georgetown case and the Horry County trials?

A Yes.

Q Do you have those with you?

A No. I don't have anything with me.

Q Okay. Do you know whether the -- did you review the transcripts of the trial to confirm the validity of the facts that were presented to you?

A No. I reviewed the State Supreme Court opinions to get an overview.

Q Okay. Now, as I understand your testimony, one thing

you've stated is the lawyer is the captain of the ship?
A Yes.
Q He makes the decisions as to what witnesses to put up and what direction to take in the case; correct?
A Yes. Yes. I mean, in consultation with the, with the team, but the ultimate responsibility rests with the lead counsel.
Q Okay. And one of the concepts you talked about was basically frontloading mitigation in the guilt phase; correct?
A Yes. Absolutely.
Q And one factor according to the ABA Guidelines it is one of the most important factors are mental health issues; correct?
A Yes. Mental health issues pervade these cases.
Q And the mental health issue -- the strongest mental health issue is whether a Defendant, based upon his mental disease or defect, lacks sufficient capacity to conform his conduct to the requirements of law; correct?
A I'm, I'm not -- I'm not sure what, what you're asking.
Q One of the strongest mental health deficiencies is when there --
A One, one of, one of them. Yes.
Q -- is when there's evidence that shows that the Defendant --
A Yes.

Q -- lacks sufficient capacity --
A Yes.
Q -- to conform his conduct to --
A Yes.
Q -- the requirements of law; correct?
A Yes.
Q And that was essentially what the testimony was in the guilt phase of this case; correct?
A Well, I'm, I'm afraid I'd say yes and no. There, there was -- yes, in the, in the sense that there was what I would call almost a neural determinism. Dr. Sachy testified essentially that no one's making choices. It's just neurons firing and, and, and that if your brain is not functioning properly then you're not making choices.
Q Okay. So --
A Sorry for the long-winded paragraph.
Q So in cases in South Carolina when that's presented, are you saying that's incompetent if it's done in the guilt phase?
A No.
Q It's based upon the strategy the particular lawyer is attempting to present at that time?
A Well, it is based on that strategy, but it also depends on how you present that evidence, and again, I don't, I don't think anyone is going to buy the, the idea of complete neural

determinism where it's just brain cells firing and nobody is making any decisions or having any responsibility. I think you have to present evidence of brain damage, for example, in the, in the context of how it may have diminished somebody's responsibility but not excused it.

Q Okay. In this case, and in this case I'm talking about the Horry County case --

A I'm with you.

Q -- you reviewed the mitigation testimony of Dr. Sachy in this case; didn't you?

A The, the, the mitigation or the guilt phase?

Q Well, let's go with the guilt phase.

A Yeah.

Q Yes.

A In any event, yes, I did, I did review his testimony.

Q And on direct examination he didn't assert that the Defendant was a psychopath; did he?

A No. He used, used the term psychopath over and over in this case.

Q In the guilt phase of the Horry County case?

A I believe so.

Q Okay. In the guilt phase of the Horry County case on direct examination did he ever use the word psychopath?

A I don't have the transcript in front of me, but --

Q But it's your recollection that he did?

A It, it -- yes. That it pervade his testimony.
Q In the guilt phase of this case did he ever make reference to Jeffrey Dahmer or Ted Bundy in the direct testimony from Mr. Diggs?
A I, I don't remember whether it was in direct testimony or, or on cross-examination, but I remember -- no. It must have been on cross-examination because I believe the reference to Mr. Bundy came up in the, in the context where he was implying that there may be all kinds of additional criminal acts that Mr. Stanko could have committed because he gave the example of Mr. Bundy having been convicted of a dozen murders but suspected of 40. So when he was asked in cross examination what -- whether there were really just three different victims of violence and only two incidents over Mr. Stanko's entire life his response was, "That we know." So you're, you're right. That was a cross-examination area.
Q Okay. In your direct testimony you stated essentially that an insanity defense should not be given in a death penalty case?
A No.
Q What exactly did you say then?
A I, I think what I was trying to convey is that there are great risks to using an insanity defense, and couple that with the statement I made earlier that insanity defenses succeed if and only if you have a long well-documented history of major

mental illness, so not just something that your experts are coming up with now but something that long preceded the capital charges. So, so --

Q And where did you get that information?

A Well, again, that's from both experience and, and the literature.

Q How many insanity cases have you ever been involved in that have succeeded -- not succeeded in guilt where an individual received a life sentence? Any?

A I don't, I don't know of -- no. I don't know of any.

Q Have you been involved in cases where an insanity defense was presented and it resulted in death?

A I wasn't directly involved in, in the case, but there was one in New York.

Q And you were part of the mitigation team in that case?

A No. Our, our office was, was conflicted in that case.

Q Okay. So how are you involved in it then? I'm confused.

A No. Just involved was probably, probably the wrong word. Was not, was not directly part of that team.

Q Okay.

A We -- our, our office had the case on appeal. So I did have a subsequent involvement.

Q Okay. You stated, which sounded like a guideline, that antisocial personality disorder is never a mitigating factor;

is that correct?
A Yes.
Q Have you ever read the case State versus Ricky Tim Caldwell out of the South Carolina Supreme Court?
A No. I have not.
Q Are you aware that Mr. Ricky Tim Caldwell received a new re-sentencing hearing because the Trial Judge failed to instruct the jury on mitigating factors related to mental or emotional disturbance at the time of the crime, capacity to conform conduct to the requirements of law, was impaired based upon testimony solely of antisocial personality disorder and psychopathic personality?
A. No. I do not know that case.
Q So you don't understand South Carolina law then; correct?
A I, I never purported to be an expert on South Carolina law, sir.
Q Well, what did you purport to be an expert on?
A On the investigation and presentation of mitigation evidence.
Q Okay. With respect to the second trial, you're supposed to have a fresh start?
A Yes.
Q Does that also mean new lawyers?
A Not necessarily.

Q Okay. Does it mean new mitigation investigator?
A Not, not necessarily.
Q Does it mean new fact investigator?
A No. Not necessarily.
Q What ABA Guideline are you referring to when you said it needs to be new investigation, new strategy?
A Well, you know, there is a -- there's nothing directly in the ABA Guidelines addressing --
Q Okay.
A -- addressing re-sentencing, but there is a guideline that discusses the need in the post-conviction context to rethink the theory of the case and not assume that everything that has happened up to that point represents the only view of the evidence or the only --
Q Okay. So you're -- so your statement that at the second trial there has to be fresh thought, new investigation, new strategies was not based upon the ABA Guideline?
A No. It's based on my own experience.
Q Okay.
A And I, and I should say similarly, you know, when we set up the, the Capital Defender Office staffing in New York we didn't look in a book for how to staff it. We drew on the experience of people who had death penalty experience in multiple jurisdictions around the country.
Q Okay. Just clarify for me, my ears aren't as good as

they used to be.
A Neither are mine.
Q With respect to the South Carolina CLE in 2006 you participated in, did I hear you state that there were or were not members of the Stanko defense team registered for that seminar?
A Yes. The investigator and the mitigation specialist registered.
Q Okay. And the investigator was Ms. Childs --
A Yes, sir.
Q -- and the mitigation investigator was Dale Davis?
A Ms. Davis. Yes. That's correct.
Q Okay. And there was a question stated that you could identify for a Defense lawyer mitigation specialists in South Carolina; is that correct?
A You know, I'm not sure whether I could have identified somebody here. I could have identified people around the country that might have been available, and I certainly could have suggested people to talk to in this, in this state.
Q Okay.
A There was a directory of mitigation specialists that had a few hundred names in it at that point.
Q Do you know who's in that directory?
A Offhand, no.
Q Do you know who is in that directory from South

Carolina?
A No. I don't know offhand.
Q Was Dale Davis in that directory?
A Probably.
Q Do you know whether she was the only one in that directory at that time?
A I don't know.
Q Okay.
A I would, I would be surprised. I can think of not names but faces.
Q Okay.
MR. ZELENKA: The Court's indulgence.
THE COURT: All right.
MR. ZELENKA: No further questions. Thank you, Your Honor.
THE COURT: Redirect?
MS. VANN: Nothing further from the Applicant, Your Honor.
THE COURT: All right. You may step down.
A Thank you, Your Honor.
THE COURT: Thank you.
MS. VANN: Your Honor, could we take a short break?
THE COURT: Yeah. Let's go ahead and take about a 10, 15 minute break.
MS. VANN: Thank you.

THE COURT: All right. Anything from the State before we break?

MR. ZELENKA: Nothing, Your Honor.

THE COURT: Anything from the Applicant?

MS. PAAVOLA: No, sir.

THE COURT: All right. We'll take about a 10, 15 minute break.

OFF THE RECORD

(On the record.)

THE COURT: Thank you very much. Please be seated.

MR. ZELENKA: Judge, a moment?

THE COURT: Yeah. Come on up.

(Whereupon, a bench conference is held.)

THE COURT: All right. Anything from the Applicant before we resume?

MS. PAAVOLA: No, Your Honor.

THE COURT: Anything from the State?

MR. ZELENKA: Nothing, Your Honor.

THE COURT: All right. You can call your next witness.

MS. VANN: The Applicant calls Dale Davis.

THE COURT: All right.

Whereupon, Dale Davis was called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: Please have a seat. State your name and spell your last name.

MS. DAVIS: My name is Dale Davis, D-A-V-I-S.

DIRECT EXAMINATION

BY MS. VANN:

Q Good afternoon, Ms. Davis.

A Hi.

Q Were you involved in Mr. Stanko's case?

A I was involved in the one in Georgetown.

Q And that was the case in 2006?

A Yes.

Q And what was your role in preparing for that trial?

A I was the mitigation specialist.

Q Are you currently a mitigation specialist?

A I'm retired now.

Q When did you -- when were you a mitigation specialist?

A I retired about two years ago, a little more than two years ago.

Q When did you start acting as a mitigation specialist in capital cases?

A I began around 1998. I was in the Public Defender's Office at the time, although I worked for the sheriff. I was in the Public Defender's Office, located there, and the Public Defender began sending me to trainings for it, and in fact, that may have been in 1994, but in 1998 was when I actively started doing this.

Q At the time of Mr. Stanko's case, were you a part of the

Public Defender's Office?
A No.
Q Were you -- you had your own mitigation company or business?
A Yes. In, in early 2000 I left the Sheriff's Department and began doing that on my own.
Q Roughly how many cases, capital cases were you involved in as a mitigation specialist?
A Somewhere 30 to 35.
Q Were all of those cases at the trial level?
A No. There were a couple of PCRs, mostly at trial level.
Q What courts were you a mitigation specialist in? Was it state and federal court?
A I did state, federal and military.
Q Did you attend any training specifically focused on capital defense or on mitigation investigation?
A Yes.
Q Do -- which?
A I attended many Life in the Balance which is Making the Case for Life. I attended a number of federal trainings, also the, the one that was mentioned previously of bring your own case, several of those, and then some other various things that related to it but weren't specifically -- mental health things and things like that weren't specifically death penalty.

Q And the bring your own case, this was the one in Charleston?
A The one with Mr. Stanko was in Charleston, yes.
Q Yes. And you brought Mr. Stanko's case?
A Yes.
Q And did you ask Mr. Diggs to attend that training?
A I did. I sent an e-mail letting him know that it was there and I live in Charleston. So I didn't need to have to stay, but it furnished everything, your rooms and everything.
Q At no charge to you?
A At no charge to the -- to -- it would have to the --
Q I would like to show you what's previously been identified as Applicant's Seven. Do you recognize that?
A Yes.
Q And what is it?
A It's -- I didn't read the whole thing, but it's asking approval to take the case to the capital defense training because it's privileged information. I needed to have the lawyer's permission to do that.
Q And who did you send that to?
A Bill Diggs.
Q Asking for his permission to take Mr. Stanko's case to this training?
A Yes.
MS. VANN: Your Honor, at this time I would like to move

to admit this as Applicant's Seven.

MR. ZELENKA: No objection.

THE COURT: All right. Applicant's Exhibit Number Seven admitted into evidence without objection.

(Applicant's Exhibit Number Seven [E-mail - Approval of Facts] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q At this time I'd like to show you what's previously been marked as Applicant's 19.

A Yes.

Q And do you recognize that?

A Yes.

Q What is it?

A It's a letter and a resume that I sent to Mr. Diggs.

Q When did you send that to Mr. Diggs?

A September 20th, 2005.

Q And is that an accurate copy of your resume at that time?

A Probably. Just a second.

Q Uh-huh.

A Yes. It appears to be.

Q Does this reflect the trainings that you had attended prior to being involved in Mr. Stanko's case?

A Yes.

MS. VANN: Your Honor, I move to admit this as

Applicant's 19.

THE COURT: Any objection?

MR. ZELENKA: No objection, Your Honor.

THE COURT: Applicant's Exhibit Number 19 admitted into evidence without objection.

(Applicant's Exhibit Number 19 [Davis Initial Letter and CV] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q When you're retained on a case as a mitigation specialist, what is typically your role?

A My role is to generally I am contacted by the attorney. I get whatever information they provide to me. I meet with the client and go through initially a lot of factual information about background and relatives and previous schools and addresses and family members with mental health issues. That's where I begin, and based on that information, and usually that takes several visits to complete, but I start gathering records, anything pertaining to the client that you can. When I get the records, I go through them and generally summarize them. Based on some records you will find reference to other records and so then I would seek those records out, meet with family members, try to get them to cooperate and hopefully find one family member that there's a real connection with because that person can help you with other family members that may be reluctant.

Q And who do you report your findings to?
A To the attorneys.
Q So it's safe to say that in 2005 when you became involved in Mr. Stanko's case you were an experienced mitigation specialist?
A Yes.
Q Do you remember how you initially became involved in Mr. Stanko's case?
A I had worked on a couple of death penalty cases previously with Gerald Kelly, and he was the second chair attorney, and he recommended both Vicki Childs and I to Mr. Diggs, and from there I sent him the information.
Q I've just handed you what is marked as Applicant's 20. Do you recognize that?
A It's billing for the case.
Q And it -- is it your billing for the case?
A Yes. It's my billing.
Q And you would keep those -- would you keep those records while you were participating in the case?
A Yes.
Q Are they an accurate copy of the time that you spent on Mr. Stanko's case?
A Yes.
MS. VANN: Your Honor, I'd move to admit this as Applicant's Exhibit 20.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: Applicant's Exhibit Number 20 admitted into evidence without objection.

(Applicant's Exhibit Number 20 [Davis Timesheets] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q Did you submit these timesheets for payment?

A Yes.

Q Who did you submit them to?

A I believe while they're, they're addressed to Mr. Diggs, it, it seems to me that I sent them to Gerald Kelly because I believe he was the one handling the money, if I'm not mistaken. That, that could be wrong.

Q Okay. Were you paid for all of the time that you submitted for your work on Mr. Stanko's case?

A On the last there was about somewhere between four and $5,000 that I wasn't paid for at the end. I was a little delayed or a bit delayed in the billing because we were moving in the course, at the beginning of the trial, and it had gone over the amount that the Judge had awarded initially. So Mr. Diggs would have had to have submitted another thing to get the order, and I just never heard anything more about it.

Q What was the makeup of the defense team for the Georgetown County trial?

A It was Mr. Diggs, Mr. Kelly, Vicki Childs and myself and there was sort of on the outlying area a woman named Califf that was supposedly the social worker.
Q Okay. And what were you asked to do specifically?
A To investigate his background, find information so that we could present mitigation in the mitigation phase of the trial. Mr. Kelly was the one primarily responsible for mitigation so.
Q Who did you report to primarily?
A I sent everything I got to both of them, but I probably had more contact e-mail-wise with Mr. Kelly, but when we came -- when we would have meetings periodically, not very often, but when we had those it would be the four of us together.
Q Who would you say was responsible for the strategy decisions?
A Mr. Diggs.
Q How much interaction did you as the investigator have with the attorneys?
A A lot -- not an awful lot of direct contact, but there was -- there were e-mails and phone calls and things like that, but I honestly can't, without looking at something that told me, I couldn't begin to estimate from then how much time it was.
Q Do you have an estimate of how many team meetings you had or how often you met as a team?

A I wish I'd had -- I'd looked over this before. I'm going to guess every couple of months, but again, I would have to verify that.
Q If you went to a team meeting, would that be recorded on your timesheet?
A Yes.
Q Who directed your mitigation investigation?
A Mr. Kelly was the one responsible for mitigation, but primarily because I had done it so often I just knew what to do and did that and reported my findings to them.
Q From your interactions with the trial attorneys, what was your understanding of the defense theory that was presented beginning with the guilt or innocence phase of the trial?
A The theory was that he was a psychopath and couldn't help but kill people.
Q And is it fair to say that the goal was to use that to obtain a not guilty by reason of insanity verdict?
A I guess.
Q When did you first come to learn that that was the defense theory?
A At the first meeting we had.
Q And who explained what the theory was?
A Mr. Diggs.
Q Was that a team decision to use that trial theory?

A No. There was never any team discussion of what the theory would be or typically you would gather all the information and then sit down together and look at the different options or what you think the theme should be based on information that you've gathered, but that was what his theory was and so it stayed that.
Q So you say typically you would have a discussion about the theory, but that's not what happened in this case?
A That did not happen in this case.
Q As far as you're aware, were there any expert evaluations prior to Mr. Diggs arriving at this theory?
A I'm, I'm not sure. I know that he had -- he already knew what he wanted to be done and he knew the experts that were going to do those specific things. I can't, because I wasn't directly involved, I don't really know exactly when they were done. Often, in most cases, I'm usually the one that does the contacting and sort of the go between with contacting expert witnesses, making arrangements for them to see the client at the jail or -- and provide them whatever they need when they see the client, but that wasn't the case here.
Q Okay.
A So I'm not sure when they were done.
Q I'd like to show you what has been marked as Exhibit 21. Do you recognize those?

A Yes.
Q And what are they?
A One of them is an e-mail from me to Gerald Kelly and Bill Diggs with copies to Johanna, who was his assistant, and Vicki Childs asking about the Stanko evaluations, if he had decided on anyone to use yet.
Q Okay. And Johanna was whose assistant?
A Johanna.
Q Whose assistant was she?
A Bill Diggs.
Q Okay. And the other e-mail?
A Is an e-mail to Gerald Kelly. The first one is dated March 10th, and then this one is also dated March 10th saying, "I don't know if you knew anything about the cancellation of these, but they were scheduled before I was on this case and before any records were collected. A week before he was supposed to be evaluated the doctors had not gotten any of the requested documents. The doctor's office called him to find out why they didn't have the documents and were told that the lawyers had decided not to use them."
Q And do these refer to evaluations scheduled for Dr. Donna Schwartz-Watts and Dr. Brawley?
A Yes.
MS. VANN: Your Honor, at this time I'd move to admit these as Applicant's 21.

THE COURT: Any?
MR. ZELENKA: No objection.
THE COURT: Applicant's Exhibit 21 admitted into evidence without objection.
MS. VANN: Thank you.
(Applicant's Exhibit 21 [E-Mails - Other Expert Evaluations] admitted into evidence and appropriately marked.)
BY MS. VANN:
Q Do you know if these evaluations ever took place?
A To my knowledge they didn't take place by them because they weren't present at trial.
Q Okay. Do you know how Mr. Diggs came up with the theory that Mr. Stanko was a psychopath who could not help killing people?
A I believe I do.
Q And what is that?
A There was a case in Augusta, a man named Rivera, who used the exact same doctors, defense and everything in a death penalty case there.
Q And was that doctor Dr. Sachy?
A Yes.
Q Do you know how Dr. Sachy came to be involved in the case?
A I don't. I'm assuming the lawyer contacted him.
Q Okay. After you heard about Mr. -- Dr. Sachy's

involvement in the case, did you do any research yourself on Dr. Sachy?

A I think I probably just did a Google thing or something like that. I mean, I knew because I had also -- I had seen that case in the paper, and there was a picture of him in the article that I read from Augusta. So I had seen that.

Q Did you contact any other people in the field about Dr. Sachy?

A If I did I don't remember.

Q Okay. I'd like to show you what's been marked as Exhibit 22.

A Okay.

Q Do you recognize those documents?

A Yes.

Q And what are they?

A It's an e-mail about all of the publications and media that had happened around the trial and the -- when it happened and the upcoming trial and also the Augusta paper article with Dr. Sachy in it.

Q Okay. And what are the attachments that are included in this exhibit?

A Experts debate brain data, doctors argues -- doctor argues Rivera's health and Judge to rule on theory's viability that had to do with the Augusta case, and there's a picture of Dr. Sachy.

Q So these are about Dr. Sachy's involvement in the Rivera case?
A Yes. As well as media --
Q Correct.
A -- attachments.
Q And who did you send this e-mail to?
A Bill Diggs, Gerald Kelly, Johanna and Vicki.
Q And when did you send it?
A March 26th, 2006.
MS. VANN: Your Honor, I move to have these admitted as Applicant's 22.
MR. ZELENKA: No objection.
THE COURT: Applicant's Exhibit 22 admitted into evidence without objection.
(Applicant's Exhibit Number 22 [E-mail - Sachy Information to Counsel] admitted into evidence and appropriately marked.)
BY MS. VANN:
Q Did you learn of the outcome of the Rivera trial?
A Yeah. I read it in a paper.
Q What was the sentence in that case?
A It was a death sentence.
Q Did Mr. Diggs, to your knowledge, ever consider any theory other than this psychopathy theory?
A He did not.

Q Was there ever any dissent among the defense team from that theory?
A There was dissent from me. I just thought it was a crazy theory to expect a jury to spare your client's life when you were telling them he couldn't help killing people. It just seemed bizarre.
Q And did you share that concern with Mr. Diggs?
A Yes.
Q And how did he respond when you shared that concern?
A He just -- it just sort of went over his head was my opinion. He just was so laser focused on this defense that -- I mean, he wasn't rude to me or anything, but I just don't think he was hearing it.
Q I'd like to show you what's been marked as Applicant's 23.
A Yes.
Q Do you recognize that e-mail?
A Yes.
Q And what is it?
A It's an e-mail from me to Bill Diggs, Gerald Kelly and Vicki Childs.
Q And when was this sent?
A December 19th, 2006.
Q And what is the e-mail about?
A It's about -- it's Science News Online about

psychopathy.

MS. VANN: Your Honor, I move to have this admitted as Applicant's Exhibit 23.

MR. ZELENKA: No objection.

THE COURT: All right. Applicant's Exhibit 23 admitted into evidence without objection.

(Applicant's Exhibit Number 23 [E-mails - Post-Trial Psychopathy] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q What was the purpose of sending this e-mail?

A I guess I kept hoping that somehow he would see the light and realize that it just wasn't a viable defense.

Q And did you highlight or mark out a specific paragraph from the article within the body of your e-mail? I think at the top of the first page you say, "This paragraph from the article below is" --

A Oh. Oh. These -- yeah. This paragraph is from the article below regarding psychopaths.

Q And did you underline a sentence of that?

A Yes.

Q What was that?

A "New study suggests that being labeled a psychopath increases the likelihood that an offender will be locked up indefinitely or even executed."

Q And was this sent after the Georgetown County trial was

over?
A I'm sorry. Can you, can you tell me when the trial was? I'm not -- I know it was in 2006, but I'm not sure when.
Q I think it was --
A I probably can tell from these timesheets.
Q Right.
A I, I think it was sent after. It was in August 2006. So, yes. It was after.
Q But was this before the Horry County trial?
A Yes.
Q So you sent this in between the trials?
A Yes.
Q Okay. I'd like to talk a bit about your specific investigation in this case. So your role was to conduct the social history investigation. Could you describe it briefly what you did particularly in this case?
A I spent a good amount of time with Stephen and found out he was raised in Goose Creek, which is very near Charleston. So I had a lot of access as opposed to having to travel a distance. I got his school records, medical records. His dad was in the military, and he was actually born in Cuba. I -- his family, I got one of his sisters to help me with contact with his mom because his dad was not real compliant with her meeting with me, and so I -- she eventually did sign a release for me so I could get her records from his birth as well. I

collected records. I talked to the teachers. I got his prison records, went through those. I had photographs. There were a number of things that he participated in school, was very active in high school, very smart, graduated, it seems like he was 11th out of a class of 200 and something people. He was -- seemed to be headed for great things. I talked -- he told me about some incidents that had happened where he was hit in the head a couple of times. I got in touch with the people that he told me were there when that happened. Unfortunately, because of the military, it took a long time to get records, but I -- he had gone to the naval hospital in Charleston and that hospital had closed. The records apparently had not been to St. Louis where they're normally collected, and I never was able to get that, but I was able to contact the person that had been there when that happened so.

Q And did you pass the information that you discovered along to the attorneys?

A Yes.

Q How did you convey that information?

A Often I scanned it, and because they were in Myrtle Beach and I was in Charleston, often I would scan it. If it was a good bit of stuff I may copy it and mail it, but more often than not I scanned and e-mailed a lot of the stuff.

Q What about your interviews with people? You said some family and friends. How would you convey that information?

A By e-mail.
Q Okay.
A Would do a report of the interview and then attach it to an e-mail.
Q What did you expect that the attorneys would do with the information that you passed along to them?
A Read it and hopefully use it. I mean, generally, that would be used to make a plan or theory for strategy.
Q Did you expect that it would be passed along to the experts involved in the case?
A I expected that it would. Generally that's something I do, but in this case since I wasn't involved with the experts, I would think they would have passed it along, but when I sent it I'm really not sure what happened to it after that.
Q So do you know if the experts received the information you collected from your social history evaluation?
A I don't. The only record that I know for sure got to an expert was the one that of Stephen's birth records and his mom's records. That's because I got input back on that.
Q I'd like to show you what's been marked as Exhibit 24.
A Yes.
Q Do you recognize that?
A Yes.
Q And what is it?
A I didn't read the entire thing, but it's about talking

about after spending time with him and looking at some of the things he had that I thought he had some obsessive-compulsive tendencies, particularly to do with writing because books that he had kept in prison had these minute details from the time he woke up with the time till, "I got up. I went to the bathroom. I put on my clothes. I", you know, it was just minute details that just were page after page after page after page, and I said the number of notebooks, seven Mead subject wireless notebooks each with 100, 150 pages that were covered. I meant, it was just -- I hadn't ever seen that kind of writing for that extent.

Q And the other attachment to this e-mail, what is that?

A The other what?

Q The other?

A Oh, I'm, I'm saying what is hypergraphia? What causes it?

Q Okay. And who did you send this e-mail to?

A To Jeff McKee, which I, I must have -- maybe I thought at the time he was going to be involved in this, and I'm not sure if he was or not, Bill Diggs, Vicki Childs and Johanna.

MS. VANN: Your Honor at this time, I move to admit this as Applicant's Exhibit 24.

MR. ZELENKA: No objection.

THE COURT: Applicant's Exhibit 24 admitted into evidence without objection.

(Applicant's Exhibit Number 24 [E-mail - Hypergraphia] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q Is it safe to say that the purpose of sending this e-mail was to indicate that you thought perhaps Mr. Stanko had hypergraphia?

A I just thought he -- it seemed to be obvious that he had those obsessive-compulsive things, and part of my role is just to recognize things like that. I don't diagnose them or do anything with it, but pass that information on to someone, a psychologist or whoever is doing it so that they can look at the information just to recognize behaviors that may indicate that.

Q Do you know if this information ever got passed along to the experts?

A I don't. The only indication I had that it wasn't was when we were in the witness room at trial, Dr. Sachy was in the room with me, and I mentioned it to him, and he didn't seem to know what I was talking about or be interested in it. So I don't know whether it was a lack of interest or he just never got it.

Q Did you ever meet with any of the experts before the trial?

A Me personally?

Q Yes.

A The only person that I recall was we had a meeting where the person that they were calling a social worker was supposed to be at, but we were all there, and I think she was about two hours late, and it was, I mean, we were breaking up by the time she got there, and the next time I saw her was at trial.

Q And is that person Evelyn Califf?

A Yes.

Q What was her role supposed to be in the case?

A I think I had probably harped about a social worker to present the information and because I had -- I don't testify. I just gather the information, and so that was who he had hired for that role, but I'm not sure if she had not done it before, didn't understand what she was supposed to do, but typically, when I do that, I have all of the interviews I've had and then the social worker would contact the people that we were going to use for witnesses or part of his life and either confirm the information or get more information from them and meet with the client and, I mean, be an integral part of the team, but she -- I know that she did not contact people because when I was getting in touch with them before trial as far as making arrangements for them to come to trial and testify and getting memorabilia and some things that they had, they had not heard from her, and the only time she saw Stephen was about 10 minutes in lockup before she testified, and then

she seemed to be testifying using my information and testifying as if it were her information.

Q Do you remember when you first told Mr. Diggs or did you tell Mr. Diggs that you thought a social worker was needed on the case?

A I'm sure I did.

Q Do you remember around when?

A I don't know. I'm, I'm surprised there's not an e-mail about that, too.

Q I'd like to show you what's been marked as Applicant's 25.

A This is a discussion I had, asked -- saying that we needed to think about a social worker and an adaptation expert.

Q And who did you send that to?

A Bill Diggs with a copy to Gerald Kelly.

Q When did you send that e-mail?

A June 28th, 2006.

Q Okay. And are there other e-mails in this packet?

A Yes. On June 30th saying -- oh, it's from, from Bill Diggs to all of us on the team. He's meeting with Evelyn Califf at his office. She's agreed to do this, and she would put -- he would put her in touch with me, and then he says again -- just -- this one is just to me, "Dr. Evelyn Califf will be calling you about Stephen. Want you to tell her what

you've uncovered, a past, etcetera." He gives me a phone number and an e-mail, and then there's from Gerald Kelly to William Diggs with copies to us about a social worker saying that we met in his office in Hampton, saying -- this is July 14th, 2006. He's saying in the -- near the end of it, "But a social worker type expert is needed and CP, and the chain of witness must be produced," CP being -- who is CP? He was -- he used initials.

Q Right. I think that was Connie Price.

A Okay.

Q One of the witnesses he was investigating.

A Oh, okay. That's one of the witnesses. Right. And then from me to them saying, "I was given the name of Dr. Evelyn Califf, but, but have not been contacted by her. I believe Bill was meeting with her in late June. Bill, did this work out?" That was July 14th, 2006.

Q And these e-mails were between the members of the defense team?

A Yes.

MS. VANN: Your Honor, I move to have these e-mails admitted as Applicant's Exhibit 25.

THE COURT: Any?

MR. ZELENKA: No objection.

THE COURT: Applicant's Exhibit 25 admitted into evidence without objection.

(Applicant's Exhibit Number 25 [E-mails - Concern for Social Worker] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q Was Mr. Diggs immediately responsive to your suggestion that you -- that the trial team obtain a social worker?

A I don't think so.

Q Did you yourself ever contact someone about being involved as a social worker?

A Yes. I eventually called Jan Vogelstein, who is in Greenville, and nationally known social worker about being involved, but because she's so scheduled up, she did not have time. She couldn't do it, and it was such short notice that I figured that when I called her, but thought I would try.

Q And do you know around the time that Dr. Califf ended up becoming involved in the case?

A Like I said, I saw her that one time at his office and, and that was not too long before the case started, but I, I never saw her or talked to her again. So I don't really know what her involvement was with Bill.

Q Okay. I'd like to show you what's been marked as Exhibit 26.

A This is dated July 21st, an e-mail from Gerald Kelly to Evelyn. This is got EV. It's just saying that he wants her to get in touch with me, that they want to -- what they want

her to do to present his history and to know about his first Department of Mental Health for -- when he asked for that, prison history, behavior and occupation, schoolwork, social history, that I would be invaluable to her, that I've been on the case collecting information. "Please work closely with Dale. You have little time to prepare, and you need her help. He's going to be in Georgetown on Monday and can meet with her."

Q And were you copied on that e-mail?

A Was I -- yes. I was.

Q And the second one?

A The second one is July 25th, 2006, from Gerald Kelly to Bill copied to Vicki and I saying what will be her role in the trial, what are you expecting her to do. "At this point I'm preparing a proof to demonstrate that Connie Price" -- some stuff about a witness. "I've encouraged," me, "to work with and help Dr. Califf. As of today I know of no progress by Dr. Califf. I mentioned this to you because Dr. Califf and client's history is in your column of obligations." I -- then I'm talking about his sister living in California and her being part of mitigation.

MS. VANN: Your Honor, I move to have this admitted as Applicant's Exhibit 26.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: Applicant's Exhibit 26 admitted into evidence without objection.

MS. VANN: Thank you, Your Honor.

(Applicant's Exhibit Number 26 [E-mails - Califf Involvement] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q Did you think that the time that Dr. Califf had between when she first became involved and when she testified at trial was enough time for her to prepare?

A If that's all she had been doing in that time maybe, but not with just, you know, a little time here and there. It was, it was very close. You typically don't have a social worker getting involved in a case that late.

Q Did you have any specific concerns about Dr. Califf's qualifications to testify as a social worker in this case?

A Well, I did because, first, she wasn't a social worker, but I didn't think that she had done death penalty work before. I mean, I just wasn't sure she understood what it was she was supposed to be doing.

Q Did you share any of those concerns with the attorneys on the case?

A Again, it's, it's been a while, but I'm sure I did, and particularly I believe one of the e-mails addressed me not hearing from her and that she wasn't a social worker.

Q Uh-huh. Now, after the Georgetown County case was over,

were you involved in any sort of debriefing with the team to discuss what worked or what may not have worked at the trial?

A No.

Q Were you involved in Mr. Stanko's Horry County trial?

A No.

Q Why was that?

A Because I was just extremely unhappy with the way the case, the way it was handled, that there really wasn't any team really involved. I thought, again, that it was just a crazy defense. It was really a prosecution case, not a defense case, and I just didn't, I didn't want to be involved in it. I just felt like you were just walking somebody to death's door.

Q I'd like to show you what has been marked as Applicant's 28. And do you recognize that?

A Yes.

Q And what is it?

A It's an e-mail from Bill Diggs to me asking if I can, "Prepare your presentation of mitigation evidence for the second trial," and I told him, no, I wasn't taking anymore cases, that I was retiring when I completed the two I had left.

Q Okay. And the second e-mail?

A Does it start at the bottom?

Q No. I think it starts at the top of the second page

with the initial e-mail at the bottom?
A Oh, okay. I, I guess I had gotten something from Vicki where he had asked her to be involved with the second trial, and she said what she got today, and I just said, "Me, too, there wasn't a chance in hell for me."
MS. VANN: Your Honor, I'd move to have these admitted as Applicant's 28.
THE COURT: Any objection?
MR. ZELENKA: No objection.
THE COURT: Applicant's Exhibit 28 admitted into evidence without objection.
(Applicant's Exhibit 28 [E-mail - Investigators Stanko II] admitted into evidence and appropriately marked.)
BY MS. VANN:
Q So in the e-mail from Mr. Diggs to you, what does he ask for you to do?
A He wants me to, "Prepare your presentation of mitigating evidence for the second trial."
Q Did that say anything to you about Mr. Diggs understanding of mitigation?
A Just said everything to me about his understanding of mitigation.
Q What do you mean by that?
A I just think that an attorney that does death penalty cases would not phrase something that way. They would ask me

to be a mitigation investigator. They would ask me to work on the case, but it was as if I had this PowerPoint that I was going to show to the jury and that was, I mean, it just -- the way it was phrased was just strange to me.

Q Did you get the sense that he was asking you to basically present what you had presented before?

A Yeah. He -- that he just -- I already -- they already had everything, and if I would just come up there and bring the stuff from the other trial and present it. I mean, that was my impression anyway.

Q And in your response to him you said you're not taking any more cases, you're retiring after you complete the two that you have left, is that the actual reason why you didn't want to be involved in the case?

A No. I just -- I was trying to be nice.

MS. VANN: One moment, Your Honor.

THE COURT: All right.

BY MS. VANN:

Q I have no further questions. Thank you, Ms. Davis.

CROSS EXAMINATION

BY MR. ZELENKA:

Q Ms. Davis, are you familiar with the ABA Guidelines?

A Yes.

Q Were you familiar with those guidelines in 2004, 2005, 2006?

A Yes.
Q What is the role of a mitigation investigator?
A It's to do a social history, investigate the background of the client, collect records and work at the direction of the trial attorney.
Q Okay. Did you collect school records?
A Yes.
Q Did you collect military records?
A He didn't have any military -- well, I, I collected some medical records from the military.
Q Okay. School records, his hospital records that you were able to get, institutional records from his prior incarceration, did you find those?
A Yes.
Q Did you speak with any witnesses?
A Yes.
Q Who'd you speak to? Do you recall?
A I spoke to a number of teachers, to his sisters, to his brother, to his mother one time by herself, and to his parents together with his sister another time.
Q Okay. How did you organize the material that you assimilated? Did you put it in a notebook?
A Yes. I put them -- I typically put it in a notebook.
Q Okay. Were those notebooks available for the defense team?

A Yes.
Q Did you give them to them or do you still retain possession of those?
A I have -- I generally make one for them and one for me and but in this case a lot of the things that I sent because of the distance between us I was just sending him the records rather than compiling them in a notebook. I, I did compile some things, but as more and more records got collected I was just e-mailing them --
Q Okay.
A -- to Mr. Diggs and, and Gerald Kelly.
Q Are there any particular witnesses based upon your understanding of the guidelines that you should have interviewed, you should have contacted to develop that social background?
A I, I think I contacted most people that I needed to. Offhand --
Q Okay.
A -- I can't recall anybody I wanted to.
Q And you kept those records?
A Yes.
Q Provided those to the lawyers so they could read them?
A Yes.
Q Or for anybody in the future who may want to read them; correct?

A Yes.
Q Let me make sure I understand something you said about your voucher.
A About what?
Q Your vouchers. You have not been paid in full; is that the way I understood your testimony?
A There was four or 5000 -- when these cases start a Judge signs an order with a certain amount of money on it, and because we were up here for so long and had housing and those kinds of things, I don't know that that was the whole thing, but anyway, it went over what the Judge had allowed by four or $5000, and so I submitted that separately, but because the lawyer had to go back and get another order for those I guess it was just never done because I never got paid the rest of the money.
Q Okay. It, it exceeded the Judge's --
A Right.
Q -- level?
A Uh-huh. Yes.
Q Were you aware of the Judge's level that he had set while you were working on the case or did that come as a surprise to you?
A No. I knew what it was.
Q Okay. My hearing heard 45,000. So that's --
A Oh, no. I wish. Well, I don't wish. I lost it.

Q Okay. One of your concerns that you expressed was you never had a team discussion about whether to go forward on the insanity theory; is that correct?
A We never had a team discussion about what the strategy for the case would be, the strategy for the mitigation case.
Q Okay.
A Really or the other, the other case as well, but, but the mitigation was the thing I was concerned about that we never discussed that based on gathered information.
Q Okay. What did you think the mitigation strategy should have been based upon all the work you did on the case and your experience in, in other capital cases?
A Well, I, I think that without going into a long thing about what I thought, I just thought that we needed to present he had been a good guy for a really long time and he -- all of those things -- anything that we put out was going to be overshadowed by the psychopath, the psychopathy. It really didn't make much difference how much information we gathered showing all of the good things. It simply could not overcome the psychopathy issue.
Q Okay. You're aware based upon your investigation of some of the State's theory on their mental health view of the Defendant; weren't you, from Dr. Crawford?
A I, I knew that Dr. Crawford had tested him. Yeah.
Q And what --

A And I -- well, I imagined it was probably the same thing. I don't know that for certain because it's been, it's been a long time since I've read any of this stuff, but I expect it probably was the same.
Q Okay. Would it refresh your recollection if I said narcissistic personality disorder with antisocial traits? Does that refresh your recollection?
A That sounds right.
Q Okay. So there was some evidence that was going to come in potentially in the penalty phase at least?
A That's true, but the Defense shouldn't be presenting it. I mean, I understand that the State's going to do that and that's the reason you have the Defense to offset that. I, I understand it would have come in regardless, but I just didn't think we should be the ones bringing it in.
Q Okay. So as I understand it, it's basically your position that, that while the Defense investigated with their expert and their expert gave them an opinion that he had an antisocial personality disorder, the Defense should have shelved that opinion?
A I'm sorry. I don't quite understand what you're asking me.
Q Well, Dr. Sachy did an evaluation of Mr. Stanko; correct?
A Now, I'm sorry. Now I understand what you're now, but

Dr. -- that was the defense. That's the reason Dr. Sachy was the selected psychology, at least in my opinion, he was the selected psychologist is because when you're doing that defense, I mean, that's, that's the evaluation you want.

Q So what you're saying is you can buy an expert or buy this expert and he would automatically say what you want them to say?

A No. What I'm saying is that you can get information and frame it in a lot of different ways. A person having a brain disorder can make them impulsive or make a lot of different things happen, but you can take information and present it in different ways, and when you present a compelling story about a client's life and what they've done, it makes -- sometimes, hopefully, often, it makes the jury understand a little bit more about them and care what happens to them.

Q Okay.

A And I don't think when you start out with that in the forefront that a jury is ever going to care what happens to the person.

Q Okay. The Defense theory in the Georgetown case was complex. It didn't just rest upon Dr. Sachy's opinion; correct?

A No. There was a whole -- there were other experts involved with it from the brain scan, and I didn't understand all of it, frankly, but I do understand brain damage.

Q Okay. But it, but it was talking basically about brain damage and a broken brain that caused him to be in the position he was in; correct?
A Yes.
Q But Dr. Sachy in the Georgetown case was not the only expert witness who testified your client was insane as a matter of South Carolina law; correct? Dr. Thrasher, Dr. Thrasher also testified that way?
A I don't remember that name. There was a doctor from California who testified about the scans, and I think a Dr. Einhorn, but those are the only ones I remember.
Q So you remember Dr. Wu from California?
A Right. Right.
Q And Dr. Einhorn who did the PET scan, but you don't remember Dr. Thrasher or Dr. Albiniak's testimony?
A Now, Dr. Albiniak, I, I do remember his testimony. I had -- he had testified in trials that I had worked with him before. So I was aware of him, but I don't remember the other name.
Q Okay. Are you aware of what happened as far as any investigation or review of your materials before the trial we're concerned about here today in Horry County?
A I know that the information was used because I got calls in the course of the trial about it, during -- but I just know the information was used. They had my notebooks. They had

the things that I had put together. So I do know that it was used.

Q Okay. And if I understand your testimony correctly, other than your input on what theory to go forward with, your work in gathering records and materials was completed by the time of the Georgetown trial?

A Yes. I mean, I, I just didn't want any, any additional involvement.

MR. ZELENKA: The Court's indulgence.

THE COURT: All right.

MR. ZELENKA: Thank you, Your Honor. No further questions.

THE COURT: Redirect.

MS. VANN: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. VANN:

Q Was it your job to ultimately decide what the defense theory was for the case?

A It's never. That's the attorney, that's the attorney's job.

Q And I think from your testimony earlier you said that when you heard what the defense theory was going to be that you told Mr. Diggs it was a bad idea?

A Yes.

Q Was it your job to select the experts that would be

involved in the case?
A It's, it's not my job necessarily to select the experts, but just from other cases because while I've worked out of the state and in other places, I've worked primarily in South Carolina, and there from that I just knew the different experts that handled different things, and so if the attorney had somebody they wanted, then, you know, that was who you used, but often I was the one who contacted the experts.
Q But the ultimate decision of who the expert would be would be up to the attorney?
A Right. Definitely.
Q And when you got involved with the case, did Mr. Diggs already have the experts chosen for who would testify or who would be involved?
A As far as I know, again, because from my first involvement the, the theory was already set. So I'm assuming based on that that he had already selected the experts, and when I say -- I don't know that I ever said to him this is a bad idea, but I just said some similar to the things that I've said here today as to reasons why I didn't think it would work.
Q Thank you.
MS. VANN: Nothing further, Your Honor.
THE COURT: All right. You may step down.
A Thank you.

THE COURT: Thank you. All right. Do we want to break for the day or do we -- you have anybody else?

MS. PAAVOLA: Your Honor, we have one more witness who's here today, and I believe she will be very short, and I think she would probably appreciate it if we can squeeze her in.

THE COURT: All right. When you say squeeze her in, are you talking about an hour's testimony or 10 minutes testimony or --

MS. PAAVOLA: No, sir. I'm estimating 15 minutes at the most.

THE COURT: All right. You can call your next witness then.

MS. VANN: The Applicant calls Vicki Childs.

THE COURT: All right.

Whereupon, Vicki Childs is called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: Please have a seat, state your name for the Court and spell your first and last name.

MS. CHILDS: My name is Vicki Childs, V-I-C-K-I, C-H-I-L-D-S.

DIRECT EXAMINATION

BY MS. VANN:

Q Hi, Ms. Childs.

A Hello.

Q Were you involved in Mr. Stanko's cases?

A Yes.
Q Were you involved in both of the cases?
A Yes.
Q And what was your role?
A I was hired as the fact investigator and an order by the Judge was given to me indicating that I would be the fact investigator.
Q Do you, do you remember when you initially became involved with Mr. Stanko's case?
A In the first case, the Georgetown case, Dale Davis and I had worked a case together in Beaufort, South Carolina, when Mr. Kelly was first chair on that case. So it was my understanding that he recommended us to Bill Diggs, and then Bill Diggs asked us to come to his office, and it went from there. So yes. That's when I was hired.
Q I'd like to show you what has been marked as Applicant's 29.
A Okay.
Q Do you recognize those?
A Yes. These are invoices that I provided to Mr. Diggs for services in the Stanko case.
Q And are they an accurate copy of the time that you spent on Mr. Stanko's case?
A Yes.
MS. VANN: Your Honor, I move to have these admitted as

Applicant's 28.

MR. ZELENKA: No objection.

THE COURT: 28 or 29?

MR. ZELENKA: 29.

MS. VANN: Sorry. I apologize. 29.

THE COURT: All right. Any objection to Applicant's Exhibit 29?

MR. ZELENKA: No objection, Your Honor.

THE COURT: All right. Applicant's Exhibit 29 admitted into evidence without objection.

(Applicant's Exhibit 29 [Childs' Timesheets] admitted into evidence and appropriately marked.)

BY MS. VANN:

Q Do your timesheets show approximately when you had your first involvement in the case?

A It looks like these are for both cases, so I think.

Q Okay. In the Georgetown case?

A January '06, maybe. For the ones that I have here, yes, January '06 it looks like.

Q Okay. And at the time of Mr. Stanko's case, approximately how many capital cases had you been involved in?

A Prior to his, I think three, I think.

Q And was your role in those cases as the fact investigator as well?

A Yes.

Q And who, for the Georgetown County case, who on the trial team did you interact with mainly?
A Mainly with the gatekeeper whose name was Johanna. It was difficult to get in touch with Mr. Diggs a lot. So I e-mailed him a lot, and if I called I usually got her, whether I asked for her or not, and then sometimes I would get to him or he would return calls, but mostly I had to pass information through her.
Q Did you have much interaction with Mr. Kelly?
A Yes. I had interaction with him as well because when we had team meetings typically we were all there or at least Mr. Diggs, Mr. Kelly and I were there.
Q Approximately how often did you meet together as the full team?
A You want me to refer to this or just from recollection?
Q Either way.
A Okay. I know initially we tried to meet fairly often. My basic role was to look over police reports, investigative reports, crime scene investigation notes, photos, autopsy photos, talk with Mr. Stanko regarding any fact witnesses that he may know about that either were in the police reports or not in the police reports. So I went out and did a lot of that stuff because I knew what to do, but I provided all of my reports to Mr. Diggs and Mr. Kelly mostly via e-mail.
Q In preparation for the Georgetown County trial who did

the mitigation investigation?
A Dale Davis.
Q And were you involved in the mitigation investigation for Georgetown?
A No. There were, I think occasionally there were witnesses that I needed to see and Dale needed to see, and sometimes we might go together and then she mostly interviewed those people alone. So sometimes I would ask them a few questions for things that I needed and then leave her alone with that person because that's -- she works best doing that part, and then I would do my part, and sometimes it would include follow-up investigations with them. So mostly I did the work on my own and then Dale did work on her own and we reported back.
Q As a fact investigator for Georgetown, what kind of issues were you investigating?
A I was looking at the way the case was investigated. I was looking at how Stephen and Laura Ling met and what friends knew about their relationship. I interviewed some people, for example, that Stephen had told me about, Connie Price, and I interviewed her and other people that, that were involved in the case either with law enforcement or other, other fact witnesses that we knew would be called by the Prosecution and that we needed to talk to as well.
Q And from your meetings with the Defense team what was

your understanding of the defense theory to be presented beginning in the guilt or innocence phase of the trial?

A Bill Diggs focused a lot on the, the PET scan that was done and Dr. Wu's testimony. I remember specifically when he got the CD or DVD from Dr. Wu that showed the color PET scan and then Dr. Wu's analysis of that PET scan and what he thought about it, based on the studies that he had done, I've never seen somebody so excited. It was like a kid in a candy store. He was beaming because this was revolutionary and it was going to change the way things were done and it was going to change capital defense and it was Christmas.

Q Did you have any concerns about the defense theory?

A I, I don't know that I had concerns about that PET scan because I have a Master's Degree in criminal justice and I currently teach criminal justice. So I'm familiar with Adrian Raine and some other people who have studied criminals and studied murderers, for instance. So I'm familiar a little bit with how they think these people think. So I wasn't necessarily concerned about that. I became more concerned and I think Mr. Kelly and, and Dale and I were all concerned somewhat that the whole psychopathy information was going to be presented, and you know, we were, we were concerned somewhat that how do you express to a jury both in the guilt and innocence phase and also in the mitigation phase, how do you tell them this guy is this way but you shouldn't kill him

or you shouldn't convict him for that matter. I mean, it, it still is a conviction is necessary here, too. So, yeah, I think some concern about that.

Q After the Georgetown County case was over did the defense team do any sort of debriefing or discuss what had worked and what had not worked?

A Not that I recall. The kid, the kid in the candy store with the balloon was deflated somewhat. So, yeah. I don't recall any. I would love to have gone and talked to every juror to see what they thought, but that, that wasn't in the budget, and I wasn't given permission or authority to go do that. So I didn't.

Q Some of the jurors were interviewed for the 48 Hours; is that correct?

A Uh-huh.

Q Did you see the 48 Hours episode?

A Yes. At the time. I haven't seen it since.

Q Okay. Did you see that prior to the Horry County trial?

A Yes. I believe so.

Q Do you know approximately when it aired?

A No. I don't remember.

Q Was it before the Horry County trial?

A I think so. Yeah. I think so. I don't remember the exact date, but yes, I believe it was before the Horry County trial.

Q To your knowledge were there ever any discussions of changing the defense theory --
A No.
Q -- before the Horry County case? How did you become involved in the Horry County case?
A Mr. Diggs asked me to continue working on, on that case. Some of the work I had done for Georgetown was crossover, but because it was an entirely separate murder there was separate crime scenes, separate photos, separate autopsy, separate fact witnesses.
Q And what was your role, what were you asked to do for the Horry County case?
A I was asked to be a fact investigator.
Q Okay. Who was on the Horry County trial team?
A Mr. Diggs, Brana Williams and myself.
Q Who was lead counsel in Horry County?
A Mr. Diggs.
Q For the Horry County case, how much contact did you have with the attorneys?
A Most of it was via e-mail and phone call. We did meet at his office several times and sometimes he would be there, sometimes not. Sometimes he would be there briefly.
Q He being Mr. Diggs?
A Mr. Diggs, yeah. And, and, you know, Brana Williams was usually there. I think I met with Brana a couple of times not

at Mr. Diggs office, but typically it was there.
Q Did Mr. Diggs ever ask you to do any investigation specifically for the Horry County case?
A Other than, you know, going out and doing the fact investigation that I would typically do, and talking with witnesses, reading over those police reports, going to look at the evidence at the Horry County Sheriff's Office, talking with Stephen, again, about potential fact witnesses and things like that.
Q Was there a mitigation investigator for the second case?
A No.
Q Did you take on any of the responsibilities that would typically be assigned to a mitigation investigator?
A Yes.
Q What kinds of things were you doing in the mitigation role for Horry County?
A It was, it was later in the game. I was asked to run down mitigation witnesses, and by that I mean contact them, locate them, get their addresses, get their phone numbers, issue subpoenas for them if we planned to use them. There were some mitigation witnesses in the second trial that were not used in the first trial either because we couldn't find them or maybe some new information came up. We -- Bryan Wilson, who was a friend of his in high school that was with him when he got hit in the head, came and testified in the

second one. So I was in contact with several people. There was also a Mr. Shealy that wasn't known about in the first one that we had in the second one. So I had to go get his information and see him, make sure all these people got called. So during the mitigation phase ordinarily I either wouldn't be there or I would just be on the periphery perhaps to go serve subpoenas if necessary, but in, in this case I was running back and forth making phone calls saying, "Okay. We're going to need you on this date at this time, so please be here". So I became totally responsible for getting mitigation witnesses here, where in the past I would not have done that.

Q Would you consider yourself an expert in mitigation investigation?

A No.

Q Would you have liked to have had a mitigation investigator work alongside you on that case?

A Well, I think it's essential when you have especially a case like this, especially any capital case, but especially when you have new witnesses that had never been spoken to previously. So if I had to contact some witnesses again for the second trial that had been used in the first trial, I could look at Dale's notes of her interview, and I would know what that person was going to say and I could go talk to them again and, you know, ask them if they had anything to add, but

the ones that I had to locate myself and interview myself and prepare for testimony, that was all new stuff that we didn't use in the first trial.

Q And who was directing what you were doing for mitigation purposes?

A Bill, and, and to some extent Brana. She was much more accessible than he. So it was easier for me to get her on the phone and say, "What do you think about this," or, "I found this person and, you know, we may want to use this person or we may not," you know, mostly her because she was much more easily accessible without a gatekeeper.

MS. VANN: Just a moment, Your Honor. No further questions.

THE COURT: Cross examination

MR. ZELENKA: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ZELENKA:

Q Ms. Childs, in going to the Georgetown County case, did you do any factual investigation concerning the Turner murder in preparation for the penalty phase in the Georgetown case?

A In preparation for mitigation?

Q That the State was going to present possibly information concerning Turner's murder in the penalty phase of the Georgetown case, did you look at that at all?

A I, I recall looking at the Turner case and doing some

work on the Turner case, but I don't know that I specifically was doing it for the penalty phase. I don't recall that.

Q Okay. In your role of the fact investigation, did you at any time have an alternative theory other than insanity to present to --

A No, sir. Wasn't, wasn't my job. No, sir. Didn't have an alternative theory. No. That's not my role.

Q In investigating the facts of the case was there a guilt phase theory that you could have used concerning Mr. Stanko's factual guilt for committing the Turner crime?

A For the Turner crime? You mean in Georgetown was I looking at the Turner -- I'm sorry.

Q I, I got ahead of you and then I twisted back.

A Okay.

Q With respect to the Horry County case, in your factual investigation concerning the Turner murder, was there an alternative defense theory that was evident to you?

A Other than what?

Q That's what I'm asking, other than the insanity that was presented?

A I'm sure we talked about stuff. I don't have any special recollection about a theory. I do remember going with an expert witness named Brent Turvey and we went to the actual scene. We talked about what we thought may have happened and how it may have happened and what the events that took place

based on what we knew from the police report and from Stephen. Did that present some sort of defense? I'm not sure that it did.

Q Okay. Let me show you Exhibit 29 and ask you to refer to -- that's --

A Okay.

Q -- the 2009 entries?

A Okay.

Q That reveals that you went to Lieber, spoke with the client?

A Uh-huh.

Q What did you talk about?

THE COURT: Excuse me. Is that a yes?

A Yes. Sorry. Yes.

THE COURT: Okay. Go ahead.

A Yes. I'm sorry. "Went to Lieber Prison to see client and discussed defense and investigation. Is that what you're referring to?

Q And what did you talk about with respect to the case and --

A Well, everything I did and every time I saw him was to discuss defense and investigation. So it's broad. It's not meant specifically as to what our defense is going to be. I was part of the defense team. So that's just the way I worded it for the invoice. Is that what you mean?

Q Yeah. So what were you, what were you discussing?
A Well, if I look specifically back in my notes from 9-30-09 I could probably tell you, but generally, one of the things I was doing was talking with people like Ms. Borland who was going to be a witness and I wanted to know how he knew her, things like that, how did he know Bryan in, what was his relationship with Bryan Wilson, what was his relationship with his family because I had to contact them as well, and beg, actually, them to come and be present at, at the trial, and they wouldn't. So I spent time talking with him about things like that in the mitigation role is one of --
Q Okay. And, and you met with the mitigation specialist at least twice according to your notations; correct?
A Meaning Dale Davis?
Q Look on the reference to 10-15-2009 and 10-20-2009.
A Okay.
Q Who was the mitigation specialist you're referring to on those?
A I don't know for sure if I met with Dale Davis and asked her questions about her investigation or if that was in reference to the person they were calling their mitigation specialist who was Evelyn Califf. I -- but I don't know that I would have referred to her as a mitigation specialist. So I'm not sure that whether I might have met with Dale and talked to her about the case and the evidence that she had

gathered in her investigation or if that might have been something else.

Q You said you spent nine hours with that person. Am, am I reading your voucher correctly?

A It's nine total, it's nine total, which included my travel to and from Conway or Myrtle Beach or wherever I was at the moment.

Q Okay. But you don't recall going over Dale Davis's books or anything with --

A Not --

Q -- Ms. Califf or trial prep?

A With Ms. Califf, no.

Q Okay.

A No. I had met her at some point during this. I think on one occasion she was at Bill's office, but no. She had access to Dale's stuff. I, I didn't get involved with working with her on that.

Q Okay. There's another reference on what I believe is the last page to witness and family contact, social work contact for trial prep 11-6, trial prep with witnesses and mitigation social worker 11-20. Do you recall what you were doing at that time?

A Yeah. That -- if I was referring to a mitigation social worker that was Evelyn Califf.

Q Okay.

A Which makes me think that the mitigation specialist I mentioned previously was probably Dale.
Q Okay. Were you in the courtroom when Ms. Davis indicated she didn't do any work on the Horry County case?
A Yes. She didn't do any work, but that doesn't mean that I can't interview her about who she talked to and ask her opinions about who she talked to and help guide me on what I needed to do in this, in this role as mitigation investigator by default.
Q Okay. Had you ever been involved in an insanity defense before?
A No. I don't believe so. One of the cases I was thinking about some years ago we had a crazy client. Do I think he was legally insane? Probably not, but if there's anybody that would have used that defense it would have been that one, not this one, in my opinion.
Q Well, why not this one?
A Because I don't believe Stephen's insane not from the legal terminology of insanity and not from having worked with people with really, really bad mental health problems in capital cases. I didn't see that in Stephen.
Q Okay. Did you share that with Mr. Diggs and Ms. Williams in preparation for the Horry County case?
A We had discussions.
Q Excuse me.

A Yeah. I'm sure we had discussions about it. Do I specifically remember what was said? No. I don't.
Q Did anything prevent you from giving your opinion?
A No.
Q Do you think they understood you had skepticism about the theory at the Horry County trial?
A Brana might have because we were able to discuss things like that a little more clearly, but not with Bill. Bill, Bill had his video and his Dr. Wu. So I don't think he was willing -- and his Dr. Sachy. I don't think he was willing to listen to much else.
Q Okay. In the discussions you had with Mr. Stanko at Lieber, did you share your concerns with him or skepticism about the insanity theory or did he?
A He shared his concerns with me. I don't know that I shared.
Q And what did he tell you?
A I don't think he was happy about the insanity defense. The only discussion I remember having with him about and it wasn't insanity. It wasn't psychopathy -- was Dr. Wu's video. Stephen was happy to find out that there was some indication in his brain that helped him understand why he did what he did, at least that's what he expressed to me. So I think he felt like finally there was something he could put his finger on that helped him understand and helped him figure out why he

would do such a thing.
Q And, and he shared that, did he not, with the jury in the fairly extensive closing statement --
A Yeah.
Q -- that he gave in the penalty phase?
A Yeah. Uh-huh.
Q In the witness contact that you had, did that include the Defendant's family members at any time?
A Yes. Yes.
Q And what was that communication like and what was the result?
A Well, without having notes I don't remember exactly what was said. I tried to get his sister, Peggy, who seemed to be the only one willing to be present, I tried to get her to come and she didn't feel psychologically that she could handle it. I made an appointment to go visit his sister Cindy, and when I got there it seemed obvious to me that she was home, her car was in the driveway and she knew I was coming, but she wouldn't answer the door. I talked to her on the phone. She had no interest in coming. His brother Jeff at first expressed some interest in coming, that he might come, but he didn't, and I think felt like it was too hard because of his work and his military work, and he was trying to get a job with the government and he was worried about all that having an effect. So he didn't come either. I felt bad for Stephen

because I was hoping that someone from his family would come.
Q Did you share that with Mr. Stanko?
A Yes.
Q Did he want his family members there?
A Yes.
Q Okay. So what he told the jury in his closing statement that he did not want his family members there, that was an incorrect statement as far as you know?
A No. I'm not saying it was incorrect. He could have changed his mind in between then, and maybe he had his own reasons for doing that.
Q Okay. But there wasn't any direction from him causing you not to try to get them there; correct?
A No. No. He, he worried about Peggy. I think he really worried about Peggy feeling uncomfortable, and Peggy's husband was putting some pressure on her not to go because of the effect it might have on her, and financially, I don't know that she was able to come, but you know, we wanted family members to be here from a mitigation standpoint.
Q Okay. Now, at the time was his mother already dead at the time of the second trial?
A I don't remember the date that she died. I know his father died after the second trial was over.
Q Okay. All right. Thank you. No further questions. Hold on one second. Thank you very much.

THE COURT: Redirect.

MS. VANN: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. VANN:

Q Ms. Childs, do you know how Mr. Stanko's father died?

A I don't remember. He had a heart attack or a stroke or something. I don't remember.

Q Do you remember how his mother died?

A No.

Q No further questions. Thank you.

THE COURT: All right. You may step down. We want to break for the evening?

MS. PAAVOLA: Yes, Your Honor. Those are all the witnesses we had for today.

THE COURT: All right. What time do you all want to get started tomorrow?

MS. PAAVOLA: We asked our witnesses to be here at 9:30 tomorrow morning, but we can change that if the Court has a --

THE COURT: No. That's fine. I mean, how far are you all traveling? Are you all staying here?

MS. PAAVOLA: Oh, we're staying here.

THE COURT: All right. How about -- you all are staying here as well?

MR. ZELENKA: Yeah. We're down the road.

THE COURT: Okay. So nobody's having to come from

Columbia or anything like that. Okay. All right. Well, let's -- oh, let me check with you all.

(Arrival time for Mr. Stanko discussed with corrections officers.)

THE COURT: All right. I'll -- we'll be in recess till 9:30 tomorrow morning. Department of Corrections, if you all can have Mr. Stanko here at 9:00 o'clock for his -- available for his attorneys if they need to see him ahead of time. If you need anything, written order, let me know. If this verbal order from the bench is sufficient then that'll be fine as well. Okay.

Anything from the Applicant before we recess for the evening?

MS. PAAVOLA: No, Your Honor.

THE COURT: Anything from the State?

MR. ZELENKA: Nothing from the State.

THE COURT: All right. We'll be in recess till 9:30 tomorrow morning. Thank you very much.

(Adjourned for day.)

(On the record, March 3, 2015.)

THE COURT: All right. Anything from the Applicant before we get started?

MS. PAAVOLA: Nothing, Your Honor.

THE COURT: Anything from the State?

MR. ZELENKA: Nothing, Your Honor.

THE COURT: All right. Ms. Paavola, you can call your next witness.

MS. PAAVOLA: The Applicant calls Robert Dudek.

THE COURT: All right.

Whereupon, Robert Dudek was called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: Please have a seat. State your name for the court and spell your last name.

MR. DUDEK: Robert, excuse me, Robert M. Dudek, D-U-D-E-K.

DIRECT EXAMINATION

BY MS. PAAVOLA:

Q Good morning, Mr. Dudek.

A Good morning.

Q Could you please tell the Court how you are currently employed?

A I'm the chief appellate defender for the Office of Appellate Defense for the Appellate Division of the Commission on Indigent Defense.

Q And did you handle the direct appeal from Mr. Stanko's Horry County conviction in 2009?
A I did with co-counsel, Appellate Defender Robert Pachak.
Q At the time that you handled that appeal, were you the chief appellate attorney?
A Yes. I was.
Q Do you need a minute there?
A Actually some assistance would be even better. Thank you. Sorry about that.
THE COURT: That's all right.
Q You did not handle the direct appeal from Mr. Stanko's Georgetown conviction; is that correct?
A No. That was handled by then Chief Attorney Joseph Savitz and Kat Hudgins.
Q Could you just generally describe how you typically go about handling a capital appeal?
A Yeah. It's not, not too much different than I would a normal case except I always, you know, make a point of going to the, going to the county, going through all exhibits, but what I do is read the transcripts, generally have one legal pad with just running witnesses, their testimony by page number so I can do my statement of facts and then generally I do a separate legal pad with all objections and motions on it.

Q Okay. And generally is that the process you would have used for Mr. Stanko's appeal?
A I have no reason to think otherwise.
Q Have you recently reviewed the transcript from the Horry County trial?
A No. I've reviewed the briefs and, and obviously met with you and Ms. Vann.
Q Yes. If I could hand you a copy of the briefs. Just one moment.
A Thank you.
Q Mr. Dudek, these documents have been pre-marked Applicant's Exhibit Numbers 30, 31 and 32. Do you recognize these documents as filed copies of the briefs you filed in Mr. Stanko's appeal?
A Yes. Yes. I do.
MS. PAAVOLA: Your Honor, the Applicant moves to admit Exhibits 30, 31 and 32.
THE COURT: Any objections?
MR. ZELENKA: No objection. Just which brief is 30, which is 31 which is 32?
MS. PAAVOLA: Sure.
BY MS. PAAVOLA:
Q Mr. Dudek, could you tell us?
A Sure. The Final Brief of Appellant is marked as 30. The Final Reply Brief of Appellant is marked as 31, and my

Petition for Rehearing is marked as 32.

THE COURT: All right. Applicant's Exhibits 30, 31 and 32 are admitted into evidence without objection.

(Applicant's Exhibit Number 30 [Final Brief of Appellant], Applicant's Exhibit Number 31 [Final Reply Brief of Appellant] and Applicant's Exhibit Number 32 [Petition for Rehearing] admitted into evidence and appropriately marked.)

BY MS. PAAVOLA:

Q Mr. Dudek, from your review, particularly the one where you note all of the running objections, do you agree that at Mr. Stanko's Horry County trial there were a number of objections that trial counsel made in the penalty phase to evidence of the Ling crime coming in in aggravation?

A That's my recollection. Yes, ma'am.

Q Did you have any particular reason for not raising an issue on appeal regarding those objections?

A The only way I can really answer that is, you know, the penalty phase of a capital trial is about the circumstances of the crime and the character of the Defendant, and our Supreme Court has been very broad on the admissibility of such evidence. It doesn't have to be the result of the conviction and, you know, never to be flipped. This is a death penalty case but, you know, in, in some places, certainly Lexington County; you know, it can almost go back to the Defendant threw

a spit ball in the fifth grade. I mean, it's, it's just wide open, right, right or wrong. I wish it wasn't, but that's my understanding of the rules I'm playing with.

Q Okay. Now, you did raise in the briefs on appeal an issue regarding the conflict of interest created by Mr. Diggs' representation of Stanko at trial?

A That's correct.

Q And the arguments that you made regarding that claim are contained in Applicant's Exhibit 30, 31 and 32?

A That's correct. Let me refresh my memory on the Petition for Rehearing but, yes, the conflict issue is also in the Petition for Rehearing.

Q All right. Mr. Dudek, I don't mean to be asking a silly question but when you raise an issue on appeal I assume it's safe to assume that your goal is to win?

A That's correct.

Q And so my question is if there had been anything further about that claim that you should have or could have raised to make it more likely to succeed, would you have had any strategic reason for not including those arguments?

A No. Again, you know, as you said, the object is to win, and obviously there could be, I guess to go to the heart of your question, there could be no strategic reason to not argue something that, that I thought would help win for Mr. Stanko.

Q Thank you, Mr. Dudek. I have no further questions for

you.
A Thank you.
THE COURT: Cross examination.
MR. ZELENKA: A few questions.

CROSS EXAMINATION

BY MR. ZELENKA:
Q Mr. Dudek, you mentioned a combination of working with Robert Pachak of your office in the brief?
A That's correct.
Q Do you know which issues you wrote and which issues Mr. Pachak wrote?
A I, Mr. Zelenka, to answer that, I can say, you know, I was lead counsel in the case. I mean, I, I think I was intimately involved on each issue. I don't remember, frankly, if I had said to Rob, meaning Mr. Pachak, will you write up such and such a draft of such and such issue. Just looking back over the six issues that were raised, I mean, I remember being heavily involved in each of them, if not having drafted them. You've read my stuff for 25 years. If you can point out a different writing style it might help.
Q I'm asking you if -- well, let me ask it this way. Was Mr. Pachak responsible for preparing a conflict of interest issue that was briefed before the Court or were you responsible for that?
A No. My memory is I, I was responsible for that because

I remember that was discussed very, very heavily because we were very hopeful on that. Obviously, we, you know, we, we wished we would have won on the Belcher, B-E-L-C-H-E-R, issue on implied malice but, you know, the issues were pretty much in the brief if I recall by orders of, you know, order of what we thought were the strongest issues.

Q Okay. And you stated, as I understand it correct, if I understand it correctly, you traveled to Horry County and reviewed the exhibits and the motions which were on file?

A Yeah. Again, that's my memory. I don't -- I, I know the change of venue was key. Now, I hope I'm not conflating this with another case, but I, I'm assuming, you know, probably would have gone through jury questionnaires, but I've done a lot of these. So I hope I'm remembering these right.

Q Okay. Where are your notes of, your running notes concerning the transcript and the motion and objections which were done in the case? Do you have those?

A I do not have them. If Ms. Paavola does not have them, I, I, I do not know.

Q Okay. Have you reviewed those notes to, to see if you took notice of the particular objections which were made concerning the use of Laura Ling's murder and the testimony of her daughter in the aggravating stage of the case?

A No.

Q Do you recall if you reviewed the motions prior to the

time of the brief that were made concerning the conflict of interest by the State in raising the issues seeking out hearings before the trial court in this particular case?

A Can you try again? I'm lost on that question.

Q Okay. Let me ask this. Did, did you review the motion that was made by the State concerning the conflict of interest based upon the ineffective assistance of counsel application being filed against Mr. Diggs?

A No. I do not remember, I do not remember a State's motion if it was anything like to remove Mr. Diggs, something like that. I do not.

Q To raise an issue concerning the status, correct.

A No. I do not recall reviewing that.

Q Okay. But if there's one in the record, you would acknowledge that if it was in the record; correct?

A Yes. I wouldn't have any choice.

Q And anything that you put in the record would've been reviewed by you?

A Yes. I mean, if something's in the Record on Appeal, I'm confident, fairly confident I would have read it and seen it.

Q Okay.

A Again, I don't, I don't -- you have me at a disadvantage because I do not know or remember if that's in the Record on Appeal.

Q With respect to the general statements you gave about the characteristics of the Defendant --
A Right.
Q -- coming in, not subject to a conviction, it's your general understanding in South Carolina that that's admissible in a penalty phase of the trial; correct?
A Correct.
Q It's not restricted under State versus Lyle; isn't that true?
A No. I mean, Lyle would not, you know, apply to the penalty phase, a totally different animal as you know.
Q Okay. And that's, that's been the law of South Carolina for quite some time -- isn't that correct -- going back to State v. Koon in 1982?
A Yeah. I don't, I don't know the -- I remember the Koon case from other things it stood for but certainly, you know, in many cases they can go back the Defendant when he was much younger committed this assault or this battery, this -- broke in this person's house, committed this burglary. Those have all been, for lack of a better term, standard operating procedure during penalty phase because, you know, again, right or wrong, it's about the character of the Defendant.
Q And details of those acts are deemed admissible; isn't that correct?
A That's my understanding. I mean, again, you know, like

as you said State v. Lyle is, is a, is a guilt phase consideration. I mean, you know, I guess a 403 prejudice versus probative, I mean, objection could still be made during the penalty phase.

Q Okay.

A Hope that answers your question.

Q I believe it does.

THE COURT: Redirect?

MS. PAAVOLA: No further questions, Your Honor.

THE COURT: All right. You may step down.

A May I be excused?

THE COURT: Any objection to Mr. --

MS. PAAVOLA: No objection.

MR. ZELENKA: No objection.

THE COURT: All right. You're free to go. Thank you.

A Thank you, Judge.

THE COURT: The Applicant can call their next witness.

MS. PAAVOLA: The Applicant calls Ms. Brana Williams.

THE COURT: All right.

Whereupon, Brana J. Williams was called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: Please have a seat. Please state your name for the Court.

MS. WILLIAMS: My name is Brana, B-R-A-N-A, J. Williams.

DIRECT EXAMINATION

BY MS. PAAVOLA:
Q Good morning, Ms. Williams.
A Hello.
Q I understand you served as counsel for Mr. Stanko at his Horry County capital trial?
A Correct. I was second chair.
Q And how did you become involved in that case?
A To the best of my recollection, the death penalty status had already been assigned to the case. There was no second chair, and I saw Bill here at the courthouse, and Bill and I had done another death penalty together and he started talking to me and asked me would I be interested, and I said sure.
Q Okay. What was that other death penalty case you had done together?
A I don't remember his name.
Q Okay. Do you --
A He was young. He was like 19 years old and his -- the, the victim was Gerald Kelly, I believe. He worked at the jail. No. That's, that's the attorney in here. It -- he -- Randy Gerald. I knew it was Gerald. Randy worked at the -- the victim was the guy who worked at the jail and our Defendant was young. He was like 18 years old, 19.
Q Okay. Do you know approximately when it was that you handled that case?
A We did this in 2009 so.

Q By this you mean Mr. Stanko's case?
A Yeah. Maybe four, five, 2004, 2005-ish.
Q Okay. Other than that case with Mr. Diggs, did you have any other previous capital defense experience?
A No. This was my second death penalty.
Q Had you ever attended any training programs or CLEs specifically about capital defense at the time that you represented Mr. Stanko?
A Yes. I went to a training seminar in Dallas.
Q Okay. Do you know approximately when that was?
A No. Prior to this. I mean, I was on the case, but right around going -- I mean, I was on the case. So I went to Dallas when I first got on, but I couldn't tell you when.
Q Do you know who was responsible for sponsoring or putting on that program?
A No. Maybe it was the National Criminal, the Criminal Defense Team. I don't know. There were a lot of people there. There -- because Ralph went, Orrie went. Ralph had Winkler at the time. There were -- there was a good like maybe eight or nine folks from Horry County that went to Dallas together.
Q Okay. Were you familiar with the ABA Guidelines for the appointment and performance of death -- defense counsel in death penalty cases at that time?
A I kind of know what they are, but I couldn't quote them

to you.
Q Had you ever read them?
A I've looked at them.
Q Do you recall approximately when you were appointed to work on Mr. Stanko's case?
A No.
Q Ms. Williams, I'd like to hand you a copy of what's been marked as Applicant's Exhibit Number 33.
MS. PAAVOLA: If I may approach the witness, Your Honor.
THE COURT: All right.
BY MS. PAAVOLA:
Q Ms. Williams, do you recognize this document?
A Yeah. This must be what I submitted for my billing.
MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit 33.
THE COURT: Any objection?
MR. ZELENKA: No objection.
THE COURT: All right. Applicant's Exhibit 33 admitted into evidence without objection.
(Applicant's Exhibit Number 33 [Williams Timesheets] admitted into evidence and appropriately marked.)
BY MS. PAAVOLA:
Q Ms. Williams, do you recall approximately when you first met with Mr. Stanko?
A Well, according to this, it was January 23rd of 2007.

Q All right. So you already testified that you were second chair. Mr. Diggs, I assume then, was first chair; is that right?
A Correct.
Q Did you have any specific division of labor agreement with Mr. Diggs about who was responsible for which kinds of tasks?
A No. We did not have a type of -- that I recall we did not have a specific division.
Q Did you have particular things that you were handling and he was handling other things?
A Bill did most of the work on the actual defense with regard to the PET scans and Dr. Wu and, and the deficiencies that we were going to address. He wanted to -- he -- and then he did a lot of the mitigation stuff, like I would help coordinate. Like he would basically make more of the decisions because I'm second chair, and so he made the majority of the decisions, but then we would help try to implement, you know, that kind of stuff, but he was the one talking to the doctors. I never actually talked to them till literally at time of trial to help coordinate them coming and testifying and that kind of stuff.
Q Okay. So you didn't meet with any of the mental health experts before trial?
A The doctors I did not. I met with Evelyn Califf, and of

course, Vicki Childs, but I didn't meet -- I met with -- Dr. Albiniak I had spoken with and Dr. Thrasher, but not Dr. Sachy nor Dr. Wu nor Dr. Gur I don't believe prior to when he actually came to Conway to testify.

Q Did you and Mr. Diggs have any discussions about what the theory of the case should be?

A Yes.

Q Did you have any discussions about whether it should be different from the strategy at the first trial?

A We probably talked about it, but there was no other -- there was nothing else available.

Q Was it your understanding that you were going to be representing what was offered at the first trial?

A Correct.

Q Did you and Mr. Diggs ever have any discussions specifically about whether it was a good idea to offer evidence that Mr. Stanko is a psychopath?

A I don't know if I recall specifically discussing that other than -- I don't know. I don't recall.

Q Were you aware that the experts were going to say that at trial?

A I'm not sure that I knew like -- I did not speak to them to say that they were going to say that, but that was an understanding and part of our discussions. I mean, that is part of his diagnosis. That's part of what was going on with

the whole bit of him being, you know, trying to declare he was insane, trying to declare he had two small of an amygdala, trying to declare that his executive function did not work properly so.

Q Did you read a copy of the transcript from the first trial?

A I read most of it.

Q I take it that you did not have any pretrial meetings with Dr. Sachy?

A I did not.

Q Were you, you may have already said this, were you in charge of directing the mitigation investigation?

A No. No. Bill was in charge of both areas, and -- but when we decided -- he decided how he wanted to handle that I helped him get that implemented, but like he picked Evelyn Califf and wanted to use her, so then I would help coordinate, you know, what he decided he wanted to do and make sure it would happen.

Q How -- so you've, I guess, already described the general strategy was to try to show that Mr. Stanko was not guilty by reason of insanity. Do you agree with that?

A Correct.

Q If that strategy didn't work and you had to go to a penalty phase, what was your understanding of the theory of the case for the penalty phase?

A That is -- becomes a little difficult for me in that I think if you try to convince a jury that somebody is insane, and I think we had to in this case, you, you can't say he killed them, but then save him. I don't think that's a sound philosophy, but if you try to say that they're insane and then the jury doesn't believe that, then you have to just literally switch to the mitigation phase and say, "Okay. Look, you still think he's guilty of it. However, you have to consider these other factors," and based on these other factors you try to spare the life. I mean, so it's a difficult -- I mean, that's always what you try to do in mitigation, and in this situation, I mean, Stephen had things that we were trying to show and trying to, to put forth, but with -- it really was a complicated, in my opinion, it was a complicated defense for a jury to understand.

Q So are you saying that you felt you had to choose between an insanity defense or a mitigation case?

A I don't think you have to choose. I think you have to look at do you have any type of defense for the guilt phase at all. If you have no defense for a guilt phase, then you would have no choice but to do absolute nothing but mitigation, and you would start your mitigation phase in the guilt phase. This wasn't that case. We had an opportunity to defend, to put forth a defense in the guilt phase and then start, when that did not work, be prepared to go to the mitigation phase.

Q Did you have any discussions about how likely it might be that the jury would actually find Mr. Stanko to be not guilty by reason of insanity?
A I'm sure we did.
Q Did you think it was likely that they would find that?
A There was a decent shot that in Horry County we could get a more sophisticated jury that might would understand the evidence presented.
Q Did you have any difficulties with jury selection?
A Yes.
Q What were they?
A Well, it was a big deal that this was a second death penalty. He had already been sentenced to death in Georgetown County. There was that silly TV show. I mean, it was very prevalent. Our Sun News is the Sun News here out of Myrtle Beach which covers everything. So it was a big deal that we were trying to get a jury that really did not know about the first death penalty, and that did not happen.
Q What do you mean that silly TV show?
A Whatever it was called, 48 Hours. I don't know. I don't, I don't know the name of the show but they covered the trial.
Q Were you aware that Mr. Diggs agreed to participate in that show?
A Yeah. My understanding is they have to. I mean, every

-- you have to. They don't just come and sit in the courtroom and do it without you agreeing.

Q Did you have any specific discussions about whether the show itself affected your ability to select a jury that had not been exposed to media?

A I don't think that show had any more impact than the local coverage had had.

Q You did make a change of venue motion; right?

A Correct. We tried.

Q Did you have any discussions about whether you should consider hiring a change of venue expert to support that motion?

A I don't recall that, and, but, but, see, we hired Dr. Albiniak to come in. What happened was Judge John ruled that because Dr. Albiniak -- Dr. Albiniak's testimony was about social impact. The fact that as an individual I might look at you and say I disagree with that, that's not my position, but in a group we'll all say, "Oh, yes. I understand. Yes. I will do it. Yes. I will be the good little girl that I'm supposed to be."

Q Uh-huh.

A Because that's what social impact does. So we hired Dr. Albiniak to discuss that. Judge John ultimately ruled that because we didn't have him sit during the entire week or so of voir dire that he couldn't say specifically with regard to the

jurors that got on our stand that they couldn't comply.
Q As far as you know, was the jury, was the change of venue issue the original reason that Dr. Albiniak was hired to work on the case?
A I don't know. I would guesstimate to say yes, but I don't, I don't know.
Q Do you recall when you asked Dr. Albiniak to offer that testimony for the change of venue motion?
A No. I do not know.
Q Did you ask him to do that?
A I think Bill knew him. So I think Bill had the initial contact and initial consultation with him.
Q Did you have any discussions with Dr. Albiniak about what that testimony was going to be?
A Yeah. We met with him prior to. We met with him at Bill's office at least once, if not twice.
Q Did he ever express that he felt he was not comfortable with giving that kind of testimony?
A Not to my recollection. If we had thought he was uncomfortable I don't think we would have gotten him to testify.
Q Did he tell you that he did not think he was an expert in the change of venue?
A No.
Q You also hired an expert named Brent Turvey from Alaska.

Do you remember that?
A Correct.
Q How did you go about finding and hiring him?
A Brent is probably the only one that I spearheaded and coordinated because I was -- had become aware of him, and we were looking at doing a crime scene reconstruction to figure out what had really happened, and we decided to get him, and so that's what we did and he came at least twice, I believe.
Q And what did you hope to accomplish by offering his testimony at trial?
A Well, the initial way that the State presented what had happened we totally discounted, we did not think that was an accurate way that the crime could have happened and the whole incident happened. It didn't make sense, and so, we needed somebody to come in and say, "Based on this I think, you know, this is step one, step two, step three, step four," hoping that there would be something in there that would give us something to help with the defense.
Q Were you hoping that he would make the crime sound not as bad as the State's theory of the crime?
A Well, no, but like the State had, if I recall correctly, there was something about there was shots in the back room and they didn't know if they shots fired in this room and shots fired in this room, and I mean, it just -- it was an improbability for the way it supposedly had happened. So we

were trying to basically nullify shots in this room or figure out -- correct something that we could use to assist in the defense because we didn't have a lot.

Q Did you think Mr. Turvey's testimony came out the way you expected it to come out?

A For the most part. Yeah.

Q If the record reflects that Mr. Turvey testified he essentially agreed with everything that the State thought about the events of the crime, would that surprise you?

A What I don't know that was actually in the testimony like, see, some of the things we didn't understand like there were bullet -- there was dust on the pillows, and we, we didn't really, could figure out, you know, if you're using the pillow to shoot somebody in the back and the shaving stuff and kind of how he fell and some things like that. Yeah. I don't know that, that his testimony was totally about that because I don't know that we talked about the bullets in the other part of the home and that those were prior, prior gunshot stuff that had happened, but, but when the, when the, when the evidence came out because it kind of morphed because what I'm telling you is when you read the stuff and then what we really figured out happened it didn't happen like it read, but when we put it together you could figure out what had happened.

Q Okay. I'm going to -- I would like to show you, Ms. Williams, volume eight of the Record on Appeal.

MS. PAAVOLA: May approach the witness, Your Honor?

THE COURT: Yes, ma'am.

BY MS. PAAVOLA:

Q Ms. Williams, if you could look there at the page that I flagged for you starting on page 3512?

A Okay.

Q And carrying through to 3531. These are various motions that the defense team filed pretrial to declare South Carolina's death penalty unconstitutional. Do you remember that?

A I know we filed a bunch of motions.

Q Did you write these motions?

A No. Bill wrote them.

Q Did you and Mr. Diggs ever discuss raising an argument that South Carolina's death penalty statute is unconstitutional because it does not narrow the pool of death eligible offenders?

A I don't -- did you mean by that that there are too many aggravating factors?

Q Yes.

A I don't recall discussing that.

Q If there had been any other way that you could have raised a constitutional attack against the death penalty statute, can you think of any strategic reason that you would not have made that argument?

A No. If we could have raised a defense, then we had thought of it we would have done it.
Q Were you responsible for reviewing and submitting any of the experts' or investigators' time for payment in the case as far as you can recall?
A I don't, I don't remember.
Q I'm going to hand you what's been marked as Applicant's Exhibits 34 and 35. Ms. Williams, do you recognize these documents?
A Yeah. It looks like the Turvey's, Brent Turvey and Dr. Gur's bills.
Q And is that your signature on the front cover sheet of those?
A Yeah. So I probably -- I apparently -- I got them from the two doctors, and I was the one that submitted them.
MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit 34 and 35.
MR. ZELENKA: No objection.
THE COURT: All right. First, for the record, which one is which?
A 34 is Brent Turvey's and 35 is Dr. Ruben Gur.
THE COURT: All right. Applicant's Exhibits 34 and 35 are admitted into evidence without objection.
(Applicant's Exhibit Number 34 [Brent Turvey Timesheets] and Applicant's Exhibit Number 35 [Ruben Gur Timesheets]

admitted into evidence and appropriately marked.)

MS. PAAVOLA: May I have one moment, Your Honor?

THE COURT: Yes, ma'am.

BY MS. PAAVOLA:

Q Ms. Williams, sometime prior to the start of the Horry County trial, did you become aware that Mr. Stanko had filed a PCR application regarding the first trial in Georgetown?

A Yes.

Q Did you ever see that PCR application?

A No. Not that I recall. I don't believe I ever have.

Q Were you aware that there were subsequent amendments to that application?

A No.

Q Did you review any of those amendments?

A Not that I recall.

Q Thank you. No further questions.

THE COURT: All right. Cross examination.

CROSS EXAMINATION

BY MR. ZELENKA:

Q Ms. Williams, during your testimony you stated you had strategy discussions with Mr. Diggs concerning the guilt and the penalty phase of the case; correct?

A Yes.

Q And one of the comments you made on direct examination was, "We talked about it but there was nothing else

available." Explain that what you meant that there was nothing else available?

A The facts of this crime were terrible. I mean, quite bluntly, they were, they were bad, and you know, as a defense lawyer you do your best to try to look for any type of explanation, any type of, I mean, any, anything that you can come up with for a defense, and quite frankly, there was -- we were limited. You know, this was very different from the Georgetown County deal. We didn't have a heated argument going on. We didn't have a, you know, cigarette butt being flicked at you. We didn't have any of that. Even after we talked to our client, I mean, it was, you know, and if I recall he didn't remember a ton of it, you know, for some of it, and we just didn't have a lot to work with.

Q Okay. And that's for the guilt phase --

A Correct.

Q -- of the trial?

A Correct.

Q Did you consider not presenting the mental health issues in the guilt phase of the trial, then saving it for the penalty phase of the trial as evidence of mental disturbance?

A Excuse me. Bill was lead counsel, so if we talked about it we may have batted that idea around, but he did not feel that that was good. I can tell you that the client absolutely was supportive of wanting that defense as part of the guilt

phase, and I mean, quite frankly, it's a, it's a, it's a good cutting edge defense. We had a doctor and the second part of that is we had a doctor saying he was insane, you know, Dr. Sachy would say that even for our set of facts. We in South Carolina, just we still don't have diminished capacity. So you've got a good argument that you have to keep arguing it and you have to put forth the facts and you've got to do it and we knew that, I mean, diminished capacity would've been a much better defense, but we don't have it. So we had to use what we had and then put it forward, but the bottom line is Bill may have tossed that around but did not really consider it, and quite frankly, had we not used it, really we, we had nothing else.

Q Nothing else for the guilt phase?

A Nothing. I mean, we may have as well just, "Okay. We stipulate to guilt and let's go to mitigation."

Q Okay. And was that something your client wanted to have happen?

A That we stipulate to guilt and go to mitigation? Absolutely not.

Q Okay. You were involved in the retention of Brent Turvey --

A Correct.

Q -- from Alaska, the crime scene or the criminologist?

A Correct.

Q And what was your reason for retaining him at the outset? Do you recall?
A We wanted to recreate the crime scene because, like I said, when we, when we read the reports there were things that they noted in the crime scene which didn't seem to make sense, it didn't flow because part of what you try to do as a defense lawyer is kind of sort of get a reenactment because you need to figure out what happened so that you can understand how to defend it, and what we read didn't really seem to all flow, and we didn't have a client that had much of a recollection. So we had to get it from somewhere, and if you're asking why we picked him, he was the one that I was semi-familiar with. Bill didn't really care one way or the other. I had heard good things about him from other criminal defense attorneys. So we picked him.
Q Okay. Was it being used to enhance your insanity defense or how did those two factors combine?
A Well, we didn't know. We needed to figure out what happened at the crime scene because it, it -- I mean, we didn't really have a whole lot as to how the actual, the actual event happened. You know, we, I mean, we had the pictures, we had how Mr. Turner fell, we had that stuff, but, but we didn't really have a lot as to, you know, literally, you know, you go to point A, point B, point C, point D, you know, this is the little, your little video camera of what you

think happened, and we didn't have that, and we, we thought we needed that and that would be something that might would assist us or maybe we could discover something that would be additional to help us in our defense of the case.

Q Okay. And, and once he provided you the information, why did you think it was important to present that same information to the jury?

A You mean of how it happened?

Q Yes.

A Because that went into supporting the defense of he was obviously not thinking correctly to do something like that and supporting the insanity defense.

Q Okay. In the penalty phase of the trial -- well, let me back up to the guilt phase. One of the factors in the guilt phase of the trial was the brain damage evidence that you were presenting; correct?

A Correct.

Q And there were two, two factors which may have supported causation for those brain factors. One of them was the incident which occurred during his birth about the low oxygen and the other was the beer bottle strike to, to his head; correct?

A Correct.

Q And you were involved in presenting Bryan Wilson who was a witness to, to that event in the guilt phase. Do you recall

that?
A I think I did the direct on him.
Q Okay. Why did you think that it was important to put in that evidence of the witness to the striking of the bottle on the, the Applicant's head while he was in high school?
A Because that would give validity to the events, one of the triggering, what we thought was one of the causing events of the current state of his brain, and it was a supporting factor and this is somebody who was long years ago. I mean, it, it was a jury tactic. I mean, that's what we were trying to do was give some validity to it, that you just didn't go hire these experts, and you know, "Here's somebody who saw it happen. We really know that that did happen, and the doctor says if that happened then this is what could result."
Q Okay. And that wasn't presented in the first trial; was it, that testimony of Mr. Wilson?
A I do not -- I don't know. I didn't -- I wasn't a part of the first trial and I did not go watch it.
Q Okay. Were you involved in any discussions if you can recall on whether to have Dr. Ruben Gur testify in this case, your case, when he was unavailable to testify in the first case? Do you recall?
A I don't. I mean, I -- we had him come, and Dr. Gur was a -- did a real good job of explaining how the brain functions and how it works. So I think he, he was, he was the

foundation guy to explain to a jury how the brain works so that they could understand the damage issue that we were presenting, but I don't, I don't know anything about that first trial.

Q Okay. In the penalty phase of the case, which you got to, was there a discussion between you -- let me back up. What was your theme in the penalty phase of the case that you were trying to show the jury as to why your client should be sentenced to a life sentence rather than death?

A Basically what we had is he had kind of a bad home life, not bad in considering the other -- let me, let me take that back. He did not have a good functional family unit. Okay. And we could show, I mean, the doctors could show, the medical testimony that he literally has an organic problem, problems with his brain. You know, you, you can't open somebody's brain and see it, but you know, you can see the cast on their arm. So people understand the bone's broke, and so what we were trying to show is, okay, now that we've gotten here, understand there's a reason that he's like that and in lieu of death based on this reason will you give him, you know, a life sentence.

Q Okay. So you didn't give up on the mental health presentation at the end of the guilt phase. You utilized it to enhance your penalty phase argument?

A That was what we attempted to do.

Q Okay. One of the issues was raised in the proceeding is the failure and the acknowledgment that family members were not present in court. Do you recall reasons why that was discussed to the jury during the courtroom proceeding?
A Yeah. I do. I can tell you. I recall Bill saying that, that part of that was, excuse me, that as bad as it may sound it's like you're trying to understand he really does have an issue and his issue is so bad that even his family doesn't have anything to do with him. I mean, you, you, you -- in a penalty phase, you know, the jury can impart life for any reason whatsoever, even if they just feel sorry for you, and so you're using, as a defense lawyer I think you've got to use everything you possibly can, but the reason behind that is Bill's thinking and I can tell you because we had this conversation was that, look, he -- I mean, I -- we didn't say this, but it's kind of like he's so bad, he's got all these issues that even his family doesn't have anything to do with him. So, I mean, these issues are very real.
Q Okay. Did you have access to the mitigation materials that Dale Davis had put together?
A Yes.
Q Did you review those materials in making your decisions on -- with Mr. Diggs on, on what to present in, in your trial?
A Yes.
Q Were those materials made available to Evelyn Califf who

is the social worker?
A Yes.
Q Were you involved in any discussions with Ms. Califf about what she was going to present or assist her in getting the presentation together or was that just done by Mr. Diggs?
A Bill was the lead -- Bill was the spearhead for that part, but when we would have our meetings at Bill's office and Ms. Califf came I was there and I -- like off the top of my head I can think of at least two times, if not three, that we were all at Bill's conference table discussing the matters and discussing what would be presented and kind of how we were going about this.
Q Okay. When you mean all you mean Ms. Califf was there, too?
A Yes. She was there. Bill was there. I was there. Most of the time Vicki Childs was there, Bill's assistant, Johanna would be presenting to help, you know, keep the paperwork straight, but yeah, we were definitely -- Ms. Califf was there, and that's where we were when a couple of times Dr. Albiniak was there. I know at least once I'm, I'm pretty sure.
Q Okay. Dr. Thrasher testified in the guilt phase of this case, but he didn't give an opinion as he did in the first trial about the Defendant being insane?
A Correct.

Q But you utilized him in the penalty phase of the trial to present information that he, he met at least two statutory mitigating circumstances. Do you recall that?
A Yes.
Q And what was the reason for that change in presentation from the first trial to the second trial; if you recall?
A Because, quite frankly, Dr. Thrasher wouldn't say he was insane during the second incident. I mean, he, he had a lot more to say about it than that, but he -- what he testified to in the trial was what he would say for us.
Q Okay.
A And that was it. He wouldn't say what he had said in the first trial.
Q All right. And he was not asked either by you or the Prosecution when he testified in this trial whether he had an opinion that the Defendant did or did not meet the definition of insanity; isn't that correct?
A That is correct because we did not want his answer coming out in the second trial.
Q Okay. And the State didn't ask either; did they?
A For whatever reason the State didn't ask and that was a good thing.
Q Did you have any concerns as you prepared for the 2009 trial from your work in 2007 that you didn't have a designated mitigation investigator working with the defense team at that

time or did you think you did have such a person?
A Well, I kind of thought we did. I mean, Dale had done a fabulous job of the first -- with the first case. She had thorough notes. She had everything there. She was not willing to work on the second case. She had things going on. She was about to retire. She didn't want to come into this trial. We had all of her notes. We had everything. Vicki Childs was there. Vicki would do the leg work with us. Bill was very comfortable with Evelyn Califf, who was the social worker who had done some things. He, he was very comfortable with her, and quite frankly, when we were looking at mitigation we're looking at Stephen's background and nothing had really changed. There was nothing else we -- I don't think there was anything else, we could have dug up anything else, we could have done any, anything additional, and in -- but I will also say this. I know that part of that we discussed with him, with Mr. Stanko, and knowing that that's where the case was. I mean, quite frankly, between Mr. Stanko and Bill they were fairly well convinced in their minds that this insanity defense was going to work and the jury was finally going to understand that there literally was an organic problem.
Q Did Ms. Childs or did you get any indication from any contact you may have had with Dale Davis that they did not support or may have had serious skepticism about using the

insanity defense?
A I, I may have talked to Dale one time, but no, I didn't get that from her. With regard to Vicki Childs, I don't know. I don't know that Vicki was full-fledged on about the defense, but she went to see Stephen a lot. She met with -- she was intimately familiar, and she certainly, even if she had any hesitation, it didn't impact what she did for us or didn't impact her helping us, and, again, I think Vicki understood the reality is we didn't have any other defense, and you know, it wasn't an object of -- it, you know, there was no way we could come in here and say, "Your Honor, we plead guilty. Now let's totally focus on mitigation."
Q Okay. With regard to your understanding of the claim of ineffective assistance of counsel that had been raised against Mr. Diggs concerning the Georgetown case prior to the time this case was tried, did you recall the, the hearings that were before the Court where this issue was being raised by the Court and by the State in its motions?
A We discussed that ad nauseam, quite frankly. Prior to Judge John being assigned the case, the Judge for our trial we had Judge Baxter -- Judge Baxley. When Judge -- when Stanko I PCR came out Judge Baxley got that assignment. So he gave up what, you know, what we call Stanko II our trial and Judge John was assigned. There had already been a motion under -- with Judge Baxley, and Bill discussed it, I discussed it,

Stephen discussed it. He absolutely wanted Bill to continue his attorney. If there was any, any conflict he was waiving it, but Judge Baxley ruled that it was okay. Then we had more hearings when Judge John took over because we were like we've already rode the -- we're already done this rodeo, and he's like, "Nope. We're going to do it again." So we did it again, and there was just ultimate, I mean, lots and lots and lots of discussion about that if there was any conflict at all Mr. Stanko waived it. He absolutely wanted Bill. He didn't want anybody else but Bill handling Stanko II.

Q Okay. With respect to the relationship between Mr. Diggs and Mr. Stanko, did there seem to be an agreement on the course of action that he wanted Mr. Diggs to take in his client's -- in his behalf throughout?

A Was, was the -- that -- were they on the same page as to what the defense was going to be? Is that what your question was?

Q Yes.

A Absolutely. Absolutely. We rode to Lieber numerous times. I, I could go back here and count but, I mean, we went down there a lot, Bill and I did, and met with him and talked about it, and absolutely, we were all on the same page as to this is what we're doing, here's where we're going, this is how we're going to get there.

Q Did any of the lawyers representing Mr. Stanko in the

Georgetown PCR case, did they inquire of you about manners that you were taking in that particular case at all, in your case?

A The Stanko I PCR lawyers?

Q Yes.

A I don't know that I ever -- I, I know Stuart Axelrod has it. I don't know that I ever talked to Stuart really about the PCR itself. I knew Stuart got it, but I don't know that -- because I'm not involved with I. I, I mean, I really -- I was over and done with and long gone. In fact, the appeal was up and almost resolved by the time I got involved in Stanko II.

Q Okay. Or Bill Godfrey when he was representing Mr. Stanko?

A I don't know that I ever spoke to him.

Q Okay.

A Now, I will say this, I had discussions with -- we had discussions with Mr. Stanko about who, what lawyers he was getting, and I know that he, he, you know, there was some change up on what lawyers he was going to have in that PCR but not, not the guts and google of it, and if it was, there still wasn't any, any reservation on his part that he wanted Bill Diggs doing this trial in Horry County.

Q Okay. But clearly, nobody was suggesting to you from the first team PCR to suggest that you folks should take a

different strategy in the second?
A No. No.
Q Okay. A decision was made apparently that you would be doing the closing argument in the guilt -- in the penalty phase of the trial?
A Correct.
Q Why did you end up doing the closing argument when you're second chair in the case? Is it a -- was there some factor that caused you to be the one that made that last argument for your client's life?
A I don't know why, maybe because I'm a girl. We were hoping that that would impact the jury. I don't, I don't remember. I just know Bill did the first one and I was going to do the second one.
Q Okay. With respect to Mr. Stanko's closing statement that he made, were you aware as to what he was going to say inasmuch as he did his argument before you did yours?
A I don't recall that he had it written out and that we read it. He, he did and we read it, it would have been right before it occurred, but I don't, I don't know. I don't know that we knew definitely that he was going to address the jury in the guilt phase way ahead of time. I, I just don't have a lot of recollection about that.
Q Okay. I'm talking about his penalty phase argument?
A Yes. That's what I'm -- I'm sorry, in the penalty

phase.
Q Okay.
A When he, when he spoke to the jury because he spoke to them, then I did.
MR. ZELENKA: All right. The Court's indulgence.
THE COURT: All right.
BY MR. ZELENKA:
Q In making the mitigation presentation of the case with the individuals connected to Stephen's past with the prison, his schoolteachers and a neighbor, were there other witnesses that either were unavailable or that you chose not to call in the penalty phase of the case in mitigation that in hindsight you wish you would have?
A We called, we called or tried to get in touch with everyone that Stephen suggested. I think we were hoping that his family would come, and they didn't. I mean, we were hoping that they would come talk to the jury, and they didn't, but everyone who would come we got here.
Q Okay.
MR. ZELENKA: I think that's it, Your Honor. Thank you.
THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. PAAVOLA:
Q Ms. Williams, you said that the facts of this case were very bad?

A Correct.
Q Do you think it's fair to say that the evidence against Mr. Stanko was overwhelming?
A Yes. That is a fair statement.
Q Do you agree that in a typical death penalty case, especially when the evidence of guilt is overwhelming, trial counsel's primary responsibility is to attempt to avoid a death sentence?
A I think that is the trial counsel's primary responsibility in any death penalty case.
Q Was avoiding a death sentence your primary goal in this case?
A Yes.
Q You said that South Carolina does not have diminished capacity. Do you agree that you had to work with the law as it exists in South Carolina?
A I think you have to work with the law as it exists. Yes. I do think that you -- part of what we as defense lawyers do, I mean, the only way the law changes is that you argue and try to change it and try to present evidence to get it changed.
Q Yes. And you filed a number of pretrial motions in an effort to attempt to get the Judge to change it; right?
A Correct.
Q But he didn't?

A Correct.
Q So after those motions were denied pretrial, did you ever have a discussion where you said to yourselves, "Hey, this law isn't going to be changed. We have to work with what we have to work with"?
A I'm sure because you have to, you have to operate within the law as it sits.
Q Were you aware that South Carolina's definition of insanity specifically excludes evidence of a mental disease or defect that is manifested by repeated criminal or antisocial conduct?
A Correct. We know what the definition is.
Q Were you aware that your experts were going to testify that Mr. Stanko is a psychopath or has antisocial personality disorder?
A I don't know. I can't answer that. I probably that we knew that testimony was going to come out because that was part of the description, but like I said, I didn't really have conversations with Dr. Sachy. I didn't know exactly what his testimony was going to be. I mean, I knew that he had testified to that in the first trial basically.
Q Was it your understanding that he was going to testify consistently with his testimony from the first trial?
A That's what I would have anticipated.
Q Were you present in the courtroom when he repeatedly

told the jury that Mr. Stanko is a psychopath who cannot help killing people?

A Dr. Sachy?

Q Yes.

A I was present through the entire trial. So I'm certain I was there when he said that.

Q Were you there when he said that Mr. Stanko's case was comparable to Ted Bundy's or Jeffrey Dahmer's?

A I'm sure I was there for that.

Q Were you aware that he told the jury that antisocial personality disorder is a disorder that cannot be cured or changed?

A I'm sure I was present if he said that.

Q Were you concerned that if the jury did not accept this evidence for your insanity defense they would later use these arguments as a reason to sentence Mr. Stanko to death?

A Yes. But I'm going to say it again, there was nothing else we had, and if you have a doctor who will say that your client is insane, I think it would have been absolutely inexcusable to go to trial and not put that evidence up.

Q Dr. Thrasher would not say that your client was insane; is that right?

A Correct. But Dr. Sachy did.

Q And the reason Dr. Thrasher didn't want to say that was because he felt Mr. Stanko's conduct did not demonstrate

anything remotely close to insanity; is that right?
A Correct.
Q Were you concerned that the reasons Dr. Thrasher stated for why he couldn't reach an insanity conclusion would also be of concern to the jury?
A Absolutely.
Q Have you ever advised a client to plead guilty?
A Yes.
Q Whose job is it to decide what the strategy of the case should be?
A You know, that's an interesting question. Most -- lots of times the clients think it's their position. This client is especially dominant in that area and was absolutely argumentative with us a good bit about different things, but ultimately, I believe that the lawyer ultimately decides what is in with regard to how the law fits, what the evidence is, how the evidence is going to come in. I think ultimately the lawyer can decide and the lawyer can recommend to the client and, you know, we kind of go, but it's, it's -- but that's a hybrid thing, quite frankly, because it's like when your client wants to testify. You can look at your client all day long and say, "Dude, you don't need to get on the stand," but if he wants to there's nothing you can do to stop him. So it's not clear-cut about that.
Q Certainly there are some decisions that the client has a

constitutional right to make such as the decision to testify; right?

A Correct.

Q But ultimately, do you think that if the client wishes to go forward with a strategy that you think is not in his interest it would be your duty to do what he tells you to do?

A No. I think if it was a terrible strategy that would not work then I do not -- I would not put that forward, but I'm going to say this, I'm going to say it again, Bill was the lead counsel. I was co-counsel. The fact of the matter is Bill wanted to do the insanity defense. We had a doc who would say he was insane. We started putting up all this evidence to then try to get it into if we were, if -- if he was found insane, it would be great, if he was found guilty, then we would shift to the mitigation area, and we were hoping that in Horry County, and we did have some good educated jurors. That was part of our jury issue in trying to screen folks was to get more educated jurors.

Q I understand you discussed the conflict issue with Diggs and Stanko?

A Correct.

Q Did you think it was a conflict?

A My personal opinion you're asking me?

Q Yeah. Did you believe it was a conflict?

A No. I really didn't because, quite frankly, any time

anybody is found guilty and they don't win on appeal they're going to PCR you and say you stunk as a lawyer anyway. I mean, that's just the given, and the question is did Bill do anything that was inappropriate in that first trial. I don't know. I wasn't there, but I know that his strategy was a solid strategy. I know that his defense was a solid defense, and he believed in it. Stanko believed in it, and it had a really good shot of winning at this level and at least it needed to be put forth. So no. I don't know that I really thought there was a conflict. The only conflict that could have existed was if the AG had to talk to him prior to and he discussed that with Stanko and they, they just --

Q So when you had those discussions with Mr. Stanko you did not advise him that it was a potential conflict?

A Not in my opinion. I, I didn't.

Q Were you present at the pretrial hearing on March 4th, 2009, with Judge John regarding the potential conflict? It's, it's not there in front of you. I'm just asking you if you recall attending that?

A I believe so. I think we were in one of these little -- we might even have been in here.

Q Do you recall that at that hearing Mr. Stanko asked Judge John if the only way he could keep Mr. Diggs as his attorney would be to waive ineffective assistance of counsel claims and Judge John responded, "No, sir. I am not asking

you to do that", if the record reflects that that's what happened at that hearing?

A Sure. Then I -- absolutely, that's what happened.

Q No further questions.

THE COURT: All right. You may step down.

A Can I be excused?

THE COURT: Any objection to Ms. Williams being excused?

MS. PAAVOLA: No objection, Your Honor.

THE COURT: Any from the State?

MR. ZELENKA: No objection.

THE COURT: All right. She's free to go.

A Thank you, Your Honor.

THE COURT: Thank you.

MS. PAAVOLA: Your Honor, the Applicant has no further witnesses.

THE COURT: All right. Do we want to take a short break, come back?

MR. ZELENKA: Your Honor, we don't have any more witnesses. We just want to make sure the Court has judicial notice of the Record on Appeal, the motions that have been made before the trial court by the parties.

THE COURT: Let's do this. Let's take about a 10, 10, 15 minute break, come back and then whatever you want to put on the record or take judicial notice of we'll, we'll go ahead and get that on the record and squared away. Okay?

MS. PAAVOLA: Thank you.

MR. ZELENKA: Okay.

THE COURT: All right. Thank you.

***** OFF THE RECORD *****

(On the record.)

THE COURT: All right. Mr. Zelenka, Ms. Scrantom, anything the State wants to present as far as witnesses or anything?

MR. ZELENKA: Your Honor, we don't have any witnesses based upon the testimony of the two trial lawyers already testifying in this case. The, the motion that I was requesting the Court to take judicial notice of was the April 2009 motion that is in the Record on Appeal. So the Court will already have that before it.

THE COURT: And what is that motion?

MR. ZELENKA: It's the motion and notice of motion to review the status of counsel for the Defendant in light of the post-conviction relief action in the companion case that was made by the Solicitor's Office to the Trial Judge and those you have.

THE COURT: Okay.

MR. ZELENKA: And that's at page 3534 and 3535, which is in volume 8 of the record, but I want to be --

THE COURT: I'm, I'm -- and I apologize. Give me that cite. Where is it again?

MR. ZELENKA: Volume eight of the record at page 3534 and 3535.

THE COURT: All right.

MR. ZELENKA: And the other matter was I wanted to be sure the Court had acknowledged or was taking judicial notice of the eight volume Record on Appeal that we've been referring to before the Court.

THE COURT: All right. All right. The Court will take judicial notice of those.

MR. ZELENKA: Thank you, Your Honor.

THE COURT: All right.

MR. ZELENKA: And, and the other issue, and I briefly discussed this with Ms. Paavola, just needing to state for the record that I learned on this Monday that Ms. Paavola's husband had begun working in the Attorney General's Office. That job is in an entirely different position within my office. It's -- he would not be working for me. He's working for another individual in the office in a consumer protection area, Mr. Sonny White. Obviously, we both have the same -- two of the same bosses, Mr. McIntosh and the Attorney Generals of the office, but that responsibility has no impact or no involvement in any of the cases that the capital litigation unit is involved in. I only make that statement for the record because sometimes these cases take a different course as things go beyond years, but I just wanted to make it clear

at this point of time there has been no involvement, no contact, in fact, actually no knowledge until after I got here that he had begun employment this week.

THE COURT: All right. So he hadn't had any involvement in this case at all?

MR. ZELENKA: Absolutely none.

THE COURT: Okay.

MR. ZELENKA: And honestly, Judge, with all due respect to Ms. Paavola, I don't believe I've ever even met him in my life.

THE COURT: All right. Anything from Mr. Stanko that you want to place on the record before --

MS. PAAVOLA: Your Honor, the only other item for the record we would like to note is as we said at the beginning those seven claims that we were not able to develop here today, we would like to pass up a copy for the Court of Martinez versus Ryan which is a recent case from the United States Supreme Court holding that when a claim of trial counsel ineffective assistance of counsel is not developed in post-conviction because of post-conviction's counsel's ineffective representation that claim will not be precluded from being considered under a de novo review standard and potentially additional factual development in federal court, and Ms. Vann and I, we want to make sure that the record is clear that we do not believe we were able to effectively

represent Mr. Stanko with regard to those claims here today because we were not able to offer any expert testimony to develop those claims.

THE COURT: All right. And what were the claims -- you're talking about the --

MS. PAAVOLA: Those are the seven claims that are enumerated in our objection to the hearing, the written objection that was filed last Friday, and then we read them into the record on Monday morning.

THE COURT: Right.

MS. PAAVOLA: They are --

THE COURT: The postponing, the change of venue request.

MS. PAAVOLA: Yes, sir. And all of the penalty phase ineffective assistance of counsel claims and the Brady claim.

THE COURT: Okay. All right. So noted. Anything else?

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

THE COURT: All right. Anything else from Mr. Stanko?

MS. PAAVOLA: Nothing, Your Honor.

THE COURT: All right. I'll take it under advisement, let you all know my decision.

MS. PAAVOLA: Thank you.

THE COURT: Thank you very much.

(Adjourned.)

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the PCR hearing held in the case of Stephen C. Stanko versus State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on March 2-3, 2015.

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

Grace L. Hurley

Grace L. Hurley, CVR-CM-M
Official Reporter

March 18, 2015.

DEFENSE OF INDIGENTS VOUCHER

NOTICE: Please complete voucher including FULL NAME and LAST KNOWN NON-INCARCERATED ADDRESS OF DEFENDANT, and attach your detailed time slip, Order of Appointment, and Notice of Intent to Seek Death Penalty, Order allowing expenses, bills for expenses, and any other supporting documentation, if required. Deliver this completed package to the trial judge for approval and then to the Clerk of Court for certification. If more than one attorney was appointed, submit a single voucher signed by both attorneys. IF YOU HAVE A QUESTION AS TO WHETHER AN EXPENSE WILL BE REIMBURSED, PLEASE CONTACT THE OFFICE OF INDIGENT DEFENSE AT 803.734.1343, FAX: 803.734.1345, e-mail: mcrowe@scoid.state.sc.us BEFORE INCURRING THAT EXPENSE. Once the voucher has been approved by the trial judge and certified by the Clerk of Court, submit the ORIGINAL VOUCHER along with one copy of the supporting documentation to: South Carolina Office of Indigent Defense, P.O. Box 11433, 1122 Lady Street, Suite 1116, Columbia, SC 29211. Please insure that supporting documentation is included and that all parts of this voucher are completed. Entries must be typed or legibly printed to be accepted. Orders submitted for expenses and payments exceeding the maximum allowed by statute must be either the original or a certified copy. YOU MUST SUBMIT THE ORIGINAL SIGNED VOUCHER. INCOMPLETE VOUCHERS AND DOCUMENTATION WILL BE RETURNED. NOTE: All vouchers must be received by the Office of Indigent Defense in correct form not later than THIRTY (30) DAYS after services were completed but in no event later than June 30th of the year services were completed, in order to be paid.

County: Georgetown	List All Case Numbers (GS, GP, JU or Arrest Warrant Numbers): H-750173; H-750181; H-750185 H-929318; H-750183
Client's Full Name: Stephen Christopher Stanko	
Last Known Address (Not to be Incarcerated): [redacted]	List All Charges: Murder; Grand Larceny; CSC w/ minor ABWIK; kidnaping
Voucher Submitted Under Seal? ☑ YES ☐ NO	Previous Vouchers Submitted For This Client at this level (Trial or Appeal)? (Mistrial/Retrial are considered new cases) ☑ YES ☐ NO
Type of Cases (Most Serious Charge): ☑ Death Penalty ☐ Felony ☐ Misdemeanor ☐ Juvenile ☐ Status Offense ☐ PCR ☐ Capital PCR ☐ Capital Appeal ☐ Non Capital Appeal ☐ PVP ☐ Other	

Pursuant to the most current and applicable S.C. law, claim is hereby made for compensation, reimbursement, or is certified by the Public Defender for representation of the above named as set out below.

ATTORNEYS' FEES

NON DEATH PENALTY CASE FEES		
	Hours at $40.00 per hour for Out-of-Court services	$
	Hours at $60.00 per hour for In-Court services (Restricted to actual hearing times)	$
DEATH PENALTY CASE FEES		
	Hours at $60.00 per hour for Out-of-Court services	$
	Hours at $75.00 per hour for In-Court services (Restricted to actual hearing times)	$ 37,935.50
	TOTAL FEES:	$ 37,935.50

MAXIMUM FEE ALLOWED IS $25,000 per attorney in Death Penalty cases, $3,500 in Felony cases, $1,000 in Misdemeanor and PCR cases, and $1,750 in PVP cases.

EXPENSES

Long Distance Telephone Calls	$
Psychiatric Examination *	$
Expert Witness (es) *	$
Investigative Services *	$
Extraordinary Travel Expenses *	$
Advanced Payment For Expenses *	$
Other Expenses (Explain) *	$

* PREQUISITE PRIOR APPROVAL FROM THE COURT. ATTACH ORIGINAL OR CERTIFIED COPY OF ORDER GRANTING PRIOR APPROVAL OF COURT — ORDER MUST STATE MAXIMUM EXPENSE ALLOWABLE WITHOUT SUBSEQUENT ORDER. EXPENSES MUST BE APPROVED PRIOR TO BEING INCURRED IN ORDER TO BE PAID. ALL EXPENSES ARE NOT REIMBURSEABLE. Please read instructions on what expenses are reimbursable.

TOTAL EXPENSES: (Attach copies of all bills with explanation of expense and Court Orders allowing expenditure where required.)	$
MAXIMUM EXPENSES allowed are $30,000 in Death Penalty cases and $500 in all other cases.	
Less amount paid by Defendant or by any person on Defendant's behalf.	$
TOTAL FEES AND EXPENSES REQUESTED ON THIS VOUCHER:	$ 37,935.50

☐ Advance payment. Date of request for funds (Approval Order attached): _____, 20__

☑ Final submission; no further requests for funds. Date case concluded: August 18, 2006

Method of Disposition: ☐ Plea ☐ Trial ☐ Acquittal ☐ Guilty Verdict ☐ Mistrial ☐ Dismissal ☐ Other

This is a true and correct statement of my service to and expenses for the above named Defendant.

Attorney's Signature: [signature]	Attorney's Signature
Check Applicable Category: ☐ Public Defender ☑ Private Attorney	Check Applicable Category: ☐ Public Defender ☐ Private Attorney

CHECK WILL BE MADE PAYABLE AND MAILED TO ONLY ONE ATTORNEY, FIRM OR PUBLIC DEFENDER CORPORATION AS REQUESTED BELOW. SOCIAL SECURITY OR F.E.I. NUMBER MUST BE INCLUDED.

Name and Address of Check Payee:
William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577

SS or F.E.I. Number: [redacted] TELEPHONE NUMBER: 843.626.4643

Trial Judge's Signature	
Court or Circuit	
Date Approved	
Clerk of Courts Signature	
Clerk of Court For (County)	
Date Certified	
OID FILE NO.:	
AGENCY VOUCHER NO.:	

OID FORM 100 (12/02) Legal Duplication is Authorized — PREVIOUS VERSIONS OF THIS FORM ARE OBSOLETE AFTER 12/31/02

Gerald Alan Kelly
4760 Yemassee Highway
Varnville, SC 29944
803-943-0510
geraldkelly@islc.net

Georgetown Detention Center 843-545-3400

TIME RECORD

TO: FILE
FROM: WID
DATE: Beginning August 30, 2005

- **August 30, 2005** Received Order of Appointment from Judge Jefferson on Tuesday, August 30, 2005. Mistakenly appointed Parnelli. Called the judge's office and informed of corrections.

.25

- **September 1, 2005**. Talked to Gerald A about the case. Talked for approximately 30 minutes. He suggested two investigators he had worked with in the past. I told him it was ok with me.

.50

- **September 22, 2005**. Trip to Georgetown from Myrtle Beach. Interview with client. With Johana and Gerald. **1st trip @ 90 miles**

5.0

- **October 21, 2005.** Conference Telephone call with Judge Jefferson, solicitors and Gerald Kelly to discuss scheduling order.

.5

- **November 3, 2005**. Receipt, review and copying of discovery materials from the Solicitor's office.

2.0

- **November 4, 2005.** Trip to Georgetown to see client and to deliver copy of materials. **(3.5 hours)**. Note: client chose not to keep the materials at this time. **2nd trip**

3.5

- **November 8, 2005.** Receiving and reviewing the letter from Mr. Kelly and the attachment therewith. **0.5**

12.25

- **November 10, 2005.** Trip to Coastal Carolina University meeting with Dr. Albiniak to discuss case strategy and expert involvement. **2.0**

- **November 14, 2005.** Responding to Mr. Kelly's letter. **0.5**

- **November 14, 2005.** Trip to Georgetown to see client and deliver copies of the discovery materials, discussing the strategy of the case. **3rd trip @ 90 miles** **3.5**

- **November 14, 2005.** Preparing the order for evaluation and contacting Dr. Tora Brawly as an expert witness in this case. **1.0**

- **November 16, 2005.** Telephone conference with Dr. Brawly, discuss the case and see the possibility to get involve as an expert witness, setting the evaluation date for January 10, 2006 **.5**

- **November 19, 2005**. Researching, preparing, and sending out the medical records request and inmate request. Also sending the orders to the judge for her signature. Sending the same to client and Mr. Kelly **2.5**

- **November 29, 2005.** Receiving a telephone call from Mr. Stanko sister. Discussing the case and a possible meeting with her and the brother and possible the trial appearance for them as witness. **0.5**

- **November 29, 2005.** Receiving a telephone call from Judge Jefferson's office in regard to the Orders submitted to her. Returning the call back leaving a message. **0.25**

- **November 30, 2005**. Receiving and reviewing a letter from Mr. Kelly and a letter from Berkeley County Mental Health Center in regard to subpoena. Transmittal Letter to Clerk of Court with the signature page on the Order for Forensic Neuro-Psychiatric Examination. **0.50**

- **January 6, 2006.** Phone call from client discussing the discovery material he received notifying him of the next meeting that we will have. **0.25**

- **January 9, 2005.** Conference Call with the Dr. Brawley' office in regard to the evaluation on January 10, 2006. The evaluation got continued, need to get another doctor involve in this case. Another order will be needed. **0.50 = 12**

- **January 10, 2006** Conference Call with Judge Jefferson, discussing the order for the Mitigation expert and investigation expert. Preparing a voucher and submitting to her for the mitigation and investigation funds that will be paid in advance.

0.5

- **January 20, 2006** Discussing the case with the mitigation specialist, records that needs to be requested. Meeting that she had with the client, information she got.

0.75

- **January 23, 2006**. Preparing the Order for Expert service of James Evans Aiken, serving to the Judge, Mr. Kelly and the client.

0.75

- **January 27, 2006.** Meeting with the mitigation expert and investigation expert discussing the case. Talking to the client on the phone and talking to the client's sister on the phone.

3

- **January 30, 2006.** preparing the package for the doctor for Stanko's evaluation on February 8, 2006.

0.5

- **January 30, 2006.** Preparing the order for the doctor expert Donna Schwartz-watts and for the evaluation on Stanko, serving the same to judge, Mr. Kelly and the client.

.75

- **March 6, 2006.** Status conference with the Judge and Mr. Kelly discussing the letter that client send to the judge, following with the letter to judge and client

1

- **March 9, 2006**. Traveling to Georgetown to see client discussing the issue in this case and the letter he send to judge about Mr. Diggs **4th trip @ 90 miles**

3

- **March 13, 2006.** Receiving a message from client, calling Georgetown detention back, leaving a message for client and paralegal talking to client, (client needs a motion to be relieve filed), talking with the judge and Mr. Kelly about this issue.

1

- **March 14, 2006**. Preparing and faxing the motion to be relieved in this case talking to the judge about it, going to Georgetown to file the motion talking to the judge to get the motion in the docket to be heard.

2.5

Sub total = 13.75

- **March 14, 2006**. Talking with Mr. Kelly about investigator's payment, talking to Mr. Adams and Mr. Kelly about the payment issue for the investigator, sending e-mails to the investigators and Mr. Kelly.

0.5

- **March 14, 2006**.Going to see Dr. Thrasher to try to retain him in this case as an expert talking to Dr. Goldshmit's office trying to retain him, but he has a conflict in this case. Talking to dr. Albiniak getting an update on his research.

1

- **March 15, 2006**. Calling Dr, Simmons trying to get him to be our expert witness in this case. He has a conflict, can not represent the defendant.

0.5

- **March 16, 2006.** Meeting with Mr. Kelly, discussing the case strategy of the defense, hearing in the morning in the motion to be relief, and talking briefly with Judge Jefferson, being informed that media may be present at the hearing in the morning

2.5

- **March 17, 2006.** Traveling the Georgetown and back to the office after the hearing in front of judge Jefferson. **5th trip @ 90 miles**

2

- **March 17, 2006.** Discussing the motion hearing with Mr. Kelly, and the argument related to it. And than the hearing in front of Judge Jefferson. Her decision on that motion

2

- **March 17, 2006**. Meeting with Dr. Thrasher. Discussing the case and the defendant. Getting his opinion as to the case, as well as

some names for expert witnesses. At this time he is not sure of his involvement in this case.

1.5

- **March 17, 2006.** Client call. A meeting is set for Thursday, March 23, 2006.

0.2

- **March 20, 2006.** Contacting Dr. Thomas Sachy an expert witness from Gray, Georgia. He will be our expert. Getting a e-mail from him, CV attached.

0.5

- **March 21, 2006.** Preparing the order for expert services, talking to the doctor about information needed from him.

1

- **March 22, 2006.** Discussing the case with doctor Sachy, reviewing published articles referenced in Dr. Sachy's prior court testimony in the Rivera case, development of strategy for the trial.

1

Sub total = 12.7

- **March 23, 2006.** Trip to Georgetown to meet with client and investigator Childs. **6th Trip @ 90 miles**

3.5

- **March 27, 2006.** Meeting with Mr. Kelly, Vicki and Dale discussing the case, strategy and the doctor who will testify at the trial of the case.

4

- **March 28, 2006.** Going to Georgetown sheriff's office reviewing the boxes with materials seized from our clients apartment after the murder of Ms. Ling. **(4 hours-** 2 hours reviewing the documents) **7th trip @ 90 miles**

4

- **March 31, 2006.** Emails to Drs. Wu, Sachy, and Einhorn, following telephone conferences with each re: services in this case, scheduling of PET scan and MRI and psyc battery of tests.

.5

- **April 5, 2006.** Telephone to doctor Einhorn, discussing the testing and calling the judge in regard to the expert order.

0.5

- **April 5, 2006.** Going to see client and discuss the testing on him and the result from viewing the document on his personal boxes seized from the sheriff's department. **(3 hours) 8th trip @ 90 miles**

3

- **April 6, 2006** Telephone discussions with Drs. Sachy and Einhorn, re: status of court order on expert fees and discussion of schedule for examinations. Dr. Sachy to set up PET Scan next week. **[.3 hours)**

.3

- **April 7, 2006** Letter to Dr. Einhorn to confirm hiring and tests to be performed. **[.2 hours] Subtotal time to date: 66.7**

.2

- **April 28, 2006** Review of juror questionnaire. Email letter to Gerald Kelly re: same. Discussion with Appellate Defense (Joe Savitz) re: capital cases and juror questionnaires and voir dire issues.

.2

- **May 1, 2006** Email from Dr. Sachy re: volumetric MRI. Scheduling of same. Teleconference with Dr. Sachy re: Dr. Gur. Call to Dr. Gur in PA. Teleconference with Judge Jefferson and other counsel re: status conference.

1.2

- **May 2, 2006** Email to Dr. Sachy re: Scheduling of tests at MUSC **(.2 hours) 17.6 (running total 68.3)**

.2

- **May 2, 2006** Survey of U.S. case law on insanity and irresistible impulse, model penal rule and S.C. Code Ann 17-24-20 (GBMI). Beginning of drafting of pre-trial motions

2.6

- **May 4, 2006** Teleconference with Dr. Sachy re: MUSC exams. E-mail letter to Sachy re: scheduling with Dr. Einhorn

.3

- **May 5, 2006** Teleconference with Dr. Einhorn re: scheduling of MUSC tests and discussion of logistics. Transmittal of requested info re: past meds in preparation of testing at MUSC and Georgetown. Drafting of letter to Judge Jefferson for the transporting of client to MUSC on May 18, 2006 at 8:00 am.

.4

- **May 8, 2006** Teleconference with Dr. Einhorn re: upcoming testing at MUSC. Travel directions and scheduling for testing at Georgetown.

.2

- **May 9, 2006** Teleconference with Dr. Einhorn re: testing and travel.

.1

- **May 9, 2006** Receipt and review of emails from Dale Davis from Laura Ling to others

1.1

- **May 11, 2006** Trip to Georgetown County Detention Center to visit with client to discuss case, facts and strategy **(3 hours) 9th trip @ 90 miles**

3

- **May 12, 2006** Multiple discussions with Dr. Einhorn, Dr. Sachy; MUSC, re: scheduling of psychological tests, pet scan and MRI **(1 hour)**

1

- **May 17, 2006** Discussions with Dr. Einhorn re: testing and travel

.2

- **May 18, 2006** Discussions with Dr. Einhorn re: testing schedules for the day

.2

- **May 18, 2006** Telephone conference with co-counsel re: case status and strategy, probable motions based on testing outcome and reports **(.75 hours)** page total = 9.85

.75

- **May 18, 2006** Telephone conference with Dr. Einhorn re: status of testing at both MUSC and GDC.

.1

9.95 (running total 78.25)

- **May 19, 2006.** Trip to Georgetown County Detention Center to visit with the client and Dr. Einhorn re: the continuance of the tests. **(2.5 hours) 10th trip @ 90 miles**

2.5

- **May 23, 2006.** multiple discussion with Dr. Wu's office, MUSC, and Dr. Sachy in regard to the test result and how to get them to Dr. Wu.

.2

- **May 24, 2006** Emails to and from Dale Davis re: investigation/mitigation and case status. Multiple calls to MUSC re: disc for Dr. Wu, call to Dr. Sachy re: order from his office re: disc data.

.7

- **May 31, 2996** Trip to Georgetown detention Center to visit with client and discuss the testing done by dr. Einhorn. **(3 hours) 11th trip @ 90 miles**

3

- **June 1, 2006** Preparing and sending the amended order on Dr. Einhorn and the voucher for his service **(.5 hours)**

.5

- **June 13, 2006** Teleconference with Dr. Wu; teleconference with Dr. Einhorn; teleconference with Gerald Kelly; receipt of letter from Solicitor's office re: insanity tests;

1.8

- **June 16, 2006** Teleconference with Dr. Wu to discuss his analysis of PET scan data; hypofrontality. Teleconference with David Keator of Brain Imaging Legal Services re: Discs

1

- **June 19, 2006** Trip to Georgetown to meet with client to discuss evidence and strategy; reviewing evidence and making copies of same at Sheriff's office **(5.5 hours) 12th trip @ 90 miles**

5.5

- **June 20, 2006** Receipt and review of PET scan images. Discussion of same with Dr. Sachy, and Dr. Wu. **(2.2 hours)**

2.2

- **June 21, 2006** Research of insanity laws and evolution of same. Drafting of pretrial motions; reviewing and making copies of documents at Horry County Police Department

8.5

- **June 22, 2006** Trip to Georgetown and meeting with client and co-counsel. Hearing before Judge Jefferson on motions and other case related matters. Meeting with client and return trip from Georgetown. **(6 hours)** (subtotal) **13th trip @ 90 miles**

6

- **June 23, 2006** Discussions with Dr. Wu concerning the color scales associated with the imaging process and articles concerning Frye arguments made in past cases in other States (not South Carolina which follows neither the Frye nor Daubert analysis)

.4

- **June 24, 2006** Trip to Georgetown, visit with client. Meeting with Dr. Sachy to discuss case and tests still to be performed. Discussion with Dr. Sachy of procedures and opinions after tests were completed. **(4.5 hours)** **14th trip @ 90 miles**

4.5

- **June 25, 2006** Research and review of psychological and psychiatric materials related to findings of Drs. Wu and Sachy.

3

- **June 29, 2006** Meeting with Dr. Thrasher regarding testimony at trial; update on findings, review of evidence

1

- **July 1, 2006** Meeting with Dr. Califf to discuss potential testimony in trial regarding family background; review of evidence to date

1

- **July 7, 2006** Trip to Georgetown to meet with client. Meeting with Dr. Thrasher. Meeting with Dr. Thrasher and client. Dr. Thrasher's protocol with client and attorney involvement. **(5 hours)** **15th trip @ 90 miles**

5

- **July 8, 2006** Review of case law including Clark v. Arizona; review of neurological articles;

6

- **July 9, 2006** Receipt and review of Sachy report draft. Discussions with Dr. Sachy re testimony at trial and findings resulting from tests.

.9

- **July 10, 2006** Letter to Dr. Einhorn re: payment for services and anticipated trial testimony and scheduling.

.6

- **July 10, 2006** Discussions with Dr. Sachy. Receipt and review of final report from Dr. Sachy. Email to Dr. Wu to discuss itinerary and scheduling.

1.2

- **July 11, 2006** Preparation of witness list and exhibit list. (1 hour)

56.5 (running total: 134.75 hours)

1

- **July 14, 2006** Trip to Georgetown to visit client and Court appointed doctor (Crawford) (5 hours) **16th trip @ 90 miles**

5

- **July 15, 2006** Trip to Georgetown to visit client and Court appointed doctor (Crawford) (4 hours) **17th trip @ 90 miles**

4

- **July 16, 2006** Discussions with Dr. Crawford and Fran Humphries re: trip to Columbia tentatively scheduled for Monday July 17, 2006 (.2 hours)

.2

- **July 18, 2006** Discussions with Dr. Sachy re: Dr. Crawford's efforts to change his opinion. Review of case law applicable to insanity and diminished capacity (1.1 hours)

1.1

10.3 (running total 145.05)

- **July 19, 2006** Review of case law in preparation for trial and presentation of insanity defense. (2.0 hours)

2

- **July 20, 2006** Review of case law and evidence in preparation of trial and motions arguments (2.4 hours)

2.4

- **July 21, 2006** Preparation for trial; review of evidence and case law. Discussions with Dr. Sachy re: updated report. Receipt and review of Dr. Gur's report. (2.5 hours)

2.5

- **July 22, 2006** Receipt and review of updated report from Dr. Sachy. Trial preparation (1 hour).

1

- **July 24, 2006** Review of juror questionnaires, motion hearing before judge Jefferson (5.5 hours)

5.5

- **July 25, 2006** Discussion with Dr. Sachy re: state motion in limine (.5 hour)

.5

- **July 25, 2006** File review and case research on insanity. Discussion with Dr. Sachy and Dr. Thrasher re: defense testimony. (2.1 hours) Formulating memo in opposition

2.1

- **July 26, 2006** Meeting with Vicki Childs; receipt and review of letter from client; e-mail to Dale Davis re: Calif; receipt of motion from co-counsel re: Conway charges; discussion with Dr. Sachy re testimony required on Monday, July 31, 2006. (3 hours)

3

- **July 28, 2006** Trip to Georgetown to visit client and Dr. Thrasher. (5 hours) **24 hours sub (169.05 running total) 18th trip @ 90 miles**

5

- **July 29, 2006** Discussions with Dr. Sachy regarding trip schedule and testimony. Receipt and review of report from Dr. Crawford. Discussions with Dr. Sachy regarding same.

2

- **July 30, 2006** Meeting with Dr. Sachy and Dr. Thrasher. Various conversations with Dr. Sachy enroute (2.3 hours)

2.3

- **July 31, 2006** Motions argument and court matters.

8

- **August 1, 2006** Trip to Georgetown County, jury qualification process. Compiling juror information with panel's and preparing for following day **(13 hours) 19th trip @ 90 miles**

13

- **August 2, 2006** Trip to Georgetown County, jury qualification process. Compiling juror information with panel's and preparing for following day **(13 hours) 20th trip @ 90 miles**

13

- **August 3, 2006** Trip to Georgetown County, jury qualification process. Compiling juror information with panel's and preparing for following day **(13 hours) 21st trip @ 90 miles**

13

- **August 4, 2006** Trip to Georgetown County for jury qualification process. (13 hours) **64.3 hours sub (running total 233.35) 22nd trip @ 90 miles**

13

- **August 5, 2006** Telephone call from Fran Humpries re: subpoena (.1); Telephone call back to Peggy at Solicitor's office (.1); call to Gerald Kelly (.1); meeting with Bernard Albiniak (1); work on examination of experts (.7) = **2 hours**

2

- **August 6, 2006** Trip to Georgetown to meet with client before trial. **(3 hours) 23rd trip @ 90 miles**

3

- **August 7, 2006** First day of trial. Trip to Georgetown. Presentation of state's case in chief. **(11 hours). 24th trip @ 90 miles**

11

- **August 8, 2006.** Second day of trial. Trip to Georgetown. State's case in chief, state rests. Beginning of defense. Dr. Albiniak. **(10 hours) 25th trip @ 90 miles**

10

- **August 9, 2006.** Third day of trial, first full day of defense. Dr. Thrasher, Dr. Einhorn, Dr. Wu. **(9 hours). 26th trip @ 90 miles**

9

- **August 10, 2006**. Fourth day of trial Dr. Sachy's testimony. Presentation of state's rebuttal witnesses: Crawford, Brannon, Brawley, Spicer. **(10 hours) 27th trip @ 90 miles**

10

- **August 11, 2006** Trip to Georgetown. Closing arguments through jury verdict. **12 hours 57 new hours. (290.35 total hours) 28th trip (@ 90 miles per trip)**

12

28 x 90 = 2,520 miles subtotal

- **August 13, 2006** Discussions with Dr. Wu, and Dr. Thrasher re: testimony in penalty phase. Trip to Georgetown to visit client and discuss penalty phase **(3.4 hours) 29th trip (@ 90 miles per trip)**

3.4

- **August 14, 2006** Trip to Georgetown, Monday, first day of penalty phase. (11.6 hours) **30th trip (@ 90 miles per trip)**

11.6

- **August 15, 2006** Trip to Georgetown, Tuesday, second day of penalty phase. (11.6 hours) **31st trip (@ 90 miles per trip)**

11.6

- **August 16, 2006** Trip to Georgetown, Wednesday, third day of penalty phase of trial. **(11. 5 hours) 32nd trip @ 90 miles per trip)**

11.5

- **August 17, 2006** Trip to Georgetown, Thursday, fourth day of penalty phase of trial. **(12 hours) 33rd trip @ 90 miles per trip)**

12

- **August 18, 2006** Trip to Georgetown, Friday, fifth day of penalty phase of trial. 9 hours) **34th trip @ 90 miles per trip)**

9

- **August 19, 2006** Preparation of Notice of Intent to Appeal and service on counsel of record. Filing of same with the State Supreme Court

.6

- **August 26, 2006** Travel to Leiber Correctional Institution to meet with client about appeal

7

Total hours = 345.45
Total mileage= 3060

INITIAL ASSESSMENT
STANKO, STEPHEN C.

Date: July 31, 2006

Setting: The patient was examined at the Georgetown County Detention Center for about 4 hours on July 7, 2006 and for about 2½ hours on July 28, 2006, a total of 6 ½ hours. These assessments were done in the facilities library and in an interview room in the facility. The patient was not restrained and was free to move about. Water and restrooms were available. The library was spacious, the interview room was small and noisy what with the loud clank of remotely operated doors nearby. The patient could and did take notes. Others present throughout the assessment hours were his attorney, Mr. William Diggs and Mr. Diggs' assistant, Ms. Yohanna Bufford.

Representation: The patient was represented by William I. Diggs and Gerald Kelly, Attorneys at Law. The patient did know his attorneys' names, addresses and telephone numbers and Mr. Diggs was present throughout each hour of evaluation. It was obvious that the patient got along well with Mr. Diggs and could relate with him with ease.

Charges: The patient said the charges in this case were Grand larceny, Criminal Sexual Conduct with a Minor, Assault and Battery with Intent to Kill, Kidnapping and Murder. He was aware of the seriousness of the charges and that if found guilty the potential maximum sentence could be the death penalty and the potential minimum outcome could be civil commitment.

Rights: The patient did understand rights afforded defendants under the Miranda line of cases and had his attorney present throughout the entirety of the examinations and thereby available to advise, instruct and to assure the patient concerning his legal rights.

Competence: The patient was aware of the basic functions of participants in a court of law including the Judge, Jury, Defense Counsel, Solicitor and Witnesses. He was aware of the right to confront witnesses. He was aware that he would be expected to sit quietly at a table alongside his attorney and to listen carefully to all the evidence and to confer with his attorney about the evidence to assist with his defense.

Documents reviewed:

1. The birth record of Stephen C. Stanko from the Naval Hospital, Guantanamo Bay, Cuba.
2. The high school record of Stephen Stanko from the Berkley County, SC School District.
3. The ICHR arrests, court charges and Disposition listing of Stephen Stanko showing entries for 1993, 1994, 1996 and 2005.
4. Arrest Warrants with affidavits for Stephen Stanko, # H705185, H929318, H750183m G750181 and H705173 issued from Georgetown County, SC dated April 14, 2005 alleging Grand Larceny, Criminal Sexual Conduct with a Minor, Assault and Battery with Intent to Kill, Kidnapping and Murder.
5. Autopsy # FA5215 and case summary 30265 of Laura Ling by Amy Shell, M.D. and Kim Collins, M.D. of July 9, 2005 at MUSC, Charleston, SC.
6. An incident report alleging a prior Kidnapping of Jane McLendon by Stephen Stanko in Goose Creek, SC dated February 20, 1996.
7. A supplementary incident report dated July 29, 1996 alleging Stephen Stanko had improperly sold and traded automobiles owned by his employer, McElveen, an auto dealer in Berkley County, SC.
8. A transcription of a taped statement of Christine Ling dated April 8, 2005.
9. Statement of Felicia Carr, case # 4050576, undated.
10. Statement of Marnie Stacy dated April 8, 2005.
11. Statement of Chuck Petrecella dated April 8, 2005.
12. Statement of Donald Nesmith dated April 8, 2005.
13. Statement of Jeff Lauman dated April 8, 2005.
14. Statement of Charles Scott Gosmele dated April 8, 2005.
15. Statement of John K. Garmer dated April 8, 2005.
16. Report of T. H. Sachy, M.D. dated July 7, 2006 and update dated July 22, 2006 concerning Stephen Stanko.
17. Draft report of R. C. Gur, PhD, undated, concerning Stephen Stanko.
18. Report of J.C. Wu, M.D. dated May 18, 2006 concerning Stephen Stanko.
19. PET Scan video on CD-ROM concerning Stephen Stanko.
20. Copies of PET Scan images of Stephen Stanko.

21. Neuropsychological Examination report of Marc Elnhorn, Psy.D., dated May 19, 2006 concerning Stephen Stanko.
22. Report of CT of Brain scan of Stephen Stanko by Eva Zo-Laberu dated May 18, 2006.
23. Multiple crime scene photographs.
24. E-mail communication between a Ms. Dale Davis and Mr. Diggs.

ID: The patient is a 38-year-old, single, childless, unemployed male inmate at the Georgetown County Detention Center, Georgetown, SC. He was dressed in an orange jump suit, stood near 6'3' tall, weighing near 200 pounds with brown eyes and dark hair and wearing corrective lenses.
HPI: According to Mr. Stanko he had been released from prison after serving some eight and one-half years of a ten-year sentence arising from allegations of multiple breach of trust charges and obtaining signatures and property under false pretenses, grand larceny, assault and battery with intent to kill and kidnapping. He came to the Berkley County, SC area seeking employment. He said his brother had wanted him to come to North Carolina but his brother's wife's son had to move in because he had been injured while serving in the USAF. Mr. Stanko lived in a hotel while he looked for other options. He made arrangements to take care of an 84-year-old woman during which time he began to fear the elderly woman may get him in trouble with his probation officer. He said he had a friend, Brett, who he met while in prison and for whom he was doing research to help appeal his case. At the local library where he performed the research he met one Laura Ling, the research manager. Attraction evolved into interest one for the other and he moved in with Ms. Ling and her adolescent daughter, [redacted] on Thanksgiving Day, 2004. He said it turned out to be the best physical relationship he had ever had. He used Ms. Ling's car to look for employment and he did some odd jobs at times. Then he started "working the con" again. He presented himself as a stock broker, telling gullible clients he could obtain stocks at a low rate and double their investment. He took money from them, did not invest it and paid some of them off with the money he got from others. On occasion he presented himself as a paralegal. At home he perceived that [redacted] and her mother were at odds more and more and [redacted] implicated him as the cause by incursion into the mother/daughter relationship. [redacted] statement did not agree with this. On the night of the incidents leading to his arrest he

said that [redacted] and her mother had argued intently, but this was not supported in [redacted] statement. He elected to pack a bag and move out, perhaps live with his friend Henry Turner. Mr. Stanko said Ms. Ling's reaction to that was to become enraged and threaten to have [redacted] report him for child molestation. He never had thought of such a thing concerning the youngster, no less had he nor would he do any such thing. He was "flabbergasted." He drank some beer, sat down on the bed, then leaned back against the wall at the head of the bed. He recalled this was near like what had happened in 1996 when he landed in prison. Ms. Ling lay down beside him talking and gesturing when suddenly her arm "flew up" striking his hand and driving a lit cigarette against his nose, near his eye. It was hot and burned him.

Next he knew he was in the shower, naked, blood all over. He grabbed a towel to cover himself and go out to see what had happened. He found Ms. Ling and [redacted] on the floor, both covered with blood. He checked for pulses. Finding none, he "freaked out," cried, contemplated suicide, feared going to prison for something he did not do. He thought someone else might have done it. [redacted] statements graphically revealed her experience at his hands during his "blackout." He planned to go to his friend Henry Turner to get some advice and help to turn himself in. He finished packing his clothing and drove Ms. Ling's automobile to Mr. Turner's residence. Apparently he took along a guitar and a bracelet he had removed from Ms. Ling. From there he traveled to Columbia, SC and then on to Augusta, GA where he was arrested. While there he had chatted up a young woman with whom he spent a couple of days and to whom he gave the bracelet taken from Ms. Ling. Eventually he was transported to the Georgetown Detention Center in Georgetown, SC.

Mr. Diggs and Mr. Kelly were appointed to represent him. Mr. Diggs contacted me to examine Mr. Stanko because of his complete inability to remember a single thing about what happened. Ms. Ling had expired but her daughter, [redacted], had survived and had made a detailed statement about her experience at the hands of Mr. Stanko that day, April 8, 2006. Mr. Diggs was referred to Dr. Sachy who arranged to have brain imaging studies done on Mr. Stanko. These reportedly indicated Mr. Stanko had low functioning of the frontal lobes of his brain.

ALLERGIES: Sulfa medications

CURRENT MEDS: None

PPHx: He said he was seen at the Berkley County, SC Mental Health Center in 1994 and by Dr. Frierson at the SC Department of Mental Health, Columbia, SC and by a Randy Wald, PhD.

FPHx:	SUICIDES:	Unknown
	SUBSTANCES:	His brother reportedly may have been "using."
	MENTAL DIS.:	None
SUBSTANCES:	TOBACCO:	None since he has been in jail
	ALCOHOL:	None
	DRUGS:	None
	NEEDLES:	None

Legal Hx:	As per HPI
Patient's Atty:	As per HPI

PMHx: Physician:	None
SURGERY:	Left herniorraphy
MEDICAL:	Born with jaundice and had vomiting and poor reflexes
INFECTION:	None
FRACTURE:	Concussion about age fifteen
TRAUMA:	Beaten and stabbed in prison
SEIZURES:	None
FHx: FATHER:	76 years old, health unknown, suffered a heart attack. They have not spoken in 12 years.
MOTHER:	73 years old, health better than his father's
BROTHERS:	One died in a fire in1983 at 23 years old. He may have been shot in the head. He used drugs. One is 40 years old, in good health, a Master Sgt. in the US Army stationed at Ft. Bragg, NC.

SISTERS: One is 51 years old and in good health and one is 49 years old, state of health unknown.
SPOUSE: DNA
CHILDREN: DNA

SOC. Hx: He was born in Guantanamo Bay, Cuba and reared in Corpus Christie, TX, Great Lakes and Charleston, SC. His father was a Master Chief, Electronics Technician who retired. His mother was a housewife. His parents got on well. There was no violence in the home. His dad drank "10 high" every night until he went to sleep. The patient felt loved as a child. Stephen was the youngest. In school he did well. The patient had dogs and never abused them. He was not a bed wetter. He had no attraction to fire. He was an "adolescent crybaby." He was a baseball catcher, played football and volleyball. He lettered in sports. He dated. He got along with school staff. He graduated high school in Goose Creek, SC in 1986. He worked in retail sales including office machinery, chemicals, life insurance, automobiles, construction equipment and water beds over a two year period. Changes were due to his running the con. He would steal equipment and sell it. "I made myself out better than I was. I never met the standards I should have. I got fired. I could not come through with promises." At age 28 he was charged with multiple Breach of Trust offenses arising from his "con" involving illegal automobile sales. He had a girlfriend with whom he had an argument and who he "tied up" with a neck tie for "a few minutes" evidently to prevent her calling the police. These matters landed him in prison for 8½ years. He said that he became a jailhouse lawyer and co-authored a book on life in prison. A few months after his release he became involved with Ms. Ling and his current circumstances evolved. It appears his whole family essentially has become alienated.

ROS: GENERAL: Good
HEENT: Corrective lenses
RESP: Negative
CV: Negative
GI: Negative
GU: Negative
MS: Negative

INT: Mole on scalp
END: Untested
NP: Please see HPI

MSE: The patient presented as a polite, friendly, cooperative, productive man appearing his stated age. He was neat, clean and dressed in an orange jump suit. His handshake was firm. His eye contact was solid. He entered the examination areas and seated himself spontaneously and sat quietly. He spoke in a clear voice at a normal rate and used neither oddities nor peculiarities of speech. His thought processes were intact. His thought content did not reveal delusional thinking. There was no evidence of pseudoperceptions. His mood was neutral. The patient was not suicidal. His affect was full range and was in keeping with expressed thoughts, mood and ideas. The patient was fully oriented. His memory was intact except as noted in the HPI. Attention, focus and concentration were adequate. His abstracting ability was intact. His judgment was intact for hypothetical situations. Attitude and outlook were hopeful. Intelligence, based upon familial, social, educational and experiential backgrounds was estimated to be above average.

Tears welled up in his eyes and his voice faltered on occasion when speaking about his affection for Ms. Ling and her daughter, [redacted]. He hugged himself with folded arms. He turned his back to the door lest inmates or staff see him crying, however he did not break out in sobbing. He was matter-of-fact when speaking of his inability to recall the awful thing he was purported to have done. He asked quizzically, "With my intelligence why would I have done that to the two people I love the most? It does not make any sense." He spoke with a calm frankness. He spoke much the same way about his working "the con" but he was a bit hesitant about the details. He was also nonplussed about his prior criminal record except to note how difficult it had made things for him. He had co-authored a book about prison life from his experience there. He considered himself somewhat of a celebrity at this detention center and spoke of an encounter with another inmate that did not result in disciplinary action. He rather pitied the man but felt confident about the way he handled that, "just cut his eye is all." He was aware that [redacted] was going to testify about him and spoke with a fatherly affection and attitude toward her. He was notably irritated by

his having perceived that a physician psychiatrist state witness had dared "lie" to him. Of course he had deceived others many times but that was different, this witness was supposed to be "a professional" and obviously held to a different standard. He said, "They really like me around here and put a scared man in my room because they, the staff, know I will take care of them." He said he had one prior "blackout" some years ago when some "gay" touched his buttocks. He made it seem as if the person were fortunate because Mr. Stanko was restrained from action by others nearby.

DSM IV DIAGNOSES

AXIS I	Diagnosis Deferred; 799.9
AXIS II	Antisocial Personality Disorder, Psychopathic Type
AXIS III	Abnormal low function of the frontal lobes, particularly of the orbito-frontal areas
AXIS IV	Serious legal entanglements
AXIS V:	Current GAF 80, highest in past 12 months unknown.

SUMMARY: Mr. Stanko started life on the margin. Medical records indicate that he had evidence of central nervous system dysfunction that caused providers to believe he might not survive. This may have initially caused frontal lobe dysfunction. In adolescence he was struck on the back of the head and rendered unconscious and suffered a concussion. He may have had contra coup injury to the frontal lobe leading to further injury to that area. He was said to have a changed personality about that time, being described as impulsive. He graduated high school and worked at many different jobs, some fifteen to twenty in near two years. He said he was initially well liked, punctual and effective but became involved in "cons" and was let go. In 1996 a girlfriend became angry at him about this and hit him. He tied her up and landed in prison for eight and one-half years. He had a blackout some years ago when touched by a "gay." Review of records up to April 2004 indicated he had developed an antisocial psychopathic behavioral style. In or about 1996 a girlfriend hit him and he became violent but had recall of the matter. Sometime later a "gay" person touched him and he lost awareness but he was restrained. This time, in April 2005, he was struck and burned by a cigarette by his girlfriend and lost awareness of his having killed his girlfriend and attacking her daughter, who survived. After his being charged in the death of his girlfriend, Ms. Ling, and the rape

and attempted murder of her daughter [redacted], he was evaluated by Drs. Gur, Wu and Sachy, all of whom found evidence of low functioning frontal lobes predisposing him to risk of eruptions of violence in response to threats or injury.

FINDINGS

At the time of the alleged offenses Mr. Stephen Stanko WAS suffering from a mental disease, disorder or defect and he DID NOT have the capacity to distinguish moral or legal right from wrong and to recognize the particular acts charged as morally or legally wrong.

At the time of the alleged offenses Mr. Stephen Stanko DID have a mental disorder, disease or defect and DID NOT have sufficient capacity to conform his behavior to the requirements of the law.

At the present time Mr. Stephen Stanko DOES have a mental disorder, disease or defect but he IS competent for trial.

J. W. Thrasher, Jr., M.D.

JWT/ds

THOMAS H. SACHY, M.D., M.Sc.
Georgia Pain and Behavioral Medicine
P. O. Box 1726, Gray, Georgia 31032
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July 7, 2006

Mr. William Isaac Diggs
Attorney at Law
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
P: 843-626-4243
F: 843-626-5123

Re: Mr. Stephen Stanko
DOB: [redacted]

Mr. Stephen Stanko was evaluated pursuant to your request that he be examined regarding his competency to stand trial, his degree of criminal responsibility, and the nature of his neuropsychiatric diagnosis.

Mr. Stanko has been charged with several felony charges including Murder and related offenses.

Sources of Information:

Interview of the defendant conducted by Thomas H. Sachy, M.D., M.Sc. at the Georgetown County SC Jail June 24, 2006, for approximately 3 hours.

A copy of Mr. Stanko's various forensic, and mental health medical records.

Notification of Rights:

At the outset of his evaluation, I informed Mr. Stanko of the request for his evaluation and that his competency to stand trial and degree of criminal responsibility would be assessed. Mr. Stanko agreed to proceed with his evaluation.

Evaluation for Competency to Stand Trial/Criminal Responsibility:

Mr. Stanko was found to be competent to stand trial. He understood his charges. He understood the possible consequences if convicted for his charges, and Mr. Stanko generally appeared to be capable of assisting his attorney with his defense.

Current Psychiatric Treatment: None

Formal Mental Status Evaluation:

Mr. Stanko was calm and cooperative during his evaluation, unusually so, given the nature of the crimes with which he has been charged. Mr. Stanko's mood was stated as being "6/10" and his affect was essentially congruent though he appeared to be superficial. He denied thoughts of suicide, homicide or psychosis and his thought processes were essentially linear and goal directed. However, he demonstrated some unexpected concrete thinking when asked what the proverb, "A rolling stone gathers no moss" meant. He stated, "If something is constantly in movement, it won't become lazy or gather waste." As well when tested for his judgment, he was asked if it was appropriate to yell "Fire!" in a crowded theatre. Mr. Stanko stated, "That is OK because there might be someone smoking."

Mr. Stanko denied harboring thoughts of predatory violence or sexually inappropriate behavior.

A Folstein Mini Mental Examination was performed upon Mr. Stanko. His score was 29/30, which is not consistent with a diagnosis of dementia.

A neurological examination was performed on Mr. Stanko. Though his cranial nerve examination was essentially normal, Mr. Stanko demonstrated two neurological soft signs as follows:

1. Bilateral hand posturing while standing on either leg.

2. Overflow mirror movements [left to right hand greater than right to left hand] when performing fine motor movements in either hand]. Neurological soft signs (NSS) are minor ('soft') neurological abnormalities in sensory and motor performance identified by clinical examination. Some authors suggest that NSS reflect a failure in the integration within or between sensory and motor systems (Griffiths *et al*, 1998), whereas others advocate deficits in neuronal circuits involving subcortical structures (e.g. basal ganglia, brain-stem and limbic system; Heinrichs & Buchanan, 1988).

A brain MRI was ordered and subsequently performed on Mr. Stanko on 5-18-2006. This MRI demonstrates a decrease in size of parietal lobe gyri and a subsequent increase in

size of parietal lobe sulci. These findings are consistent with early parietal lobe atrophy of unknown origin.

A 3-Dimensional PET scan analysis was ordered and subsequently performed on Mr. Stanko on 5-18-2006. These images show a significant reduction of brain function, particularly in the orbital and medial orbital areas of Mr. Stanko's frontal lobes.

Pertinent Information From Other Sources:

Records form the William S. Hall Psychiatric Institute dated 5/30/1996:

Mr. Stanko had 15–20 jobs in a two-year period. He was also regarded as a "brilliant" salesman and he could talk anybody into anything. Mr. Stanko was charged with fraud in 1995 and he had difficulties with bouncing checks. A correspondence from his girlfriend at the time stated that Mr. Stanko was involved in "schemes" and that his behavior could change "remarkably." "He was a nice person who could become angry and cruel." "Pt. wouldn't sleep at night, he would pace the floors, had pressured speech."

According to Mr. Stanko's mother, he started lying impulsively in 1985 after he was struck on the head by a full bottle of beer. Mr. Stanko lived in a fantasy world. He would steal household possessions and he would become very grandiose. She described him as being hyper then quiet, like two different people. He was also very argumentative

Neuropsychological Examination Performed by Marc Einhorn Psy.D. dated 5-18-06 and 5-19-06:

Mr. Stanko's IQ [143] was found to be in the superior range.

Mr. Stanko's MMPI-2 profile was indicative of antisocial personality disorder with a well-socialized veneer. His profile is suggestive of a vulnerability to sudden violence when wronged or slighted. His judgment and controls are poor.

Mr. Stanko's Mutiphasic Sex Inventory is indicative of some form of sexual misconduct, a lack of accountability and general irresponsibility.

Positron Emission Tomography Scan Analysis - UCI Brain Imaging Center dated 5/18/06:

Scan finding: The study is of good technical quality. There is a pattern of relative ventral metabolic hypofrontality with orbital frontal being lower relative to occipital regions.

PRELIMINARY IMPRESSION: 1. Abnormal scan.

PRELIMINARY CONCLUSION: The pattern is compatible with encephalopathy or neuropsychiatric disorder. Clinical correlation is recommended. Clinical records can be

forwarded to UCI-BIC for further differential diagnostic consideration and citation of relevant medical literature for a clinical correlation report for PET scan.

Opinion and Conclusions:

The frontal lobes of the brain are responsible for executive functions that are necessary for the organization of information to facilitate a contextually appropriate behavioral response. The alterations in emotional responsivity that occur in individuals with orbito-frontal brain lesions are frequently accompanied by a characteristic pattern of social inhibition that includes behaviors that are characterized by a lack of empathy and social restraints [Salloway, et al. 2001].

Damage to orbito-frontal centers of the human brain that normally monitor and regulate aggressive impulses can lead those so affected to be at risk for episodes of behavioral dyscontrol when such individuals are fatigued, confused, or *over stimulated* [Salloway et al., 2001]. [It is my understanding that Mr. Stanko was threatened with being reported as a child molester, and he was slapped and burned with a cigarette at the time of the alleged crimes]. As well, those individuals who have suffered demonstrable damage to the prefrontal region of the brain proceed to acquire an antisocial, psychopathic like personality [Demasio et al., 1994].

Mr. Stephen Stanko has been charged with crimes consistent with a diagnosis of Psychopathy. His psychiatric history and recent neuropsychiatric testing also point to psychopathic behavior/tendencies. Most importantly, Mr. Stanko's structural and functional brain imaging shows evidence of fronto-parietal dysfunction that is indicative of an involuntary cause for his anti-social behavior. It must be recognized that scientific research in this field consistently points to the conclusion that poorer functioning of the prefrontal cortex predisposes to violence, and that prefrontal deficits may characterize impulsive and/or predatory murderers [Raine, 2001].

The South Carolina Insanity Statute states that, "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."

As such, it is my opinion that at the time of the alleged crimes Mr. Stephen Stanko met this definition for insanity as he was unable to distinguish moral or legal right from moral or legal wrong or to recognize the particular acts charged as morally or legally wrong due to his neuropsychiatric impairment, namely decreased frontal lobe functioning consistent with hypofrontality and a diagnosis of involuntarily acquired Psychopathy. Additionally, it is my opinion that Mr. Stanko could not recognize the acts charged as morally or legally wrong at the time.

This completes the evaluation of Mr. Stephen Stanko. If you have any questions regarding this report, please feel free to contact me at the address and phone number above. Thank you for this opportunity to examine your client.

Sincerely,

Thomas H. Sachy, M.D., M.Sc.
Neuropsychiatrist, Forensic Psychiatrist

References:

Demasio et al., (1994) The return of Phineas Gage: Clues about the brain from a skull of a famous patient. Science, 264, 1102-1105

Griffiths, *et al* (1998) Neurological abnormalities in familial and sporadic schizophrenia. *Brain*, 121, 191-203.

Heinrichs, et al. (1988) Significance and meaning of neurological signs in schizophrenia. *American Journal of Psychiatry*, 145, 11-18

Raine, et al. (2001) Violence and Psychopathy, 35-55

Salloway, et al. (2001) The Frontal Lobes and Neuropsychiatric Illness, 53, 144-145

Preliminary draft

UCI BRAIN IMAGING CENTER

Positron Emission Tomography Scan Analysis

NAME: Stephen Stanko
DATE PATIENT SEEN: May 18, 2006
REFERRING DIAGNOSIS R/o encephalopathy
SCAN DESCRIPTION:

On May 18, 2006, Fluorine-18 deoxyglucose (FDG) was administered intravenously Transaxial slices of the head were obtained on the MUSC GE scanner. The 3d brain PET scan was of good technical quality. Raw data was presented in horizontal, coronal, and sagittal views. Raw images were reconstructed and visually interpreted.

Scan finding:

The study is of good technical quality. There is a pattern of relative ventral metabolic hypofrontality with orbital frontal being lower relative to occipital regions.

PRELIMINARY IMPRESSION: 1. Abnormal scan.

PRELIMINARY CONCLUSION: The pattern is compatible with encephalopathy or neuropsychiatric disorder. Clinical correlation is recommended. Clinical records can be forwarded to UCI-BIC for further differential diagnostic consideration and citation of relevant medical literature for a clinical correlation report for PET scan.

Joseph C. Wu, M.D.
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949-824-7867

Preliminary draft

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DRAFT REPORT: MRI Quantitative Analysis: Mr Steven Stanko

The MR data of Mr. Stanko were examined via delineation of regions of interest (ROI) of the brain, i.e. by evaluating partitions of the brain. Examining ROI's is important if there is some localized abnormality that does not affect the entire brain, but is present only in certain parts of it. We performed this ROI analysis assisted by a semi-automated template warping algorithm [1].

As normative data we used a set of 41 healthy males. Statistical analysis of the data from these 41 normal individuals showed that this group was adequately large for capturing statistics of normal brain structural variability. In particular, the leave one out cross-validation procedure was applied and showed that, if one were to examine new random samples from the normal male population, brain measurements from these new samples agree with the measurements obtained from this set of 41.

Mr. Stanko's overall evaluation resulted in the conclusion that he has an unusual brain structure. To localize Mr. Stanko's structural abnormalities, we examined the volumes of different brain compartments. The results are summarized in the following plot, which reflects measurements from the major brain lobes of the left and right hemispheres.

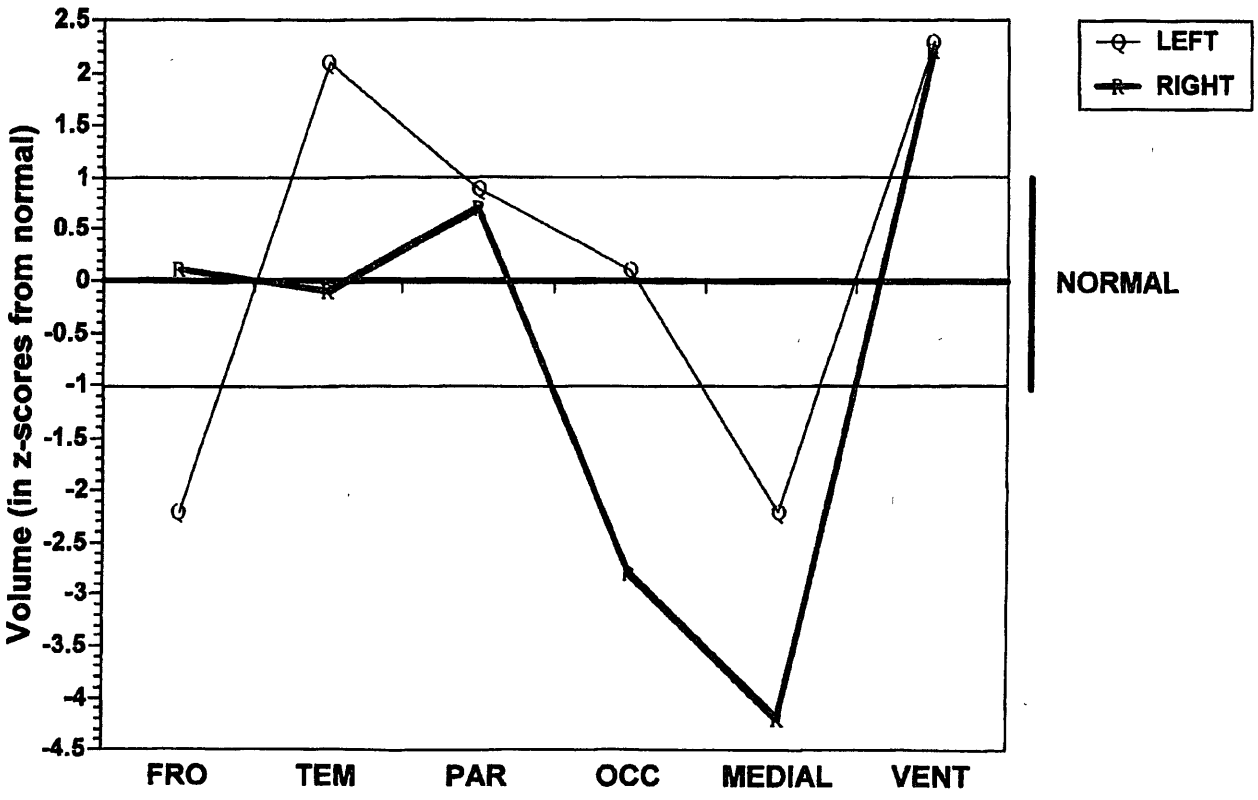


Figure 1: Plots of "z-scores" for Mr. Stanko's brain, reflecting standard deviation units away from the average, are used to summarize how well a measurement falls within the normal range. A value of 1 indicates that the measurement is one standard deviation away from the average. FRO=FRONTAL; TEM=TEMPORAL; PAR=PARIETAL; OCC=OCCIPITAL; MEDIAL=MEDIAL GRAY MATTER; VENT=VENTRICULAR CSF.

As can be seen in Figure 1, there is an abnormally reduced volume in the left frontal and right occipital lobes, as well as bilateral decrease of medial gray matter volume, as well as abnormally increased volume of left temporal and both left and right ventricular cerebrospinal fluid (CSF) volume. The abnormalities indicate atrophy or dystrophy of medial and left frontal brain structure, associated with increased ventricular CSF. Such findings are consistent with a neurodevelopmental disorder such as schizophrenia, most likely reflecting genetic vulnerability combined with environmental stresses such as adverse in utero conditions or postnatal trauma. The behavioral consequences of reduced left frontal volume would include poor impulse control, and reduced volume of medial gray matter structure would be associated with abnormal affect regulation.

We also applied a statistical analysis technique called principal component analysis (PCA), in combination with "leave one out" cross validation. The purpose of this analysis was to determine the likelihood of finding an individual with brain profile as unusual as that of Mr. Stanko, if we were to randomly select a normal male from the general population. To test this question, the program randomly selects one of the 41 healthy males, and used the remaining 40 as baseline. The volumetric measurements described above were performed for the left-out normal male and for Mr. Stanko side by side. This procedure was repeated 41 times, each time leaving a different normal male out of the baseline sample, and comparing the respective brain measurements with Mr. Stanko's. This analysis showed that **only one normal male had a brain profile that was as unusual as that of Mr. Stanko.** Based on this analysis, one can conclude that there is 2.4% probability to find a normal male with such unusual brain structure. This is less than the traditionally acceptable level of significance, which is 5%, and we can therefore conclude that statistically Mr. Stanko has an abnormal brain structure.

We hope this report is useful and will be happy to answer any questions.

Christos Davatzikos, Ph.D.
Associate Professor
Department of Radiology

Ruben C. Gur, PhD
Professor
Departments of Psychiatry, Neurology and Radiology

1. Shen, D. and C. Davatzikos, "HAMMER: Hierarchical attribute matching mechanism for elastic registration". *IEEE Trans on Med. Imaging*, 2002. **21**(11): p. 1421-1439.

From: Dale Davis <dalemdavis@bellsouth.net>
Sent: Wednesday, January 18, 2006 7:32 PM
To: Bill Diggs
Subject: Mitigation seminar in Charleston
Attachments: ABA guidelines(2003).pdf; a-training - letter-charleston.doc; a-training backgroundsurveyCharleston.doc; a-training casesummary-charleston.doc

I am registered for a mitigation seminar in Charleston that is part of the NACDL's meeting here on Feb 9-10. The attorney that I was scheduled to attend with cannot go and I wondered if you would be interested. It is different than anything I have attended before as it only accepts teams of at least two who are working on a current state case. The group putting it on have a grant so there is no cost and it provides for airfare and accommodations. There are some requirements since it is a grant: a case summary, agreement to follow up, confidentiality agreement as facts of real cases are discussed - I have attached the things that Tanya Green sent to me so you can read them. I told her by e-mail that I would let her know asap if I can find a replacement. You, the fact investigator and I can all attend, if you want.
Please let me know as soon as possible. The links below are to the NACDL seminar and the mitigation seminar.
http://www.nacdl.org/public.nsf/Events/MidwinterMeeting
Actually when I looked, the link to the mitigation session is no longer on the site, I guess because the registration for it is closed but the attached describe it well.
I hope you can attend.
Dale

Dale M. Davis
Capital Mitigation Specialist
Criminal Mitigation Services

This e-mail message and any accompanying attachments may contain legally privileged or confidential information. If you are not the intended recipient, you are hereby notified that taking any action based upon the information contained in the email or attachments, or any dissemination, distribution or copying of this e-mail or attachments, is strictly prohibited. If you have received this e-mail in error, please permanently delete the original, all copies and printouts, and notify my office immediately by e-mail or at (843) 871-6176. Thank you.

NATIONAL CONSORTIUM FOR CAPITAL DEFENSE TRAINING
CHARLESTON, SOUTH CAROLINA

December 19, 2005

Greetings! Thank you for your agreement to participate in the Capital Defense Training scheduled in Charleston, SC, for February 9-10, 2006. This program is funded by a grant from the United States Bureau of Justice Assistance (BJA) and your attendance, air travel, lodging, and most meals are no charge to you. As this program is part of a pilot capital defense training project, BJA staff will be present at some of the training sessions.

The program has a Bring-Your-Own-Case (BYOC) format where you will work on one of your pending capital cases in small group workshops. In many of these workshops you will be paired with your team member(s) as well as with other practitioners from other jurisdictions.

With the hope that funding for additional training programs will be forthcoming, you will be asked to provide background information and complete written assessments and evaluations during the training. Some participants may also be contacted after the program and asked to participate in an interview and further evaluation. *By attending this program and checking the appropriate boxes on the Registration Form, you agree to provide requested information and participate in these evaluations if asked.*

Program faculty will also provide additional assistance to you after the training as you continue to prepare for your capital trial or settlement of the case.

• ***Preparation for Conference:*** Please read the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases prior to your arrival. 31 Hofstra L.Rev. 913-1090 (Summer 2003) or http://www.abanet.org/deathpenalty/. A copy is appended here in electronic form.

• ***Participants***: Please make arrangements to arrive at the Charleston Place Hotel, 205 Meeting Street, Charleston, SC, where all training events will take place, no later than 8 AM Thursday February 9, 2006; the program ends at 6 PM Friday, February 10, 2006.

TRAVEL: As air travel costs are covered by the program grant, all arrangements should be made through Linda Campbell at (800) 446-8644 x230 or email lindac@tadvisor.com by January 16 2006. If arrangements are not made by then, your travel costs ***may not*** be covered by the conference grant. Travel from the Charleston International Airport to the Hampton Inn - Historic District (see "Hotel" below) is available by taxi (approx. $25) or airport shuttle (approx. $10).

HOTEL: All non-local training participants will stay at the Hampton Inn- Historic District. The hotel address is 345 Meeting Street, Charleston, SC, and the local phone number is (843) 723-4000. The hotel is a few blocks from the Charleston Place Hotel, where all of the training events will take place. Participants should plan to arrive and check-in on Wednesday evening and check-out on Friday. You do not need to make hotel reservations; your name will be on a guest

list at the hotel as the BJA grant is covering the room expense. All incidentals will have to be paid for by guests separately.

If you have not yet completed the Registration Form, Initial Background Questionnaire and Confidential Case Information Form, please do so. ***Failure to complete the Initial Background Questionnaire or the Confidential Case Information Form and/or sign the Confidentiality Oath on the Registration Form will preclude participation in the program.***

If you have any questions or concerns, please contact:

TANYA GREENE
Training and Assistance Counsel
National Consortium for Capital Defense Training
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NATIONAL CONSORTIUM FOR CAPITAL DEFENSE TRAINING PILOT PROGRAM
CHARLESTON, SOUTH CAROLINA
FEBRUARY 9-10, 2006

INITIAL QUESTIONNAIRE

Please complete and return to Tanya Greene at tanyagreenelaw@yahoo.com or fax to (718) 432-2567 or mail to: P.O. Box 567 Kingsbridge Station, Bronx, NY 10463 PRIOR to the conference; OR deliver at the conference registration table.

Your cooperation is greatly appreciated.

Background Information

Q1. Name and Title or Office: _____

Q2. Age: _____

Q3. Race: _____

Q4. Gender: _____

Q5. What languages, other than English, do you speak? _____

Q6. State Where You Practice Law: _____

Q7. Current Occupation (check one)

ATTORNEY.....O

How many years have you been a defense attorney? _____

MITIGATION SPECIALIST/INVESTIGATOR.....O

How many years have you been a mitigation specialist/investigator? _____

FACTUAL INVESTIGATOR.....O

How many years have you been a factual investigator for the defense? _____

Q8. Thinking back on your prior experiences with capital cases, have you ever worked in the following capacities? If so, on how many cases?

	YES	NO	If yes, number of cases
a. Lead Counsel, Defense	O	O	
b. Lead Counsel, Prosecution	O	O	
c. Second Chair, Defense	O	O	
d. Second Chair, Prosecution	O	O	
e. Appellate Attorney, Defense	O	O	

f. Appellate Attorney, State	O	O	
g. Factual Investigator, Defense	O	O	
h. Factual Investigator, State (including law enforcement)	O	O	
i. Mitigation Specialist/Investigator	O	O	
j. Other:_____	O	O	

Q9. Does your state have a capital defender office? (check one)

NO.....
YES.....O
.....O

a. If yes, what services does the office provide?

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IF YOU ARE NOT AN ATTORNEY, PLEASE GO TO QUESTION 16

Q10. In your state, what are the qualifications, if any, for defense attorneys to be appointed to a capital case? What is the renewal process?

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Q11. How are defense attorneys for capitally-charged individuals identified in your state?

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Q12. How are defense attorneys for capitally-charged individuals appointed in your state?

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a. **If you are a contract public defender,** please explain how the contract system works in your state:

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Q13. What strategies do you use for help on your capital cases? For example, do you meet with colleagues or supervisors for brainstorming sessions? What about case reviews, case meetings, do you meet with colleagues or supervisors for those activities?

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a. Are these strategies available for you to take advantage of or do you have to create them informally? (check one)

I have to create them informally ..... O
These strategies are available ..... O

Q14. Are you in private practice, a contract public defender, or an agency/institutional public defender? (check one)

PRIVATE PRACTICE ..... O
CONTRACT PUBLIC DEFENDER ..... O
AGENCY/INSTITUTIONAL PUBLIC DEFENDER ..... O (SKIP TO QUESTION 15)

If you <u>do not</u> work for a public defender agency or institution:

a. How do you obtain and pay for investigators and mitigation specialists in your capital work?

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b. What percentage of the time, from 0% to 100%, are your requests for payments for investigators and mitigation specialists granted? _____%

c. Are you paid for actual time spent on a capital case or are your requests cut? (check one)

TIME SPENT ..... O
REQUESTS CUT ..... O

d. If your requests are cut, on average, by how much (0%-100%)? _____%

e. What is your hourly rate for work that you do on capital cases?

_____ in-court

_____ out-of-court

f. Is there a cap on the total amount of money that you can receive for the work that you do on capital cases?

NO, there is not a cap ..... O
YES, there is a cap ..... O

i) <u>If yes</u>, what is the cap? _____$

Q15. How do you obtain and pay for experts in your capital work?

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a. Is there a cap on the amount of money available to pay experts?

NO, there is not a cap..... O
YES, there is a cap..... O

i) If yes, what is the cap? _____$

Q16. Have you ever worked on a capital case where your client was a foreign national? (check one)

NO..... O
YES..... O

a. If yes, what different actions, if any, did you have to take on your client's behalf?

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Prior Training

Q17. In an average year, how many criminal defense training programs do you attend?

NONE..... O
NUMBER: _____

Q18. Overall, how many capital defense training programs have you attended?

THIS WILL BE MY FIRST ..... O (SKIP TO QUESTION 19)
NUMBER: _____

a. Now we would like to know what types of capital defense training programs or sessions you have previously attended. Have you attended the following types of capital defense training programs: large or small lectures; small group, interactive sessions that do not use cases; small group interactive, skill-based sessions that use hypothetical cases; or small group interactive, skill-based sessions that make use of your own cases?

	ATTENDANCE	
	YES	NO
LECTURE (LARGE OR SMALL GROUP)		
SMALL GROUP INTERACTIVE SESSIONS, NOT USING CASES AT ALL		
SMALL GROUP INTERACTIVE SESSIONS, USING HYPOTHETICAL CASES		
SMALL GROUP INTERACTIVE SESSIONS, USING YOUR OWN CASES		

b. In your opinion, which of the following is the most effective method of training? Please rank the following methods of training from 1 to 4, with 1 equal to the most effective and 4 equal to the least effective.

LECTURE (LARGE OR SMALL GROUP)	RANK
SMALL GROUP INTERACTIVE SESSIONS, NOT USING CASES AT ALL	
SMALL GROUP INTERACTIVE SESSIONS, USING HYPOTHETICAL CASES	
SMALL GROUP INTERACTIVE SESSIONS, USING YOUR OWN CASES	

Q19. Have you ever presented at a capital defense training program? (check one)

NO
YES ..... O
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a. If yes, what topic(s)?

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Q20. Does your state (including state-funded agencies or organizations) provide capital defense training? (check one)

NO
YES ..... O
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a. If yes, how often? _____

b. Is the cost of the training covered by your agency/organization or office? (check one)

NO .....
YES..... O
ONLY A PORTION of the cost is covered (please explain)..... O
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