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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 12 OF 14

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continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's social history and records regarding trial counsel's perparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested $13,000 for the services of a licensed social worker[9] and $9,000 for the services of a media expert.[10]

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert. *See* Order Denying Applicant's Second Motion

[9] In support of the request for a licensed social worker, counsel informed the Court that, in all capital cases, a defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014). Undersigned counsel stated that trial counsel focused on the psychopathy defense early in their preparation for trial and failed to adequately investigate and present other available mitigation and social history evidence by relying exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopathy theory. Those experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Undersigned counsel further submitted that the expert who testified regarding Stanko's life history at trial did little to prepare for trial and was only able to testify generally and ineffectively about Stanko's upbringing. Counsel indicated that their mitigation investigation had uncovered mitigating evidence in Stanko's social and family history, including information about the harsh environment created by Stanko's military father, that was not presented at trail and required the assistance of a licensed social worker to develop, interpret, and present.

[10] In support of the request for a media expert, counsel informed the Court that media coverage of Stanko's case began immediately after the crimes occurred. The case was covered by local and national media throughout all stages, including law enforcement's national manhunt for and arrest of Stanko, preparations for his trial in Georgetown, each day of his trial in Georgetown, Stanko's conviction and death sentence in Georgetown, and preparations for his trial in Horry County. Undersigned counsel submitted that trial counsel was aware of the massive media coverage surrounding the case, but that trial counsel did not present the trial court with any information regarding media coverage in moving for a change of venue. Counsel, therefore, asked the Court to approve funding for an expert in media studies and media saturation to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court.

To Authorize Funding for Expert Services (Sept. 25, 2014). The Court interpreted counsel's funding requests as arguing that funding for a licensed social worker and a media expert is necessary because "none were used during Stanko's criminal trial." *Id.* at 2. The Court denied the requests, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *Id.* The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Stanko filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In light of the merits hearing scheduled for March 2, 2015, Stanko asked the Court to hold an *ex parte* hearing on the Second Motion to Reconsider as soon as possible. On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the Court order Stanko transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the Court sent counsel an email canceling the *ex parte* hearing, informing Stanko the Court would decide the Second Motion to Reconsider without oral arguments, and ordering Stanko to file a brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Stanko's Motion for Order of Transport.

This Brief is filed in support of the Second Motion to Reconsider. As of the filing of this Brief, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 3, 2015.

II. LEGAL BASIS FOR AUTHORIZING THE EXPENDITURE OF FUNDS IN EXCESS OF THE STATUTORY LIMITS.

The South Carolina legislature has provided that indigents seeking post-conviction relief from capital judgments are entitled to expert assistance upon an *ex parte* finding by the court that such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant"); *see also* Rule 602(g)(6), SCACR ("In post-conviction relief matters, expenses related to representation and fees of appointed counsel may be paid where permitted and as prescribed in these Rules and the Defense of Indigents Act.").

The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a

right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The ability to retain the services of experts and investigative assistance in various areas is particularly essential in capital cases. A capital case "is an extraordinary proceeding" where "the attorney is charged with the awesome responsibility of defending a person's life." *Bailey*, 309 S.C. at 460, 424 S.E.2d at 506. To prepare for the guilt or innocence phase of a capital trial, an attorney must vigorously and thoroughly investigate the facts and circumstances of the alleged crime, which often requires the assistance of various experts. *See id.* (recognizing that unlike the solicitor, the defense attorney does not have "the entire array of state, county, and municipal law enforcement" at his disposal). Just as assistance is imperative in the guilt or innocence phase of a capital case, it is equally necessary during the sentencing phase where counsel is challenged by novel and complex issues. *See id.* at 461, 424 S.E.2d at 506-07. Due to the finality and irrevocability of the penalty of death, the United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In order to ensure that the appropriate sentence is chosen, the Court has emphasized the importance of presenting to the sentencing body the fullest information possible concerning the defendant's life and characteristics. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that preventing the sentencer in a capital case from considering the defendant's characteristics "creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also Jurek v. Texas*, 428 U.S. 262, 271 (1976) (asserting that the sentencing body must have before it all possible relevant information about the individual whose fate it must determine).

Thus, in capital cases, defense counsel has a duty to vigorously investigate and present mitigating evidence. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Williams v. Taylor*, 529 U.S. 362, 393 (2000). This duty requires that counsel's investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." (internal quotation marks omitted)).

Post-conviction counsel must "continue an aggressive investigation of all aspects of the case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4); *see also id.* 10.15.1(E)(4) commentary ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."). Post-conviction counsel must review the record and conduct investigation to determine whether the applicant's conviction or sentence are "in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code § 17-27-20(A)(1). This responsibility necessarily includes determining whether the applicant received ineffective assistance of counsel during his trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). If trial counsel's decision to end investigation, including mitigation investigation, was either inconsistent with professional standards or unreasonable because known information should have led counsel to investigate further, a capital defendant may have a valid claim of ineffective assistance of counsel. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *Strickland*,

466 U.S. 688, 690-91 (1984). When evaluating *Strickland* claims, courts "evaluate the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins*, 539 U.S. at 536 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

III. ARGUMENT IN SUPPORT OF RECONSIDERATION.

Undersigned counsel are in an impossible (and unprecedented) bind. This Court has denied requests for funding for necessary expert assistance on the basis that Stanko cannot provide the court with the conclusions the experts will reach. This is not only inconsistent with the relevant statutory language, but it is also at odds with more than twenty years of capital post-conviction practice in this state; no other judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude. The statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1).[11] Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. In counsel's experience, and in the experience of other practiced capital post-conviction attorneys in South Carolina, no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 5; Holt Aff. ¶ 4.[12] Instead, courts have required counsel for PCR applicants to

[11] Stanko refers to the funding provision set forth in S.C. Code § 16-3-26 as the provision applicable to capital proceedings, whereas the Court's orders referred to the "reasonably necessary" standard in the funding provision found in the general provisions of the chapter regarding defense of indigents. *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 into the capital case post-conviction relief procedures). The "reasonably necessary" language, however, is the same in each funding provision.

[12] All affidavits referenced in this Brief were attached to the *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services, filed with this Court on October 14, 2014.

simply explain that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 7.

The standard set forth in the Court's orders—requiring a favorable result for the applicant prior to authorizing expert funding—expects that counsel would be able to retain the services of an expert without being able to guarantee their services would be paid for. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to a winning claim in a PCR action.[13] Many experts would not ethically be able to take a case under these conditions, which essentially create a contingency fee arrangement. *See* Knight Aff. ¶ 4 (stating that the ethics rules for forensic psychologists prohibit a forensic psychologist from taking a case on a contingent fee basis because contingent fees are considered a threat to impartiality).[14] Additionally, such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services. *See* Andrews Aff. ¶¶ 5, 9; Norris Aff. ¶ 8.

The Court's interpretation of the "reasonably necessary" requirement, therefore, impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). The right to the assistance of counsel when filing an application for post-conviction relief is hollow in the absence of the concomitant right of an indigent applicant to

[13] An expert could not ethically state before doing an evaluation what the evaluation will yield. Any expert who did so would be subject to impeachment on that basis.

[14] Dr. Susan Knight's affidavit is attached to this Brief.

receive funding for expert and investigative services where appropriate. *See Williams*, 618 F.2d at 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). It is the state's duty to "ensure that a defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506.

The Supreme Court of the United States specifically recognized that the "right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to *research* and present a defendant's habeas claims." *McFarland*, 512 U.S. at 859 (emphasis added). Post-conviction counsel in capital cases "must continue an aggressive investigation of all aspects of the capital case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4). "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* 10.15.1(E)(4) commentary. Thus, though counsel has no way of knowing at the outset of its post-conviction preparation what claims will ultimately be presented to the court, post-conviction counsel have a duty to investigate the case entirely and often require the assistance of experts to do so. *See id.* 4.1 commentary ("Analyzing and interpreting [evidence in a capital case] is impossible without consulting experts.")

The Supreme Court of the United States has also established that a state court reviewing a state prisoner's federal claims must provide the prisoner with an opportunity to present evidence relevant to the federal claims. *See Coleman v. Alabama*, 377 U.S. 129, 133 (1964). In order to meaningfully access and to provide a fair opportunity to present all relevant evidence, a court must provide adequate funding for investigative and expert services. The Supreme Court has specifically

acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007) (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake*, 470 U.S. at 82 (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

Undersigned counsel have identified facts demonstrating that expert services in this case are reasonably necessary. Counsel, therefore, request the Court reconsider its denial of funding for a licensed social worker, a forensic psychologist, and a media expert. In support of this request, counsel submit the following facts, which include new facts uncovered by counsel's investigation since the original requests for funding were presented to the Court.

A. Facts and argument relevant to the request for a licensed social worker.

Counsel ask the Court to reconsider its denial of funding for a licensed social worker to investigate and present Stanko's social history. Despite the fact that there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's inadequate development and presentation of Stanko's social history as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(e)(3).

In this case, undersigned counsel's investigation reveals that trial counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial and failed to adequately

investigate and present other available mitigation and social history evidence as a result. As part of their investigation, undersigned counsel interviewed Dale Davis, who served as the mitigation investigator for Stanko's Georgetown County trial. Davis stated that she objected to trial counsel's strategy to present Stanko as a psychopath. She told counsel their theory was not mitigating and that they needed to hire a social worker to aid in developing an presenting Stanko's social history. Over Davis' objections, trial counsel continued to pursue the psychopath strategy, limited their mitigation and mental health investigation accordingly, and did not hire anyone to aid in presenting Stanko's social history until approximately three weeks before trial.

Thus, undersigned counsel's investigation has made it clear that trial counsel focused on its psychopath "defense" without sufficient investigation and conducted the remainder of their trial preparation with a sort of "tunnel vision," ignoring anything that did not fit the psychopath theory. Trial counsel relied exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopath theory. These experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Trial counsel's focus on the psychopath theory thus resulted in a curtailed mitigation and social history investigation.

In all capital cases, the defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) ("Important sentencing considerations include a defendant's 'medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences'") (quoting *Wiggins*, 539 U.S. at 524); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary ("[T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase."). The testimony of a licensed social

worker is one of the most basic, fundamental elements of virtually every capital sentencing proceeding in the modern era. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (2008) (instructing that it is the duty of the defense team to prepare experts to testify, including social workers "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning"); *see also* Holt Aff. ¶ 7; Glass Aff. ¶ 7.

Here, trial counsel utterly failed to investigate and present the jury with an adequate and accurate overview of Stanko's social history as mitigation. Trial counsel did not call any family members and called few friends, teachers, or employers.[15] Instead, trial counsel relied solely on Evelyn C. Califf who has a doctorate in Christian Counseling. Undersigned counsel's investigation has revealed that Califf began working on this case only a few weeks prior to trial and spent only one hour with the client and spoke briefly with only one of Stanko's sisters over the telephone in preparation for trial. As a result of her limited involvement, Califf was only able to testify generally and ineffectively about Stanko's upbringing and family life.

Undersigned counsel's investigation, conducted with the assistance of a mitigation investigator, has uncovered mitigating evidence in Stanko's social and family history that was not presented at trial. Since their appointment, counsel and the mitigation investigator have interviewed roughly twenty lay witnesses with knowledge of mitigating evidence surrounding Stanko's social history. Specifically, counsel have developed a relationship with Stanko's siblings,

[15] Trial counsel also failed to even interview the appropriate people in Stanko's life to develop a full understanding of his life history and mental health. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, parole officers, and others.").

which was not done in preparation for trial, and have interviewed over a dozen friends, classmates, and teachers who were not interviewed by the trial team. These lay witnesses have presented a portrait of Stanko vastly different from that presented at trial.

Witnesses have described Stanko as generally well-liked, smart, outgoing, and a person with vast potential. During his late teenage years, Stanko began exaggerating the truth and, in some instances, outright lying. Around the same time, almost all of Stanko's close friends went off to college. Stanko did not go to college, despite his unquestioned intelligence and potential to succeed in college. Stanko instead began working as a salesman and began scamming friends and strangers. This led to legal trouble and eventual incarceration during Stanko's mid to late 20s. This evidence demonstrates a need for a social worker to aid counsel in understanding the information provided by the lay witnesses, directing counsel toward other potentially mitigating evidence, and in presenting that evidence to the Court in support of Stanko's ineffective assistance of counsel claim. *See* Glass Aff. ¶ 7 ("A testifying social worker is, therefore, necessary to evaluate [mitigation] information like this and to describe how . . . events shaped Mr. Stanko's life, particularly in light of his significant brain damage."); ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (instructing a defense team to work with a social worker "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning").

Due to undersigned counsel's concerns about preparing for a hearing in this case in such a short period of time, counsel contacted licensed social worker Arlene Andrews, Ph.D. Though Dr. Andrews would not normally begin working on a capital case without a funding order from the court, she agreed to begin work on Stanko's case while the motion for her funding was pending.[16]

[16] The funding statute, S.C. Code § 16-3-26(C)(1), authorizes the court to approve funding *nunc pro tunc.*

Andrews Aff. ¶ 5. Dr. Andrews has, therefore, reviewed the trial mitigation testimony, reviewed Stanko family records, met with Stanko, and interviewed Stanko's brother. Andrews Aff. ¶ 7. As a result of her preliminary work on the case, Dr. Andrews believes there is a compelling mitigation story to be told in support of Stanko's PCR application. Andrews Aff. ¶ 8. In order to complete her social history evaluation and presentation, much work remains to be completed. Andrews Aff. ¶ 9. She must, (1) interview Mr. Stanko several more times; (2) interview Mr. Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends and former girlfriends from childhood and leading up to his crimes; (4) review the social history records counsel are continuing to collect; and, (5) conduct any additional work that may develop as the investigation progresses. Andrews Aff. ¶ 9. However, Dr. Andrews cannot complete this work without authorization of funds from the Court. Andrews Aff. ¶ 9.

The fact that trial counsel presented the testimony of mental health experts and some social history evidence does not negate Stanko's claim. The Supreme Court of South Carolina recently overturned a circuit court's denial of post-conviction relief where trial counsel presented the testimony of three mental health experts and a social history witness. *See Weik*, 409 S.C. 214, 761 S.E.2d 757. The court found that "[t]hough counsel introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's *social history* even though there was abundant social history evidence available to them." *Id.* at 235, 761 S.E.2d at 768 (emphasis original). Stanko's case involves the same circumstances where trial counsel focused their investigation and mitigation presentation on mental health evidence, while ignoring social history evidence readily available to them.

The assistance of a licensed social worker with capital case experience is therefore necessary to assist undersigned counsel in developing an understanding of Stanko's social history

as it mitigates his crime and correlates to his mental health and in presenting related issues to this Court in support of his post-conviction relief claims. This Court must, therefore, authorize funds for a licensed social worker as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Undersigned counsel have conferred with Dr. Andrews; she is willing and able to assist counsel in this case.[17] Counsel, with input from Dr. Andrews, estimate that expenditure of approximately 100 hours is reasonably necessary to conduct the required evaluation in this case. The hours requested are reasonable given that, in counsel's experience, the request is on the low end of the number requested in similar cases and the request takes into account the expectation that the mitigation investigation conducted by counsel and the mitigation investigator will locate and identify the significant social history witnesses for Dr. Andrews to interview allowing her to conduct her social history evaluation efficiently. Dr. Andrews' rate is $130 per hour. Dr. Andrew's rate is reasonable given her experience and the fact that, in counsel's experience, this rate is on the low end of the average rates charged by expert Licensed Social Workers in South Carolina.

B. Facts and argument relevant to the request for a forensic psychologist.

Despite the fact that Stanko's mental health has been an issue in this case since the very beginning, a competent and reliable mental health evaluation has never been completed. Though there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's inadequate mental health evaluation of Stanko as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(e)(4).

[17] Dr. Andrews' current CV was attached to the Second Funding Motion filed with this Court. **4964**

Stanko has a high IQ of 143 and little history of violent behavior. Undersigned counsel's investigation clearly reveals that trial counsel's inquiry into Stanko's mental health was inadequate in that counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial. Trial counsel then sought out an expert in psychopathy, Dr. Thomas Sachy, after learning of Dr. Sachy's involvement in a Georgia case where Dr. Sachy testified about his diagnosis of the defendant as a psychopath.[18] Undersigned counsel's interviews with members of Stanko's trial team suggest that (1) Stanko's attorney, William Diggs, selected the psychopathy defense prior to the completion of any mental health evaluation of Stanko; (2) Diggs sought out an expert (Dr. Sachy) who was obsessed with psychopathy and determined that this theory was the best fit for Stanko's defense prior to completing an evaluation of Stanko; and (3) that neither Diggs nor Sachy could be dissuaded from the psychopathy theory even though they were advised that psychopathy was a bad strategy, it was not mitigating, and it had no chance of success.[19]

Undersigned counsel have diligently worked to interview the experts who testified at trial. Counsel's interview with Dr. Sachy confirmed that Dr. Sachy's work on the case began and ended with the theory that Stanko was a psychopath. Dr. Joseph Wu and Dr. Bernard Albiniak both informed counsel that their involvement in the case was limited in nature and they were never asked to conduct a formal mental health evaluation or provide a diagnosis. Counsel's investigation

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[18] Undersigned counsel's investigation has revealed the inherent flaws in trial counsel's reliance on a diagnosis of psychopathy. Dr. Pamela Crawford, who testified as a court's forensic psychologist at trial, told undersigned counsel that the problem with trial counsel's use of the psychopathy diagnosis is that psychopathy is not an accepted clinical diagnosis, does not appear in the Diagnostic and Statistical Manual (the manual setting the standard for diagnosing mental disorders), and is not a mental illness.

[19] *See supra* Section III.A (describing undersigned counsel's interview with mitigation investigator Dale Davis, who objected to trial counsel's strategy because it was inherently not mitigating and encouraged trial counsel to continue investigating Stanko's social history and mental health).

further indicates that Dr. Ruben Gur was only asked to analyze magnetic resonance imaging (MRI) of Stanko's brain and Dr. Marc Einhorn was only asked to conduct neurological testing, designed to evaluate brain functioning. Neither Dr. Gur nor Dr. Einhorn's reports indicate they conducted a mental health evaluation or made a mental health diagnosis. Finally, Dr. James Thrasher appears to have evaluated Stanko only for competency to stand trial and criminal responsibility. Dr. Thrasher's report does not indicate that he evaluated Stanko for mental illness as it related to mitigation. Accordingly, though six[20] psychological experts testified at Stanko's trial, none completed a full mental health evaluation. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process" but is "often of vital importance to a jury's decision at the punishment phase.").

While undersigned counsel cannot point to a specific diagnosis at this time, counsel's inability to do so is due to the fact that they themselves are not mental health experts and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses. As the ABA Guidelines note, "Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions . . . that could be of critical importance." ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary. For this reason, the ABA Guidelines mandate that "at least one member of the defense team . . . be a person

[20] The Court's order indicates there were seven mental health experts who testified at trail. Undersigned counsel submits there were only six. Brent Turvey, who also testified at trial, specializes in crime scene reconstruction and did not conduct a mental health evaluation of Stanko. Additionally, Dr. Evelyn Califf, who testified during the penalty phase of the trial, is a certified Christian counselor, not a psychologist. Dr. Califf was asked to present a social history, not to conduct a mental health evaluation.

qualified by experience and training to screen for mental or psychological disorders or defects." *Id.*

"Mental health experts are essential to defending capital cases." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary. Jurors making a determination of the punishment for a defendant often find "the defendant's psychological and social history and his emotional and mental health [to be] of vital importance." *Id.* Given the fact that trial counsel prematurely abandoned investigation into Stanko's life history and its effect on Stanko's mental health, there is a strong possibility that Mr. Stanko has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*. Undersigned counsel, therefore, ask this Court to authorize the necessary funds for a forensic psychologist to complete a competent and reliable mental health evaluation of Stanko as was never done before trial and cannot be completed without the assistance of a mental health expert. *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B); *see also* Norris Aff. ¶ 4 ("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.")

Undersigned counsel have conferred with Dr. Knight and she is willing to evaluate Mr. Stanko.[21] Dr. Knight estimates that it will require approximately 60 hours to review records, interview Stanko, conduct any needed psychological testing, interview relevant witnesses and prepare a report. Dr. Knight's rate is $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area. Dr. Knight's rates are reasonable given her experience and the fact that, in counsel's experience, the rates are on the low end of the average rates charged by expert forensic psychologists in South Carolina.

[21] Dr. Knight's current CV was attached to the First Funding Motion filed with this Court.

C. Facts and argument relevant to the request for a media expert.

Despite the fact that there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's ineffectiveness in failing to conduct a media saturation study and present it to the trial court in support of the motion for a change of venue as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(b)(1), 11(b)(2). Prior to trial in Horry County, defense counsel decided to move for a change of venue. At the pre-trial motions hearing held one month prior to jury selection, however, trial counsel informed the trial court that they were not presenting the change of venue motion at that time. ROA 3110. Partway through voir dire, counsel asked for a change of venue based on members of the jury pool's prior knowledge of the case against Stanko. ROA 1284-90. The State suggested it would be better for the court to consider the change of venue argument after the jury had been selected, but before it was sworn. ROA 1289.

In support of the change of venue motion, defense counsel did not object to the State's suggestion and the court delayed consideration of the change of venue motion until after selection of the jury. ROA 1289-90. After the jury was selected, defense counsel formally moved for a change of venue. ROA 1334-1415. Defense counsel presented the testimony of Dr. Bernard Albiniak, an expert in social psychology, who testified that in public forums, people will conform their statements to what they believe will be generally accepted by the group even if that is not what they actually believe. ROA 1336-81. Dr. Albiniak is not an expert in media saturation; he has never conducted a media study; and, during his testimony, he did not even mention having reviewed such a study. Dr. Albiniak opined that the jurors, when asked by the court if they could set aside their prior knowledge of the case, would tell the judge they could do so even if it was not

what they believed. The State pointed out that none of Dr. Albiniak's research or studies involved juror behavior. With no evidence of the extent of the media coverage surrounding Stanko's case, the court denied the defense motion for a change of venue. ROA 1415.

The media coverage of Stanko's crimes and trial began immediately after the crimes occurred. Local and national media has continually covered all stages of Stanko's case, including law enforcement's national manhunt for and arrest of Stanko, preparations for his trial in Georgetown, each day of the trial in Georgetown County, Stanko's conviction and death sentence in Georgetown County, and preparations for Stanko's trial in Horry County. In fact, the entire Georgetown County trial was covered by 48 Hours, which aired an hour long special on Stanko multiple times prior to Stanko's trial in Horry County. Trial counsel were aware of the media coverage surrounding Stanko's case before the jury was selected in Horry County, yet trial counsel did not present the trial court with any information about media coverage in moving for a change of venue.

The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury. U.S. Const. amend. VI. Pretrial publicity about a case can be so pervasive and saturate the community to such an extent as to make it impossible to select an impartial jury from the community where the crime occurred. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In such a case, the pretrial publicity creates a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected from a local jury pool. *See Skilling v. United States*, 561 U.S. 358 (2010).

In this case, the Horry County community was inundated with media detailing the crimes for which Stanko stood trial and Stanko's conviction and death sentence in Georgetown County. The media even extensively covered and detatiled the trial strategy used in Georgetown County,

which was again presented in a nearly identical fashion to the Horry County jury. This creates a likelihood that, with the services of an appropriate expert, Stanko could have shown that an impartial jury could not have been selected from residents of Horry County. Trial counsel, however, presented no evidence relating to the amount and type of media coverage the potential jurors encountered in their daily lives before becoming members of the jury pool. This creates a strong likelihood that Stanko has viable claim for ineffective assistance of counsel under *Strickland*. An expert in media studies and media saturation is therefore necessary to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court. The study, counsel believe, will demonstrate that the media surrounding Stanko's case saturated the Horry County community, making it impossible to select an impartial jury from that location. Further, the study will show the information that trial counsel should have presented to the trial court in support of the motion for a change of venue. This Court must, therefore, authorize funds for a media expert as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Undersigned counsel have conferred with Professor Vidmar about being retained on Stanko's case.[22] He is willing and able to assist counsel in conducting a media study for Stanko's case. Professor Vidmar made an initial review of the media surrounding the case and has confirmed the media study can be completed retroactively. Professor Vidmar has experience conducting and testifying regarding retroactive media studies in post-conviction cases. Counsel have conferred with Professor Vidmar and estimate that expenditure of approximately thirty hours[23] is reasonably

[22] Professor Vidmar's current CV was attached to the Second Funding Motion filed with this Court.

[23] The hours needed to conduct the media study are estimated at merely thirty hours because undersigned counsel, through their positions at the Death Penalty Resource & Defense Center and in an effort to conserve court resources, will have student assistance in collecting and organizing

necessary to conduct the required study and provide testimony in this case. Professor Vidmar's rate is $300 per hour. An affidavit from Professor Vidmar attached to the Second Funding Motion, demonstrates that his rates are reasonable given the fact that he has earned the same amount or significantly higher amounts in other cases on which he has recently been retained.

IV. SUMMARY OF REQUESTED EXPENDITURES.

For all of the reasons set forth above, Stanko requests the following expenditures:

Licensed Social Worker

To investigate, evaluate, and develop an understanding Stanko's social history, its mitigation of his crime, and to assist post-conviction counsel in presenting mitigating evidence related to Stanko's social history, Stanko requests authorization for the initial expenditure of $13,000 and reasonable expenses to retain a Licensed Expert in Social Work to be paid at a rate of $130 per hour.

Forensic Psychologist

To investigate, evaluate, and develop an understanding of the correlation between Stanko's life history and his mental health and to assist post-conviction counsel in presenting mental health evidence, Stanko requests authorization for the initial expenditure of $15,000 and reasonable expenses to retain a forensic psychologist to be paid at a rate of $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area.

Media Expert

To conduct a study of the media surrounding his case and present the conclusions of that study to the Court, Stanko requests authorization for the expenditure of $9,000 and reasonable expenses to retain a media expert to be paid at a rate of $300 per hour.

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the relevant media for the study. Professor Vidmar, therefore, will require less time to review the materials and form his conclusions.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel request the Court reconsider its denial of funding for a licensed social worker, a forensic psychologist, and a media expert.

January 6, 2015

Respectfully submitted,

EMILY C. PAAVOLA
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803-765-1044

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

Susan Knight, PhD, ABPP, who appeared personally before me, affirms and states the following:

1. I, Susan Knight, am a clinical psychologist with specialization and board-certification in forensic psychology. I am currently employed full-time in private practice conducting forensic psychological evaluations for various legal and organizational entities. I am also a Clinical Assistant Professor in Psychiatry and Behavioral Sciences at the Medical University of South Carolina; and hold adjunct professor positions at the Charleston School of Law and the Cornell Law School.

2. Over the course of my career, I have conducted hundreds of court-ordered forensic evaluations of criminal defendants, as well as many privately retained evaluations. These evaluations have primarily addressed the psycho-legal issues of legal competencies, mental state at the time of offense, and sentencing/mitigation considerations. Further, I have been retained for consultation and/or to conduct a mental health evaluation in approximately nine capital cases at the pre-trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on March 25, 2014 about conducting and presenting a mental health evaluation of Mr. Stanko for his Horry County post-conviction relief proceedings. I am available and willing to work on the case, but cannot begin doing so until the Court authorizes funding for my services.

4. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client. Further, per guidelines governing conduct for my profession, such contingent fees are considered a "threat to impartiality" and therefore "forensic practitioners strive to avoid providing professional services on the basis of contingent fees" (Specialty Guidelines for Forensic Psychology, 2013, p. 12). Therefore, in keeping with ethical practice standards, I would not be able to accept a case under such conditions.

5. In order to complete my evaluation, I must: (1) review the trial transcript; (2) conduct comprehensive interviews with Mr. Stanko on multiple occasions; (3) interview collateral sources, including Mr. Stanko's siblings, other family members, and friends from childhood and the time leading up to his crimes; (4) review the mental health and social history records counsel have collected; (5) conduct any additional work that may develop as the evaluation progresses; and (6) prepare my opinion for presentation to the Court, which would likely include an extensive and detailed report of my findings. This is work that cannot be completed without authorization of funds from the Court.

6. Once the Court authorizes funding for a mental health evaluation. the evaluation will take approximately six (6) months to complete. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. A mental health evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation.

7. Without the authorization of funds from the Court and a continuance of the hearing, I cannot complete a mental health evaluation or aid counsel in their presentation of Mr. Stanko's post-conviction claims.

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

SUSAN KNIGHT

Sworn to and subscribed before me
This 5TH day of JANUARY, 2015

Notary Public for the State of South Carolina
My commission expires: My Commission Expires May 9, 2017

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

2016 MAY 18 PM 2:28

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:

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Benjamin H. Culbertson

Benjamin H. Culbertson, Circuit Court Judge	2148 Judge Code	May 13, 2016 Date

4975

For Clerk of Court Office Use Only

This judgment was entered on the 18 day of May 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 18 day of May, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

Emily C. Paavola	Donald J. Zelenka
Lindsey S. Vann	Caroline M. Scrantom
	Anthony Mabry
	Jimmy A. Richarson
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

Melanie Huggins Ward
CLERK OF COURT

Court Reporter: Grace L. Hurley

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2014-CP-26-035
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	
	)	
vs.	)	FINAL ORDER
	)	DENYING POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

2016 MAY 18 PM 2:28

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

I. Right to Conflict-Free Assistance of Counsel

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

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

[3] See Footnote 1, *ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Ineffective Assistance of Counsel in Appeal

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

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

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

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

VII. Unconstitutionality of South Carolina Death Penalty Statute

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

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

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

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

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

May 13, 2016
Georgetown, SC

Copy of Order/
filed 5-18-16 mailed to all
parties not in default on 5-18-16
initials BHC 4985

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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May 13, 2016
Via Email and U.S. Mail Delivery

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RE: *Stanko v. State* (Case No. 2014-CP-26-035)

Dear Ladies and Gentlemen:

Please find enclosed a copy of the Form 4 and Final Order Denying Post-Conviction Relief in this case. By copy of this letter and enclosure, I am forwarding the originals to the clerk of court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosure (a/s)
pc: Melanie Huggins-Ward, Clerk of Court

2016 MAY 13 PM 2:28

STATE OF SOUTH CAROLINA COUNTY OF HORRY STEPHEN C. STANKO, #6022 Plaintiff, vs. STATE OF SOUTH CAROLINA Defendant.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2014-CP-26-035 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney: Lindsey S. Vann, Bar No. 131408 Address: 900 Elmwood Avenue, Suite 200 Columbia, SC 29201 Phone: 803-765-1044Fax 803-765-1143 E-mail: _____Other: _____	Defendant's Attorney: Anthony Mabry, Bar No. _____ Address: P.O. Box 11549 Columbia, SC 29211 Phone: _____ Fax_____ E-mail: _____Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Lindsey S. Vann 5/23/16
Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☒ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

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.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

MOTION TO ALTER OR AMEND JUDGEMENT

Pursuant to Rule 59, S.C. R. Civ. P., Applicant, Stephen C. Stanko, respectfully moves this Court to alter or amend the judgment contained in the Court's Final Order Denying Post-Conviction Relief [hereinafter "the Order"], dated May 13, 2016 and received by undersigned counsel via U.S. Mail on May 16, 2016. The Order contains a number of factual and legal errors and fails to address several arguments supporting Applicant's claims.

I. FUNDING.

In order to adequately investigate and prepare to present Applicant's grounds for post-conviction relief, Applicant filed multiple funding motions that were denied by this court, including requests for funding for: (1) a forensic psychologist; (2) a licensed, testifying social worker; and, (3) a media expert. Prior to Applicant's hearing on the merits of his PCR claims, undersigned counsel objected to holding the hearing because they were unable to adequately investigate and prove multiple claims due to the funding denials. *See* Objection to the Evidentiary Hearing (Feb. 27, 2015). This Court's Order recognized that counsel filed the objection, but made no ruling on the objection, except for some conclusory statements that the funding would not have

resulted in a winning claim within the context of several individual claims. *See* Order at 6 n.6, 8 n.7. By making these findings, the Court once again applied the wrong standard for determining whether funding for expert assistance is reasonably necessary in PCR proceedings.

The PCR statute permits a court to authorize payments for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services *prior* to the court's authorization of funds. Nevertheless, this Court consistently and erroneously concluded the statute requires the Court to deny funds unless Applicant can first demonstrate that the outcome of a requested expert's services would result in a winning PCR claim. *See, e.g.*, Order at 6 n.6, 8 n.7; Order Denying Applicant's Second Motion to Authorize Funding for Expert Services, at 2 (Sept. 25, 2014). This interpretation of the term "reasonably necessary" supposes that PCR counsel would be able to retain the services of an expert without being able to guarantee payment. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to a winning claim in a PCR action.[1] Such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services.

As a result of this Court's funding denials, PCR counsel were forced to represent Applicant at an evidentiary hearing for which *no funding for a single testifying expert witness* was available. Undersigned counsel's representation of Applicant was therefore grossly inadequate. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process,

[1] An expert could not ethically state before doing an evaluation what the evaluation will yield. Any expert who did so would be subject to impeachment on that basis.

including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). The right to the assistance of counsel when filing an application for post-conviction relief is hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services to investigate, develop and present his claims for adjudication. *See Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)); *see also Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (holding that the state has a duty to "ensure that a defendant has . . . [funding for] the services of experts necessary to a meaningful defense.").

By holding a hearing without providing Applicant with the funds necessary to develop and prove his claims, this Court violated the federal substantive rules that govern federal claims and the procedures necessary for the reasonable resolution of federal constitutional questions. *See e.g.*, *Coleman v. Alabama*, 377 U.S. 129, 133 (1964) (establishing a right to a hearing and a right to present evidence relevant to an applicant's federal claims); *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).

In sum, by failing to permit adequate factual development or provide Applicant a meaningful opportunity to present the facts in support of his claims, this Court did not allow undersigned counsel the ability to effectively represent Applicant and, as a result, lacked 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."). This Court should, therefore, vacate its order, provide Applicant with adequate resources to investigate and prove his claims, and allow further proceedings for Applicant to present his proof developed as a result.

II. GROUNDS 10 & 11(A) & (C)(2) & (F)(2) – CONFLICT OF INTEREST.

In denying multiple claims related to Applicant's trial counsel's conflict of interest, the Order found that, even if trial counsel had a conflict of interest, Applicant "knowingly, voluntarily and effectively" waived the conflict. Order, at 3, 5-6. This finding fails, as did all of the attorneys and trial judges involved with Applicant's trial, to define the conflict Applicant purportedly waived and fails to address the relevant legal standards for assessing a waiver of a conflict of interest. As the Order noted, at the time of Applicant's Horry County trial, Applicant had filed a PCR application in his Georgetown County case, which alleged that his trial counsel, William Diggs, provided ineffective assistance of counsel when representing Applicant in Georgetown County.

Order, at 3. The Horry and Georgetown County cases were both death penalty cases, stemming from two murders occurring within twenty-four hours of each other, but in separate counties. It was undisputed that Diggs was lead counsel in both the Georgetown and Horry County cases and used essentially the same trial strategy for both trials. Thus, as Diggs was preparing and presenting the defense case in Horry County, Applicant had filed a PCR application alleging that Diggs was ineffective in presenting the same defense case previously in Georgetown.

On October 17, 2008, Applicant filed his initial PCR application in Georgetown County, alleging "[i]neffective assistance of trial or appellate counsel." PCR Exhibit 9 – Initial Georgetown PCR Application. At the appointment hearing in Horry County, on December 8, 2008, when Judge Baxley was considering appointing Diggs to represent Applicant in his second trial, Applicant informed the court that he had a pending PCR application alleging Diggs' ineffectiveness. ROA[2] 2947-48. The court decided to leave the issue to be discussed with appointed post-conviction counsel. ROA 2948. On March 4, 2009, the conflict issue was again discussed at a hearing before Judge John after he was appointed to replace Judge Baxley. ROA 2955-69. The judge opined that he thought it might be a "downright disqualification of Mr. Diggs in this matter," but Diggs assured the Court "we've talked about it on a number of occasions" though he admitted he had not even "seen the PCR application." ROA 2958-59. Applicant informed the judge that he intended to file an amended application, ROA 2959, and the Court asked Applicant to have the amended PCR application sent to him. ROA 2964. Diggs asked the court to revisit the issue if the judge determined the amended PCR application created a conflict. ROA 2964. The judge decided to

[2] Citations to the ROA refer to the Record on Appeal from the Horry County case filed with the Court by Respondent.

allow Diggs to stay on the case "with the ability for the court to re-visit it in the future." ROA 2964-65.

On April 25, 2009, the State filed a motion to review the status of Diggs as counsel, asserting a "non-waivable conflict of interest exists between William I. Diggs, Esquire, and the defendant." ROA 3534-35. The State asserted that Diggs intended "to offer a similar defense and similar mitigation utilizing the same experts from the companion case" and asked for a hearing on the status of Diggs as counsel in the Horry County case. ROA 3535. The court held a hearing on June 5, 2009, prior to the filing of the amended PCR application. ROA 2971. At the hearing, the State asserted that its main concern was the fact that Applicant waived the attorney-client privilege with respect to the claims he raised in the Georgetown PCR and Diggs planned to present a similar defense with the same witnesses at the Horry County trial. ROA 2974. Diggs said he did not "take a position in the case on the issue," but indicated Applicant would like for Diggs to continue as his attorney. ROA 2977. The court questioned Applicant, who confirmed he wanted Diggs to remain on the case, ROA 2983, and found that Diggs could continue to represent Applicant. ROA 2985.

On August 24, 2009, at a pretrial hearing, the State informed the court that the attorney general would not contact Diggs about the pending PCR application until after the conclusion of the Horry County trial. ROA 3016. The court found that no circumstances had changed and stated he "believe[d] that issue has and continues to be resolved." ROA 3019. On October 21, 2009, Applicant filed an amended PCR application in the Georgetown County case. PCR Exhibit 10 – Final Amended Georgetown PCR Application. Despite its indication that it would consider the issue again after the amended application was filed, ROA 2964-65, the court held no additional hearings on the conflict issue after the filing of the final amended application.

"A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest." *Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001) (en banc), aff'd, 535 U.S. 162 (2002).

The trial court has a duty to protect a criminal defendant's Sixth Amendment right to conflict-free counsel, and must make an adequate inquiry when he or she knows or has reason to know of a conflict. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." *Glasser v. United States*, 315 U.S. 60, 71 (1942); *see also Holloway v. Arkansas*, 435 U.S. 475, 487 (1978) ("In this case the trial court simply failed to take adequate steps in response to repeated motions, objections, and representations made to it, and no prospect of dilatory practices was present to justify that failure."). Trial counsel also has a duty to provide conflict-free representation and to notify the court and the client of any potential conflict. *See, e.g., Holloway*, 435 U.S. at 485-86 ("defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."); *Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.").

A conflict of interest exists "when a defense attorney places himself in a situation inherently conducive to divided loyalties." *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979). Although conflicts of interests often occur when an attorney represents multiple clients, a conflict may also exist between an attorney's private interests and those of the client. *United States v. Magini*, 973 F.2d 261, 263-64 (4th Cir. 1992). "A concurrent conflict of interest exists if . . . there is a significant risk that the

representation . . . will be materially limited . . . by a personal interest of the lawyer." Rule 1.7, Rule 407, SCACR. A personal conflict of interest arises when the defendant's claims are pitted against the defense of counsel's professional reputation, such as when a defendant has attacked his counsel's adequacy or performance. One major reason for this is the more counsel does or says in a second proceeding, the more counsel puts into the record that could later be used against him in the ineffectiveness claim. *See, e.g., Owens v. State*, 792 So.2d 650, 655 (Fla Ct. App. 2001); *Adams v. State*, 380 So.2d 421, 422 (Fla. 1980); *People v. Fields*, 410 N.E.2d 1178, 1179 (Ill App. Ct. 1980); *People v. Norris*, 361 N.E.2d 105, 110 (Ill App. Ct. 1977); *Roberts v. State*, 2013 WL 5506645, *2 (Ala. Crim. App. Oct. 4, 2013); *State v. Taylor*, 1 S.W.3d 610 (Missouri Ct. App. 1999); ABA Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 94-384 (1994) (stating a conflict exists where a lawyer's representation of a defendant is limited by the lawyer's personal interests, including the lawyer's interest in avoiding liability for malpractice or preserving his reputation); *see also Christeson v. Roper*, 135 S. Ct. 891 (2015) (finding conflict of interest between duty to provide competent and diligent representation and attorneys' interest in preserving their professional reputations where habeas attorneys failed to argue for equitable tolling which would be to admit their own incompetence). An attorney's motives when involved in an actual conflict of interest "are irrelevant." *Zuck v. State*, 588 F.2d 436, 439 (5th Cir. 1979). "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense." *Id.* at 440. "[T]he evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing." *Holloway*, 435 U.S. at 490 (emphasis in original).

Waiver of a conflict of interest is valid only if it is made voluntarily, knowingly and intelligently. In order for a waiver of the right to conflict-free counsel to be knowing and

intelligent, the State must show that the defendant: (1) was aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and, (3) was aware of his right to obtain other counsel. *Zuck*, 588 F.2d at 440. The only way a defendant can knowingly and intelligently waive the conflict is if he understands the true nature of the consequences. "[A] defendant cannot knowingly and intelligently waive what he does not know," *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990), and an alleged waiver is not knowing, intelligent and voluntary unless the defendant knows of the precise form of the conflict that eventually arose at trial. *See, e.g., United States v. Swartz*, 975 F.3d 1042, 1049-50 (4th Cir. 1992); *Thomas v. State*, 346 S.C. 140, 145, 551 S.E.2d 254, 256 (2001). Similarly, "informed consent" requires the lawyer to provide "reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0, Rule 407, SCACR.

Conflicts involving allegations of attorney ineffectiveness present a difficult variation on the problem of obtaining informed consent because the lawyer's own ability to give advice regarding the conflict is compromised by the lawyer's desire not to have to "fess up to a mistake." *See* John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Capital Post-Conviction Representation Posed by* Martinez v. Ryan Cornell Law School Legal Studies Research Series, Jan. 28, 2015, at 31, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556939. "The client's capacity to make fully informed decisions concerning the representation is impaired by the lawyer's inability to provide fully candid, impartial advice." *Id.*

Here, Applicant's counsel operated under an actual conflict of interest. *See* Ground 10 & 11(a). After Applicant filed a PCR application alleging that Diggs was ineffective in his

presentation of a defense at the Georgetown County trial, Diggs' had a personal and professional stake in demonstrating that his performance at the initial trial was not deficient. In order to do so, he would have been tempted to present the same defense as he did previously because the more he added to or changed the defense, the more it would tend to show his prior defense was inadequate and he was thus ineffective. *See Owens*, 792 So.2d at 655. Any change Diggs made at the subsequent trial could be used as evidence that he was deficient at the first trial. *See id.* This temptation permeated the entire trial making the prejudice to Applicant greater than if there had been a conflict related to a single witness or portion of the trial. *See Zuck*, 588 F.2d at 439. Diggs presented a virtually identical defense at the Horry County and Georgetown County trials and, at the PCR hearing, Diggs testified that he never considered changing his strategy after the Georgetown trial. Hrg. Tr., 68, Mar. 2-3, 2015 [hereinafter "Tr."]; *see also* Tr. 215 (testimony of Vicki Childs stating there was never "any discussions of changing the defense theory . . . before the Horry County case."). The State even recognized Diggs' plan to go forward with the same defense, asserting: "Diggs . . . has represented to the Court in connection with the present case that he intends to offer a similar defense and similar mitigation utilizing the same experts from the [Georgetown trial]." ROA 3535.

Any purported waiver of this conflict of interest was not valid because it cannot be shown that the Applicant was aware of the specific nature of the conflict or fully informed of the consequences of continuing with counsel under the onus of that conflict. *Zuck*, 588 F.2d at 440. Despite the fact that the trial court discussed with Applicant the concern that a conflict might exist and that Applicant could tell the court if he wanted a different lawyer, no one ever defined the conflict or the potential consequences of that conflict. The hearings on the issue focused on the fact that Applicant wanted Diggs to continue as counsel and on how to handle the waiver of

attorney-client privilege. Neither of Applicant's lawyers, the court, nor the State informed Applicant of the potential consequences of waiving the conflict – i.e. that Diggs would be tempted to present the same defense in order to avoid damaging his professional reputation because making changes to the defense could provide evidence that his performance was deficient at the first trial. Without the potential consequences ever being articulated, Applicant could not make a valid waiver, regardless of his assertions that he wanted the same counsel. This Court should, therefore, amend its judgment to grant relief on Applicant's Ground 10 & 11(a).

Additionally, Diggs provided Applicant with ineffective assistance of counsel by failing to adequately advise Applicant regarding the conflict of interest under which he operated. *See* Ground 10 & 11(c)(2). To establish ineffective assistance of counsel on conflict of interest grounds Applicant must establish that: (1) his attorney labored under "an actual conflict of interest" that (2) "adversely affected his lawyer's performance." 445 U.S. at 348. After a petitioner satisfies this two-part test, prejudice is presumed. *Strickland*, 466 U.S. at 692. When counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Due to the inherent seriousness of the breach and the difficulty in "measure[ing] the precise effect on the defense of representation corrupted by conflicting interests," the standard for determining whether a defendant is entitled to relief for ineffective assistance of counsel is modified such that defendant need not show prejudice. *Id.* Rather, "[p]rejudice is presumed . . . if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler*, 446 U.S. at 348 (1980)). In *Mickens v. Taylor*, the Supreme Court held that "'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance* – as opposed to a mere theoretical division of

loyalties." 535 U.S. 162, 171-172, n.5 (2002). The Court concluded that "a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief." *Id.* In other words, an actual conflict for Sixth Amendment purposes is precisely one that adversely affects the attorney's performance. *Id.* As discussed above, Diggs operated under an actual conflict of interest by representing Applicant when Applicant had a PCR application pending that asserted Diggs was ineffective in his previous representation.

That the conflict adversely affected Diggs' performance is also readily apparent given the nearly identical trial strategy implemented at the second trial as compared to the first. Changes to the trial strategy could have been used as evidence that Diggs was ineffective in the first proceedings and, likely to protect his professional reputation, Diggs did not even consider changing his strategy. As Russell Stetler testified at the PCR hearing, professional standards for lawyers require that an attorney preparing for a second death penalty case for the same defendant must "have completely fresh thoughts, reinvestigation, new strategy . . . regardless of the outcome of the . . . first trial." Tr. 153. Diggs' failure to even consider a new strategy, *see* Tr. 215, ROA 3535, adversely affected Diggs' performance and this Court should amend its judgment and grant relief on Ground 10 & 11(c)(2).

Diggs was also ineffective in failing to raise the conflict with the court, but instead consistently stating that he did not believe there was a conflict and that he had not even read the Georgetown PCR application. ROA 2958-59; *State v. Stanko*, 402 S.C. 252, 269, 741 S.E.2d 708, 717 (2013) (finding the conflict of interest claim was not preserved because trial counsel did not object to the conflict); *Holloway*, 435 U.S. at 485-86 ("defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."); *Cuyler*, 446 U.S. at

346-47 ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); *see also Mickens*, 240 F.3d at 357 ("An objection raised by defense counsel is particularly persuasive evidence of a Sixth Amendment violation because: (1) defense counsel is in the best position to evaluate his potential conflicts of interest; (2) defense attorneys are obligated to inform the court of conflicts of interest; and (3) attorneys are officers of the court whose declarations to the court are 'virtually made under oath.'") (citing *Holloway*, 435 U.S. at 485-86).

Applicant's appellate counsel were similarly ineffective in failing to adequately raise and argue the conflict of interest issue. *See* Ground 10 & 11(f)(2). The Constitution guarantees the right to the effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Appellate Counsel's performance is measured by the same familiar two-pronged standard used for evaluation of trial counsel. *See Strickland*, 466 U.S. at 687 (requiring a showing that (1) "counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defendant" to prove ineffective assistance of counsel). Appellate counsel can be ineffective for failing to raise a meritorious issue on appeal. *See Southerland*, 337 S.C. at 615-16, 524 S.E.2d at 836 (finding both deficient performance and prejudice when appellate counsel abandoned a meritorious jury instruction claim); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002) (finding appellate counsel ineffective for failing to adequately assert a claim of prosecutorial retaliation); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (finding appellate counsel ineffective for abandoning an insufficiency claim). Appellate counsel can also be ineffective for raising an issue on appeal but failing to adequately brief or argue that issue. *Patrick*, 349 S.C. 203, 562 S.E.2d 609 (appellate counsel

ineffective where counsel only "devoted three short paragraphs to this issue, did not give any useful analysis, and only cited one case.").

On direct appeal, Applicant's counsel raised, but inadequately briefed the issue related to Diggs' conflict of interest. Appellate counsel asserted the trial court erred by accepting a "truncated and inadequate waiver" of the conflict of interest and erred in requiring that Diggs and Applicant not discuss the Georgetown County case. *See* PCR Exhibit 30 – Final Brief of Appellant, at 20-29. The South Carolina Supreme Court found the claim was not preserved because trial counsel failed to object to the conflict at trial. *State v. Stanko (Stanko II)*, 402 S.C. 252, 269, 741 S.E.2d 708, 717 (2013). Even if the issue was preserved, the court found Applicant waived the conflict of interest. *Id.* at 270, 741 S.E.2d at 717. Though appellate counsel raised the issue of the conflict, like everyone involved in the trial, counsel failed to adequately articulate the actual nature of the conflict under which Diggs operated – that Diggs would be tempted to present the same defense in order to avoid being found ineffective in the Georgetown case.[3] *See* Exhibit 30, at 20-29. It was not until the petition for rehearing that appellate counsel described the actual nature of the conflict. *See* Exhibit 32 – Petition for Rehearing, at 5-6. However, by that time, the argument was waived for not having been raised in the initial briefing and the South Carolina Supreme Court denied rehearing. *See* Rule 221(a), SCACR. As a result of appellate counsel's failures, no court has ever addressed the actual nature of the conflict in this case and this Court should amend its judgment and grant relief on Ground 10 & 11(f)(2).

[3] At the PCR hearing, appellate counsel stated that if he could have raised anything further about the conflict of interest claim, he had "no strategic reason not to argue" it and there was no reason not to argue something that "would help win for Mr. Stanko." Tr. 233.

III. GROUNDS 10 & 11(B)(1)&(2) – INEFFECTIVE ASSISTANCE OF COUNSEL: CHANGE OF VENUE.

The Order denying Applicant's claims that trial counsel were ineffective in handling the change of venue motion because they agreed to delay the motion and did not present an appropriate expert on media saturation found that Applicant's lawyers raised the motion for change of venue before jury selection, argued about the amount of pre-trial publicity, and called Dr. Albiniak to testify. Order, at 4. At trial, defense counsel raised a change of venue motion after individual *voir dire*, but before jury selection based on the number of jurors who had prior knowledge of the case, including knowledge of Applicant's prior death sentence. ROA 1284. Counsel proposed to call Dr. Albiniak to testify about the reliability of the validity of the jurors' responses when they were asked by the court whether they could set aside their prior knowledge about the case. ROA 1285. Before Dr. Albiniak testified, the state suggested the court take up the motion after the jury had been selected and defense counsel agreed, without objection. ROA 1288-89. After the jury was selected, the defense presented the change of venue motion with testimony from Dr. Abliniak. ROA 1335-1415. Dr. Albiniak is an expert in social psychology and testified that in public forums, people will conform their statements to what they believe will be generally accepted by the group even if that is not what they actually believe. ROA 1336-81. Dr. Albiniak is not an expert in media saturation; he has never conducted a media study; and, during his testimony, he did not even mention having reviewed such a study. Dr. Albiniak opined that the jurors, when asked by the court if they could set aside their prior knowledge of the case, would tell the judge they could do so even if it was not what they believed. The State pointed out that none of Dr. Albiniak's research or studies involved juror behavior, and Dr. Albiniak was not present for any of the individual *voir dire*. With no evidence of the extent of the media coverage surrounding Stanko's case, the court denied the defense motion for a change of venue. ROA 1415.

The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury. U.S. Const. amend. VI. Pretrial publicity about a case can be so pervasive and saturate the community to such an extent as to make it impossible to select an impartial jury from the community where the crime occurred. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In such a case, the pretrial publicity creates a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected from a local jury pool. *See Skilling v. United States*, 561 U.S. 358 (2010).

The pretrial media coverage of this case was significant due to the facts surrounding the crimes and the fact that Applicant was previously tried and sentenced to death in the adjoining county. Between the Georgetown and Horry County trials, an hour-long *48 Hours* television program describing the defense presented and result of the Georgetown County trial aired on national television. *See* Tr. 214. This media coverage was so pervasive that many of the potential jurors had knowledge of the prior trial. As a result, Diggs testified at the PCR hearing that he used his juror strikes "to eliminate people who knew about the case" rather than using a more typical defense strategy to elminate jurors who would be less favorable to the defense. Tr. 80. Given the effect Diggs knew the pretrial media had on the jury, he was ineffective in agreeing to postpone the change of venue motion until after the jury was selected. *See Skilling*, 561 U.S. 358; *Rideau*, 373 U.S. 723; *State v. Truesdale*, 278 S.C. 368, 371, 296 S.E.2d 528, 530 (1982). The Order does not address these legal arguments and should be amended to grant relief on Ground 10 & 11(b)(1) accordingly.

The Order's denial of Ground 10 & 11(b)(2), in which Applicant alleged that trial counsel were ineffective in failing to call an appropriate expert regarding the media surrounding the case ignores the repeated requests undersigned counsel made for an expert to review the media

surrounding the case in order to prove the claim that trial counsel were ineffective in failing to retain such and expert. It is undisputed that Dr. Albiniak was not qualified to testify regarding the media saturated and Applicant demonstrated that a media expert was necessary to prove that such an expert should have been retained by trial counsel.[4] Because this Court did not provide Applicant with the funding necessary to prove his claim for relief, this Court should vacate its judgment, provide Applicant with adequate resources to investigate and prove his Ground 10 & 11(b)(2), and allow further proceedings for Applicant to present his proof developed as a result.

IV. GROUNDS 10 & 11(D) – FALSE TESTIMONY.

The Order denied Applicant's claim that the State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer, Ground 10 & 11(d), finding that Applicant challenged the testimony on cross examination at trial and "nothing indicates that the

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[4] In asserting funds for a media expert were necessary, Applicant argued:

> In this case, the Horry County community was inundated with media detailing the crimes for which Stanko stood trial and Stanko's conviction and death sentence in Georgetown County. The media even extensively covered and detatiled the trial strategy used in Georgetown County, which was again presented in a nearly identical fashion to the Horry County jury. This creates a likelihood that, with the services of an appropriate expert, Stanko could have shown that an impartial jury could not have been selected from residents of Horry County. Trial counsel, however, presented no evidence relating to the amount and type of media coverage the potential jurors encountered in their daily lives before becoming members of the jury pool. This creates a strong likelihood that Stanko has viable claim for ineffective assistance of counsel under *Strickland*. An expert in media studies and media saturation is therefore necessary to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court. The study, counsel believe, will demonstrate that the media surrounding Stanko's case saturated the Horry County community, making it impossible to select an impartial jury from that location. Further, the study will show the information that trial counsel should have presented to the trial court in support of the motion for a change of venue. This Court must, therefore, authorize funds for a media expert as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Motion to Reconsider, at 22-23, Oct. 14, 2014.

State knowingly presented" such testimony. Order, at 6. The Order noted that the Court denied Applicant's request for funding "to obtain an expert who could dispute Dr. Spicer's testimony," stating that any evidence from such an expert "would have only corroborated the testimony of Dr. Wu and would not have indicated any due process violation by the State." Order, at 6 n.6. Contrary to the Court's assertion, it is impossible to know what evidence would have been discovered and presented through an expert in the field had counsel been granted the funds to retain such an expert. Accordingly, this Court should vacate its judgment, provide Applicant with adequate resources to investigate and prove his Ground 10 & 11(d), and allow further proceedings for Applicant to present his proof developed as a result.

V. GROUNDS 10 & 11(E)(1) – INEFFECTIVE ASSISTANCE OF COUNSEL: COUNSEL UNREASONABLY INFORMED THE JURY THAT APPLICANT'S FAMILY DID NOT LIKE HIM.

The Order denied Applicant's claim that trial counsel was ineffective in informing the jury that Applicant's family did not like him, Ground 10 & 11(e)(1), finding that trial counsel made a "conscious decision" to inform the jury that Applicant's family did not like him and refused to attend the trial because it "would support Stanko's defense that he could not function like a normal person and, thus, mitigate his culpability." Order, at 7. At trial, counsel repeatedly emphasized that Applicant's family was not present and were alienated by Applicant. Diggs began in the opening by informing the jury: "Look around the courtroom. I can tell you Steve has family, brothers and sisters, and parents. None of them are here." ROA 1450. During the closing in the guilt phase. Diggs once again emphasized the family's absence: "[W]hen we look out there and see an empty courtroom, with no family members here because of a lifetime of deceit, lying, abuse with family members, and we see the killing of a friend for no reason, that's insanity." ROA 2462. "He has four siblings. Not one of them is here." ROA 2450. "He has alienated all of the family members based on his deceit, lying, inability to be – to even have a relationship with those people." ROA

2451. "He's alienating all of his family members. They won't even come to see him in his trial. He tries to kill his friends." ROA 2455. During sentencing, Diggs elicited similar testimony from the witness called to testify about Applicant's life history. Evelyn Califf testified that Applicant's one living grandparent would not speak to her and none of the family members were at the trial. ROA 2800.

At the PCR hearing, Diggs testified that he made these references to Applicant's family "[t]o show that Stephen has a problem. Okay. He's not a normal rational thinking person." Tr. 64. Russell Stetler, an expert in the development and presentation of mitigation evidence, testified, however, that a capital defense attorney's goal in presenting mitigation evidence is the function of "humanizing" and "presenting evidence that will make some kind of human connection between the capital Defendant and the members of the jury." Tr. 143. The American Bar Association's Guidelines for capital defense counsel further admonish counsel that their duty is to seek to humanize the defendant and give the jury reasons to vote for life. ABA Guidelines 10.11, commentary (2003). By telling the jury that Applicant's family was alienated by him, Diggs failed to fulfill his duty to humanize Applicant, instead, dehumanizing him by emphasizing that Applicant was not even be loved by his family.

The Order's finding that Diggs made a strategic decision to inform the jury of Applicant's family's dislike of him fails to address whether this strategic decision was reasonable. Where counsel's asserted strategic reason for doing or not doing something at trial is not reasonable, counsel's performance is deficient. *See, e.g., Ard v. Catoe*, 372 S.C. 318, 332-34, 642 S.E.2d 590, 597-98 (2007) (finding (1) counsel was deficient in calling a non-independent expert who would be required to call into question the conclusion of a SLED analysis who was under his supervision at the time he drew the conclusion – counsel's decision to rely on such an expert was unreasonable,

and (2) finding counsel unreasonable for failing to discuss gunshot residue pre-trial with the witness who would testify about the gunshot residue); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (finding counsel's decision to rely on evidence the defendant was not guilty rather than investigating and presenting mitigating evidence was not a reasonable strategic decision because the jury had rejected the defense theory that the defendant was not the actual perpetrator); *Moore v. Johnson*, 194 F.23d 586, 618 (5th Cir. 1999) (finding counsel proffered a strategic reason for not investigating or presenting mitigating evidence, which was that counsel focused on a residual doubt/alibi defense during punishment, unreasonable; the court found that the alibi defense failed miserably and was rejected by the jury during the guilt phase; the decision to rely on the defense again at penalty was unreasonable).

In Applicant's case, Diggs agreed that the goal was to obtain a life sentence. Tr. 16. In order to do so, as Stetler testified, it was necessary to humanize Applicant in the eyes of the jury. Repeatedly telling the jury that Applicant's family did not care about him anymore and did not attend the trial – in essence that they did not care what happened to Applicant – could only have acted to further dehumanize Applicant in the eyes of the jury and make it more likely they would return a death sentence. It likely had that effect as the jury deliberated for only one hour before returning a unanimous verdict for death. ROA 2894. Diggs' purported strategic reason for presenting this information to the jury was unreasonable and this Court should amend the Order and grant relief on Ground 10 & 11(e)(1).

VI. GROUNDS 10 & 11(E)(2) – INEFFECTIVE ASSISTANCE OF COUNSEL: COUNSEL UNREASONABLY ELICITED DEHUMANIZING TESTIMONY ABOUT APPLICANT.

The Order went on to deny Applicant's claim that trial counsel were ineffective in unreasonably eliciting dehumanizing testimony about Applicant, Ground 10 & 11(e)(2), finding that "references to psychopathy, including testimony from Stanko's expert witness that Stanko is

a psychopath, was an attempt to corroborate Stanko's defense of insanity and mitigate his culpability by showing that he could not control his actions." Order, at 7. A review of the record reveals significant testimony from the defense experts, and elicited by defense counsel, that dehumanized Applicant by calling him a psychopath and inferring that he was less than human.

This began in Diggs' opening statement to the jury when he stated: "We are going to show you how it can be that someone so intelligent in some ways cannot do the simplest of things like have breakfast with a friend without murdering him." ROA 1451. Diggs further asserted that whatever condition Applicant suffered from was untreatable and could not be fixed. ROA 1452 ("You can't just give him some medicine and make it better."). During the defense case, when trying to explain what happened during the murder, defense expert Brent Turvey testified that Applicant's actions were worse than the State's theory of the case. Despite the state pathologist's testimony that bruising to the side of the victim's face resulted from falling after he was shot, ROA 1744, Turvey testified that the blunt force abrasion going around Turner's head was "not just from falling. . . . That's being struck." ROA 1842-43.

The most significant dehumanizing testimony, however, came from Dr. Thomas Sachy who was the defense's star witness. He testified that a person with brain damage like Applicant's is more likely to act impulsively violent or in a "psychopathic manner." ROA 2191. When discussing Applicant's frontal lobe impairments, Sachy testified "you can't be human without it." ROA 2192. He repeatedly informed the jury that Applicant was a psychopath or a person with antisocial personality disorder. *See, e.g.*, ROA 2197, 2211, 2213, 2233, 2235, 2254. Sachy went on to inform the jury that being a psychopath or having antisocial personality disorder is "God-given" and "[w]e can't cure it yet." ROA 2244-25. He then compared Applicant and his incurable disorder to Ted Bundy and Jeffrey Dahmer. ROA 2233.

The Order finding that this testimony was strategically elicited to further Applicant's insanity defense ignores the fact that such a strategy is not reasonable. As an initial matter, psychopathy and antisocial personality disorder legally cannot support a finding of insanity. The South Carolina insanity statute specifically excludes from its definition of insanity behaviors and conduct that form the basis of a psychopathy or antisocial personality disorder diagnosis. S.C. Code § 17-24-10 ("Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish a defense of insanity."). The jury knew this to be true because the State's expert testified, and the judge instructed,[5] that antisocial personality disorder is not enough to satisfy the requirements for a not guilty by reason of insanity verdict. ROA 2285, 2470. Any strategy to use psychopathy or antisocial personality disorder was, therefore, unreasonable because the evidence cannot satisfy the legal standard for insanity. *See Ard*, 372 S.C. at 332-34, 642 S.E.2d at 597-98; *Council*, 380 S.C. 159, 670 S.E.2d 356 (2009); *Moore*, 194 F.23d at 618.

Additionally, counsel's presentation of this evidence was not a reasonable strategy decision because, once the jury rejected the argument that Applicant was insane – as they were legally required to do based on the explicit language of the statute – they would use the evidence as a reason to sentence Applicant to death. Counsel have a duty to humanize their clients in the eyes of the jury. ABA Guidelines 10.11, commentary. Due to the inherently dehumanizing nature of labels like "psychopath" and "antisocial personality disorder," the overwhelming weight of legal authority views such evidence as aggravating rather than mitigating. *See, e.g., Kokal v. Secretary*, 623 F.3d 1331, 1349 (11th Cir. 2010) (a mental health evaluation "may have been 'potentially

[5] The jury instruction on not guilty by reason of insanity stated: "Evidence of a mental disease or defect that is manifested only by repeated criminal or other anti-social conduct is not sufficient, in and of itself, to establish the defense of insanity." ROA 2470.

aggravating,' because it suggests that Kokal has antisocial personality disorder, 'which is a trait most jurors tend to look disfavorably upon' and 'is not mitigating but damaging.'"); *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994) ("Antisocial personality disorder has been held not to be mitigating as a matter of law."). Because prosecutors easily turn evidence of antisocial personality disorder against the defendant, no competent capital defense attorney would ever pursue a diagnosis of antisocial personality disorder or label his client a psychopath. *See Looney v. State*, 941 So.2d 1017, 1028-29 (Fla. 2006) ("[A] diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation."); *Parker v. Secretary*, 331 F.3d 764, 788 (11th Cir. 2003) (holding that it was valid trial strategy not to present damaging psychological evidence that the defendant "was antisocial and a sociopath"). Thus, by presenting evidence that his own experts believed he was a psychopath and less than human, defense counsel presented inherently aggravating evidence against their own client and were ineffective. *See* Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 530 (2013) ("If left unchallenged in a capital case, ASPD and related constructs are quite literally the 'kiss of death.'"). This Court should, therefore, amend its judgment and grant relief on Ground 10 & 11(e)(2).

VII. GROUNDS 10 & 11(E)(3)&(4) – INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION EVIDENCE.

The Order denied Applicant's claim that trial counsel were ineffective in failing to adequately investigate and present mitigating evidence, Grounds 10 & 11(e)(3)&(4), finding trial counsel "investigated and presented mitigating evidence of Stanko's life history, background and mental health." Order, at 8. The Order recognized that trial counsel failed to hire a mitigation

investigator for the Horry County trial,[6] but found that "decision [did] not constitute ineffective assistance of counsel." Order, at 8. The Order ignores the significant evidence presented at the PCR hearing that demonstrated trial counsel did not conduct a sufficient investigation prior to settling on a theory for the Georgetown County case and failed to adequately investigate and reconsider the strategy prior to the Horry County trial.

Evidence presented at the PCR hearing revealed that trial counsel settled on the defense theory – that Applicant was insane at the time of the crime because he is a psychopath who could not help committing the murders – prior to any expert meeting or evaluating Applicant and trial counsel refused to consider other theories as the investigation proceeded. *See* Tr. 177. Diggs testified that he spoke with Dr. Bernard Albiniak on November 10, 2005 to discuss some ideas about the case. Tr. 18. Dr. Albiniak did not meet or evaluate Applicant. *See* PCR Exhibit 11 – Dr. Alibinack's Time Sheets. Drs. Tora Brawley and Donna Schwartz-Watts were initially contacted with the intention of having them evaluate Applicant in January of 2006. Tr. 20. However, before either of them – or any other evaluating expert – met Applicant, they were told not to conduct an evaluation because "they really weren't prepared to go in the direction that we wanted to go." Tr. 21. In March of 2006, at the same time Applicant was asking for his counsel to be removed because he did not believe they were actively preparing for trial, *see* ROA (Georgetown)[7] 3542-97, Diggs contacted Dr. J.W. Thrasher who recommended Diggs contact Dr. Thomas Sachy about the case

[6] As the evidence at the PCR hearing demonstrated, it is erroneous to say that Diggs "decided" not to retain a mitigation investigator. Diggs asked experienced mitigation specialist Dale Davis to participate in the Horry County investigation and trial preparation, but she refused. *See* Tr. 197-98.

[7] Cites to "ROA (Georgetown)" refer to the record on appeal from the Georgetown County case. Undersigned counsel believe Respondent filed the Georgetown ROA with the Court; however, they are able to provide the pertinent sections if the Court does not have the full ROA.

prior to any meeting with Applicant. Tr. 22, 25. On March 20, 2006, Diggs contacted Dr. Sachy and noted on his timesheet for that day: "He will be our expert." Tr. 25. Thus, after a 30 minute phone call with Dr. Sachy, who had not met the applicant or seen any records about the case, Diggs decided the direction the defense would take and that Sachy would be the expert for trial. *See* Tr. 25.

Dr. Sachy previously testified in a Georgia case called *Rivera*, in which he presented a theory that the defendant was a psychopath with hypofrontality and was, therefore, insane because he could not help committing the crimes for which he stood trial. *See* Tr. 27. This was the same defense Sachy ultimately presented at Applicant's trial, but despite the fact *Rivera* ended in a death sentence, Diggs did not discuss the *Rivera* case with Sachy in detail. Tr. 25, PCR Ex. 22 – Emails: Sachy Information to Counsel (providing Diggs with information about the *Rivera* trial and its outcome).

From Diggs' phone call with Dr. Sachy and decision to pursue the strategy Sachy put forward in *Rivera*, Sachy began the evaluation of Applicant and involved numerous experts who were also involved in the *Rivera* case. *See* Tr. 29, 31, 32 (discussing the involvement of Drs. Joseph Wu, Mark Einhorn, and Ruben Gur). From that point on in the trial preparation, Diggs did not consider changing the trial strategy. Mitigation investigator, Dale Davis, described Diggs as "laser focused on the [psychopath] defense." Tr. 183.

Davis confirmed that that the trial theory was decided upon prior to any investigation of the case. She testified that at the first defense team meeting, she learned that the theory was that Applicant was a psychopath who could not help killing. Tr. 177. She thought this theory was actually aggravating and was a "crazy theory." Tr. 183. Davis believed using Diggs' theory as the defense was like "walking somebody to death's door." Tr. 196. She told Diggs she did not believe

the theory would work to obtain a life sentence for Applicant, but Diggs "was so laser focused on this defense" that Davis did not believe Diggs even heard her objections. Tr. 183.

Nevertheless, Davis conducted a social history investigation and collected evidence regarding Applicant's life history and potential mental health problems. Despite not being a mental health expert, Davis recognized red flags of mental illness and sent information regarding Applicant's obsessive compulsive tendencies and his hypergraphia.[8] Tr. 188; PCR Exhibit 24-Emails: Hypergraphia (sending information about hypergraphia and other investigation issues to Diggs). Davis does not believe that any of the experts were provided with this information. Tr. 188.

As Davis predicted, Diggs' theory "walk[ed] [Applicant] to death's door" and he received a death sentence in the Georgetown County case. In spite of the outcome of the Georgetown County trial, as Diggs prepared for the Horry County trial, he never considered changing his defense strategy. Tr. 68; 215. Diggs asked Davis to participate in the second trial and Davis believed he was not asking her to do any further investigation, but instead to re-present what had been prepared for the first trial. Tr. 198. Davis refused to be involved in the case again for that reason. *See* Tr. 198. Nevertheless, Davis attempted to convince Diggs not to offer the same strategy at the Horry County trial by sending Diggs and the rest of the defense team an article about using psychopathy in criminal trials. Tr. 183-84. The article stated a "new study suggests that being labeled a psychopath increases the likelihood that an offender will be locked up indefinitely or even executed." PCR Exhibit 23 – Emails: Post-trial Psychopathy (sending article entitled

[8] Davis attached an article to the email explaining hypergraphia, which is defined as "[t]he driving compulsion to write." PCR Exhibit 24. The article also noted that hypergraphia has been associated with temporal lobe epilepsy (a neurological condition characterized by recurrent seizures in the temporal lobe of the brain), bipolar disorder, schizophrenia, and frontotemporal dementia. *See id.*

"Scientists explore the frightening world of psychopaths" to Diggs). Thus, despite irrefutable evidence that the defense strategy would result in a death sentence, Diggs stuck to his theory and once again tried to obtain a not guilty by reason of insanity verdict at the Horry County trial based on Applicant's brain damage and psychopathy that made it impossible for Applicant to avoid killing. Unsurprisingly, it took the jury only one hour to sentence Applicant to death a second time in Horry County.

Under United States and South Carolina Supreme Court precedent, it is clear that Diggs' failure to conduct investigation or have any expert evaluate Applicant prior to deciding on the trial strategy was deficient performance. *See Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. . . . . [The omissions] clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."); *Weik v. State*, 409 .C. 214, 761 S.E.2d 757 (2014) (counsel were ineffective in failing to develop and present mitigating evidence, even when trial counsel introduced psychological testimony regarding mental illness because counsel "failed to present even a skeletal version of Petitioner's *social history*"); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (counsel were ineffective in failing to investigate and prepare expert testimony about the defendant's mental condition as it existed at the time of the murder; though counsel in this case were more diligent that counsel in *Wiggins*, counsel were deficient in failing to conduct an adequate investigation).

At the PCR hearing, undersigned counsel did not present an alternative theory that should have been presented at trial because they were denied funding for the expert assistance necessary

to aid in developing that theory. Applicant asked for funds for a forensic psychologist and a testifying social worker to assist in developing and presenting evidence regarding a trial strategy that counsel should have pursued. This Court denied both requests prohibiting Applicant from fully developing and presenting his claim for relief. *See* Order 8 n.7.

Funds for a forensic psychologist were necessary because although six psychological experts testified at Stanko's trial, none completed a full mental health evaluation and all were retained specifically to support Diggs' and Dr. Sachy's pre-selected psychopath defense. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process" but is "often of vital importance to a jury's decision at the punishment phase.").

Because undersigned counsel themselves are not mental health experts and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses, a forensic psychologist was necessary to assist counsel in evaluating Applicant. As the ABA Guidelines note, "Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions . . . that could be of critical importance." ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary. For this reason, the ABA Guidelines mandate that "at least one member of the defense team . . . be a person qualified by experience and training to screen for mental or psychological disorders or defects." *Id.* Thus, "[m]ental health experts are essential to defending capital cases." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary.

Funds for a testifying social worker were similarly necessary, despite the funds authorized for a mitigation investigator. *See* Order, at 8 n.7. The mitigation investigator discovered relevant evidence, but submitted to the Court that a social worker was necessary to "to evaluate [mitigation] information like this and to describe how . . . events shaped Mr. Stanko's life, particularly in light of his significant brain damage." Affidavit of Drucy Glass, attached as Exhibit 1; *see also* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (instructing a defense team to work with a social worker "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning"). The fact that trial counsel presented the testimony of mental health experts and some social history evidence does not negate Applicant's claim. The Supreme Court of South Carolina recently overturned a circuit court's denial of post-conviction relief where trial counsel presented the testimony of three mental health experts and a social history witness. *See Weik*, 409 S.C. 214, 761 S.E.2d 757. The court found that "[t]hough counsel introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's *social history* even though there was abundant social history evidence available to them." *Id.* at 235, 761 S.E.2d at 768 (emphasis original). Stanko's case involves the same circumstances where trial counsel focused their investigation and mitigation presentation on a single, ill-advised theory, while ignoring social history evidence readily available to them. The assistance of a licensed social worker with capital case experience was therefore necessary to assist undersigned counsel in developing an understanding of Applicant's social history as it mitigates his crime and correlates to his mental health and in presenting related issues to this Court in support of his post-conviction relief claims.

Thus, this Court's denial of funding prevented Applicant from being able to present evidence of prejudice. The Court should, therefore, vacate its order, provide Applicant with adequate resources to investigate and prove his claims alleged in Grounds 10 & 11(e)(3)&(4), and allow further proceedings for Applicant to present his proof developed as a result.

VIII. GROUNDS 10 & 11(F)(1) – INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: FAILURE TO RAISE ISSUE OF LING EVIDENCE AS AGGRAVATION.

The Order denied Applicant's claim that appellate counsel were ineffective in failing to argue the trial court erred in admitting significant evidence relating to Applicant's prior murder conviction, Ground 10 & 11(f)(1), finding appellate counsel thought the argument was futile and Applicant's prior murder conviction was admissible as aggravating evidence. Order, at 8. In Applicant's Horry County case, the State presented significant evidence related to a prior murder for which Applicant had already been sentenced to death during the guilt and punishment phase. Trial counsel consistently objected to the admission of this evidence through a motion *in limine* and by objecting contemporaneously throughout the trial. *See, e.g.*, ROA 2220-23 ("Your Honor, my objection is that I think that, you know, part of the Court has ruled this continuance times, but we are not to address the Ling incident. It's not doing -- I mean, the graphic part of it, coming into it."); ROA 2490-94 (motion *in limine* to exclude evidence of the Ling murder at the sentencing phase on the basis of double jeopardy and the Eighth Amendment); ROA 2605-06 (renewed objection); ROA 2611 (renewed objection); ROA 2617 (asking the court to limit the evidence regarding the Ling murders to the historical facts: "It's going to be inflammatory, and again, the jury might well sentence Mr. Stanko to death based simply on the circumstances relating to the Ling incident.").

The Order failed to take into consideration the type of evidence presented by the State regarding the Ling murder. The State entered a sixteen minute 911 call made by Ms. Ling's fifteen

year old daughter immediately after her mother had been killed and she had been attacked. ROA 2606. The State then offered pictures of Ms. Ling's daughter's room. ROA 2611. The first EMT to arrive at the Ling crime scene also testified in graphic detail about the scene as he arrived. ROA 2608-16. At this point, trial counsel objected because it became clear that the State was providing more details of the Ling murder than the murder that occurred in Horry County. It was as if the State was seeking to obtain a second death sentence based on the Ling murder. ROA 2617.

Despite trial counsel's preservation of this issue, appellate counsel did not raise the issue on appeal. The Constitution guarantees the right to the effective assistance of counsel on direct appeal. *Evitts*, 469 U.S. 387; *Southerland*, 337 S.C. at 615, 524 S.E.2d at 836. Appellate Counsel's performance is measured by the same familiar two-pronged standard used for evaluation of trial counsel. *See Strickland*, 466 U.S. at 487. Appellate counsel can be ineffective for failing to raise a meritorious issue on appeal. *See Southerland*, 337 S.C. at 615-16, 524 S.E.2d at 836 (finding both deficient performance and prejudice when appellate counsel abandoned a meritorious jury instruction claim); *Patrick*, 349 S.C. 203, 562 S.E.2d 609 (finding appellate counsel ineffective for failing to adequately assert a claim of prosecutorial retaliation).

Because appellate counsel failed to raise this meritorious, preserved claim, they were ineffective. *See* U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (recognizing that the exceptional and irrevocable nature of the death penalty requires "extraordinary measures" under the Eighth Amendment to ensure reliability of decisions regarding punishment); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). The Order failed to address the extent to which evidence of the Ling murder was inappropriately admitted

and prejudicial to Applicant. The Court should, therefore, amend its judgment and grant relief on Ground 10 & 11(f)(1).

IX. GROUNDS 10 & 11(B)(3) & (H) – SOUTH CAROLINA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

The Order denied Applicant's claims that South Carolina's death penalty statute is unconstitutional, Grounds 10 & 11(b0(3) & (h), finding "the constitutionality of the Death Penalty Act is well settled" and "was addressed in Stanko's appeal." Order, at 9. The Order fails to address the legal arguments made by Applicant that the death penalty is unconstitutional because it fails to adequately narrow the pool of offenders eligible for the death penalty, which were set forth in Applicant's Motion for Summary Judgment.

After the Supreme Court struck down the death penalty due to is arbitrary and capricious imposition in *Furman v. Georgia*, 408 U.S. 238 (1972), 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. 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 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.").

The South Carolina death penalty statute adopted after *Furman* and *Gregg*, originally 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. In the three decades since the original death penalty statute was passed, the Legislature has expanded the list of aggravating factors on numerous occasions.[9] 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

[9]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 *Gregg*, 428 U.S. at 222 (White, J. concurring)).

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.

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.[10]

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

[10] Specifically, the court has given expansive definition to the aggravating factors of physical torture, kidnapping, attempted armed robbery, and prior murder conviction, such that nearly every murder in South Carolina could be death eligible.

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.[11] 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 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

[11]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.).

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[12] – decisions which are as 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.").

---

[12]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.").

The arguments above were not presented to the trial court or the South Carolina Supreme Court on direct appeal. *See Stanko II*, 402 S.C. at 282, 741 S.E.2d at 724 (addressing a claim that the death penalty was unconstitutional as applied to Applicant because of his mental conditions). This Court's Order also failed to address these arguments and this Court must amend its Order accordingly. As demonstrated above, the South Carolina death penalty is invalid on its face and the Court should grant relief on Grounds 10 & 11(b)(3)[13] and 10 & 11(h).

[13] Trial counsel was ineffective for failing to raise this challenge to the death penalty because the arguments made here were available to counsel at the time of trial and counsel's pretrial motions to find the death penalty unconstitutional did not address the statute's failure to adequately narrow the pool of offenders eligible for the death penalty. *See* ROA 3512-31. At the PCR hearing, Diggs stated he had no strategic reason for not challenging the death penalty on these grounds.

CONCLUSION

For the reasons stated above, this Court should amend its order and grant relief on the claims Applicant was able to fully present at the PCR hearing. For claims Applicant could not fully develop due to the denial of funding for necessary experts, this Court should vacate its Order, approve funding for the necessary experts, and hold additional proceedings to allow Applicant to present further evidence in support of his claims for relief.

Respectfully submitted,

EMILY C. PAAVOLA
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044

Counsel for Applicant

May 23, 2016.

Exhibit 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Drucy Glass, who appeared personally before me, affirms and states the following:

1. I, Drucy Glass, am a mitigation investigator in the state of South Carolina.

2. I have worked as a mitigation investigator/specialist since 1990 and have worked on more than forty capital cases at the trial and post-conviction levels in state, federal, and military courts.

3. I was retained by Stephen Stanko's counsel to serve as a mitigation investigator in Mr. Stanko's Horry County capital post-conviction relief proceedings. The Court entered an order authorizing funding for my services in Mr. Stanko's case on April 29, 2014.

4. My role as a mitigation investigator involves locating and interviewing lay witnesses, locating and obtaining social history records, and summarizing the information collected for presentation to the attorneys and experts involved in the case. In order to present my social history findings to the court, the typical practice is for counsel to retain a testifying social worker who will analyze the social history information I have developed, meet the key social history witnesses, review the social history records, and present that information to the court or jury.

5. I believe a testifying social worker is necessary to present Mr. Stanko's social history to the Court in this proceeding.

6. Since being retained on Mr. Stanko's case, I have worked closely with counsel. I have interviewed friends and neighbors of Mr. Stanko and his family in the Goose Creek area, where he lived until he went to prison in the mid-1990s. I have also worked with counsel to obtain records relating to Mr. Stanko and his family. This preliminary mitigation investigation reveals that the mitigation investigation and social history presented at Mr. Stanko's trial was incomplete and failed to tell the whole story of Mr. Stanko's life.

7. More mitigation investigation remains to be completed; however, my investigation thus far indicates that a significantly mitigating story of Mr. Stanko's life was not uncovered or presented at Mr. Stanko's trial. My investigation has revealed that Mr. Stanko was raised in a very private family which hid significant family events either due to shame or an inability to acknowledge the emotions surrounding the event. For example, Mr. Stanko was fifteen years old when his oldest brother was murdered. Mr. Stanko and his brother became very close in the years before the murder and Mr. Stanko was profoundly affected by his brother's death. Nevertheless, Mr. Stanko's closest friends at the time did not even know Mr. Stanko's brother died. The Stanko family, including Mr. Stanko, did not talk about this traumatic family event or express the pain they experienced, even with those

closest to them. This same shame effected the family when Mr. Stanko went to prison in the mid-1990s. Mr. Stanko's family hid the fact that he was in prison and then refused to help him when he was released in 2004. A testifying social worker is, therefore, necessary to evaluate information like this and to describe how these, and other, events shaped Mr. Stanko's life, particularly in light of his significant brain damage.

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

Drucy Glass
DRUCY GLASS

Sworn to and subscribed before me
This 10th day of October, 2014

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

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

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Applicant's Motion to Supplement the PCR Record and Applicant's Motion to Alter or Amend Judgment was mailed today by first class United States mail, postage prepaid, this 23rd day of May, 2016, upon the following:

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

Jill B. Abernethy

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
STEPHEN C. STANKO, #6022)
Plaintiff,)
vs.)
)
STATE OF SOUTH CAROLINA)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2014-CP-26-035

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Lindsey S. Vann, Bar No. 131408 Address: 900 Elmwood Avenue, Suite 200 Columbia, SC 29201 Phone: 803-765-1044Fax 803-765-1143 E-mail: ____Other: ____	Anthony Mabry, Bar No. ____ Address: P.O. Box 11549 Columbia, SC 29211 Phone: ____ Fax____ E-mail: ____Other: ____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: ____
Estimated Time Needed: ____ Court Reporter Needed: ☐YES/☐ NO

SECTION II: Motion/Order Type

☒Written motion attached
☐Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

[signature] 5/23/16
Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: ____
☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: ____	JUDGE CODE ____ Date: ____

CLERK'S VERIFICATION

Collected by:____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

5032

SCCA 233 (11/2003)

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

APPLICANT'S MOTION TO SUPPLEMENT PCR RECORD

Applicant Stephen C. Stanko, through undersigned counsel, respectfully moves this Court to supplement the PCR record with the attached information from the Disciplinary Hearing Commission of the North Carolina State Bar regarding Applicant's lead trial attorney, William Isaac Diggs. *See* North Carolina Complaint, attached. This document was recently provided to undersigned PCR counsel by the Attorney General's Office.

At the PCR hearing held in this matter on March 2-3, 2015, Mr. Diggs admitted that he was currently suspended from the practice of law, but denied knowing whether any disciplinary charges had been made against him and further denied making any admissions that would reflect on his general character for truthfulness. According to the attached North Carolina disciplinary complaint, however, Mr. Diggs stole over $100,000 from two minor clients and reported his misappropriation of these funds to the South Carolina Office of Disciplinary Counsel by letter dated September 19, 2014. North Carolina Complaint 1-3. Mr. Diggs admitted, "I was not pushed to distribute these funds quickly and they remained in trust. Over time, I used all of these funds from both cases to cover office overhead." *Id.* at 3, ¶ 13. Mr. Diggs also admitted his theft to Horry County Associate Probate Judge, Dundee Carter, who notified the South Carolina

Commission on Lawyer Conduct of this fact by letter dated September 22, 2014. *Id.* at 3, ¶ 14. Mr. Diggs' actions constituted a crime, or series of crimes, which reflect adversely on his character for honesty, trustworthiness and fitness to practice law. This information is relevant to this Court's credibility determinations of Mr. Diggs and his testimony in this matter. Accordingly, Mr. Stanko moves to supplement the PCR record to include the attached document.

May 23, 2016

Respectfully submitted,

EMILY C. PAAVOLA
LINDSEY S. VANN
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044

Attachment

The Disciplinary Hearing Commission

of the North Carolina State Bar

April 12, 2016

Mr. Mr. Jimmy A. Richardson, II
Solicitor, Fifteenth Circuit
P. O. Box 1276
Conway, SC 29528

Re: The North Carolina State Bar v. William I. Diggs
16DHC15

Dear Mr. Richardson:

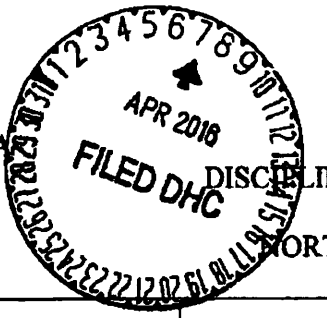
Pursuant to 27 N. C. Admin. Code Subchapter B, §.0102(c)(8) which requires the State Bar to provide a copy of the Complaint to the district attorney in the district in which the defendant-attorney maintains a law office if the complaint alleges criminal activity, I am enclosing a copy of the Complaint filed in the above captioned matter. The N. C. State Bar attorney assigned to this matter is Jennifer Porter. Ms. Porter's telephone number is 919/828-4260 extension 262 and her email is jporter@ncbar.gov.

Very truly yours,

Dottie Miani

Dottie Miani, Clerk
Disciplinary Hearing Commission

Enclosure



STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
16 DHC 15

THE NORTH CAROLINA STATE BAR, Plaintiff v. WILLIAM I. DIGGS, Attorney, Defendant	COMPLAINT

Plaintiff, complaining of Defendant, alleges and says:

1. Plaintiff, the North Carolina State Bar ("State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar (Chapter 1 of Title 27 of the North Carolina Administrative Code).

2. Defendant, William I. Diggs ("Diggs"), was admitted to the North Carolina State Bar in 1980, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Rules of Professional Conduct.

Upon information and belief:

3. During all or part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of South Carolina, where he was also licensed to practice law.

4. In the course of his law practice, Defendant maintained and utilized an attorney trust account at National Bank of South Carolina (NBSC), a division of Synovus Bank, account number ending in digits 6601 ("trust account").

5. Defendant also had an operating account for his law practice at NBSC, account number ending in digits 2701 ("operating account").

6. Between July 2009 and September 2014, Defendant deposited entrusted funds for clients into his trust account, including funds for the following client matters: Sapps Estate;

Tisdale minors.

7. From August 2009 through September 2014, Defendant should have maintained in his trust account entrusted funds in excess of $100,000.00 for his clients, including but not limited to funds on behalf of the Sapps Estate and the Tisdale minors.

8. Defendant failed to maintain his clients' entrusted funds in his trust account, including but not limited to funds for the Sapps Estate and the Tisdale minors, as shown by the following:

a. As of February 12, 2012, the balance of Defendant's trust account was $103.78.

b. As of June 5, 2012, the balance of Defendant's trust account was $21.09.

c. Defendant's trust account balance remained $21.09 until September 2012.

d. In September 2012, he transferred $2,500.00 from his operating account to his trust account and immediately disbursed the $2,500.00 by check on behalf of a Tisdale minor, which returned the trust account balance to $21.09.

e. Defendant's trust account balance remained at $21.09 until the end of October 2012, when a $300.00 disbursement resulted in a negative balance on October 30, 2012 of -$278.91.

f. As of October 31, 2012, the balance of Defendant's trust account was -$314.91.

g. As of March 15, 2013, the balance of Defendant's trust account was $325.94.

h. As of October 4, 2013, the balance of Defendant's trust account was $79.84.

i. As of December 20, 2013, the balance of Defendant's trust account was $64.17.

j. As of January 13, 2014, the balance of Defendant's trust account was $117.17.

k. As of March 26, 2014, the balance of Defendant's trust account was $559.17.

l. As of May 16, 2014, the balance of Defendant's trust account was $55.81.

9. In March and April 2014, Defendant made two disbursements from his trust account on behalf of Tisdale. By this time, however, Defendant did not have funds for this client in his trust account.

10. Between August 2009 and September 2014, Defendant disbursed funds from his trust account through improper means and without identification of the client whose funds were being disbursed, including as follows:

a. Electronic transfers from his trust account to his operating account;

b. checks made payable to cash;

c. debit counter withdrawals;

d. checks made payable to him.

11. Through the above-described means, Defendant misappropriated entrusted funds from his attorney trust account for his personal use and benefit.

12. By letter dated September 19, 2014, Defendant reported his misappropriation of the Sapps Estate and Tisdale entrusted funds to the South Carolina Office of Disciplinary Counsel.

13. In his letter reporting his misappropriation of the Sapps Estate and Tisdale funds, Defendant admitted "I was not pushed to distribute these funds quickly and they remained in trust. Over time, I used all of these funds from both cases to cover office overhead."

14. By letter dated September 22, 2014, Dundee W. Carter, Horry County Associate Judge of Probate, notified the South Carolina Commission on Lawyer Conduct that at an in-chambers meeting held to discuss Defendant's failure to disburse the Sapps Estate funds to counsel for the conservator for the minor beneficiaries, Defendant admitted the funds had been depleted from his trust account by transfer into his operating account and the Sapps Estate funds were no longer available for disbursement.

15. Defendant did not report his misappropriation to the North Carolina State Bar.

16. By letter dated September 29, 2014, the Supreme Court of South Carolina Commission on Lawyer Conduct notified the North Carolina State Bar of its September 23, 2014 order placing Defendant on interim suspension in South Carolina.

17. On October 1, 2014 the North Carolina State Bar initiated a grievance investigation regarding Defendant's misappropriation of entrusted funds.

18. On October 9, 2014, the North Carolina State Bar served Defendant by certified mail with a letter of notice in the grievance investigation concerning his misappropriation of entrusted funds. Defendant had fifteen days from service to respond to the State Bar's inquiry in the disciplinary matter.

19. Defendant failed to respond to the inquiry of the State Bar in the disciplinary matter.

20. The above described improper transfers and disbursements of entrusted funds and admitted misappropriation occurred during times of demonstrable financial need on the part of Defendant, as shown in part by multiple negative balances in his operating account including as

follows:

a. In 2009, the balance of Defendant's operating account was negative on several occasions, including on the following dates: October 15 (-$157.34); October 26 (-$94.44); October 27 (-$722.54), November 17 (-$218.34); November 18 (-$326.34); November 19 (-$850.35), December 15 (-$545.40).

b. In 2010, the balance of Defendant's operating account was negative on several occasions, including on the following dates: February 9 (-$434.27); February 10 (-$1,003.63); February 11 (-$2,445.06); February 18 (-$561.55); April 2 (-$175.49); April 6 (-$489.04); April 7 (-$633.04); April 8 (-$729.88); May 14 (-$53.58); May 25 (-$330.29); May 26 (-$402.29); July 12 (-$1,110.32); July 13 (-$1,218.32); July 15 (-$182.51); July 19 (-$758.60); August 11 (-$794.71); August 17 (-$402.20); October 13 (-$1,529.10); October 14 (-$1,958.41).

c. In 2011, the balance of Defendant's operating account was negative on several occasions, including on the following dates: January 3 (-$648.91); January 4 (-$828.91); January 5 (-$2,237.29); January 6 (-$179.29); January 18 (-$705.77); January 19 (-$271.89); January 20 (-$90.17); January 28 (-$819.10); January 31 (-$54.89); February 2 (-$153.79); February 3 (-$319.79); February 4 (-$839.26); February 7 (-$1,185.26); February 9 (-$543.26); February 10 (-$885.04); February 15 (-$470.47); March 2 (-$969.59); March 3 (-$1,063.59); March 4 (-$495.06); March 9 (-$142.92); March 10 (-$1,273.92); March 18 (-$517.76); March 21 (-$879.98); March 23 (-$499.01); March 25 (-$94.39); April 4 (-$336.34); April 7 (-$52.06); April 8 (-$776.00); April 19 (-$1,268.13); April 25 (-$657.43); April 26 (-$983.15); May 6 (-786.06); May 9 (-$274.91); May 10 (-$1,502.61); May 23 (-$10.52).

d. In 2012, the balance of Defendant's operating account was negative on the following dates: March 14 (-$108.15); March 15 (-$299.12); March 30 (-$1,529.82); March 31 (-$1,539.82); June 4 (-$1,737.41); June 5 (-$13.81); June 7 (-$187.06); June 12 (-$121.51); June 19 (-$122.31); June 20 (-$340.67).

21. When the above itemized negative balances occurred in his operating account, Defendant often transferred funds from his trust account to his operating account to return the balance of his operating account to a positive balance.

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline as follows:

1. Pursuant to N.C. Gen. Stat. § 84-28(b)(2), for violation of the following Rules of Professional Conduct in effect at the time of the conduct:

(a) By disbursing to himself entrusted funds from his trust account to which he was not entitled, Defendant failed to hold and maintain separate from his property the entrusted funds of his clients in violation of Rule 1.15-2(a), used entrusted funds

for his personal benefit in violation of Rule 1.15-2(j), and failed to promptly pay or deliver entrusted funds in violation of Rule 1.15-2(m);

(b) By knowingly disbursing to himself entrusted funds to which he was not entitled, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation in violation of Rule 8.4(c);

(c) By issuing checks to "cash" from his trust account, Defendant used items drawn on a trust account made payable to cash to withdraw funds from his trust account in violation of Rule 1.15-2(h);

(d) By using electronic transfers, checks made payable to himself or to cash without client attribution, and counter withdrawals to disburse funds from his trust account in a manner that failed to produce the record required under Rule 1.15-3(b)(2) identifying the client from whose funds in the trust account the disbursement was being made, Defendant failed to disburse entrusted funds in accordance with Rule 1.15 in violation of Rule 1.15-2(a), and failed to maintain requisite records for his trust account in violation of Rule 1.15-3(b)(2);

(e) By failing to report his misappropriation of entrusted funds to the North Carolina State Bar, Defendant failed to promptly inform the North Carolina State Bar of the misappropriation of entrusted funds in violation of Rule 1.15-2(o);

(f) By failing to respond to the letter of notice issued to him by the State Bar in its grievance investigation, Defendant knowingly failed, in connection with a disciplinary matter, to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b).

2. Pursuant to N.C. Gen. Stat. § 84-28(b)(3), for failure to answer the formal inquiry issued by the North Carolina State Bar in a disciplinary matter.

WHEREFORE, Plaintiff prays that:

(1) Disciplinary action be taken against Defendant in accordance with N.C. Gen. Stat. § 84-28(a) and § .0114 of the Discipline and Disability Rules of the North Carolina State Bar (27 N.C. Admin. Code §1B.0114), as the evidence on hearing may warrant;

(2) Defendant be taxed with the administrative fees and costs permitted by law in connection with this proceeding; and

(3) For such other and further relief as is appropriate.

This the 7th day of April, 2016.

Jennifer A. Porter
Deputy Counsel
State Bar No. 30016
The North Carolina State Bar
P.O. Box 25908
Raleigh, NC 27611
919-828-4620
Attorney for Plaintiff

Signed pursuant to 27 N.C. Admin. Code § 1B.0113(n) and § 1B.0105(a)(10).

Michael L. Robinson, Chair
Grievance Committee

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 to Supplement the PCR Record and Applicant's Motion to Alter or Amend Judgment was mailed today by first class United States mail, postage prepaid, this 23rd day of May, 2016, upon the following:

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

Jill B. Abernethy

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

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

August 1, 2016
Conway, South Carolina

BEFORE:

Honorable Benjamin H. Culbertson, Judge.

APPEARANCES:

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

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

Teresa J. F. Bautz, RPR
Official Court Reporter

E X H I B I T S

NO.	DESCRIPTION	ID	EV

No exhibits submitted.

Exhibits retained by Clerk of Court.

(The hearing commenced at approximately 9:46 a.m.)

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

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

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

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

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

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

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

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

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

let y'all decide. All right.

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

THE COURT: Yes, ma'am.

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

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

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

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

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

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

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

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

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

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

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

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

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

unreasonable does not prohibit an ineffective assistance of counsel finding.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The South Carolina Rules of Professional Conduct

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

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

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

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

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

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

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

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

Additionally, we presented some funding requests

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

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

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

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

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

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

Finally, we had a claim that appellate counsel was

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

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

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

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

THE COURT: All right.

MS. VANN: Thank you, Your Honor.

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

why his relationship with others were of that particular nature.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That was a reasonable strategy. And we think,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

aggravation by the State.

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

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

amend your order in this particular case.

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

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

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

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

The strategy was not reasonable because counsel

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

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

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

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

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

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

THE COURT: Okay.

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

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

MS. VANN: That's correct.

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

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

MS. VANN: Thank you.

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

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

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

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

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

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

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

THE COURT: Thank you very much, okay.

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

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

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

MR. ZELENKA: No objection to that.

MS. PAAVOLA: Thank you.

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

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

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

MR. ZELENKA: No, I haven't.

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

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

faulting them.

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

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

THE COURT: Okay.

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

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

MS. PAAVOLA: The motion itself.

MR. ZELENKA: No objection.

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

MR. ZELENKA: I will.

THE COURT: Thank you very much.

MR. ZELENKA: Is there a time deadline?

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

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

(End of Transcript of Record)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

I, TERESA J.F. BAUTZ, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 6th day of May, 2018.

I FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

S/Teresa J. F. Bautz

TERESA J.F. BAUTZ, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS THE FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022, Applicant, v. State of South Carolina, Respondents.	C/A No. 2014-CP-26-00035 **RESPONDENT'S PROPOSED ORDER** **Order Allowing Respondent's Copying of Records Previously Unsealed**

FILED
HORRY COUNTY
2015 JAN 26 PM 4:43

On January 12, 2015, Respondent filed a written Motion to Unseal Ex Parte Funding Requests and Orders, to which Applicant Stanko filed a written Return. The undersigned granted Respondent's motion via Form 4 Order filed February 27, 2015. The undersigned denied Applicant's motion to reconsider in another Form 4 Order filed March 3, 2015. Respondent now seeks to view the documents unsealed as a result of that Form 4 Order.

Once ordered sealed, "[n]o copies shall be made . . . without a written order of the court unless authorized by statute or court rule." Rule 3.1.6, S.C. Clerk of Court Manual (defining protected records and related procedures); *see e.g.* S.C. Code Ann. Section 63-7-2600 (in an action for termination of parental rights sealed documents may only be opened "upon order of the judge for good cause shown"); *Cf.* Rule 41.1, SCRCP (requirements for sealing documents and settlement agreements). The undersigned's February 27, 2015, Order granted Respondent the ability to view and copy the previously sealed documents. (*See* Respondent's Mot. to Unseal Ex Parte Funding Requests and Orders).

It is therefore ORDERED that Respondent be granted access to the documents unsealed as a result of this Court's February 27, 2015, Order Granting Respondent's Motion to Unseal Ex Parte Funding Requests and Orders.

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AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

Jan. 11, 2017
~~December~~ ___, ~~2016~~
Conway, South Carolina

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.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

APPLICANT'S OBJECTIONS TO RESPONDENT'S PROPOSED ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND

Applicant Stephen C. Stanko, through undersigned counsel, submits the following objections to the proposed order denying Applicant's Motion to Alter or Amend submitted by Respondent. *See Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992) (directing that, upon submission of a proposed order by one party, "opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order").

1. *Objection to Respondent Drafting Proposed Order:* Applicant objects to this Court's reliance on a party to this litigation to draft an order on the substantive issues in this post-conviction relief ("PCR") case. The South Carolina Supreme Court has criticized the practice of wholesale adoption of one side's proposed order. *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C. 2004) ("[W]e strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases."); *see also Chicopee Mgf. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961). At a minimum, this Court must "carefully review the order prior to signing it," *Pruitt*, 310 S.C. at 256, 423 S.E.2d at 128, and consider Applicant's objections to the order that follow.

COPY

2. *Page 2, Footnote 2:* Applicant objects to Respondent's proposed footnote saying Respondent did not have "knowledge of the specifics of each [funding] request" until February 10, 2017. The footnote is irrelevant and inaccurate. At the outset of Applicant's PCR hearing on March 2, 2015, this Court ruled from the bench that the orders should be unsealed. PCR Hrg. Tr. 4, Mar. 2, 2015. Thus, Respondent could have had access to the funding pleadings as early as the first day of Applicant's PCR hearing.

3. *Page 3, 4, 35:* Throughout the proposed order, Applicant's funding requests are inaccurately described as requests for certain experts to determine whether investigators preparing for Applicant's trial missed anything, not to determine whether Applicant's trial attorneys were ineffective. All of Applicant's funding requests and his PCR application demonstrate the inaccuracy of such a finding. Beginning with Applicant's first funding motion, Applicant sought the assistance of a forensic psychologist because:

> [T]rial counsel's inquiry into Mr. Stanko's mental health was inadequate in that counsel settled on a theory that Mr. Stanko is a psychopath early on in their preparation for trial. Trial counsel's focus on this theory resulted in a curtailed mitigation investigation . . . and the failure of trial counsel to direct mental health experts to consider the relationship between Mr. Stanko's life history and brain damage and/or mental illness. Trial counsel utterly failed to present the jury with an overview of Mr. Stanko's life history.

Applicant's First Motion to Authorize Funding for Expert and Investigative Services, at 12-13 (Apr. 1, 2014).

Similarly, the request for funding for a licensed social worker was made as a result of trial counsel's ineffectiveness in retaining, directing, and utilizing experts at trial:

> Trial counsel relied exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopath theory. These experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development.

Applicant's Second Motion to Authorize Funding for Expert Services, at 8 (July 28, 2014).

These funding requests were tied to claims that trial counsel provided ineffective assistance of counsel under the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, claim for relief 10(e)(3) alleged:

> Counsel failed to investigate and present all available mitigating evidence of applicant's life history and background, including testimony from an appropriate social history expert and/or other appropriate witnesses about how applicant's history and background affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weik v. State*, 409 S.C. 214 (2014).

Final Amended Application for Post-Conviction Relief, at 4 (Sept. 30, 2014); *see also* First Amended Application for Post-Conviction Relief, at 4 (June 16, 2014) (claims 10(e)(2) & (3)). Claim for relief 10(e)(4) further alleged:

> Counsel failed to investigate and present all available mitigating evidence of applicant's mental health, including testimony from an appropriate mental health expert and/or other appropriate witnesses about how applicant's mental health/illness affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weik v. State*, 409 S.C. 214 (2014).

Final Amended Application for Post-Conviction Relief, at 4; *see also* First Amended Application for Post-Conviction Relief, at 4 (claims 10(e)(2) & (3)). Thus, Applicant's funding requests were all relevant to ineffective assistance of counsel claims, which required expert evaluations and testimony to prove. This Court should, therefore, amend the proposed order to remove the finding that Applicant's funding requests' "purported purpose was to determine whether the investigators utilized in Applicant's trial missed anything, not to determine whether Applicant's trial attorneys were ineffective." Proposed Order, at 4-5.

4. *Page 4:* Applicant objects to the proposed order's misstatement of the statute regarding funding in capital PCR cases. The order incorrectly states: "Requests for funding for expert and investigative services in a capital trial fall within the discretion of the trial judge and may be granted upon a showing of reasonable necessity." In actuality, the statute does not provide trial

judges with the discretion described in the proposed order. Instead, South Carolina Code § 16-3-26(C)(1)[1] provides that "Upon a finding . . . that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues related to guilt or sentence, the court *shall* authorize the defendant's attorneys to obtain such services on behalf of the defendant and *shall* order payment." *Id.* (emphasis added). Thus, a finding of reasonable necessity removes discretion from the judge and the funding must be ordered to ensure an adequate and constitutional defense for the capital PCR applicant.[2]

5. *Page 6:* Despite acknowledging that "Applicant's 59(e) Motion asserts that the undersigned, akin to [Applicant's][3] trial and appellate counsel, did not adequately define the conflict, and that the Order of Dismissal fails to set out the legal standard utilized in dispensing of these allegations," the proposed order, once again, does not define the conflict or address the legal standard regarding conflicted counsel and should be edited to do so.

6. *Page 12:* The proposed order, like the order denying PCR and the South Carolina Supreme Court, once again ignores that Applicant could not have made a knowing waiver of his attorney's conflict of interest because he was never advised about the conflict or its potential consequences. *See Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990) ("[A] defendant cannot knowingly and

[1] South Carolina Code § 16-3-26 applies to death penalty trials and capital PCR cases. S.C. Code § 17-27-160(B) (incorporating the capital trial funding provisions into the capital PCR statute).

[2] As Applicant argued in his motions to reconsider funding denials and the Rule 59(e) motion, this Court erroneously concluded the "reasonably necessary" standard required Applicant to demonstrate investigative or expert services would result in proof of a meritorious claim for relief *prior* to the Court's authorization of funds. This interpretation is inconsistent with the statute and the practice of PCR judges throughout the state and denied Applicant effective assistance of counsel during his PCR proceedings.

[3] The proposed order refers to Applicant as "Appellant" and should be edited to properly refer to "Applicant."

intelligently waive what he does not know."). The record is clear that no one ever told Applicant his trial counsel would have a personal incentive to avoid fixing any of the "errors [that] may have been made in an earlier trial" because changes in the second trial would support a finding he was ineffective in the first trial.

This Court's reliance on the fact that Applicant stated he wanted Diggs to continue as his attorney puts the onus on Applicant to understand the nature of the conflict and its potential consequences without ever having been advised about those issues. Instead, the onus is on counsel or the court to recognize the conflict and inform the defendant of its nature and potential consequences. *See Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978) ("[D]efense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."); *Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); *Glasser v. United States*, 315 U.S. 60, 71 (1942) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel.").

The South Carolina Supreme Court recently addressed a similar issue in *Robertson v. State*, 795 S.E.2d 29 (2016), rejecting an argument that a PCR applicant was, himself, responsible for ensuring his PCR counsel were qualified. The Court held "[w]e believe it is unreasonable to think that an indigent PCR applicant, who relies on the State to appoint qualified counsel, would have the knowledge to question counsel's qualifications at the outset of the proceeding." *Id.* at 35. The same reasoning applies here—Applicant was an indigent capital defendant relying on the court to appoint conflict-free counsel to represent him. It was not his responsibility, but the attorney's, to

recognize the conflict of interest. This Court should edit the order to address counsel's ineffectiveness in failing to raise and advise Applicant of the conflict.

7. *Page 17:* The proposed order states that only one juror seated on Applicant's case had knowledge about Applicant's prior crimes and she said she did not remember much about the crimes. This ignores the fact that this juror not only knew about Applicant's prior crimes, but also recalled that he had been sentenced to death for those crimes. ROA 635. Additionally, the assertion that the juror did not remember much about the crimes fails to acknowledge that she independently recalled during *voir dire* that "he had murdered his girlfriend, and left the daughter for dead. . . . And then came to Conway and murdered a man in Conway." ROA 630. The Court should edit the proposed order to acknowledge the actual depth of knowledge the juror had regarding the case before being seated as a juror.

8. *Page 20, Footnote 7:* The proposed order states that Applicant's fact investigator could have investigated false testimony by Dr. Kenneth Spicer. Fact investigator, Mark Harris, could not have done so because the claim was that Dr. Spicer falsely testified about the results of a PET scan. To prove this claim, Applicant needed funding for an expert familiar with evaluating PET scans and research surrounding PET scans. A fact investigator could not be expected to have such knowledge and the order should be edited accordingly.

9. *Page 20:* Without offering any reasoning, the proposed order states that Applicant's claim that Dr. Spicer offered false testimony when testifying about the results of the PET scan should have been raised on direct appeal. A false testimony claim is proven by demonstrating (1) the state presented false testimony, and (2) the state knew, or should have known, the testimony was false. *See Napue v. Illinois*, 360 U.S. 264 (1959). Applicant could not have proven the falsity or the knowledge of the State without submitting additional evidence, which cannot be done on direct

appeal. This claim was, therefore, properly raised in PCR proceedings and the paragraph on page 20 to the contrary should be removed.

10. *Page 27:* The proposed order states "Dr. Thrasher oversaw Applicant's birth at Guantanamo Bay." Dr. Thrasher was stationed at Guantanamo Bay as an enlisted soldier. ROA 1965-66. He never worked in the hospital, ROA 1966, and did not "oversee" Applicant's birth. The order should be edited accordingly.

11. *Page 35-36:* In denying Applicant's request that the Court alter its denial of the claim that trial counsel were ineffective in failing to adequately investigate, develop, and present mitigation evidence, the proposed order states "[n]one of the facts cited in Applicants' [sic.][4] requests differed from those presented in mitigation at trial" and "counsel did not utilize the fruits of [mitigation investigator] Ms. Glass' funded investigation at PCR." These assertions are incorrect. Applicant filled his funding motions with facts counsel began to develop—through their own investigation and information collected by the mitigation investigator—as part of their mitigation investigation. For example, counsel's investigation allowed them to develop a relationship with Applicant's siblings, which trial counsel had not accomplished. *See* Applicant's Second Motion to Authorize Funding for Expert Services, at 9. Counsel also presented information they uncovered about why Applicant began the schemes the State used as a focal point in the case in aggravation at Applicant's trial. *See* Applicant's Motion to Reconsider Denial of Funding for Expert and Investigative Services, at 14.

Applicant did make use of the investigation conducted by the mitigation investigator and included an affidavit from Ms. Glass as an exhibit to his Motion to Reconsider Denial of Funding for Expert and Investigative Services. In that affidavit, Ms. Glass informed the Court of the

[4] This typographical error should be edited.

investigation she had completed and that she had uncovered information that was not presented at trial. For example, through her investigation, she discovered the Stanko family's collective shame and inability to acknowledge emotions. This caused the family to avoid talking about, investigating, or healing from Applicant's older brother's murder. Because of this, even Applicant's closest friends did not know about the trauma Applicant suffered as a result of losing the older brother he looked up to so much. *See* Glass Aff. ¶ 7. None of these facts were presented at trial. After gathering this information, Ms. Glass determined that a testifying social worker was necessary to present Applicant's social history and mitigating evidence to the Court. Glass Aff. ¶ 5. Though Ms. Glass uncovered this evidence, her role as a mitigation investigator is not to testify and present the evidence to the Court. As counsel argued in their funding motions seeking funds for a licensed social worker, "[t]he testimony of a licensed social worker is one of the most basic, fundamental elements of virtually every capital sentencing proceeding in the modern era." Applicant's Second Motion to Authorize Funding for Expert Services, at 7 (citing ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a)(2008) (instructing that it is the duty of the defense team to prepare experts to testify, including social workers "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning"). In light of Applicant's detailed funding motions, this Court should edit the proposed order to eliminate a finding that Applicant did not provide the Court with information not presented at trial and did not utilize the mitigation investigator.

CONCLUSION

For the reasons stated above, this Court should, at a minimum, edit the proposed order provided by Respondent because signing the order as is would result in incorrect findings of fact and applications of law.

Respectfully submitted,

EMILY C. RAAVOLA
Justice 360
900 Elmwood Avenue, Suite 200
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803-765-1044

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803-765-1044

Counsel for Applicant

March 6, 2017.

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

The undersigned certifies that a copy of the Applicant's Objection to Respondent's Proposed Order Denying Applicant's Motion to Alter or Amend was mailed today by first class United States mail, postage prepaid, this 6th day of March 2017, upon the following:

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

Jill B. Abernethy

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS THE FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022, Applicant, v. State of South Carolina, Respondents.	)	**C/A No. 2014-CP-26-00035** **Order Denying Applicant's Motion to Supplement the PCR Record**

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

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

Now comes before this Court Applicant's Motion to Supplement the PCR Record with records from the North Carolina State Bar reflecting a disciplinary complaint filed against Applicant's trial counsel William I. Diggs ("Diggs"). At a hearing conducted in this matter on August 1, 2016, the parties presented argument concerning the supplementation of the PCR with the complaint filed with the North Carolina bar, which was accepted as a court's exhibit.

Following the hearing in this matter, Applicant's trial counsel Diggs was disbarred by the South Carolina Supreme Court. *In the matter of William Isaac Diggs,* Op. No. 27669 (S.C. Sup. Ct. filed Sept. 28, 2016) (Shearouse Adv. Sh. No. 38 at 17-30). Diggs' disbarment stems from a misappropriation of client funds in North Carolina and his subsequent failure to report the outcome of the North Carolina disciplinary proceedings to the South Carolina bar. *Id.*

This Court finds that Diggs' disbarment furthers no cause to supplement or reopen the record in this case. Disbarment does not require any per se finding of ineffective assistance of

counsel which would warrant the grant of post-conviction relief. The "'technical versus substantive' standard" utilized in licensure also applies in disbarment situations; that is, a disbarment for violation of technical bar requirements will not generally suffice, whereas being found to be incompetent by the state bar to represent clients qualifies as ineffective assistance." *Padgett v. United States*, 302 F. Supp. 2d 593, 603 (D.S.C. 2004) (finding no ineffective assistance stemming from counsel's subsequent disbarment for misuse of client funds) (citing *United States v. Novak*, 903 F.2d 883, 889 (2d Cir. 1990) (counsel disbarred six years after representation for fraudulently representing facts in his bar application).

> There is also a significant distinction between an attorney disbarred *at the time* of the representation and one disbarred *subsequent to* the representation. A variety of state and federal cases clearly hold that, unless it is somehow causally related to the representation at issue, disbarment *after* the representation is not automatically suspect. *E.g., United States ex rel. Ortiz v. Sielaff*, 542 F.2d 377, 380 (7th Cir. 1976) (affirming holding that subsequent disbarment "for reasons having nothing to do with petitioner's case" is "irrelevant" to performance at trial); *Hernandez v. Wainwright*, 634 F.Supp. 241, 246 (S.D.Fla. 1986) (subsequent disbarment not in itself sufficient absent showing of "direct nexus" with trial); *Collins v. State*, 74 Ohio App.3d 660, 600 N.E.2d 284, 285 (1991) (disbarment after trial did not render conviction "null and void"); *White v. State*, 267 Ga. 523, 481 S.E.2d 804, 806 (1997) ("objective standard of reasonableness" in *Strickland v. Washington* still applies after unrelated disbarment).

Id. at 603–04; *see also Roach v. Martin*, 757 F.2d 1463, 1472-73 (4th Cir. 1985) (finding no reason in disbarment record to overturn court's denial of post-conviction relief); *Soering v. Deeds*, 217 F.3d 840, 2000 WL 870490, at *5 (4th Cir. Jun. 30, 2000) (court summarily rejected the contention that lead trial counsel, "who has since been disbarred, was emotionally and mentally troubled at the time of the trial").

Applicant essentially argues that the complaint initiating Diggs' disbarment should be added to the PCR record because it may indicate that Diggs provided untruthful testimony at the PCR hearing. (Aug. 1, 2016, Tr. p. 34, lines 2-10). Applicant posits that Diggs denied knowing the extent of the allegations against him in North Carolina during his PCR testimony. (*Id*). At

PCR, Diggs testified that he was suspended from the practice of law in 2014 and that he was unaware of the status of any investigation by the Office of Disciplinary counsel. (PCR Tr. p. 83). Questioning continued:

> PCR Counsel: 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?
>
> Diggs: No.
>
> PCR Counsel: Have you made any public admissions during those proceedings that would reflect on your general character for truthfulness?
>
> Diggs: No.
>
> PCR Counsel: Have you pled guilty to any of the charges that that office has made against you?
>
> Diggs: I don't know if they've made charges against me.

(*Id.*). The record is unclear whether Applicant's counsel was questioning Diggs about his suspension from the practice of law in North Carolina, South Carolina, or both. (*Id.*).

Considering the foregoing, this Court declines to supplement the PCR record with any documentation regarding Diggs' disbarment. The undersigned finds Applicant's argument in favor of supplementation unpersuasive on the ultimate issue before its consideration: whether Applicant received the effective assistance of competent, appointed counsel at his 2009 capital trial. First, the reason for disbarment—misuse of client funds—does not relate to any subject suggesting an impediment to Diggs' representation of Applicant at his 2009 capital trial. *Compare Padgett, supra, and In the matter of William Isaac Diggs,* Op. No. 27669 (S.C. Sup. Ct. filed Sept. 28, 2016) (Shearouse Adv. Sh. No. 38 at 17-30). Second, the timing of these disciplinary matters does not support an inference that Diggs' representation was hampered by ongoing disciplinary proceedings at the time he represented Applicant. North Carolina

proceedings were not initiated against Diggs until 2016, long after he concluded his representation. *In the matter of William Isaac Diggs, supra* at 19, ¶ 3. Disciplinary proceedings in both states concluded after the March 2-3, 2015, evidentiary hearing conducted in the instant PCR case. (*Id.*). Therefore, the undersigned declines to supplement the record in this case and finds the documentation unpersuasive regarding the ultimate issue before it.

NOW, THERFORE, based upon the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that Applicant's Motion to Supplement the PCR Record is **DENIED**.

AND IT IS SO ORDERED.

Benjamin H. Culbertson

The Honorable Benjamin H. Culbertson
Presiding Circuit Court Judge

Sept. 27, 2017
Conway, South Carolina

ALAN WILSON
ATTORNEY GENERAL

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

September 29, 2017

The Honorable Renee Elvis, Clerk
Horry County Courthouse
P.O. Box 677
Conway, South Carolina 29528-0677

Re: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No. 2014-CP-26-035
(Capital Case)

Dear Ms. Elvis:

Enclosed please find the ***Order Denying Applicant's Motion to Supplement the PCR Record*** and the ***Order Denying Applicant's Motion to Alter or Amend Judgment*** in the above-referenced case for filing in your office. The Orders were signed by Judge Culbertson on September 27, 2017. Please clock-stamp and return these copies to me in the envelope provided. By copy of this letter, I am serving opposing counsel with same.

Thank you for your assistance in this matter.

Sincerely,

Caroline M. Scrantom
Assistant Attorney General

CMS/lbb

cc: Lindsey Vann, Esquire
Emily Paavola, Esquire
Trisha Allen, Victim Advocacy Division

5098

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS THE FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022, Applicant, v. State of South Carolina, Respondents.	)	**C/A No. 2014-CP-26-00035** **Order Denying Applicant's Motion to Alter or Amend Judgment**

FILED
HORRY COUNTY
2017 OCT -3 PM 1:33
CLERK OF COURT
HORRY COUNTY, SC

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

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

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

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

MHC

undersigned denies the motion for the reasons enumerated below.

I. Funding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

requests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Preservation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

conduct will not be deemed ineffective assistance of counsel." *Watson v. State,* 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). The court reviews the strategic decision "an objective standard of reasonableness." *Ingle v. State,* 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith,* 539 U.S. 510, 521, 123 S. Ct. 2527, 2535 (2003). The court is to "focus on whether the investigation supporting counsel's decision" on the introduction or non-introduction of mitigating evidence "*was itself reasonable.*" *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 2537 (citing *Williams v. Taylor, supra,* at 415, 120 S.Ct. at 1495). "In assessing counsel's investigation, we must conduct an objective review of their performance . . . which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* (quoting *Strickland v. Washington, supra,* at 689, 104 S.Ct. at 2052).

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

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

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

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

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

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

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

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

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

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

2. Counsel Elicited Expert Testimony that Applicant was a Psychopath

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Ineffective Assistance of Counsel During Appellate Proceedings

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

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

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

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

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

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

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

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

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

VII. Unconstitutionality of South Carolina Death Penalty Statute

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

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

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

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

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

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

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

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

[signature block on following page]

AND IT IS SO ORDERED.

The Honorable Benjamin H. Culbertson
Presiding Circuit Court Judge

Sept. 27, 2017
Conway, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS THE FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022, Applicant, v. State of South Carolina, Respondents.	)	**C/A No. 2014-CP-26-00035**

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

CERTIFICATE FOR SERVICE

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

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

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

This 29th day of September, 2017.

CAROLINE M. SCRANTOM
Assistant Attorney General

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS THE FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022, Applicant, v. State of South Carolina, Respondents.	)	**C/A No. 2014-CP-26-00035**

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

CERTIFICATE FOR SERVICE

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

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

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

This 29th day of September, 2017.

CAROLINE M. SCRANTOM
Assistant Attorney General

TRIAL. YOU MAY PROCEED.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

MR. DIGGS: THE DEFENDANT WOULD CALL DR. BERNARD ALBINIAK.

DR. BERNARD ALBINIAK, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: YOU MAY PROCEED.

DIRECT EXAMINATION

BY MR. DIGGS:

Q DR. ALBINIAK, WOULD YOU GIVE US AN OVERVIEW OF YOUR EDUCATIONAL BACKGROUND AND EXPERIENCE, PLEASE SIR?

A I HAVE A BS DEGREE IN PSYCHOLOGY, 1968. I HAVE A PHD IN PSYCHOLOGY, 1977.

Q ALL RIGHT. AND FOLLOWING THE TIME OF THE RECEIPT OF THE PHD, WHAT DID YOU DO IN THAT FIELD?

A I -- MY SPECIALTY IS PHYSIOLOGICAL PSYCHOLOGY AND GRADUATE SCHOOL.

Q WHAT IS PHYSIOLOGICAL PSYCHOLOGY?

A I DID ONE YEAR OF BRAIN RESEARCH USING ANIMAL SUBJECTS. WE STUDIED BRAIN -- BRAIN FUNCTION, BRAIN STRUCTURE, BRAIN ANATOMY.

Q OKAY. AND HOW DOES ONE BECOME ABLE TO WORK IN THAT FIELD?

A YOU SIMPLY -- IN GRADUATE SCHOOL -- WHEN I WAS IN

GRADUATE SCHOOL IN PSYCHOLOGY, YOU HAD TO CHOOSE TWO SPECIALTIES -- SUBSPECIALTIES.

Q YES, SIR.

A ONE OF THEM WAS PHYSIOLOGICAL.

Q OKAY.

A IF YOU CHOOSE THAT SPECIALTY, YOU DO A LOT OF LABORATORY BRAIN RESEARCH AS A CONSEQUENCE.

Q SO YOU HAD TO STUDY IN PHYSIOLOGICAL PSYCHOLOGY TO GET YOUR PHD IN PSYCHOLOGY?

A YES, I DID.

Q WAS IT A PHD OR LESSER?

A PHD.

Q ALL RIGHT. AND WHAT HAVE YOU DONE IN THE FIELD OF PHYSIOLOGICAL PSYCHOLOGY SINCE THAT TIME?

A WELL, I TEACH AT COURSE -- I TEACH SEVERAL COURSES IN THAT FIELD AT THE UNIVERSITY.

Q WHERE IS THAT?

A COASTAL CAROLINA UNIVERSITY.

Q OKAY.

A I HAVE BEEN THERE 32 YEARS.

Q THIRTY-TWO YEARS. HOW MANY COURSES HAVE YOU TAUGHT OVER THAT PERIOD OF TIME IN YOUR...

A PROBABLY FIVE DIFFERENT COURSES WHICH OVER -- OVERLAP IN THAT FIELD.

Q ALL RIGHT. FIVE DIFFERENT COURSES?

A YEAH.
Q ARE THEY REPEATED ON ANY BASIS?
A THEY ARE REPEATED ON ABOUT A YEARLY OR TWO YEAR BASIS.
Q ALL RIGHT. SO HOW MANY YEARS ALTOGETHER HAVE YOU TAUGHT PUTTING THE -- PUTTING THE FIVE COURSES TOGETHER IN THAT AREA?
A I'M BEGINNING MY 33RD YEAR.
Q OKAY.
A SO, A LOT.
Q ARE THERE ARTICLES THAT ARE PUBLISHED IN YOUR AREA OF EXPERTISE?
A CERTAINLY.
Q PEER REVIEWED ARTICLES?
A CERTAINLY.
Q WHAT ARE SOME OF THOSE ARTICLES OR THE PUBLICATIONS?
A RIGHT NOW A LOT OF THE WORK IN PHYSIOLOGICAL PSYCH HAS TO DO WITH BRAIN SCAN. THAT'S THE MOST.
Q I'M NOT GOING THERE YET. I'M TALKING ABOUT PHYSIOLOGICAL PSYCHOLOGY. HAVE YOU PUBLISHED ARTICLES OR IN YOUR--
A NO, I HAVE NOT.
Q -- SPECIALTY AREA?
A NO, I HAVE NOT.
Q HAVE YOU PUBLISHED ARTICLES IN OTHER AREAS?

A I HAVE. YES, I HAVE.

Q AND...

A WELL, I SHOULD TAKE THAT BACK. MY DISSERTATION WAS PUBLISHED IN A JOURNAL THAT'S PHYSIOLOGICAL.

Q ALL RIGHT. WELL...

MR. HEMBREE: YOUR HONOR, DR. ALBINIAK IS WELL KNOWN AND HE TEACHES AT COASTAL AND HE'S WELL KNOWN TO THE STATE. WE HAVE NO OBJECTION TO HIM BEING QUALIFIED AS AN EXPERT IN PSYCHOLOGY.

MR. DIGGS: YOUR HONOR, WHAT WE ARE OFFERING HIM FOR IS AN EXPERT IN THE AREA OF PHYSIOLOGICAL.

MR. HEMBREE: WE HAVE NO OBJECTION TO HIM BEING OFFERED AS AN EXPERT IN THE AREA OF -- IN THE FIELD OF PHYSIOLOGICAL PSYCHOLOGY.

MR. DIGGS: ALL RIGHT.

THE COURT: SO ADMITTED.

MR. DIGGS: THANK YOU.

THE COURT: YOU MAY PROCEED.

BY MR. DIGGS:

Q TELL US ABOUT THAT FIELD. AGAIN, I ASK YOU WHAT YOU DO. BE A LITTLE MORE SPECIFIC WITH RESPECT TO THE BRAIN AND ITS FUNCTION AND STRUCTURE.

A WELL, IT -- IN THE OLD DAYS WHEN I WAS TRAINED, WE WOULD DO LESIONS OF THE BRAIN TO SEE WHAT EFFECTS THAT WOULD HAVE ON BEHAVIOR. THESE DAYS THEY DON'T DO THAT ANY

LONGER. THEY DO BRAIN SCANNING TECHNOLOGY.
Q AND WHAT KIND OF BRAIN SCANNING TECHNOLOGY IS USED?
A IT'S REALLY TWO BASIC FORMS OF BRAIN SCAN. ONE TYPE OF BRAIN SCAN LOOKS AT THE STRUCTURE OF THE BRAIN, IT'S -- ITS MORPHOLOGY. THE OTHER TYPE OF SCANNING LOOKS AT THE FUNCTION OF BRAIN CELLS. THAT'S CALLED PET SCANNING MOSTLY. SO WE LOOK AT TWO THINGS, STRUCTURE AND FUNCTION OF BRAIN CELLS.
Q ALL RIGHT. WITH RESPECT TO THE FUNCTION, YOU INDICATED THAT PET SCAN IS USED?
A THAT'S TYPICAL.
Q CAN YOU EXPLAIN A LITTLE BIT -- AND YOU'RE NOT AN EXPERT IN PET SCANS?
A NO.
Q BUT CAN YOU TELL US A LITTLE ABOUT -- COULD YOU GIVE US AN OVERVIEW OF HOW THE PET SCAN WORKS AND--
MR. HEMBREE: YOUR HONOR, I OBJECT TO THAT QUESTION. HE'S NOT AN EXPERT IN THE FIELD OF PET SCAN, AND WE--
THE COURT: IS THE OBJECTION BEYOND THE AREA OF EXPERTISE?
MR. HEMBREE: YES. OUT OF HIS AREA OF EXPERTISE. I'M SORRY, YOUR HONOR.
THE COURT: PLEASE APPROACH.
MR. DIGGS: WE'RE NOT OFFERING HIM FOR THAT,

YOUR HONOR.

THE COURT: PLEASE APPROACH. NO SPEAKING OBJECTIONS.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

THE COURT: THE OBJECTION IS SUSTAINED. FOUNDATION. YOU MAY PROCEED.

MR. HEMBREE: THANK YOU, YOUR HONOR.

BY MR. DIGGS:

Q ARE PET SCANS NORMALLY USED IN YOUR FIELD OF EXPERTISE?

A YES.

Q BY OTHER EXPERTS?

A YES, THEY ARE.

Q AND WHAT OTHER KIND OF SCANNING DEVICES WOULD BE USED?

A THERE'S PET, THERE'S CATH, THERE'S SPECT, S-P-E-C-T, THERE'S MRI, FMRI. AGAIN, THOSE -- ALL THOSE SCANNING DEVICES FALL IN TWO GROUPS, EITHER STRUCTURAL, LOOK AT STRUCTURE OF THE BRAIN, OR ACTIVITY IN BRAIN CELLS.

Q ALL RIGHT. WHAT DO WE KNOW, DR. ALBINIAK, ABOUT THE STRUCTURE OF THE BRAIN CELL?

A WE KNOW A GREAT DEAL ABOUT THE STRUCTURE OF THE BRAIN. WE KNOW ONE AREA OF BRAINS PERFORM CERTAIN FUNCTIONS LIKE INTELLIGENCE AND EMOTIONALITY AND SO ON.

Q IN OUR CASE WE'RE FOCUSING ON SPECIFIC AREAS OF THE

BRAIN. WHAT ARE THE AREAS THAT WOULD BE APPLICABLE IN THIS SITUATION?

A THE MAIN BRAIN AREAS THAT ARE INVOLVED IN THE SITUATION LIKE THIS ARE THE LIMBIC SYSTEM, WHICH IS AN ANCIENT PART OF THE BRAIN. IT CONTROLS EMOTIONAL BEHAVIOR.

SO WHEN A PERSON FEELS ANGER, THAT'S A NERVE CELL OR NERVE CELLS IN THE LIMBIC SYSTEM FIRING AND YOU EXPERIENCE THAT AS ANGER.

THE FRONTAL LOBES ON THE OTHER HAND USUALLY INHIBIT THE LIMBIC SYSTEM. SO IF A PERSON GETS ANGRY, THEY DON'T ACT OUT BECAUSE THE FRONTAL LOBE INHIBITS THE LIMBIC SYSTEM IN A NORMAL PERSON.

Q SPECIFICALLY WHAT KIND OF EMOTIONS ARE GENERATED -- I ASSUME GENERATED WOULD BE AN APPROPRIATE WORD?

A YES.

Q WHAT KIND OF EMOTIONS ARE GENERATED IN THE LIMBIC SYSTEM?

A THE FULL GAMUT OF--

Q CAN YOU GIVE US SOME EXAMPLES?

A ANGER, DISGUST, HAPPINESS, SADNESS, ET CETERA. SO WHEN A PERSON ENCOUNTERS A STIMULUS, THE LIMBIC SYSTEM NOTICES THAT FIRST AND INFORMS THE FRONTAL LOBES ABOUT WHAT THAT STIMULUS IS. THE FRONTAL LOBES HAVE TO MAKE A DECISION ABOUT WHETHER TO BEHAVE THAT WAY OR NOT.

Q NOW, WOULD FEAR BE AN EMOTION OUT OF THE LIMBIC SYSTEM?

A CERTAINLY.

Q ALL RIGHT. AND AGAIN, ALL OF THESE -- DO WE HAVE ANY CONTROL TO -- OR AN ABILITY TO THINK ABOUT THOSE EMOTIONS AT THE LIMBIC SYSTEM LEVEL?

A NO. THEY ARE AUTOMATIC AT THE LIMBIC SYSTEM LEVEL.

Q WOULD YOU SAY THEY'RE AUTOMATIC JUST LIKE MAYBE A HEARTBEAT OR A...

A YES.

Q RESPIRATION?

A ALL THOSE FUNCTIONS ARE AUTOMATIC.

Q ALL RIGHT. DO WE KNOW ANYTHING ABOUT THE STRENGTH OF THE EMOTIONS, IN PHYSICAL TERMS?

A I WILL TELL YOU ONE EXAMPLE. ONE OF THE STRUCTURES IN THE LIMBIC SYSTEM THAT DENOTES FEAR AND ANXIETY AND THREAT IS THE AMYGDALA, A -- PART OF THE LIMBIC SYSTEM.

IF A PERSON ENCOUNTERS A MILDLY THREATENING STIMULUS, IT WOULD BE SOME PRIOR TO THE AMYGDALA, BUT NOT A GREAT DEAL. THE FRONTAL LOBES CAN CONTROL THAT. THE PERSON DOESN'T ACT OUT.

BUT IF THERE'S TREMENDOUS STIMULATION OF THE AMYGDALA, THAT CAN OVERRIDE THE FRONTAL LOBES AND THE PERSON WILL BEHAVE AGGRESSIVELY.

Q I WAS GOING TO ACTUALLY ASK YOU. THE STRENGTH OF

THAT EMOTION COMING OUT OF THE LIMBIC SYSTEM AND THE AMYGDALA AND THAT SITUATION COMPARED TO THE RELATIVE ABILITIES OF THE -- OF A POWER OR THE ABILITY OF THE FRONTAL LOBES TO REGULATE THAT, DO YOU KNOW -- CAN YOU TELL US ANYTHING ABOUT HOW THE RELATIVE STRENGTHS OF THOSE SIGNALS THAT ARE GENERATED IN THE BRAIN?

A THE LIMBIC SYSTEM CAN AND OFTEN TIMES DOES OVERPOWER THE FRONTAL LOBES. THE FRONTAL LOBES HAVE BEEN THE LAST PART OF THE BRAIN TO EVOLVE. THE LIMBIC SYSTEM HAS BEEN AROUND FOR MILLIONS OF YEARS.

ALL ANIMALS HAVE A LIMBIC SYSTEM. ALL ANIMALS CAN BEHAVE EMOTIONALLY. HUMANS HAVE RECENTLY EVOLVED THE FRONTAL LOBE SYSTEM THAT CONTAINS SOME OF THAT EMOTIONALITY, BUT IT'S NOT PERFECT BY ANY MEANS.

Q ALL RIGHT. WHERE IS THE CAPACITY TO DISTINGUISH RIGHT FROM WRONG IN THE BRAIN?

A PROBABLY FRONTAL LOBE.

Q AND WHY DO YOU SAY PROBABLY?

A IT'S A HIGHER -- WHAT WE CALL A HIGHER MENTAL FUNCTION. THOSE ARE ALL LOCATED IN THE FRONTAL LOBE. SO THE FRONTAL LOBE -- OVER A LOT OF THINGS. IT MAKES DECISIONS OF WHAT'S APPROPRIATE BEHAVIOR. IT CONTROLS EMOTIONALITY. IT'S PROBLEM-SOLVING. IT'S ALL THOSE HIGHER FUNCTIONS OF WHICH TELLING RIGHT FROM WRONG IS ONE OF THOSE.

Q DO YOU KNOW IN YOUR FIELD WHAT A HEALTHY BRAIN SHOULD LOOK LIKE?

A YES.

Q IN OTHER WORDS, A LOT OF TIMES YOU HEAR, WELL, IS HE NORMAL? AND EVERYONE SAYS, WELL, WHAT IS NORMAL? BUT DO WE KNOW WHAT A NORMAL, HEALTHY BRAIN LOOKS LIKE AND HOW IT SHOULD BE STRUCTURED?

A YES. THE DATABASE NOW FOR MENTAL -- OR FOR BRAIN STRUCTURE ARE HUGE.

Q HOW MANY -- WHAT DO YOU MEAN BY HUGE?

A THEY HAVE BEEN DOING THESE SCANS NOW FOR ABOUT 20 YEARS, SO THEY HAVE A HUGE DATABASE OF NORMAL BRAIN STRUCTURE. THEY KNOW WHAT THAT LOOKS LIKE.

Q AND WHAT DO THESE SCANS LOOK LIKE? IF YOU LOOK AT THEM, HOW DO THEY -- WHAT DO THEY LOOK LIKE?

A ALL RIGHT. DEPENDS ON WHETHER ITS AN MRI SCAN, THEN IT WILL BE IN HIGH DETAIL DEFINITION, VERY, VERY HIGH DETAILED DEFINITION. YOU CAN SEE TUMORS, YOU CAN SEE MINUTE DISTURBANCES IN STRUCTURE.

IF IT'S A PET SCAN, YOU WILL SEE COLORS. BLUE MEANS CELLS ARE ALMOST NON-ACTIVE. RED MEANS CELLS ARE VERY ACTIVE. SO YOU HAVE TO LOOK AT WHICH SCAN OR BOTH SCANS.

Q NOW, ARE THERE NORMAL RANGES IN TERMS OF WHAT SIZE OF THE PARTICULAR AREAS OF THE BRAIN SHOULD BE?

A YES. THOSE HAVE BEEN STANDARDIZED, YEAH.

Q AND WOULD THAT BE APPLICABLE TO THE FRONTAL LOBE?
A FRONTAL LOBES ESPECIALLY.
Q AND HOW -- CAN YOU SAY THAT THERE IS A -- A HEALTHY OR STANDARD SIZE PRETTY MUCH?
A YES.
Q WITH RESPECT TO THE FRONTAL LOBES?
A YES, IN BOTH FUNCTION AND STRUCTURE.
Q IN FUNCTION AND STRUCTURE. NOW AND AGAIN, IF YOU WANT TO LOOK AT WHAT THE FUNCTIONAL ABILITY IS, CAPACITY, WITH RESPECT TO THE NORMAL HEALTHY BRAIN, HOW WOULD YOU MAKE THAT DETERMINATION?
A YOU WOULD DO A PET SCAN.
Q OKAY.
A UNDER CIRCUMSTANCES WHERE A PERSON IS INVOLVED, WHILE THEY SCAN THEM, THEY ARE INVOLVED IN A FRONTAL LOBE FUNCTION. THEY ARE INVOLVED IN A TASK THAT REQUIRES A FRONTAL LOBE. THE FRONTAL LOBE SHOULD WORK WELL THEN. SO IF YOU SEE BLUE, OR -- THE FRONTAL LOBES ARE NOT WORKING.
Q AND IS THERE STANDARD PROTOCOL, PROCEDURE IN JOURNALS--
A YES.
Q -- PUBLISHED ARTICLES ON HOW TO DO THAT?
A YES, THOSE HAVE BEEN STANDARDIZED.
Q SO WHEN THESE DATABASES ARE PUT TOGETHER, THEY ARE GOING TO HAVE PET SCANS OF INDIVIDUALS WHO ARE -- WHO HAVE

BEEN DETERMINED TO BE HEALTHY?

A YEAH.

MR. HEMBREE: YOUR HONOR, I'M GOING TO OBJECT TO THIS LINE OF QUESTIONING AGAIN ABOUT THE PET SCANS. THIS IS OUTSIDE THE SCOPE OF DR. ALBINIAK'S EXPERTISE.

MR. DIGGS: WELL--

THE COURT: NO SPEAKING OBJECTIONS. PLEASE APPROACH.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

THE COURT: THE OBJECTION IS SUSTAINED. FOUNDATION.

BY MR. DIGGS:

Q WITHIN YOUR FIELD OF EXPERTISE, DOCTOR, WHEN YOU ARE DOING PROJECTS AT WORK AND IN CLASSES AND SO FORTH, DO YOU USE PET SCANS IN ORDER TO DETERMINE BRAIN INJURY, TRAUMA, AND FUNCTION?

A I USE THEM AS A TEACHING TOOL.

Q YES.

A YEAH.

Q OKAY. AND HOW ABOUT WITH RESPECT TO THE STRUCTURE?

A YES, MRI SCANS.

Q MRI?

A MRI SCANS.

Q AND WITH THE USE OF PET SCANS AND MRI SCANS AND OTHER

TYPES OF SCANS, WITHIN THE SCOPE OF YOUR EXPERTISE, ARE YOU ABLE TO MAKE OPINIONS, FORM OPINIONS, ABOUT THE STATUS OR STATE OF A PARTICULAR BRAIN?

A YES.

Q NOW, CAN -- HAVE YOU LOOKED AT INFORMATION PERTAINING TO MR. STANKO?

A YES. I HAVE SEEN PET SCANS AND MRIS WHICH WERE EVALUATED BY OTHER EXPERTS.

Q ALL RIGHT. AND DO YOU HAVE AN OPINION ON THE FUNCTION AND THE STRUCTURE OF MR. STANKO'S BRAIN?

A BOTH STRUCTURE AND FUNCTION OF FRONTAL LOBE AREAS ARE ABNORMAL.

Q NOW, WHY DO YOU SAY THAT?

A THE -- THE VOLUME OF THE LEFT FRONTAL LOBE DONE BY DR. GUR, THE ANALYSIS DONE BY -- IS SUBSTANTIALLY REDUCED. IN OTHER WORDS, THERE'S TISSUE MISSING IN THE LEFT FRONTAL LOBE OVER HERE.

THERE IS ALSO A LOT OF FLUID IN HIS BRAIN. THERE'S MORE FLUID IN HIS BRAIN THAN IS NORMAL. THE CSF, CEREBROSPINAL FLUID IS ELEVATED. WHEN THE CEREBROSPINAL FLUID IS ELEVATED, THAT MEANS THERE IS TISSUE MISSING.

Q NOW, ARE MRIS SOMETHING THAT WERE NORMALLY USED BY PERSONS IN YOUR FIELD OF EXPERTISE?

A OFTEN TIMES, YES.

Q AND WOULD IT HELP YOU TO LOOK AT DR. GUR'S REPORT

RIGHT NOW--

A PROBABLY SO.

Q -- TO EXPLAIN TO US THIS ISSUE ABOUT THE--

A PROBABLY SO.

Q LET ME SHOW YOU...

MR. HEMBREE: YOUR HONOR, THIS IS DEFENSE EXHIBIT ONE. WE HAVE NO OBJECTION TO ITS INTRODUCTION.

THE COURT: MARKED AND ADMITTED WITHOUT OBJECTION.

MR. DIGGS: THANK YOU.

THE COURT: YOU'RE WELCOME.

(WHEREUPON, DEFENSE EXHIBIT 1 WAS ADMITTED INTO EVIDENCE.)

BY MR. DIGGS:

Q LET ME ASK YOU TO TURN AROUND AND LOOK AT THAT, DR. ALBINIAK. JUST GIVE US AN EXPLANATION, PLEASE SIR, ABOUT WHAT WE'RE LOOKING AT HERE.

A WHAT -- WHAT DR. GUR DID -- DR. GUR IS A BRAIN SCANNER AT THE UNIVERSITY OF PENNSYLVANIA, A FULL PROFESSOR, BEEN THERE 30 YEARS. HE DOES THIS ALL THE TIME. HE DID WHAT WE CALL A VOLUMETRIC ANALYSIS OF THE MR DATA THAT MUSC SENT HIM.

Q ALL RIGHT. SO AN MRI WAS DONE ON MR. STANKO?

A AT MUSC.

Q AT MUSC HERE IN SOUTH CAROLINA?
A THEY SENT THE DATA TO DR. GUR. HE DID THE COMPUTER ANALYSIS. IT'S ALL DONE BY THE COMPUTER. HE DOESN'T DO IT. THE COMPUTER'S SOFTWARE SORT OF DOES THE PROPER THING.
Q ALL RIGHT. HOW DOES HE GO ABOUT ANALYZING THAT MRI DATA?
A HE COMPARES MR. STANKO'S BRAIN WITH 42 NORMAL BRAINS, SO YOU HAVE A SAMPLE OF 42 NORMAL BRAINS.
Q IS THAT A SIGNIFICANT SAMPLE?
A THAT'S A LARGE SAMPLE. THIRTY WOULD BE ADEQUATE. THIRTY WOULD BE ADEQUATE.
Q ALL RIGHT. FOR STATISTICAL PURPOSES?
A FOR STATISTICAL PURPOSES, YEAH.
Q ALL RIGHT.
A WHAT WE FOUND, IF I CAN DEMONSTRATE, THE THIN LINE IS THE LEFT HEMISPHERE, THIS SIDE OF THE BRAIN. THE RED LINE IS THE RIGHT HEMISPHERE, THIS SIDE OF THE BRAIN. THAT FIRST POINT IS THE FRONTAL LOBE. IT'S NORMAL ON THE RIGHT SIDE. I SHOULD -- I GUESS HAVE TO DO -- THIS WOULD BE CONSIDERED NORMAL, ANYWHERE IN THIS REGION.

THEN THE LEFT FRONTAL LOBE IS DECIDEDLY SMALLER IN VOLUME MEANING THERE'S TISSUE MISSING. THIS IS THE CEREBROSPINAL FLUID, MARKEDLY ELEVATED, MARKEDLY ELEVATED.

AGAIN, THIS IS THE FRONTAL LOBE, THE LEFT FRONTAL

LOBE. SIGNIFICANT LOSS OF TISSUE FOR SOME REASON. DON'T KNOW WHY. THIS IS THE CEREBROSPINAL FLUID ELEVATED. THE ONLY WAY YOU COULD HAVE MORE FLUID IN THE BRAIN IS TISSUE MISSING.

THIS IS THE MEDIAL GRAY MATTER, SUBSTANTIALLY LOWER HERE AND SIGNIFICANTLY LOWER THERE.

Q DOC, LET'S PULL THIS OUT AND PUT IT -- SEE IF WE CAN PUT IT IN A LITTLE BETTER POSITION -- POSITION TO BE SEEN BETTER.

A AGAIN, THIS IS DR. GUR'S WORK. HE TOOK THE MUSC MRI DATA WHICH IS STRUCTURE OF THE BRAIN SENT TO HIM. HE COMPUTER ANALYZED IT. HE WAS LOOKING FOR DIFFERENCES IN REGIONS OF THE BRAIN. HE COMPARED THIS BRAIN TO -- MR. STANKO'S BRAIN TO 42 NORMAL BRAINS AS A GROUP.

WHAT HE FOUND IS HE -- HE ANALYZED THE DATA FOR THE LEFT HEMISPHERE WHICH IS THE LEFT SIDE OF THE PATIENT'S HEAD, AND THE RIGHT HEMISPHERE.

THE LEFT HEMISPHERE, THE FRONTAL LOBE SHOWS DECIDEDLY LESS TISSUE THAN IS NORMAL. THE RIGHT FRONTAL LOBE ADEQUATE. THIS AGAIN, CEREBROSPINAL FLUID. THE FLUID IS ELEVATED IN THE BRAIN WHICH MEANS THERE'S A LOSS OF TISSUE THROUGHOUT THE BRAIN.

AND THAT WAS MARKEDLY HIGHER, A LOT -- EXCUSE ME -- YEAH, MARKEDLY HIGHER. THIS IS THE MEDIAL GRAY AREA. GRAY TISSUE IN THE BRAIN ARE NERVE CELLS. WHITE TISSUE IS

FIBERS IN THE BRAIN. SO THE MIDDLE PART OF HIS BRAIN HAS LOST GRAY TISSUE, GRAY -- GRAY NERVE CELLS DUE TO SOME FACTOR.

THE ONLY THING DR. GUR CAN'T TELL US IS HOW DID THIS HAPPEN. WE KNOW THAT THERE'S A LOSS OF TISSUE, THERE'S A SUBSTANTIAL LOSS OF TISSUE. HOW THAT OCCURRED IS UNCLEAR.

Q DR. ALBINIAK, LOOK AT THE CHART ON THE LEFT HAND MARGIN. YOU HAVE NUMBERS THERE. WOULD YOU EXPLAIN TO US WHAT THOSE NUMBERS MEAN?

A ALL RIGHT. THIS IS KIND OF STATISTICAL, SO I WILL TRY TO DO THE BEST I CAN.

Q OKAY.

A THIS IS NORMAL. IN OTHER WORDS, A NORMAL BRAIN SHOULD HAVE ALL THESE MARKS AROUND THIS LINE. PERFECTLY NORMAL BRAIN. REMEMBER, THIS IS ONLY MR. STANKO'S BRAIN. THE COMPARISON BRAINS ARE NOT THERE.

A NORMAL BRAIN WOULD HAVE TO FALL BETWEEN THESE TWO LIMITS. THIS IS ONE STANDARD DEVIATION BELOW NORMAL. THIS IS ONE STANDARD DEVIATION ABOVE NORMAL. THIS POINT WHERE HIS FRONTAL -- LEFT FRONTAL LOBES ARE IS ABOUT TWO AND A THIRD STANDARD DEVIATIONS BELOW NORMAL.

THAT WOULD MEAN THE CHANCES OF AN AVERAGE BRAIN BEING THAT IMPAIRED WOULD BE ABOUT 1 PERCENT. IT'S A VERY LOW PROBABILITY. THIS IS EVEN WORSE. THIS IS ABOUT TWO AND A HALF STANDARD DEVIATIONS. MEANS THAT'S LESS THAN

1 PERCENT. THIS IS A FAIRLY ABNORMAL BRAIN.
Q ALL RIGHT. AND HOW ABOUT THIS, GOING DOWN FOUR--
A YEAH, THIS -- OVER FOUR. THAT IS--
Q OVER FOUR.
A THAT IS--
COURT REPORTER: I'M SORRY. I DIDN'T HEAR HIM.
BY MR. DIGGS:
Q WOULD YOU REPEAT THAT FOR THE COURT REPORTER, PLEASE.
A THE MEDIAL RIGHT -- THE MEDIAL RIGHT HEMISPHERE IS DOWN AT ABOUT FOUR STANDARD DEVIATION UNITS WHICH WOULD BE LESS THAN TWO TENTHS OF 1 PERCENT. IN OTHER WORDS, TWO TENTHS OF 1 PERCENT OF THE BRAIN WOULD BE THAT DIFFERENT.
Q WHAT ROLE DOES THE MEDIAL -- WHAT DO YOU CALL THAT?
A THE MEDIAL GRAY IS THE AREA OF THE BRAIN ABOVE THE LIMBIC SYSTEM WHICH IS INVOLVING EMOTIONAL BEHAVIOR. THERE HAS BEEN LOSS OF BRAIN TISSUE THERE.
Q THERE IS -- AND IT'S INVOLVED IN WHAT?
A EMOTIONAL BEHAVIOR.
Q EMOTIONAL BEHAVIOR. AND CAN YOU GIVE US KIND OF A -- AN EXPLANATION OF WHAT HAPPENS TO BRAIN SIGNALS WHEN THEY GENERATE IN THE LIMBIC SYSTEM? DO THEY GO THROUGH THE MEDIAL TO THE FRONTAL?
A YEAH, THEY WILL GO FROM THE LIMBIC SYSTEM TO WHAT WE CALL THE CINGULATE CORTEX WHICH IS PART OF THIS MEDIAL GRAY AREA. FROM THE CINGULATE CORTEX TO THE FRONTAL LOBE.

THE FRONTAL LOBE NOW KNOWS IT'S AN EMOTIONAL STIMULUS THAT THEY CONFRONTED, AND THE FRONTAL LOBE NOW HAS TO DECIDE WHAT TO DO.

Q DO WE KNOW--

A ACT ON IMPULSE OR NOT.

Q DO WE KNOW -- OKAY. SO THE EMOTION WOULD COME OUT OF THE LIMBIC SYSTEM IN THE AMYGDALA?

A EXACTLY.

Q INITIALLY GO THROUGH THE MEDIAL GRAY--

A GRAY.

Q -- WHICH MR. STANKO HAS--

A QUITE DEFICIENT.

Q -- DEFICIENT IN THE STRUCTURE?

A IN THE STRUCTURE, CELL BODIES.

Q DOES IT -- DOES IT -- CAN YOU TELL US WHAT THE PURPOSE OF THE MEDIAL GRAY--

A IT'S REALLY BASICALLY TO TRANSFER INFORMATION TO THE FRONTAL LOBE.

Q TRANSFERRING INFORMATION?

A ABOUT EMOTIONAL EVENTS. NOW, WHAT HE DIDN'T DO IS HE DIDN'T SCAN THE AMYGDALA WHICH IS A SUBPART OF THE LIMBIC SYSTEM. I WOULD LIKE TO HAVE SEEN THAT. HE DID NOT DO THAT.

Q SO IT GOES THROUGH THE MEDIAL GRAY?

A TO THE FRONTAL LOBE.

Q WHERE HE -- WHERE MR. STANKO IS DEFICIENT?
A YES.
Q AND IT GOES UP TO THE FRONTAL LOBE WHERE AGAIN HE IS DEFICIENT?
A YEAH.
Q IN GRAY MATTER?
A IN GRAY MATTER.
Q AND AGAIN, JUST STATISTICALLY, HOW LIKELY WOULD IT BE THAT WE WOULD FIND ANOTHER PERSON WITH A BRAIN STRUCTURE LIKE MR. STANKO?
A DR. GUR IN HIS CORRESPONDENCE WITH ME SAID THE CHANCES OF A PERSON ON THE STREET BEING SCANNED AND HAVE A BRAIN THIS ABNORMAL WOULD BE LESS THAN 2 PERCENT.
Q LESS THAN 2 PERCENT?
A LESS THAN 2 PERCENT.
Q AND THAT WOULD BE THROUGHOUT THE--
A THROUGHOUT THE--
Q -- DATA?
A -- BASE.
Q ALL RIGHT. YOU CAN RETURN. NOW, IS THERE ANYTHING ELSE ABOUT MR. STANKO'S BRAIN STRUCTURE THAT YOU TOOK INTO ACCOUNT?
A I -- I WANTED TO KNOW PERSONALLY WHY THIS WOULD HAPPEN, HOW DID THIS OCCUR.
Q WERE THERE ANY OTHER SCANS THAT WERE DONE THAT YOU

TOOK INTO ACCOUNT?

A I DON'T RECALL ANY OTHER SCANS OTHER THAN -- PICTURES OF SCANS.

Q ALL RIGHT. YOU SAW -- ALL RIGHT. YOU SAW PET SCAN--

A I KNOW THERE'S A PET SCAN.

Q AND WHAT CAN YOU TELL US ABOUT THE INFORMATION THAT YOU GAINED FROM THE PET REPORTS THAT YOU RECEIVED?

MR. HEMBREE: YOUR HONOR, ONCE AGAIN I OBJECT. IT'S OUTSIDE THE SCOPE OF DR.--

THE COURT: PLEASE APPROACH.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

THE COURT: MADAM FORELADY, LADIES AND GENTLEMEN, I NEED TO TAKE UP A MATTER OF LAW WITH THE ATTORNEYS. IT SHOULD BE VERY BRIEF. IF YOU WILL GO WITH THE BAILIFFS. PLEASE DO NOT DISCUSS THE CASE DURING THIS BREAK. THIS SHOULD BE VERY BRIEF.

(JURY LEFT THE COURTROOM AT 5:02 PM.)

THE COURT: WE'LL BE AT EASE FOR JUST A FEW MOMENTS. DOCTOR, YOU CAN STEP DOWN. PLEASE DON'T DISCUSS YOUR TESTIMONY WITH ANYONE.

THE WITNESS: YES, MA'AM.

(WHEREUPON A RECESS WAS HAD.)

THE COURT: OKAY. DOCTOR, IF YOU WILL RE-TAKE THE STAND. IS THE STATE READY TO PROCEED?

MR. HEMBREE: YES, YOUR HONOR.

THE COURT: IS THE DEFENSE READY TO PROCEED?

MR. KELLY: YES, MA'AM.

THE COURT: IF YOU WILL BRING IN THE JURY.

(JURY ENTERED THE COURTROOM AT 5:29 PM.)

THE COURT: YOU MAY BE SEATED. LADIES AND GENTLEMEN, WE TRULY APPRECIATE YOUR PATIENCE. WE'LL NOW RESUME THE TESTIMONY. MR. DIGGS, YOU MAY PROCEED WHEN YOU'RE READY.

MR. DIGGS: THANK YOU, YOUR HONOR.

BY MR. DIGGS:

Q DR. ALBINIAK, DO YOU HAVE AN OPINION, AN EXPERT OPINION, ON FUNCTION WITH RESPECT TO MR. STANKO'S BRAIN?

A YES, I DO.

Q WHAT IS THAT?

A HIS FRONTAL LOBE FUNCTION WOULD BE SUB-NORMAL.

Q SUB-NORMAL?

A RIGHT, PARTICULARLY -- THERE ARE DIFFERENT AREAS OF THE FRONTAL LOBE. THE FRONTAL LOBE AREA THAT'S MOST INVOLVED IN HIS BRAIN DEFICIENTLY (SIC) IS THE ORBITAL FRONTAL LOBE. THAT'S THE PART OF THE FRONTAL LOBE THAT INHIBITS THE LIMBIC SYSTEM. SO THE IMPAIRMENT WOULD BE MOSTLY INHIBITING LIMBIC RESPONSES.

Q ALL RIGHT. NOW, THIS IS THE FUNCTIONAL -- AGAIN, TELL US THE DIFFERENCE.

A ALL RIGHT. THE PET SCAN IS--

Q BETWEEN -- LET ME FINISH THE QUESTION. TELL ME THE DIFFERENCE BETWEEN THE -- THE ABNORMAL FUNCTION AS OPPOSED TO THE ABNORMAL STRUCTURE.

A OKAY. THE PET SCAN SHOWS ABNORMAL FUNCTION OF THE CELLS IN THE ORBITAL FRONTAL LOBE. MEANING WHEN YOU PET SCAN THE BRAIN, YOU SEE SHADES OF BLUE IN THE ORBITAL FRONTAL LOBE. AS A MATTER OF FACT, MARKEDLY BLUE. THAT MEANS THOSE CELLS ARE NOT FIRING LIKE THEY SHOULD NORMALLY FIRE.

YOU SEE OTHER AREAS OF HIS BRAIN THAT ARE RED MEANING THOSE CELLS ARE FIRING AT A -- AT A NORMAL RATE.

Q ALL RIGHT. AND AGAIN, WITH RESPECT TO THE VOLUME AND THE STRUCTURE, IS THAT A DIFFERENT DEFECT?

A THAT'S A DIFFERENT ANALYSIS, BUT IT REACHES A SIMILAR CONCLUSION. DR. GUR, HIS DATA SHOW, THAT THE FRONTAL LOBE, THE LEFT FRONTAL LOBE, IS DECIDEDLY DEFICIENT IN VOLUME MEANING THERE'S BRAIN TISSUE MISSING. IT'S BEEN DAMAGED OR -- OR WHAT COULD HAPPEN.

Q ALL RIGHT. ARE THERE ANY WAYS WHERE WE COULD SIMULATE -- SAY IF WE WANTED TO SIMULATE HOW MR. STANKO WOULD FUNCTION WITH THIS ABNORMAL STRUCTURE AND FUNCTION. HOW -- COULD WE DO THAT IN SOME FASHION?

A NOT IN THE HUMAN. YOU CAN'T DO IT IN A HUMAN. THE WAY THEY STUDY FRONTAL LOBE FUNCTIONS OF HUMANS, THEY FIND HUMANS WHO HAVE FRONTAL LOBE DAMAGE OR VETERANS,

COMMONLY -- UNFORTUNATELY WAR VETERANS HAVE FRONTAL LOBE DAMAGE IN MANY CASES. THEY STUDY THOSE INDIVIDUALS.

Q DO THEY ENGAGE IN ABNORMAL BEHAVIOR?

A THEY TEND TO BE HIGHLY IMPULSIVE. THEY TEND TO BE -- THEY DON'T PLAN THEIR ACTIVITIES VERY LOGICALLY. THEY DON'T CONSIDER THE CONSEQUENCES OF THEIR BEHAVIOR.

Q ALL RIGHT. NOW, WOULD YOU CHARACTERIZE THE DIMINISHED OR LACK OF FUNCTION IN THE FRONTAL LOBE AND THE LACK OF VOLUME IN THE STRUCTURE BOTH WITH THE MEDIAL GRAY AND THE FRONTAL LOBE AS A MENTAL DEFECT OR DISEASE?

A IT'S CERTAINLY A DISEASED STATE OF THE BRAIN. IT'S NOT REPAIRABLE. YOU'RE NOT GOING TO REPAIR IT -- STRUCTURAL DAMAGE.

Q SO IT'S A BRAIN DEFECT?

A IT'S A BRAIN DEFECT.

Q AND HOW, AGAIN, WOULD THIS TYPE OF IMPAIRMENT, FUNCTIONAL AND STRUCTURAL, TRANSLATE INTO BEHAVIOR PROBLEMS?

A UNDER NORMAL CIRCUMSTANCES YOU WOULDN'T SEE ANY EVIDENCE PROBABLY. BUT UNDER STRESSFUL OR THREATENING CIRCUMSTANCES WHERE THE THREAT IS PERCEIVED, YOU WILL SEE IMPAIRED INHIBITORY RESPONSES ON THE FRONTAL LOBE, SO YOU HAVE TO HAVE CERTAIN CONDITIONS WHERE YOU WOULD SEE THE MANIFESTATIONS.

Q DO WE HAVE ANY IDEA WITH MR. STANKO HOW THESE

DEFORMITIES OR DEFECTS CAME INTO BEING?

A THERE'S SOME EVIDENCE THAT AT BIRTH -- HE HAD A DIFFICULT BIRTH APPARENTLY. HE WAS BORN IN CUBA AT GUANTANAMO BAY. THE DOCTORS AT THE TIME OF HIS BIRTH -- HIS -- HIS MOTHER WAS GOING TO HAVE A TUBAL LIGATION. THEY SUGGESTED SHE NOT HAVE ONE. THEY DIDN'T THINK HE WOULD SURVIVE.

THEY WERE FAIRLY CERTAIN HIS CONDITION NEUROLOGICALLY WAS SO BAD THAT HE MIGHT NOT SURVIVE. HE DID SURVIVE, OBVIOUSLY.

Q COULD...

A BUT POSSIBLY BRAIN DAMAGED.

Q ALL RIGHT. NOW, LET ME ASK YOU, THE FRONTAL LOBE -- ARE HUMANS THE ONLY LIVING BEINGS ON THE PLANET THAT HAVE A FRONTAL LOBE?

A NO. NO.

Q AND WHAT--

A ALL THE GREAT--

Q WHAT TYPE OF ANIMAL--

A ALL THE GREAT APES HAVE FRONTAL LOBES. THEY HAVE LESS THAN WE DO.

Q IS THERE A HIERARCHY SYSTEM?

A THERE'S A HIERARCHY, RIGHT.

Q WHAT WOULD THAT BE?

A IF YOU GO DOWN THE HIERARCHY TO THE REPTILIANS, LIKE

CROCODILES AND ALLIGATORS AND CAIMAN, THEY HAVE NO FRONTAL LOBES AT ALL, SO THEY CAN'T CONFORM THEIR BEHAVIOR. THEY ACT ON INSTINCT. THEY HAVE NO FRONTAL LOBES.

Q SO THEY HAVE NO CAPACITY TO DISTINGUISH--

A NO CAPACITY.

Q -- THEY EITHER MAKE A DECISION TO EAT, FOR EXAMPLE, OR NOT?

A AND THAT'S AN INSTINCTIVE DECISION.

Q AND IS THAT A LOT DIFFERENT FROM THE LIMBIC SYSTEM IN THE HUMAN?

A NO. THE LIMBIC STRUCTURES ARE ABOUT THE SAME, THE REPTILIAN BRAIN AND THE HUMAN BRAIN.

Q CAN THE LIMBIC SYSTEM EMOTIONS DRIVE CONDUCT?

A CERTAINLY.

Q AND CAN YOU TELL US HOW THAT COULD BE -- OR UNDER WHAT CIRCUMSTANCES?

A UNDER ANY EMOTION PROVOKING CIRCUMSTANCE, UNDER ANY EMOTION PROVOKING CIRCUMSTANCE THE LIMBIC STRUCTURES ARE ACTIVE, AND IF THERE'S NO FRONTAL LOBE TO OFFSET THOSE, YOU GET EMOTIONAL BEHAVIOR, YOU GET THE OUTPUT OUT OF THE LIMBIC SYSTEM.

Q AND AGAIN, THE LIMBIC SYSTEM IS NOT CAPABLE OF MAKING JUDGMENTS?

A NO. NO.

Q OR DISTINCTIONS?

A NO.
Q OTHER THAN--
A IT'S SIMPLY RECOGNIZING -- IT'S RECOGNIZING EMOTION, LIKE FEAR OR ANGER.
Q LET ME ASK YOU, DOES THE LIMBIC SYSTEM ACT IN A RATIONAL MANNER?
A NO. BY DEFINITION ITS THE EMOTIONAL CENTER OF THE BRAIN, SO IT'S BY DEFINITION NOT RATIONAL.
Q AND SO IF A PERSON'S CONDUCT WAS BEING DRIVEN BY A LIMBIC SYSTEM PRODUCED EMOTION, WOULD YOU EXPECT IT TO BE IRRATIONAL?
A YES, IF THERE WERE NO OFFSETTING FRONTAL LOBE IN THE--
Q AND MAKE NO SENSE?
A YEAH, MAKE -- BE IRRATIONAL.
Q WHERE DO OUR DREAMS COME FROM?
A FROM? I DIDN'T UNDERSTAND.
Q OUR DREAMS. WHEN WE'RE ASLEEP, FOR EXAMPLE--
A THE NEWEST LITERATURE INDICATES THAT WHEN A PERSON GOES TO SLEEP AND ENTERS REM SLEEP, THE FRONTAL LOBES SHUT DOWN. THERE'S VIRTUALLY NO ACTIVITY IN THE FRONTAL LOBES. SO DREAMS ORIGINATE MOSTLY IN LIMBIC SYSTEM. THAT'S WHY THEY HAVE A HIGH CONTENT OF ANGER AND AGGRESSION AND SEXUALITY, AND THEY SEEM TO BE REALLY UNUSUAL.
THE FRONTAL LOBES HAVE NO INFLUENCE OVER THAT

PROCESS. WHEN YOU COME OUT OF THE DREAM STATE, THE FRONTAL LOBES ARE ACTIVE AGAIN.

Q SO THEY DON'T MAKE -- IS THAT WHY OUR DREAMS SOMETIMES DON'T MAKE SENSE?

A DON'T MAKE SENSE.

Q JUST SILLY, CRAZY?

A DISCONNECTED PIECES.

Q ALL RIGHT. LET ME ASK YOU, IF YOUR CONDUCT OR IF AN INDIVIDUAL'S CONDUCT IS BEING DRIVEN BY THE LIMBIC SYSTEM EMOTIONS, WOULD THEY STILL BE ABLE TO TALK AND SAY THINGS?

A SURE.

Q CARRY ON A CONVERSATION?

A OF COURSE.

Q HOW COULD THAT BE?

A GIVE YOU AN EXAMPLE. A SLEEPWALKING PERSON. PEOPLE WHO SLEEPWALK WILL TYPICALLY, OFTEN TIMES HAVE A CONVERSATION, THEY'LL GO TO THE REFRIGERATOR, GET A PIECE OF CAKE, THEY WILL GO BACK TO BED AND NOT REMEMBER ANY OF THOSE THINGS.

Q AND THAT CONDUCT IS BEING DRIVEN...

A BY BRAIN AREAS OTHER THAN THE FRONTAL LOBES.

Q OTHER THAN THE FRONTAL LOBES?

A THE CONVERSATION IS CONTROLLED BY THE TEMPORAL LOBE.

Q AND SO ONE WOULD NOT HAVE TO BE CONSCIOUS IN ORDER TO ENGAGE IN THE CONVERSATION?

A CERTAINLY, UNDER CERTAIN CIRCUMSTANCES.
Q AND THAT MIGHT -- IT MIGHT BE THAT ONE WHO IS CONVERSING WITH SOMEONE IN THAT STATE MIGHT NOT REALIZE THAT PERSON'S--
A CORRECT.
Q DR. ALBINIAK, I APPRECIATE YOUR TIME. ANSWER ANY QUESTIONS THAT COUNSEL MAY HAVE.
A CERTAINLY.

THE COURT: YOU MAY PROCEED.

MR. HEMBREE: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. HEMBREE:
Q DR. ALBINIAK, YOU'RE NOT SUGGESTING THAT STEPHEN STANKO WAS SLEEPWALKING WHEN HE RAPED--
A NO, CERTAINLY NOT.
Q -- CHRISTINA LING AND KILLED LAURA LING?
A NO, SIR. CERTAINLY NOT.
Q OKAY. LET ME KIND OF CUT TO THE CHASE. YOUR TESTIMONY ABOUT DR. GUR -- I MEAN, ESSENTIALLY YOU'RE JUST PARROTING WHAT INFORMATION WAS --
A YES.
Q -- PROVIDED TO YOU BY DR. GUR?
A EXACTLY.
Q I MEAN, YOU'RE NOT -- THIS WASN'T AN INDEPENDENT ANALYSIS THAT YOU CONDUCTED?

A CERTAINLY.
Q YOU DIDN'T BRING IN 42 BRAINS AND STUDY THEM?
A CERTAINLY NOT.
Q DID YOU HAVE THE BENEFIT OF SEEING THE -- THE MRIS ON THE 42 BRAINS THAT HE USED IN--
A NO, I DID NOT.
Q YOU DID NOT?
A NO.
Q SO AS FAR AS YOU KNOW, YOU MIGHT HAVE HAD -- BRAIN NUMBER SEVEN MIGHT HAVE BEEN UP HERE ON THIS PARTICULAR -- THE MEDIAL AXIS, AND BRAIN NUMBER 24 COULD HAVE BEEN DOWN HERE ON THE TEMPORAL AXIS. I MEAN, THIS IS SIMPLY AN AVERAGE.
A WELL, THAT'S STANKO'S BRAIN. HE COMPARED HIS -- HIS BRAIN TO THE AVERAGE OF THE 42 BRAINS.
Q RIGHT. WHAT I'M TRYING TO GET AT, THOUGH, IS THE -- THE AVERAGE THAT DR. GUR ESTABLISHED HERE WAS -- HE TOOK 42 BRAINS WITH -- HE HAD MEASUREMENTS IN ALL THESE--
A ALL MEASUREMENTS.
Q -- DIFFERENT AREAS OF THE BRAIN?
A RIGHT.
Q AND HE AVERAGED THEM?
A CORRECT.
Q AND HE CAME UP WITH THIS AVERAGE THAT, HERE'S THE AVERAGE BRAIN?

A RIGHT. BUT THEN HE DID ONE OTHER THING. I DON'T WANT TO INTERRUPT YOU.
Q IT'S OKAY.
A HE COMPARED EACH NORMAL BRAIN WITH STANKO'S INDIVIDUALLY. HE WENT THAT FAR TO DO THAT. HE FOUND ONE OF 42 BRAINS WAS ABNORMAL AS STANKO'S BRAIN. THE OTHER 41 WERE NOT.
Q OKAY. SO -- YEAH. I DON'T KNOW WHAT THAT MEANS, BUT I UNDERSTAND WHAT YOU'RE SAYING, BUT--
A HE--
Q -- CAME UP WITH AN AVERAGE?
A YEAH.
Q HE CAME WITH AN AVERAGE. SO THERE WERE PEOPLE THAT HAD -- HAD OTHER AREAS THAT WERE NOT WITHIN THAT AVERAGE?
A SOME, YEAH.
Q OKAY. NOW, YOU TESTIFIED DR. GUR SAID THAT 2 PERCENT OF THE POPULATION HAS SAME BRAIN--
A OR THAT MUCH BRAIN ABNORMALITY.
Q CONDITION, ABNORMALITY--
A YES.
Q -- AS STEPHEN STANKO'S?
A YEAH.
Q SO THE 300 PEOPLE IN THE UNITED STATES, HOW MANY PEOPLE WOULD THAT BE? 2 PERCENT OF THE POPULATION OF THE UNITED STATES OF AMERICA?

A PROBABLY -- NOT A GOOD MATHEMATICIAN, BUT SEVERAL HUNDRED THOUSAND.

Q HOW ABOUT 6 MILLION? DOES THAT SOUND ABOUT RIGHT?

A SOUNDS ABOUT RIGHT.

Q 1 PERCENT OF 300 MILLION WOULD BE 3 MILLION, AND 2 PERCENT WOULD BE 6 MILLION PEOPLE?

A EXACTLY.

Q AS A MATTER OF FACT, ISN'T IT TRUE THAT THERE'S SOMEBODY ELSE IN THIS ROOM--

A POSSIBLY, CERTAINLY.

Q -- JUST LIKE THIS GUY?

A (NODDED HEAD).

Q THE INTELLIGENCE IN THE BRAIN, CONTAINED IN THE FRONTAL LOBES?

A MORE DISTRIBUTED, THOUGH, IN ALL LOBES. AND INTELLIGENCE IS A VERY VAGUE FUNCTION. IT'S IN ALL THE LOBES OF THE BRAIN. TO A LARGE DEGREE IN THE FRONTAL LOBES--

Q TO A LARGE DEGREE?

A TO A LARGE.

Q TO A LARGE DEGREE IN THE FRONTAL LOBES. BECAUSE THE FRONTAL LOBES ARE THE -- YOU KNOW, THEY EXECUTE ON THINGS. THEY PLAN THINGS; CORRECT?

A EXECUTIVE FUNCTIONS.

Q AND THEN DO EXECUTIVE FUNCTIONS AND CARRY OUT THOSE

PLANS?
A EXACTLY.
Q AND SO IF YOUR FRONTAL LOBES ARE WORKING PROPERLY, THEN YOU'RE TAKING STEPS, YOU'RE DOING THINGS, YOU'RE -- YOU'RE MAKING A PLAN?
A MAKING CORRECT CHOICES.
Q YEAH. AND YOU -- AND YOU MAKE CHOICES. YOU MAKE CHOICES--
A RIGHT.
Q -- THAT ARE GOAL-DIRECTED?
A GOAL-DIRECTED.
Q OKAY. SO IF YOU HAVE AN OBJECTIVE AND A GOAL, THEN YOU MAKE THOSE CHOICES THAT ARE CONSISTENT WITH THAT GOAL, IF YOUR FRONTAL LOBES ARE--
A IF, RIGHT--
Q -- FUNCTIONING?
A -- FRONTAL LOBE--
Q IF YOUR FRONTAL LOBES ARE FUNCTIONING?
A RIGHT.
Q SO, IF YOU HAVE GOT A GUY WHO IS -- WHO HAS COMMITTED MURDER, TO STEAL A CAR, OBTAIN MONEY, AND -- AND PROVIDE A -- AN EXCUSE WHY THE VICTIM WON'T SHOW UP AT WORK THE NEXT DAY, IT WOULD APPEAR THAT THOSE -- THERE'S A PLAN GOING ON; WOULD IT NOT?
A ALL RIGHT. THAT -- THAT FUNCTION OF THE FRONTAL LOBE

MAY BE INTACT, THE PLANNING FUNCTION, BUT THE INHIBITION OF EMOTION MAY NOT BE. REMEMBER, THE FRONTAL LOBES CONTAIN VARIOUS AREAS WITH VARIOUS FUNCTIONS, SO YOU CAN HAVE AN INTELLIGENT PERSON WHO HAS NO EMOTION CONTROL.

Q AND YOU KNOW, TYPICALLY IN A EMOTIONAL RESPONSE WILL BE AN IMMEDIATE, QUICK, BAM.

A TYPICALLY.

Q RIGHT. TYPICALLY. AND THEN IT DISSIPATES.

A WITH SOME DEGREE OF TIME, YEAH.

Q WITH SOME DEGREE OF TIME. AND OFTEN TIMES QUICKLY.

A OFTEN TIMES QUICKLY.

Q OKAY. BECAUSE THE FRONTAL LOBES KIND OF KICK BACK IN; DON'T THEY?

A OFTEN TIMES.

Q YOU HAVE THAT FIGHT OR FLIGHT, THAT IMMEDIATE -- YOU CAN EVEN FEEL IT SOMETIMES; CAN'T YOU?

A SURE.

Q YOU CAN PHYSICALLY FEEL IT THAT YOU'VE GOT THIS -- THIS TRIGGER.

A THE URGE.

Q THE URGE, WHATEVER IT MIGHT BE.

A UH-HUH.

Q AND THEN -- BUT THEN YOUR FRONTAL LOBES RE-ENGAGE?

A AGAIN, MORE NORMAL FRONTAL LOBES RE-ENGAGE.

Q MORE NORMAL. BUT NORMAL FRONTAL LOBES RE-ENGAGE?

A ENGAGE--
Q AND THEY SAY--
A -- INHIBIT BEHAVIOR.
Q THEY INHIBIT THE BEHAVIOR. EVEN IF YOU ACTED OUT.
A YES.
Q EVEN IF YOU HAVE DONE SOMETHING WRONG.
A YEAH.
Q THEN THOSE FRONTAL LOBES TYPICALLY QUICKLY BRING YOU BACK.
A GAIN CONTROL.
Q GAIN SOME CONTROL. GAIN CONTROL. NOW, WERE YOU AWARE THAT MR. STANKO HAS AN IQ OF 143?
A I HAD READ THAT IN THE REPORTS.
Q YOU HAVE READ THAT IN THE REPORTS. COULD YOU TELL THIS JURY WHAT -- IS THAT SIGNIFICANT -- IS -- WHAT -- IS THAT A GENIUS?
A IQ IS MEASURED ON A HUNDRED POINT SCALE. 130 WOULD BE TWO STANDARD DEVIATIONS ABOVE THE MEAN, SO THAT WOULD PUT HIM IN THE UPPER HALF OF 1 PERCENT. THAT WOULD BE IN THE GENIUS CATEGORY.
Q OKAY. SO HE'S IN -- HE'S GOT THE INTELLIGENCE OF A -- HE IS HIGHLY--
A HIGHLY INTELLIGENT.
Q ALL RIGHT. A LOT OF THAT INTELLIGENCE, LOT OF THAT INTELLIGENCE YOU HAVE ALREADY TESTIFIED IN THE FRONTAL

LOBES. THAT'S WHERE THAT COMES FROM?
A YES.
Q ISN'T IT TRUE -- I'M GOING TO GET IN TROUBLE ON THIS, BUT I'M GOING TO ASK ANY WAY. ISN'T IT TRUE THAT WOMEN'S FRONTAL LOBES ARE SMALLER THAN MEN'S FRONTAL LOBES?
A ON AVERAGE, YEAH, ON AVERAGE.
Q BUT THAT DOESN'T MEAN THEY ARE INSANE?
A NO, CERTAINLY NOT.
Q THEY'RE NOT PSYCHOPATHS BECAUSE THEIR--
A NO, NO.
Q -- FRONTAL LOBES ARE SMALL?
A NO.
Q AND IT'S NOT YOUR TESTIMONY -- IT'S NOT YOUR TESTIMONY, AS I UNDERSTAND, THAT THIS DEFENDANT IS A PSYCHOPATH BECAUSE HE MAY HAVE SOME FRONTAL LOBE ISSUE?
A IT'S IN HIS RECORDS THAT HE IS. I DON'T--
Q WELL, IT'S NOT YOUR OPINION.
A NO.
Q THAT'S NOT YOUR--
A NO, I HAVEN'T FORMED AN OPINION.
Q I'M NOT TALKING ABOUT WHAT SOMEBODY ELSE MIGHT -- AN OPINION WE MIGHT HAVE FROM SOMEBODY ELSE LATER. NOW, HE'S -- YOU'RE NOT SAYING -- IT'S NOT YOUR OPINION THAT HE HAS NO FRONTAL LOBE FUNCTION?
A NO.

Q I MEAN, IT'S CLEAR THAT HE'S ABLE TO CONTROL HIMSELF AND--
A AND--
Q -- BEHAVE PROPERLY AND, YOU KNOW, ACT THE WAY PEOPLE EXPECT HIM TO ACT, OTHERS EXPECT HIM TO ACT?
A CERTAINLY.
Q SO, YOU WOULD -- WOULD IT BE FAIR TO SAY THAT THE FUNCTIONING -- IS IT YOUR TESTIMONY THAT THE FUNCTIONING OF HIS FRONTAL LOBES IS DIMINISHED, HIS CAPACITY FOR HIS FRONTAL LOBES TO FUNCTION IS DIMINISHED?
A IMPAIRED.
Q IMPAIRED?
A WHATEVER WORD YOU WANT--
Q LESSER THAN--
A LESS.
Q -- LESSER THAN SOME PEOPLE?
A NOT OBLITERATED.
Q RIGHT. GREATER THAN SOME, LESSER THAN OTHERS.
A YES.
Q SOMEWHERE YOU JUST SAID, BUT SOMEWHERE.
A CERTAINLY.
Q NOW, YOU WERE MENTIONING THE BEHAVIORS. MR. DIGGS WAS TALKING TO YOU ABOUT THE BEHAVIORS YOU MIGHT EXPECT TO FIND OR BEHAVIORS OF SOMEONE WITH THIS -- THIS SITUATION, THIS SITUATION.

BUT THAT'S REALLY NOT YOUR -- YOU -- THAT'S REALLY THE AREA OF PSYCHIATRY, IS IT NOT? ISN'T THAT MORE ALONG THE LINES OF THE STUDY OF PSYCHIATRY AS OPPOSED TO YOUR STUDYING THE FUNCTION AND STRUCTURE OF THE BRAIN?

A WELL, THE ULTIMATE OUTCORE OF THE BRAIN IS BEHAVIOR, SO IF A PERSON HITS ANOTHER PERSON WITH A BRICK BECAUSE THEY GOT ANGRY, THAT'S A BEHAVIORAL EVENT.

Q RIGHT. BUT ISN'T THAT -- ISN'T THAT REALLY WHAT THE STUDY OF PSYCHIATRY IS ALL ABOUT?

A I THINK IT CROSSES BOTH FIELDS ACTUALLY.

Q OKAY. THAT'S FAIR. NOW, YOU DIDN'T -- YOU TESTIFIED THAT THIS MAN HAS BIRTH DEFECTS. WHAT'S YOUR AUTHORITY FOR THAT TESTIMONY?

A I READ THE MEDICAL REPORT THAT SUGGESTED THAT IT MIGHT CONTRIBUTE. THE REPORTS OF GUANTANAMO BAY, CUBA.

Q OKAY. I WANT TO JUST HAVE YOU TAKE A LOOK AT THOSE REPORTS.

MR. HEMBREE: YOUR HONOR, I DO NOT INTEND TO OFFER THESE AT THIS TIME. I JUST WANT TO HAVE THEM IDENTIFIED BY THE WITNESS AT THIS POINT IN TIME.

BY MR. HEMBREE:

Q THESE ARE LISTED AS COURT'S EXHIBITS FIVE AND SIX. AND ASK IF YOU WILL TAKE A LOOK AT THOSE AND--

A YEAH, ONE WAS THE MOTHER, ONE WAS THE CHILD. YEAH.

Q OKAY. IS THIS -- AND IF YOU NEED TO TAKE A LOOK AT

THEM, DO THAT, BUT--
A YEAH, THESE ARE THE ONES I...
Q ALL RIGHT. IS THAT THE -- IS THAT THE COMPLETE FILE--
A YES.
Q -- THE EXTENT OF THE DOCUMENTS YOU REVIEWED--
A YES.
Q -- TO REACH THE CONCLUSION OR TO OFFER THE CONCLUSION TODAY THAT MR. STANKO'S GOT BIRTH DEFECTS?
A WELL, I WOULDN'T SAY HAS. I'D SAY IT WAS A POSSIBILITY.
Q OKAY.
A POSSIBILITY.
Q OKAY.
A HE WAS HOSPITALIZED I RECALL FOR FIVE DAYS WHICH IS UNUSUAL FOR AN INFANT TO BE HOSPITALIZED THAT LONG -- OR FOUR OR FIVE DAYS. SO I THOUGHT THE PHYSICIANS WERE CONCERNED WITH HIS--
Q THAT WAS BACK IN 1968, THOUGH. DIDN'T THEY KEEP MAMA AND BABY A LITTLE LONGER BACK IN THE DAY?
A I THINK HER BIRTH WAS VAGINAL, SO THEY WOULDN'T HAVE HAD TO KEEP HER A LONG TIME. SO I WAS -- I -- I INTERPRETED THAT TO MEAN THEY WERE CONCERNED ABOUT THE BABY.
Q WENT IN ON THE 14TH, CHECKED OUT ON THE 18TH?

A YEAH. AND SHE -- HE WAS JAUNDICED AT BIRTH WHICH MEANS LIVER INVOLVEMENT.

Q LOTS OF BABIES ARE JAUNDICED AT BIRTH; AREN'T THEY?

A YES, BUT IT'S NOT A GOOD SIGN.

Q PRETTY COMMON. YEAH, IT'S SOMETHING TO BE CONCERNED ABOUT, BUT DOESN'T MEAN BIRTH DEFECTS. IT MEANS--

A NOT NECESSARILY, BUT I THINK WHAT STRUCK ME MOST IS SOME OF HIS REFLEX BEHAVIORS WERE NOT NORMAL. SO IF A BABY'S GOT ABNORMAL REFLEX BEHAVIORS, THAT TELLS ME THE BRAIN HASN'T COMPLETED ITS DEVELOPMENT.

NOW, IT MIGHT CONTINUE DEVELOPING AFTER BIRTH, BUT THAT WAS A LITTLE BIT OF A CONCERN.

Q NOW, DID YOU -- DOES THAT SOMETIMES -- THAT DEVELOPMENT THAT CONTINUES, IS THAT -- TAKE PLACE IN JUST A MERE FEW DAYS? CAN IT BE VERY QUICK?

A USUALLY IT WOULD TAKE WEEKS. IT WILL TAKE WEEKS OR MONTHS.

Q BUT THAT'S THE EXTENT OF THE DOCUMENTS--

A YEAH, THAT'S THE EXTENT--

Q -- THAT YOU REVIEWED--

A YEAH.

Q -- TO OFFER THAT OPINION?

A YES.

Q OKAY. THE -- DOCTOR, MR. DIGGS ASKED YOU SOME QUESTIONS ABOUT SORT OF THE EMOTIONAL BEHAVIORS OR THE,

YOU KNOW, THAT EMOTIONAL -- WELL, EMOTIONAL BEHAVIOR CAN OVERRIDE THE FRONTAL LOBES. AND THAT--

A YEAH.

Q -- THAT THAT LIMBIC SYSTEM CAN JUST BE SO POWERFUL--

A YES.

Q -- THAT IT CAN CAUSE SOMEONE TO DO SOMETHING THEY MIGHT NOT NORMALLY DO. IS THAT A FAIR--

A I GIVE YOU AN EXAMPLE? ROAD RAGE.

Q OKAY.

A THAT'S ROAD RAGE -- PROBABLY LIMBIC SYSTEM OVERRIDING FRONTAL LOBE FUNCTIONING.

Q RIGHT.

A TEMPORARILY.

Q BUT YOU'RE NOT SAYING THAT EVERYONE WHO HAS EXPERIENCED ROAD RAGE IS A PSYCHOPATH; ARE YOU?

A NO, CERTAINLY NOT.

Q OH, NO. CERTAINLY NOT. SO -- AND YOU'RE NOT SUGGESTING OR SAYING TO THIS JURY THAT EVERYBODY THAT HAS ROAD RAGE HAS FRONTAL LOBE PROBLEMS; ARE YOU?

A CERTAINLY NOT.

Q NO. SO THESE ARE NORMAL FOLK--

A YES.

Q -- THAT HAVE -- THAT HAVE EMOTIONAL OUTBURSTS?

A EPISODE OF EMOTIONALITY.

Q AND THEY'RE RESPONSIBLE FOR THEMSELVES. YOU'RE

NOT -- ARE YOU SUGGESTING -- LET ME ASK YOU THIS. ARE YOU SUGGESTING TO THIS JURY THAT BECAUSE IT'S AN EMOTIONAL OUTBURST, THAT THE PERSON IS NOT RESPONSIBLE FOR THEIR ACTIONS, THAT THEY--

A NO, NOT ASSUMING INTACT BRAIN. ASSUMING A NORMAL BRAIN, NO, THEY'RE RESPONSIBLE.

Q OKAY. THEY'RE RESPONSIBLE?

A YES.

Q EVEN THOUGH -- EVEN THOUGH THEY LOST CONTROL?

A AND THEY DO SOMETHING BAD, YES.

Q OKAY. AND MR. STANKO'S BRAIN IS DIMINISHED AND YOU'RE SAYING BECAUSE IT'S DIMINISHED, HIS CAPACITY TO--

A IT MAY HAVE PLAYED A FACTOR.

Q -- TO -- THAT BECAUSE HIS BRAIN IS SOMEHOW DIMINISHED, THAT IT MAY HAVE -- MAY NOT HAVE -- AND I HAVEN'T NOTHING -- I MEAN, WE'RE NOT -- WE DON'T HAVE AN INSANITY ISSUE HERE.

A EXACTLY.

Q BUT IF IT DID, IT JUST DIMINISHED HIS ABILITY TO CONTROL HIMSELF.

A TO CONTROL THAT IMPULSIVE BEHAVIOR.

Q BECAUSE HE IS ABLE TO DO THAT.

A UNDER MOST CIRCUMSTANCES.

Q ALL RIGHT. DR. ALBINIAK, THANK YOU. MR. DIGGS HAS A FEW FOLLOW-UP.

MR. DIGGS: JUST A COUPLE VERY BRIEFLY.

THE COURT: YOU MAY PROCEED.

REDIRECT EXAMINATION

BY MR. DIGGS:

Q WHEN AN INDIVIDUAL IS BORN, ISN'T IT TRUE THAT THEY DO NOT DEVELOP ADDITIONAL BRAIN MATTER?

A ALL THE NERVE CELLS THAT YOU WILL EVER HAVE ARE PRESENT AT BIRTH.

Q OKAY. PRESENT AT BIRTH. SO WE TALK ABOUT CONTINUED DEVELOPMENT, WE'RE NOT TALKING ABOUT ADDITIONAL MATERIAL?

A NOT NERVE CELLS, NO.

Q NOT NERVE -- NOT THE GRAY MATTER?

A NO.

Q NOT THE BRAIN MATTER. WHAT DOES CONTINUE TO DEVELOP?

A THE CELLS HAVE TO CONNECT WITH EACH OTHER. WE CALL THOSE DENDRITES AND SYNAPSES. THAT'S WHAT GROWS IN A BABY'S BRAIN.

Q SO IF THERE WAS A DEFECT THERE, IT'S NOT GOING TO -- HE'S NOT GOING TO GROW OUT IT IN TERMS OF--

A PROBABLY NOT IN--

Q -- IN TERMS OF--

A IF THE CELLS ARE DAMAGED, NERVE CELLS ARE DAMAGED, NO. NO.

Q AND IF THERE IS A -- A LOWER AMOUNT OF GRAY MATTER IN THE BRAIN AT BIRTH, HE'S NOT GOING TO PRODUCE ANY NEW GRAY

MATTER AS HE GETS OLDER?

A NO.

Q NOW, WITH RESPECT TO THIS 2 PERCENT FIGURE ON DR. GUR, THAT IS JUST WITH RESPECT TO THE MRI; CORRECT?

A YES.

Q WE HAVEN'T THROWN IN ANY OTHER FUNCTIONAL DEFICIENCIES.

A RIGHT, THE PET SCAN.

Q CORRECT?

A YES.

Q AND SO WHEN WE THROW IN THE FUNCTIONAL DEFICIENCIES, WE'RE GOING FAR LOWER, ARE WE NOT, IN TERMS OF--

A WELL, THE POINT IS YOU CAN HAVE A LOSS OF TISSUE WITH NORMAL FUNCTION. YOU CAN HAVE A LOSS OF TISSUE IN ABNORMAL FUNCTION, THAT COMPLICATES THINGS. YOU HAVE AN ADDITIONAL IMPAIRMENT BASICALLY.

Q WELL, DID DR. GUR REVIEW ANYTHING TO YOUR KNOWLEDGE OTHER THAN THE MRI?

A NO, HE NEVER SAW THE PET SCANS, NO.

Q ALL RIGHT. AND SO WE FIND JUST BASED ON THE MRI AND THE LACK -- AND THE STRUCTURE--

A STRUCTURE.

Q -- THAT THERE'S 2 PERCENT?

A CORRECT.

Q BUT THEN YOU'RE NOT OFFERING OPINION -- HE'S NOT

GOING TO STAY IN THAT 2 PERCENT WHEN WE THROW IN THE ADDITIONAL STRUCTURE OF -- EXCUSE ME -- FUNCTIONAL--

A IT WOULD BE LOWER.

Q IT WOULD BE--

A HOW MUCH LOWER IS DEBATABLE.

Q IT WOULD BE LOWER?

A LOWER.

Q WHO IS DR. GUR, BY THE WAY?

A DR. GUR IS THE HEAD OF THE BRAIN IMAGING CENTER AT THE UNIVERSITY OF PENNSYLVANIA, ONE OF THE EXPERTS IN THE UNITED STATES IN BRAIN SCAN.

Q AND IS HE HELD IN HIGH ESTEEM--

A YES, HE IS.

Q -- IN THE --

A HE'S HEAVILY--

Q -- RECEIVED?

MR. HEMBREE: YOUR HONOR, THIS IS IMPROPER REDIRECT.

THE COURT: IT IS OUTSIDE OF THE SCOPE. SUSTAINED.

MR. DIGGS: YOUR HONOR, COULD I BE HEARD?

THE COURT: WELL, NO, NO, NO. SIDE BAR PREFERABLY.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

THE COURT: THE QUESTION -- YOU MAY PROCEED.

MR. DIGGS: YOUR HONOR, THAT CONCLUDES -- I DON'T HAVE ANY ADDITIONAL REDIRECT.

THE COURT: ANY OBJECTION TO THE WITNESS BEING EXCUSED FROM THE STATE?

MR. HEMBREE: NONE FROM THE STATE, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. DIGGS: NONE, YOUR HONOR.

THE COURT: SIR, YOU'RE EXCUSED. HAVE A GOOD DAY.

(WHEREUPON THE WITNESS LEFT THE STAND.)

THE COURT: MADAM FORELADY, LADIES AND GENTLEMEN, WE'RE GOING TO TAKE ADVANTAGE OF THIS BREAK IN TESTIMONY TO TAKE OUR EVENING RECESS.

DURING THE BREAK PLEASE DO NOT DISCUSS THE CASE AMONG YOURSELVES. AS I HAVE EXPLAINED TO YOU ON YESTERDAY, AND YOU WILL HEAR ME SAY THIS OVER AND OVER AGAIN, WE HAVE TO GO TO ALL LENGTHS TO MAKE SURE THAT WE PREVENT ANY PREMATURE DELIBERATIONS IN THIS CASE.

AND IT'S ESSENTIAL THAT AT ALL TIMES YOU MAINTAIN YOUR IMPARTIALITY UNTIL YOU HAVE HEARD ALL OF THE EVIDENCE, THE ARGUMENTS OF COUNSEL, AND THE COURT'S CHARGE ON THE LAW, AND UNTIL YOU'RE RELEASED TO DELIBERATE REGARDING THIS MATTER AT THE APPROPRIATE TIME AMONG YOURSELVES.

PLEASE LEAVE YOUR NOTEPADS IN YOUR SEATS. OF COURSE, WE WILL SECURE THOSE DURING THE RECESS AND PROTECT YOUR PRIVACY.

I AM SURE THAT Y'ALLS ACCOMMODATIONS ARE COMFORTABLE. I KNOW THAT IT'S INCONVENIENT. I NEED TO EMPHASIZE ON BEHALF OF THE STATE AS WELL AS THE DEFENSE THAT WE REALLY APPRECIATE YOUR SACRIFICE.

WE KNOW THAT IT IS SLIGHTLY UNCOMFORTABLE. THE ONLY THING THAT MAKES HOTELS BEARABLE FOR ME IS A TV. SO I UNDERSTAND. I UNDERSTAND HOW FRUSTRATING THAT MAY BE. SO I WANTED TO TELL YOU THAT WE REALLY DO APPRECIATE YOUR SACRIFICE.

HOPING Y'ALL HAVE A WONDERFUL EVENING AND WE WILL RESUME THE TRIAL IN THE MORNING AT 9:30. Y'ALL HAVE A GOOD EVENING. GET SOME REST.

(WHEREUPON THE JURY LEFT THE COURTROOM AT 5:57 PM.)

THE COURT: YOU MAY BE SEATED. ANYTHING BEFORE WE BREAK FOR THE EVENING FROM THE STATE?

MR. HEMBREE: NOTHING FROM THE STATE, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. DIGGS: YOUR HONOR, IF YOU WILL GIVE US JUST A SECOND.

THE COURT: SURE.

MR. KELLY: JUDGE, THERE IS ONE THING.

THE COURT: CERTAINLY.

MR. KELLY: IF WE MAY, MA'AM, WE'D LIKE TO ASK THAT WE BEGIN TOMORROW AT 10:30 RATHER THAN 9:30 BECAUSE WE HAVE GOT THESE EXPERTS COMING FROM OUT OF TOWN.

THE COURT: I WOULD ASSUME THE STATE WILL HAVE NO EXCEPTION?

MR. HEMBREE: NO, YOUR HONOR. WE HAVE NO OBJECTION.

THE COURT: WE WILL DO THAT. I WILL ACCOMMODATE YOU.

MR. KELLY: THANK YOU, MA'AM.

THE COURT: NOT A PROBLEM. IF WE COULD LET EVERYBODY KNOW SO THEY DON'T BRING THE JURY OVER TOO EARLY, THAT IT'S 10:30 INSTEAD OF 9:30. AND I WILL SEE YOU ALL IN THE MORNING AT -- WELL, I WILL BE HERE EARLY, BUT, YOU KNOW, WE WILL BE PREPARED TO START AT 10:30.

MR. KELLY: THANK YOU, MA'AM.

THE COURT: THANK YOU. Y'ALL HAVE A GOOD EVENING.

(COURT IN RECESS FOR THE EVENING.)

***** AUGUST 9TH, 2006 *****

THE COURT: IS THE DEFENSE READY TO PROCEED?

MR. DIGGS: YES, YOUR HONOR.

THE COURT: DO WE HAVE MR. STANKO? PLEASE BRING IN THE JURY.

(JURY ENTERED THE COURTROOM AT 10:43 AM.)

THE COURT: YOU MAY BE SEATED. LADIES AND GENTLEMEN, I HOPE THAT YOU ALL HAD A RESTFUL EVENING. WE WILL NOW RESUME WITH THE TRIAL. YOU MAY PROCEED.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

MR. DIGGS: WE WOULD CALL DR. JAMES THRASHER.

THE COURT: SIR, IF YOU WOULD COME TO THE WITNESS STAND AND BE SWORN.

DR. JAMES THRASHER, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE WITNESS: JAMES W THRASHER, JUNIOR, T-H-R-A-S-H-E-R.

THE COURT: YOU MAY PROCEED.

MR. DIGGS: THANK YOU.

DIRECT EXAMINATION

BY MR. DIGGS:

Q DR. THRASHER, WHAT DO YOU DO FOR A LIVING?

A I'M A PRACTICING PSYCHIATRIST IN MYRTLE BEACH, SOUTH CAROLINA.

Q OKAY. WHERE WERE YOU ORIGINALLY FROM?

A JAMESTOWN, NEW YORK.

Q ALL RIGHT. AND WOULD YOU GIVE US THE BENEFIT OF YOUR EDUCATION, PLEASE SIR.

A YES. I GRADUATED FROM THE -- WELL, IT'S OLD DOMINION UNIVERSITY IN NORFOLK, VIRGINIA. WAS SO LONG AGO -- WITH A BACHELOR OF SCIENCE DEGREE. THEN I WENT TO THE MEDICAL COLLEGE OF VIRGINIA IN RICHMOND, VIRGINIA WHERE I GRADUATED WITH A DEGREE IN MEDICINE.

Q YOU WERE AN HONORS GRADUATE IN COLLEGE?

A YES, I WAS.

Q WHERE DID YOU GO TO FOR YOUR -- WHERE DID YOU GO FOR YOUR MEDICAL TRAINING?

A IN THE MEDICAL COLLEGE OF VIRGINIA IN RICHMOND, VIRGINIA. IT'S NOW CALLED VIRGINIA COMMONWEALTH UNIVERSITY.

Q OKAY. AND WHEN WAS THAT?

A THAT WAS 1961 THROUGH 1965.

Q ALL RIGHT. DID YOU DO AN INTERNSHIP?

A I DID, IN CHARLESTON, SOUTH CAROLINA, '65 THROUGH '66.

Q OKAY. HERE IN CHARLESTON?

A YES.

Q SOUTH CAROLINA?

A YES.

Q AND HOW ABOUT RESIDENCY? DID YOU DO A RESIDENCY OF ANY KIND?

A I DID A THREE YEAR ADULT PSYCHIATRIC RESIDENCY AT THE NAVY HOSPITAL AT PHILADELPHIA, PENNSYLVANIA '66 THROUGH '69.

Q NOW, DID YOU HAVE ANY OTHER EDUCATION BEYOND YOUR MEDICAL TRAINING?

A YES. I HAD A -- I HAD A ONE YEAR FORENSIC PSYCHIATRY FELLOWSHIP TRAINING AT THE UNIVERSITY OF PENNSYLVANIA IN PHILADELPHIA.

Q WHAT DO YOU DO -- WHAT DOES ONE STUDY IN A FORENSIC PSYCHIATRIC -- OR PSYCHIATRY FELLOWSHIP?

A WELL, IT'S A BRANCH OF TRAINING AND PRACTICE IN WHICH ONE STUDIES AND TREATS THE PERSONS WITH MENTAL DISEASES AS THEY MAY INTERFACE OR NOT WITH LEGAL AREAS INCLUDING CIVIL AND CRIMINAL CONCEPTS.

Q AND DO YOU REMEMBER -- CAN YOU GIVE US THE DATES WHEN YOU WERE IN THE FORENSIC PSYCHIATRY FELLOWSHIP?

A I THINK IT WAS '71 THROUGH '72.

Q AND HOW ABOUT ANY FURTHER TRAINING BEYOND THAT?

A I WENT TO LAW SCHOOL AT TEMPLE UNIVERSITY IN PHILADELPHIA, PENNSYLVANIA AND GRADUATED THERE WITH A DEGREE IN LAW, JURIS DOCTORATE.

Q DID YOU EVER TAKE ANY BAR EXAMS OR...

A I TOOK THE PENNSYLVANIA BAR EXAM AND PASSED IT.

Q OKAY.

A AND I WAS LICENSED AS A -- AN ATTORNEY IN THE STATE

OF PENNSYLVANIA.

Q AND I'M SORRY, YOU MAY HAVE ANSWERED THIS ALREADY, BUT DO YOU REMEMBER WHEN YOU GRADUATED WITH YOUR JD FROM LAW SCHOOL?

A I THINK IT WAS IN '78.

Q NOW, WHAT IS THE NAVAL JUSTICE SCHOOL?

A OH, THAT'S THE JAG SCHOOL, THE NAVY JAG SCHOOL. I WAS ON ACTIVE DUTY IN THE MILITARY.

Q YES, SIR.

A AND WITH A -- FOR 26 YEARS PRACTICING AS A PHYSICIAN AND A PSYCHIATRIST. AND WHEN I GOT THAT LAW DEGREE, I WAS SENT TO THE NAVY JAG SCHOOL IN NEWPORT, RHODE ISLAND TO STUDY MILITARY LAW.

Q ALL RIGHT. DID YOU EVER HAVE ANY NEED TO PUT THAT TO USE?

A MANY TIMES.

Q OKAY. TELL US ABOUT THAT, JUST TO -- A GENERAL OVERVIEW.

A WELL, MOST OF IT HAD TO DO WITH SERIOUS LEGAL OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

Q OKAY. HOW LONG DID YOU DO THAT TYPE OF WORK?

A WELL, EVER SINCE I GRADUATED UNTIL I RETIRED FROM THE NAVY.

Q OKAY. WHEN WAS THAT?

A 1988.

Q ALL RIGHT. ARE YOU BOARD CERTIFIED?
A I AM, IN PSYCHIATRY.
Q AND WHO WOULD BE THE -- WHAT IS THE ENTITY THAT DOES THE BOARD CERTIFICATION IN PSYCHIATRY?
A THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY.
Q HOW DO YOU GET BOARD CERTIFIED?
A YOU -- ONE HAS TO HAVE A CERTAIN AMOUNT OF BASIC TRAINING AND -- AND PROOF THAT YOU HAD SUCCESSFULLY COMPLETED THAT, AND THEN YOU'RE ELIGIBLE TO TAKE A -- AN EXAM, AND TAKES -- I THINK YOU HAVE TO HAVE TWO -- TWO YEARS OF CLINICAL PRACTICE BEFORE YOU TAKE THE EXAM IN ADDITION TO THE TRAINING BEFORE THAT, THEN YOU TAKE THE EXAM. IF YOU PASS IT, YOU'RE BOARD CERTIFIED.
Q AND DO YOU REMEMBER OR CAN YOU TELL US WHEN THAT WAS APPROXIMATELY, WHEN YOU BECAME BOARD CERTIFIED?
A I DON'T REMEMBER THE EXACT DATE OF THAT. I'VE GOT IT ON A CV.
Q OKAY. LET ME ASK YOU, DO YOU KNOW HOW MANY PSYCHIATRISTS -- DO YOU HAVE TO BE BOARD CERTIFIED TO BE A PRACTICING PSYCHIATRIST?
A NO, YOU DON'T.
Q HOW MANY PSYCHIATRISTS ARE BOARD CERTIFIED?
A I THINK THE GREATER MAJORITY OF THEM ARE.
Q OKAY. TELL US WHAT LICENSES YOU HOLD.
A I CURRENTLY HOLD A LICENSE TO PRACTICE MEDICINE

SURGERY IN SOUTH CAROLINA. I HAD OTHER LICENSES, BUT THEY'RE ALL INACTIVE NOW.

Q ALL RIGHT. OTHER LICENSES SUCH AS WHAT?

A WELL, I PRACTICED IN NEVADA FOR PERIOD OF TIME WHERE I RAN A MENTAL HOSPITAL AND I HAD TO HAVE A LICENSE TO PRACTICE THERE.

Q OKAY.

A I PRACTICED IN PENNSYLVANIA AND I HAD A PENNSYLVANIA LICENSE. I PRACTICED IN FLORIDA WHEN I WAS THERE WITH THE NAVY, AND IT -- ORIGINALLY PHYSICIANS ON ACTIVE DUTY IN THE MILITARY DIDN'T HAVE TO HAVE A LICENSE IN THE STATE IN WHICH THEY WERE LOCATED BY THE MILITARY. IT CHANGED. SO I HAVE FOUR LICENSES.

I GOT A CALIFORNIA LICENSE THAT I NEVER PUT TO WORK BECAUSE I ANTICIPATED THAT -- I GOT IT BECAUSE I ANTICIPATED THAT WITH THE MILITARY, MIGHT WELL BE STATIONED IN CALIFORNIA, BUT THAT NEVER CAME TO BE, BUT I GOT THAT LICENSE BUT I NEVER PUT IT TO USE.

Q ALL RIGHT. HAVE YOU HAD ANY APPOINTMENTS OR ENGAGED IN OTHER PROFESSIONAL ACTIVITIES?

A YES. I HAVE...

Q LET'S START WITH THE MOST RECENT AND GO BACK--

A WELL...

Q -- JUST FOR A LITTLE WAYS. PRESENTLY WHAT DO YOU DO?

A I'M IN PRIVATE PRACTICE IN MYRTLE BEACH, SOUTH

CAROLINA, AND HAVE BEEN SINCE 1993.
Q AND IN YOUR PRIVATE PRACTICE, WHAT DO YOU DO?
A I SEE PSYCHIATRIC PATIENTS ON DAILY, REGULAR BASIS.
Q AND DO YOU TREAT THEM OR--
A I DO.
Q -- COUNSEL?
A YES, I DO, A GREAT NUMBER OF THEM.
Q AND PRIOR TO YOUR PRIVATE PRACTICE, CAN YOU TELL US WHAT YOU DID?
A I WAS ON ACTIVE DUTY IN THE MILITARY. WELL, I'M SORRY. I WAS A MEDICAL DIRECTOR OF THE COASTAL CAROLINA HOSPITAL WHICH WAS IN MYRTLE BEACH, AND IT'S -- IT WAS A SMALL PSYCHIATRIC FACILITY. I WAS A MEDICAL DIRECTOR FOR A BRIEF PERIOD.
Q ALL RIGHT. WERE YOU EVER A STAFF PSYCHIATRIST OR CONSULTING PSYCHIATRIST WITH ANY HOSPITALS OR...
A YES, I WAS. I WAS AT THAT ONE INITIALLY, THEN I BECAME THE -- THE MEDICAL DIRECTOR.
Q ALL RIGHT. HOW ABOUT -- YOU DON'T HAVE A COPY OF YOUR CV; DO YOU?
A I DON'T HAVE IT WITH ME, NO.
Q I WANT TO JUST HAND YOU THIS AND LET YOU -- LET YOU USE THIS TO REFRESH YOUR MEMORY WITH RESPECT TO OTHER THINGS THAT YOU HAVE DONE--
A CERTAINLY.

Q -- IN YOUR PROFESSIONAL CAREER. I WANT TO ASK YOU JUST TO REVIEW THAT AND MAYBE I CAN ASK YOU A COUPLE OF QUESTIONS ABOUT SOME OF THOSE.

A SURE. UH-HUH.

Q LET ME TAKE THAT BACK FROM YOU.

A SURE.

Q IN THE CAPACITY AS A PSYCHIATRIST OR COUNSELOR, HAVE YOU EVER BEEN ASSOCIATED OR WORKED WITH INMATES OR VIOLENT OFFENDERS?

A YES, I HAVE. I WAS A CONSULTING PSYCHIATRIST AT THE JAIL IN CHARLESTON, SOUTH CAROLINA, FOR A TIME WHERE I WAS TEACHING RESIDENT PHYSICIANS IN TRAINING AS IT WAS A PORTION OF THEIR TRAINING AT THE TIME, AND I WAS ALSO A CONSULTING PSYCHIATRIST FOR THE -- THE FEDERAL HOSPITAL IN -- HOSPITAL -- THE FEDERAL PRISON HOSPITAL IN ROCHESTER, MINNESOTA.

Q HOW LONG DID YOU DO THOSE TYPES OF JOBS, ENGAGE IN THOSE TYPES OF RESPONSIBILITIES?

A WELL, THE -- THE ONE IN CHARLESTON WAS FOR A FEW YEARS AND THE ONE IN ROCHESTER, MINNESOTA WAS ON TWO DIFFERENT OCCASIONS THAT AMOUNTED I THINK CLOSE TO SIX MONTHS OR MAYBE A YEAR.

Q NOW, HOW ABOUT PROFESSIONAL SOCIETIES, DO YOU BELONG TO ANY?

A I BELONG TO THE AMERICAN ACADEMY OF PSYCHIATRY AND

LAW AND THE AMERICAN PSYCHIATRIC ASSOCIATION.

Q HAVE YOU EVER BEEN INVOLVED IN THE GENERATING PROFESSIONAL PUBLICATIONS OR PRESENTATIONS?

A YES, I HAVE. I PUBLISH -- I CO-PUBLISHED AN ARTICLE ON THE -- ON THE TRAINING OF PSYCHIATRISTS IN FORENSIC PSYCHIATRY ACROSS THE NATION IN CONCERT WITH DR. ROBERT SADOFF A GOOD NUMBER OF YEARS AGO, THE ASSESSMENT OF THE PROGRAMS THAT WERE IN ACTION AT THAT TIME.

AND I CO-AUTHORED A PAPER WITH AN ATTORNEY CONCERNING THE USE OF HYPNOSIS IN A TRIAL, AND THAT WAS A FIRST. THAT -- THAT TO MY KNOWLEDGE THAT WAS THE FIRST TIME THAT HYPNOSIS HAD BEEN ENTERED INTO A CRIMINAL TRIAL SETTING. BOTH OF THESE WERE A GOOD NUMBER OF YEARS AGO.

MR. DIGGS: YOUR HONOR, WE'D OFFER DR. THRASHER AS AN EXPERT IN PSYCHIATRY AND FORENSIC PSYCHIATRY.

THE COURT: ANY OBJECTIONS OR QUESTIONS?

MR. HEMBREE: NO, YOUR HONOR.

THE COURT: SO ADMITTED. YOU MAY PROCEED.

BY MR. DIGGS:

Q NOW, DR. THRASHER, DO YOU KNOW STEPHEN STANKO?

A I HAVE MET THE MAN, YES, I HAVE, TWICE.

Q AND DO YOU HAVE AN OPINION WITH RESPECT TO THE ISSUE OF SANITY AT THE TIME OF THE INCIDENT THAT WE'RE HERE ABOUT IN THIS PARTICULAR CASE?

A YES, I HAVE.

Q WHAT IS THAT OPINION?
A THAT MR. STANKO DID HAVE A MENTAL DISEASE, DEFECT OR DISORDER AT THE TIME OF THE COMMITMENT OF THESE INCIDENTS AND THAT HE WAS NOT ABLE TO -- TO -- TO -- NOR APPRECIATE THE DIFFERENCE BETWEEN MORAL OR LEGAL RIGHT OR WRONG AND THAT HE WAS NOT ABLE -- AS A RESULT OF THOSE DEFECTS HE WAS NOT ABLE TO CONFORM HIS BEHAVIOR TO THE REQUIREMENTS OF THE LAW.
Q YOU STATE IN YOUR REPORT THAT 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 ACT CHARGED AS MORALLY OR LEGALLY WRONG. ARE THOSE YOUR WORDS?
A CORRECT.
Q NOW, I WANT TO TALK TO YOU A LITTLE BIT ABOUT WHAT YOU DID TO COME TO THAT CONCLUSION.
A ALL RIGHT.
Q AND IF YOU WOULD, LET ME START -- I HAVE A COPY OF YOUR REPORT HERE. I JUST WANT TO START WITH THE SETTING. WHAT IS THAT, WHAT DO YOU MEAN BY THE SETTING AS YOU HAVE WRITTEN IN YOUR REPORT?
A WELL, THE SETTING -- EXCUSE ME -- THE SETTING IS THE PLACE IN WHICH I SAT WITH THIS MAN AND TALKED TO HIM AND GOT THE INFORMATION, DID THE EXAMINATION.

Q YOU TALKED TO MR. STANKO?
A YES, I DID.
Q ALL RIGHT. AND CAN YOU TELL US THE CONDITIONS WHEREIN THAT TOOK PLACE?
A IT WAS IN THE -- IN THE LIBRARY AT THE DETENTION CENTER IN GEORGETOWN THE FIRST TIME, AND THEN IT WAS IN A SMALL INTERVIEW ROOM SOMEWHERES ELSE IN THE FACILITY -- THANK YOU VERY MUCH -- SOMEWHERES ELSE IN THE FACILITY AND NEAR A -- NEAR A COMMON PASSAGEWAY.
Q ALL RIGHT. AND HOW WAS IT THAT YOU CAME OR BECAME INVOLVED IN THE CASE? WHY WERE YOU THERE?
A WELL, YOU HAD CALLED ME BECAUSE OF YOUR INTERACTIONS WITH MR. STANKO SOMETIME EARLIER AND HE HAD ALLEGED THAT HE HAD ABSOLUTELY NO MEMORY OF THIS, SOME VERY SERIOUS CRIMES. A PERSON HAD BEEN KILLED AND ANOTHER PERSON AND THEIR -- A MOTHER AND A DAUGHTER, THE MOTHER HAD BEEN KILLED AND THE DAUGHTER HAD BEEN BADLY INJURED AND RAPED, AND HAD NO MEMORY OF IT AT ALL, NOT A THING.
Q SO YOU WERE MADE KNOWN OF THE CHARGES WITH RESPECT TO MR. STANKO AND THE ALLEGED ACTIVITIES, CONDUCT HE HAD BEEN ENGAGED IN?
A YES.
Q DID YOU HAVE ANY OPINION AT THAT TIME AS TO ANY OF THESE ISSUES WITH RESPECT TO SANITY OR ANYTHING LIKE THAT?
A I'M SORRY?

Q DID YOU HAVE ANY OPINION AT THAT POINT? HAD YOU FORMED AN OPINION?

A WHEN I WAS TALKING WITH HIM?

Q YEAH. WELL NO, WHEN I INITIALLY ENGAGED YOU IN THIS CASE.

A NO.

Q TELL US ABOUT THE INTERVIEW THAT YOU HAD WITH HIM. INITIALLY WHAT DID YOU DISCUSS WITH MR. STANKO ABOUT THIS PROCEDURE?

A ABOUT THIS PROCEDURE? I WANTED TO KNOW IF HE KNEW WHAT HE HAD BEEN CHARGED WITH, JUST A VERY IMPORTANT THING, AND HE WAS FULLY AWARE OF THAT, AND I WANTED TO KNOW IF HE KNEW WHAT HIS RIGHTS WERE AND--

Q OKAY.

A -- AS A DEFENDANT. AND I WANTED TO KNOW HIS EXPLANATION OF WHAT WAS GOING ON. I WANTED TO KNOW IF HE GOT ALONG WITH HIS ATTORNEYS, AND INDEED HE DID.

Q WHAT DID YOU GATHER FROM THAT? WHAT DID YOU TAKE AWAY FROM THAT PARTICULAR ENCOUNTER?

A WELL, HE WAS DOING QUITE WELL AT THAT POINT. HE WAS INTACT AND IN TOUCH AND WHAT -- IN FULL AWARENESS OF THE THINGS THAT WERE GOING ON AND WAS DEALING WITH IT REASONABLY AND SENSIBLY.

Q ALL RIGHT. DID YOU SPEND OR DID YOU MAKE AN EFFORT TO DETERMINE WHETHER MR. STANKO WAS COMPETENT AT THAT

TIME?
A YES, I DID.
Q AND WHAT DO YOU MEAN BY COMPETENCY, RIGHT -- GOT A HEADING IN YOUR REPORT ABOUT COMPETENCY.
A WELL--
Q WHAT ARE YOU LOOKING FOR THERE?
A WELL, A PERSON THAT -- TO BE COMPETENT TO ATTEND THESE PROCEEDINGS HAS TO KNOW WHAT THEY'RE CHARGED WITH, HAS TO BE ABLE TO GET ALONG WITH AN ATTORNEY AND HELP PRESENT HIS CASE AND HAS TO KNOW WHAT -- IN A GENERAL SENSE WHAT THE PARTICIPANTS IN THE TRIAL SETTING DO, WHAT THEIR JOB IS, WHAT THE JUDGE, THE ATTORNEYS, BOTH SIDES, THE PROSECUTOR AND THE DEFENSE ATTORNEY, AND THE JURY.
Q HOW DOES THAT -- WELL, WHAT WAS YOUR CONCLUSION WITH RESPECT TO HIS COMPETENCY?
A HE WAS COMPETENT, YEAH.
Q ALL RIGHT. HOW DOES THAT FIT, THOUGH, WITH THE OPINION YOU GAVE ME PREVIOUSLY ABOUT HIM BEING INSANE AT THE TIME OF THIS OFFENSE?
A WELL, THE...
Q WHAT'S THE DIFFERENCE?
A WELL, HE -- AT THE TIME OF THE COMMISSION OF THE ACTS HE WAS BEHAVING SIGNIFICANTLY AND RATHER DRAMATICALLY DIFFERENT THAN THE TIME OF THE EXAMINATION.
Q HOW CAN ONE BE COMPETENT AT ONE POINT AND INSANE AT

ANOTHER POINT?

A WELL, IT CAN COME ABOUT FROM MENTAL ILLNESSES AND BRAIN INJURIES AND BRAIN DYSFUNCTION LIKE SEIZURES, THOUGH HE DOES NOT HAVE SEIZURES.

Q I SEE.

A BUT IT CAN MANIFEST AT ONE POINT OR ANOTHER, NORMALLY DEPENDING UPON WHAT THE SITUATION IS --

Q OKAY.

A -- IMPENDING ON HIM.

Q I SEE. ONE MAY HAVE A SEIZURE FOR ONE MOMENT AND NOT BE HAVING A SEIZURE AT ANOTHER MOMENT?

A RIGHT.

Q DUE TO WHAT?

A MISFIRING OF THE BRAIN.

Q ALL RIGHT. SO SIMPLY BECAUSE SOMEONE HAS A BRAIN DEFECT THAT CAUSES THEM TO HAVE SEIZURES DOESN'T MEAN THEY'RE ALWAYS GOING TO BE IN A STATE OF HAVING SEIZURES?

A NO.

Q IS THAT THE WAY INSANITY CAN WORK?

A YES.

Q OKAY. NOW, DO YOU HAVE A COPY OF YOUR REPORT WITH YOU?

A I DO.

Q WOULD YOU OPEN THAT UP, PLEASE?

A YEAH. UH-HUH.

Q LET'S GO TO PAGE TWO. AND ON PAGE TWO OF YOUR REPORT YOU TALK ABOUT DOCUMENTS THAT YOU HAVE REVIEWED WITH RESPECT TO THIS CASE. CAN YOU TELL US WHAT IT WAS SPECIFICALLY YOU REVIEWED AND WHEN YOU REVIEWED IT AND WHY YOU REVIEWED IT?

A WELL, I ASKED YOU FOR THE AVAILABLE RECORDS AND REPORTS CONCERNING THE CASE AND YOU PROVIDED THEM FOR ME HERE.

Q DID WE PROVIDE YOU EVERYTHING THAT YOU ASKED US FOR?

A YES. AND THAT -- THAT LIST OF THINGS INCLUDED REPORTS AND ACTUAL CT DISKS THAT WERE OF SOME IMAGING THAT HAD BEEN DONE OF MR. STANKO.

Q OKAY. DID YOU HAVE ANY OTHER REPORTS, TESTS THAT HAD BEEN DONE, REPORTS OF TESTS?

A OTHER THAN THIS LIST?

Q NO. DID YOU HAVE, FOR EXAMPLE, AN -- THE MRI RESULTS?

A YES, I DID.

Q ALL RIGHT. AS A RESULT OF YOUR REVIEW OF THOSE MATERIALS, WHAT IMPACT DID THAT HAVE ON YOUR ULTIMATE OPINION IN THIS CASE?

A WELL, RATHER SIGNIFICANT BECAUSE IT -- IT TURNS OUT THAT MR. STANKO HAS A NOTABLE DYSFUNCTION OF A CRITICAL AREA IN HIS BRAIN, AND THAT AREA IS INVOLVED IN THE CONTROLS THAT HUMAN BEINGS HAVE OVER HOW THEY BEHAVE.

Q DID YOU SEE THE REPORT FROM DR. GUR, FOR EXAMPLE?
A YES.
Q THE MRI?
A YES.
Q DO YOU RECALL THAT? DO YOU REMEMBER?
A WELL, IT SHOWED SOME VOLUMETRIC CHANGES IN THE FRONT OF HIS BRAIN IN THE BACK.
Q LET ME SHOW YOU WHAT'S BEEN MARKED AS DEFENSE EXHIBIT NUMBER ONE.
A YES, I SAW THAT.
Q ALL RIGHT. DO YOU SEE ANYTHING OF SIGNIFICANCE IN THIS CHART?
A WELL, AS DESCRIBED TO ME THAT THE -- THE DARK LINE ACROSS MARKED AS NORMAL IS WHERE THE GREATER MAJORITY OF PEOPLE'S TRACING SUCH AS THIS WILL POOVER (SIC) AND HE'S GOT -- IN THE MEDIAL BRAIN -- ACROSS THE BOTTOM IS THE FRONT OF THE BRAIN, THE TEMPORAL LOBE, PARIETAL LOBE, OCCIPITAL LOBE, AND MEDIAL LOBE, AND THE VENTRICLES WHICH ARE THE OPEN SPACES WITHIN THE BRAIN WITH FLUID.

AND AT THE -- IN THE MEDIAL AREA AND THE FRONTAL AREA THE BLUE AND THE RED LINES ARE WAY BELOW NORMAL MEANING -- OR IN -- IMPLYING THAT THOSE AREAS ARE DYSFUNCTIONAL.
Q ALL RIGHT. HE -- WHEN YOU SAY, BELOW NORMAL, WE'RE SAYING SMALLER WITH RESPECT TO THIS?
A LARGER. I MEAN, MORE BELOW NORMAL, INCREASINGLY

BELOW NORMAL.

Q YEAH. RIGHT.

A INCREASINGLY -- WELL, IT'S AWKWARD. LESS AND LESS FUNCTION OF THAT AREA OF THE BRAIN.

Q NOW WE'RE LOOKING AT THE STRUCTURE OF THE BRAIN HERE; CORRECT?

A YES.

Q WOULD YOU SAY--

A WELL, WE'RE LOOKING AT A -- A SCALE DERIVED FROM MEASUREMENTS OF THE FUNCTIONING OF THIS STRUCTURE OF THE BRAIN.

Q AND YOU HAVE GOT IT NORMAL, THIS -- YOU SAID THIS LINE OF ZERO WOULD BE THE NORMAL?

A SAID TO BE.

Q AND WITH RESPECT TO THE FRONTAL LOBE WE HAVE NEARLY A 2.5 DEVIATION. IS THAT THE WAY YOU READ IT?

A YES.

Q BELOW NORMAL?

A BELOW, YES.

Q DOES THAT HAVE AN IMPACT OR AN EFFECT OR INFLUENCE ON YOUR OPINION AS TO SANITY IN THIS CASE?

A YES.

Q ALL RIGHT. HOW ABOUT THE MEDIAL LOBE OR AREA?

A SAME.

Q CAN YOU EXPLAIN TO US HOW THOSE TWO AREAS OF THE

BRAIN MIGHT INTERACT AND WORK TOGETHER?

A WELL, THE -- THE FRONTAL PART OF THE BRAIN I THINK IN THIS CASE IS THE -- IN MY CONCERN ABILITY (SIC) HERE IS THE MOST IMPORTANT PART BECAUSE THE FRONTAL PART OF THE BRAIN ABOVE A PERSON'S EYES IS THE AREA OF THE BRAIN THAT HAS TO DO WITH OUR ABILITY TO HAVE EMPATHY FOR ANOTHER HUMAN BEING, TO HAVE FEELINGS ABOUT ANOTHER HUMAN BEING, TO BE ABLE TO DEVELOP MEANINGFUL AND LASTING ATTACHMENTS WITH ANOTHER HUMAN BEING, AND IT'S WHERE OUR -- OUR MORAL VALUES ARE SORT OF OPERATIVE.

Q ALL RIGHT. IS THAT WHERE -- WHEN YOU TALK ABOUT LACK OF CAPACITY TO DISTINGUISH RIGHT AND WRONG, IS THAT THE AREA THAT WE'RE TALKING ABOUT?

A YES.

Q IS THAT WHAT YOU'RE SAYING?

A YES.

Q ALL RIGHT. AND GO AHEAD. DID I INTERRUPT YOU? CAN YOU CONTINUE ON?

A NO, I -- THAT'S ALL RIGHT.

Q HOW COULD IT BE THAT THAT AREA OF THE BRAIN MIGHT SEEMINGLY WORK OKAY ON SOME OCCASIONS AND NOT ON OTHERS?

A WELL, HOW DID IT GET THAT WAY I GUESS IS HOW WE NEED TO APPROACH IT. IT -- FROM HIS BIRTH RECORDS, WHICH YOU PROVIDED FOR ME, IT WAS CLEAR THAT HE WAS HAVING SERIOUS NEUROLOGICAL TIMES AT THE -- AT THE POINT OF HIS BIRTH.

Q CAN YOU SPEAK TO THAT? WHAT KIND OF PROBLEM?
A CENTRAL NERVOUS SYSTEM PROBLEMS. HIS BRAIN WASN'T FUNCTIONING RIGHT SUCH TO THE DEGREE THAT THEY ANTICIPATED THAT HE MIGHT NOT SURVIVE. IT WAS PRETTY SERIOUS. AND THAT MAY WELL HAVE SET THE GROUNDWORK FOR THE DYSFUNCTION OF THE LOWER PARTS OF THE FRONTAL LOBE.
Q AND WHY -- WHY IS THAT?
A SORRY?
Q HOW COULD THAT BE? WHY DO YOU SAY THAT?
A WELL, IN THE -- IT -- IN THE DEVELOPING BRAIN THERE IS A CRUCIAL PROCESS THAT TAKES PLACE CALLED MIGRATION, AND CELLS THAT FORM THE BRAIN ARE PRODUCED CENTRALLY, AND THEY MIGRATE OUT INTO THE VARIOUS AREAS OF THE BRAIN WHERE THEY BECOME INTERCONNECTED AND OPERATIVE.

AND IT'S NOT HARD FOR THAT TO BE INTERRUPTED BY WHATEVER. I DON'T KNOW WHAT THE SPECIFIC CAUSE OF HIS NEUROLOGIC...

Q COULD IT HAVE BEEN DNA?
A I'M SORRY?
Q COULD IT HAVE BEEN SOME KIND OF PROBLEM WITH THE DNA STRUCTURE ITSELF?
A THAT'S POSSIBLE.
Q COULD IT BE THAT BASICALLY?
A IT COULD BE. IT'S POSSIBLE.
Q ALL RIGHT.

A IT COULD HAVE BEEN THE TRAUMA AT BIRTH. HE COULD HAVE BEEN LOW ON OXYGEN AT BIRTH. IT COULD HAVE BEEN ANY ONE OR A NUMBER OF THINGS WHICH COULD INTERFERE WITH THE PROPER DISSEMINATION OF CELLS AND FUNCTION -- AND ULTIMATE FUNCTION IN VARIOUS AREAS OF THE BRAIN.

WHEN HE WAS 15 HE WAS HIT ON THE BACK OF THE HEAD. THAT, TOO, COULD HAVE HAD A -- WHAT THEY CALL CONTRACU INJURY, THE FRONT OF THE BRAIN, HITTING IT ON ONE SIDE.

Q EXPLAIN THAT TO ME. TELL US ABOUT THAT.

A WELL, WHEN A PERSON'S HEAD IS STRUCK, THERE IS A IMMEDIATE, YOU KNOW, THE BRAIN CASING IS -- IS VERY FIRM. THE SKULL IS VERY FIRM. WHEN IT'S HIT -- THE BRAIN IS LOOSE, AND IT -- BOUNCE UP AGAINST THE POINT OF CONTACT, AND THEN IT WILL BE IMPELLED THE OPPOSITE DIRECTION WHERE IT CAN AGAIN -- AGAIN BOUNCE UP AGAINST THE BONE AND GET INJURED THAT WAY.

Q WHERE WAS STEPHEN HIT?

A HE WAS HIT IN THE BACK OF THE HEAD.

Q OKAY. AND HOW -- HOW THEN -- HE'S HIT BACK HERE. YOU EXPECT THE INJURY TO BE THERE. HOW -- ORDINARILY WOULD. SO HOW DID IT TRANSFER FROM BEING HIT IN THE BACK OF THE HEAD TO THE FRONT?

A BECAUSE -- BECAUSE OF THE BRAIN BOUNCING WITH THAT BLOW. THE BRAIN IS NOT FIRMLY -- IT'S VERY VIABLE. IT'S VERY SOFT AND IT CAN MOVE INSIDE THE SKULL. AND IT CAN BE

INJURED IN BOTH PLACES.
Q ALL RIGHT. SO, AT THAT POINT HE'S LOOKING AT A POSSIBLE DOUBLE WHAMMY WITH RESPECT TO THE BRAIN?
A THEY ARE -- EXPLANATIONS OF TWO LAYERED, YOU KNOW, TWO POSSIBLE EXPLANATION OF LAYERED CAUSES FOR DYSFUNCTION. YOU KNOW, BRAIN DEVELOPMENT IS A RATHER MAGNIFICENT THING AND IT GOES ON FOR YEARS THROUGH TEEN-AGE YEARS.
Q WHEN YOU SAY DEVELOPMENT, EXPLAIN TO US EXACTLY WHAT YOU MEAN BY THAT.
A WELL, ADOLESCENTS GO THROUGH BRAIN CELL CONNECTION AND DISCONNECTION AND RESTRUCTURING AND CONNECTION, DISCONNECTION IN A HUGE WAY. ENORMOUS AREAS OF THE BRAIN ARE INVOLVED. EVENTUALLY AT ABOUT 20 TO 23 IT SETTLES DOWN TO THE FINAL PRODUCT.
Q AND THAT'S WHY -- WOULD THAT BE WHY TEENAGERS DO CRAZY THINGS THAT THEY DON'T REPEAT WHEN THEY GET OLDER, MORE MATURE?
A YES. SOMETIMES THEY DO OUTLANDISH THINGS AND SOMETIMES THEY DO WONDERFUL THINGS. ONE THING THAT THEY DO IS SLEEP A LOT. THEY SLEEP A LOT. AND THEY -- THEY -- THOSE PROCESSES OF CONNECTION, DISCONNECTION, AND ALL THAT GO ON WHEN A PERSON IS IN THEIR ADULT SLEEP. IT'S THE SLOWEST SLEEP LEVEL THAT YOU CAN GET TO. AND THEY SPEND A LOT OF TIME THERE BECAUSE THEY'RE GOING THROUGH THIS BRAIN

CHANGE.

NOW, AN INJURY ALONG THE LINE CAN DISRUPT OR CHANGE OR EFFECT THE ULTIMATE FINAL CONNECTIONS.

Q LET'S TALK ABOUT THIS VOLUMETRIC MASS ISSUE AGAIN WITH RESPECT TO THE GROWTH AND EVOLUTION OF THE BRAIN.

A YES.

Q WOULD IT BE TRUE TO SAY THAT THE ABNORMALITY THAT -- THE DEFECT OR DEFORMITY THAT STEPHEN HAD AT BIRTH WITH RESPECT TO THE DECREASED VOLUME MATTER, GRAY MATTER--

A YES.

Q -- WOULD NOT GROW. WE'RE TALKING ABOUT A DIFFERENT KIND OF GROWTH. THAT'D BE TRUE?

A IT'S POSSIBLE, YES.

Q OKAY. BUT WITH RESPECT TO THE GROWTH NOW, YOU'RE REFERRING PRIMARILY TO THE NEURONS AND THE CONNECTIONS TO --

A YES.

Q -- ADOLESCENTS AND THOSE KINDS OF THINGS THAT FORM--

A YES.

Q -- WITH AGE.

A YES.

Q OKAY. NOW, DID YOU REVIEW ANY OTHER DOCUMENTS OR RECORDS THAT WERE IMPORTANT TO YOU IN YOUR ASSESSMENT IN THIS CASE?

A WELL, THE -- THIS LIST THAT SPILLS OVER ON TO PAGE

THREE, AND I REVIEWED EVERY ONE OF THOSE.
Q OKAY. WERE YOU AWARE DURING YOUR REVIEW OF THE MATERIALS IN THIS CASE THAT MR. STANKO HAD AT ONE TIME DESIRED TO GO INTO THE AIR FORCE ACADEMY?
A YES.
Q AND HE WAS REJECTED?
A YES.
Q WOULD HE HAVE GONE THROUGH SOME KIND OF TESTING OR PSYCHOLOGICAL EVALUATION PRIOR TO THAT TIME IN ORDER TO GAIN ADMISSION TO THAT ACADEMY?
A TO THE ACADEMY?
Q YEAH.
A I SUPPOSE SO, YES.
Q ALL RIGHT. WOULD THAT BE -- AND I'M ASKING YOU TO HYPOTHESIZE HERE. COULD THAT -- COULD THAT HAVE BEEN A FACTOR IN TERMS OF THE DECISION NOT TO ADMIT HIM?
A WELL, IT MAY HAVE BEEN HAD THEY UNCOVERED IT.
Q IN YOUR REPORT YOU MENTIONED -- YOU HAD A HEADING CALLED ID. WHAT WAS THE PURPOSE -- WHAT DO YOU DO THERE IN THAT PARTICULAR SECTION?
A I TRY TO DESCRIBE THE BASIC IDENTIFICATION OF THE PERSON WITH WHOM I'M DEALING AT THE TIME.
Q DID YOU HAVE ANY INFORMATION ABOUT MR. STANKO'S INTELLECTUAL ABILITY?
A YES. THERE WAS A -- AN IQ TEST WAS PERFORMED AND HIS

IQ WAS MEASURED AT 143, I BELIEVE.

Q CAN AN INTELLIGENT PERSON STILL BE INSANE?

A YES.

Q AT TIMES?

A YES.

Q OR ALL THE TIME? IN OTHER WORDS, DOES INSANITY -- DOES SANITY HAVE ANY DIRECT CORRELATION WITH INTELLIGENCE?

A NOT NECESSARILY.

Q WHY DO YOU SAY THAT?

A WELL, BECAUSE PEOPLE WHO ARE -- WELL, I CAN TALK ABOUT IT IN TERMS OF PSYCHOSIS, PROBABLY. PEOPLE WHO ARE QUITE MAD OR QUITE PSYCHOTIC, HALLUCINATING, AND HAVING DELUSIONS AND BEHAVING BIZARRELY CAN HAVE HIGH INTELLIGENCE.

AND THE DIFFERENCE IS THAT THEY'RE -- THEIR DELUSIONAL SYSTEMS ARE MORE ENTANGLED AND MORE TWISTED, MORE INVOLVED, YOU KNOW. AND ON THE OTHER SIDE OF THINGS WHEN THEY ARE TREATED, BECAUSE OF THEIR INTELLIGENCE, THEY'RE EASIER TO GET WELL AGAIN.

AND IF THEY DO SOMETHING ILLEGAL OR CRIMINAL WHILE THEY'RE IN THEIR MAD STATE THEN, YOU KNOW, THE ISSUE OF INSANITY MIGHT BE -- MIGHT ARISE.

Q NOW, YOU INDICATED YOU LOOKED AT SOME SCANS INVOLVING MR. STANKO.

A I DID.

Q WHAT DID THE -- WHAT DID YOU GATHER FROM THE -- THAT INFORMATION?
A WELL, FROM -- FROM THE SCANS THAT I SAW, MR. STANKO HAD DECREASED FUNCTIONING IN THE -- RATHER NOTABLY DIFFERENT FROM NORMALS IN THE BOTTOM PART OF HIS FRONTAL LOBES INVOLVING OTHER PARTS OF HIS FRONTAL LOBE AS WELL.
Q IS THAT -- WOULD YOU CHARACTERIZE THAT AS A BRAIN DEFECT?
A IT'S A BRAIN FUNCTION DEFECT IN MY MIND.
Q HOW ABOUT THE STRUCTURAL MRI ABNORMALITY, WOULD THAT BE A BRAIN DEFECT?
A IT WOULD.
Q IT WOULD?
A YES. YES.
Q SO WE'RE TALKING ABOUT HERE TWO SEPARATE TYPES OF DEFECTS.
A YES, BUT THEY'RE INTERDIGITATED.
Q COULD BE INTERTWINED, BUT THEY ARE--
A YEAH, THEY COULD BE MUTUALLY EFFECTIVE OR DISEFFECTIVE.
Q CERTAINLY SOMEONE COULD HAVE A REDUCED STRUCTURE AND HAVE NORMAL FUNCTION; CORRECT?
A YES.
Q AND SOMEONE COULD HAVE REDUCED FUNCTIONING IN A NORMAL STRUCTURE?

A YES.
Q BUT STEPHEN HAS BOTH REDUCED STRUCTURE AND REDUCED FUNCTION?
A BY THOSE SCANS, YES.
Q YES. HE HAS BOTH OF THOSE. SO HE HAS TWO SEPARATE TYPES OF DEFECTS?
A UH-HUH. YES.
Q AND ARE YOU SURPRISED THAT THOSE TYPES OF DEFECTS WOULD BE PRESENT IN SOMEONE CHARGED WITH THESE PARTICULAR ACTS?
A NO.
Q WHY DO YOU SAY THAT?
A WELL, IT GIVES US SOME EXPLANATION OF HOW AND WHY AND -- THINGS CAME ABOUT THE WAY THEY DID. I MEAN, LOOK AT WHAT HE DID.
Q ALL RIGHT.
A IT WAS...
Q AND AS HE SITS HERE LOOKING NORMAL, LOOKS NORMAL, HANDSOME, IS HE A NORMAL, HEALTHY INDIVIDUAL?
A WELL, IN MANY ASPECTS, YES.
Q YES?
A BUT EXCEPT IN HIS BRAIN FUNCTION, NO, HE IS REALLY DIFFERENT.
Q ALL RIGHT. AND EVEN AS HE SITS HERE, IS VERY WELL-BEHAVED, SEEMINGLY NORMAL, HE'S VERY DIFFERENT?

A HIS BRAIN FUNCTION IS NOTABLY DIFFERENT, YES, SIR.
Q ALL RIGHT. AND IT'S GOING TO BE DIFFERENT IN EVERYTHING HE DOES IN HIS LIFE. WOULDN'T THAT BE TRUE?
A IT'S GOING TO BE PERSISTENT, YES. AT THIS POINT, YOU KNOW, IF HE HAS IT AT THIS STAGE, IT'S SETTLED. IT'S VERY UNLIKELY THAT -- MAKE A SIGNIFICANT CHANGE NOW.
Q ALL RIGHT. NOW, DID YOU CHECK TO SEE IF THERE WERE ANY OTHER POSSIBILITIES FOR THE CAUSE OF THE -- THE CONDITION THAT STEPHEN HAS, FOR EXAMPLE, DRUG ABUSE OR SOMETHING OF THAT NATURE THAT WOULD BE SELF-INFLICTED OR SELF-INDUCED?
A I ASKED HIM ABOUT THOSE THINGS AND HE DENIED THEM ALL.
Q ALL RIGHT. DO YOU HAVE ANY RECORDS FROM ANYWHERE THAT INDICATES THAT HE HAS A DRUG PROBLEM OR USED DRUGS--
A NO.
Q -- ILLEGAL OR OTHERWISE?
A NO.
Q IS THERE ANYTHING THAT YOU SEE IN STEPHEN'S HISTORY THAT WOULD SHOW YOU THAT HE HAS THIS BRAIN DEFECT BY CHOICE, THAT ANYTHING HE DID BROUGHT THIS ON HIMSELF?
A NO. NO.
Q WHAT IS MSE?
A OH, MENTAL STATUS EXAMINATION.
Q WHAT DID YOU GATHER FROM THAT OR TELL US ABOUT THAT.

DID YOU CONDUCT A STATUS EXAM?

A I DID. AND HE -- HE ESSENTIALLY ON MOST OF THE PARAMETERS WAS QUITE LIKE ANYBODY ELSE IN A NORMAL SENSE EXCEPT THAT HE HAD -- HE HAD -- HE SHOWED VERY LITTLE CONCERN OR WORRY, SADNESS, OR PREOCCUPATION WITH WHAT HE HAD DONE AND WHAT HAD HAPPENED TO THOSE POOR PEOPLE.

Q ALL RIGHT. AND LET'S ASSUME YOU HAD A HEALTHY INDIVIDUAL, HEALTHY BRAIN. WHAT WOULD YOU EXPECT THAT PERSON TO EXHIBIT IN TERMS OF EMOTIONS OR SPEAKING?

A WELL, I TREATED AND I HAVE SEEN AND TREATED VICTIMS AND -- OF CRIMES AND I HAVE SEEN AND TREATED PERSONS WHO HAD HORRIBLE THINGS HAPPEN TO THEIR LOVED ONES. THEY DON'T REACT THAT WAY.

YOU KNOW, A CASE OF A MAN WHO ACCIDENTALLY BACKED OVER HIS SON IN THE DRIVEWAY, I MEAN, IT WAS INCONSOLABLE AND RATHER PERMANENTLY SO. THAT WAS HORRIBLE. AND YOU KNOW, IT DIDN'T MASK ANY TEARING OR SADNESS OR ANYTHING, BUT JUST BESIDE HIMSELF.

Q WHAT WAS YOUR UNDERSTANDING OF -- OF STEPHEN AND LAURA'S RELATIONSHIP?

A MY UNDERSTANDING WAS THAT IT WAS PRETTY GOOD, PRETTY POSITIVE. HE SAID IT WAS THE BEST RELATIONSHIP HE'D HAD IN HIS -- IN HIS LIFE.

Q YOU KNOW, IN A -- IN A MALE-FEMALE ROMANTIC KIND OF--

A ABSOLUTELY, YEAH.

Q -- WAY?
A YES.
Q SO HE CARED FOR MS. LING?
A APPARENTLY. APPARENTLY HE DID.
Q NOW, WHY OR WOULD THERE BE AN EXPLANATION SCIENTIFICALLY OR MEDICALLY FOR WHY STEPHEN DIDN'T SHOW ANY EMOTION OR LITTLE EMOTION OVER WHAT HAD HAPPENED?
A WELL, BECAUSE HIS BRAIN DOESN'T FUNCTION THAT WAY, THE AREAS THAT ARE INVOLVED, AND SENSING AND DISPLAYING THOSE SORTS OF THINGS DON'T -- DOESN'T FUNCTION WELL.
Q IS THAT A VOLUNTARY DECISION THAT HE GETS TO MAKE?
A NO.
Q ALL RIGHT.
A IT JUST DOESN'T WORK.
Q DOES HE HAVE FREE WILL IN THE SENSE THAT WE HAVE TO STAND (SIC)--
A YES.
Q DOES HE HAVE FREE WILL TO CONSIDER, HOWEVER, THE EMPATHY OR EMOTION OVER THE LOSS?
A DOES HE HAVE FREE WILL TO CONSIDER IT?
Q YES.
A SURE HE DOES, YES.
Q TO FEEL IT AS A HEALTHY PERSON WOULD DO AS YOU JUST DESCRIBED THE GENTLEMAN--
A NO, HE'S -- HE'S NOT CAPABLE OF THAT. THAT'S --

FOLKS WITH THESE PROBLEMS, AND THEY'RE -- THEY'RE AN ENIGMA. YOU WONDER HOW IN THE WORLD THEY CAN DO THESE OUTLANDISH THINGS AND KIND OF BE BLASE ABOUT IT AS IF THEY DON'T CARE.

AND IT'S ALWAYS BEEN A QUESTION IN MY MIND, HOW DOES THIS COME ABOUT, WHY IS THIS SO, WHY -- WHAT IS DIFFERENT ABOUT THESE PEOPLE. AND THESE RECENT STUDIES HAVE SHOWN THAT THE AREA OF THE BRAIN INVOLVED -- AND MANY, MANY CASES IS EFFECTIVE THE WAY MR. STANKO'S BRAIN IS EFFECTIVE.

Q TELL US ABOUT THOSE STUDIES. WHAT KIND OF STUDIES ARE YOU SPEAKING OF?

A A BRAIN FUNCTION STUDIES, A -- PET SCAN STUDIES, THINGS LIKE THAT.

Q ARE THOSE STUDIES PUBLISHED? HOW DO YOU KNOW ABOUT THEM AND LEARN ABOUT THEM?

A WELL, THEY HAVE BEEN AROUND FOR A LONG TIME. I GIVE LECTURES TO PHYSICIANS ON THE MEDICATIONS WE USE IN PSYCHIATRY, AND I KNOW THAT THEY HAVE BEEN USED BY THE MANUFACTURER OF THOSE MEDICATIONS TO DETERMINE WHERE THE DEFECT IS IN THE BRAIN AND WHERE THE MEDICATION GOES WHEN IT'S GIVEN TO THE PATIENT AND WHAT THE EFFECT IS ON THE BRAIN.

THESE ARE BRAIN FUNCTION STUDIES. THESE ARE FUNCTION STUDIES OF A LIVE, LIVING, OPERATING BRAIN. BEEN VERY

USEFUL. AND OF COURSE, THEY HAVE BEEN USEFUL IN -- PRIMARILY IN STUDIES INVOLVING SCHIZOPHRENIA.

Q PET SCANS HAVE BEEN?

A OH, YES. YEAH.

Q YOU -- IN YOUR PRACTICE DO YOU PRESCRIBE MEDICATIONS?

A I DO.

Q AND SO YOU'RE TELLING US THAT THOSE PRESCRIPTIONS THAT YOU WRITE FOR YOUR PATIENTS ARE AT TIMES DEVELOPED WITH THE USE OF PET SCANS?

A IT'S A PROCESS OF DEVELOPING THEM AND THEIR EFFECTIVENESS AND WHERE THEY FUNCTION AND WHAT'S WRONG, YES, IT'S ALL KIND OF INVOLVED IN THAT.

Q OKAY. AND WITH RESPECT TO MR. STANKO'S FUNCTION, BRAIN FUNCTION, THE USE OF THE PET SCAN IN THIS SETTING IS NO DIFFERENT. WOULD THAT BE CORRECT?

A I DON'T THINK SO. I DON'T LIVE IN THAT PET SCAN WORLD. THERE MAY BE TECHNICAL DIFFERENCES PUT TO PLAY. I KNOW WHEN THEY DO -- THEY WANT TO SHOW HOW AN AREA OF THE BRAIN FUNCTIONS, SO THEY HAVE A PERSON DO THINGS THAT ACTIVATES THAT BRAIN, THAT PART OF THE BRAIN.

AND THEN THEY GIVE THEM SOME MATERIAL THAT'S ABSORBED BY THAT PART OF THE BRAIN AND THEN THEY DO THE SCANS. AND THEY CAN SEE WHERE THAT ACTIVITY TOOK PLACE.

Q OKAY. AND THAT WOULD BE -- IS THAT PRETTY STANDARD PROCEDURE THAT'S FOLLOWED IN EVERY CASE WHEN PET SCANS ARE

PUT TO USE?

A WELL, THERE MAY BE VARIATIONS ON THE -- THE BASIS OF THAT. NOW, I DON'T -- I CAN'T...

Q WELL, VARIATIONS LIKE TYPE OF MACHINE, RESOLUTION, DEGREE, THOSE KIND--

A MATERIAL USED, YES, STEPS USED TO ACTIVATE PARTICULAR PARTS OF THE BRAIN SO THAT THEY CAN GET A VIEW OF THAT PART, YOU KNOW.

Q HOW ABOUT A -- IN YOUR SUMMARY IN YOUR REPORT, HOW DO YOU SUM UP YOUR ASSESSMENT OF MR. STANKO IN PSYCHIATRIC TERMS?

A YOU MEAN THE DIAGNOSIS?

Q WELL, YEAH. I DON'T -- I DON'T WANT TO REALLY GET INTO THE SPECIFIC DIAGNOSIS HERE, BUT TELL US ABOUT THE SUMMARY. IF YOU LOOK AT THAT SECTION OF YOUR REPORT THAT TALKS ABOUT THE SUMMARY.

A UH-HUH.

Q WHAT DID YOU GATHER? WHAT DID YOU COME AWAY WITH AFTER YOUR REVIEW OF ALL OF THE INFORMATION IN YOUR... CONDUCTING OF YOUR INTERVIEWS AND SUCH--

A WELL, I TRIED TO HIT THE HIGHLIGHTS OF THINGS IN HIS BACKGROUND UP TO THAT POINT AND THEN REACH A CONCLUSION. AND I LISTED THE VARIOUS THINGS THAT I THOUGHT WERE INVOLVED IN THE EVOLUTION OF THE WAY HE IS AND HOW HE HAS BEEN ACTING IN SAME OR SIMILAR FASHION IN THE PAST AND

WHY.

Q READ FOR US, IF YOU WOULD, THE FIRST MAYBE THREE SENTENCES UNDER SUMMARY.

A THE FIRST THREE?

Q YEAH. THAT...

A YEAH, SURE. 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.

Q ALL RIGHT. AND DO YOU CONCLUDE THAT BASED ON THE RECORD, THE MEDICAL RECORDS, THAT WERE MADE AVAILABLE TO YOU AT THE TIME?

A YES.

Q NOW, AGAIN STATE FOR US WHAT YOUR OPINION IS WITH RESPECT TO MR. STANKO AND THE ISSUE SANITY AT THE TIME OF THESE OFFENSES.

A HE WAS INSANE.

Q THANK YOU VERY MUCH, DOCTOR. ANSWER ANY QUESTIONS COUNSEL MAY HAVE.

A YES.

THE COURT: YOU MAY PROCEED.

MR. HEMBREE: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

<u>CROSS-EXAMINATION</u>

BY MR. HEMBREE:

Q GOOD MORNING, DR. THRASHER.

A GOOD MORNING, MR. HEMBREE. IT'S NICE TO SEE YOU.

Q GOOD TO SEE YOU AGAIN. DR. THRASHER, LET'S TALK ABOUT A FEW THINGS THAT I THINK WE CAN AGREE ABOUT. MR. STANKO IS NOT MENTALLY RETARDED?

A OH, NO.

Q HE DOES NOT SUFFER FROM MULTIPLE PERSONALITY DISORDER?

A NO.

Q HE'S NOT SCHIZOPHRENIC?

A NO.

Q HE HAS AN IQ OF 143?

A HE DOES.

Q AND HE IS COMPETENT TO STAND TRIAL?

A HE IS.

Q HE'S NOT SUFFERING FROM A MENTAL DEFECT OR DISEASE THAT WOULD RENDER HIM INCAPABLE OF ASSISTING HIS LAWYERS, UNDERSTANDING THE PROCEEDINGS, UNDERSTANDING THE CONSEQUENCES, ET CETERA?

A NOT AT THE CURRENT TIME HE'S NOT.

Q CORRECT. NOT AT THE CURRENT TIME. NOW, YOU DIDN'T INTERVIEW HIM OR TALK WITH HIM ON APRIL 7TH, APRIL 8TH, APRIL 9TH OF 2005 BY ANY CHANCE; DID YOU?

A NO, I DID NOT.

Q THE -- LET'S SORT OF TALK ABOUT YOUR -- YOUR SPECIALTY IS PSYCHIATRY; IS THAT CORRECT?
A YES.
Q AND THERE'S SOME SORT OF BASIC BUILDING BLOCKS I THINK OR ELEMENTS TO A GOOD PROFESSIONAL MEDICALLY ACCEPTED PSYCHIATRIC DIAGNOSIS; TRUE?
A YES.
Q THE CLINICAL INTERVIEW IS AT THE VERY FOUNDATION OF A GOOD PSYCHIATRIC EVALUATION AND DIAGNOSIS?
A YES.
Q IT'S THE MOST IMPORTANT PIECE; IS IT NOT?
A WELL, IT MAY -- IT'S AN IMPORTANT PIECE, YES, BUT IT DOESN'T -- THAT DOESN'T DIMINISH THE VALUE OF THE OTHER PARTS AS WELL.
Q I UNDERSTAND IT. YOU WANT TO LOOK AT EVERYTHING. AND THERE ARE A LOT OF OTHER PARTS THAT YOU CAN UNDERTAKE IN AN EVALUATION TO MAKE A VERY COMPLETE ANALYSIS?
A YES.
Q LIKE AN MRI, ORDERING AN MRI WHICH MEASURES THE--
A YES.
Q -- THE STRUCTURE OF THE BRAIN WOULD BE A -- AN ELEMENT THAT YOU MIGHT WANT TO HAVE IN MAKING A DIAGNOSIS; TRUE?
A YES.
Q AND IT IS TYPICAL THAT YOU WOULD CONSULT FOR -- WITH

A NEUROLOGIST. ISN'T THAT WHO YOU WOULD -- WOULD REQUEST AN MRI FROM?

A THAT'S MOST OFTEN WHAT I DO, YES.

Q OKAY. AND A -- NEUROLOGY IS A SPECIALTY IN THE MEDICAL FIELD?

A YES.

Q NOW, ANOTHER ASPECT, ANOTHER BUILDING BLOCK MIGHT BE A NEUROPATH OR A NEUROPSYCHOLOGIST?

A YES.

Q A NEUROPSYCHOLOGIST IS A PSYCHOLOGIST THAT TESTS WHAT?

A THE BRAIN FUNCTION.

Q OKAY. AND THAT WOULD BE ANOTHER PERSON THAT YOU MIGHT CONSULT WITH IN RENDERING AN OPINION?

A YES.

Q AND AS A MATTER OF FACT, THE DEFENDANT HIRED A NEUROPSYCHOLOGIST; DIDN'T HE?

A YES.

Q DR. EINHORN.

A DR. SACHY, I THINK.

Q WELL, DID YOU REVIEW DR. EINHORN'S REPORT?

A YES, I SAW THAT, YEAH. YEAH.

Q AND WE'RE TALKING ABOUT THE NEUROPSYCHOLOGIST?

A PSYCHOLOGIST, OKAY.

Q I BELIEVE THAT WAS DR. EINHORN?

A THAT'S RIGHT.
Q OKAY. NOW, THE -- WELL, IF YOU'RE GOING TO DO A PET SCAN, YOU MIGHT WANT TO HAVE A PET SCAN. THAT WOULD BE A -- LET'S SEE. YOU WOULD CONSULT I WOULD IMAGINE WITH A RADIOLOGIST. THOSE ARE TYPICALLY THE DOCTORS THAT READ PET SCANS; CORRECT?
A YES, THEY DO.
Q OKAY. AND THAT WOULD BE SOMEONE YOU MIGHT SEND -- YOU MIGHT SAY, WOULD YOU PLEASE RUN A PET SCAN TO -- YOU WOULD CONSULT WITH A RADIOLOGIST, SAY, PLEASE RUN A PET SCAN, EVALUATE IT FOR ME, AND GIVE ME BACK THE RESULTS SO I CAN MAKE A THOROUGH DIAGNOSIS HERE.
A THAT'S WHAT I HAVE TO DO.
Q THAT'S WHAT YOU'D HAVE TO DO BECAUSE THAT'S NOT YOUR AREA OF SPECIALTY.
A NO.
Q NO. I MEAN, YOU CAN'T DO IT ALL. YOUR AREA OF SPECIALTY IS PSYCHIATRY, BUT YOU WANT -- YOU SORT OF ASSEMBLE THOSE ELEMENTS TO COME UP WITH A DIAGNOSIS?
A IDEALLY, YES.
Q IDEALLY. OKAY. NOW, IN CONDUCTING YOUR -- OR BEGINNING THE PROCESS OF YOUR DIAGNOSIS AND IN THE COURSE OF THE CLINICAL INTERVIEW, ISN'T IT -- ISN'T IT -- ISN'T THE PATTERN OF BEHAVIOR REALLY THE GOLD STANDARD IN DETERMINING THE MENTAL STATUS OF THE PATIENT? WHEN YOU'RE

TRYING TO EVALUATE THEIR MENTAL STATUS AT THE TIME, YOU LOOK AT THE PATTERN OF BEHAVIOR?

A YOU LOOK AT THE PATTERN OF BEHAVIOR, YOU LOOK AT THE ACTUAL BEHAVIOR, YOU LOOK AT THE -- YOU TAKE INTO ACCOUNT THE HISTORY, WHAT YOU KNOW TO THAT POINT, AND SEE HOW THEY MAY INTERDIGITATE AND HOW THEY MAY INTERACT.

Q SO THAT--

A DEPENDING ON--

Q I MEAN, THAT PATTERN OF BEHAVIOR BEFORE, DURING, AND AFTER THE QUESTIONED TIMEFRAME IS CRITICAL IN YOUR CLINICAL INTERVIEW; ISN'T IT? ISN'T THAT TRUE?

A WELL, IT'S CRITICAL IN THE SENSE THAT IT'S A VERY NARROW SLICE OF THE MENTAL STATE OF A PERSON AT THAT MOMENT. IT ISN'T BEHAVIOR OVER TIME. IT'S HOW THEY PRESENT THEMSELVES AS AGAINST THE BACKGROUND AT THE TIME THAT YOU'RE EXAMINING THEM.

Q BUT IT'S IMPORTANT TO UNDERSTAND HOW THEY WERE BEHAVING IMMEDIATELY BEFORE AND IMMEDIATELY AFTER AS WELL AS SOME PAST HISTORY THAT MIGHT HELP TO EXPLAIN THIS BEHAVIOR; TRUE?

A IT WOULD BE NICE TO KNOW ALL OF THAT, YES.

Q AND THAT'S WHAT YOU DID. YOU LOOKED AT THINGS FROM HIS DISTANT PAST?

A YES.

Q YOU WENT BACK TO HIS BIRTH?

A YES.
Q YOU WENT TO HIS HIGH SCHOOL RECORDS?
A I DID.
Q YOU LOOKED AT HIS -- HIS ADULT -- RECORDS OF HIS ADULT PAST?
A I DID.
Q YOU LOOKED AT REPORTS AND STATEMENTS AND INTERVIEWS OF FOLKS ABOUT THINGS THAT HAPPENED IMMEDIATELY AFTER THIS EVENT?
A YES, I DID.
Q UH-HUH. AND YOU CONSIDERED ALL OF THOSE THINGS IN REACHING YOUR DIAGNOSIS HERE?
A I DID.
Q ALL RIGHT. LET ME TALK TO YOU ABOUT DR. EINHORN'S REPORT. YOU SAID YOU HAD -- YOU HAD CONSIDERED THAT. AND DR. EINHORN WAS A NEUROPSYCHOLOGIST THAT WAS RETAINED BY THE DEFENDANT, I BELIEVE; CORRECT?
A YES.
Q LET'S SEE HERE. HAVE YOU GOT A COPY OF HIS REPORT IN YOUR FILE?
A I BELIEVE...
Q LET YOU LOOK ON WITH ME. NOW, IF YOU WILL TAKE A LOOK AT DR. EINHORN'S REPORT WHERE IT SAYS, EXAMINATION RESULTS. YES. YOU HAVE GOT IT RIGHT THERE.
A YES, I DO.

Q VERY GOOD. EXAMINATION RESULTS. WHAT DOES DR. EINHORN REPORT IN THE FIRST LINE UNDER, EXAMINATION RESULTS?

A WHAT PAGE ARE YOU ON?

Q I'M ON PAGE ONE.

A PAGE ONE?

Q YES, SIR. TOWARD THE BOTTOM OF THE PAGE.

A YES, I HAVE IT.

Q AND WHAT DOES DR. EINHORN REPORT, WHAT DOES HE SAY?

A HE REPORTS -- HE REPORTS ALL AREAS OF FUNCTION THAT HE EXAMINED WITHIN NORMAL LIMITS.

Q OKAY. IT SAYS NEUROLOGICAL TEST RESULTS ARE UNIFORMLY NEGATIVE; CORRECT?

A YES.

Q SO HE'S NORMAL?

A HE SAYS THEY'RE NORMAL.

Q GOOD. AND THEN HE GOES THROUGH THE NEBRASKA NEUROPSYCHOLOGICAL BATTERY. AND LET ME JUST GO THROUGH THESE WITH YOU. MOTOR FUNCTIONS. AND YOU TELL ME WHAT -- WHAT THE RESULTS OF THOSE DIFFERENT--

A IT'S NORMAL TO ALL OF THEM.

Q OKAY. MOTOR FUNCTIONS. WHAT DOES IT SAY?

A IT'S NORMAL TO ALL OF THEM.

Q CONCENTRATION?

A WELL, IT'S NORMAL TO EVERY ONE OF THEM. THEY ARE ALL

NORMAL.

Q TACTILE FUNCTIONS?

A SAME.

Q WITHIN -- WHEN IT SAYS, WITHIN NORMAL LIMITS; CORRECT?

A YEAH.

Q VISUAL FUNCTIONS?

A SAME.

Q RECEPTIVE SPEECH?

A SAME.

Q EXPRESSIVE SPEECH?

A SAME.

Q WRITING?

A SAME.

Q READING?

A SAME.

Q ARITHMETIC?

A SAME.

Q MEMORY?

A SAME.

Q INTELLECTUAL PROCESSES?

A SAME.

Q TOWER OF LONDON, WHATEVER THAT MEANS.

A SAME.

Q WISCONSIN CARD SORTING TEST?

A SAME.
Q TRAILS A?
A SAME.
Q TRAILS B?
A SAME.
Q FINGER TAPPING?
A SAME.
Q VENDOR GESTALT (SIC)--
A SAME.
Q RAY'S 15 ITEM MEMORY TEST?
A SAME.
Q IMMEDIATE RECALL OF A STORY?
A ABOVE AVERAGE.
Q ABOVE AVERAGE. DELAYED RECALL OF A STORY?
A WITHIN NORMAL LIMITS.
Q RAY OSTERIC (SIC) COMPLEX FIGURE?
A ABOVE AVERAGE.
Q DELAY RAY OSTERIC COMPLEX FIGURE?
A ABOVE AVERAGE.
Q AND WRAT-THREE READING?
A STANDARD.
Q STANDARD. AND THEN HE GAVE HIM AN INTELLIGENCE TEST; CORRECT?
A HE DID.
Q AND I WON'T -- I'M NOT GOING TO MAKE YOU SUFFER

THROUGH THE MANY, MANY CATEGORIES THERE.

A I APPRECIATE THAT.

Q THEY INDICATED A VERBAL IQ OF...

A 140 -- VERBAL?

Q VERBAL IQ OF...

A 140. PERFORMANCE 136 AND A FULL SCALE 143.

Q OKAY. WHICH IS VERY SUPERIOR?

A IT IS, YES.

Q NOW, HE DID A REVIEW OF SYSTEMS; CORRECT?

A I DID?

Q NO. DR. EINHORN DID A REVIEW OF SYSTEMS?

A YES, HE DID.

Q NOW, LET'S GO THROUGH THOSE. TELL ME HOW HE REPORTED THESE. ATTENTION AROUSAL ORIENTATION?

A WELL, WITHOUT BELABORING THE -- THE...

Q DOCTOR, I'M GOING TO BELABOR IT; OKAY?

A WITHOUT BELABORING THE ISSUE HERE, EVERY SAME ONE OF THESE ARE -- ARE LISTED AS NORMAL.

MR. DIGGS: OBJECTION.

THE COURT: BASIS OF THE OBJECTION.

MR. KELLY: THE SOLICITOR IS BADGERING THE WITNESS.

THE COURT: OVERRULED. DR. THRASHER, WHEN A QUESTION IS ASKED, YOU NEED TO ANSWER YES OR NO AND THEN YOU CAN GO ABOUT TO EXPLAIN YOUR ANSWER.

THE WITNESS: THANK YOU.

THE COURT: YOU MAY PROCEED.

BY MR. HEMBREE:

Q REVIEW OF SYSTEMS. ATTENTION AROUSAL ORIENTATION?

A WITHIN NORMAL LIMITS.

Q VERBAL FUNCTIONING?

A WITHIN LIMITS.

Q VISUAL SPACIAL FUNCTION?

A SAME.

Q SENSORY MOTOR FUNCTION?

A SAME.

Q MEMORY?

A SAME.

Q HIGHER ORDER EXECUTIVE FUNCTION?

A SAME.

Q WOULDN'T THAT BE THE FRONTAL LOBES, DOCTOR? HIGHER ORDER EXECUTIVE FUNCTIONS. DOESN'T THAT TAKE PLACE IN THE FRONTAL LOBES?

A YES, IT COULD, SURE.

Q WELL, WITHIN NORMAL LIMITS?

A THAT'S WHAT IT SAYS.

Q NOW, HE DID A MENTAL STATUS EXAMINATION OF HIS PERSONALITY AND EMOTIONAL STATUS; CORRECT? YOU SEE THAT ON PAGE THREE?

A I DO.

Q THOUGHT PROCESSES WERE WHAT?
A CLEAR AND VISUAL.
Q ANY EVIDENCE OF PSYCHIATRIC DISTORTION?
A NONE.
Q OR THINKING OR PERCEPTION?
A NONE.
Q SPEECH IS, WHAT? HOW DOES HE DESCRIBE SPEECH?
A ARTICULATE AND EVENTUALLY SPONTANEOUS AS HE BECAME MORE COMFORTABLE.
Q HE DOES SAY THAT THERE'S A DEPRESSIVE COMPONENT, THOUGH; DOESN'T HE?
A HE DOES.
Q BUT HE SAYS IT DOES NOT INTERFERE WITH HIS COGNITIVE FACILITIES, SLEEP OR APPETITE?
A THAT'S WHAT HE SAID.
Q HE DID A MMPI2, MINNESOTA MULTI-PHASIC PERSONALITY INVENTORY, AND PRODUCED A -- WHAT DID -- WHAT DID THE MMPI INDICATE?
A HE SAID THE PROFILE INDICATES AN ANTISOCIAL PERSONALITY DISORDER WITH A WELL-SOCIALIZED VENEER.
Q ALL RIGHT. NOW, THIS VENEER. HE'S GOT A -- HE'S GOT AN ANTISOCIAL PERSONALITY DISORDER. WHAT IS ANTISOCIAL PERSONALITY? WHAT DOES THAT MEAN?
A MEANS A PERSON WHO HAS DIFFICULTY FOLLOWING THE NORMS OF SOCIETY.

Q SO JUST A BAD PERSON, WON'T FOLLOW THE RULES?
A SOME OF THE ACTS THAT THEY DO ARE BAD, YES.
Q OKAY. AND HE'S GOT A WELL-SOCIALIZED VENEER. NOW, WHAT DOES THAT MEAN TO YOU?
A THAT MEANS HE'S ABLE TO AT LEAST MIMIC WHAT NORMAL PEOPLE DO.
Q HE COVERS IT UP?
A HE'S AT LEAST ABLE TO MIMIC IT.
Q HE'S KIND OF A CON-MAN; ISN'T HE?
A THAT HE IS.
Q THAT HE IS. AS A MATTER OF FACT, HE TELLS LIES UPON LIES; DOESN'T HE?
A HE SURE HAS.
Q AND HE DID TO YOU; DIDN'T HE?
A I DON'T RECALL THAT HE DID. HE TOLD ME WHAT HE EXPERIENCED, BUT I DON'T RECALL HIM TELLING A SPECIFIC LIE.
Q DID YOU -- DID YOU -- IN YOUR CLINICAL ASSESSMENT WHEN HE INFORMED YOU -- I ASSUME THAT HE INFORMED YOU THAT HE HAD THIS AMNESIA, THAT HE HAD SOME KIND OF AMNESIA, HE COULDN'T REMEMBER. YOU TESTIFIED TO THAT EARLIER; IS THAT CORRECT? DID HE TELL YOU -- HE REPORTED THAT TO YOU?
A THAT -- DID YOU ASK ME IF HE TESTIFIED TO THAT? I DON'T THINK--
Q NO. NO. THAT HE TOLD YOU THAT. I'M SORRY. IT WAS

MY -- POOR CHOICE OF WORDS ON MY PART. DID -- IN THE CLINICAL INTERVIEW WITH THIS DEFENDANT, DEFENDANT STEPHEN STANKO, DID HE TELL YOU THAT HE COULDN'T REMEMBER THE MURDER AND THE RAPE?

A THAT'S RIGHT.

Q THAT HE--

A NOT A THING.

Q NOT A THING?

A NOT A THING.

Q OKAY. DO YOU BELIEVE THAT? DO YOU BELIEVE THAT HE HAD SOME SORT OF TEMPORARY AMNESIA?

A HE'S A PSYCHOPATH. HE TELLS STORIES. WHETHER HE BELIEVED IT OR KNEW IT OR NOT, HE'S A PSYCHOPATH.

Q OKAY.

A HE TELLS STORIES. THAT DOESN'T MAKE ANY DIFFERENCE.

Q AND DO YOU BELIEVE THAT HE WAS TELLING YOU A STORY? DO YOU BELIEVE THAT HE WAS TELLING YOU A STORY ABOUT THAT AMNESIA?

A I BELIEVE HE TOLD ME A STORY.

Q SO MAYBE HE DID LIE TO YOU?

A I'M SORRY?

Q SO PERHAPS HE DID LIE TO YOU?

A IT'S POSSIBLE, CERTAINLY. THERE ARE A COUPLE OF EXPLANATIONS FOR PEOPLE BEING TOTALLY AMNESIC, BUT HE...

Q HE DOESN'T FIT ANY OF THOSE?

A NONE OF THEM APPLIED IN THIS CASE.
Q NONE OF THEM APPLIED. NOW, SUMMARY, DR. EINHORN'S REPORT AGAIN ON PAGE FOUR, INDICATES THAT THE NEUROPSYCHOLOGICAL TEST RESULTS OF HIGHER CORTICAL FUNCTIONS ARE UNIFORMLY NEGATIVE; CORRECT?
A YES.
Q WHICH WE'VE REALLY ALREADY GONE OVER. THAT'S JUST A SUMMARY OF THE -- THE DETAILS. AND DR. EINHORN'S REPORT -- THE DEFENSE EXPERT, DR. EINHORN, ONE OF THE PEOPLE THAT YOU'RE GOING TO RELY ON TO REACH YOUR DIAGNOSIS SAYS DEFENDANT STANKO IS NORMAL?
A WELL, HE DIDN'T USE THE WORD NORMAL.
Q WITHIN NORMAL LIMITS, HOW ABOUT THAT?
A PART OF IT WAS THAT WAY. UNIFORMLY NEGATIVE. HE'S NOT NORMAL. HE HAS A PERSONALITY STRUCTURE OF AN ANTISOCIAL PERSONALITY WITH A SOCIALIZED OVERLIE AND HE IS PRONE TO SUDDEN VIOLENCE WHEN THREATENED.
Q OKAY.

MR. HEMBREE: YOUR HONOR, I NEED TO TAKE UP A MATTER AT THE BENCH.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

THE COURT: MADAM FORELADY, LADIES AND GENTLEMEN, I HAVE A MATTER OF LAW I NEED TO TAKE UP WITH THE ATTORNEYS OUTSIDE OF YOUR PRESENCE. PLEASE LEAVE YOUR NOTEPADS IN YOUR SEATS.

PLEASE HAVE NO DISCUSSION ABOUT THIS CASE DURING THE BREAK. IF YOU NEED ANYTHING, PLEASE LET THE BAILIFFS KNOW. WE APPRECIATE YOUR PATIENCE IN ADVANCE.

(JURY LEFT THE COURTROOM AT 11:49 AM.)

THE COURT: YOU MAY BE SEATED. I AM SORRY. YOU MAY PROCEED, MR. HEMBREE.

BY MR. HEMBREE:

Q DR. THRASHER, DID STEPHEN STANKO TELL YOU ABOUT--

THE COURT: WAIT. WAIT ONE SECOND FOR ME. I'M NOT SURE THEY HAVE ALL GONE IN THAT ROOM AGAIN. OKAY. IS EVERYONE IN? OKAY. YOU MAY CONTINUE. I APOLOGIZE.

BY MR. HEMBREE:

Q DID DEFENDANT STEPHEN STANKO TELL YOU ABOUT OR DID YOU REVIEW MATERIALS ABOUT THE ELIZABETH MCLENDON ASSAULT?

A YES, HE DID. THAT WAS A PRIOR KIDNAPPING, YES.

Q RIGHT. IT INVOLVED KIDNAPPING. SHE WAS -- HER HANDS WERE TIED BEHIND HER BACK I BELIEVE AND SHE--

A WITH A TIE.

Q WITH A NECKTIE.

A RIGHT.

Q CORRECT. WHICH WAS EXACTLY WHAT WAS USED IN THIS PARTICULAR -- IN THESE CRIMES AS WELL?

A ON BOTH VICTIMS.

Q ON BOTH VICTIMS.
A YES.
Q CORRECT. SO THERE'S A CLEAR PATTERN OF BEHAVIOR THERE. I THINK WE COULD ALL AGREE TO THAT; TRUE?
A YES INDEED.
Q AS WELL AS THE EFFORT TO STUFF A RAG SOAKED IN AMMONIA OR -- WELL, WITH CLOROX?
A CLOROX.
Q EXCUSE ME -- CLOROX -- THAT HE ATTEMPTED TO STUFF IN HER MOUTH AND -- AND OBVIOUSLY BRING HARM TO HER IN SOME WAY. I MEAN, IT WAS NOT TO HELP HER IN ANY WAY, IT WAS TO EITHER KILL OR QUIET HER IN SOME WAY; CORRECT?
A INDEED.
Q AND DID YOU -- IN THE COURSE OF THAT REPORT OR THAT DISCUSSION WITH THE DEFENDANT, DID YOU LEARN THAT THIS WAS DONE AFTER MS. MCLENDON HAD GONE TO BED AND THAT HE ACTUALLY WAS SLEEPING ON THE COUCH AND THEN THEY HAD HAD A DISAGREEMENT, HE WENT TO SLEEP ON THE COUCH, SHE WENT IN THE BEDROOM AND WENT TO BED, AND THEN HE ENTERED HER BEDROOM AFTER HE BELIEVED HER TO BE ASLEEP AND ASSAULTED HER?
A I THINK THOSE ARE THE DETAILS, BUT I DON'T THINK HE TOLD ME ALL THAT MUCH DETAIL ABOUT IT.
Q DID -- WELL, DID YOU -- DID YOU REVIEW THOSE DETAILS IN THE REPORTS THAT YOU READ?

A YES.
Q OKAY. SO YOU'RE AWARE OF ALL OF THAT IS -- AS FAR AS THAT PARTICULAR--
A BEEN AWARE OF IT, YES.
Q -- THAT PARTICULAR EVENT GOES. AND IS IT FAIR TO SAY THAT THIS WAS SOMETHING THAT YOU CONSIDERED AND LOOKED AT WHEN YOU WERE MAKING YOUR DIAGNOSIS AND REACHING THE CONCLUSION THAT THIS DEFENDANT'S INSANE?
A THIS WAS PART OF IT, YES.
Q PART OF IT, SURE. IT'S AN IMPORTANT PART; ISN'T IT?
A YES, AS WAS ALL THE REST.
Q WELL, IT IS ALL IMPORTANT. BUT THAT PATTERN OF CONDUCT IS -- IS -- WE ALREADY TALKED ABOUT THAT AND THAT'S WHY I ASKED YOU THESE QUESTIONS. I MEAN, THAT'S AN IMPORTANT PART OF PSYCHIATRY, RIGHT, IN MAKING A PSYCHIATRIC DIAGNOSIS; AGREED?
A PATTERNS?
Q YES.
A YES.
Q NOW, DID HE TELL YOU ABOUT -- WELL, HE DIDN'T TELL YOU ANYTHING ABOUT THE CRIMES THEMSELVES BECAUSE HE COULDN'T REMEMBER--
A MCLENDON THING OR THE CURRENT ONE, THE LING?
Q THE CURRENT ONE. I'M SORRY. THAT WAS MY--
A NO, HE DIDN'T.

Q HE DIDN'T RELAY -- ALL HE SAID WAS THAT HE DIDN'T KNOW ANYTHING ABOUT WHAT HAPPENED UP UNTIL HE JUST BLACKED OUT. THEY HAD SOME DISAGREEMENT, THERE WAS AN ACCUSATION MADE AGAINST HIM, A CIGARETTE HIT HIM IN THE FACE. DIDN'T HE TELL YOU ABOUT THAT?

A YES. YES.

Q AND THEN HE JUST LOST -- HE JUST BLACKED OUT. THE NEXT THING HE KNOWS HE'S IN THE SHOWER. IS THAT ESSENTIALLY HIS STORY TO YOU?

A YES, SHOWER AND COVERED IN BLOOD.

Q COVERED IN BLOOD. DID HE INDICATE TO YOU THAT HE CHECKED THE PULSE OF BOTH VICTIMS?

A LATER. YEAH, AND -- HE SAID HE DID LATER, YES.

Q OKAY. AFTER HE WAS OUT OF THE SHOWER?

A YES.

Q DID HE INDICATE TO YOU THAT HE PACKED HIS CAR?

A YES.

Q HE INDICATED--

A HE SAID HE FINISHED PACKING HIS BELONGINGS, YES.

Q HIS BELONGINGS. DID HE INDICATE TO YOU THAT HE WENT THROUGH THE POCKETBOOKS OF BOTH THE VICTIMS?

A NO.

Q DID HE INDICATE TO YOU THAT -- WELL, IN THE -- IN THE REVIEW OF THE REPORTS, WERE YOU MADE AWARE OF THAT?

A I DON'T RECALL.

Q OKAY. DID HE TELL YOU THAT HE WENT TO THE ATM MACHINE WITH LAURA LING'S ATM CARD AND WITHDRAW $700?
A HE DID.
Q ALL RIGHT. IMMEDIATELY AFTER HE PACKED HIS BELONGINGS?
A HE DID.
Q DID HE INDICATE TO YOU -- DID HE TELL YOU THAT HE STOLE A BRACELET FROM -- FROM LAURA LING?
A NO. I LEARNED THAT LATER.
Q DID HE TELL YOU ANYTHING ABOUT STEALING A GUITAR?
A NO. I LEARNED THAT LATER, TOO.
Q OKAY. DID -- DID HE -- DID HE TELL YOU ABOUT GOING TO HENRY TURNER'S HOUSE?
A HE DID.
Q WHAT DID HE TELL YOU ABOUT GOING TO MR -- DID HE TELL YOU WHEN HE WENT TO MR. TURNER'S HOUSE THAT HE INFORMED MR. TURNER THAT HIS FATHER HAD DIED?
A THAT I DON'T RECALL, BUT HE SAID HE WENT TO MR. TURNER'S HOUSE TO SEE IF HE COULD GET HELP FROM MR. TURNER TO HELP HIM TURN HIMSELF IN.
Q AND DID HE TELL YOU THAT HE TOLD MR. TURNER THAT HE HAD COMMITTED THESE CRIMES?
A YES.
Q AND YOU BELIEVED THAT?
A WELL -- WELL, HE -- HE SAID THAT HE WASN'T SURE THAT

HE HAD DONE IT. HE THOUGHT PERHAPS SOMEBODY ELSE HAD DONE IT, JUST AS IF HE WAS TOTALLY CONFUSED BY THE SUDDEN SCENE THAT HE -- THAT HE ENCOUNTERED IN THAT BEDROOM.

AND HE ASCERTAINED THAT HE MAY HAVE DONE IT AND HE SAID HE BECAME UPSET AND SUICIDAL AND WAS GOING TO MR. TURNER'S HOUSE TO TELL HIM ABOUT IT AND HELP TURN HIMSELF IN.

Q ALL RIGHT. DID HE TELL YOU THAT HE ACTUALLY TOLD HENRY TURNER ABOUT THIS CRIME?

A THAT I DON'T HAVE A RECALL. HE MAY HAVE. I DON'T...

Q I DON'T REMEMBER SEEING THAT IN YOUR REPORT. I DID SEE THAT HE TOLD YOU WHAT HIS INTENTION WAS--

A YES.

Q -- WHEN HE WENT TO TURNER'S, BUT IT WASN'T CLEAR WHAT HE TOLD YOU ABOUT THE MURDER OF HENRY TURNER.

A THAT'S A WHOLE DIFFERENT ISSUE NOT -- NOT RELATED TO THIS PARTICULAR HEARING NOW.

Q OH, NO, IT'S -- WELL, LET ME ASK YOU ABOUT THAT. IT'S A PATTERN OF CONDUCT; IS IT NOT?

A YES.

Q AND IT'S -- IT'S IMPORTANT. I MEAN, YOU NEED TO KNOW THAT TO MAKE A FULL DIAGNOSIS; DO YOU NOT?

A YES. YES.

Q YOU NEED TO KNOW THE STEPS HE TOOK AFTER THE CRIME?

A YEAH. WE WENT THROUGH THAT, YEAH.

Q OKAY. AND SO IT IS IMPORTANT FOR YOUR TESTIMONY IN REACHING YOUR DIAGNOSIS?
A YES.
Q OKAY. WELL, THAT'S -- SO -- AND I JUST WANTED TO MAKE -- THAT'S WHY I'M ASKING THESE QUESTIONS; OKAY?
A UH-HUH.
Q TELL ME WHAT HE INFORMED YOU ABOUT HENRY, THE MURDER OF HENRY TURNER.
A HE SAID THAT HENRY TURNER OBTAINED A PISTOL AND POINTED IT AT HIM AND HE -- EITHER TURNER APPROACHED HIM OR VICE VERSA, BUT CAME -- THEY CAME IN CLOSE CONDUCT (SIC) AND THAT HE DISARMED MR. TURNER, THE GUN WENT FLYING ONE DIRECTION, HE PUSHED MR. TURNER AWAY, AND THEN HE -- LEFT ON THE GUN AND TOOK IT UP WHEN MR. TURNER GOT UP AND CAME AT HIM AGAIN. HE FIRED IT ONCE TO HIS MEMORY.
Q OKAY. DID HE CLAIM ANY AMNESIA DURING THIS PARTICULAR MURDER?
A NO.
Q THE -- HE SAYS IT WAS SORT OF A SELF-DEFENSE, I GUESS?
A DIDN'T USE THAT TERM, BUT...
Q DID HE TELL YOU ABOUT--
A PRESENTATION WAS SIMILAR TO THAT, YEAH.
Q DOCTOR, DID YOU READ THE POLICE REPORTS ABOUT THE HENRY TURNER MURDER?

A YES, I DID.
Q IN THE COURSE OF READING THOSE POLICE REPORTS, DID YOU KNOW THAT THERE WAS A PILLOW USED? THERE WAS ACTUALLY A GUNSHOT FIRED THROUGH THE PILLOW?
A THAT I DON'T RECALL EITHER. I MAY NOT HAVE SEEN THAT ONE.
Q HOW ABOUT THE AUTOPSY? DID YOU HAVE A CHANCE TO REVIEW THAT?
A YES.
Q AND DID YOU NOTE IN THE AUTOPSY THAT MR. TURNER WAS SHOT IN THE BACK?
A YES.
Q AND THEN HE WAS ALSO SHOT IN THE CHEST?
A YES, IN THE FRONT AND THE BACK, YEAH.
Q AND DID YOU -- DID YOU HAVE THE BENEFIT WHEN READING THAT REPORT OF KNOWING THAT MR. TURNER HAD A -- A SHAVER IN HIS HAND, AN ELECTRIC SHAVER IN HIS HAND WHEN HE WAS KILLED?
A THERE WAS A MENTION OF A ELECTRIC SHAVER. I DON'T KNOW IF IT WAS IN HIS HAND WHEN HE WAS FOUND DEAD ON THE FLOOR OR IT WAS IN HIS HAND WHEN HE WAS SHOT. I DON'T KNOW.
Q OKAY.
A I DON'T...
Q BUT YOU'RE AWARE OF THAT?

A I AM AWARE THAT...

Q IT WAS IN THE REPORT?

A YEAH, HE WAS IN THE BATHROOM.

MR. DIGGS: YOUR HONOR, COULD I OBJECT ON THE GROUNDS OF RELEVANCY HERE? I THINK HE'S EXPLORED WHAT HE -- TO THE EXTENT THAT HE MIGHT HAVE BEEN ENTITLED TO.

I DON'T UNDERSTAND WHAT THIS HAS TO DO WITH THE ISSUES THAT -- THAT ARE PRESENT IN THIS CASE, AND I WOULD ASK THAT HE GET BACK ON TRACK AT LEAST PERTINENT TO THIS CASE.

MR. HEMBREE: JUDGE, THE -- IF I MAY, THE KEY HERE IS I'M TRYING TO GLEAN WHAT DR. THRASHER KNEW FROM OTHER SOURCES SO -- BECAUSE HE'S HAVING TO ASSESS THE STORY THAT THIS DEFENDANT TOLD HIM, AND HE'S GOT POLICE REPORTS AND OTHER ITEMS OF EVIDENCE OR REFERENCES TO EVIDENCE THAT HE CAN EVALUATE WHEN CONSIDERING THE STORY TO MAKE A JUDGMENT AS TO WHETHER THIS STORY IS TRUE OR NOT.

THAT'S IMPORTANT BECAUSE HE'S GOT TO LOOK AT THIS PATTERN OF BEHAVIOR TO MAKE A -- TO MAKE A -- A DIAGNOSIS. SO I'M TRYING TO FIND OUT WHAT HE KNOWS AND WHAT HE DOESN'T KNOW SO HE CAN TELL ME IF HE BELIEVES THIS STORY THAT STANKO TOLD HIM AS HE'S EVALUATED--

THE COURT: WELL, THE PURPOSE OF THIS EN CAMERA HEARING IS A PROFFER SO THAT IN THE EVENT THE COURT DOES NOT ALLOW THE TESTIMONY, THAT THERE WILL BE A COMPLETE RECORD ON APPEAL. SO I DON'T KNOW THAT, YOU KNOW, I'M NOT THE FACT FINDER, SO I CAN'T BE INFLUENCED.

MR. DIGGS: RIGHT.

MR. HEMBREE: I WILL TRY TO -- I WILL TRY TO WRAP THIS UP.

THE COURT: WE CAN TAKE A BREAK NOW OR...

MR. HEMBREE: I'M PRETTY CLOSE. JUDGE, I'M PRETTY CLOSE TO FINISHING REALLY THIS ASPECT OF IT.

THE COURT: GO AHEAD. THE OBJECTION IS OVERRULED.

MR. HEMBREE: THANK YOU, YOUR HONOR.

BY MR. HEMBREE:

Q SO DR. THRASHER, YOU WERE AWARE OF THE TWO SHOTS?

A YES.

Q YOU DON'T KNOW IF -- YOU'RE NOT SURE ABOUT THE PILLOW?

A NO, I'M NOT.

Q OKAY. WELL, IF I TELL YOU THAT THERE WAS A PILLOW FOUND WITH A GUNSHOT THROUGH IT AND THERE WERE FIBERS FOUND IN THE BODY OF HENRY TURNER CONSISTENT WITH THAT PILLOW AND FIBERS FOUND ON THE BULLET IN HENRY TURNER

CONSISTENT WITH THAT PILLOW, WOULD THAT CHANGE OR ALTER YOUR OPINION ABOUT WHAT OCCURRED AT MR. TURNER'S HOUSE?

A MR. HEMBREE, COMING FROM YOU IT'S UNDOUBTEDLY TOTALLY BELIEVABLE AND CORRECT.

Q WELL, THANK YOU. I -- THANK YOU FOR THAT UNSOLICITED TESTIMONIAL.

MR. DIGGS: I OBJECT TO THE WITNESS VOUCHING FOR THE SOLICITOR.

THE WITNESS: YOU ASKED ME IF IT WOULD CHANGE MY OPINION--

BY MR. HEMBREE:

Q YES.

A -- OF WHAT HE DID AT THAT CRIME SCENE?

Q YES.

A MADE AN OPINION ON WHAT HE DID AT THAT CRIME SCENE.

Q WHAT IS YOUR OPINION OF WHAT HE DID AT THAT CRIME SCENE? THAT'S -- MAYBE I CAN CUT TO THE CHASE.

A KILLED MR. TURNER.

Q AND DO YOU BELIEVE THAT IT WAS IN SELF-DEFENSE?

A THAT'S HARD FOR ME TO PUT TOGETHER. THAT'S VERY DIFFICULT FOR ME TO PUT TOGETHER.

Q BUT THAT -- I MEAN, BUT THAT WOULD BE VERY SIGNIFICANT AND, I MEAN, THAT'S KIND OF IMPORTANT TO DETERMINE IN MAKING YOUR DIAGNOSIS; TRUE?

A WELL, I THINK HIS STORY WAS STRUCTURED IN SUCH A WAY

THAT IT COULD BE TAKEN AS A SELF-DEFENSE. BUT BASED ON THE TOTAL INFORMATION, THAT'S DOUBTFUL.

Q THAT'S FAIR ENOUGH. I -- THAT'S REASONABLE.

A DOUBTFUL.

Q THAT'S REASONABLE ENOUGH.

A NEITHER ONE OF US WERE THERE, NEITHER ONE OF US SAW IT.

Q DID HE TELL -- OR YOU HAD THE BENEFIT OF REVIEWING -- WELL, LET ME ASK YOU THIS AND SEE IF THIS CHANGES YOUR OPINION ANY. IF I -- I'M -- I'LL TELL YOU THAT THERE IS A PERSON WHO RECEIVED A CALL FROM HENRY TURNER THAT MORNING AND IN THE COURSE OF THAT CALL, MR. TURNER SAID THAT STANKO HAD COME TO HIS HOUSE AND HAD TOLD HIM THAT HIS FATHER HAD DIED, THAT STANKO'S FATHER HAD DIED, AND HE NEEDED TO TALK TO SOMEBODY.

WOULD THAT IN ANY WAY CHANGE YOUR OPINION OR DIAGNOSIS OR ASSIST YOU IN EVALUATING THIS DEFENDANT?

A WELL, IT -- IF IT WAS MR. STANKO, IT WOULD HAVE SOME IMPACT, YES.

Q YES.

A YEAH.

Q OKAY. WELL, IT WAS MR. STANKO THAT -- THAT TOLD THIS TO MR. TURNER. SO IN WHAT WAY WOULD IT CHANGE YOUR OPINION?

A WELL, THE TWO CONFLICTING STORIES HE TOLD ME ONE

THING AND HE TOLD SOMEBODY ELSE SOMETHING ELSE OR HE DID SOMETHING ELSE WHEN THEY ARE ABSOLUTELY CONFLICTING, SO PLACES HIS VORACITY IN DOUBT, BUT THAT'S--

Q ALL RIGHT.

A -- THAT'S NOT INCONSISTENT WITH HIS PERSONALITY AT ALL.

Q WERE YOU AWARE OF HIS TELEPHONE CALL TO DR -- I MEAN TO MR. GUAMER AT THE LIBRARY AT ABOUT 9:30 THAT FRIDAY MORNING TELLING MR. GAUMER THAT LAURA LING WAS HOME SICK WITH FOOD POISONING?

MR. KELLY: YOUR HONOR, WE WOULD OBJECT. THIS IS A RECITATION OF FACTS NOT IN EVIDENCE. THE TESTIMONY WAS IS THAT A PERSON CALLED THE LIBRARY WHOSE VOICE SOUNDED LIKE STEPHEN STANKO, NOT THAT STEPHEN STANKO CALLED THE LIBRARY.

THE COURT: WELL, I THINK THAT HE WOULD HAVE TO REPHRASE THE QUESTION. I THINK THE CLEAR INFERENCE FROM MR. GAUMER'S TESTIMONY IS THAT HE HAD BEEN IN CONTACT WITH MR. STANKO ON TWO DIFFERENT OCCASIONS AT A BOOK CLUB AIMED AT GETTING MEN MORE INVOLVED IN LIBRARY ACTIVITIES, THAT HE KNEW HIS VOICE, THAT HE WAS ABLE TO IDENTIFY IT, BUT HE IDENTIFIED THE VOICE ON THE OTHER LINE, ON THE OTHER END OF THE PHONE AS THAT OF MR. STANKO.

BUT I THINK THAT THE SOLICITOR WOULD NEED TO

REPHRASE THE QUESTION AND CONFINE IT TO THOSE FACTS AS PRESENTED. BUT OTHERWISE IT WILL GO TO THE WEIGHT AND THE FOUNDATION OF THIS WITNESS'S TESTIMONY, AND I THINK WITH THE REPHRASING IT WILL BE A PERMISSIBLE QUESTION.

MR. HEMBREE: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME. YOU MAY PROCEED.

BY MR. HEMBREE:

Q DR. THRASHER, DID YOU REVIEW MR. GAUMER'S STATEMENT?

A I DID.

Q SO YOU WERE AWARE THAT HE HAS -- HE HAS TESTIFIED THAT A PERSON CALLED HIM THAT HAD A VOICE THAT SOUNDED LIKE STEPHEN STANKO, AND THAT PERSON REPORTED THAT LAURA LING WOULD NOT BE COMING TO WORK THAT DAY?

A I DON'T THINK THAT THE DOCUMENT THAT I READ ABOUT HIS REPORT CAME FROM HIS TESTIMONY. I THINK IT CAME FROM A POLICE INVESTIGATIVE REPORT.

Q OKAY.

A BUT IT DID SAY ESSENTIALLY WHAT YOU JUST BROUGHT OUT, YEAH.

Q IN SUBSTANCE?

A SOMEBODY HAD CALLED AND SAID MS. LING WOULDN'T BE TO WORK. AND WHEN MR. GAUMER EVIDENTLY -- WELL, SHE'S, YOU KNOW, HOW SHE IS DOING, YOU KNOW, IS THERE SOMETHING WE CAN, YOU KNOW, WHATEVER HE -- THE INTERACTION WAS, THE

PERSON ON THE OTHER END GOT A LITTLE DEFENSIVE AND SAID, I HAVE -- I HAVE HER CELLPHONE, TO CALL ME IF YOU HAVE ANY PROBLEMS.

Q SO YOU WERE ABLE TO CONSIDER THAT IN--

A OH, YEAH.

Q -- ASSUMING -- LET'S -- I MEAN, ASSUMING THAT IT WAS MR. STANKO, I MEAN, THAT'S WHAT THE TESTIMONY IS TODAY, THAT'S WHAT THE -- THAT'S WHAT THE TESTIMONY WAS THAT HE--

A NO--

Q -- THE WITNESS BELIEVES IT TO BE MR. STANKO.

A THE IMPLICATION WAS CERTAINLY CLEAR AND -- IN THAT REPORT.

Q AND YOU CONSIDERED THAT IN MAKING YOUR DIAGNOSIS OF MR. STANKO?

A SURE. SURE.

Q WERE YOU AWARE OR WERE YOU MADE AWARE IN THE INCIDENT REPORT OR -- WELL, SURE IT WOULD HAVE BEEN -- HAD TO HAVE BEEN IN THE INCIDENT REPORT -- THAT MR. STANKO CALLED HIS BROTHER AT ABOUT 9:55 THAT MORNING, THAT FRIDAY MORNING, AND APOLOGIZED FOR EVERYTHING TO HIS BROTHER, LEFT A -- LEFT A VOICE ON THE ANSWERING MACHINE AT HIS BROTHER'S HOME IN NORTH CAROLINA?

A I BELIEVE SO.

Q WOULD THAT HAVE ANY IMPACT -- I MEAN, HE'S EXPRESSING REMORSE HERE. WOULD THAT HAVE ANY IMPACT ON YOUR

DIAGNOSIS?
A WELL, I DON'T KNOW WHAT HE'S APOLOGIZING FOR.
Q WELL -- WELL, HE'S...
A REMORSE FOR WHAT?
Q I MEAN, HE'S JUST KILLED THREE PEOPLE OR KILLED TWO PEOPLE, TRIED TO--
A HE'S APOLOGIZING BECAUSE HE DIDN'T KEEP AN APPOINTMENT OR BECAUSE HE HAD DONE SOMETHING VIAL TO HIS BROTHER?
Q DOCTOR, THIS IS -- I MEAN, THIS IS WITHIN -- WITHIN HOURS OF THE MURDERS.
A I UNDERSTAND.
Q OKAY. I MEAN--
A UNDERSTAND, BUT I DON'T -- I DON'T KNOW WHAT THE CONTENT OF THAT PHONECALL WAS ABOUT. WE CAN ASSUME IT WAS ABOUT--
Q OKAY.
A -- WHAT HE HAD JUST DONE.
Q YEAH.
A MAKE THAT ASSUMPTION.
Q PRETTY -- PRETTY GOOD ASSUMPTION WOULDN'T YOU SAY? I MEAN, YOU'RE GOING TO CONSIDER IT LIKE THAT. I MEAN, WHEN YOU CONSIDER IT IN FORMING YOUR OPINION, AREN'T YOU GOING TO LOOK AT IT IN THE LIGHT OF THE CIRCUMSTANCES THAT LED TO THE CALL?

A WELL, I DON'T KNOW. HE CALLS HIS BROTHER AND SAYS I'M SORRY FOR WHATEVER IT IS AND IS IT CONNECTED OR IS IT NOT CONNECTED? DON'T KNOW.

Q OKAY.

MR. HEMBREE: JUDGE, THAT'S ALL I HAVE ON THE QUESTIONS FOR DR. THRASHER FOR THE PURPOSES OF THE PROFFER.

THE COURT: OKAY. I WILL HEAR ANY -- I ASSUME THE REASON YOU ASKED FOR THE EN CAMERA HEARING WAS BECAUSE YOU TOLD ME YOU WERE GOING TO GET INTO SOME TESTIMONY ABOUT MR. TURNER; IS THAT CORRECT?

MR. HEMBREE: THAT'S CORRECT, YOUR HONOR.

THE COURT: I GUESS I -- WE NEED TO MAYBE DO IT IN REVERSE ORDER. LET ME HEAR FROM THE DEFENSE IF THEY HAVE ANY EXCEPTIONS TO THE PROFFER -- TO THE EVIDENCE THAT IS BEING OFFERED IN THE PROFFER. I KNOW YOU ALREADY OBJECT TO MR. TURNER'S -- ANYTHING ABOUT MR. TURNER.

MR. KELLY: OH, YES, MA'AM. WE OBJECT. LET ME ASK -- IS THAT WHAT THIS IS ABOUT? THE SOLICITOR IS ASKING THE COURT TO ALLOW THE JURY TO HEAR EVIDENCE THAT HENRY TURNER WAS KILLED IN HIS HOME?

THE COURT: YEAH, AS THE EVIDENCE OF INSANITY. BASED ON THE PRETRIAL DISCUSSIONS THAT WE HAD, I INSTRUCTED YOU ALL IF YOU'VE GOT A MOTION IN LIMINE

TO EXCLUDE ANY REFERENCES TO MR. TURNER, AND I TOLD -- INSTRUCTED THE SOLICITOR THAT WHEN HE, WITH ANY WITNESS, GOT TO THE POINT WHERE HE FELT HE WAS GOING TO ELICIT ANY TESTIMONY IN THAT REGARD, THAT HE LET THE COURT KNOW SO THAT THE MATTER CAN BE TAKEN UP OUTSIDE OF THE JURY'S PRESENCE.

MR. KELLY: AND FURTHER THAT HE WANTS TO -- PERMISSION OF THE COURT TO PRESENT EVIDENCE THAT JANE ELIZABETH MCLENDON WAS ATTACKED BY STEPHEN STANKO, HE WAS CONVICTED OF THOSE CHARGES. AM I TO UNDERSTAND THAT AS WELL?

MR. HEMBREE: YOUR HONOR, I DON'T INTEND TO GO INTO THE FACT HE WAS CONVICTED OF THOSE CHARGES. IF -- I MEAN, THAT'S A DIFFERENT ISSUE. IT'S -- THE ACTS THEMSELVES ARE A PATTERN OF BEHAVIOR THAT ARE RELEVANT TO THE -- TO THE DOCTOR'S OPINION ABOUT MR. STANKO'S TESTIMONY.

HE'S ALREADY TESTIFIED TO THAT EFFECT. SO WE DON'T INTEND TO GO INTO THE CONVICTION, BUT WE WILL GO INTO THE CONDUCT.

THE COURT: OKAY. DOES THAT CLARIFY IT FOR YOU, MR. KELLY?

MR. KELLY: YES, MA'AM. WE WOULD -- I WOULD ASK THE DOCTOR... DOCTOR, DID YOU READ JANE ELIZABETH MCLENDON'S HANDWRITTEN ACCOUNT OF WHAT TOOK PLACE AT

THE TIME THAT SHE WAS ATTACKED BY STEPHEN STANKO?

THE WITNESS: I BELIEVE I DID.

MR. KELLY: AND IN THAT DO YOU RECALL THAT SHE SAID THAT SHE WAS UNTIED BY HIM OR RELEASED BY HIM BEFORE HE LEFT HER HOME?

THE WITNESS: YES.

MR. KELLY: OKAY. JUDGE, WE THINK IT'S TOTALLY IMPROPER. I'M SURE MR. DIGGS MIGHT HAVE OTHER QUESTIONS IN THIS MATTER. WE THINK IT'S TOTALLY IMPROPER AND HIGHLY PREJUDICIAL BECAUSE THERE ARE LESS INTRUSIVE WAYS IN WHICH TO GIVE THE SAME EVIDENCE WITHOUT GOING INTO THE DETAILS OF THESE ALLEGED CRIMES.

AS YOU'RE AWARE, JUDGE, STEPHEN STANKO HAS BEEN INDICTED IN A NEIGHBORING COUNTY, HORRY COUNTY. HASN'T BEEN TRIED. I BELIEVE THE SOLICITOR BELIEVES HE MURDERED AND ROBBED MR. TURNER, BUT IT HASN'T BEEN ANY ADJUDICATION TO THAT EFFECT.

IT COULD -- AND -- AND I'M SURE HE BELIEVES THERE'S A PATTERN THAT'S TAKEN PLACE THAT HE'D LIKE TO SHOW THE JURY IN THIS PHASE BETWEEN ELIZABETH MCLENDON AND THE CURRENT CRIMES. WE THINK THAT THAT'S HIGHLY PREJUDICIAL AND SHOULDN'T BE ALLOWED.

THE DOCTORS CAN SIMPLY TESTIFY THAT THEY'RE AWARE OF PREVIOUS INSTANCES AND TIME FOLLOWING AND

THAT -- AND CAN SPEAK TO THOSE MATTERS WITHOUT SPEAKING TO THE FACTS OR THE NAMES OF PERSONS WHO MIGHT BE INVOLVED.

THE COURT: SO TELL ME AGAIN WHAT YOU DO NOT FIND OBJECTIONABLE, SO LET ME SEE IF YOU ALL HAVE AN AGREEMENT BEFORE I... COULD YOU -- TELL THE SOLICITOR WHAT YOU DO NOT FEEL WOULD BE -- YOU WOULD NOT OBJECT TO.

MR. KELLY: WELL...

THE COURT: BECAUSE I HEAR YOU SAYING THERE'S SOME THINGS YOU WOULD NOT FIND OBJECTIONABLE AND THAT YOU MIGHT FEEL WOULD BE A LESS INTRUSIVE WAY OF HIM EXAMINING THE VORACITY AND UNDERLYING OPINION OF DR. THRASHER.

MR. KELLY: YOUR HONOR, WE DON'T OBJECT TO THE GOING INTO ELIZABETH MCLENDON FACTS AS KNOWN BY THE DOCTOR.

THE COURT: OKAY.

MR. KELLY: BUT NOT THE CONVICTIONS.

THE COURT: OKAY.

MR. KELLY: AS FAR AS HENRY TURNER IS CONCERNED, WE THINK THAT THIS DOCTOR OR ANYBODY ELSE CAN SAY, YES, I'M AWARE OF WHAT HAS BEEN ACCOUNTED TO ME BY ALL SOURCES AVAILABLE TO ME, INCLUDING THE DEFENDANT, OR ANY REPORTS, AND -- AND IT AFFECTS MY OPINION IN

THIS PARTICULAR WAY.

IN OTHER WORDS, I KNOW AND AM AWARE OF INCIDENCES THAT ARE -- THAT TOOK PLACE. AND TO THE EFFECT OF THIS, JUDGE...

THE COURT: WITHOUT GOING INTO THE SPECIFICS.

MR. KELLY: YEAH. WITHOUT GOING INTO THE SPECIFICS. ARE YOU AWARE FOR INSTANCE, DOCTOR, THAT IT APPEARS THAT HE -- HE DROVE A LONG DISTANCE SHORTLY AFTER OR THAT HE WENT TO AN ATM MACHINE OR THAT HE SPOKE WITH OTHER PERSONS.

THIS TYPE OF INNOCUOUS -- THAT THE JURY CAN SEE WHAT THE SOLICITOR IS TRYING TO SHOW, AND THAT IS THAT HE WAS RATIONAL, NOT THAT HE'S A MURDERER, NOT THAT HE'S A ROBBER, BUT THAT HE'S RATIONAL.

SO, YES. I MEAN, JUDGE, IF THE QUESTION REALLY IS -- IS WHEN YOU GET DOWN TO IT, IS IT IMPORTANT FOR THE DIAGNOSIS? YES. BUT IS IT IMPORTANT FOR THE JURY? NO. AND IT'S HIGHLY PREJUDICIAL.

SO IF HE CAN ASK QUESTIONS OF ANY TYPE ABOUT ANY INSTANCES WHATSOEVER THAT SHOWS WHAT HE HAS A RIGHT TO PROVE, WHICH IS THAT HE WAS ON HIS CLAIM RATIONAL AND SANE, WITHOUT PREJUDICING THE JURY BY SAYING THINGS THAT HAVE NOT BEEN PROVEN AND ARE STILL PENDING IN OUR COURTS, THERE'S NO EVIDENCE AT ALL THAT HE MURDERED HENRY TURNER AT THIS POINT.

THE SOLICITOR THINKS HE DID. BUT THERE'S NO EVIDENCE THAT HE DID. AND THERE'S BEEN NO ADJUDICATION OF IT -- THAT ANY EVIDENCE BEFORE THIS COURT. WE CAN'T BE ALLOWED IN FRONT OF THIS COURT.

SO WE DON'T MIND THE FAIRNESS OF IT, WHICH IS TO SHOW WHETHER OR NOT THERE IS EVIDENCE THAT THE DEFENDANT MIGHT HAVE BEEN RATIONAL OR SANE, BUT NOT THAT HE'S SOME KIND OF CONVICTED OR OUGHT TO BE CONVICTED CRIMINAL.

THE COURT: MR. HEMBREE? I'M SORRY, MR. DIGGS?

MR. HEMBREE: I WAS GOING TO LET THE DEFENSE MAKE THEIR ARGUMENT AND THEN I WILL BE GLAD TO RESPOND.

MR. DIGGS: YOUR HONOR, I BELIEVE THAT DR. THRASHER SAID HE'S AWARE OF ALL THIS STUFF OR AT LEAST MOST OF IT AND IT DIDN'T AFFECT HIS ULTIMATE OPINION ABOUT THE SANITY OR LACK THEREOF AT THE TIME OF THE LAURA LING INCIDENT.

NOW, IF IT WERE A SITUATION WHERE SOLICITOR WAS SAYING, WELL, WHAT ABOUT THIS AND THIS, MR. TURNER, YOU DIDN'T KNOW ABOUT THAT, DID YOU? NOW, HOW DOES THAT AFFECT YOUR OPINION? AND DR. THRASHER SAID, WELL, I CERTAINLY WOULD CHANGE MY OPINION IN THAT RESPECT.

YOU KNOW, THAT WOULD BE ANOTHER -- THAT'S NOT

WHAT WE HAVE HERE. I WOULD JUST -- THAT'S ALL I WOULD HAVE TO ADD, AND I THINK MR. KELLY'S MADE THE POINT.

THE COURT: SOLICITOR?

MR. HEMBREE: THANK YOU, YOUR HONOR. ONCE THE DEFENSE ELECTS TO OFFER AN INSANITY DEFENSE, THAT BURDEN OF -- AS WE DISCUSSED YESTERDAY AND WE DISCUSSED A NUMBER OF TIMES -- THERE'S A PRESUMPTION OF SANITY UNTIL THE DEFENSE OFFERS THAT INSANITY DEFENSE AS IS A STRATEGIC MATTER, THEY HAVE CHOSEN TO DO THAT.

ONCE THEY DO THAT, THEN THE BURDEN SHIFTS TO THE STATE TO PROVE THAT THE DEFENDANT WAS SANE AT THE TIME. AND THAT IS WHY I AM PERMITTED TO GO INTO RELEVANT PATTERN OF CONDUCT THAT HAVE BEEN -- THOSE -- THAT PATTERN OF CONDUCT THAT HAS BEEN CONSIDERED BY DR. THRASHER OR ANY OTHER DOCTOR IN REACHING A DIAGNOSIS OF THIS DEFENDANT.

IT'S NOT OFFERED AS SUBSTANTIVE EVIDENCE. THAT WOULD BE COVERED IN YOUR LIMITING INSTRUCTION TO THE JURY. CLEARLY THEY CANNOT CONSIDER IT AS SUBSTANTIVE EVIDENCE FOR PURPOSES OF THE GUILT OR INNOCENCE OF THIS DEFENDANT OUTSIDE THE SCOPE OF THE DEFENSE OF INSANITY. BUT YOU KNOW, THAT -- THAT'S GOING TO BE THE COURT'S RESPONSIBILITY.

HOWEVER, YOU KNOW, HOWEVER, THAT'S WHY I'VE ASKED THE QUESTIONS OF DR. THRASHER ABOUT DETAILS, ABOUT THE THINGS THAT HE KNEW BECAUSE THOSE DETAILS, THE DETAILS OF THOSE ACTS ARE HOW -- ARE THE BEHAVIORS OF THE DEFENDANT THAT LEAD TO THE DIAGNOSIS DR. THRASHER HAS OFFERED. IT'S RELEVANT. AND AS DR. THRASHER SAID, IT'S RELEVANT.

THE COURT: WELL, LET ME ASK A MORE BASIC QUESTION. BASED ON MR. KELLY'S REPRESENTATIONS TO THE COURT, THE MATTERS THE DEFENDANT WOULD NOT FIND OBJECTIONABLE, DO YOU THINK THAT YOU COULD CONFINE YOUR QUESTIONING TO THOSE PARAMETERS AS REGARDS -- THE INFORMATION ABOUT MS. ELIZABETH MCLENDON?

MR. HEMBREE: NO QUESTION, YOUR HONOR. ELIZABETH MCLENDON -- WE CAN TALK ABOUT -- I NEVER INTENDED TO TALK ABOUT CONVICTIONS, SO WE'RE ALREADY IN AGREEMENT ABOUT THAT AND--

THE COURT: I'M JUST TRYING TO BE CLEAR FOR THE RECORD AND TAKE IT SEQUENTIALLY.

MR. HEMBREE: THANK YOU, YOUR HONOR.

THE COURT: NOW, MR. KELLY INDICATES THAT HE WOULD HAVE NO OBJECTION TO YOU SHOWING THAT MR. STANKO IS CAPABLE OF RATIONAL THOUGHT WITHOUT REFERRING TO THE SPECIFICS OF THE MURDER OF HENRY TURNER. WOULD YOU BE ABLE TO DO THAT?

MR. HEMBREE: NO, YOUR HONOR.

THE COURT: CONFINE YOUR QUESTIONING?

MR. HEMBREE: I CANNOT CONCEIVE OF A WAY TO ASK QUESTIONS IN A MANNER THAT -- DID HE DO OTHER THINGS BUT I'M NOT GOING TO TALK TO YOU ABOUT THOSE THAT INDICATE HE WAS RATIONAL. I MEAN, THAT'S -- THAT'S SO VAGUE AND IT REALLY -- IT REALLY LIMITS MY ABILITY, OUR -- THE STATE'S ABILITY TO PROVE HE WAS SANE, AND THAT'S OUR BURDEN AT THIS POINT THAT'S BEEN PUT ON US BY THE--

THE COURT: I DON'T THINK IT LIMITS YOUR ABILITY TO PROVE HE'S SANE. CLEARLY THE CASE LAW ALLOWS YOU TO PRESENT ANY TYPE OF EVIDENCE THAT WOULD BEAR ON THE PART OF HIM TO CONCEAL OR DESTROY EVIDENCE, MANIFEST IN THAT THAT MANIFESTED AWARENESS OF HIS KNOWING RIGHT FROM WRONG.

AND I'M NOT -- AGAIN, I THINK THAT CLEARLY YOU HAVE THE ABILITY ON CROSS IS -- WIDE LATITUDE IS GIVEN IN CROSS TO INQUIRE INTO THIS EXPERT'S, YOU KNOW, FOUNDATION OF HIS OPINION.

AND REALLY WHAT YOU'RE DOING IS MORE IN THE NATURE OF IMPEACHMENT. IT'S MORE LIKE, YOU KNOW, DID YOU KNOW ALL THESE THINGS, AND DID THIS IN ANY WAY ALTER YOUR OPINION. AND I THINK TO SOME EXTENT IT WOULD BE RELEVANT.

THE PROBLEM AND WHERE I'M STRUGGLING RIGHT NOW IS THAT IT IS SO PREJUDICIAL. AND THE OTHER PART ABOUT -- THE OTHER LEVEL THAT I HAVE TO DEAL WITH IS YOU REALLY -- THE COURT COULD EVER BE INTRODUCED BECAUSE IT'S AN ACT HE HAS NOT BEEN CONVICTED OF, YOU WOULD HAVE TO PROVE IT BY CLEAR AND CONVINCING TO -- EVIDENCE TO THE COURT WHICH MEANS THEN WE'D HAVE TO HAVE ANOTHER LITTLE TRIAL WITHIN A TRIAL FOR YOU TO EVEN BE ABLE TO MENTION IT. SO I NEED TO THINK ABOUT IT FOR A FEW MINUTES.

MR. HEMBREE: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME. DR. THRASHER, YOU MAY STEP DOWN, REFRESH YOURSELF. PLEASE DON'T DISCUSS THE TESTIMONY DURING THE BREAK.

THE WITNESS: YES, MA'AM.

THE COURT: OKAY.

MR. DIGGS: YOUR HONOR, MAY I SPEAK TO DR. THRASHER?

THE COURT: YOU CAN TALK TO HIM, BUT YOU CANNOT TALK ABOUT HIS TESTIMONY IN ANY REGARD. AND I NOTICED THAT SOME WITNESSES MAY BE IN THE GALLERY. YOU ALL MAY WANT TO DEAL WITH THE SEQUESTRATION ISSUE.

MR. HEMBREE: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

(WHEREUPON A RECESS WAS HAD.)

THE COURT: WHILE WE ARE AWAITING -- BY ORDER OF THE CHIEF JUSTICE, PLEASE DO NOT HAVE ANY CELLPHONES IN THE ON POSITION. THEY SHOULD BE OFF AT ALL TIMES. THEY SHOULD NOT BE ON VIBRATE OR OTHERWISE. THEY SHOULD BE TURNED OFF.

IF THEY GO OFF, THEY WILL BE CONFISCATED; OKAY? SO I DON'T WANT THAT TO COME AS ANY SURPRISE TO ANYONE. CELLPHONES CAN BE VERY DISRUPTIVE FOR LACK OF A BETTER WAY OF PUTTING IT AND IT'S VERY DISTRACTING TO THE JURY WHEN THEY GO OFF, ESPECIALLY IN THE MIDDLE OF TESTIMONY.

AND I UNDERSTAND SOME PEOPLE'S CELLPHONES WERE CONFISCATED THIS MORNING. IS THAT CORRECT? YOU ALL CAN GO AHEAD AND RETURN THOSE TO THEM, BUT MAKE SURE THAT THEY ARE OFF; OKAY? THANK YOU ALL VERY MUCH. AND WE'LL WAIT ON MR. STANKO, THEN WE'LL PROCEED.

(DEFENDANT ENTERED THE COURTROOM.)

THE COURT: THE COURT HAS TAKEN THE -- HAS CONSIDERED THE MOTION IN LIMINE OF THE DEFENSE REGARDING ANY REFERENCE TO THE TESTIMONY REGARDING THE OFFENSE WHICH TOOK PLACE OR IS ALLEGED TO HAVE TAKEN PLACE AT HENRY LEE TURNER'S HOME.

THE COURT WOULD SUSTAIN THE OBJECTION AND WOULD RESTRICT THE STATE FROM MAKING ANY REFERENCE TO THE

OFFENSES THAT ALLEGEDLY TOOK PLACE AT MR. TURNER'S RESIDENCE FOLLOWING THESE EVENTS.

THE COURT WOULD FIND THAT IT IS -- THAT THE TESTIMONY AS ELICITED BY THE SOLICITOR IS RELEVANT AS REGARD TO THE ASSESSMENT OF THE PATTERN OF BEHAVIOR OF THE DEFENDANT.

HOWEVER, THE COURT FINDS THAT ALTHOUGH RELEVANT, PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE PURSUANT TO RULE 403.

IN ADDITION TO THAT, AND AS I TOLD YOU ALL IN CHAMBERS, THE COURT FOUND IF IN FACT THAT IS WHAT THE STATE IS SEEKING TO ELICIT FROM DR. THRASHER, THEY BASICALLY ACCOMPLISHED THAT BECAUSE DR. THRASHER'S TESTIMONY ON CROSS INDICATED THAT HE REALLY BELIEVED VERY LITTLE OF WHAT MR. STANKO SAID TO HIM.

HE SAID HE TELLS STORIES. HE'S A PSYCHOPATH. SO I THINK THAT EVEN IF HE WERE TO TELL HIM THESE THINGS, THAT IT WOULD NOT HAVE SUBSTANTIALLY IN ANY WAY OR APPRECIABLY ALTERED HIS OPINION AS REGARD TO WHETHER MR. STANKO WAS SANE OR INSANE.

NOW, BY AGREEMENT OR BY -- WITHOUT OBJECTION THE STATE WILL BE ALLOWED TO MENTION THE INCIDENTS WHICH TOOK PLACE REGARDING MS. ELIZABETH MCLENDON. THE COURT ALSO FINDS APPROPRIATE THAT THE STATE ALSO BE ALLOWED TO INQUIRE TO THE MATTERS REGARDING THE

PHONECALL WITH MR. GAUMER.

AND PURSUANT TO OUR CHAMBERS CONFERENCE -- AND ALTHOUGH, YOU KNOW, WE DID NOT REALLY TALK ABOUT THIS, ABOUT THE PHONECALL THAT HE -- OR THE MESSAGE HE LEFT ON HIS BROTHER'S ANSWERING MACHINE, IS THERE ANY EXCEPTION FROM THE DEFENSE TO THE MENTIONING OF THAT?

MR. KELLY: THERE IS NONE.

THE COURT: OKAY. ALSO, AS WE -- YOU ALL CAN HELP MY MEMORY IF I LEAVE ANYTHING OUT -- THE COURT WOULD FIND THAT IT IS CLEARLY WITHIN THE SCOPE OF CROSS THAT THE SOLICITOR WOULD BE ALLOWED TO ELICIT TESTIMONY REGARDING ALL OF THE INCIDENTS WHICH TOOK PLACE AT THE RESIDENCE AFTER THE INCIDENTS, INCLUDING THE ITEMS THAT WERE TAKEN, THE ATM MACHINE, THE VEHICLE BEING DISCARDED, THE DEFENDANT GETTING ANOTHER VEHICLE AND MODE OF TRANSPORTATION WITHOUT, OF COURSE, ANY REFERENCES TO THEFT. AND I FORGET THE OTHER.

MR. HEMBREE: THE CELLPHONE.

THE COURT: THE CELLPHONE.

MR. HEMBREE: OBTAINED -- AND USE THE LANGUAGE IN OUR QUESTION -- OBTAINED ANOTHER CELLPHONE.

THE COURT: I KNEW THERE WAS SOMETHING THAT I WAS OMITTING. IS THAT THE DEFENSE'S RECOLLECTION OF

THE ITEMS THAT IT DOES NOT OBJECT TO THE STATE GOING INTO?

MR. DIGGS: IT'S MY RECOLLECTION.

MR. KELLY: YES, MA'AM. AND I THINK ALSO THE SOLICITOR WILL NOT REFER TO ANY CONVICTIONS HAVING TO DO WITH MCLENDON MATTERS.

THE COURT: THAT'S CORRECT.

MR. HEMBREE: THAT'S CORRECT. THAT'S THE APPROACH WE'LL TAKE, YOUR HONOR.

THE COURT: WITH THOSE INSTRUCTIONS, AND AS I INDICATED, I THINK CLEARLY THE STATE HAS THE ABILITY TO GO INTO ANY MATTERS THAT ON THE PART OF THE DEFENDANT TO CONCEAL OR DESTROY EVIDENCE WHICH WOULD MANIFEST HIS AWARENESS OF RIGHT AND WRONG.

AND I THINK THAT THE MATTERS THAT WILL BE ELICITED CLEARLY FALL WITHIN THE SCOPE OR IN THOSE PARAMETERS. OKAY. ARE WE READY TO PROCEED?

MR. HEMBREE: THE STATE'S READY, YOUR HONOR.

THE COURT: THE DEFENSE READY?

MR. KELLY: YES, MA'AM.

THE COURT: WE'D LIKE TO TRY TO FINISH DR. THRASHER SO THAT THE JURY CAN HAVE LUNCH. PLEASE BRING IN -- DOCTOR, IF YOU WOULD RE-TAKE THE STAND, I WILL REMIND YOU YOU'RE STILL UNDER OATH. IF YOU ALL COULD BRING IN THE JURY.

(WITNESS RESUMED THE STAND.)

(JURY ENTERED THE COURTROOM AT 1:08 PM.)

THE COURT: YOU MAY BE SEATED. LADIES AND GENTLEMEN, WE APPRECIATE YOUR PATIENCE WHILE WE RESOLVED THOSE MATTERS OF LAW. YOU MAY PROCEED.

MR. HEMBREE: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

BY MR. HEMBREE:

Q DR. THRASHER, I THINK WHEN WE LAST WERE TALKING, WE HAD DISCUSSED SOME OF THE ELEMENTS OR BUILDING BLOCKS OF A -- OF A -- AN ADEQUATE OR A GOOD PSYCHIATRIC, PSYCHIATRIC EXAM AND DIAGNOSIS; CORRECT?

A THAT'S WHAT YOU WERE DOING.

Q OKAY. WE WERE TALKING ABOUT THAT OR I WAS ASKING YOU SOME QUESTIONS ABOUT THAT?

A YES, YOU WERE.

Q AND AS I RECALL, WE WERE TALKING ABOUT ONE OF THE -- ONE OF THOSE ELEMENTS BEING THE CLINICAL, THE CLINICAL EXAMINATION OF THE DEFENDANT AND THE EVALUATION OF THE PATTERN OF BEHAVIOR OF THE DEFENDANT.

A YES INDEED.

Q THAT'S AN IMPORTANT THING. AND YOU'D ALREADY TESTIFIED TO THAT.

A IT IS.

Q NOW, IN THE COURSE OF EVALUATING DEFENDANT STANKO,

YOU WERE MADE AWARE OF CERTAIN BEHAVIORS OR INCIDENTS THAT WERE RELEVANT TO YOUR DIAGNOSIS; ISN'T THAT TRUE?

A YES.

Q AND LET ME TAKE YOU TO -- AND YOU -- I THINK YOU MENTIONED WHEN MR. DIGGS WAS ASKING YOU QUESTIONS -- YOU REVIEWED A LOT OF REPORTS AND STATEMENTS AND YOU -- YOU SAID THEY TOOK A -- I MEAN, IT WENT OVER ALMOST A FULL PAGE OF MATERIAL THAT YOU HAD CONSIDERED IN REACHING YOUR DIAGNOSIS.

A YES, SIR, ONE PAGE AND PART OF ANOTHER.

Q ONE PAGE AND PART OF ANOTHER. SO QUITE A LENGTHY--

A YES, SIR.

Q -- A LONG LIST OF THINGS. ONE OF THOSE THINGS WAS A REPORT OF AN INCIDENT INVOLVING IN A MS. MCLENDON.

A I AM SORRY. MISSED THAT. WHO?

Q AN INCIDENT INVOLVING MS. MCLENDON.

A YES.

Q FROM 1996.

A YES.

Q AND DID YOU -- YOU REVIEWED THAT REPORT?

A I DID.

Q AND DID IT REVEAL PATTERNS OF BEHAVIOR TO YOU THAT WERE SIGNIFICANT?

A YES.

Q WOULD YOU PLEASE TELL THIS JURY THE CIRCUMSTANCES

INVOLVING THAT INCIDENT THAT YOU CONSIDERED. WHAT HAPPENED TO HER?

A WHAT HAPPENED TO HER?

Q YES.

A SHE AND MR. STANKO WERE INVOLVED IN AN ARGUMENT OVER -- I CAN'T REMEMBER EXACTLY WHAT HE SAID THE ARGUMENT WAS ABOUT.

Q DO YOU HAVE THAT REPORT IN YOUR -- IN YOUR MATERIALS THERE?

A I DON'T KNOW IF I HAVE IT IN HERE OR NOT. IT MAY COME TO MIND WHAT IT WAS ABOUT AS I TALK. AND SHE -- OH, I KNOW WHAT IT WAS. HE HAD BEEN INVOLVED IN SOME SORT OF CON. HE WAS CHEATING ON PEOPLE. HE WAS BORROWING MONEY HERE, SAYING HE WAS GOING TO INVEST IT AND THEN NOT INVESTING IT, AND YOU KNOW, JUST CONNING PEOPLE.

AND SOME SALE OF AUTOMOBILES, IT WAS -- HE WORKED FOR A LARGE AUTOMOBILE DEALER IN THE -- IN THE CHARLESTON AREA AND HE WAS SELLING VEHICLES ILLEGALLY, AND EVIDENTLY GETTING THEM FROM THE BUSINESS. AND MS. MCLENDON FOUND OUT ABOUT THAT. THEY GOT INTO AN ARGUMENT OVER IT AND...

Q NOW, WHAT WAS HER RELATIONSHIP WITH DEFENDANT STANKO, MS. MCLENDON?

A THEY WERE CLOSE. AND EVIDENTLY SHE THREATENED TO REPORT HIM TO THE POLICE AND THEY GOT INTO A FIGHT WHERE SHE HIT HIM AND HE ENDED UP TYING HER UP WITH A -- WITH A

NECKTIE--
Q NOW--
A -- FOR A PERIOD OF -- FOR A PERIOD OF TIME AND THEN HE LET HER GO.
Q WERE YOU MADE AWARE IN THE REVIEW OF THOSE REPORTS -- DID YOU EVER INTERVIEW MS. MCLENDON?
A NO. NO. EXCUSE ME.
Q AND WERE YOU AWARE IN THE REVIEW OF THOSE REPORTS IN CONSIDERING THAT -- THAT EVENT THAT THE DEFENDANT TOOK A RAG SOAKED IN CLOROX AND STUFFED IT INTO MS. MCLENDON'S MOUTH?
A YES INDEED.
Q OKAY. AND THEN TIED HER UP WITH NECKTIES?
A NECKTIE, YES.
Q FOR A PERIOD OF TIME?
A YES.
Q AND THEN ULTIMATELY...
A LET HER GO.
Q RELEASED HER?
A YES.
Q AND HE TOOK OFF?
A HE DID.
Q OKAY. YOU'RE AWARE OF THAT?
A YES.
Q NOW, IS IT YOUR -- WOULD IT BE YOUR TESTIMONY THAT HE

WAS INSANE ON THAT OCCASION?

A NO.

Q LET ME ASK YOU ABOUT SOME OF THE EVENTS, SOME OF THE BEHAVIORS OF THE DEFENDANT AROUND THE -- DURING THE COURSE OF THESE CRIMES, THE MURDER OF LAURA LING AND SEXUAL ASSAULT AND ATTEMPTED MURDER OF CHRISTINA LING. I BELIEVE THE DEFENDANT TOLD YOU THAT HE HAD AMNESIA?

A WELL, HE DIDN'T USE THE WORD. HE JUST SAID HE COULDN'T REMEMBER A SINGLE THING.

Q OKAY. DIDN'T REMEMBER ANYTHING ABOUT IT?

A UH-HUH.

Q BLACKED OUT?

A HE DIDN'T USE THAT WORD. HE JUST SAID HE COULDN'T REMEMBER ANYTHING ABOUT IT.

Q FAIR ENOUGH. I APPRECIATE THAT. AND HE WAS -- I THINK HE TOLD YOU THAT HE WOKE UP IN THE SHOWER WITH BLOOD ALL OVER HIM?

A HE NEXT CAME AWARE OF THINGS IN THE SHOWER COVERED WITH BLOOD, YES.

Q AND THEREAFTER DID HE INDICATE TO YOU THAT HE CHECKED THE PULSE OF BOTH VICTIMS?

A WELL, HE -- HE SAID THAT HE DIDN'T KNOW WHY HE WAS IN THIS STATE OR WHAT WAS GOING ON, HE GOT OUT OF THE SHOWER, HE PUT A TOWEL OVER HIMSELF TO GO OUT AND SEE WHAT IT WAS, AND FOUND THIS HORRIBLE SCENE OF MS. LING AND HER

DAUGHTER.
Q UH-HUH. AND HE -- DID HE REPORT TO YOU THAT HE DIALED 9-1-1?
A NO, HE DIDN'T. HE DID TELL ME THAT HE CHECKED PULSES AND COULDN'T GET ANY ON EITHER ONE. THE YOUNG LADY WAS THANK GOD ALIVE.
Q AND HE DIDN'T GET A -- AT LEAST HE DIDN'T FEEL A PULSE IS WHAT HE REPORTED TO YOU ON EITHER ONE?
A THAT'S RIGHT. HE DIDN'T DETECT A PULSE.
Q DIDN'T DETECT A PULSE?
A HE THOUGHT BOTH OF THEM HAD DIED.
Q AND DID HE TELL YOU THAT HE THEN PACKED A SUITCASE, PACKED HIS BELONGINGS?
A HE SAID HE FINISHED PACKING HIS SUITCASE.
Q OKAY.
A HE HAD BEEN IN THE PROCESS OF PACKING A SUITCASE TO LEAVE THE HOUSE BECAUSE HE THOUGHT THAT HE WAS CAUSING DISRUPTION BETWEEN MS. LING AND HER DAUGHTER.
Q THAT'S WHAT HE REPORTED TO YOU?
A THAT'S WHAT HE TOLD ME, YEAH.
Q OKAY.
A THAT HE WAS -- HE WANTED TO LEAVE. AND SO AS TO NOT CAUSE THAT FAULT, ARGUMENT, DIDN'T WANT THAT TO HAPPEN HE SAID. AND THEN HE WAS PACKING A SUITCASE AND MS. LING AND HE FELL INTO AN ARGUMENT AND SHE SAID THAT SHE WAS GOING

TO HAVE HIM--

Q OKAY. I'M NOT -- THAT WASN'T MY QUESTION TO YOU. MY QUESTION WAS, DID HE TELL YOU THAT HE PACKED A SUIT -- HE FINISHED PACKING A SUITCASE?

A HE DID.

Q OKAY. HE LOADED UP THE SUITCASE AND HIS BELONGINGS. DID HE TELL YOU THAT HE LOADED HIS SUITCASE AND BELONGINGS IN MS. LING'S RED MUSTANG?

A YES. HE SAID HE PUT THEM IN MS. LING'S CAR.

Q AND HE TOOK HER CAR?

A HE DID.

Q AND THEN DID HE REPORT TO YOU WHERE HE WENT NEXT?

A HE SAID THAT HE WENT TO AN ATM MACHINE TO GET SOME MONEY.

Q OKAY. DID HE TELL YOU HOW MUCH HE GOT?

A I THINK IT WAS $70.

Q SEVENTY OR 700?

A MAY HAVE BEEN 700, I DON'T REMEMBER.

Q REMEMBER THE SEVEN?

A IT'S THE SEVEN, 7-0 SOMETHING.

Q FAIR ENOUGH.

A THEN HE USED A CREDIT CARD THAT HE SAID THEY BOTH -- FROM AN ACCOUNT THAT THEY BOTH HAD CONTRIBUTED TO.

Q OKAY.

A BUT I THINK IT WAS IN HER NAME.

Q OKAY. AN ACCOUNT IN HER NAME?
A I THINK IT WAS.
Q OKAY. AND DID HE SAY -- DID HE INFORM YOU THAT HE GOT RID OF THE RED MUSTANG AND OBTAINED OTHER TRANSPORTATION WITHIN HOURS OF THE CRIME?
A HE LEFT THE MUSTANG AT ANOTHER ADDRESS--
Q CORRECT.
A -- AND THEN--
Q OBTAINED ANOTHER -- ANOTHER VEHICLE?
A ANOTHER VEHICLE AND THEN LEFT, YES.
Q OKAY. AND DID HE INDICATE TO YOU THAT HE OBTAINED ANOTHER CELLPHONE?
A I DON'T THINK HE -- HE TOLD ME THAT.
Q WERE YOU AWARE IN MAKING YOUR DIAGNOSIS THAT HE THEN LEFT THE JURISDICTION OF THE STATE?
A NO. HE WENT TO COLUMBIA.
Q OKAY. WENT TO COLUMBIA FIRST, BUT THEN ULTIMATELY LEFT THE JURISDICTION OF THE STATE?
A YES.
Q ALL RIGHT. HE LEFT THE JURISDICTION OF THE COUNTY FIRST AND THEN LEFT THE JURISDICTION OF THE STATE?
A YES, SIR.
Q WHERE HE WAS -- AND WAS APPREHENDED IN GEORGIA?
A YES.
Q SEVERAL DAYS LATER?

A YES.
Q DID HE MAKE OR WERE YOU AWARE THAT THERE WAS A WITNESS THAT REPORTED A MAN WITH A VOICE OF STEPHEN STANKO CONTACTED LAURA LING'S EMPLOYER, SOCASTEE LIBRARY, APPROXIMATELY 9:35 THE NEXT DAY OR THE -- THE ACTUAL DAY OF THE MURDER, AND INFORMED MS. LING'S SUPERVISOR THAT SHE HAD FOOD POISONING AND WOULD NOT BE IN?
A THE -- THE MATERIAL THAT I HAD DIDN'T SAY THAT IT WAS MR. STANKO'S VOICE, BUT THE REST OF IT IS AS YOU DELINEATED. IT'S -- A MALE CALLED AND SAID MS. LING WOULD NOT BE IN, ET CETERA.
Q OKAY. AND THIS WAS WITHIN HOURS?
A AND HE HAD MS. LING'S TELEPHONE.
Q ALL RIGHT. THAT WAS -- THAT WAS REPORTED TO YOU IN YOUR EVALUATION OF THIS CASE?
A YEAH. YES.
Q AND DOCTOR, AND MAYBE I'M KIND OF CUTTING TO THE ULTIMATE QUESTION HERE, BUT THESE APPEAR TO BE STEPS TAKEN, ONE -- IN A SEQUENTIAL FASHION OF SOMEONE WHO KNOWS THEY HAVE DONE SOMETHING TERRIBLY BAD AND THEY'RE TRYING TO AVOID RESPONSIBILITY FOR THEIR ACTIONS. WOULDN'T YOU AGREE WITH THAT?
A IT APPEARS THAT WAY, YES.
Q LET ME TAKE YOU TO HIS -- TO YOUR REPORT, JUST REVIEW A COUPLE OF AREAS. AND I'M NOT GOING TO BE AS DETAILED

AS -- IN MY QUESTIONS AS I WAS WITH MR. EINHORN'S OR DR. EINHORN'S REPORT. BUT I LOOKED THROUGH HIS SOCIAL HISTORY. YOU TOOK A SOCIAL HISTORY ON THE DEFENDANT?

A I DID. I DID.

Q AND IT LOOKS TO BE A VERY NORMAL SOCIAL HISTORY.

A LOOKS PRETTY BENIGN.

Q VERY BENIGN EVEN.

A YES.

Q THAT'S A GOOD WAY TO SAY IT. NO VIOLENCE IN THE HOME?

A NO.

Q PATIENT -- MR. STANKO FELT LOVED AS A CHILD; CORRECT?

A THAT'S WHAT HE SAID.

Q DID WELL IN SCHOOL?

A HE DID.

Q WAS NOT A BEDWETTER?

A NO.

Q NO ATTRACTION TO FIRE?

A NO.

Q PLAYED SPORTS?

A HE DID.

Q DATED IN HIGH SCHOOL?

A YES.

Q BUT HE SAYS THAT, YOU KNOW, HE -- HE INDICATES IN HIS SOCIAL HISTORY THAT HE TRIED TO MAKE HIMSELF OUT BETTER

THAN HE REALLY WAS.
A YEAH, HE TRIED TO INFLATE HIMSELF.
Q HE'S ALWAYS INFLATING HIMSELF. SORT OF THE NARCISSISTIC -- IS THERE SOME LEVEL OF NARCISSISM THAT IS -- WOULD BE A DIAGNOSIS FROM THAT SORT OF CONDUCT? IS THAT -- OR AM I OFF TRACK THERE?
A WELL, NOT A SPECIFIC -- THERE COULD BE A SYMPTOM OF NARCISSISM WITHOUT REACHING A -- A SPECIFIC DIAGNOSIS ENTAILING PRIMARY SYMPTOMOLOGY OF NARCISSISM.
Q THE -- ALTHOUGH YOU INDICATED EARLIER THAT HE WAS SORT OF IN THE -- IN THE CLINICAL INTERVIEW THAT HE -- HE WAS SOMEWHAT DISPASSIONATE IN TALKING ABOUT THESE EXPERIENCES, THE EXPERIENCES INVOLVING THIS CRIME; TRUE?
A WELL, HE DIDN'T TALK ABOUT THE -- THE CRIMES INVOLVING MS. LING AND HER DAUGHTER AT ALL. AND, YES, HE WAS DISPASSIONATE. HE SAID THAT HE -- HE WAS MOST FOND OF THESE TWO PEOPLE, AND HERE THEY HAD BEEN BRUTALLY KILLED OR ONE OF THEM HAD, AND HE WAS RATHER JUST -- AS A MATTER OF FACT, THE ONLY THING -- SOMEBODY WHO HAD LOST A LOVED ONE THAT WAY WOULD BE JUST SUFFUSED WITH FEELINGS OF SADNESS AND WEEPING AND CRYING, BUT HE WAS PRETTY STONAGE.
Q WELL, YOU USED THE EXAMPLE OF A FATHER THAT BACKED OVER HIS CHILD IN THE DRIVEWAY, BUT THAT'S REALLY A MUCH DIFFERENT--
A WELL--

Q -- I MEAN, THAT'S A DRAMATICALLY DIFFERENT SERIES OF--
A ABSOLUTELY.
Q -- FACTS?
A ABSOLUTELY. BUT THE -- THE EMOTIONAL IMPACT OF SUCH THINGS IS -- FROM A -- REFERRED TO IN THE STANKO CASE, YOU WOULD EXPECT ORDINARILY FOR A PERSON TO HAVE VOLCANIC EMOTIONS OF -- AND SADNESS AND FEAR AND--
Q BUT HE DIDN'T COME OUT WITH VOLCANIC, BUT HE -- HE REPORTED HERE THAT HE HAD TEARS WELL UP IN HIS EYES AND HIS VOICE FALTERED ON OCCASION. SO THERE WAS SOME EMOTIONAL RESPONSE. IT'S NOT WHAT YOU WOULD EXPECT, BUT--
A CERTAINLY NOT.
Q -- WHAT SOME -- WHAT SOME -- SOME LEVEL OF EMOTIONAL RESPONSE. AND YOU DIAGNOSED HIM WITH AN ANTISOCIAL PERSONALITY DISORDER?
A I DID.
Q OKAY. NOW, LET ME TALK TO YOU A LITTLE BIT ABOUT THIS -- ABOUT THIS CONTRACU -- WHAT YOU SAY IS A CONTRACU INJURY OR YOU SUGGEST THAT THERE MAY HAVE BEEN SOME CONTRACU INJURY.

YOU'RE NOT SAYING, DOCTOR, THIS IS THE BLOW TO THE HEAD THAT WAS REPORTED BY SOMEBODY TO YOU. HAVE YOU SEEN ANY DOCUMENTS TO SUBSTANTIATE THAT -- THAT REPORT?
A I THINK IT WAS IN THE TESTIMONY -- OR I MEAN THE

STATEMENT FROM HIS MOTHER.
Q OKAY.
A YEAH.
Q BUT NO -- I MEAN, WHEN I SAY -- THERE'S NO POLICE REPORT OR ANYTHING LIKE THAT?
A NO. NO. I DIDN'T SEE ANY MEDICAL REPORTS TO THAT--
Q NO MEDICAL REPORTS, NOTHING LIKE THAT. THIS WAS JUST REPORTED FROM A FAMILY MEMBER --
A YEAH.
Q -- OF THE DEFENDANT--
A YES.
Q -- THAT HE GOT HIT IN THE HEAD -- GOT HIT IN THE HEAD WHEN HE WAS A TEENAGER?
A ABOUT AGE 15. AND SHE ALSO SAID THAT'S ABOUT THE TIME HE BEGAN TO CHANGE.
Q WELL, YOU'RE -- YOU'RE NOT SAYING THAT -- YOU CAN -- I DON'T THINK YOUR TESTIMONY IS, BUT YOU TELL ME -- ARE YOU SAYING WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT THIS DEFENDANT, STEPHEN STANKO, HAS SUFFERED A CONTRACU INJURY TO HIS BRAIN?
A NO, I'M NOT.
Q OKAY. YOU CAN'T SAY THAT; CAN YOU?
A I DON'T HAVE THE EVIDENCE OF THAT, NO.
Q NO. YOU DON'T HAVE EVIDENCE OF THAT. YOU'VE GOT ONE REFERENCE BY HIS MOTHER THAT HE GOT HIT IN THE HEAD WITH A

BOTTLE.

A AND A PERSONALITY CHANGE, YEAH.

Q OKAY. HIS GRADES GO DOWN?

A OH, NO.

Q NO? GRADES ARE GOOD. KEPT DATING. PLAYING SPORTS?

A YUP.

Q RIGHT?

A HE DID.

Q DID HE START TORTURING ANIMALS AFTER HE GOT HIT IN THE HEAD WITH A BOTTLE?

A NEVER.

Q OKAY. COMMITTING ACTS OF RANDOM VIOLENCE, YOU KNOW, EXPLOSIVE VIOLENCE AS A TEENAGER AFTER GOT HIT IN THE HEAD WITH A BOTTLE?

A NO HISTORY OF IT.

Q NO HISTORY OF THAT AT ALL?

A NONE.

Q ALL RIGHT. LET'S TALK ABOUT THIS. YOU HAVE TESTIFIED, DOCTOR, AND YOU HAVE PUT IN YOUR REPORT, YOU RELY VERY HEAVILY ON THE FACT THAT HE HAS CENTRAL NERVOUS SYSTEM DYSFUNCTION, FRONTAL LOBE, AND THIS MAY HAVE INITIALLY CAUSED THE FRONTAL LOBE DYSFUNCTION.

YOU'RE SAYING, DOCTOR, THAT -- YOU'RE TESTIFYING WITHIN A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT THIS DEFENDANT HAS A BIRTH DEFECT; IS THAT CORRECT?

A IT'S POSSIBLE, YES.
Q WHAT DO YOU BASE THAT OPINION ON, DOCTOR?
A MEDICAL RECORDS OF HIS BIRTH.
Q YOU HAD A CHANCE TO REVIEW THOSE YOURSELF?
A I DID.
Q I'M GOING TO SHOW YOU A COUPLE OF DOCUMENTS AND ASK YOU TO IDENTIFY THEM FOR ME. THAT'S COURT'S FIVE AND COURT'S SIX.
A THIS ONE, COURT'S FIVE, IS A RECORD OF HIS CARE AFTER BIRTH.
Q OKAY.
A AND THE OTHER ONE IS A RECORD OF THE DELIVERY.
Q THAT'S THE -- THAT'S ESSENTIALLY -- I BELIEVE SIX IS ESSENTIALLY THE MEDICAL REPORT ON MRS. STANKO, DEFENDANT STANKO'S MOTHER, AND THEN THIS IS THE--
A HIS DELIVERY AND HIS BIRTH, COURT'S SIX, YEAH.
Q VERY GOOD. AND THEN HIS AFTERCARE.
A HIS AFTERCARE.
Q AND YOU TESTIFIED, DOCTOR, THAT HE HAD NEUROLOGICAL DAMAGE OR THERE WAS SOME CONCERN WITH NEUROLOGICAL DAMAGE?
A UH-HUH.
Q ALL RIGHT. WE'RE GOING TO -- YOU KEEP THAT REPORT HANDY BECAUSE I WANT TO ASK YOU SOME -- WE GOING TO GET RIGHT TO THIS. I WANT TO TAKE YOU TO THE PAGE THAT SAYS -- SORRY -- COURT'S EXHIBIT NUMBER 5 THAT SAYS,

CLINICAL DIAGNOSIS, HERE.

DOCTOR, TELL ME ON THAT -- IN THAT CLINICAL DIAGNOSIS WHERE THE DOCTORS EXPRESS CONCERN ABOUT STEPHEN STANKO'S NEUROLOGY OR BRAIN.

A IN THAT SECTION RIGHT THERE?

Q YES, SIR. IN CLINICAL DIAGNOSIS.

A YEAH. HE STATES TWO THINGS. TERM BIRTH OF A LIVING CHILD AND JAUNDICE, PHYSIOLOGIC, AND SOMETHING ELSE.

Q OKAY. HE'S JAUNDICED.

A PHYSIOLOGIC AND EXAGGERATED I THINK THE WORD IS, YEAH, HE'S JAUNDICE, YEAH.

Q HE'S JAUNDICED. THAT'S WHAT THE CLINICAL DIAGNOSIS IS, JAUNDICED?

A YES.

Q NOT BRAIN DAMAGED, NOT INTERCRANIAL (SIC) HEMORRHAGE, NOT BIRTH DEFECT. IT DOESN'T SAY ANYTHING ABOUT THAT; DOES IT, DOCTOR?

A NO, IT DOESN'T.

Q ALL RIGHT. LET'S TALK SOME MORE. LET'S TAKE A LOOK AT THE CLINICAL RECORD OF A NEWBORN. I WILL DRAW YOUR ATTENTION TO RIGHT HERE. CLINICAL RECORD OF A NEWBORN. COMPLICATIONS AT DELIVERY. WHAT DOES IT SAY? I WILL HELP YOU. I'M SORRY. THAT'S--

A I DON'T SEE THAT.

Q IT'S KIND OF -- IT'S GOT A LOT OF STUFF ON THERE.

COMPLICATIONS AT DELIVERY?
A NONE.
Q CHARACTER OF CRY.
A WHERE IS THAT? GOOD.
Q GOOD. INFANT'S CONDITION AT BIRTH. RIGHT HERE.
A APGAR 10.
Q APGAR 10. NOW, I DON'T KNOW EXACTLY WHAT -- WELL, I DO KNOW WHAT APGAR 10 MEANS. I'M -- I DO KNOW, BUT I'M NOT SURE EVERYBODY KNOWS. TELL ME WHAT THAT IS.
A APGAR 10 IS THE BEST SCORE THAT A CHILD CAN GET AT BIRTH. IT'S A -- VIRGINIA APGAR MADE A RATING SCALE ON HOW TO SCORE HOW WELL A CHILD IS DOING AT BIRTH. AND APGAR 10 IS THE BEST SCALE -- OR THE BEST SCORE.
Q SO HE IS -- ACCORDING TO THOSE MEDICAL RECORDS AT HIS BIRTH HE IS AS HEALTHY AS HE COULD POSSIBLY BE ACCORDING TO THE APGAR SCALE?
A THAT'S WHAT HE SAYS.
Q NOW, THERE ARE SOME ABNORMAL FINDINGS.
A THERE ARE.
Q THERE ARE. WE GET DOWN TO THE BOTTOM. HAS EXCESSIVE MUCUS; CORRECT?
A YES.
Q AND HE'S VOMITING INTERMITTENTLY?
A YES.
Q ALL RIGHT. AND THEY STUCK A FEEDING TUBE INTO HIS

STOMACH WITHOUT DIFFICULTY AND REMOVED SOME FLUID FROM HIS STOMACH?

A THEY DID.

Q APPEARS THAT THEY'RE CONCERNED ABOUT THIS VOMITING AND IT MIGHT BE SOME STOMACH PROBLEM; CORRECT, DOCTOR?

A THEY HAD FORCEFUL VOMITING OF CLEAR FLUID MUCUS DURING THE EXAM, RIGHT.

Q OKAY. SO HE THREW UP AND HE'S GOT SOME JAUNDICE. I COULD TAKE YOU TO -- LET ME TAKE YOU TO THE DOCTOR'S NOTES HERE ON -- STARTING ON THE 14TH AT THE TOP. INFANT VOMITING; RIGHT?

A YES.

Q OKAY. IT DOESN'T SAY BRAIN DEFECT; DOES IT?

A NO.

Q LET'S SEE. LET'S TAKE YOU DOWN HERE ABOUT HALF-WAY DOWN THE PAGE AT THE -- THE DOCTOR'S NOTES AT 10:00.

A YES.

Q ATE WELL WITHOUT PROBLEMS.

A TRUE.

Q SUCKING ACTION VERY GOOD.

A TRUE.

Q LET'S TAKE YOU TO 14 -- THIS IS 1400 HOURS, THAT WOULD BE 2:00 IN THE AFTERNOON. ATE WELL WITHOUT PROBLEMS.

A YES.

Q SPENT QUIET MORNING.
A YES.
Q THESE SEEM TO KIND OF SCRAMBLE AROUND, BUT... OKAY. IT DOES SAY HERE AT THE BOTTOM OF THIS NEXT PAGE, HE SOUNDED AS IF NASALLY CONGESTED. AS I SAY, THESE PAGES ARE A LITTLE -- HERE WE GO. ALL RIGHT.
A CHECK RESPIRATION, SOUNDED NASALLY CONGESTED, TRUE.
Q ALL RIGHT. LET'S TAKE YOU UP A LITTLE HERE UNDER -- LOOKS LIKE THE 960A. SAYS, POSITION, COLOR AND CRY GOOD.
A IT WAS PLACED IN TRENDELENBERG WHICH MEANS THAT HIS FEET WERE RAISED ABOVE HIS HEAD, AND HIS COLOR AND CRY WERE GOOD, AND I'M ASSUMING IT'S A RESULT OF HIS BEING HEAD PLACED IN THAT PARTICULAR POSITION.
Q OKAY.
A THEY DO THAT WHEN PEOPLE GET FAINT OR SHOW EVIDENCE OF POOR CIRCULATION PROBLEMS TO THE HEAD AND UPPER PART OF THE BODY.
Q LET ME TAKE YOU TO -- THIS PAGE LOOKS LIKE THE 16TH HERE. I'M NOT -- I'M GOING TO BE FAIR WITH YOU. LET ME GET YOU TURNED TO THAT PAGE BECAUSE THESE ARE NOT -- THEY JUST AREN'T IN VERY GOOD ORDER.

HERE WE GO. LET'S JUST KIND OF GO DOWN. 1400 HOURS. ATE WELL WITHOUT PROBLEMS.

A TRUE.
Q ALL RIGHT. QUIET. AND BELOW THAT 1445, QUIET

MORNING WITHOUT PROBLEMS.
A RIGHT. YES.
Q OKAY.
A YES.
Q I JUST -- GET DOWN TO THE BOTTOM. 6:00 ATE WELL WITHOUT PROBLEMS.
A TRUE.
Q QUIET NIGHT WITHOUT PROBLEMS.
A TRUE.
Q FLIP OVER THE PAGE TO 1400 HOURS, THIS NEXT PAGE HERE. YEAH. 1400 HOURS, ATE WELL NO PROBLEMS.
A TRUE.
Q QUIET AM, NO PROBLEMS.
A TRUE.
Q 1845 -- GUESS 6:45 ATE WELL WITH NO PROBLEMS.
A TRUE.
Q 2145, ATE WELL, NO PROBLEMS.
A TRUE.
Q 2200 HOURS, SPENT QUIET PM.
A TRUE.
Q ATE WELL WITHOUT PROBLEMS AT -- LOOKS LIKE 2:00 IN THE MORNING.
A YES.
Q QUIET NIGHT, 6:00.
A YES.

Q AND THEN AT 10:00, ATE WELL, NO PROBLEMS.
A YES.
Q OKAY. 7:15. GETTING ON THE LAST PAGE HERE. I SAY -- ACTUALLY THERE'S ANOTHER PAGE. BUT I'M NOT GOING TO MAKE YOU GO THROUGH THOSE, ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN REFERENCES TO ATE WELL WITH NO PROBLEMS. LET ME TAKE YOU JUST TO THE LAST PAGE.
A ALL RIGHT.
Q THE LAST PAGE SAYS, 10:00, ATE WELL, NO PROBLEMS.
A YES.
Q 1400 HOURS, ATE WELL, NO PROBLEMS.
A YES.
Q 1730, 5:30, DR. MASON WAS IN AND DISCHARGED THE MOTHER.
A TRUE.
Q DOES IT EVER INDICATE IN THIS REPORT OR ANY OTHER DOCUMENT YOU HAVE THAT -- THAT THE DEFENDANT WAS PUT IN ANY KIND OF NEONATAL CARE UNIT OR SPECIAL SORT OF A -- OF A UNIT?
A NO.
Q NO. DOES IT INDICATE THAT THERE WERE ANY X-RAYS DONE OR ANY TREATMENTS ORDERED FOR ANY KIND OF BRAIN DEFECT OR INTRACRANIAL DAMAGE?
A NONE.
Q NONE. DOCTOR, I WANT TO TAKE YOU TO SOME OF THE

PHYSICIANS' NOTES BECAUSE THERE WERE SOME CONCERNS ABOUT THE VOMITING.

A I DON'T...

Q STILL IN STATE'S FIVE (SIC).

A ALL RIGHT.

Q I WILL PUT IT OVER THERE.

A OKAY.

Q RIGHT HERE. I'M GOING TO START AT THE BOTTOM BECAUSE THE BOTTOM STARTS 114, IT GOES 15, 16, 17 AND 18 TOWARD THE TOP, KIND OF BACKWARDS. I DON'T KNOW WHY. FAIR ENOUGH?

A UH-HUH.

Q LET ME START ON THE 14TH. WE TALKED ABOUT EXCESSIVE MUCUS AND INTERMITTENT VOMITING AS A FIRST LINE; CORRECT?

A YES.

Q IT SAYS HERE, BABY HAS POOR MORO, M-O-R-O, BUT FAIR SPONTANEOUS MOVEMENT. WHAT DOES MORO MEAN?

A WHERE? I DON'T SEE IT.

Q HERE.

A OH, YEAH. OKAY. THAT'S A NEUROLOGIC REFLEX.

Q OKAY. IT'S A NEUROLOGIC REFLEX. IT'S A SUCKING ACTION; ISN'T IT? IT'S A BABY'S SUCKING ACTION IS THE MORO?

A NO, IT'S NOT.

Q OKAY.

A IT'S A -- A GRASP REACTION TO--
Q OKAY.
A -- BABIES HAVE. NO, IT ISN'T THAT TYPE OF GRASP REACTION, IT'S A -- IT'S MORE OF A GENERAL REACHING AND CLASPING--
Q OKAY.
A -- IN -- IN RESPONSE TO A DESTABILIZATION LIKE IF THEY ARE ABOUT TO FALL, THEY'LL DO THAT GRASPING ACTION. THAT'S A MORO AND DEMRON (SIC) REACTION.
Q ALL RIGHT.
A IT'S SO NORMAL THAT IF THEY DON'T HAVE IT, THERE'S CONCERN THAT SOMETHING ISN'T WORKING RIGHT.
Q CONCERN. OKAY. RAISES THE QUESTION. DON'T KNOW WHAT IT MEANS YET, BUT IT RAISES THE QUESTION.
A CERTAINLY.
Q NOW, WE LOOK DOWN TO THE NEXT LINE AND IT SAYS, VOMITING DUE TO -- AND YOU SEE THIS? IT HAS A QUESTION MARK.
A VOMITING SECONDARY TO--
Q SECONDARY TO.
A -- TO POSSIBLE CEREBAL (SIC)...
Q -- CEREBRAL DOME?
A THAT WORD I CAN'T -- CEREBRAL HEMORRHAGE. THERE'S A WORD IN BETWEEN, BUT I CAN'T MAKE IT OUT.
Q IT'S CEREBRAL -- IT'S CEREBRAL SOMETHING. AND THEN

LOOK. LOOK, DOCTOR. THERE'S A DASH AND ANOTHER QUESTION MARK. YOU SEE THAT?

A UH-HUH, QUESTION OF ABNORMAL --

Q OKAY.

A -- ABNORMAL PATHOLOGY, RIGHT.

Q OKAY. SO THERE'S A CEREBRAL SOMETHING.

A UH-HUH.

Q SO THERE'S VOMITING SECONDARY TO QUESTION MARK. THEY ARE WONDERING. THEY DON'T KNOW. ISN'T THAT FAIR TO SAY? ISN'T THAT HOW YOU INTERPRET THAT? THEY ARE ASKING A QUESTION.

A SURE.

Q IT'S POSSIBLE CEREBRAL--

A IT'S POSSIBLE.

Q -- OR POSSIBLE INTRACRANIAL HEMORRHAGE; CORRECT? SECOND -- YOU SEE THAT HERE?

A WAIT A MINUTE. YES, INTRACRANIAL HEMORRHAGE.

Q DOESN'T SAY THERE'S INTRACRANIAL HEMORRHAGE. IT SAYS THERE'S A POSSIBILITY. THESE ARE THINGS THAT MAY BE CAUSING VOMITING; CORRECT?

A DOESN'T SAY POSSIBILITY. IT JUST SAYS A--

Q QUESTION MARK.

A QUESTION MARK.

Q OKAY. AND THEN THE THIRD THING -- THERE'S A DASH AND THERE'S A THIRD THING LISTED, A QUESTION MARK; CORRECT?

A LOOKS TO BE ABNORMAL PATHOLOGY, YES.
Q NO, THAT'S ABDOMINAL PATHOLOGY.
A YES.
Q ABDOMINAL PATHOLOGY. SO THEY DON'T REALLY KNOW; DO THEY, DOCTOR?
A HE'S LISTING THE -- WHOEVER IT IS LISTING THE POSSIBILITIES OF...
Q WHAT'S CAUSING VOMITING.
A WHAT -- WHAT'S CAUSING VOMITING, AND IT DOESN'T SAY ANY OF THEM IS EXCLUDED.
Q RIGHT.
A IT DOESN'T SAY THEY ARE ALL ADDED TOGETHER. THEY ARE TAKING THEM ALL INTO CONSIDERATION.
Q THEY ARE JUST -- HE'S BRAINSTORMING AT THIS POINT; TRUE?
A WELL, I DON'T KNOW WHAT HE'S DOING AT THE TIME. THAT'S WHAT HE WROTE.
Q OKAY. AND THEY SAY, PLEASE OBSERVE CLOSELY NOW, WILL GET X-RAYS LATER TODAY IF NO IMPROVEMENT.
A IT SAYS PLAN. DOESN'T SAY--
Q I AM SORRY, PLAN.
A OBSERVE CLOSELY, WILL GET X-RAYS LATER TODAY IF NO IMPROVEMENT. RIGHT?
Q RIGHT. SO -- BUT THERE ARE NO X-RAYS EVER ORDERED; WERE THERE, DOCTOR?

A NOT THAT I KNOW OF.
Q RIGHT. AND LET'S GO -- LET'S GO TO 15.
A UH-HUH.
Q WHAT'S IT SAY? 6:00, DOCTOR CHECKS HIM OUT.
A DR. MASON SAYS, LOOKS BETTER NOW.
Q LOOKS BETTER NOW.
A GOOD SPONTANEOUS MOVEMENTS.
Q RIGHT.
A NOW FAIRLY GOOD.
Q I THINK THAT'S MORO FAIRLY GOOD.
A WELL, I THINK IT'S NOW FAIRLY GOOD.
Q OKAY. NO VOMITING TODAY.
A EXCEPT...
Q OR MINIMAL REGURGITATION.
A REGURGITATION.
Q RIGHT.
A THAT'S KIND OF -- KIND OF CONTRADICTORY.
Q RIGHT. LET'S GO TO 16. MODERATE JAUNDICE; CORRECT?
A YES.
Q TAKING FEEDING WITHOUT DIFFICULTY; CORRECT?
A YES.
Q NO VOMITING.
A YES.
Q BILIRUBIN DOWN.
A YES.

Q AND WHAT'S THE NEXT ONE SAYS, DOCTOR?
A NEUROLOGICAL OKAY.
Q NEUROLOGICAL OKAY. AND, DOCTOR, TELL ME IN THERE -- TELL ME IN THERE HOW YOU REACH THE CONCLUSION THAT THIS MAN'S GOT A BRAIN DEFECT BASED ON THAT MEDICAL REPORT?
A WELL, I SAID -- I SAID IT'S POSSIBLE THAT HE HAD THIS AT THE TIME OF BIRTH WITH SOME SIGNS APPEARING AT THE TIME OF HIS BIRTH DERIVED FROM THIS HEALTH RECORD, AND THERE THEY ARE.
Q DID YOU READ THE REST OF THE RECORD OR DID YOU JUST STOP AT THE FIRST DAY WHEN THEY WERE BRAINSTORMING ABOUT THE THREE POSSIBILITIES OF WHY THIS KID IS VOMITING?
A I READ IT.
Q DID YOU READ THE 17TH?
A I'M SORRY?
Q TAKE A LOOK AT THE 17TH. WHAT DOES IT SAY? WHAT DOES DR. MASON SAY ON THE 17TH?
A IS THAT AT THE TOP OF THE PAGE?
Q YES, SIR.
A CLINICALLY DOING WELL, BILIRUBIN 19.1 MILLIGRAM PERCENT.
Q CLINICALLY DOING WELL. HOW ABOUT THE 18TH?
A BILIRUBIN DOWN TO 17.8--
Q UH-HUH. WHAT'S THE NEXT LINE SAY?
A -- MILLIGRAMS PERCENT AND NO ABNORMALITIES ON

PHYSICAL EXAM EXCEPT RESOLVING JAUNDICE.

Q SO THE BABY'S GOT JAUNDICE?

A UH-HUH.

Q DR. THRASHER, YOU WERE RETAINED BY THE DEFENSE IN THIS CASE, IS THAT CORRECT, NOT BY THE COURT?

A TRUE.

Q PLEASE ANSWER ANY QUESTIONS MR. DIGGS MAY HAVE ON REDIRECT.

MR. DIGGS: JUST FOLLOW-UP.

THE COURT: ANY RE-DIRECT? YOU MAY PROCEED.

REDIRECT EXAMINATION

BY MR. DIGGS:

Q WHAT IS YOUR UNDERSTANDING OF POOR MORO REFLEX?

A MORO REFLEX?

Q M-O-R-O.

A YEAH, IT'S -- IT'S A SHORT WORD FOR WHAT -- THE FULL WORD FOR IT, FOR MORO AND DEMRONS, AND IT'S A GRASPING REFLEX.

Q MORO -- A POOR MORO REFLEX MEANS BRAIN DEFECT; DOES IT NOT?

A I AM SORRY?

Q IF YOU HAVE A POOR MORO REFLEX, IS THAT AN INDICATION OF BRAIN DEFECT?

A IT CAN WELL BE, YES.

Q CAN WELL BE. AND HOW MANY TIMES IS IT NOTED IN THESE

PAPERS -- NUMBER OF TIMES; WEREN'T THEY?
A YES, BUT I DON'T REMEMBER THE EXACT NUMBER OF TIMES.
Q OKAY. AND ONE OF THE DAYS THAT THE SOLICITOR SKIPPED WAS THE 15TH. POSSIBLE -- LET ME SHOW YOU THIS. HOW DO YOU -- HOW DO YOU READ THIS?
A 1 15 0 -- 1 15 08? THINK.
Q I DON'T THINK IT'S LEGIBLE.
A THAT'S...
Q IT'S OUT OF COURT'S NUMBER SIX.
A WELL -- WELL, POSTPONE PLANNED TUBAL LIGATION IN VIEW OF PRECAUTIOUS (SIC) STATE OF THE BABY WITH VOMITING AND POSSIBLE INTRACRANIAL HEMORRHAGE.
Q OKAY. ALL RIGHT. NOW, CAN WE RULE OUT THE INTRACRANIAL HEMORRHAGE OR DOES THAT SAY DAMAGE?
A PARDON ME. LET ME SEE AGAIN. YEAH, IT SAYS POSSIBLE INTRACRANIAL DAMAGE.
Q OKAY. AND DID THEY EVER RULE THAT OUT WITH ANY DEGREE OF SPECIFICITY AS FAR AS YOU CAN TELL?
A NO.
Q NEVER DID ANY FOLLOW-UP ON IT AS FAR AS WE CAN TELL?
A ONLY TO DESCRIBE THE -- THE YOUNGSTER'S BEHAVIOR ON SUBSEQUENT DAYS, YEAH.
Q AND THEY ADVISED AGAINST THE TUBAL LIGATION?
A YEAH.
Q THEY ACTED -- THEY ACTED ON THAT INFORMATION; DIDN'T

THEY?
A THEY DID.
Q OKAY.
A IT'S APPARENTLY BECAUSE THEY THOUGHT THAT HIS MOTHER OUGHT NOT TO HAVE HER TUBES TIED BECAUSE THIS INFANT MIGHT NOT SURVIVE.
Q AND WE DON'T MEAN ANY DISRESPECT, BUT THIS WAS AN ARMY BASE?
A GUANTANAMO BAY--
Q GUANTANAMO BAY.
A -- CUBA IS -- IT'S A NAVAL BASE ACTUALLY, YEAH.
Q NAVAL BASE?
A YEAH.
Q I'M DOUBLY SORRY. LET'S TALK JUST BRIEFLY ABOUT WHAT THE SOLICITOR SAYS IS A FALSEHOOD BY THE--
A I CAN'T HEAR YOU. I COULDN'T HEAR YOU WALKING AWAY.
Q ALL RIGHT. LET'S TALK ABOUT MEMORY LOSS IN THIS SITUATION.
A ALL RIGHT.
Q HOW ARE MEMORIES INITIALLY LAID DOWN? WHERE DO THEY BEGIN TO FORM, IF YOU KNOW?
A WELL, MY UNDERSTANDING IS THAT THEY -- THEY GO INTO A TEMPORARY COLLECTION IN THE HIPPOCAMPUS OF THE BRAIN WHICH ARE -- THERE ARE TWO OF THEM. THERE'S A NUCLEI ON EITHER SIDE CALLED THE HIPPOCAMPUS AND THEN IT'S PROCESSED FROM

THERE IN THE LONGER TERM MEMORY.

Q DOES THE FRONTAL LOBE AREA HAVE ANYTHING TO DO WITH LAYING DOWN MEMORIES?

A YES, IT DOES.

Q DOES? IF YOU HAVE A DEFECT THERE, COULD IT INTERFERE WITH MEMORY PROCESS?

A IT COULD.

Q AREN'T THERE STUDIES THAT SHOW THAT, IF YOU KNOW?

A I CAN'T QUOTE ANY SUCH STUDIES.

Q ALL RIGHT. BUT HAVE YOU LOOKED FOR THEM?

A OH, YES. YES.

Q IF YOU MENTIONED LIKE A -- AN EPILEPTIC SEIZURE, SOMEONE MIGHT NOT HAVE SEIZURES ALL THE TIME.

A WELL...

Q NOW, WHAT IF -- WHAT IF SOMEONE WERE HAVING AN EPILEPTIC SEIZURE?

MR. HEMBREE: YOUR HONOR, I'M GOING TO OBJECT TO THIS REDIRECT. WE DIDN'T GO INTO ANY OF THIS--

THE COURT: BASIS IS OUTSIDE THE SCOPE--

MR. HEMBREE: OUTSIDE THE SCOPE.

THE COURT: PLEASE APPROACH.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

THE COURT: THE OBJECTION IS SUSTAINED. OUTSIDE THE SCOPE OF CROSS.

BY MR. DIGGS:

Q LET'S GO SPECIFICALLY TO -- EXCUSE ME -- THE MCLENDON INCIDENT WHERE YOU OPINED THAT MR. STANKO WAS NOT INSANE DURING THAT INCIDENT, THE MCLENDON, ELIZABETH MCLENDON INCIDENT WHERE SHE WAS TIED UP AND--

A YES.

Q -- GAGGED. YOU REMEMBER WHEN YOU WERE TALKING ABOUT THAT? BUT IT WAS A VERY SIMILAR INCIDENT, WAS IT NOT, TO THE FACTS THAT WE HAVE HERE?

A YES.

Q VERY SIMILAR.

A YES.

Q THAT -- STEPHEN WAS APPROACHING INSANITY AT THAT POINT. WOULD YOU AGREE WITH THAT?

A HE COULD HAVE BEEN.

Q COULD HAVE BEEN?

A BUT HE WAS ABLE TO RESTRAIN HIMSELF AND TAKE ANOTHER COURSE OF ACTION IF...

Q IS THAT CONSISTENT -- ARE THOSE BEHAVIORS CONSISTENT, WHAT HE DID WITH ELIZABETH MCLENDON AND WHAT HE DID WITH LAURA LING, ARE THEY CONSISTENT?

A NOT THROUGHOUT, CERTAINLY NOT.

Q HOW ABOUT WITH RESPECT TO THE MOTIVATION AND THE ABILITY TO CONTROL--

A DIFFERENT--

Q -- THE LIMBIC SYSTEM EMOTION?

A THEY WERE DIFFERENT.
Q THEY WERE DIFFERENT. BUT ARE THEY SIMILAR? HE WAS ANGERED WITH MS. MCLENDON; CORRECT?
A YES.
Q TIED HER UP.
A HE DID.
Q NEARLY KILLED HER.
A STUFFED A RAG--
Q COULD HAVE?
A STUFFED A RAG -- HE COULD HAVE, YES.
Q YES. WITH MS. LING, TIED HER UP.
A HE DID THAT.
Q AND HE KILLED HER.
A HE SURELY DID.
Q SIMILAR, SIMILAR CONDUCT; CORRECT?
A YES.
Q DO YOU HAVE AN OPINION ABOUT WHY THAT WOULD BE OR HOW IT COULD HAPPEN BASED ON YOUR OPINION IN THIS CASE?
A WELL, IN THE FIRST INSTANCE HE WAS -- HE WAS ABLE TO CONTROL HIMSELF, DIVERT HIS ATTENTION TOWARDS MORE APPROPRIATE BEHAVIORS AND NOT CARRY IT THROUGH MUCH TO MCLENDON'S GOOD FORTUNE, I'LL TELL YOU.
Q EXACTLY.
A AND THE LING CASE IT'S SIGNIFICANTLY DIFFERENT. HE WENT--

Q SIGNIFICANTLY FARTHER OR FURTHER ON THAT SLIDING SCALE--
A YES INDEED.
Q -- TOWARDS INSANITY AND ACROSS THE THRESHOLD?
A WELL, LOOK AT WHAT HE DID. HE WAS INSANE. HE DIDN'T -- HE DIDN'T DO ANYTHING TO RESTRAIN HIMSELF. HE WASN'T -- HE WASN'T TAKING INTO CONSIDERATION ANYTHING ABOUT THE MORALITY OF IT OR THE LEGALITY OF IT, PAID NO ATTENTION TO THAT WHATSOEVER.
Q NOW, WHY IN THIS SCENARIO WOULD MR. STANKO USE A TOWEL TO CLOTHE HIMSELF, IF YOU KNOW?
A YOU MEAN WHEN HE CAME OUT OF THE SHOWER?
Q WHEN HE CAME OUT OF THE SHOWER.
A OH, I THINK IT WAS BECAUSE HE DIDN'T WANT TO GO OUT THERE UNCOVERED.
Q IF HE KNEW THEY WERE DEAD, WHO IS GOING TO SEE HIM?
A WHO WOULD CARE, RIGHT.
Q YEAH.
A DID I ANSWER YOUR QUESTION?
Q I THINK YOU DID.
A ALL RIGHT.
Q THANK YOU.

MR. DIGGS: THAT'S ALL I HAVE, YOUR HONOR.

RECROSS-EXAMINATION

BY MR. HEMBREE:

Q DR. THRASHER, ISN'T THE SUM AND SUBSTANCE OF YOUR OPINION AS I JUST LISTENED TO MR. DIGGS ASK YOU THESE QUESTIONS, THE SUM AND SUBSTANCE OF YOUR OPINION THAT HE WAS SANE WHEN HE ASSAULTED, TIED UP, AND TRIED TO KILL MCLENDON, BUT HE WAS INSANE WHEN HE TIED UP, BEAT, MURD -- CUT THE THROAT OF AND MURDERED LAURA LING AND RAPED CHRISTINA LING, TIED HER UP AND CUT HER THROAT, SIMPLY BECAUSE OF WHAT HE DID BECAUSE IT WAS JUST SO MUCH WORSE?

A NO. HE HAD NO CONTROL OVER WHAT HE WAS DOING. HE WAS INSANE.

Q JUST BECAUSE IT WAS -- IT WAS WORSE.

A HE HAD NO CONTROL OVER IT. HE DIDN'T HAVE THE AWARENESS OF THE MORAL OR LEGAL RIGHT OR WRONG. HE WAS INSANE.

Q THANK YOU, DOCTOR.

A YES, SIR.

MR. DIGGS: YOUR HONOR, THAT'S ALL.

THE COURT: ANY EXCEPTION TO THE WITNESS BEING EXCUSED FROM THE STATE?

MR. HEMBREE: NONE FROM THE STATE.

THE COURT: FROM THE DEFENSE?

MR. DIGGS: NONE.

THE COURT: DOCTOR, YOU'RE EXCUSED. HAVE A GOOD DAY.

THE WITNESS: THANK YOU, YOUR HONOR.

(WITNESS LEFT THE STAND.)

THE COURT: MADAM FORELADY, LADIES AND GENTLEMEN, WE'RE GOING TO TAKE ADVANTAGE OF THIS BREAK IN TESTIMONY TO TAKE OUR LUNCHEON RECESS.

THE CLERK HAS BEEN VERY GENEROUS. SHE HAS BROUGHT IN A CATERED LUNCH FOR YOU. AND FROM -- SMELLS VERY GOOD, SO I ASSUME IT WILL BE A WONDERFUL LUNCH FOR YOU. WE APPRECIATE YOUR PATIENCE IN ALLOWING US TO PUSH BEYOND THE LUNCH TIME TO FINISH THIS WITNESS.

HOPE THAT YOU ALL HAVE AN ENJOYABLE LUNCH AND I WILL BE BACK WITH YOU SHORTLY TO LET YOU KNOW WHEN WE WILL BE RESUMING THE TRIAL BECAUSE EVEN AFTER YOU EAT, I WANT TO GIVE YOU AN OPPORTUNITY TO GET SOME AIR; OKAY?

IF YOU WOULD GO WITH THE BAILIFFS. LEAVE YOUR NOTEPADS IN YOUR SEAT AND HAVE NO DISCUSSION ABOUT THE CASE DURING THE BREAK.

(JURY LEFT THE COURTROOM AT 1:52 PM.)

THE COURT: YOU MAY BE SEATED. ANYTHING WE NEED TO TAKE UP BEFORE WE BREAK FOR LUNCH?

MR. HEMBREE: NOTHING FROM THE STATE, YOUR HONOR.

THE COURT: I WILL ASSUME THAT WE WILL...

(OFF-THE-RECORD DISCUSSION WAS HAD.)

THE COURT: WE WILL BE AT EASE UNTIL -- I HAVE 1:51. LET'S JUST ROUND IT OUT TO THE HOUR. WE WILL RESUME AT THREE. IT'S NOT GOING TO TAKE THE JURY LONG TO EAT AND I DON'T WANT THEM TO BE COOPED UP IN THAT ROOM ANY LONGER THAN NECESSARY. WE'LL BE AT EASE.

MR. HUMPHRIES: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

(WHEREUPON COURT WAS IN RECESS FOR LUNCH.)

THE COURT: IS THE STATE READY TO PROCEED?

MR. HEMBREE: YES, YOUR HONOR.

THE COURT: IS THE DEFENSE READY TO PROCEED?

MR. KELLY: YES, MA'AM.

THE COURT: DO WE NEED TO WAIT ON MR. DIGGS?

MR. KELLY: YES, MA'AM, I THINK SO.

(WHEREUPON THERE WAS A PAUSE.)

THE COURT: OKAY. MR. DIGGS, ARE YOU READY TO PROCEED?

MR. DIGGS: WE'RE READY.

THE COURT: OKAY. PLEASE BRING IN THE JURY.

(JURY ENTERED THE COURTROOM AT 3:10 PM.)

THE COURT: YOU MAY BE SEATED. LADIES AND GENTLEMEN, I HOPE THAT YOU ALL HAD A RESTFUL LUNCH, HOPE YOU ALL ENJOYED YOUR LUNCH. WE WILL NOW RESUME WITH THE TRIAL. MR. DIGGS, YOU MAY PROCEED.

MR. DIGGS: THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. WE CALL DR. MARC EINHORN.

MARC EINHORN, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: SIR, IF YOU COULD SPELL YOUR LAST NAME FOR THE COURT REPORTER.

THE WITNESS: E-I-N-H-O-R-N.

THE COURT: YOU MAY PROCEED.

MR. DIGGS: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. DIGGS:

Q DR. EINHORN, WHERE ARE YOU EMPLOYED AND HOW ARE YOU EMPLOYED?

A I'M SELF-EMPLOYED IN ROSWELL, GEORGIA AS A NEUROPSYCHOLOGIST.

Q CAN YOU GIVE US THE BENEFIT OF YOUR EDUCATION AND TRAINING?

A DEGREES ARE IN -- A DOCTORAL DEGREE IN CLINICAL PSYCHOLOGY, MASTER'S DEGREE IN CLINICAL PSYCHOLOGY, AND A BACHELOR'S DEGREE IN PSYCHOLOGY, SUBSEQUENT TRAINING POST-DOCTORAL IN NEUROPSYCHOLOGY AND FORENSIC PSYCHOLOGY.

Q WHERE DID YOU GO TO SCHOOL?

A DOCTORAL DEGREE CAME FROM THE NOVA SOUTHEASTERN UNIVERSITY IN FT. LAUDERDALE, MASTER'S FROM LOYOLA COLLEGE IN BALTIMORE, AND THEN UNDERGRADUATE AT THE UNIVERSITY OF

FLORIDA.

Q NOW, YOU SAY YOU'RE SELF-EMPLOYED IN PRIVATE PRACTICE?

A YES.

Q HOW LONG HAVE YOU BEEN SO EMPLOYED?

A I WAS FIRST LICENSED IN 1983.

Q AND AT THAT POINT WHAT DID YOU DO?

A FROM 1983 THROUGH THE PRESENT I HAVE WORKED PRIVATELY FOR THE MOST PART. THERE HAVE BEEN OTHER JOBS IN HOSPITALS, REHAB CENTERS ALONG THE WAY, BUT GENERALLY PRIVATE PRACTICE.

Q ALL RIGHT. NOW, DID THERE COME A TIME WHEN YOU BECAME INVOLVED WITH THE STEPHEN STANKO CASE?

A YES. I WAS CALLED LAST SPRING TO PERFORM SOME TESTING.

Q WHO INITIALLY CALLED YOU?

A I BELIEVE IT WAS YOURSELF OR DR. SACHY. PROBABLY YOU CALLED ME FIRST.

Q OKAY. AND PRIOR TO THAT TIME YOU AND I DID NOT KNOW EACHOTHER; IS THAT CORRECT?

A NEVER HEARD OF YOU.

Q AND IT COULD HAVE BEEN DR. SACHY WHO CALLED YOU?

A POSSIBLY.

Q BUT ONE OF THE TWO OF US?

A YES.

Q AND WHAT WERE YOU ASKED TO DO?
A I WAS ASKED TO DO TWO THINGS. ONE, TO DO A FULL NEUROPSYCHOLOGICAL EXAMINATION OF MR. STANKO, AND SECONDLY TO PROVIDE THE -- THE TESTING AT THE MEDICAL CENTER PRIOR TO THE PET SCAN PROCEDURE.
Q HAVE YOU EVER BEEN QUALIFIED AS AN EXPERT IN ANY COURT ANYWHERE?
A YES.
Q AND APPROXIMATELY HOW MANY OCCASIONS?
A PROBABLY SEVERAL HUNDRED.

MR. DIGGS: AND YOUR HONOR, WE WOULD OFFER DR. EINHORN AS A -- AN EXPERT IN CLINICAL AND NEUROPSYCHOLOGY.

THE COURT: I AM SORRY. I APOLOGIZE. ANY QUESTIONS OR OBJECTIONS?

MR. HEMBREE: NO, YOUR HONOR. WE WOULD STIPULATE TO DR. EINHORN'S QUALIFICATIONS AS A NEUROPSYCHOLOGIST.

THE COURT: SO ADMITTED.

BY MR. DIGGS:
Q DR. EINHORN -- AND BY THE WAY, YOU HAVE A -- A PSYD. WHAT DOES THAT MEAN?
A DOCTOR OF PSYCHOLOGY.
Q HOW DOES THAT DIFFER FROM A PHD?
A A PHD HAS A RESEARCH EMPHASIS. A DOCTOR OF

PSYCHOLOGY IS A CLINICAL EMPHASIS.

Q OKAY.

A THAT'S THE PRIMARY DIFFERENCE.

Q NOW, WHAT DID YOU DO AFTER YOU WERE CONTACTED IN THIS CASE? YOU INDICATED THAT YOU WERE ASSIGNED A COUPLE OF TASKS. WOULD YOU REPEAT THAT FOR US?

A YEAH. I WAS ASKED TO PROVIDE THE TESTING AT THE MEDICAL CENTER IN CHARLESTON PRIOR TO THE PET SCAN IN OTHER FILM STUDIES, AND WHILE IN CHARLESTON I ACTUALLY WENT -- WENT TO THE DETENTION CENTER AND DID A FULL TWO DAY FOR ABOUT 10 HOURS OF NEUROPSYCHOLOGICAL TESTING.

Q OKAY. NOW, SO YOU SPENT A COUPLE OF DAYS WITH MR. STANKO?

A YES, SIR.

Q AND TELL US WHAT YOUR RESPONSIBILITIES WERE OR THE REASONS FOR YOUR PRESENCE THE FIRST DAY IN CHARLESTON.

A PRIOR TO THE PET SCAN OF -- WHAT I DID WAS ADMINISTER A -- A TEST WHOSE SPECIFIC PURPOSE WAS TO STIMULATE THE FRONTAL LOBES OF MR. STANKO'S BRAIN.

Q ALL RIGHT.

MR. DIGGS: YOUR HONOR, MAY WE APPROACH?

THE COURT: YOU MAY.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME, MR. DIGGS. YOU MAY

PROCEED WHEN YOU'RE READY.

BY MR. DIGGS:

Q AND PICKING UP WITH THE PET SCAN, YOU WERE PRESENT WHEN THE PET SCAN WAS DONE?

A AS SOON AS I WAS FINISHED WITH HIM I LEFT AND THEN HE WENT AND HAD HIS PET SCAN, SO I WAS NOT PRESENT FOR THE ACTUAL PET SCAN.

Q ALL RIGHT. WHAT DID YOU DO? WHAT WAS YOUR ROLE THERE?

A I WAS ASKED TO -- TO REPLICATE A PROCEDURE THAT HAD BEEN DONE PREVIOUSLY WHICH REQUIRED THE ADMINISTRATION OF A TEST CALLED A CONTINUOUS PERFORMANCE TEST PRIOR TO THE PET SCAN.

AND WHAT THAT REQUIRED WAS MY TAKING A LAPTOP OVER TO THE MEDICAL CENTER WHERE MR. STANKO HAD BEEN BROUGHT OVER BY LAW ENFORCEMENT, AND ON MY LAPTOP WHICH THE -- WHICH CONTAINED THE TEST, HE PERFORMED THE CONTINUOUS PERFORMANCE TEST.

Q ALL RIGHT. AND WHAT DID YOU DO WHILE THE TEST WAS BEING DONE?

A IT WAS GIVEN TWO TIMES. THE FIRST TIME THAT I ADMINISTERED IT--

Q NO, I MEAN, WHAT DID YOU DO WHEN THE ACTUAL PET SCAN WAS BEING DONE?

A OH, WHEN WE WERE FINISHED AND THE PET SCAN WAS BEING

DONE, I DROVE ON OVER TO THE DETENTION CENTER.

Q ALL RIGHT. AND WHO HAD ASKED YOU TO GO THERE AND PARTICIPATE IN THE PET SCAN PROCESS?

A DR. SACHY.

Q AND THIS CONTINUOUS PERFORMANCE TEST?

A YES.

Q AND YOU WERE DOING THAT AS A RESULT OF HIS OR AT HIS REQUEST?

A YES.

Q NOW, WHEN YOU GOT BACK THE NEXT DAY, DID THE ADDITIONAL TESTING THAT YOU HAD SPOKEN ABOUT, WHY WERE YOU DOING THAT? WHAT WAS THE PURPOSE OF THAT TEST OR THOSE TESTS?

A THERE WAS A COUPLE REASONS. THE MAIN REASON WAS TO LOOK FOR ANY KIND OF NEUROPSYCHOLOGICAL IMPAIRMENTS. AND QUITE A NUMBER OF DIFFERENT TESTS WERE DONE, SOME LENGTHY, SOME NOT SO LENGTHY, BUT ALL SORTS OF TESTS COVERING VARIOUS DIFFERENT TYPES OF PROCESSES.

SECONDLY I WENT TO ADMINISTER A TEST OF PERSONALITY AND EMOTIONAL FUNCTIONING WHICH WAS MORE THAN ANYTHING ELSE FOR THE BENEFIT OF DR. SACHY SO THAT HE COULD INTEGRATE THAT INTO HIS EXAMINATION.

Q NOW, YOU HAVE PROVIDED A WRITTEN REPORT OF YOUR TEST RESULTS AND CONCLUSION; CORRECT?

A YES.

Q DID YOU -- CAN YOU TELL US, IF YOU KNOW, WHAT DR. SACHY WAS LOOKING FOR WHEN YOU PERFORMED THESE TESTS, WHEN HE ASKED YOU TO PERFORM THESE TESTS?

A WHAT HE WAS LOOKING FOR WAS ANY INDICATION, WHETHER MILD OR OTHERWISE, OF IMPAIRMENTS OF HIGHER CORTICAL FUNCTIONING WHICH IS WHAT NEUROPSYCHOLOGICAL TESTS SPECIFICALLY ASSESS. HIGHER CORTICAL FUNCTIONS MEANING THE TOP LAYER OF THE BRAIN WHERE ALL THE CREASES AND FISSURES ARE.

Q AND YOUR RESULTS FROM THOSE TESTS WERE WHAT?

A THEY WERE UNIFORMLY NEGATIVE MEANING HE WAS IN GOOD HEALTH, THERE WERE NO -- NO FINDINGS OF ANYTHING.

Q NOW, IS THAT INCONSISTENT WITH THE PROBLEM THAT IS PRESENTED, WE CONTEND, WITH MR. STANKO AND THE DIMINISHED FUNCTION OF HIS FRONTAL LOBES?

A NO.

Q WHY DO YOU SAY THAT?

A THE TESTING THAT I ADMINISTERED WAS SPECIFICALLY DESIGNED TO UNDERSTAND HIGHER CORTICAL FUNCTIONS, THE TOP LAYER OF THE BRAIN. THE OTHER TYPES OF PROCEDURES USED IN THIS CASE WERE ALL SUBCORTICAL, DEEPER DOWN IN THE BRAIN.

Q OKAY. AND SO IN THIS CASE, IN MR. STANKO'S CASE, YOUR TESTS WERE ADMINISTERED, WOULD IT BE FAIR TO SAY, IN ORDER TO SIMPLY TRY TO DIAGNOSE AND DETERMINE IF THERE WAS A PROBLEM AT THAT HIGHER CORTICAL AREA?

A WELL, YES. WE WANT TO SEE IF SOMETHING IS THERE. IF SO, THE EXTENT OF IT AND LOCATION OF IT, AND AT THE VERY LEAST TO RULE IT IN OR RULE IT OUT AS PART OF THE PROBLEM.

Q AND THAT WAS THE EXTENT OF THE SEARCH. IT WAS A SEARCH; WOULD THAT BE CORRECT?

A A SYSTEMATIC SEARCH.

Q YES.

A YES. UH-HUH.

Q YES. AND IN THIS PARTICULAR CASE WHAT AREA OF THE BRAIN ARE WE FOCUSING ON, IF YOU KNOW?

A THE SUBCORTICAL PORTIONS OF THE FRONTAL LOBES.

Q ALL RIGHT. AND THAT'S OUTSIDE OF THE AREA THAT YOU TESTED THAT RESULTED IN THIS REPORT?

A COMPLETELY UNRELATED.

Q ALL RIGHT. DR. EINHORN, ANSWER ANY QUESTIONS THAT COUNSEL MAY HAVE.

THE COURT: ANY CROSS-EXAMINATION OF THE WITNESS?

MR. HEMBREE: NOT VERY MUCH, JUST A FEW QUESTIONS.

THE COURT: YOU MAY PROCEED.

MR. HEMBREE: THANK YOU.

THE COURT: YOU'RE WELCOME.

CROSS-EXAMINATION

BY MR. HEMBREE:

Q DR. EINHORN, YOU'RE NOT LICENSED TO PRACTICE IN SOUTH CAROLINA; ARE YOU?
A THAT IS CORRECT.
Q AND YOU -- HAVE YOU EVER BEEN QUALIFIED AS AN EXPERT IN A COURT OF RECORD IN SOUTH CAROLINA?
A NOT THAT I CAN RECALL.
Q YOU TYPICALLY WORK IN GEORGIA?
A YES.
Q OTHER PLACES AS WELL, I SUSPECT, BUT TYPICALLY THAT'S YOUR HOME AND THAT'S WHERE YOUR OFFICE IS?
A YES.
Q OKAY. AND IT'S -- YOU HAVE A FAIRLY REGULAR BUSINESS RELATIONSHIP WITH DR. SACHY?
A I DON'T KNOW WHAT REGULAR MEANS. IT'S ONCE IN A WHILE.
Q WHEN HE CALLS ON YOU FROM TIME TO TIME TO CONDUCT THESE NEUROPSYCHOLOGICAL TESTS ON CASES HE'S WORKING ON?
A THERE'S BEEN A COUPLE.
Q OKAY.
A THIS IS NOT WHAT I DO FOR A LIVING IF THATS WHAT YOU ARE TAKING ON.
Q OKAY. THE -- DID ABOUT 10 HOURS OF TESTING; THAT'S CORRECT?
A YES.
Q WHAT ABOUT THE -- YOU PUT IN -- THE DEFENDANT THROUGH

A BATTERY OF TESTS CALLED THE MULTIPHASIC SEX INVENTORY NUMBER TWO.

A YES.

Q DID YOU HAVE ANY SIGNIFICANT FINDINGS OR CONCLUSIONS AS A RESULT OF THOSE TESTS?

A THE FINDINGS OF THAT TEST WERE FOLLOWS. AND AGAIN, THAT WAS FOR THE BENEFIT OF DR. SACHY BECAUSE PSYCHIATRISTS DON'T DO TESTS, PSYCHOLOGISTS DO TESTS. AND THE FINDINGS WERE THAT MR. STANKO ADMITTED TO SOME UNSPECIFIED SEXUAL ACTIVITY THAT HE SAID IN HIS RESPONSE ADMITS THAT HE DID NOT FEEL ACCOUNTABLE FOR OR RESPONSIBLE FOR. THAT WAS THE PRIMARY FINDING.

Q DIDN'T HE TRY TO EXPLAIN AWAY HIS LACK OF RESPONSIBILITY BY SAYING, MY SEXUAL OFFENSE HAPPENED BECAUSE I WAS TREATED BADLY IN MY LIFE?

A THAT WAS ONE OF THE RESPONSES THAT HE MADE OUT OF MANY, MANY.

Q AND MY SEXUAL OFFENSE HAPPENED BECAUSE OF STRESS--

A YES.

Q -- IN MY LIFE?

A HE SAID THAT.

Q LET ME TALK WITH YOU A LITTLE BIT ABOUT THE PET SCAN. YOU WERE -- YOU WENT OVER -- AS I UNDERSTAND, YOU WENT OVER TO MUSC OR--

A YES.

Q -- AND MET WITH THE DEFENDANT?
A YES.
Q AND YOU HAD YOUR LAPTOP COMPUTER AND YOU HAD BEEN PROVIDED A TEST TO ADMINISTER TO MR. STANKO?
A WELL, NO ONE PROVIDED IT. IT WAS MINE.
Q IT WAS YOUR TEST?
A YES.
Q OKAY. AND IT WAS -- WHAT KIND OF TEST WAS -- IT WAS THE CONTINUOUS PERFORMANCE TEST?
A YES.
Q WHAT DOES THE CONTINUOUS PERFORMANCE TEST INCLUDE?
A IT IS A TEST THAT FOR THE MOST PART IS DESIGNED TO TEST INDIVIDUALS FOR ADHD. AND THE PERSON SITS IN FRONT OF A SCREEN AND HAS TO RESPOND TO INSTRUCTIONS WITH RANDOM AUDITORY AND VISUAL STIMULUS, STIMULI COMING AT THEM.
Q WELL, I MEAN, GIVE ME AN EXAMPLE. I'M A LITTLE BIT LOST.
A FOR EXAMPLE -- FOR EXAMPLE, THE VOICE ON THE COMPUTER INSTRUCTS MR. STANKO TO SAY, TOUCH -- CLICK THE MOUSE EVERY TIME YOU SEE THE NUMBER ONE. SO THEN ON THE SCREEN THE NUMBER TWO FLASHES AND A VOICE SAYS NUMBER ONE OR VICE VERSA, ON THE SCREEN IT MAY SHOW NUMBER ONE FLASH WITH A VOICE THAT SAYS NUMBER TWO.
SO THERE'S COMPETING AND CONFLICTING STIMULUS THAT A PERSON HAS TO RESPOND TO.

Q AND THEY USE THIS FOR ADHD TO SEE HOW FOCUSED SOMEONE CAN REMAIN?
A YES.
Q ALL RIGHT. AND DO YOU GET A RESULT ON THAT TEST AND IT TELLS YOU WHETHER THEY CAN REMAIN FOCUSED OR THEY'RE BEING DISTRACTED BY THESE OTHER THINGS?
A YES.
Q WELL, BUT YOU WERE THERE TO GIVE HIM A PET SCAN. WHAT WAS THE CONTINUOUS PERFORMANCE TEST -- HE WASN'T -- HE WAS NOT SUSPECTED THAT HE HAD ADHD OBVIOUSLY?
A NO. THAT HAD NOTHING TO DO WITH USING THAT TEST.
Q SO THIS TEST WAS -- WHOSE IDEA WAS THIS PARTICULAR TEST?
A THERE WAS A GROUP OF PSYCHIATRISTS AND PSYCHOLOGISTS IN CALIFORNIA THAT USE THIS PROCEDURE.
Q OKAY. SO SOMEBODY TOLD YOU, GO GIVE HIM THIS CONTINUOUS PERFORMANCE -- THEY, YOU KNOW, DID -- INSTRUCTED YOU, WHATEVER.
A YES.
Q YOU KNOW, ADVISED YOU TO DO THIS PARTICULAR TEST ON -- ON DEFENDANT STANKO AND THEN YOU CAN LEAVE?
A WELL, THEY HAD DONE A FORMAL RESEARCH PROJECT USING THIS PROCEDURE. SO WHAT WE DID WAS SIMPLY DUPLICATE WHAT THEY HAD DONE.
Q OKAY. I GOT YA. I MEAN, THEY'RE RESEARCH

SCIENTISTS. THEY ARE GUYS OUT THERE, YOU KNOW, KIND OF CUTTING-EDGE SORT OF STUFF?

A RIGHT.

Q THIS -- THIS WAS NOT SOMETHING THAT YOU WOULD TYPICALLY DO IF YOU'RE SEEKING A PET SCAN TO HELP DIAGNOSIS A PATIENT?

A NO.

Q NO. AND SO YOU CAN'T SAY OR CAN YOU SAY FROM YOUR OWN KNOWLEDGE THAT THIS TEST WOULD -- WOULD ACTUALLY ENGAGE THE FRONTAL LOBES OR NOT?

A WELL, I DIDN'T HAVE TO SAY IT. IT WAS ALREADY SAID FOR ME.

Q OKAY. SOMEBODY ELSE TOLD YOU TO DO IT.

A YES.

Q I'M NOT -- YEAH, I JUST WANTED TO KNOW IF THAT WAS YOUR OPINION OR IF THAT WAS SOMEONE ELSE'S OPINION. NOW, A TEST LIKE THIS, IF YOU -- I GUESS IT ENGAGES THE FRONTAL LOBES.

BUT WHAT IF YOU'RE REAL SMART LIKE MR. STANKO IS, ISN'T -- ISN'T IT FAIR TO SAY OR ISN'T IT REASONABLE TO SAY THAT IF YOU'RE REAL SMART, YOU DO NOT ENGAGE THE SAME CAPACITIES OF YOUR BRAIN AS SOMEONE WHO IS NOT SO SMART WHEN THEY'RE GIVING -- GIVING ONE OF THESE PSYCHOLOGICAL TESTS, IT REQUIRES MUCH MENTAL ENERGY, SO TO SPEAK?

A I'M NOT EXACTLY SURE WHAT YOUR QUESTION IS.

Q OKAY. WELL, LET'S -- I PROBABLY DIDN'T PHRASE IT VERY WELL. I APOLOGIZE, DOCTOR.

A IT COULD HAPPEN.

Q WOULD YOU AGREE WITH ME THAT SOMEONE WHO IS SMARTER, HAS A HIGHER INTELLIGENCE, HIGHER IQ, CAN DO MENTAL EXAMINATIONS EASIER THAN SOMEONE WHO HAS A LOWER IQ?

A DEPENDING ON THE TEST THAT WOULD BE TRUE. IN SOME CASES THAT WOULD NOT BE TRUE, AND PROBABLY MOST CASES THAT WOULD BE TRUE.

Q MOST CASES IT WOULD BE TRUE?

A YES.

Q NOW, YOU SAID THAT, YOU KNOW, HE DID FINE IN THE HIGHER CORTICAL FUNCTIONS, HE DID FINE ON -- ESSENTIALLY DID FINE ON ALL YOUR TESTS--

A YES.

Q -- DIAGNOSED HIM WITH A PERSONALITY DISORDER WHICH IS--

A YES.

Q -- YOU KNOW, I THINK IS GOING TO BECOME -- HAS BECOME SORT OF A CONSTANT THEME. BUT IF HE HAD A BRAIN DEFECT, IS IT POSSIBLE, IS IT JUST AS LIKELY THAT HE WOULD HAVE HAD SOME DIFFICULTIES IN THE HIGHER CORTICAL FUNCTIONS?

A NOT NECESSARILY.

Q I MEAN, I -- I MEAN, BUT -- AND I -- MAYBE I DIDN'T ASK THE QUESTION VERY WELL. BUT HE COULD, HE MIGHT, AND

HE MIGHT NOT. THAT'S WHAT YOU'RE SAYING; ISN'T IT?
A IF YOU COULD PLEASE ASK THE QUESTION AGAIN.
Q IF HE HAD A BRAIN DEFECT, HE MIGHT DO WELL ON YOUR -- YOUR NEUROPSYCHOLOGICAL TESTS OR HE MIGHT NOT DO WELL ON THE NEUROPSYCHOLOGICAL TESTS, JUST DEPENDS?
A DEPENDS ON HOW YOU ARE DEFINING BRAIN DEFECT.
Q WELL, JUST A BRAIN DEFECT. I'M TALKING -- OF COURSE--
A YEAH, IT MAY OR MAY NOT SHOW UP.
Q SO -- GOT YA. GOT YA. AND DOCTOR, WE HAVE BEEN THROUGH YOUR REPORT WITH DR. THRASHER. I'M NOT GOING TO MAKE YOU GO BACK THROUGH THAT AS WE DID EARLIER TODAY.

LET ME CHECK AND SEE IF I HAVE ANY OTHER QUESTIONS FOR YOU. THANK YOU, DR. EINHORN. I DON'T HAVE ANY OTHER QUESTIONS FOR YOU. PLEASE ANSWER ANY QUESTIONS--

THE COURT: ANY REDIRECT?

REDIRECT EXAMINATION

BY MR. DIGGS:
Q DR. EINHORN, JUST ONE FOLLOW-UP. HAVE YOU BEEN CONTINUOUSLY ENGAGED IN THE PRACTICE OF NEUROPSYCHOLOGY SINCE YOU WENT INTO PRACTICE INITIALLY IN THE EARLY 80'S?
A SINCE 1986, SO THERE'S THREE OR FOUR YEARS.
Q 1986?
A YES.
Q THAT'S ALL I HAVE.

THE COURT: ANY EXCEPTION TO THE WITNESS BEING EXCUSED?

MR. HEMBREE: NO, YOUR HONOR. NONE FROM THE STATE.

THE COURT: DEFENSE?

MR. DIGGS: NO, NO OBJECTION.

THE COURT: SIR, YOU'RE EXCUSED. THANK YOU.

MR. DIGGS: YOUR HONOR, OUR NEXT WITNESS IS GOING TO HAVE SOME EQUIPMENT THAT PLUGS INTO THIS AND IT MAY TAKE HIM JUST A COUPLE OF MINUTES.

THE COURT: DO WE NEED TO TAKE A BRIEF RECESS?

MR. DIGGS: JUST VERY BRIEF, YOUR HONOR. SHOULDN'T BE BUT A COUPLE OF MINUTES.

THE COURT: MADAM FORELADY, LADIES AND GENTLEMEN, WE'RE GOING TO TAKE A BRIEF BREAK WHILE WE GET SOME TECHNOLOGY IN LINE. WE APPRECIATE YOUR PATIENCE. PLEASE LEAVE YOUR NOTEPADS IN YOUR SEATS AND DO NOT DISCUSS THE CASE.

(JURY LEFT THE COURTROOM AT 3:32 PM.)

THE COURT: WE'LL BE AT EASE FOR A FEW MINUTES. JUST LET ME KNOW WHEN YOU GET IT ALL DONE.

MR. DIGGS: YES, MA'AM.

(WHEREUPON THERE WAS A PAUSE.)

THE COURT: IS THE STATE READY TO PROCEED?

MR. HEMBREE: YES, YOUR HONOR.

THE COURT: IS THE DEFENSE READY TO PROCEED?

MR. DIGGS: YES, YOUR HONOR.

THE COURT: PLEASE BRING IN THE JURY.

(JURY ENTERED THE COURTROOM AT 3:40 PM.)

THE COURT: YOU MAY BE SEATED. LADIES AND GENTLEMEN, WE APPRECIATE YOUR PATIENCE. WE'LL NOW RESUME WITH THE TRIAL. MR. DIGGS, YOU MAY PROCEED.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

MR. DIGGS: THE DEFENSE WOULD CALL DR. JOSEPH C WU.

THE COURT: DO YOU HEAR A BEEP?

MR. DIGGS: I THINK IT'S BOUNCING OFF THE WALLS.

THE COURT: OKAY.

DR. JOSEPH C. WU, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE WITNESS: MY NAME IS JOSEPH CHONG SANG WU, W-U.

THE COURT: THANK YOU. I THINK THAT THE FEEDBACK BEING CAUSED BY -- ARE Y'ALL USING A COMPUTER THAT'S ATTACHED TO THIS --

MR. DIGGS: YES, MA'AM, BUT IT SHOULDN'T HAVE AUDIO WITH IT.

THE COURT: THERE'S SOME FEEDBACK ON IT. CAN YOU HEAR IT? MAYBE JUST BECAUSE THIS SPEAKER IS ON.

OKAY. I CAN BEAR WITH IT. GO AHEAD.

DIRECT EXAMINATION

BY MR. DIGGS:

Q DR. WU, TELL US WHAT YOU DO AND WHERE YOU'RE EMPLOYED.

A YES. I AM A MEDICAL DOCTOR. I'M ALSO AN ASSOCIATE PROFESSOR AT THE COLLEGE OF MEDICINE AT THE UNIVERSITY OF CALIFORNIA. I'M ALSO A CLINICAL DIRECTOR FOR THE UNIVERSITY OF CALIFORNIA IRVINE BRAIN IMAGING CENTER.

Q ALL RIGHT. AND YOU HAVE A COPY OF YOUR CV WITH YOU; DO YOU NOT?

A YES, I DO.

Q ALL RIGHT. AND JUST FOR OUR INFORMATION, THAT -- WE MAY REFER TO THAT. THAT'S WHY I ASKED YOU TO HOLD THAT. OKAY. THANK YOU. DR. WU, LET'S START BY HAVING YOU RECOUNT FOR US, PLEASE SIR, YOUR EDUCATION.

A YES. I DID MY PRE-MEDICAL EDUCATION AT STANFORD UNIVERSITY IN PALO ALTO, CALIFORNIA. I GRADUATED FROM THEM WITH HONORS IN 1978. AFTER THAT I DID A MEDICAL SCHOOL TRAINING WHERE I OBTAINED MY MD AT THE UNIVERSITY OF CALIFORNIA IRVINE COLLEGE OF MEDICINE WHICH I COMPLETED IN 1982 IN WHICH I ALSO AGAIN FINISHED WITH HONORS.

I THEN DID AN INTERNSHIP AND RESIDENCY IN PSYCHIATRY ALSO AT THE UNIVERSITY OF CALIFORNIA IRVINE WHICH I ALSO FINISHED IN 1986 AGAIN WITH HONORS. AFTER THAT I DID A

TWO YEAR FELLOWSHIP IN PET SCAN IMAGING OF THE BRAIN ALSO AT THE UNIVERSITY OF CALIFORNIA IRVINE WHICH I COMPLETED IN 1988.

Q ALL RIGHT. THANK YOU VERY MUCH. DURING YOUR MEDICAL SCHOOL TRAINING, DID YOU FOCUS YOUR STUDIES ON ANY PARTICULAR FIELD?

A DURING MY MEDICAL SCHOOL AND RESIDENCY I WAS ESPECIALLY INTERESTED IN LEARNING MORE ABOUT THE BRAIN AND NEUROPSYCHIATRY, AND ESPECIALLY ABOUT HOW BRAIN IMAGING COULD HELP UNDERSTAND HOW A BRAIN WORKS.

Q OKAY. AND YOU DECIDED TO GO INTO PSYCHIATRY?

A YES.

Q TELL US WHAT YOUR UNDERSTANDING OF PSYCHIATRY IS.

A WELL, PSYCHIATRY ENCOMPASSES THE STUDY OF DISEASES OF THE HUMAN PSYCHE THAT INVOLVE OPERATIONS, FOR EXAMPLE, MOODS SUCH AS DEPRESSION OR MANIA OR IN TERMS OF REALITY TESTING SUCH AS SCHIZOPHRENIA OR PSYCHOSIS OR IN TERMS OF MEMORY SUCH AS ALZHEIMERS DISEASE.

IT CAN ENCOMPASS AREAS SUCH AS TRAUMATIC BRAIN INJURY OR IT CAN HAVE AN ALTERATION OF THE ABILITY TO THINK PROPERLY. IT CAN ENCOMPASS DEVELOPMENTAL DISORDERS SUCH AS AUTISM OR MENTAL RETARDATION.

SO THOSE ARE SOME OF THE KIND OF THINGS THAT PSYCHIATRISTS ARE ESPECIALLY INTERESTED IN ARE THOSE KINDS OF NEUROPSYCHIATRIC DISORDERS THAT INVOLVE THE INTERFACE

BETWEEN THE BRAIN AND THE MIND.

Q COULD THEY ALSO BE INVOLVED WITH THE STUDY OF BRAIN DEFECTS OR ABNORMALITIES?

A YES. BRAIN DEFECTS WOULD BE ONE OF THE THINGS THAT WE STUDY IN PSYCHIATRY. MOST OF THE CONDITIONS THAT WE LOOK AT, FOR EXAMPLE, TRAUMATIC BRAIN INJURY OR AUTISM OR SCHIZOPHRENIA ALL INVOLVE SOME FORM OF DEFECT IN HOW THE BRAIN OR MIND OPERATES.

Q NOW, ARE YOU BOARD CERTIFIED IN PSYCHIATRY?

A YES, I AM BOARD CERTIFIED IN PSYCHIATRY.

Q AND APPROXIMATELY HOW MANY PSYCHIATRISTS ARE BOARD CERTIFIED?

A I BELIEVE ROUGHLY HALF THE PSYCHIATRISTS IN THE COUNTRY ARE BOARD CERTIFIED.

Q WHAT IS THE SIGNIFICANCE OF THAT, IF ANY, THE -- THE CERTIFICATION PROCESS?

A WELL, BOARD CERTIFICATION IN -- MEANS THAT ONE HAS PASSED A RIGOROUS WRITTEN TEST AS WELL AS A RIGOROUS LIVE EXAMINATION IN WHICH ONE IS PLACED WITH A PATIENT THAT ONE HAS NEVER SEEN BEFORE AND ONE IS EVALUATED BY THREE EXAMINERS WHILE ONE EXAMINES A PATIENT AND THEN COMES UP WITH A DIAGNOSIS FOR THE PATIENT.

SO THAT -- AND ONE LOOKS AT HOW ONE CONDUCTS THE EXAM AND WHETHER OR NOT ONE CORRECTLY CONSIDERED THE RIGHT FACTORS, AND SO IT'S A COMBINATION OF BOTH WRITTEN AND

PRACTICAL KNOWLEDGE OF HOW TO BE A PSYCHIATRIST.

Q LET ME ASK YOU IF YOU ARE A MEMBER OF ANY PROFESSIONAL SOCIETIES.

A I'M A MEMBER OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE SOCIETY OF NEUROSCIENCE, THE SOCIETY OF BIOLOGICAL PSYCHIATRY, THE SOCIETY OF NUCLEAR MEDICINE. AND THOSE ARE SOME OF THE MEDICAL AND SCIENTIFIC ORGANIZATIONS THAT I BELONG TO.

Q NOW, YOU'RE THE DIRECTOR OF THE BRAIN IMAGING CENTER; IS THAT CORRECT?

A YES, I'M THE CLINICAL DIRECTOR FOR THE UNIVERSITY OF CALIFORNIA IRVINE BRAIN IMAGING CENTER.

Q AND YOU'RE ALSO ASSOCIATE PROFESSOR AT THE COLLEGE, THE UNIVERSITY?

A YES. I ALSO AM AN ASSOCIATE PROFESSOR AT THE COLLEGE OF MEDICINE AND IN -- IN UNIVERSITY OF CALIFORNIA.

Q WHAT DO YOU DO? LET'S -- LET'S TALK ABOUT YOUR RESPONSIBILITIES AS A ASSOCIATE PROFESSOR. WHAT DO YOU DO IN THAT CAPACITY?

A WELL, THE ASSOCIATE PROFESSOR I'M INVOLVED WITH TEACHING MEDICAL STUDENTS AND RESIDENTS ABOUT THE BRAIN AND ABOUT PSYCHIATRY. AND SO I GIVE LECTURES ON NEUROANATOMY, ON THE NEUROCHEMISTRY OF THE BRAIN, ON THINGS SUCH AS DOPAMINE, SEROTONIN, HOW THEY AFFECT THE BRAIN, ON PSYCHOPHARMACOLOGY.

ALSO GIVE LECTURES ON BRAIN IMAGING, HOW TO USE PET SCANS AND MRI SCANS TO HELP EVALUATE THE BRAIN. AND SO THOSE ARE SOME OF MY TEACHING RESPONSIBILITIES. AND I GIVE LECTURES TO MEDICAL STUDENTS, I GIVE LECTURES TO RESIDENTS, I GIVE LECTURES TO FELLOWS AFTER THEY FINISH THEIR RESIDENCY.

I'M ALSO INVOLVED WITH PATIENT CARE, AND SO I SEE PATIENTS, I -- AND SO I HAVE PATIENTS WHO COME TO ME FOR BOTH DIAGNOSIS AND TREATMENT WITH A WIDE VARIETY OF NEUROPSYCHIATRIC DISORDERS INCLUDING MANIC DEPRESSIVE ILLNESS, SCHIZOPHRENIA, DEMENTIA, TRAUMATIC BRAIN INJURY, ADD.

AND THEN I AM ALSO INVOLVED WITH DOING RESEARCH. AND SO AS A RESEARCHER AT THE UNIVERSITY, I PUBLISH PAPERS. ONE OF THE THINGS I HAVE TO DO IS NOT ONLY DO I HAVE TO TEACH ABOUT PSYCHIATRY, NOT ONLY DO I HAVE TO PRACTICE PSYCHIATRY, BUT I ALSO HAVE TO TRY TO CONTRIBUTE TO NEW INFORMATION ABOUT PSYCHIATRY AS A RESEARCHER, AND SO I PUBLISH OVER 50 PAPERS ON BRAIN IMAGING AND PET SCANNING IN NEUROPSYCHIATRIC DISORDERS.

AND SO I PUBLISH PAPERS ON HOW PET SCANS CAN AND -- HELP US BETTER UNDERSTAND DEPRESSION, HOW PET SCANS CAN HELP US BETTER UNDERSTAND DEMENTIA, TRAUMATIC BRAIN INJURY.

I'VE ALSO PUBLISHED PAPERS ON THE EFFECTS OF DRUGS

SUCH AS COCAINE ON BRAIN IMAGING. AND SO THOSE ARE THE THREE MAJOR AREAS THAT I AM INVOLVED IN AS A ASSOCIATE PROFESSOR OF TEACHING, PATIENT CARE, AND RESEARCH.

Q THANK YOU, DR. WU. AND AS THE CLINICAL DIRECTOR OF THE BRAIN IMAGING CENTER, ARE YOUR RESPONSIBILITIES DIFFERENT THERE? AND IF THEY DO, CAN YOU TELL US WHAT YOU DO IN THAT...

A WELL, PART OF MY CLINICAL CARE INVOLVES NOT ONLY SEEING PATIENTS WHO COME TO ME FOR TREATMENT OF SAY DEPRESSION OR SCHIZOPHRENIA, BUT I'M ALSO RESPONSIBLE FOR THE CLINICAL BRAIN IMAGING, THE PET SCANNING CENTER.

SO WE HAVE A LARGE NUMBER OF PATIENTS WHO COME TO OUR PET SCANNING CENTER WITH DIFFERENT KINDS OF PSYCHIATRIC AND NEUROLOGICAL DIAGNOSIS. AND SO I AM RESPONSIBLE FOR ENSURING THAT THE SCAN IS CLINICALLY INTERPRETED.

AND SO I HAVE BEEN INVOLVED IN THE ACQUISITION AND INTERPRETATION OF OVER 5000 BRAIN PET SCANS. AND SO I HAVE SEEN BRAIN PET SCANS OF PATIENTS WITH ALZHEIMERS, DEMENTIA, SCHIZOPHRENIA, WITH MANIC DEPRESSIVE ILLNESS, WITH STUTTERING, WITH BULIMIA, AND SO I'VE BECOME VERY FAMILIAR WITH HOW VARIOUS KINDS OF NEUROPSYCHIATRIC DISORDERS CAN MANIFEST IN TERMS OF BRAIN FUNCTIONAL IMAGING.

Q OKAY. AND I WAS JUST GOING TO ASK YOU IF YOU HAVE ANY TRAINING IN THE ADMINISTRATION AND INTERPRETATION OF

PET SCANS.

A YES. AFTER I COMPLETED MY RESIDENCY IN PSYCHIATRY, I DID A TWO YEAR FELLOWSHIP IN BRAIN IMAGING. AS PART OF THAT TWO YEAR FELLOWSHIP I WORKED WITH PET SCANS, I WORKED WITH THE MEDICINE PHYSICIANS, AND I WAS INVOLVED IN THE -- LEARNING HOW TO ACQUIRE PET SCANS, HOW TO INTERPRET PET SCANS, HOW TO ADMINISTER PET SCANS DURING THAT TWO YEARS AFTER MY RESIDENCY.

Q ALL RIGHT. YOU MENTIONED A NUMBER OF PUBLICATIONS. DID YOU SAY APPROXIMATELY 40?

A CLOSER TO 50 PEER REVIEWED JOURNAL ARTICLES.

Q ALL RIGHT. AND WHAT DO YOU MEAN BY PEER REVIEWED?

A BY PEER REVIEWED, THIS MEANS THAT OTHER SCIENTIFIC AND MEDICAL PEERS, OTHER DOCTORS AND SCIENTISTS WHO ARE KNOWLEDGEABLE ABOUT THE FIELD OF PET SCAN IMAGING OF THE BRAIN HAVE ANONYMOUSLY REVIEWED MY SCIENTIFIC CONTRIBUTION TO PUBLICATIONS PRIOR TO PUBLICATION, AND THEY HAVE INDEPENDENTLY DETERMINED THAT THE METHODOLOGY AND THE SCIENCE OF -- BEHIND THE ARTICLES THAT I HAVE WRITTEN ARE SOUND AND ARE WORTHY OF BEING PUBLISHED.

Q HOW MANY ARTICLES ARE PUBLISHED? CAN YOU GIVE US A PERCENTAGE AS OPPOSED TO THE NUMBER OF ARTICLES THAT ARE ACTUALLY SUBMITTED BY AUTHORS WHO WANT TO BE?

A WELL, I WOULD SAY THAT IT DEPENDS ON THE JOURNAL. SOME JOURNALS, FOR EXAMPLE, WILL ONLY PUBLISH 10 PERCENT

OF THE ARTICLES THAT ARE SUBMITTED TO THEM. SOME MAY ONLY PUBLISH 1 PERCENT. IT DEPENDS ON THE JOURNAL.

Q OKAY. AND YOU HAVE BEEN PUBLISHED IN THOSE JOURNALS?

A I HAVE BEEN PUBLISHED IN THOSE JOURNALS. I HAVE ALSO BEEN ON THE OTHER SIDE. I HAVE ALSO BEEN AN ANONYMOUS REVIEWER THAT'S BEEN SELECTED BECAUSE OF MY EXPERTISE IN THE AREA OF BRAIN IMAGING TO BE A JUDGE OF OTHER SCIENTISTS AND DOCTORS, AUTHORS, AND TO DETERMINE WHETHER OR NOT THE METHODOLOGY AND THE SIGNIFICANCE OF THEIR FINDING IS WORTHY OF BEING PUBLISHED.

Q SO YOU HAVE DONE -- WORN BOTH HATS IN THAT SITUATION?

A YES, I'VE BOTH HAD MY WORK REVIEWED AS WELL AS BEEN A REVIEWER OF OTHER PEOPLE'S WORKS. AND THIS IS ONE OF THE WAYS THAT THE SCIENTIFIC FIELD ENSURES THAT THERE'S A CERTAIN SCIENTIFIC QUALITY TO WHAT'S BEING PUBLISHED.

Q NOW, YOU HAVE BEEN EMPLOYED AT THE BRAIN IMAGING CENTER FOR HOW LONG?

A I HAVE BEEN EMPLOYED AT -- ALMOST 20 YEARS NOW.

Q OKAY. DURING THAT TERM, LET ME ASK YOU THIS. WHAT DOES THE ADMINISTRATION OF THE PET SCAN MEAN? WHAT DOES IT ENTAIL?

A WELL, THE ADMINISTRATION OF A PET SCAN MEANS THAT ONE ADMINISTERS WHAT WE CALL A RADIOISOTOPE, A SUGAR MOLECULE. SUGAR IS THE MAIN FUEL FOR BRAIN FUNCTION OR ACTIVITY. THE MORE ACTIVE A PARTICULAR PART OF THE BRAIN IS, THE

MORE SUGAR THAT PART OF THE BRAIN CONSUMES, BURNS UP.

AND SO IN ORDER TO TRY AND LOOK AT THE PATTERN OF FUNCTION IN THE BRAIN, WE USE A SPECIAL KIND OF RADIOACTIVE SUGAR MOLECULE WHICH WE CAN SAFELY ADMINISTER. IT'S A LOW AMOUNT OF RADIATION, ROUGHLY EQUIVALENT TO TWO CHEST X-RAYS SERIES.

BUT THIS LOW AMOUNT OF RADIOACTIVE SUGAR IS SUFFICIENT IN TERMS OF PROVIDING US WITH INFORMATION TO SEE HOW MUCH SUGAR IS BEING BURNED UP IN DIFFERENT AREAS OF THE BRAIN.

Q OVER THE YEARS, HOW MANY PET SCANS HAVE YOU ADMINISTERED?

A WELL, I HAVE BEEN INVOLVED WITH -- IN INTERPRETATION AND ADMINISTRATION OF OVER 5000 BRAIN PET SCANS FOR NEUROPSYCHIATRIC PURPOSES WHICH IS ONE OF THE -- PROBABLY THE LARGEST SERIES IN THE COUNTRY.

Q AND YOU MAY HAVE ANSWERED THIS, BUT I WANTED TO ASK YOU WHY YOU DO PET SCANS. WHY ARE PET SCANS ADMINISTERED--

A WELL, PET SCANS--

Q -- IN THE -- BRAIN CENTER?

A PET SCANS ARE ADMINISTERED FOR BOTH CLINICAL AND RESEARCH PURPOSES. CLINICALLY WE DO PET SCANS TO HELP US TO TRY AND SEE IF THE PATTERN OF BRAIN FUNCTION CAN HELP US SHED SOME LIGHT INTO A PERSON'S DIAGNOSIS OR BEHAVIOR.

AND IT CAN BE VERY HELPFUL IN CERTAIN SITUATIONS.

SO FOR EXAMPLE, IF SOMEONE HAD A MEMORY DISORDER OR, YOU KNOW, WE THINK THAT THEY HAVE A MEMORY DISORDER, WE CAN SEE IF THEY HAVE A ABNORMAL PATTERN OF FUNCTION IN THE BRAIN WHICH MIGHT LEAD US TO A SPECIFIC DIAGNOSIS OF SAY ALZHEIMERS DISEASE.

OR IF SOMEONE HAS A PROBLEM WITH, FOR EXAMPLE, HEARING VOICES, A PET SCAN CAN HELP US TO IDENTIFY WHAT PARTS OF THE BRAIN ARE INVOLVED WITH HEARING VOICES. OR IF SOMEONE HAS PROBLEMS WITH COGNITION, IF THEY HAVE PROBLEM WITH THINKING, SAY AFTER THEY HAD SOME KIND OF BRAIN INJURY, WE CAN SEE WHAT AREAS OF THE BRAIN HAVE BEEN INJURED, AND THIS CAN HELP TO COME UP WITH A BETTER IDEA OF WHAT THE PATIENT'S PROGNOSIS IS.

SO THOSE ARE SOME OF THE CLINICAL REASONS WHY WE DO BRAIN PET SCANS.

Q ALL RIGHT. ARE THERE OTHER REASONS SUCH AS RESEARCH OR FORENSIC?

A YES. AND SO WE DO RESEARCH SCANS. WE'RE VERY INTERESTED IN TRYING TO DEVELOP NEW TREATMENT FOR DIFFERENT CONDITIONS SUCH AS ALZHEIMERS DISEASE, SCHIZOPHRENIA, DEPRESSION.

AND PART OF DEVELOPING NEW TREATMENT IS TRYING TO UNDERSTAND HOW NEW TREATMENTS MIGHT WORK. AND SO PART OF WHAT WE DO IS THAT WE USE A LOT OF THE NEWER TREATMENTS

THAT ARE BEING TESTED TO SEE HOW THEY EFFECT THE BRAIN OF PEOPLE WITH SAY ALZHEIMERS DISEASE.

AND THIS CAN GIVE US SOME INSIGHT INTO HOW THESE MEDICATIONS ARE WORKING, WHETHER THEY'RE WORKING, WHETHER SOMETHING NEEDS TO BE CHANGED OR DONE DIFFERENTLY, AND SO WE DO A LOT OF THAT KIND OF RESEARCH, FUNCTIONAL BRAIN IMAGING.

I'M ALSO INVOLVED WITH BRAIN IMAGING THAT'S BEING USED FOR FORENSIC PURPOSES--

Q WHAT DO WE MEAN BY FORENSIC PURPOSES?

A FOR FORENSIC PURPOSES, THIS IS A COURT-ORDERED TESTING OF BRAIN FUNCTION IN AN INDIVIDUAL IN ORDER TO SEE IF IT CAN PROVIDE MEDICAL AND CLINICAL INFORMATION ABOUT WHETHER OR NOT THERE'S ANY ABNORMALITY IN THE BRAIN THAT CAN HELP SHED LIGHT ON A PERSON'S BEHAVIOR.

Q I SEE. NOW, BUT YOU HAVE NOT BEEN COURT ORDERED IN THIS CASE?

A NO, I HAVE NOT SPECIFICALLY ADMINISTERED THE PET SCAN IN THIS CASE.

Q OKAY. AND I DO THIS -- I ASK THIS QUESTION, DR. WU, SIMPLY BECAUSE I WANT TO GET TO KNOW YOU AS THOROUGHLY, AS WELL AS WE CAN AT THIS POINT, AND I WANT YOU TO ADDRESS THE TOPIC OF RESEARCH AWARDS AND GRANTS THAT YOU HAVE BEEN INVOLVED WITH. COULD YOU SPEAK TO THAT?

A YES. I HAVE RECEIVED -- BEEN FORTUNATE TO RECEIVE A

NUMBER OF RESEARCH AWARDS INCLUDING THE NATIONAL ALLIANCE OR RESEARCH AND SCHIZOPHRENIA AND DEPRESSION, AND THE ASSOCIATION OF ACADEMIC PSYCHIATRY AMONG OTHER AWARDS.

I HAVE ALSO RECEIVED AWARDS FROM THE STANLEY FOUNDATION FOR THE STUDY OF MANIC DEPRESSIVE ILLNESS. AND I'VE ALSO RECEIVED A -- GRANTS FROM THE NATIONAL INSTITUTE OF MENTAL HEALTH, THE FEDERAL AGENCY -- THE FEDERAL GOVERNMENT'S MAJOR ARM FOR FUNDING RESEARCH INTO MENTAL ILLNESS, AND SO THOSE ARE SOME OF THE AWARDS AND GRANTS THAT I HAVE RECEIVED THROUGH THE YEARS.

Q THANK YOU, DR. WU. HAVE YOU EVER BEEN QUALIFIED TO TESTIFY AS AN EXPERT IN ANY COURT IN THE UNITED STATES?

A YES, I HAVE.

Q AND HAVE YOU BEEN QUALIFIED TO TESTIFY CONCERNING PET SCANS?

A YES, I HAVE.

Q THE ADMINISTRATION AND INTERPRETATION OF PET SCANS?

A YES, I HAVE.

Q AND HAVE YOU EVER BEEN QUALIFIED TO TESTIFY IN CRIMINAL CASES?

A YES, I HAVE.

Q GIVE US SOME -- WE DON'T NEED THE NAMES OF THOSE CASES, BUT HOW MANY DIFFERENT JURISDICTIONS HAVE YOU BEEN ASKED TO PROVIDE EXPERT TESTIMONY IN?

A WELL, I HAVE BEEN ASKED TO PROVIDE EXPERT TESTIMONY

IN FLORIDA, IN TEXAS, IN MICHIGAN, IN WASHINGTON, IN ALABAMA, IN CALIFORNIA, IN NEVADA, IN COLORADO. SO THOSE ARE SOME OF THE PLACES THAT I HAVE BEEN ASKED TO PROVIDE EXPERT WITNESS TESTIMONY IN.

Q OKAY.

MR. DIGGS: LET ME AT THIS POINT, YOUR HONOR, TENDER DR. WU AS AN EXPERT IN PSYCHIATRY AND IN THE ACCEPTABILITY, USEFULNESS, ADMINISTRATION AND INTERPRETATION OF PET SCANS.

THE COURT: ANY OBJECTIONS OR QUESTIONS -- QUESTIONS OR OBJECTIONS?

MR. HUMPHRIES: NO, YOUR HONOR.

THE COURT: SO ADMITTED. YOU MAY PROCEED.

BY MR. DIGGS:

Q DR. WU, LET ME ASK YOU AT THE BEGINNING TO DESCRIBE FOR US HOW THE PET SCAN WORKS. WE WENT INTO THAT A LITTLE BIT EARLIER, BUT -- BUT GO OVER AGAIN FOR US WHAT HAPPENS WHEN A PET SCAN IS TAKEN OF A PATIENT.

A WELL, BASICALLY THE WAY A PET SCAN WORKS IS THAT WE TAKE A SUGAR MOLECULE WHICH IS -- HAS A LOW AMOUNT OF RADIOACTIVITY AND WE INJECT THIS INTO THE PATIENT'S BLOOD VESSELS AND THEN THE RADIOACTIVE SUGAR MOLECULE TRAVELS IN THE BLOOD VESSELS INTO THE BRAIN.

AND AREAS OF THE BRAIN THAT ARE MORE ACTIVE ARE GOING TO ACCUMULATE MORE OF THIS RADIOACTIVE SUGAR MOLECULE IN

AREAS OF THE BRAIN THAT ARE LESS ACTIVE. AND WE ARE THEN ABLE TO SEE HOW MUCH ENERGY RAYS COME FROM WHAT PARTS OF THE BRAIN DEPENDING UPON THE ACCUMULATION OF RADIOACTIVE SUGAR WHICH IS DEPENDENT UPON HOW MUCH FUNCTION OR ACTIVITY DIFFERENT PARTS OF THE BRAIN HAVE.

Q NOW, YOU BROUGHT SOME DEMONSTRATIVE MATERIAL WITH YOU TODAY, DID YOU NOT, TO HELP EXPLAIN WHAT YOUR TESTIMONY IS?

A YES. I BROUGHT SOME FIGURES TO HELP EXPLAIN TO THE JURY SOME OF THE BASIC PRINCIPLES OF PET SCAN AND HOW THEY WORK IN ORDER TO HELP MAKE IT A -- MORE UNDERSTANDABLE.

MR. DIGGS: YOUR HONOR, WITH YOUR PERMISSION I WOULD ASK THAT DR. WU TURN ON THE POWERPOINT AND LET'S LET HIM USE THAT AS HE DISCUSSES HIS TESTIMONY.

THE COURT: CERTAINLY. YOU MAY PROCEED.

MR. DIGGS: THANK YOU.

MR. HUMPHRIES: MAY WE APPROACH VERY BRIEFLY, YOUR HONOR?

THE COURT: YOU MAY.

BY MR. DIGGS:

Q WE'LL GO -- I DON'T WANT TO GO THERE YET.

A YES, I KNOW. LET ME GO TO THE VERY FRONT.

(WHEREUPON A BENCH CONFERENCE WAS HELD.)

BY MR. DIGGS:

Q ALL RIGHT. DR. WU, LET ME ASK YOU THIS BEFORE WE

BEGIN THE PET SCAN, THE POWERPOINT ON THE PET SCAN RECITATION. IS IT POSSIBLE FOR US TO DOWNLOAD YOUR INFORMATION SO THAT WE CAN HAVE A COPY OF IT PRESERVED FOR REVIEW AT A LATER TIME?

A YES. AND I CAN DOWNLOAD THE POWERPOINT ONTO A JUMP DRIVE AND TRANSFER IT TO YOUR COMPUTER OR TO ANY OTHER COMPUTER THAT THE COURT WISHES.

THE COURT: YOU MAY PROCEED, MR. DIGGS.

BY MR. DIGGS:

Q ALL RIGHT. WHAT WE'RE -- WHAT I'M ACTUALLY -- I MIGHT HAVE MISSTATED. WE'RE NOT GOING TO PRESERVE THIS FOR THE JURY TO REVIEW LATER. WE WANT TO MAKE IT PART OF THE RECORD, HOWEVER, IN THE FUTURE IF -- FOR EXAMINATION IF NEED BE.

A YES.

Q ALL RIGHT. NOW, HAVING SAID THAT, GO AHEAD. WHAT ARE WE LOOKING AT AT THIS POINT, DR. WU?

A WELL, THIS ILLUSTRATES A TYPICAL PET SCAN COMPARED TO A TYPICAL MRI SCAN AND THIS SHOWS THAT PET SCANS ARE A PICTURE OF BRAIN FUNCTION WHEREAS MRI SCANS ARE PICTURES OF THE BRAIN STRUCTURE SO THAT, FOR EXAMPLE, YOU CAN TAKE A CADAVER AND YOU CAN GET A PERFECTLY NORMAL MRI OF THE CADAVER'S BRAIN BECAUSE IT'S SHAPED LIKE THE CADAVER'S BRAIN, COULD BE PERFECTLY NORMAL, BUT THERE WOULD OBVIOUSLY BE NO FUNCTIONING IN A CADAVER'S BRAIN, AND IN

THAT CASE YOU GET A BLANK SCREEN.

AND WHAT WE'RE SEEING HERE ARE DIFFERENT COLORS IN THE PET SCANS, LIKE AREAS THAT ARE RED WOULD BE AREAS THAT WOULD BE HIGHER IN SUGAR METABOLISM, AND AREAS THAT ARE BLUE WOULD BE AREAS THAT WOULD BE LOWER IN SUGAR METABOLISM.

AND WHAT WE HAVE HERE ARE THREE DIFFERENT SLICES, A HIGH SLICE HERE, THIS IS A MIDDLE SLICE HERE, AND THIS IS A LOW SLICE HERE.

AND ONE OF THE THINGS THAT YOU'LL NOTICE IN THE NORMAL BRAIN IS THAT THE TYPICAL NORMAL BRAINS SHOW MORE ACTIVITY IN THIS AREA HERE WHICH WE CALL THE FRONTAL LOBE PORTIONS THAN THE BACK AREA OF THE BRAIN HERE. SO THIS IS A TYPICAL PET VERSUS MRI SCAN.

Q OKAY. YOU I BELIEVE EXPLAINED THIS. DO YOU SEE WHERE I'M POINTING HERE?

A YES.

Q EXPLAIN TO ME, IF YOU WOULD, HOW THIS WORKS AND WHAT'S INTENDED TO BE SHOWN. IS THIS SOME KIND OF MARKER FOR US TO GET ORIENTED IN TERMS OF WHERE WE'RE LOOKING AT WITH RESPECT TO THESE PARTICULAR IMAGES?

A YES. THE BLUE PLANE INDICATES WHERE THAT SLICE CAME FROM. YOU CAN SEE THAT THAT BLUE PLANE IS RELATIVELY HIGHER IN THIS SUBJECT'S HEAD.

Q OKAY. SO UP HERE, MHS5, WE'RE TALKING ABOUT A SPOT

HIGHER IN THE HEAD?

A YES, RIGHT ABOUT HERE MAYBE.

Q IN THE -- OKAY. CONTINUE ON.

A AND THEN MHS8 WOULD BE RIGHT ABOUT HERE, WOULD BE ABOUT MIDWAY IN THE BRAIN. THAT WOULD BE THE RED SLICE. AND SO THAT'S SORT OF IN THE MIDDLE OF THE BRAIN. AND THEN THE MHS10 WOULD BE NEAR THE BASE OF THE BRAIN, AND THAT WILL BE THE YELLOW SLICE.

AND SO THESE COLORED PLANES ARE -- COULD HELP ORIENT THE JURY TO WHERE THESE PET SLICES ARE COMING FROM.

Q ALL RIGHT. CONTINUE ON, IF YOU WOULD.

A LET ME SEE. OKAY. I THINK THAT THE IMAGE APPEARS TO BE STUCK HERE. LET'S SEE.

Q YOU NEED TO REBOOT IT?

A YEAH, I'M NOT -- IT APPEARS THAT FOR SOME REASON THE COMPUTER HAS FROZEN. I'M SORRY ABOUT THAT, BUT IT'S A TECHNICAL... IT'S A TECHNICAL--

THE COURT: THERE'S SOME FEEDBACK COMING FROM SOMEWHERE, AND I HAVEN'T FIGURED OUT WHERE IT IS, BUT I HAVE BEEN ABLE TO HEAR IT FROM THE BEGINNING. NOW, IT'S DISTURBING YOU ALL HAVE NOW EXPERIENCED IT. CAN WE DO ANYTHING ABOUT WHAT THE SOURCE OF THAT...

IS THE MICROPHONE ON ON THIS OTHER TV OR ON... BECAUSE WE REALLY DON'T NEED THEM ALL. THERE IS NO AUDIO CONNECTED TO...

MR. DIGGS: COULD YOU TELL WHERE THAT SQUEAL WAS COMING FROM?

(OFF-THE-RECORD DISCUSSION WAS HELD.)

BY MR. DIGGS:

Q PLEASE CONTINUE, DR. WU.

A YES. WHAT THIS--

Q WHAT ARE WE LOOKING AT?

A THIS NEXT SLIDE TELLS US WHERE WE GET THE WORD POSITRON EMISSION TOMOGRAPHY FROM. POSITRON EMISSION TOMOGRAPHY, OR PET SCANS, IS TO A POSITIVE ELECTRONS. ELECTRONS IN OUR UNIVERSE NORMALLY HAVE A NEGATIVE CHARGE.

WE CAN CREATE AN ELECTRON THAT HAS A POSITIVE CHARGE, A POSITRON, AND THIS IS CALLED THE ANTIMATTER VERSION OF THE ELECTRON.

NOW, THE ADVANTAGE OF BEING ABLE TO BRING A POSITRON OR THIS ANTIMATTER VERSION OF ELECTRON IS THAT WHEN YOU COMBINE ANTIMATTER AND MATTER, YOU GET THE FORMATION OF A TREMENDOUS AMOUNT OF ENERGY USING EINSTEIN'S EQUATION E EQUALS MC SQUARE OR E EQUALS ENERGY AND M EQUALS A MASS AND THE POSITRON AND THE ELECTRON, SO THAT WHEN YOU TAKE A SMALL AMOUNT OF POSITRONS, YOU GET A TREMENDOUS AMOUNT OF ENERGY.

FOR THOSE OF YOU WHO ARE SCIENCE FICTION FANS, YOU MAY REMEMBER A SHOW, STAR TREK, IN WHICH THE USS ENTERPRISE WAS POWERED BY A MATTER ANTIMATTER ENGINE.

WHILE THAT SHOW IS SCIENCE FICTION, THE FUNDAMENTAL PHYSICS PRINCIPLE THAT THE COMBINATION OF MATTER AND ANTIMATTER CREATES TREMENDOUS ENERGY IS THE FUNDAMENTAL PRINCIPLE THAT UNDERLIES PET SCANS.

Q ALL RIGHT. WHAT ARE WE LOOKING AT HERE?

A NOW, THIS DEVICE HERE IS HOW WE CREATE THE POSITRON. THIS DEVICE IS CALLED A CYCLOTRON. A CYCLOTRON IS A 22 TON INSTRUMENT WHICH CAN TAKE PARTICLES SMALLER THAN AN ATOM AND CAN ACCELERATE IT TO ALMOST A SPEED OF LIGHT WHICH IS 186,000 MILES A SECOND.

WE ARE ABLE TO TAKE THESE TWO PARTICLE TRIANGULAR MAGNETS HERE AND THESE TWO PARTICLE TRIANGULAR MAGNETS, PUSH THEM THROUGH ARTICLES SMALLER THAN AN ATOM, SO BY THE TIME IT COMES OUT OF THE CYCLOTRON AND HITS A TARGET, IT IS GOING 99.99 PERCENT THE SPEED OF LIGHT.

AND AT THAT POINT IN TIME YOU ARE ABLE TO CREATE THE POSITRON EMITTER WHICH CAN THEN BE ATTACHED TO A SUGAR MOLECULE. AND HERE WE HAVE A PICTURE OF A RADIOCHEMIST WHO TAKES THE POSITRON EMITTER CREATED BY THE CYCLOTRON AND HE'S ATTACHING IT TO A SUGAR MOLECULE INSIDE SOMETHING CALLED A HOT CELL.

THE HOT CELL HAS A 2-INCH THICK LEAD AND GLASS WINDOW WHICH SHIELDS THE RADIOCHEMIST FROM THE RADIOACTIVITY AS HE ATTACHES THE POSITRON EMITTER TO THE SUGAR MOLECULE BEFORE IT IS PREPARED FOR ADMINISTRATION TO THE PATIENT.

AFTER THE RADIOCHEMIST HAS MADE THE POSITRON EMITTING SUGAR MOLECULE, WE THEN TAKE THAT POSITRON EMITTING SUGAR MOLECULE AND WE INJECT IT INTO THE PATIENT THROUGH A SMALL PLASTIC TUBE CALLED A INTRAVENOUS LINE.

AND HERE IS AN EXAMPLE OF A MODEL WHO IS GETTING AN INTRAVENOUS LINE BEING PLACED IN HIS ARM.

Q NOW, WOULD THIS HAVE BEEN THE SAME TECHNOLOGY THAT WOULD BE EMPLOYED IN ANY PET SCAN?

A THIS IS THE SAME FUNDAMENTAL PROCEDURE AND TECHNOLOGY PRINCIPLES THAT UNDERLIE PET SCANNING AT ANY CENTER IN THE WORLD.

Q OKAY. SO THAT WOULD BE INCLUDING MUSC HERE IN SOUTH CAROLINA?

A THAT'S CORRECT.

Q ALL RIGHT. CONTINUE ON, IF YOU WILL.

A OKAY. AND THEN HERE WE SEE THE -- THE SUGAR MOLECULE BEING ADMINISTERED INTO THE SUBJECT'S ARM. AND HERE WE HAVE THE SUBJECT ENGAGING IN WHAT WE CALL AN ACTIVATION TASK.

Q OKAY. AND IS THERE ANOTHER NAME TO THAT? ACTIVATION TASK?

A YEAH, OR VIGILANCE TASK.

Q IS THERE ANOTHER NAME FOR--

A OR CPT.

Q CPT MEANING...

A YES, THESE ARE ALL SYNONYMOUS. THE CPT IS A SPECIFIC TYPE OF ACTIVATION OR VIGILANCE TASK.

Q ALL RIGHT. CONTINUANCE PERFORMANCE TEST.

A AND SO THIS CPT OR CONTINUANCE PERFORMANCE TEST HAS BEEN SHOWN SCIENTIFICALLY TO HAVE LOWER VARIABILITY THAN RESTING STATE WHICH ARE TYPICALLY USED AT MANY OF THE CENTERS.

Q OKAY. DOES THAT MEAN IT'S MORE -- IT MAKES THE PET SCANS MORE ACCURATE?

A YES.

Q AND RELIABLE?

A YES. SO USING THE CPT TASK RESULTS IN HIGHER ACCURACY, GREATER RELIABILITY, AND SO THIS IS SOMETHING THAT I RECOMMEND BE DONE FOR NEUROPSYCHIATRIC PET SCANS.

Q NOW, DO YOU KNOW IF THAT WAS DONE IN MR. STANKO'S CASE?

A THAT WAS DONE IN MR. STANKO'S CASE.

Q OKAY. CONTINUE ON.

A AND THERE ARE NUMEROUS SCIENTIFIC PUBLICATIONS WHICH HAVE DEMONSTRATED THAT THIS TYPE OF PROCEDURE HAS IMPROVED RELIABILITY OVER WHAT IS COMMONLY USED AT MOST CENTERS, WHICH IS A REST TASK.

AND AGAIN, NUMEROUS PUBLICATIONS WHICH HAVE DEMONSTRATED THAT THIS TASK IS MORE SENSITIVE AT DETECTING NEUROPSYCHIATRIC ABNORMALITIES THAN -- THAN THE MORE

COMMONLY USED REST TASK.

Q ALL RIGHT. REPEAT THAT FOR ME BECAUSE I WANT TO HEAR THAT AGAIN. IT IS MORE SENSITIVE THAN WHAT?

A WHAT -- THE CPT TASK DURING THE UPTAKE RESULTS IN THE ABILITY FOR A WELL-TRAINED AND EXPERIENCED PHYSICIAN WHO IS KNOWLEDGEABLE WITH LOOKING AT PET SCANS WITH THE CPT TASK, USING THIS TYPE OF TASK A PHYSICIAN WITH THE PROPER TRAINING AND EXPERIENCE CAN MORE RELIABLY AND EASILY DETECT ABNORMALITY ASSOCIATED WITH SAY, FOR EXAMPLE, TRAUMATIC BRAIN INJURY OR SCHIZOPHRENIA THAN THEY CAN WHEN THEY USING REST TASK.

Q AND THAT WOULD BE APPLICABLE TO A BRAIN DEFECT; WOULD IT NOT?

A YES, THE BRAIN DEFECT WHETHER IT'S DEVELOPMENTAL, WHETHER IT'S BRAIN INJURY, WHETHER IT'S -- WHATEVER THE CAUSE, YEAH. THAT -- AND IN SOME SENSE THIS IS SOMEWHAT ANALOGOUS TO A TREADMILL STRESS TEST.

IF YOU HAVE A SUSPECTED CARDIAC PROBLEM, YOU CAN GET A RESTING EKG, BUT IT'S NOT GOING TO BE AS SENSITIVE AT DETECTING WHETHER OR NOT YOU REALLY HAVE A CARDIAC PROBLEM THAN IF YOU DID A TREADMILL STRESS TEST. TREADMILL STRESS TEST IS GOING TO BE MORE ACCURATE. SO IN SOME SENSE THIS IS KIND OF ANALOGOUS TO THAT.

Q ALL RIGHT. CONTINUE ON. YOU HAVE...

A WELL, AFTER THE SUBJECT HAS HAD THE RADIOACTIVE SUGAR

MOLECULE CREATED BY THE CYCLOTRON ADMINISTERED TO THE PATIENT THROUGH THE SMALL PLASTIC TUBE DURING THIS CPT TASK, IT TAKES ABOUT 30 MINUTES. AFTER THAT, THE SUBJECT IS THEN TRANSFERRED TO THE SCANNER.

NOW, THIS IS KIND OF LIKE WHAT HAPPENS WHEN YOU TAKE A PICTURE. ONCE A NEGATIVE IS EXPOSED, THEN YOU TAKE THE EXPOSED NEGATIVE TO THE, YOU KNOW, RITE AID OR WHATEVER DRUG STORE YOU WANT TO TAKE IT TO TO DEVELOP THAT -- THE NEGATIVE.

BUT ONCE IT'S EXPOSED AND THEN THE SHUTTER CLOSES, THEN NOTHING YOU DO AFTER THAT IS GOING TO EFFECT THE DISTRIBUTION OF THE EXPOSURE. AND SO THE SAME THING IS TRUE IN THIS CASE.

ONCE THAT CPT TASK IS DONE, IT'S AS IF THE SHUTTER HAS CLOSED, AND THEN IT'S -- IT'S JUST LIKE AT THE ONSET HAPPENS -- AFTER ITS GOING TO CHANGE THE RELATIVE DISTRIBUTION.

Q ALL RIGHT. THE CONTINUANCE PERFORMANCE TEST IS DONE DURING THE INJECTION THAT WE SAW JUST A FEW MINUTES AGO?

A YES.

Q AND THE PURPOSE FOR DOING IT AT THAT TIME IS WHAT?

A WELL, BECAUSE IT TAKES ABOUT 30 MINUTES RIGHT AFTER THE INJECTION FOR THE SUGAR MOLECULE TO SETTLE INTO THE BRAIN, AND 15 OR 30 MINUTES.

AND SO IN -- DURING THAT TIME PERIOD, YOU KNOW, ONE

WANTS TO TRY TO GET -- TO USE HIS TASK IN ORDER TO GET -- REDUCE THE NOISE AND TO ENHANCE RELIABILITY.

Q ALL RIGHT. AND THAT IS WHAT OUR DOCTOR WAS DOING WITH MR. STANKO DURING THAT INJECTION PERIOD?

A YES, THAT'S CORRECT.

Q DURING THE CONTINUANCE PERFORMANCE TEST?

A YES, THAT'S CORRECT.

Q AND THEN YOU SAY THAT TAKES HOW MANY MINUTES? HOW LONG?

A I WOULD SAY 15 TO 30 MINUTES FOR THIS TO OCCUR.

Q OKAY. THEN BY THAT TIME WHILE HE'S DOING THE TEST, WHAT IS SUPPOSED TO BE HAPPENING IN THE BRAIN?

A WELL, DURING THAT TIME AREAS OF THE BRAIN THAT ARE MORE ACTIVE WILL ACCUMULATE MORE OF THIS RADIOACTIVE SUGAR MOLECULE AND AREAS OF THE BRAIN WHICH ARE DEFECTIVE OR WHAT -- ACCUMULATE LESS OF THIS RADIOACTIVE SUGAR MOLECULE THAN THE AVERAGE OR NORMAL BRAIN.

Q OKAY. SO THAT BECOMES RADIOACTIVE?

A YES. SO WHAT WE'RE LOOKING AT IS KIND OF LIKE A VARYING LEVELS OF A SUGAR METABOLISM IN THE BRAIN.

Q ALL RIGHT. NOW, SO WHEN DR. EINHORN SAID HE ADMINISTERED THE CPT, THE CONTINUANCE PERFORMANCE TEST, AND THEN LEFT--

A YES.

Q -- DID THE SCAN, IS THAT THE APPROPRIATE PROCEDURE?

A THAT WOULD BE FINE, YES.
Q ALL RIGHT. BECAUSE AT THAT -- BY THE TIME THE SCAN IS ACTUALLY DONE--
A YES.
Q -- WHEN THIS INDIVIDUAL IS GOING INTO THE MACHINE--
A YES.
Q -- HE'S ALL -- THAT PERSON ALREADY HAS THE RADIOACTIVE MATERIAL--
A YES.
Q -- CIRCULATING INTO THE BODY AND IN THE BRAIN?
A YES.
Q AND IT'S DONE THOSE THINGS THAT YOU WANTED IT TO DO SO THE PICTURE CAN BE TAKEN?
A YES. SO BASICALLY WHAT WE'RE DOING IS WE'RE DEVELOPING THE EXPOSED NEGATIVE. AND SO ONCE THE CPT TASK IS DONE, IT'S AS IF THE SHUTTER ON A CAMERA HAS CLOSED AND THE RADIOACTIVE SUGAR IS FINALIZED IN ITS POSITION. AND AFTER THAT WE'RE BASICALLY DEVELOPING THE EXPOSED NEGATIVE TO SEE THE PATTERN OF THE DISTRIBUTION DURING THE TIME THE CPT TASK HAD OCCURRED.
Q NOW, IS THE RELIABILITY AFFECTED BY SOMEONE'S IQ?
A NO. THE RELIABILITY IS THE SAME WHETHER THE PERSON HAS HIGH IQ OR LOW IQ.
Q OKAY. SO THE FACT THAT MR. STANKO WAS SMART WOULDN'T INDICATE HE WOULD BE ABLE TO MANIPULATE WHERE THAT

RADIOACTIVE MATERIAL WAS GOING OR HOW THE PET SCAN PICKED IT UP?

A NO, NO. THAT WOULD NOT EFFECT THE PATTERN OF ACTIVITY.

Q OKAY. NOW, DURING THE CPT, CONTINUANCE PERFORMANCE TEST, WHAT IF SOMEBODY WANTED TO TRY TO TRICK THE MACHINE OR THE PROCESS?

A WELL, THERE IS NO WAY THAT I KNOW OF THAT A PERSON COULD SELECTIVELY CAUSE A DECREASE OF SUGAR ACTIVITY IN THE FRONTAL LOBE AREA OF THE BRAIN.

Q AND WHY DO YOU SAY THAT?

A WELL, IT'S -- IF YOU WERE TRYING TO DO THIS, IT'S ALMOST LIKE THE CONSCIOUS EFFORT WHERE YOU WOULD HAVE TO PLAN AND THINK ABOUT THIS WOULD ACTUALLY RESULT IN YOUR HAVING TO USE THE FRONTAL LOBE AND WOULD PROBABLY RESULT IN YOUR ACTUALLY INCREASING THE SUGAR METABOLISM IN THE FRONTAL--

Q ALL RIGHT. SO IF SOMEONE TRIED TO THROW THE TEST, IT WOULD ONLY MAKE THE TEST MORE ACCURATE?

A IT WOULD -- IT WOULD RESULT IN A FRONTAL LOBE BEING MORE ACTIVE.

Q OR MORE NORMAL?

A MORE ACTIVE. AND IF THEY HAD AN ABNORMALLY LOW FRONTAL LOBE, IT WOULD TEND TO MASK AN ABNORMALLY LOW FRONTAL LOBE IF YOU WERE TO RAISE THE FRONTAL LOBE

ACTIVITY IN SOMEONE WHOSE FRONTAL LOBE WAS ABNORMALLY LOW.

Q ALL RIGHT. WHAT DO WE HAVE NEXT THERE, DR. WU, BEFORE WE GET INTO MR. STANKO?

A WELL, LET'S SEE. WELL, THIS BASICALLY SHOWS WHAT HAPPENS HERE IS THAT THE E-PLUS POSITRON, E-MINUS ELECTRON, TO CREATE THESE TWO ENERGY RAYS.

Q OKAY.

A AND THEN HERE WE HAVE A SERIES OF CRYSTAL DETECTORS IN THE SCANNER--

Q I SEE. SO THIS WOULD BE THE MACHINE--

A YES.

Q -- THAT WE JUST SAW THE PERSON BEING MOVED INTO?

A YES. THAT'S CORRECT. AND SO WHAT WE HAVE IS THAT THE ENERGY RATE CREATED BY THE ANTIMATTER MATTER ENERGY TRANSFORMATION PROCESS ARE DETECTED BY THESE CRYSTAL DETECTORS THAT ARE SPECIFICALLY TUNED TO DETECT THESE -- THIS TYPE OF ENERGY RAYS.

Q ARE THOSE -- WHERE ARE THOSE DETECTORS LOCATED?

A THE DETECTORS ARE THESE CRYSTALS THAT ARE ALL AROUND HERE, SO THERE ARE THOUSANDS OF CRYSTAL DETECTORS AND THEY ARE ALL HERE SO THAT WHENEVER YOU HAVE A SIMULTANEOUS REGISTRATION OF ENERGY RAYS ONTO -- ON A PAIR OF CRYSTAL DETECTORS, YOU HAVE BUILT-IN COINCIDENCE CIRCUITS THAT WILL AUTOMATICALLY DETECT WHEN YOU HAVE A SIMULTANEOUS REGISTRATION OF ENERGY RAYS ON THE CRYSTAL DETECTORS.

AND THEN THE COMPUTER ESSENTIALLY KEEPS TRACK OF ALL OF THE MILLIONS OF SUCH COINCIDENCES. AND VERY SIMPLISTICALLY, MATHEMATICAL TERMS, IT LOOKS AT THE INTERSECTION OF ALL THESE LINES AND AREAS OF THE BRAIN THAT HAVE HIGH SUGAR METABOLISM ARE GOING TO HAVE LOTS OF ENERGY RAYS COMING FROM THAT PARTICULAR AREA, AND SO THERE'S GOING TO BE LOTS OF INTERSECTIVE LINES OF ENERGY RAYS THAT THE COMPUTER WILL KEEP TRACK OF.

AND AREAS OF THE BRAIN THAT ARE LESS ACTIVE WILL HAVE LESS ENERGY RAYS COMING FROM THOSE AREAS, SO THERE WILL BE FEWER INTERSECTIONS MATHEMATICALLY.

Q OKAY. MOVE TO YOUR NEXT...

A OKAY. SO--

Q TELL ME ABOUT THAT. WHY SHOULD WE BE -- WHY SHOULD WE BELIEVE THAT WE CAN RELY ON WHAT THE PET SCANS TELL US?

A WELL, PET SCANS HAVE BEEN AROUND FOR OVER 20 YEARS. THEY HAVE BEEN USED AS A PRIMARY MEANS OF LOOKING AT BRAIN FUNCTION OR METABOLISM IN LITERALLY THOUSANDS OF ARTICLES. THEY ARE GENERALLY ACCEPTED BY PSYCHIC (SIC) COMMUNITY AS BEING HIGHLY RELIABLE FOR DETECTING BRAIN FUNCTION OR BRAIN ACTIVITY. AND THEY HAVE BEEN USED IN A WIDE VARIETY OF CLINICAL PURPOSES.

Q WHEN WE LOOK AT THE INFORMATION PICKED UP, WHAT -- WHAT HAPPENS AT THAT POINT AFTER THE PROCESS THAT YOU'VE EXPLAINED OF THE ENERGY GOING THROUGH THE BRAIN?

A WELL--
Q WHAT IS DONE WITH THE INFORMATION THAT'S GATHERED AT THAT POINT?
A WELL, WHAT'S DONE IS THAT WE CAN LOOK AT PICTURES LIKE THIS. THESE PICTURES DEPICT THE RELATIVE LEVEL OF SUGAR ACTIVITY IN DIFFERENT KINDS OF DISEASES OR DISORDERS OF THE BRAIN AND THE MIND.
Q ALL RIGHT. SHOW US -- TELL US EXACTLY WHAT WE'RE LOOKING AT HERE.
A WELL--
Q AND EXPLAIN TO US WHAT'S GOING ON, HOW THE PET SCAN DID THIS, HOW YOU USE IT IN MAKING SOME KIND OF MEDICAL JUDGMENT OR DETERMINATION ABOUT THIS PATIENT.
A WELL, FOR EXAMPLE, IN THIS EXAMPLE WE ARE LOOKING AT SOMEONE WHO HAS A COMPLAINT OF MEMORY PROBLEMS, AN ELDERLY INDIVIDUAL AND SUBJECT IS...

(WHEREUPON THERE WAS A PAUSE).

THE COURT: WE DON'T KNOW WHAT'S CAUSING IT. WE APOLOGIZE. HOPE IT DOESN'T DISTURB YOU TOO MUCH. YOU MAY CONTINUE.

A WHAT WE'RE LOOKING AT HERE FOR EXAMPLE IS AN ELDERLY INDIVIDUAL WHO HAS SOME MEMORY PROBLEMS, AND THE QUESTION IS, IS THIS PERSON SUFFERING FROM ALZHEIMERS DISEASE. OR WE CAN LOOK AT THE PATTERN OF SUGAR METABOLISM IN THIS PERSON COMPARED TO AN AGE-MATCH NORMAL CONTROL.

AND WHAT WE SEE HERE IS THAT THERE'S LESS RED IN THIS AREA HERE IN THE ALZHEIMERS PERSON THAN IN THE AGE-MATCH NORMAL CONTROL.

Q ALL RIGHT. WHAT -- WHY IS THAT? HOW COULD THAT HAPPEN?

A WELL, RED MEANS THAT THERE'S MORE HIGH LEVELS OF SUGAR ACTIVITY BEING BURNED IN THESE AREAS OF THE BRAIN RIGHT HERE, AND THAT'S NORMAL. AND WHEN YOU HAVE ALZHEIMERS DISEASE, WHAT HAPPENS IS THAT THE SUGAR METABOLATE IN THESE AREAS OF THE BRAIN START TO DROP.

AND SO ACTUALLY MEDICARE NOW IS PAYING FOR SOME FORMS OF PET SCANS FOR SOME TYPE OF ALZHEIMERS DISEASE TO HELP DOCTORS DETERMINE WHETHER OR NOT A PERSON HAS ALZHEIMERS DISEASE OR SOME OTHER FORM OF DEMENTIA LIKE FRONTAL TEMPORAL DEMENTIA.

Q NOW, WOULD IT BE FAIR TO SAY THAT THOSE COLOR DIFFERENCES, THOSE VARIATIONS -- LET'S GO BACK TO THAT PREVIOUS SLIDE. NOW, THIS NORMAL CONTROL, DESCRIBE FOR US WHAT A NORMAL CONTROL IS.

A WELL, A NORMAL CONTROL IS AN INDIVIDUAL WHO DOES NOT HAVE ANY KIND OF NEUROLOGICAL OR PSYCHIATRIC DISEASE.

Q OKAY. AND HOW DO YOU MAKE A DETERMINATION OF WHO GETS INTO THAT CONTROL AND HOW MANY PEOPLE ARE EXAMINED AND GO -- PUT INTO THAT DATABASE?

A WELL, WE HAVE A -- WHAT WE USE IS A STRUCTURED

CLINICAL INTERVIEW FOR DIAGNOSIS. IT'S A -- A STANDARDIZED SCREENING INSTRUMENT WHICH IS CALLED A SKID FOR SHORT, STRUCTURED CLINICAL INTERVIEW FOR DIAGNOSIS, AND THIS IS AN ACCEPTED METHOD FOR SYSTEMATICALLY TRYING TO DIAGNOSIS PATIENTS. IT'S AN EXTENSIVE INTERVIEW.

Q ALL RIGHT. NOW, HAS THIS BEEN RESEARCHED AND SUBJECTED TO PUBLICATION AND PEER REVIEWED?

A YES. THE SKID HAS BEEN SUBJECTED TO PEER REVIEW. PET SCANS OF NORMAL CONTROLS--

Q NOW--

A -- THAT HAVE BEEN EVALUATED BY SKID HAVE BEEN SUBJECTED TO PEER REVIEW.

Q OKAY. SO IN THE NORMAL CONTROL, WE SEE WHAT -- WOULD THAT BE NORMAL FUNCTION? WOULD IT BE ACCURATE TO SAY WE SEE NORMAL BRAIN FUNCTION?

A YES. WHAT WE'RE SEEING ON THE RIGHT HAND SIDE IS A TYPICAL AGE-MATCH NORMAL CONTROL SUBJECT COMPARED TO A -- AN INDIVIDUAL THE SAME AGE WHO IS STARTING TO DEVELOP ALZHEIMERS DISEASE.

Q ALL RIGHT. AND IN THE ALZHEIMERS DISEASE PATIENT WE HAVE, WHAT, REDUCED ACTIVITY?

A YES. WHEN WE SEE AN AREA THAT'S LABELED 5A, IT'S LESS RED. THAT MEANS LESS SUGAR METABOLISM BEING BURNED IN THAT AREA. GREEN IS LESS ACTIVITY THAN RED. AND THIS IS A CHARACTERISTIC PATTERN THAT IS CONSISTENT WITH

ALZHEIMERS DISEASE.

Q ALL RIGHT. SO WE KNOW THAT THIS PATTERN WILL EFFECT BEHAVIOR?

A YES.

Q AND THE BEHAVIOR WILL MANIFEST ITSELF INTO THOSE SYMPTOMS THAT WE ASSOCIATE WITH ALZHEIMERS?

A YEAH, THAT'S CORRECT. AND THIS PATTERN OF ABNORMAL SUGAR METABOLISM IS ASSOCIATED WITH A PATTERN OF ABNORMAL BEHAVIOR BECAUSE IT REFLECTS BRAIN FUNCTION THAT IS NOT WORKING PROPERLY.

Q AND IT WOULD BE ABSURD TO SUGGEST THIS PERSON WAS FAKING THIS--

MR. HUMPHRIES: I'M GOING TO OBJECT AT THIS POINT REGARDING THE LEADING.

THE COURT: SUSTAINED. LEADING.

MR. HUMPHRIES: THANK YOU.

THE COURT: YOU MAY REPHRASE.

BY MR. DIGGS:

Q WOULD IT BE ANY WAY FOR THE PATIENT ON THE LEFT TO MANIPULATE AND PRODUCE THAT BRAIN SCAN?

A THERE IS NO WAY -- WAY THAT I CAN THINK OF THAT A PATIENT CAN COLLECTIVELY REDUCE SUGAR METABOLATE IN THESE AREAS TO TRY TO MAKE HIS PET SCAN LOOK LIKE AN ALZHEIMERS DISEASE PET SCAN IF HE REALLY DOESN'T HAVE ALZHEIMERS DISEASE.

Q NOW, WHEN A PET SCAN IS TAKEN, GO AHEAD -- LET'S GO TO YOUR NEXT SLIDE. GO AHEAD AND EXPLAIN TO US WHAT WE'RE LOOKING AT THERE.

A WELL, WHAT WE'RE LOOKING AT HERE IS A THREE-DIMENSIONAL RECONSTRUCTION OF AN ALZHEIMERS DISEASE PATIENT'S PET SCANS COMPARED TO A THREE-DIMENSIONAL RECONSTRUCTION OF A NORMAL CONTROL.

AND SO WHAT WE HAVE DONE IS THAT WE HAVE TAKEN ALL OF THE TWO-DIMENSIONAL SLICES THAT ARE PRESENT AND WE DIGITALLY STACKED THEM ONE ON TOP OF THE OTHER SO THAT WE CAN SEE THE RELATIVE RELATIONSHIP OF THE INDIVIDUAL SLICES AS THEY WOULD APPEAR IN THE BRAIN.

AND SO IT IS EASIER TO SEE HOW THE DIFFERENT SLICES RELATE WHEN THEY'RE STACKED ON TOP OF EACH OTHER IN A THREE-DIMENSIONAL RECONSTRUCTION.

Q ALL RIGHT. LET ME ASK YOU ABOUT THIS COLOR SCALE. HOW -- WHO DETERMINES HOW MUCH ACTIVITY GETS ASSIGNED A PARTICULAR COLOR?

A WELL, THE AMOUNT OF ACTIVITY IS DETERMINED BY THE BRAIN AND AMOUNT OF SUGAR THAT'S BEEN CONSUMED. AND WHAT HAPPENS IS THAT DIFFERENT PATTERNS OF DISEASE HAVE DIFFERENT NUMERICAL VALUES OF SUGAR.

(PAUSE -- FEEDBACK NOISE IN THE COURTROOM.)

THE WITNESS: I'M WONDERING IF THE MIKE I'M USING POSSIBLY...

THE COURT: I THINK THEY ARE, BUT WE CAN'T TURN IT OFF. THE JURY WOULDN'T BE ABLE TO HEAR YOU.

THE WITNESS: OKAY.

THE COURT: WE'LL JUST HAVE TO RIDE IT OUT. IT WILL BE OKAY. YOU MAY CONTINUE.

BY MR. DIGGS:

Q ALL RIGHT. WE WERE TALKING ABOUT THE ACTIVITY IN THE BRAIN BEING ASSIGNED A PARTICULAR NUMERICAL VALUE.

A YES. THE DIFFERENT DISEASES ARE GOING TO BE ASSOCIATED WITH DIFFERENT QUANTITY OF SUGAR BEING CONSUMED NUMERICALLY IN DIFFERENT PORTIONS OF THE BRAIN. SO AN ALZHEIMERS DISEASED PATIENT'S BRAIN THERE IS NUMERICAL DECREASE IN THE AMOUNT OF SUGAR THAT'S CONSUMED IN THIS AREA, AND THIS NUMERICAL DECREASE IS REFLECTED IN THE COLOR PATTERN THAT IS IN THE BOTTOM OF THIS PICTURE.

Q OKAY. NOW, ARE THOSE -- DOES A HUMAN ASSOCIATE THAT OR MAKE THAT ASSIGNMENT OR IS THAT DONE BY COMPUTER?

A WELL, THIS -- THIS COLOR TABLE AUTOMATICALLY ASSIGNS DIFFERENT COLORS TO DIFFERENT NUMBERS.

Q OKAY.

A AND NOW, THERE ARE DIFFERENT TYPES OF COLOR SCALES THAT ONE CAN CHOOSE, BUT ONCE ONE CHOOSES A COLOR SCALE, FOR EXAMPLE, RAINBOW COLOR SCALE, THEN THE COMPUTER WILL SAY, OKAY, IF YOU'RE CHOOSING A RAINBOW COLOR SCALE, THE COMPUTER WILL AUTOMATICALLY ASSIGN HIGH NUMERICAL SUGAR

CONCENTRATION TO THE HOT COLORS, RED, AND LOW NUMERICAL SUGAR CONSUMPTION TO COLD COLORS LIKE BLUE.

Q ALL RIGHT. HAVE YOU EVER SEEN ANY OF THE DATA THAT'S RETURNED FROM NASA'S, LIKE, MARS ROVER OR ANYTHING LIKE THAT?

A YES.

Q JUST A BUNCH OF NUMBERS?

A YES, IT'S A SERIES OF ZEROS AND ONES.

Q IS THAT SIMILAR TO WHAT WE HAVE HERE?

A WELL, YES. ON A DIGITAL LEVEL ESSENTIALLY, IMAGING, WHETHER IT'S PET IMAGING, MRI IMAGING, THEY ARE ESSENTIALLY A SERIES OF ZEROS AND ONES.

Q OKAY. SO GO AHEAD WITH YOUR PRESENTATION, DR. WU.

A SO WHAT WE DO IS THAT WE TAKE THOSE ZEROS AND ONES AND WE BASICALLY FIGURE OUT, WELL, HOW MANY ZEROS AND ONES MAKE UP HOW MUCH SUGAR, AND THEN HOW MUCH SUGAR WILL THEN DETERMINE WHAT COLOR WAS -- THE COMPUTER WILL ASSIGN.

SO IF THERE'S A LOW AMOUNT OF SUGAR, THE COMPUTER WILL ASSIGN A COLD COLOR. IF THERE'S A HIGH AMOUNT OF SUGAR, THE COMPUTER WILL ASSIGN A HOT COLOR IN THIS CASE. AND SO THIS IS A THREE-DIMENSIONAL DEPICTION OF THE SAME DATA THAT WAS IN THE TWO-DIMENSIONAL SLICES.

AND WHAT WE SEE HERE IS THAT ALZHEIMERS DISEASE PATIENTS SHOW A DECREASE IN THIS AREA OF THE BRAIN RIGHT HERE COMPARED TO THAT OF AGE-MATCHED NORMALS.

Q WHAT DO WE HAVE NEXT?
A WELL, SO NOW WHAT WE HAVE HERE IS SOME OF THE OTHER USES OF PET SCANNING TO SHOW THAT PET SCANNING IS VERY RELIABLE AS A MEDICAL IMAGING TOOL, AND IT'S USED, FOR EXAMPLE, BY CANCER SPECIALISTS TO DETERMINE WHETHER OR NOT THEY SHOULD RE-ADMINISTER RADIATION THERAPY.

AND SO THE FACT THAT PET SCANS ARE USED TO HELP CANCER SPECIALISTS MAKE THESE KINDS OF LIFE OR DEATH MEDICAL DECISIONS, SHOULD YOU GIVE A CANCER PATIENT MORE RADIATION TREATMENT OR NOT, IS AN INDICATION THAT THE MEDICAL COMMUNITY CONSIDERS PET SCANNING TO BE HARD SCIENCE, SOMETHING THAT IS VERY RELIABLE.

Q I WAS JUST GOING TO ASK YOU IN THE TREATMENT OF PATIENTS, OF COURSE, IT WOULD BE ROUTINE, WOULD IT NOT, FOR A PHYSICIAN TREATING A CANCER PATIENT TO MAKE DECISIONS ABOUT THAT PERSON'S TREATMENT ON THE RESULTS OF A PET SCAN?
A YES. IT IS A ROUTINE FOR A CANCER SPECIALIST TO MAKE DECISIONS, LIFE OR DEATH MEDICAL DECISIONS, BECAUSE THEY VIEW THE INFORMATION COMING FROM A PET SCAN AS MEDICALLY AND SCIENTIFICALLY RELIABLE.
Q HOW LONG HAS THAT BEEN THE CASE HERE IN THE UNITED STATES?
A WELL, THE FACT THAT WE HAD OVER 20 YEARS WORTH OF SCIENTIFIC PUBLICATIONS, LITERALLY THOUSANDS OF SCIENTIFIC

AND MEDICAL PUBLICATIONS, INDICATE THAT THE SCIENTIFIC AND MEDICAL COMMUNITY CONSIDER PET SCANNING TO BE RELIABLE IN TERMS OF ITS ABILITY TO MEASURE BRAIN FUNCTION OR BRAIN ACTIVITY.

Q ALL RIGHT. AND SO ARE THE -- LET ME -- LET ME BACK UP AND ASK YOU THIS. WHAT ARE WE LOOKING AT WITH THIS PARTICULAR SIGN?

A THIS IS JUST LIKE -- THAT PET SCAN CAN BE USED LIKE IN OTHER CONDITIONS SUCH AS PARKINSON'S DISEASE.

Q GO AHEAD.

A IT CAN BE USED -- OKAY -- EPILEPSY.

Q ALL RIGHT. SHOW US WHAT WE HAVE HERE. WHAT'S HAPPENING ON THE -- THIS PARTICULAR SLIDE?

A WELL, IN EPILEPTIC PATIENTS YOU CAN HAVE TOO MUCH ACTIVITY. SO IN THE MIDDLE OF A SEIZURE YOU CAN HAVE AN ABNORMAL LEVEL OF ACTIVITY. AND SO WHAT -- AND SO THIS IS JUST TO ILLUSTRATE THAT HE HAS A NORMAL RATE OF ACTIVITY AND TOO MUCH OR TOO LITTLE CAN BE AN INDICATION OF A CLINICAL ABNORMALITY.

Q AND THIS -- THIS EXCESSIVE ACTIVITY--

A YES.

Q -- YOU CAN ASSOCIATE WITH BEHAVIOR--

A YES.

Q -- IN THE FORM OF A SEIZURE?

A YES. AND FOR EXAMPLE, SOME FORMS OF SEIZURES RESULT

IN DISTURBANCES IN THINKING, DISTURBANCES IN ACTIONS. AND SO PEOPLE CAN SOMETIMES HAVE FUNNY THOUGHTS, THEY CAN BEHAVE IN FUNNY WAYS WHEN THEY ARE HAVING THIS SEIZURE BECAUSE THE BRAIN IS DRIVING THOSE KIND OF THOUGHTS AND BEHAVIORS.

Q OKAY. WHAT DO WE HAVE NEXT ON THE PRESENTATION?

A OKAY. AND THEN THESE ARE JUST SOME EXAMPLES--

Q ALL RIGHT. LET'S LOOK AT -- LET'S LOOK AT THAT FOR A SECOND. EXPLAIN TO ME WHAT IS HAPPENING.

A WELL, WHAT WE HAVE HERE IS EXAMPLE OF SOMEONE WHO -- WITH WHAT WE CALL A CLOSED-HEAD INJURY. THIS IS SOMEONE, FOR EXAMPLE, WHO HAS BEEN IN A MOTOR VEHICLE ACCIDENT AND MAYBE THEIR HEAD STRUCK THE DASHBOARD AND THEY MIGHT HAVE A PERFECTLY NORMAL CAT SCAN BECAUSE THIS STRUCTURE OF THE BRAIN IS INTACT, BUT THE FUNCTIONING OF THE BRAIN IS ABNORMAL, AND SO IN THIS CASE WE HAVE AN ABNORMALLY LOW FUNCTIONING--

Q YES. SHOW US SPECIFICALLY WHERE YOU'RE SAYING WE HAVE ABNORMAL FUNCTIONS.

A WELL, IT WOULD BE IN THIS AREA RIGHT HERE, RIGHT WHERE WE SEE THIS BLUE AREA RIGHT THERE AND RIGHT THERE.

Q SO WE'RE SIMPLY COMPARING THAT BLUE AREA WITH THE RED--

A IN THE NORMAL CONTROL.

Q -- IN THE NORMAL CONTROL?

A YES, UH-HUH.
Q NOW, LET'S EXPLAIN WHAT WE HAVE HERE, THE SCHIZOPHRENIA.
A WELL, THIS IS JUST AN ILLUSTRATION THAT IN SCHIZOPHRENIC PATIENTS OR CERTAIN PSYCHIATRIC DISORDERS WE CAN SEE AN ABNORMAL DECREASE IN FRONTAL LOBE ACTIVITY, MORE GREEN HERE COMPARED TO THE RED HERE IN NORMAL CONTROLS. THIS IS ALSO A THREE-DIMENSIONAL VIEW.
Q ALL RIGHT. LET ME ASK YOU, HOW ARE -- THERE ARE DIFFERENT METHODS FOR INTERPRETING THIS OR VIEWING THIS DATA; IS THAT CORRECT?
A YES.
Q QUALITATIVE AND QUANTITATIVE?
A YES.
Q TELL US WHAT THEY ARE AND HOW THEY DIFFER.
A WELL, I WOULD SAY THAT QUALITATIVE IS WHEN YOU TAKE SOMEONE WHO IS EXPERIENCED IN -- WITH THE DISEASE AND WITH THE SPECIFIC TECHNIQUE, AND THEY USE THEIR EXPERIENCE IN -- WITH THAT SPECIFIC TECHNIQUE AND DISEASE TO SAY, WELL, THIS SCAN LOOKS ABNORMAL BASED ON MY CLINICAL EXPERIENCE.

AND QUANTITATIVE IS A WAY OF TRYING TO USE STATISTICAL MEASUREMENTS TO TRY AND DETERMINE WHETHER OR NOT THERE ARE ABNORMALITIES.
Q SO WHEN WE LOOK AT THIS PARTICULAR -- OR SLIDE, ARE

WE LOOKING AT QUALITATIVE, QUANTITATIVE, A COMBINATION OF BOTH, OR WHAT?

A WELL, THE INFORMATION IS QUANTITATIVE, BUT WE HAVEN'T USED STATISTICS TO MAKE THE DETERMINATION OF -- WHAT I HAVE DONE IS I HAVE USED MY CLINICAL EXPERIENCE WITH LOOKING AT LOT OF THIS KIND OF CPT PET SCAN IN NEUROPSYCHIATRIC DISORDERS AND TO DETERMINE WHETHER OR NOT THERE'S AN ABNORMALITY.

Q ALL RIGHT. LET'S GO TO THIS CASE. WHAT WERE YOU ASKED TO DO IN MR. STANKO'S CASE?

A WELL, IN MR. STANKO'S CASE I WAS ASKED TO REVIEW THE PET SCAN THAT WAS DONE AT MUSC WITH DR. EINHORN PRESENT WHO ADMINISTERED THE CPT TEST DURING THE UPTAKE.

Q ALL RIGHT. AND WHAT HAPPEN -- DID YOU -- HOW DID YOU GO ABOUT DOING THAT?

A WELL, MUSC SENT ME A CD WITH THE INFORMATION IN WHAT WE CALL DICOM FORMAT. DICOM FORMAT IS A -- A FILE FORMATTING SYSTEM THAT IS INDEPENDENT OF WHAT WE CALL PROPRIETARY SYSTEM THAT MOST MEDICAL IMAGING DEVICES HAVE.

MOST MEDICAL IMAGING DEVICES MADE, FOR EXAMPLE, BY A PARTICULAR COMPANY. BEFORE DICOM YOU COULDN'T READ, SAY, A PET SCAN FIRED ON A GE MACHINE ON A C MACHINE OR CTI MACHINE.

AND SO PEOPLE CAME UP WITH DICOM AS A WAY FOR A DOCTOR AT ONE CENTER TO BE ABLE TO READ THE DATA FROM A

SPECIFIC BRAND THAT WASN'T THE ONE THAT HIS CENTER USED. AND SO DICOM IS A COMMON INTERCHANGEABLE FILE FORMATTING SYSTEM THAT IS USED BETWEEN DIFFERENT CENTERS. AND SO I RECEIVED THE INFORMATION IN A DICOM FORMATTED FILE.

Q AND DID YOU REVIEW THAT INFORMATION?

A YES, I DID.

Q AND DO YOU -- DID YOU FORM AN OPINION IN THIS CASE WITH USE OF THE PET SCAN DATA?

A YES, I DID.

Q ABOUT THE FUNCTION OF MR. STANKO'S BRAIN?

A YES, I DID.

Q AND WHAT IS THAT OPINION?

A WELL, MY OPINION IS THAT MR. STANKO HAS AN ABNORMAL BRAIN PET SCAN AND THAT HIS ABNORMALITY RESIDES IN AN AREA WHICH WE REFER TO AS THE VENTRAL FRONTAL LOBE AREA. THAT IS, THIS IS AN AREA NEAR THE BASE OF THE FRONTAL LOBE, NEAR THE -- THE BOTTOM OF THE FRONTAL LOBE AREA, AND THAT THE RATIO OF ACTIVITY OF THIS LOW FRONTAL LOBE AREA COMPARED TO REFERENCE REGIONS IN THE BACK WAS ABNORMAL AND CONSISTENT WITH SOME TYPE OF FRONTAL LOBE ABNORMALITY.

Q ALL RIGHT. CAN WE LOOK AT IT?

A YES. NOW, I HAVE STILLS HERE FROM A THREE-DIMENSIONAL CD.

Q ALL RIGHT. LET'S LOOK AT THIS ONE JUST FOR A SECOND. TELL US WHAT WE'RE LOOKING AT HERE.

A WELL, THIS IS A STILL FROM THE 3D DEPICTION THAT WE HAVE. AND WHAT WE'RE SEEING HERE IS THREE-DIMENSIONAL RECONSTRUCTION OF MR. STANKO'S PET SCAN ON THE LEFT SIDE AND A NORMAL CONTROL ON THE RIGHT SIDE.

AND THE PRIMARY AREA OF ABNORMALITY IS THIS AREA RIGHT DOWN HERE, RIGHT NEAR THE BASE OF THE BRAIN. AND IF WE LOOK AT IT UP HERE, YOU CAN SEE IT'S PRESENT RIGHT HERE. AND THIS BLUE AREA OF THE BRAIN HERE COMPARED TO A NORMAL CONTROL AVERAGE SHOWS RED.

YOU CAN SEE HERE ON THE COLOR SCALE HERE THAT BLUE IS APPROXIMATELY 80 PERCENT LOWER, IT'S 70 TO 80 PERCENT LOWER THAN THE RED IN THIS AREA, SO...

Q HOW MUCH LOWER?

A I WOULD SAY SOMEWHERE BETWEEN 50 TO 80 PERCENT LOWER THAN--

Q FIFTY TO 80 PERCENT?

A YES, 50 TO 80 PERCENT LOWER THAN A NORMAL.

Q FIFTY TO 80 PERCENT LOWER?

A YES, THAT'S CORRECT.

Q ALL RIGHT. NOW, DR. WU, DO WE HAVE A VIDEO?

A YES, WE HAVE A VIDEO.

Q CAN YOU PUT ALL OF THESE SLICES TOGETHER AND RUN A MOVIE?

A YES, I CAN.

Q CAN WE DO THAT WITH MR. STANKO'S PET SCAN?

A YES. THIS MAY TAKE A MINUTE FOR THE VIDEO TO BOOT UP.

Q THANK YOU. AND HOW LONG IS THIS VIDEO, BY THE WAY?

A THE VIDEO IS ABOUT FOUR OR SLIGHTLY OVER FOUR MINUTES.

Q ALL RIGHT. AND THERE'S NO AUDIO?

A THERE'S NO AUDIO, THAT'S CORRECT.

Q CAN YOU MAKE THAT FULL SCREEN?

A YES.

Q OKAY. AND I WANT YOU TO TALK US THROUGH THIS, DR. WU. I MAY ASK YOU TO STOP IT FROM TIME TO TIME. BUT EXPLAIN TO US WHAT WE'RE LOOKING AT IN THIS--

A YES.

Q -- MOVIE.

A WHAT WE'RE LOOKING AT HERE IS MR. STANKO'S THREE-DIMENSIONAL PET SCAN ON THE LEFT SIDE AND A NORMAL CONTROL AVERAGE ON THE RIGHT SIDE. AND SO WHAT WE'RE SEEING HERE IS HIS BRAIN FROM DIFFERENT ANGLES OR VIEWS COMPARED TO THAT OF A NORMAL CONTROL.

Q COULD I ASK A QUESTION? THE HIGHER CORTICAL LEVELS WOULD BE HERE? AM I CORRECT THERE?

A WELL, LET'S SEE. WE HAVE THIS AREA OF THE BRAIN WHICH IS WHAT WE CALL THE VENTRAL FRONTAL LOBE AREA, AND THEN WE ALSO HAVE OTHER FRONTAL LOBE AREAS WHICH ARE -- APPEAR TO BE INTACT IN MR. STANKO, SO THE HIGHER FRONTAL

LOBE AREAS APPEAR TO BE INTACT.

Q ALL RIGHT. NOW, IS THAT HOW DR. EINHORN CAN DO TESTS AND GET NORMAL RESULTS?

A YES.

Q OKAY.

A THE TEST THAT DR. EINHORN DOES INVOLVE TESTS OF WHAT WE CALL THE HIGHER FRONTAL LOBE AREAS, THE -- THIS SIDE HERE. SO THESE INCLUDE TESTS SUCH AS WISCONSIN CARD SORT TEST, OR TRAILS A, TRAILS B. AND MR. STANKO'S PET SCAN SHOWS THAT THOSE AREAS OF HIS BRAIN ARE PERFECTLY NORMAL.

THE AREA OF ABNORMALITY IS -- AREA OF THE FRONTAL LOBE WHICH IS ANY AREA THAT IS NOT TESTED BY ANY OF DR. EINHORN'S TESTS.

Q ALL RIGHT. DID YOU STOP THAT? LET'S CONTINUE IT ON.

A YES. AS YOU CAN SEE FROM DIFFERENT ANGLES HERE THAT MOST OF MR. STANKO'S BRAIN APPEARS TO LOOK FAIRLY SIMILAR TO THE NORMAL. IT'S REALLY ONLY IN THIS PORTION HERE, THE BOTTOM OF THE FRONTAL LOBE AREA THAT -- WHERE WE HAVE THIS BLUE AREA THAT WE SEE THAT HE SHOWS AN ABNORMALITY.

AND -- AND SO IF WE LOOK AT IT FROM THE RIGHT SIDE YOU CAN SEE THAT THERE IS AN ABNORMAL DECREASE IN THE FRONTAL LOBE ACTIVITY THERE.

Q SO WE'RE LOOKING -- THIS LITTLE MAN DIRECTS US -- WHAT -- WE CAN USE HIM TO TELL US WHERE WE'RE LOOKING AT WITH RESPECT TO THE BRAIN?

A YES.
Q ORIENTATION--
A THIS LITTLE MAN HERE IS TO HELP ORIENT THE JURORS TO WHAT YOU WERE SEEING. SO FOR EXAMPLE, WHEN THIS LITTLE MAN IS FACING THIS WAY, WE KNOW THAT WE'RE LOOKING AT A LEFT PROFILE VIEW.
Q YES, SIR.
A AND ON THE LEFT PROFILE VIEW WE CAN SEE THAT BASE OF THE FRONTAL LOBE AREA HERE IS BLUISH COMPARED TO THE NORMAL CONTROL AVERAGE THERE.
Q OKAY. START IT UP AGAIN, IF YOU WOULD.
A YES. YOU CAN SEE HERE THAT IT'S GOING BY THAT CLOCK THERE.
Q YES, SIR.
A OKAY. NOW, HERE, WHAT WE'RE SEEING HERE IS BOTH THE LEFT AND THE RIGHT HEMISPHERE VIEWS SHOWN SIMULTANEOUSLY. AND SO YOU CAN SEE THAT THERE'S THIS DECREASE IN THE BASE OF THE RIGHT FRONTAL LOBE HERE AND A DECREASE IN THE LEFT FRONTAL LOBE AREA HERE.

NOW, THIS IS A FRONTAL VIEW, AND SO WE'RE LOOKING AT MR. STANKO'S PET SCAN FROM THE FRONT AS YOU CAN SEE IT FROM THE MODEL HERE.
Q YES.
A WE CAN SEE THAT THERE IS DECREASE ON BOTH SIDES OF MR. STANKO'S BRAIN.

Q WHAT HAPPENS IF WE TURN -- THERE WE GO. ALL RIGHT. CAN YOU STOP THAT?
A YES.
Q WHAT ARE WE LOOKING AT HERE?
A WELL, WHAT WE HAVE DONE HERE IS THAT WE HAVE TILTED MR. STANKO'S BRAIN BACK SO THAT YOU CAN SEE THE BASE OR THE BOTTOM...
Q GO AHEAD.
A -- OF HIS FRONTAL LOBE ACTIVITY. AND YOU CAN SEE HERE THAT THE BASE OF HIS FRONTAL LOBE SHOWS A SIGNIFICANT DECREASE COMPARED TO THAT OF THE NORMAL CONTROL AVERAGE.
Q THERE IS NO RED ON MR. STANKO AT ALL.
A THAT'S CORRECT. IN THE BASE OF HIS FRONTAL LOBE AREA HE SHOWS AN ABNORMALLY LOW FRONTAL LOBE LEVEL OF ACTIVITY.
Q HOW MUCH -- HOW MUCH LOWER?
A I WOULD SAY IT'S -- PROBABLY ABOUT 50 PERCENT LOWER, AT LEAST.
Q 50 PERCENT LOWER?
A YES, UH-HUH.
Q SO THE FRONTAL AREA, THE AREA THAT WE LOOKED AT FROM THE SIDE--
A YES.
Q -- IS 50 TO 80 PERCENT?
A YES.
Q AND THIS IS ABOUT 50 PERCENT?

A I WOULD SAY 50 PERCENT, IN SOME AREAS MAY BE GREATER.
Q 50 PERCENT OR GREATER?
A YES, UH-HUH.
Q ALL RIGHT. START IT UP AGAIN, IF YOU WOULD, PLEASE SIR.

THE COURT: DOCTOR, WOULD YOU MAKE SURE THAT THE MIKE IS OFF ON YOUR LAPTOP? I SEEM TO THINK THAT YOUR MIKE AND THE MIKE ON THE COMPUTER MAY BE CAUSING THE REVERBERATION.

THE WITNESS: THERE IS NO SOUND. AND--

THE COURT: WE JUST WANTED TO MAKE SURE. TRYING TO FIGURE OUT.

THE WITNESS: I KNOW IT'S--

THE COURT: OH, NO. NO. WE'RE FINE. I JUST WANTED TO MAKE SURE IF WE COULD RESOLVE IT. I'M SORRY, MR. DIGGS. I DIDN'T MEAN TO INTERRUPT YOU.

MR. DIGGS: OKAY.

BY MR. DIGGS:
Q WOULD YOU START THAT UP, PLEASE SIR?
A YES. AND SO WE LOOK AT THE BACK OF MR. STANKO'S BRAIN, THE BACK OF HIS BRAIN SEEMS TO BE FAIRLY SIMILAR TO THAT OF A NORMAL SUBJECT'S. AND SO REALLY WHAT WE'RE SEEING IS THAT IT'S JUST THIS PORTION OF THE BRAIN THROUGH THE BASE OF THE FRONTAL LOBE AREA OF THE BRAIN THAT IS ABNORMAL IN MR. STANKO.

Q ALL RIGHT. ALL RIGHT. EXPLAIN THIS FOR US.
A WELL, WHAT WE'RE SEEING HERE AND WHAT WE'LL SEE IS WE'LL SEE AS WE ARE SLICING THE BRAIN ON A MILLIMETER BY MILLIMETER BASIS WE'RE SORT OF DIGITALLY SLICING DOWN THE BRAIN LOWER AND LOWER FROM -- SO THAT AS IF WE TOOK A METAPHORICAL BUZZSAW AND WE'RE SLICING FROM THE TOP OF THE BRAIN DOWN THIS WAY AND WE'RE LOOKING AT DIFFERENT SLICES AS WE SLICE AWAY...
Q THROUGH THE BRAIN?
A AS WE SLICE AWAY THROUGH THE BRAIN.
Q START THAT UP. KEEP GOING.
A OKAY. AND NOW WE'RE GETTING TOWARDS THE BASE OF THE BRAIN AT THIS LEVEL HERE. AND YOU CAN SEE HERE, THIS IS NORMAL CONTROL SUBJECT HERE. AND WE CAN SEE THAT THERE IS THIS DECREASE OF ACTIVITY IN THE FRONTAL LOBE IN THE BASE OF THE FRONTAL LOBE COMPARED TO THE HIGHER UP AREAS, SO IF IT HAD GONE -- GONE BACK UP HIGHER.
Q START THE MOVEMENT AGAIN.
A SEE, SO AS YOU CAN SEE, HIGHER UP THE -- THERE IS NO DIFFERENCE. IT'S ONLY AS WE START TO GO LOWER DOWN.
Q KEEP GOING.
A AS WE START TO GO LOWER DOWN THAT WE START TO SEE--
Q KEEP GOING. YES, SIR. KEEP GOING. STOP. CAN YOU BACK IT UP JUST A FEW?
A YEAH, I CAN BACK UP JUST A LITTLE BIT HERE.

Q ALL RIGHT. LET'S LOOK AT THAT. THE ENTIRE AREA IS IN BLUE.

A YEAH.

Q COMPARE THAT TO THE NORMAL CONTROL AND TELL US WHAT'S THE DIFFERENCE.

A WELL, THIS INDICATE THAT THE FRONTAL LOBE, THE BASE OF THE FRONTAL LOBE HAS A MUCH LOWER LEVEL OF SUGAR METABOLISM THAN THE NORMAL CONTROL AVERAGE.

Q WHICH MEANS IN FUNCTIONAL TERMS...

A WELL, IN FUNCTIONAL TERMS THE FRONTAL LOBE IS INVOLVED WITH THINGS SUCH AS--

Q WELL, IT'S NOT WORKING?

A IT'S NOT WORKING, THAT'S CORRECT.

Q ALL RIGHT. AND WHAT WOULD BE THE RESULT -- HOW WOULD THAT HAVE AN EFFECT ON SOMEONE'S BEHAVIOR?

A WELL, LET'S SEE. THE FRONTAL LOBE IS A VERY IMPORTANT PART OF THE BRAIN FOR HELPING TO REGULATE IMPULSES AND FOR EXERCISING PROPER JUDGMENT.

SO FOR EXAMPLE, WE KNOW FROM A FAMOUS STUDY OF VIETNAM VETS WHO SUFFER FROM HEAD INJURIES THAT IF YOU LOOK AT A LARGE NUMBER OF VIETNAM VETS WHO SUFFERED HEAD INJURIES AND YOU COMPARED THOSE VETS WHO HAD FRONTAL LOBE INJURIES, WHICH IS THOSE SUCH THAT HAD THE SAME SIZE INJURY THAT OTHER PARTS OF BRAIN, TEMPORAL AND OCCIPITAL LOBE AREAS, THE VETS WITH THEIR FRONTAL LOBE INJURIES WERE

GOING TO BE ANYWHERE FROM TWO TO SIX TIMES MORE VIOLATIVE OR AGGRESSIVE THAN VETS WHO HAD INJURIES IN THE OCCIPITAL TEMPORAL LOBE AREA. AND SO THIS IS ONE EXAMPLE.

WE ALSO NOTE, FOR EXAMPLE, FROM STUDY OF STROKE VICTIMS THAT IF YOU HAVE A STROKE IN THE FRONTAL LOBE AREA OF THE BRAIN, THE CLOSER YOU GET TOWARDS THIS FRONTAL LOBE AREA, THE MORE AGGRESSIVE STROKE PATIENTS ARE LIKELY TO BE.

THEY ARE MORE LIKELY TO BE MORE IRRITABLE, MORE TEMPERAMENTAL, MORE AGGRESSIVE, MORE DISINHIBITED COMPARED TO THE SAME SIZE STROKE IF THE STROKE WERE FURTHER BACK IN THE BRAIN.

Q ALL RIGHT. CONTINUE ON. WOULD YOU START UP THE VIDEO AGAIN?

A AND SO THESE ARE WHAT WE CALL AXIO SLICES. NOW WE WILL SHOW SLICES FROM WHAT WE CALL A SAGGITAL PERSPECTIVE. A SAGGITAL PERSPECTIVE IS WHEN WE -- IT TAKES OUR BUZZSAW AND INSTEAD OF CUTTING FROM TOP TO BOTTOM, IT'S AS IF YOU ROTATE THE BUZZSAW 90-DEGREES.

NOW WE'RE CUTTING FROM THIS WAY. AND SO YOU'RE LOOKING AT A SIDE VIEW OF THE BRAIN HERE AND YOU CAN SEE FROM THE MODEL HERE--

Q YES, SIR.

A -- THIS IS A SIDE-VIEW OF THE BRAIN.

Q GOING FROM THE RIGHT OVER TO THE LEFT?

A GOING FROM THE RIGHT TO THE LEFT.

Q OKAY.

A SEE? AND THEN YOU CAN SEE HERE THAT -- THAT THERE IS SOME -- LET'S SEE -- A DECREASE IN THE PORTION OF THE FRONTAL LOBE AREA IS HERE COMPARED TO THIS, AND THEN HERE WE'RE SEEING THAT THERE IS A DECREASE IN THE BASE OF THE FRONTAL LOBE AREA.

SO AGAIN, IT'S THIS FLOOR OF THE FRONTAL LOBE, THE BASE OF THE FRONTAL LOBE, NOT THE HIGHER PART OF THE FRONTAL LOBE WHICH IS WHERE DR. EINHORN'S TESTING TESTED FUNCTION FOR THE HIGHER PART OF THE FRONTAL LOBE.

THERE AREN'T VERY GOOD NEUROPSYCHOLOGICAL TESTS FOR THE FLOOR OF THE FRONTAL LOBE. THE PET SCAN'S ACTUALLY ONE OF THE BEST WAYS FOR LOOKING AT THE FUNCTION OF THE FLOOR OR BASE OF THE FRONTAL LOBE.

Q WELL IN FACT, IS THERE ANY OTHER WAY TO LOOK AT IT?

A THERE ARE OTHER METHODS SUCH AS QUANTITATIVE MRIS THAT ONE CAN USE TO LOOK AT THIS, SO THAT WOULD BE ANOTHER WAY OF LOOKING AT THIS.

Q ALL RIGHT. CONTINUE ON. LET'S FINISH UP THE MOVIE OR GO TO THE -- START IT UP AGAIN, IF YOU WOULD.

A AND SO AGAIN--

Q DO YOU HAVE -- CAN I ASK YOU IF YOU HAVE AN OPINION ABOUT THE PERCENTAGE OF REDUCTION OF ACTIVITY IN THAT AREA?

A YES. I WOULD SAY IT IS A CLINICALLY SIGNIFICANT LEVEL OF DECREASE IN FRONTAL LOBE ACTIVITY, THAT THIS IS A LEVEL OF DECREASE THAT WOULD BE CONSISTENT WITH SOMEONE WHO HAD A SIGNIFICANT DEVELOPMENTAL PROBLEM WITH THE FRONTAL LOBE NOT DEVELOPING PROPERLY. IT WOULD ALSO--

Q I'M SORRY TO INTERRUPT, BUT I WANTED YOU TO STOP. WE'VE GONE INTO -- CAN YOU BACK IT UP AND LET'S PICK IT UP?

A SURE.

Q AND THEN I'LL LET YOU FINISH THE THOUGHT THAT YOU HAD. ALL RIGHT. EXPLAIN WHAT'S HAPPENING HERE.

A OKAY. SO NOW -- SO OUR FIRST SLICE IS WE'RE GOING FROM THE TOP OF THE BRAIN DOWN AND THEN OUR SECOND SERIES OF SLICES WE ROTATED OUR METAPHORICAL BUZZSAW AND WE ARE GOING FROM LEFT TO RIGHT.

NOW WE'VE ROTATED OUR METAPHORICAL BUZZSAW AGAIN SO THAT WE'RE NOW GOING FROM THE FACE TO THE BACK. AND SO WHAT WE'RE GOING TO SEE NOW ARE VIEWS OF THE BRAIN FROM THE FACE GOING BACKWARDS TO THE BACK OF THE HEAD.

Q ALL RIGHT.

A AND SO YOU CAN SEE HERE THAT THIS IS FROM THE FACE HERE, AND SO WE'RE LOOKING AT THE BRAIN FROM THREE DIFFERENT ANGLES HERE.

Q AND SO ALREADY WE'RE LOOKING RIGHT BEHIND WHAT WOULD BE RIGHT BEHIND THE EYES?

A YES. AND YOU CAN SEE IT, ESPECIALLY THIS FLOOR OF THE FRONTAL LOBE AREA, AND YOU CAN SEE THAT IT SEEMS TO BE EVEN MORE PROMINENT HERE BY THE LEFT SIDE THAN THE RIGHT SIDE--

Q YES, SIR.

A -- IN MR. STANKO.

Q NOW, WE'LL GET TO THAT IN JUST A MINUTE. AND I'M ALMOST THROUGH, DR. WU. BUT CONTINUE ON, LET'S LOOK AT THIS. AND THEN I'LL ASK YOU ABOUT IT.

A AND SO NOW WE FINISH CUTTING BACK, AND MOST OF THE REST OF THE BRAIN IS -- IS PERFECTLY NORMAL, JUST THIS BASE OF THE FRONTAL LOBE AREA THERE WHICH HAS A SIGNIFICANT ABNORMALITY.

Q CAN YOU GIVE ME AN IDEA IN TERMS OF PERCENTAGE WHEN WE LOOKED AT THAT LEFT FRONTAL LOBE IN THAT LAST SEGMENT, THE PERCENTAGE OF REDUCED ACTIVITY IN THAT AREA OF HIS BRAIN?

A WELL, I WOULD SAY THAT IT LOOKED LIKE IT WAS AT LEAST 50 PERCENT OR MORE GREATER DECREASE.

Q AND IS THAT KIND OF JUDGMENT SOMETHING THAT YOU DO REGULARLY IN YOUR PRACTICE AND IN YOUR POSITION AS A CLINICAL DIRECTOR OF THE BRAIN IMAGING CENTER?

A YES, IT IS.

Q ALL RIGHT. IS IT SOMETHING YOU'RE -- YOU FEEL COMFORTABLE IN TELLING US?

A YES. NOW, I FEEL COMFORTABLE BECAUSE I HAVE SEEN THOUSANDS OF BRAIN PET SCANS USING THIS CPT TEST IN NEUROPSYCHIATRIC PATIENTS.

Q LET ME SHOW YOU WHAT'S BEEN MARKED AS DEFENSE EXHIBIT NUMBER ONE. HAVE YOU SEEN THIS?

A YES, I HAVE.

Q AND WHAT DO YOU UNDERSTAND IT TO BE?

A THIS IS DR. RUBEN GUR'S VOLUMETRIC MEASUREMENT OF BRAIN -- FOR THE BRAIN.

Q AND WHERE WAS THE DATA GATHERED FOR THAT PARTICULAR ASSESSMENT, IF YOU KNOW?

A MY UNDERSTANDING IS THAT HE USED MUSC DATA.

Q OKAY. AND IS THIS DIAGRAM CONSISTENT WITH WHAT YOU OR -- COMPARE THE TWO, THIS DIAGRAM, THE MRI, AND THE PET SCAN. WHAT CAN WE GATHER, WHAT CONCLUSION CAN WE REACH FROM THESE TWO SOURCES, THESE TWO TYPES OF SCANS?

A WELL, WHAT THIS SHOWS IS THAT MR. STANKO HAD A SIGNIFICANT BRAIN ABNORMALITY USING TWO DIFFERENT MEASURES OF THE BRAIN THAT HE SHOWS BRAIN ABNORMALITIES ON PET SCANS WHICH MEASURE HOW MUCH SUGAR IS BEING BURNED UP, BUT HE ALSO SHOWS ABNORMALITIES ON DR. RUBEN GUR'S MEASUREMENT OF THE SIZE OF THE FRONTAL LOBE.

AND DR. RUBEN GUR NOTED SPECIFICALLY THAT MR. STANKO HAD AN ABNORMAL DECREASE IN THE LEFT FRONTAL LOBE AREA WHICH WAS STATISTICALLY SIGNIFICANT, AND THIS WOULD BE AN

EXAMPLE OF A QUANTITATIVE AND STATISTICAL APPROACH TO LOOKING AT THE BRAIN OF MR. STANKO.

Q WOULD IT BE FAIR TO SAY THAT WE HAVE TWO ABNORMAL -- ABNORMALITIES?

A YES. WE HAVE TWO DIFFERENT TYPE OF ABNORMALITIES, BUT THEY BOTH OVERLAP--

Q ALL RIGHT.

A -- IN TERMS OF THE FRONTAL LOBE BEING DEFECTIVE.

Q AND WHAT ARE THOSE TWO ABNORMALITIES?

A WELL, THE FIRST ABNORMALITY IS A FUNCTIONAL OR A METABOLIC ABNORMALITY, AND WHICH WE SEE THE PET SCAN SHOWS AN ABNORMAL DECREASE OF FUNCTION IN THE FLOOR OR BASE OF THE FRONTAL LOBE, SO THAT'S A FIRST TYPE OF ABNORMALITY.

THE SECOND TYPE OF ABNORMALITY IS THIS MEASUREMENT OF THE SIZE OF THE FRONTAL LOBE USING DR. RUBEN GUR'S VOLUMETRIC QUANTITATIVE APPROACH IN WHICH HE SHOWS THERE'S A STATISTICALLY SIGNIFICANT DECREASE IN THE SIZE OR VOLUME OF THE FRONTAL LOBE.

AND SO THESE ARE TWO SEPARATE WAYS OF LOOKING AT BRAIN FUNCTION AND THEY BOTH SHOW REALLY TWO VERY DIFFERENT APPROACHES THAT MR. STANKO HAD AN ABNORMAL BRAIN IN THE FRONTAL LOBE AREA.

Q DR. WU, ARE THERE STILL EXPERTS WHO DISAGREE WITH THIS WHOLE AREA OF TECHNOLOGY?

A YES, THERE ARE OPPOSING EXPERTS.

Q WHAT IS THE -- WHAT IS THE OPPOSITION FROM THOSE PEOPLE? HOW WOULD YOU CHARACTERIZE THAT?
A WELL...
Q CAN YOU SAY?
A I WOULD SAY THAT THERE ARE VARIOUS OBJECTIONS THAT SOME OF THE OPPOSING EXPERT WITNESS MIGHT RAISE INCLUDING -- ONE OBJECTION WHICH IS THAT THEY FEEL THAT IT'S NOT READY FOR PRIMETIME USE IN THE COURT YET, THAT THERE'S NOT ENOUGH--
Q EVEN THOUGH -- EVEN THOUGH IT -- IT'S READY FOR PRIMETIME USE WITH RESPECT TO LIFE AND DEATH MEDICAL DECISIONS?
A THAT'S CORRECT. IT'S USED ALL THE TIME RIGHT NOW TO HELP NEUROSURGEONS DECIDE WHETHER TO OPERATE, TO HELP CANCER SPECIALISTS DECIDE WHETHER OR NOT TO RE-ADMINISTER RADIATION TREATMENT--
Q AND THAT'S THE SAME EXACT TECHNOLOGY THAT YOU'RE USING IN THIS CASE AS A BASIS FOR YOUR TESTIMONY?
A YES, THE SAME EXACT TECHNOLOGY. AND I WORK WITH SOME OF THOSE DOCTORS TO HELP THOSE DOCTORS MAKE LIFE OR DEATH MEDICAL DECISIONS ABOUT THEIR PATIENTS' TREATMENTS.
Q ARE THERE ANY OTHER REASONS OR BASES FOR THEIR...
A WELL, I WOULD SAY THAT'S A PRIMARY BASIS. AND OF COURSE, THERE ARE A NUMBER OF -- THERE'S A MYRIAD OF OTHER REASONS DEPENDING UPON DIFFERENT EXPERTS.

Q LET ME ASK YOU THIS FINALLY, DR. WU. WITH RESPECT TO ALL OF YOUR ANSWERS TODAY, HAVE YOU STATED THEM TO A REASONABLE DEGREE OF MEDICAL AND PROFESSIONAL CERTAINTY?

A YES.

Q THANK YOU VERY MUCH, DR. WU. ANSWER ANY QUESTIONS THAT COUNSEL MAY HAVE.

THE COURT: MADAM FORELADY AND LADIES AND GENTLEMEN, YOU ALL HAVE BEEN SITTING OVER AN HOUR, PROBABLY CLOSER TO AN HOUR AND A HALF. I'M GOING TO GIVE YOU A VERY BRIEF RECESS. THE COURT WILL RESUME THE CROSS-EXAMINATION OF THE DOCTOR.

DURING THE BREAK PLEASE DO NOT DISCUSS THE CASE IN ANY WAY. PLEASE LEAVE YOUR NOTEPADS IN YOUR SEATS. AND I WOULD ANTICIPATE THIS BREAK WOULD BE ABOUT 10 MINUTES.

(JURY LEFT THE COURTROOM 5:04 PM.)

THE COURT: YOU MAY BE SEATED. DR. WU, YOU MAY STEP DOWN, JUST PLEASE DO NOT DISCUSS YOUR TESTIMONY WITH ANYONE.

THE WITNESS: YES, YOUR HONOR.

THE COURT: ALL RIGHT. WE WILL BE AT EASE FOR ABOUT 10 MINUTES. GIVE THE JURY AN OPPORTUNITY TO REFRESH THEMSELVES. WE WILL RESUME IN 10 MINUTES.

(WHEREUPON THERE WAS A RECESS.)

THE COURT: OKAY. OKAY. IS THE STATE READY TO

PROCEED?

MR. HUMPHRIES: THE STATE'S READY TO PROCEED.

THE COURT: IS THE DEFENSE READY TO PROCEED?

MR. DIGGS: YES, YOUR HONOR.

MR. HUMPHRIES: WE CAN CUT THESE...

MR. DIGGS: YOUR HONOR, WE WOULD MOVE TO INTRODUCE THE PET SCAN VIDEO, NOT THE--

THE COURT: PARDON ME? SAY THAT ONE MORE TIME.

MR. DIGGS: THE DEFENSE WOULD MOVE TO INTRODUCE THE PET SCAN VIDEO, NOT THE SLIDE PRESENTATION, BUT JUST THAT VIDEO, AND WE ALSO HAVE SOME STILL PICTURES THAT WERE TAKEN FROM THAT DISK, AND WE WOULD MOVE TO INTRODUCE THOSE.

THE COURT: ANY EXCEPTIONS?

MR. HUMPHRIES: AS LONG AS WE HAVE THE CLEAR UNDERSTANDING WE ARE TALKING ABOUT THAT FOUR MINUTE VIDEO AND NOT THE ACCOMPANYING--

THE COURT: THOSE ARE THE ACTUAL SLIDES FROM MR. STANKO'S PET SCAN; CORRECT?

MR. DIGGS: YES.

THE COURT: AND WE WILL MARK THEM INDIVIDUALLY.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: AND WE WILL DO IT AT THE BREAK WHEN THE COURT REPORTER HAS ENOUGH TIME.

COURT REPORTER: THEY'RE DONE. IT'S 2 THROUGH

19.

THE COURT: OH, YOU'VE ALREADY DONE THEM? YOU'RE SO GOOD. OKAY. SO THAT WILL BE TWO THROUGH 19 WITHOUT OBJECTION.

(WHEREUPON, DEFENDANT'S EXHIBITS 2-19 WERE ADMITTED INTO EVIDENCE.)

THE COURT: IS THERE ANYTHING ELSE WE NEED TO TAKE UP BEFORE WE BRING IN THE JURY?

MR. HUMPHRIES: NOT FROM THE STATE, YOUR HONOR.

THE COURT: ANYTHING FROM THE DEFENSE? ANYTHING ELSE WE NEED TO TAKE UP?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: ALL RIGHT. PLEASE BRING IN THE JURY.

(JURY ENTERED THE COURTROOM AT 5:39 PM.)

THE COURT: YOU MAY BE SEATED. LADIES AND GENTLEMEN, I HOPE THAT YOU ENJOYED YOUR BREAK. WE'LL NOW RESUME WITH THE CROSS-EXAMINATION OF THE WITNESS. MR. HUMPHRIES, YOU MAY PROCEED WHEN YOU'RE READY.

MR. HUMPHRIES: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. HUMPHRIES:

Q GOOD AFTERNOON, DR. WU.

A GOOD AFTERNOON, SIR.

Q I'M FRAN HUMPHRIES. I'VE JUST GOT A FEW QUESTIONS

FOR YOU. LET'S -- LET'S CLEAR UP ONE THING. WHEN WE'RE TALKING ABOUT THESE LIFE AND DEATH ISSUES THAT YOU MENTIONED IN REGARD TO THE PET SCAN, YOU'RE TALKING ABOUT BRAIN TUMORS?

A YES.

Q OKAY.

A OR EPILEPSY.

Q WELL, OKAY. WELL, LET'S TALK ABOUT BRAIN TUMORS SPECIFICALLY BECAUSE THAT WAS THE ONE THING THAT WE KEPT COMING BACK TO IN DIRECT, YOU KNOW, BRAIN TUMORS, LIFE AND DEATH, AND CERTAINLY BRAIN TUMORS ARE A LIFE AND DEATH ISSUE.

WHAT IS IT ABOUT THE PET SCAN THAT CAN HELP IDENTIFY THESE BRAIN TUMORS?

A WHAT THE PET SCAN DOES IS THAT IT CAN IDENTIFY AREAS OF OVERACTIVE SUGAR METABOLISM. TUMORS TEND TO HAVE A SIGNIFICANT INCREASE IN SUGAR METABOLISM. AND SO SOMETIMES, FOR EXAMPLE, IF YOU HAVE A CANCER PATIENT AND THEY HAVE BEEN TREATED WITH RADIATION THERAPY, A FEW MONTHS LATER YOU DON'T KNOW IF THE TUMOR HAS GROWN BACK AGAIN OR IF THERE IS WHAT WE CALL RADIATION NECROSIS OR SCARRING.

AND SO WITH A PET SCAN, IF THERE'S A TUMOR GROWING BACK AGAIN, THAT AREA WILL TYPICALLY BE RED HOT, STICK OUT LIKE A SORE THUMB VERSUS RADIATION NECROSIS WOULD

TYPICALLY BE VERY DARK.

AND SO IN THAT CASE IF THE TUMOR IS GROWING BACK AGAIN, THE CANCER SPECIALIST WOULD PROBABLY ELECT TO RESUME RADIATION THERAPY, TAKE A SECOND ROUND.

Q BUT THE TUMORS ITSELF, THAT'S REALLY IN A CONSTANT STATE. THAT IS, YOU CAN DETERMINE THE SIZE OF IT WHETHER YOUR BRAIN IS AT REST, HAS BEEN -- WE HAVE DONE ONE OF THESE CONTINUOUS ACTIVITY EXERCISES. I MEAN, THE TUMOR IS GOING TO BE THE SAME REGARDLESS.

A WELL, I WOULD SAY THAT THE TUMOR IS GOING TO HAVE A LIFE OF ITS OWN. THE CANCER CELLS ARE KIND OF OFF ON THEIR OWN AND THEY ARE MULTIPLYING LIKE CRAZY ON THEIR OWN, AND SO THEY ARE LIKE A ROW OF -- CELLS.

Q AND THAT IS -- AND PERHAPS I WOULD HAVE SAID IT THAT WAY. THERE -- THAT'S A DISTINCTLY SEPARATE ISSUE FROM THE GENERAL FUNCTIONING OF THE BRAIN.

A THAT'S CORRECT. A TUMOR IS KIND OF LIKE A -- CELLS THAT HAVE DECIDED TO BREAK OFF ON THEIR OWN INDEPENDENT OF WHAT ANY OTHER CELLS IN THE BRAIN NEED, REQUIRE.

Q AND THAT IS ONE USE OF THE PET SCAN?

A YES.

Q OKAY. YOU WERE SHOWN DEFENDANT'S ONE AND YOU SAID THAT THERE WAS CLEARLY SOME -- HOW DID YOU DESCRIBE IT IN REGARD TO THE FRONTAL LOBE?

A SIGNIFICANT DECREASE IN FRONTAL QUANTITATIVE

VOLUMETRIC MEASUREMENTS IN TERMS OF A -- FOUR OR STANDARD DEVIATION DIFFERENCE.

Q HOW WOULD YOU CHARACTERIZE THE MEDIAL MEASUREMENT?

A WELL, I WOULD SAY THAT THAT APPEARS TO BE A DECREASE AS WELL ON THE RIGHT SIDE.

Q OF... SUBSTANTIALLY MORE SIGNIFICANTLY EVEN THAN THE FRONT; WOULDN'T YOU SAY?

A YES, THAT'S CORRECT.

Q FAIR. THAT'S OKAY ON THE PET SCAN, THOUGH; RIGHT?

A WELL, I WOULD SAY THAT IT'S DIFFERENT MEASURES LOOKING AT THE QUANTITATIVE VOLUMETRIC--

Q NO QUESTION ABOUT THAT. IT'S OKAY ON THE PET SCAN. FAIR TO SAY?

A ARE YOU TALKING ABOUT THE MEDIAL PORTION--

Q I'M TALKING ABOUT--

A -- THE BRAIN.

Q -- WHEN YOU TESTIFIED THAT THE REST OF HIS BRAIN IS INTACT IN REGARD TO FUNCTION EXCEPT FOR THESE LOWER LEVELS OF THE FRONTAL LOBE, THAT INCLUDES THE MEDIAL; DOES IT NOT?

A YES.

Q OKAY. SO MEDIAL IS OKAY AS REGARD TO PET SCAN?

A IN--

Q THAT'S MY ONLY QUESTION. YES OR NO?

A IN TERMS OF BRAIN FUNCTION. IN TERM OF SUGAR

METABOLISM, THAT WOULD BE CORRECT.

Q THANK YOU. NOW, THERE WAS AN ANALOGY WHICH I *THOUGHT* QUITE INTERESTING. YOU ANALOGIZED FROM THE PET SCAN TO A STRESS TEST.

A YES.

Q AND OF COURSE, MOST OF US ARE FAMILIAR WITH A STRESS TEST. LET ME ASK YOU IF YOU AGREE WITH THIS, THIS ASSERTION, THIS POSITION QUITE FRANKLY THAT ONE OF THE PREVIOUS DEFENSE EXPERTS ACCEDED TO, THAT IF A PERSON -- IN MOST CASES IF A PERSON IS MORE INTELLIGENT, THE FRONTAL LOBES -- TO DO A PARTICULAR TASK AS COMPARED TO SOMEONE WHO IS MUCH LESS INTELLIGENT, THE FRONTAL LOBES WOULD SHOW LESS ACTIVITY OR ARE LESS ENGAGED. DO YOU AGREE WITH THA ASSERTION?

A I THINK IT WOULD DEPEND ON SOME SPECIFIC CIRCUMSTANCES.

Q SO YOU CAN'T SAY YES OR NO?

A IN GENERAL I CAN'T SAY THAT AS A GENERAL RULE, NO, THERE ARE -- ONE WOULD HAVE TO BE VERY SPECIFIC ABOUT SPECIFIC CIRCUMSTANCES.

Q COULD THAT -- BECAUSE THAT WOULD SUGGEST THAT PERHAPS THE SITUATION COULD BE MANIPULATED IF THAT WERE TO BE THE CASE. THAT IS, THE VALIDITY OF THE PET SCANS PARTICULARLY AS RELATES TO THE FRONTAL LOBES, IF THAT WERE THE CASE, IT WOULD SUBJECT THEM UNDER THE RIGHT SET OF CIRCUMSTANCES

WITH THE RIGHT SUBJECT TO BEING MANIPULATED?
A WELL, AS I STATED PREVIOUSLY, IF ONE WERE TO TRY TO MANIPULATE THE PET SCAN, ONE WOULD HAVE TO ENGAGE THE FRONTAL LOBE ACTIVITY IN TERMS OF THINKING ABOUT HOW TO MANIPULATE THE PET SCAN. THIS WOULD INCREASE FRONTAL LOBE ACTIVITY.

THE ABNORMALITY THAT WE SEE IN MR. STANKO IS NOT AN OVERACTIVITY, IT'S ACTUALLY AN UNDERACTIVITY. AND SO WHAT WE SEE AS ABNORMAL TO BE UNDERACTIVITY, AND SO IF HE WERE TO TRY TO MANIPULATE THIS, THIS WOULD TEND TO UNDERSTATE THE UNDERACTIVITY SO THAT WHAT YOU WOULD IN EFFECT GET WOULD BE LESS OF A DIFFERENCE. IN EFFECT, SUCH ATTEMPT WOULD TEND TO UNDERSTATE THE DIFFERENCE.

Q WHAT ABOUT IF YOU JUST DIDN'T TRY AS HARD ON THIS CONTINUOUS ACTIVITY TEST OR WHATEVER YOU CALL IT? WHAT IF YOU JUST DIDN'T TRY AS HARD?

A WELL, I WOULD SAY THAT HE -- THIS -- THE PERFORMANCE WAS MONITORED BY DR. EINHORN, THAT -- HE WAS DOING THE TEST IN A -- THE SATISFACTORY MANNER, SO IT WAS CLEAR THAT HE WAS PERFORMING THE TEST AS EXPECTED. IT'S CLEAR THAT HE WOULD NOT -- SLACKING OFF ON THE TEST.

Q HOW DO YOU KNOW?

A I TALKED TO DR. EINHORN.

Q AND THE TRUTH OF THE MATTER IS REALLY THAT THE PET SCANS ARE VERY SENSITIVE IN TERMS OF ACCURACY TO THE

PROCEDURE FOR PROTOCOL USED PRIOR TO ADMINISTERING THE PET SCAN. IS THAT FAIR TO SAY?

A YES. IF YOU, FOR EXAMPLE, USED A -- A DIFFERENT PROTOCOL LIKE A READING PROTOCOL, YOU WOULD SHOW -- OR A SINGING PROTOCOL, YOU'D SEE READING DURING THE BRAIN VITAL FORCE -- AREAS OF THE BRAIN LIGHT UP.

Q SO THEY ARE SENSITIVE?

A THEY ARE A TAD SENSITIVE, YES, OR FUNCTION TESTS, YES.

Q ALL RIGHT. LET ME ASK. IS THERE A DISTINCTION BETWEEN FUNCTION AND ACTIVITY? YOU USED THOSE TERMS IN YOUR DIRECT TESTIMONY, AND I'M NOT SURE IF YOU WERE USING THEM AS BEING THE SAME THING, JUST TWO WAYS OF SAYING THE SAME THING, OR IS THERE A DISTINCTION, FUNCTION AND ACTIVITY?

A WELL, I WOULD SAY THAT IN THE FUNCTIONAL BRAIN IMAGING LITERATURE, THE TWO TERMS ARE OFTEN USED INTERCHANGEABLY.

Q BECAUSE IT WOULD SEEM TO ME THAT FUNCTION WOULD BE THIS -- THIS GENERAL, YOU KNOW, STATE OF THE BRAIN, AND ACTIVITY WOULD -- WOULD BE TEMPORARY, IT WOULD CHANGE BASED ON WHAT YOU WERE DOING THE ACTIVITY, WHAT CONDITION YOU WERE IN.

IS THERE NO SUCH DISTINCTION IN YOUR MIND AND YOUR AREA OF EXPERTISE? I'M JUST ASKING.

A I WOULD SAY THAT IT'S OFTEN USED INTERCHANGEABLY SYNONYMOUSLY IN THE LITERATURE, BUT I THINK THAT PEOPLE WOULD HAVE SOMETIMES TRY TO DRAW DISTINCTION, BUT I WOULD SAY THAT MOST PEOPLE TEND TO USE TERMS INTERCHANGEABLY IN THIS PARTICULAR AREA.

Q AND YOU DO?

A YES.

Q OKAY. LET'S GET BACK TO THAT STRESS TEST. AND THIS IS THE THING THAT INTERESTS ME. WHEN WE TALK ABOUT A STRESS TEST, OBVIOUSLY THERE -- PEOPLE ARE IN DIFFERENT LEVELS OF FITNESS, IF YOU WILL, AS RELATES TO THE STRESS TEST -- STRESS TEST?

A YES.

Q CORRECT? OBVIOUSLY THAT'S THE REASON YOU TAKE THE TEST IS TO DETERMINE AT WHAT LEVEL -- NOT NECESSARILY YOUR PHYSICAL FITNESS, BUT HOW YOUR HEART IS DOING?

A YES.

Q WHICH IS DIRECTLY RELATED OFTEN TIMES TO YOUR LEVEL OF FITNESS. YOU'D AGREE WITH THAT?

A YES.

Q OKAY. AND, OF COURSE, YOU'RE AWARE THAT THERE ARE THOSE SUPERIOR, VERY SUPERIOR INDIVIDUALS, FOR INSTANCE, SPECIAL FORCES, YOU KNOW, DELTA, RECON, SEALS, RANGERS, THOSE GUYS OR WOMEN, IF THEY'RE INVOLVED IN THIS STRESS TEST, YOU WOULD EXPECT TO SEE VERY LITTLE ELEVATION IN

TERMS OF CARDIAC FUNCTION; WOULDN'T YOU?
A WELL, I WOULD SAY THAT IF YOU'RE LOOKING AT ELEVATION AT HEART RATE, YES, I WOULD SAY THAT A WELL-CONDITIONED INDIVIDUAL WOULD SHOW LESS OF AN INCREASE IN HEART RATE FOR A GIVEN UNIT OF EXERCISE.
Q AND OF COURSE, THAT WAS YOUR ANALOGY. WOULD YOU -- WOULD YOU NOW SUBMIT THAT IF SOMEONE WAS OF A VERY SUPERIOR LEVEL IN TERMS OF INTELLIGENCE THAT THE SAME WOULD NOT BE TRUE, THAT IS, THAT THE LEVEL OF FUNCTIONING OR -- OR THE WAY THE FUNCTIONING APPEARED IN THE FRONTAL LOBES, PARTICULARLY IN THIS CASE, WOULDN'T SHOW AS MUCH ACTIVITY BECAUSE OF THEIR HIGH LEVEL OF INTELLIGENCE?
A I WOULD SAY THAT FOR THIS SPECIFIC TEST, THE CPT TASK, THERE IS NO EVIDENCE THAT THERE IS AN INTELLIGENT INTERACTION.
Q DOCTOR, IF IN FACT THIS PROTOCOL OR PROCESS PRIOR TO THE ADMINISTERING OF THE PET SCAN COULD BE MANIPULATED -- AND I THINK WHAT YOU HAVE TESTIFIED TO IS THAT YOU DON'T KNOW OF A WAY IT COULD BE MANIPULATED. IS THAT FAIR TO SAY?
A NOT THAT I CAN THINK OF.
Q OKAY. THAT'S FAIR. BUT IF IT COULD, THAT WOULD HAVE SERIOUS IMPACT IN CERTAIN CIRCUMSTANCES ON THE VALIDITY AND USEFULNESS OF A SUBSEQUENT PET SCAN. IS THAT FAIR TO SAY?

A YES.
Q THANK YOU, DOCTOR.
THE COURT: ANY RE-DIRECT?
MR. DIGGS: JUST VERY BRIEFLY.
THE COURT: YOU MAY PROCEED.

REDIRECT EXAMINATION

BY MR. DIGGS:
Q AND IF IT COULD BE MANIPULATED, IT WOULD HAVE A SERIOUS IMPACT ON YOUR CREDIBILITY AS A EXPERT IN YOUR FIELD?
A YES.
Q YOU'RE WILLING TO TAKE THAT RISK?
A YES.
Q AND COUNSEL'S QUESTION ABOUT INTELLIGENCE, HE ASSUMES THAT BECAUSE MR. STANKO'S INTELLIGENT THAT HIS BRAIN WOULD HAVE LESS ACTIVITY. IS THERE ANY STUDY THAT YOU'RE AWARE OF THAT SHOWS THAT TO BE TRUE?
A THERE'S NO STUDY I'M AWARE OF THAT WOULD SHOW THAT AN INDIVIDUAL OF GREATER INTELLIGENCE WOULD SHOW A SPECIFICALLY DECREASED LEVEL OF ACTIVITY RIGHT IN THIS PORTION OF THE FRONTAL LOBE.
Q THAT WAS GOING TO BE MY NEXT QUESTION. HE ASSUMES THAT INTELLIGENCE IS LOCATED IN THAT SAME AREA.
A YES. THERE'S NO EVIDENCE--
Q IS THAT THE CASE?

A NO, AS A MATTER OF FACT--
Q ALL RIGHT.
A -- YOU CAN HAVE PEOPLE WHO HAVE A FRONTAL LOBOTOMY WHO DON'T SHOW SIGNIFICANT CHANGE IN IQ. IQ MEASURES TYPICALLY DO NOT DIRECTLY MEASURE FRONTAL LOBE ACTIVITY.
Q ONE LAST QUESTION. WHEN COUNSEL ASKED YOU ABOUT THE MEDIAL AREA OF MR. STANKO'S BRAIN SHOWING UP AS NORMAL ON THE PET SCAN?
A YES.
Q DOES THAT PET SCAN SHOW ACTIVITY PER A DEFINED AREA OR IS A -- AN AGGREGATE OF THE ACTIVITY IN THAT AREA OF THE BRAIN?
A WELL, PET SCAN SHOWS ACTIVITY IN SPECIFIC AREAS LIKE THE FRONTAL LOBE OR THE TEMPORAL LOBE. NOW, THE MEDIAL CAN BE AGGRATIVE (SIC), BUT WE DON'T LOOK AT AN AGGREGATE GROUP OF METABOLISM.
Q ALL RIGHT. THAT'S MY POINT. HE COULD HAVE A LOW VOLUME, OKAY, BUT IT'S STILL PER VOLUME--

MR. HUMPHRIES: OBJECT TO THE LEADING, YOUR HONOR.

THE COURT: SUSTAINED. LEADING.

MR. HUMPHRIES: THANK YOU.

THE COURT: YOU MAY REPHRASE.

BY MR. DIGGS:
Q DOES THE FACT -- DOES THE LOW VOLUME, VOLUMETRIC

MASS, NECESSARILY INDICATE THERE SHOULD BE LESS ACTIVITY PER AREA?

A NO.

Q OKAY. THAT'S ALL I HAVE.

THE COURT: ANY EXCEPTION TO THE WITNESS BEING EXCUSED?

MR. HUMPHRIES: NONE, YOUR HONOR. THANK YOU.

THE COURT: ANY FROM THE DEFENSE?

MR. DIGGS: NONE, YOUR HONOR.

THE COURT: DOCTOR, YOU'RE EXCUSED.

THE WITNESS: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

(WITNESS LEFT THE STAND.)

THE COURT: MADAM FORELADY, LADIES AND GENTLEMEN, WE'RE GOING TO TAKE ADVANTAGE OF THIS BREAK IN TESTIMONY TO TAKE OUR EVENING RECESS. THE LAWYERS AND I WILL BE WORKING, HOWEVER, A LITTLE BIT LONGER.

WE HAVE SOME OTHER MATTERS TO ATTEND TO REGARDING THIS CASE AND MATTERS OF LAW THAT WE NEED TO -- THAT WE WILL BE ATTENDING TO, AND PROBABLY IN ANOTHER 30 MINUTES OR SO WE WILL ALSO BE BREAKING.

WE WILL RESUME THIS TRIAL IN THE MORNING AT 9:30. DURING THE RECESS PLEASE ABIDE BY THE COURT'S INSTRUCTIONS AND HAVE NO DISCUSSION ABOUT THIS CASE

AMONG YOURSELVES AND PLEASE LEAVE YOUR NOTEPADS IN YOUR SEATS AND WE WILL MAKE SURE THAT YOUR PRIVACY IS PROTECTED DURING THE RECESS.

YOU ALL HAVE BEEN EXTREMELY PATIENT WITH US. WE APPRECIATE IT AND I HOPE THAT YOU ALL HAVE A WONDERFUL EVENING. WE WILL SEE YOU IN THE MORNING AT 9:30. IF YOU WILL GO WITH THE BAILIFFS.

(JURY LEFT THE COURTROOM AT 5:56 PM.)

THE COURT: YOU MAY BE SEATED. I APOLOGIZE. IS THE DOOR CLOSED? WHAT WE DISCUSSED AT THE SIDE BAR EARLIER WAS THE FACT THAT WE WOULD GO OVER SEVERAL THINGS AND I'LL -- JUST A MINUTE -- TO MAKE SURE MR. STANKO HAD AN ADEQUATE OPPORTUNITY TO HAVE MEANINGFUL AND FULL DISCUSSION WITH HIS ATTORNEYS REGARDING CERTAIN OF HIS RIGHTS, AND THAT'S WHAT I INTEND TO DO RIGHT NOW.

I'M GOING TO GO OVER WITH HIM HIS RIGHT TO TESTIFY AND THE CONSTITUTIONAL IMPLICATIONS OF THAT. I'M ALSO GOING TO GO OVER WITH HIM PURSUANT TO 16-3-28 HIS RIGHT TO ADDRESS THE JURY IN BOTH THE GUILT AND THE PENALTY PHASE SO THAT AGAIN HE CAN HAVE MEANINGFUL DISCUSSION WITH HIS ATTORNEYS REGARDING THAT.

I'M NOT GOING TO ELICIT FROM HIM ANY ANSWERS AT THIS POINT. IT IS MY INTENT AT THIS POINT SIMPLY TO

ADVISE WHAT HIS RIGHTS ARE AND THEN TO GIVE HIM ADDITIONAL OPPORTUNITY THAT -- WE ANTICIPATE THAT THE -- THAT THERE WILL BE ONE ADDITIONAL WITNESS.

I ASSUME HE PROBABLY WILL TAKE MOST OF THE MORNING TOMORROW. THEN WE HAVE THE STATE'S REBUTTAL CASE IN WHICH I ANTICIPATE WILL TAKE HALF A DAY OR MORE, I WOULD THINK.

MR. HEMBREE: YOUR HONOR, I THINK WE WILL BE ABLE TO WRAP IT UP BY TOMORROW EVENING.

THE COURT: OH, OKAY. SO ANTICIPATE WE WILL -- WE ARE PROJECTING THAT WE WILL CLOSE AND CHARGE ON FRIDAY. BEAR WITH ME.

AND SO WHAT I WANTED TO DO IS GO AHEAD AND QUESTION HIM REGARDING CERTAIN OF THOSE ISSUES SO THAT WHEN THE TIME -- THE APPROPRIATE TIME COMES, THAT I WILL BE ABLE TO ADVISE HIM AGAIN AND THEN GO OVER THOSE MATTERS WITH HIM AND GET SOME ANSWERS FOR -- OBTAIN ANSWERS FOR THE RECORD REGARDING WHETHER HE INTENDS TO EXERCISE ANY OF THOSE RIGHTS.

BUT I WANTED TO GIVE HIM SOME TIME FOR COOL REFLECTION, TO HAVE AN OPPORTUNITY TO DISCUSS THOSE MATTERS WITH COUNSEL. IS THERE ANY EXCEPTION TO THE COURT PROCEEDING IN THAT MANNER FROM THE STATE?

MR. HEMBREE: NONE FROM THE STATE, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. KELLY: NO, MA'AM.

THE COURT: MR. STANKO, IF YOU WOULD STAND FOR ME, PLEASE, AND RAISE YOUR RIGHT HAND AND BE SWORN.

STEPHEN STANKO, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: MR. STANKO, I AM GOING TO AT THIS TIME EXPLAIN TO YOU CERTAIN OF YOUR RIGHTS. IF YOU DO NOT UNDERSTAND ANYTHING THAT I SAY, PLEASE LET ME KNOW. IF YOU NEED -- IF YOU WANT ME TO EXPLAIN ANYTHING IN MORE DETAIL, PLEASE LET ME KNOW. DO YOU UNDERSTAND?

THE DEFENDANT: YES, MA'AM.

THE COURT: SIR, WE HAVE NOW REACHED THE STAGE OF THE TRIAL WHERE YOU MAY PRESENT YOUR DEFENSE. YOU HAVE THE RIGHT TO CLAIM THE PROTECTIONS GIVEN TO YOU BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

THIS AMENDMENT STATES IN PART THAT NO PERSON SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF. THIS MEANS THAT YOU CANNOT BE REQUIRED TO TESTIFY IN THIS CASE.

YOU HAVE THE RIGHT TO TESTIFY ON YOUR OWN BEHALF. HOWEVER, NO ONE CAN MAKE YOU TESTIFY. THIS IS A PERSONAL RIGHT AND NO ONE CAN WAIVE THIS RIGHT EXCEPT YOU.

IF YOU DECIDE TO TESTIFY, YOU WOULD BE SUBJECT TO THE SAME RULES THAT GOVERN OTHER WITNESSES, AND YOU MAY BE EXAMINED AND CROSS-EXAMINED ON ANY RELEVANT ISSUE IN THIS CASE.

IN ADDITION, IF YOU HAVE ANY CONDITIONS INVOLVING DISHONESTY OR FALSE STATEMENT OR FOR CRIMES PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR AND THIS COURT DETERMINES THAT THE PROBATIVE VALUE OF ADMITTING THIS EVIDENCE OUTWEIGHS ITS PREJUDICIAL EFFECT TO YOU, THE SOLICITOR WILL BE ABLE TO INTRODUCE YOUR RECORD TO ATTACK YOUR CREDIBILITY.

AND IN A MOMENT I'M GOING TO ASK THEM IF YOU WERE TO TESTIFY WHAT RECORD THEY WOULD BE SEEKING TO INTRODUCE TO IMPEACH YOUR CREDIBILITY SO THAT AGAIN YOU WILL HAVE A MEANINGFUL OPPORTUNITY TO FULLY GO OVER THOSE MATTERS WITH YOUR COUNSEL.

IF YOU DECIDE TO TESTIFY, THIS DECISION ON YOUR PART MUST BE FREELY AND VOLUNTARILY AND INTELLIGENTLY MADE WITH KNOWLEDGE OF THE PROTECTIONS GIVEN TO YOU BY THE FIFTH AMENDMENT AND THE CONSEQUENCES OF YOUR DECISION TO TESTIFY.

IF YOU DECIDE NOT TO TESTIFY, I WILL INSTRUCT THE JURORS THAT THEY CANNOT GIVE THE FACT THAT YOU DID NOT TESTIFY ANY CONSIDERATION WHATSOEVER, AND THAT THERE IS TO BE ABSOLUTELY NO PREJUDICE TO YOU

BECAUSE YOU DID NOT TESTIFY.

IT IS LEFT ENTIRELY UP TO YOU WHETHER OR *NOT YOU* TESTIFY. YOU MAY TALK WITH YOUR ATTORNEYS, YOUR FAMILY MEMBERS, AND FRIENDS, OR ANYONE ELSE, BUT THE FINAL DECISION WILL BE LEFT ENTIRELY UP TO YOU.

MR. STANKO, DO YOU UNDERSTAND YOUR RIGHTS AS I HAVE JUST EXPLAINED THEM TO YOU?

THE DEFENDANT: YES, MA'AM, I DO.

THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT WHAT I HAVE JUST EXPLAINED TO YOU?

THE DEFENDANT: NO, MA'AM.

THE COURT: AND AS I INDICATED FOR THE RECORD, WHAT MR. HUMPHRIES, OR MR. HEMBREE, WHAT RECORD WOULD YOU ALL BE SEEKING, IF ANY, TO IMPEACH MR. STANKO IF HE WERE TO DECIDE TO TESTIFY?

MR. HEMBREE: JUDGE JEFFERSON, IT'S RATHER EXTENSIVE, AND I DON'T HAVE A COPY OF IT IN THE COURTROOM AT THIS MOMENT. I HAVE SENT ONE OF OUR STAFF MEMBERS TO GO RETRIEVE THAT -- THAT CRIMINAL HISTORY.

THE COURT: WELL, I WILL CONTINUE, THEN WE WILL GO OVER THAT.

MR. HEMBREE: THANK YOU, YOUR HONOR.

THE COURT: MR. STANKO, AS I'VE INDICATED FOR THE RECORD, I'M GOING TO GIVE YOU THIS ADVISEMENT

TWICE TO SOME EXTENT. I WANTED TO ADVISE YOU OF YOUR RIGHTS SO THAT YOU HAVE THE OPPORTUNITY TO FULLY DISCUSS THIS WITH YOUR ATTORNEYS OVER THE NEXT DAY OR SO, GIVE OR TAKE, WHENEVER WE REACH THAT STAGE OF THE TRIAL WHERE YOU MAY WANT TO EXERCISE YOUR RIGHT TO TESTIFY OR NOT TO TESTIFY.

BUT I WANTED YOU TO BE ABLE TO HAVE A FULL AND KNOWING DISCUSSION WITH THEM AND TO GIVE YOU SOME TIME OF REFLECTION REGARDING THAT. SO THAT IS WHY I'M GOING TO ADVISE YOU TWICE.

ALSO, SIR, I NEED TO ADVISE YOU THAT PURSUANT TO SOUTH CAROLINA CODE ANNOTATED 16-3-28 THAT YOU HAVE THE RIGHT IN BOTH THE GUILT AND PENALTY PHASES, ALTHOUGH TO SOME EXTENT TALKING ABOUT PENALTY PHASE IS PREMATURE, BUT YOU -- BUT I WANT TO AGAIN ADVISE YOU OF WHAT YOUR RIGHTS ARE SO THAT YOU CAN HAVE A FULL DISCUSSION WITH THAT ABOUT THESE ISSUES WITH YOUR COUNSEL.

YOU HAVE THE RIGHT TO ADDRESS THE JURY IN CLOSING ARGUMENT IN BOTH OF THOSE PHASES. SIR, DO YOU UNDERSTAND?

THE DEFENDANT: YES, MA'AM.

THE COURT: HAVE YOU FULLY DISCUSSED THIS RIGHT WITH YOUR LAWYERS?

THE DEFENDANT: NOT FULLY YET. THEY DID--

THE COURT: WHEN I SAY FULLY DISCUSS, I DON'T MEAN MAKE A DECISION. I MEAN, DO YOU UNDERSTAND THAT -- AND HAVE THEY EXPLAINED TO YOU THAT YOU HAVE THIS RIGHT?

THE DEFENDANT: YES, MA'AM.

THE COURT: OKAY. DO YOU HAVE ANY QUESTIONS ABOUT THAT OR DO YOU UNDERSTAND THE COURT'S EXPLANATION OF THAT RIGHT?

THE DEFENDANT: I UNDERSTAND.

THE COURT: AGAIN, I'M GOING TO GIVE YOU -- I WANTED TO ADVISE YOU SO THAT YOU WOULD HAVE A FULL OPPORTUNITY TO DISCUSS THESE MATTERS WITH YOUR COUNSEL. AND AT THE APPROPRIATE TIME I WILL AGAIN MAKE INQUIRY OF YOU AS TO WHETHER YOU WANT TO EXERCISE EITHER OF THESE RIGHTS.

HAVE YOU HAD AN OPPORTUNITY TO REVIEW THE RECORD OF HIS CONVICTIONS, MR. HEMBREE?

MR. HEMBREE: YES, YOUR HONOR. I WILL...

THE COURT: AND YOU KNOW WHAT WE NEED TO DO? AND I NEGLECTED TO DO THIS. HAS THE JURY BEEN TAKEN FROM THE BUILDING YET?

DEPUTY: YES.

THE COURT: OKAY. I JUST WANTED TO MAKE SURE BECAUSE I KNOW OUR VOICES CARRY, AND I DIDN'T KNOW WHICH DIRECTION THEY WERE BEING TAKEN OUT AND I DID