ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

STATE OF SOUTH CAROLINA,

Appellant,

v.

STEPHEN CHRISTOPHER STANKO,

Respondent

Appellate Case No. 2010-154746

FINAL BRIEF OF RESPONDENT

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1.

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2.

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

3.

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4.

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5.

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6.

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STATEMENT OF THE CASE

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

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

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

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

RESPONDENT'S STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Penalty Phase

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

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

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

ARGUMENT I.

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

What Occurred Below

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

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

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

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

The Issue Raised on Appeal

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

The Lack of Merit of this Issue

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

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

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

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

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

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

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

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

Regardless, the confusion this Court was concerned about in Belcher could not have occurred in this case based on the trial court's instruction to the jury regarding insanity and criminal intent. (R. 2464-2480, Tr. pp. 2056-2072). In charging the jury in this case, Judge John instructed the jury that a basic principle of law is that "criminal intent is required to prove the defendant is guilty of the crime charged. A person who is insane cannot have criminal intent, and therefore cannot be found guilty of a crime." (R. 2470, ll. 12-16, Tr. p. 2062, ll. 12-16).

The trial court also explained malice in detail, both express malice and inferred malice. The Court instructed the jury that express malice is shown when a person speaks words which express hatred or ill-will for another, "or when the person prepared beforehand to do the act which was later accomplished." (R. 2472, ll. 12-16, Tr. p. 2064, ll. 12-16). In this case there was extensive evidence Stanko prepared beforehand to do the act which was later accomplished by arming himself with a loaded firearm, approaching the victim from behind while he was shaving, and picking up a pillow

and placing it over the gun and using the same as a silencer. Stanko did not challenge this jury instruction below and is not challenging it now.

Additionally, Judge John instructed the jury on implied malice. The Court explained other inferences of malice beside the permissive inference of malice from the use of a deadly weapon. (R. 2472-2473, Tr. pp. 2064-2065). The Court instructed the jury that "[m]alice may be inferred from conduct showing a total disregard for human life." (R. 2472, ll. 16-17, Tr. p. 2064, ll. 16-17). The Court also instructed the jury that malice may be inferred if one intentionally kills another during the commission of a felony. (R. 2472, ll. 23-24, Tr. p. 2064, ll. 23-24). Appellant did not object to these charges below and has not objected to them on appeal. (See BOA). And, this Court did not obviate any of these charges in its decision in Belcher. The State established implied malice at trial. The State established Stanko's conduct showed a complete disregard for human life, and the State proved Stanko intentionally killed Henry Turner in the commission of an armed robbery. The jury could not have been confused by the court's charge as in Belcher. This ground of Stanko's appeal must be dismissed.

Harmless Error

Even assuming *arguendo* that the defense of insanity and malice do intersect, and Judge John erred in charging the permissive inference of malice from the use of a deadly weapon, the error was harmless beyond a reasonable doubt where there was overwhelming evidence of malice. Belcher, 385 S.C. at 611. Errors, including erroneous jury instructions, are subject to harmless error analysis. *See* Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008).

As this Court noted in Belcher, "[i]n many murder prosecutions, as Belcher concedes, there will be overwhelming evidence of malice apart from the use of a deadly weapon." Belcher, 385 S.C.

at 611. As this Court noted in the footnote immediately following the just quoted passage, even Belcher conceded that: "In many, if not most murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption ... Obviously[,] when a defendant walks into the store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." Id., n. 8, *quoting* BOA, Belcher, p. 9. Likewise, the evidence of malice in this case was overwhelming justifying a finding of harmless error. Belcher.

Stanko surreptitiously gained entry into the victim's home by telling the victim that his father had just died, when in fact Stanko's father had not died, but Stanko had murdered his girlfriend, raped her daughter, cut the daughter's throat, stolen his girlfriend's car, and withdrawn money from his girlfriend's bank account using an ATM machine. Stanko continued this deception by fraudulently leading the victim to believe that he was grieving for his deceased father. The victim sat up with Stanko in the victim's home for several hours talking and attempting to console Stanko over the death of his father until daybreak. Either when the victim left to get breakfast or while the victim was shaving, Stanko obtained a .357 caliber handgun. Stanko either loaded the handgun with .38 caliber bullets or knew the weapon was already loaded when he retrieved it. Stanko approached the victim from behind while the victim was distracted shaving. Stanko inserted the pistol into a pillow in an attempt to silence the weapon before he shot the victim in the back. Stanko shot the victim in the back while the victim was defenseless using the pillow as a silencer. When the victim turned after being shot, Stanko struck the victim knocking him to the floor. Stanko then shot the victim again in the chest while the victim was on his knees. Stanko rendered the victim helpless by killing him.

After killing the victim, Stanko then emptied the victim's pockets. Stanko then took the

victim's car keys and stole the victim's gray pick-up truck. Stanko left Laura Ling's stolen red Ford Mustang in the victim's driveway. Stanko then fled the coastal area of South Carolina in Turner's gray pick-up truck. Stanko was arrested in Augusta, Georgia still in possession of Turner's truck and in possession of the murder weapon. However, Stanko had reloaded the weapon after murdering Turner.

Stanko's own crime-scene reconstruction expert agreed to the basic facts set forth above. (R. 1830-1846, Tr. pp. 1422-1438). And, the State's evidence established the same. There was no evidence presented to the jury that Stanko and the victim quarreled. There was no evidence presented Stanko was acting in self-defense. There was no evidence presented the victim did anything to provoke his murder. There was no evidence before the jury that Stanko handled the weapon with criminal negligence which would authorize a charge on involuntary manslaughter. Instead, there was overwhelming evidence of malice.

"Under South Carolina law, '[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it.'" Belcher, 385 S.C. at 609, n. 5, 685 S.E.2d at , n. 5; State v. Fennell, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000); *see also* State v. McDaniel, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904)(same). "It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." Id.; Arnold v. State, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); *see also* Singletary v. State, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984)(same); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct. App. 2007)(same).

Furthermore, malice is said to be expressed where there is manifested a violent, deliberate,

intention unlawfully to take away the life of another human being. Singletary v. State, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984). And, "[m]alice has been defined as the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Johnson, 291 S.C. 127, 128, 352 S.E.2d 480 (1987). Finally, malice can be supplied or inferred by the commission of a felony dangerous to human life, such as armed robbery. Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (19730, *cert. denied* 416 U.S. 968; State v. Norris, 285 S.C. 86, 91-92, 328 S.E.2d 339, 342 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956).

Stanko's actions in murdering the victim to steal the victim's car and escape the coastal area of South Carolina show a formed purpose and design to do a wrongful act under circumstances that exclude any legal right to do so. Belcher; Fennell; McDaniel. The evidence in this case demonstrated wickedness, depravity, and a heart devoid of social duty and fatally bent on mischief. Belcher; Arnold; Singletary. The evidence showed Stanko intended to injure the victim so he could steal his vehicle. The evidence showed Stanko intended to kill the victim. The evidence established Stanko killed the victim in the commission of an armed robbery. Any error in charging the jury on the permissive inference of malice from the use of a deadly weapon, was harmless given the overwhelming evidence of malice in this case.[7] Id. This ground of this appeal must be dismissed with prejudice.

Further, Stanko presented expert testimony, if believed, that he was insane when he murdered

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[7]The facts of this case are similar to those facts set forth in Belcher's brief in which he conceded the evidence of malice would be overwhelming and there would be no prejudice to the defendant from the challenged charge even if charged as a presumption. Id. at 611, n. 8. Stanko's father was not dead. Stanko deceptively gained entry into the victim's home. Stanko shot the victim to steal his truck and escape the coastal area of South Carolina.

Henry Turner. The State produced evidence and expert witnesses that disproved that Stanko was insane when he murdered Henry Turner. At the close of the guilt phase, the jury was appropriately instructed that where the Defendant appropriately raises insanity as a defense, the State must prove the Defendant's sanity beyond a reasonable doubt. The jury returned a verdict of guilty of murder and armed robbery. The jury necessarily found either Stanko did not prove insanity by a preponderance of the evidence or the State had proved Stanko's sanity and disproved insanity beyond a reasonable doubt. The jury also rejected a verdict of guilty but mentally ill. Therefore, since the jury found Stanko was sane and not mentally ill, any finding of malice based on the charge of the permissive inference of malice arising from the use of a deadly weapon was appropriate and could not be prejudicial to Stanko. This appellate ground has no merit and must be dismissed.

Additionally, any error in charging the permissive inference of malice from the use of a deadly weapon would be harmless in this case where the Court charged the jury on express malice and instructed the jury that express malice is shown where the defendant prepared beforehand to do the act which was later accomplished. (R. 2472, ll. 12-16, Tr. p. 2064, ll. 12-16). And, the evidence in this case showed Stanko did exactly that: armed himself with a loaded pistol, approached the victim from behind while he was occupied shaving, and shot the victim in the back while using a pillow as a silencer.

Additionally, any error in charging the permissive inference of malice from the use of a deadly weapon would be harmless in this case where the Court charged other permissive inferences of malice to which Stanko did not object and those permissive inferences of malice are applicable in this case. The jury was instructed that malice may be inferred where the defendant's conduct indicates a total disregard for human life. The jury was also instructed malice may be inferred where

the defendant intentionally kills another during the commission of a felony. Both of these facts were established by the evidence in this case. The evidence showed Stanko acted with complete and total disregard for human life, and he killed Henry Turner in the commission of an armed robbery. As a result, this appellate ground has no merit.

ARGUMENT II.

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

This ground is not preserved for appellate review. At several hearings before Judge Baxley and Judge John, Stanko specifically requested that William "Bill" Diggs be appointed to represent him in his 2nd death penalty trial (the Turner murder case) or that Diggs remain as his attorney in his 2nd death penalty trial (the Turner murder case). Diggs had previously represented Stanko in his first capital murder trial (the Ling murder case) in Georgetown County.

The State expressed its concern in Diggs' representation because Stanko had filed a post-conviction relief (PCR) application against Diggs in regards to his representation of Stanko in the Ling case in Georgetown County. Stanko insisted that Diggs represent him in the Turner murder. Stanko explained that while Diggs made some mistakes in his first capital trial, Diggs would not make the same mistakes in his second trial. Stanko further explained that his defense to Turner's murder was the same, and Diggs was thoroughly familiar with the defense he was going to present and the facts and evidence in the case. Following Stanko's wishes, Diggs was appointed to

represent Stanko in the Turner murder case and Diggs was not removed from the case when this issue was raised several times by *the Court* or by *the State*. Stanko did not object to the appointment of Diggs, and in fact acquiesced to this ruling since this is exactly what he wanted and requested several times. Stanko never raised this issue to the trial court. Stanko now alleges on appeal that Judges Baxley and John erred, in appointing Diggs to represent him in the Turner murder case and not removing Diggs, even though that is exactly what he, Stanko, asked for repeatedly and received.

This appellate ground must be dismissed because it is not preserved for appellate review. Stanko made no objection to the appointment of Diggs as counsel in this case, and in fact requested that Diggs be his attorney and requested several times that he not be removed. He cannot now argue the lower court erred where Judge Baxley and Judge John gave him exactly what he wanted and repeatedly insisted on. *See* State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008)(*Stanko I.*), *citing* State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996)(no issue is preserved for appellate review if the objecting party accepts the trial court's ruling and does not contemporaneously make an additional objection); State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998)(issue is not preserved where appellant acquiesced in court's ruling thereby waiving issue below); Ex Parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995)(a party cannot acquiesce to an issue at trial and then complain on appeal). Furthermore, an unchallenged ruling, right or wrong, is the law of the case. S.C. Coastal Conservation League v. S.C. Dep't of Health & Evnt'l Constol, 363 S.C. 67, 610 S.E.2d 482 (2005); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). Stanko cannot complain of an error he brought about himself. An appellant may not claim that the trial strategy he opted for warrants a new trial. State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007); State v. Babb, 299 S.C. 451, 455, 385 S.E.2d, 827, 829 (1989) ("[A] party cannot complain of an error which his own

conduct has induced."). This ground must be dismissed with prejudice.

The Lack of Merit of this Ground

Stanko also claims any waiver was truncated and not sufficient. The record demonstrates the opposite.

The Initial Appointment of Counsel Hearing

After the State served Stanko with its Notice of Intent to Seek the Death Penalty for the Turner murder, the Honorable Michael Baxley, Circuit Court Judge, was appointed by this Court to preside over this capital trial (the Horry County capital case/the Turner murder). On November 15, 2006, Judge Baxley held an appointment of counsel hearing with Stanko, William "Bill" Diggs, and the Solicitor with regard to this death penalty case (the Turner/Horry County murder).[8] At the November 15, 2006 hearing, Stanko requested that Diggs be appointed to represent him in the Horry County capital case.[9] Stanko specifically asked Judge Baxley *not* to appoint *Gerald Kelly*. Stanko indicated he had problems with Kelly's performance in the Georgetown County death penalty case. However, Stanko indicated to the Court that he had no problem with Diggs' representation in the Georgetown capital case. Stanko asked the court to appoint someone other than Gerald Kelly to be 2nd chair capital counsel. (R. 2909-2928, Tr. November 15, 2006, pp. 1-19).

Diggs also informed the Court that he saw no conflict in representing Stanko in the Horry County capital trial. Diggs indicated the defense in this capital case was going to be the same as the

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[8]Diggs along with Gerald Kelly had represented Stanko in the Georgetown capital case (the Ling murder). The Georgetown capital case was on direct appeal at the time the appointment of counsel hearing took place in this case. Gerald Kelly was not present at this appointment of counsel hearing.

[9]Stanko was questioned under oath in an *ex parte* hearing and expressed his desire that Diggs be appointed to represent him.

Georgetown capital trial;[10] it was a credible defense; he was thoroughly familiar with the case, and significant savings in time and resources would be saved if he represented Stanko again, i.e. another attorney would not have to get up to speed on the facts and defense. Diggs informed the Court that some continuity needed to be maintained with the previous defense team, and it only made sense that he be appointed since he was in charge of the medical testimony previously presented. Diggs informed the Court he had a good relationship with Stanko. (R. 2909-2928, Tr. November 15, 2006, pp. 1-19).

After hearing from Stanko and Diggs, Judge Baxley appointed Diggs as 1st chair capital counsel in this capital case. (R. 2909-2928, 3508, 3532, Tr. November 15, 2006, pp. 1-19 & Order Appointing Counsel). Judge Baxley also subsequently appointed Brana J. Williams, Esquire, as 2nd chair capital counsel on February 23, 2007, *not* Gerald Kelly, after hearing from Stanko and Diggs regarding their input for 2nd chair counsel. (R. 2909-2928, 3533, Tr. November 15, 2006, pp. 1-19 & Order Appointing Counsel, February 23, 2007).

The PCR Appointment of Counsel Hearing before Judge Baxley

Subsequently, Stanko, through appellate counsel Joseph Savitz and Katherine Hudgins, filed a PCR Application in the Georgetown capital case (the Ling murder). Judge Baxley was also assigned by this Court to that capital PCR matter. On December 8, 2008, Judge Baxley held an appointment of counsel hearing in the Georgetown capital PCR case. (R. 2929-2954, Tr. December 8, 2008, pp. 1-26). At that hearing, Stanko expressed his desire to have Diggs represent him in the Horry County capital case [Turner murder] even though he had filed a PCR application in

[10]As previously set forth in the statement of facts, Turner's murder occurred just a few hours after the murder of Ling and the attempted murder of her daughter.

Georgetown County regarding his conviction and death sentence for the Ling murder. Stanko informed Judge Baxley that he still desired to have Diggs represent him in the Horry County case/the Turner murder. Stanko explained to Judge Baxley that while Mr. Diggs may have made some mistakes in the Georgetown capital case, he would not make the same mistakes again, and Stanko still desired Diggs to represent him in the Horry County (Turner) capital case. Stanko further explained that the defense in this case was going to be the same, and Diggs was thoroughly familiar with the defense. Stanko also explained to Judge Baxley that he did not want to lose Diggs as his attorney in the Horry County (Turner) case because he filed a PCR action against Diggs in a separate case in Georgetown County. (R. 2947-2948, Tr. December 8, 2008, pp. 19-20).

Subsequently, Judge Baxley was removed as the trial judge for the Horry County (Turner) capital case. Judge Baxley remains the judge on the Georgetown capital PCR case. The Honorable Stephen H. John, Circuit Court Judge, was appointed by this Court to replace Judge Baxley and preside over this case (the Horry County capital case/the Turner murder).

The March 4, 2009 Hearing before Judge John

Judge John raised the issue of the viability of Diggs' continued representation of Stanko in light of the Georgetown PCR application at a March 4, 2009 hearing. Diggs informed Judge John that he had conferred with Stanko regarding any potential conflict, and Stanko still wished for Diggs to represent him in the Horry County death penalty case/the Turner murder. Judge John then questioned Stanko under oath. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

Stanko explained his PCR application was filed with the assistance of Katherine Hudgins of the Office of Appellate Defense to stop his death sentence. Stanko explained to Judge John that he did not agree with the allegations of the PCR application against Mr. Diggs, only those against Mr.

Kelly. Stanko also explained that any allegations he raised against Diggs in the future would not affect Diggs' representation in this case. Stanko further explained that he wanted Diggs to represent him in this case, the Horry County case, because Diggs was familiar with the defense, which was the same as that offered in the Georgetown case, and Diggs believed in his case. Stanko stated that he knew of no other attorneys who believed in his case more than Diggs and Brana Williams. Stanko insisted that Diggs be his attorney in the Horry County case. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

Judge John engaged in a detailed colloquy with Stanko regarding his desire to have Diggs represent him in his Horry County capital murder trial. Judge John specifically questioned Stanko regarding the potential conflict of interest with regard to the PCR application against Diggs in the Georgetown capital murder case. Stanko informed the Court that he wanted Diggs to remain on the Horry County case. Stanko informed the Court that he did not wish to waive any claims of ineffective assistance against Diggs in the Georgtown County case, but if that is what he would have to do to retain Diggs on the Horry County case, then he might just have to do that. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

Judge John also engaged in a detailed colloquy with Diggs regarding his representation of Stanko in the Horry County [Turner murder] case. Diggs assured the Court he had no problem with Stanko filing a PCR Application against him regarding the Georgetown County case, and he was ready and able to represent Stanko in the Horry County case. Diggs assured the Court the fact that Stanko had filed a PCR Application in Georgetown County would have no effect on his ability to represent Stanko in the Horry County case. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

After hearing from both Stanko and Diggs, Judge John allowed Diggs to remain as counsel

in the Horry County case because of Stanko's expressed desire, after careful thought, that Diggs remain on the case. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

The June 5, 2009 Hearing before Judge John

On April 28, 2009, the State filed a motion entitled "Motion and to Notice of Motion to Review Status of Counsel for Defendant in Light of Post-Conviction Relief Action in Companion Case." (See Motion). A hearing was convened into the State's Motion on June 5, 2009, where the issue of Diggs continued representation of Stanko in light of the Georgetown PCR application was again addressed by the Court, Mr. Diggs, and Stanko. (R. 2971-2990, Tr. June 5, 2009, pp. 1-20).

At the hearing, the Solicitor informed the Court that Stanko's filing of the PCR Application in Georgetown County had waived the attorney-client privilege necessary to defend those allegations. The Solicitor informed the Court that it would not seek in any way to call Mr. Diggs as a witness in the Horry County case or to take advantage of any waiver of the attorney-client privilege in the Georgetown County PCR case in the Horry County capital trial. The State asked the Court to explore with Mr. Diggs and Stanko whether this caused any conflict that would necessitate the removal of Mr. Diggs in the Horry County capital trial.

Judge John conducted a detailed colloquy with Mr. Diggs. Diggs informed the Court again that Stanko wanted Diggs to remain on the Horry County case as his attorney. Diggs assured the Court that the filing of the Georgetown PCR case had no impact on his relationship with Stanko and did not affect his ability to represent him in the current action. Diggs also assured the Court that the filing of the PCR application had no impact or interfered with his representation of Stanko in the Horry County case. Diggs also assured the Court that the filing of the PCR application itself caused him no problems with his client, as he was an experienced attorney, and he would do his utmost to

represent Stanko in this case.

Judge John also noted on the record that this was the 3rd time this issue had been discussed. Judge John noted that Judge Baxley conducted an extensive hearing of record where Mr. Stanko was questioned about Mr. Diggs representation because Judge Baxley was aware of the filing of the PCR Application. Judge John noted that Judge Baxley found at that time that Diggs continued representation of Stanko was proper. Judge John noted that he had also conducted a hearing in which he questioned Mr. Stanko about all of these matters and the Court found at that point in time, based on what Mr. Stanko had told him and his knowledge of his rights under the Sixth Amendment to the U.S. Constitution and the numerous U.S. Supreme Court cases and South Carolina cases like State v. Sanders, that Stanko was aware of the issue, and he wanted Mr. Diggs to continue his representation of him. (R. 2978-2979, June 5, 2009 Tr. pp. 8-9).

Ms. Williams also informed the Court that she had discussed with Stanko his meeting with his PCR attorneys in the Georgetown County case, and the allegations that would be asserted against Mr. Diggs in the Georgetown PCR were regarding failure to object to certain evidence or failure to cross-examine further or more of a trial technique, and she saw nothing that she was aware of that would be waiving any privilege with regard to their [her and Diggs'] current defense of Stanko in the Horry County case.

Judge John questioned Stanko under oath again. Stanko informed the Court that he had met with his PCR attorneys in the Georgetown County case and nothing had changed since the last time he spoke with Judge John. Stanko informed the Court that he continued to want Diggs to represent him in the Horry County/Turner death penalty case. Stanko informed Judge John that there was free and open communication between he and Mr. Diggs despite the fact that Stanko had filed a PCR

action against Diggs in the Georgetown County case. Stanko informed the Court that he and Mr. Diggs were able to fully discuss all issues that he [Stanko] deemed necessary. Stanko informed the Court Diggs was not unresponsive or harboring any ill feelings against Stanko because of the filing of the Georgetown County PCR action. Stanko also informed the Court that he did not anticipate any problems in the future. Stanko informed the Court that the issues he was going to be raising in his PCR that had anything to do with Mr. Diggs had nothing to do with any issues that would create a conflict or cause any communication problems between Mr. Diggs and himself. Stanko further clarified that he was not waiving any issues he raised in the Georgtown PCR, but that did not mean he did not have 100% trust in Mr. Diggs in the upcoming Horry County trial. And, Stanko informed Judge John that he trusted Mr. Diggs "one hundred percent" in his ability to properly represent him in this Horry County action. And, he continued to want Diggs to represent him in this case. (R. 2979-2982, June 5, 2009 Tr. pp. 9-12).

At the conclusion of the hearing, Judge John found that Stanko had expressed on more than one occasion his full and complete confidence in the abilities of Mr. Diggs to represent him in the Horry County capital case. There was free and open communication between the defendant and Mr. Diggs. Mr. Stanko had raised no issue that would impact Mr. Diggs ability to properly represent Mr. Stanko in the upcoming trial, and therefore, the Court found that Mr. Diggs could continue to represent Mr. Stanko in the trial in November of 2009. (R. 2984-2985, June 5, 2009, Tr. pp. 14-15).

The August 24, 2009 Hearing before Judge John

The issue was addressed again at the August 24th hearing before Judge John. The Solicitor marked as an exhibit a "Statement of the Attorney General" setting forth that the Attorney General's Office would have no contact with Mr. Diggs regarding the Georgetown County PCR case while

Diggs was preparing for and trying the Horry County death penalty case. (Court's Ex. 1, "Statement of the Attorney General"). Judge John indicated again on the record that Mr. Stanko had clearly expressed his desire that Mr. Diggs represent him in this case. Mr. Diggs informed the Court that Stanko's desire had not changed. Stanko also indicated to the Court there was no change in his position that Mr. Diggs continue to represent him in the Horry County death penalty case. Judge John noted on the record that this issue had been addressed by Judge Baxley and by himself twice, and Mr. Stanko remained steadfast in his desire that Mr. Diggs represent him in this case, and both Diggs and Stanko had expressed the complete ability to cooperate and to properly present the defense of Mr. Stanko in this matter. The Court also noted that it considered the issue resolved unless and until Mr. Diggs or Mr. Stanko raised the issue to the Court. (R. 3015-3020, Tr. August 24, 2009, pp. 5-10).

The issue was never again raised to the Court by Stanko, Diggs, or Brana Williams. The Horry County capital case proceeded to trial in November of 2009. The Georgetown capital PCR case is still pending and has not gone to trial.

There simply is no merit to this ground. First, Stanko waived and abandoned any issue regarding any conflict or potential conflict of interest by his own conduct and insistence that Diggs represent him in the Horry County case.

Further, neither Diggs nor Brana Williams raised any objection to Diggs appointment to represent Stanko in the Horry County case at any time from their appointment through the trial of the case. This issue was waived and abandoned at the trial level.

While Stanko's appellate counsel argues that he could not have waived any conflict because he is insane, the jury rejected this contention, and the record shows Stanko did not contend he was

insane during any pre-trial proceedings or during the trial, only at the time of the Turner murder. In fact, Stanko was examined and found competent to stand trial and to assist his attorneys in his defense in this case. (R. 3365-3378, Tr. Nov. 4, 2009, pp. 1-14). And, Stanko was found competent to stand trial at his previous trial in Georgetown County by both the State's examining psychiatrist and his own expert. (R. 3365-3378, Tr. Nov. 4, 2009, pp. 1-14). The record also shows Stanko was completely coherent, articulate, intelligent, and sane at all hearings regarding this issue. (R. 1-3507, See all Transcripts). This argument has no merit.

Stanko also argues the waiver was not proper because Judge John instructed Stanko and Diggs not to discuss the prior case. This is incorrect and is not supported by the record.

Judge John instructed Diggs that he was not to discuss the pending *PCR action* in Georgetown County with Stanko because Stanko *was represented by counsel* in that action. Judge John did not instruct Diggs and Stanko that they could not discuss the prior Georgetown County death penalty case. In fact, the record shows Stanko and Diggs indicated to Judge John that the pending PCR action had not prevented them from discussing all matters that they needed to discuss to prepare Stanko's defense, which necessarily included the prior criminal case in Georgetown County. There is a difference between not discussing the PCR case, on which Stanko was represented by collateral counsel, and discussing the prior criminal case. This argument has no merit.

Finally, on this record, Stanko has failed to establish an actual conflict in Diggs representing him in the Horry County/Turner death penalty case. Stanko has pointed to nothing in the transcript that indicates Diggs did not properly represent him in the Horry County/Turner murder case. Stanko has pointed to nothing in the record that would indicate the filing or pendency of the PCR action in

Georgetown County had any effect on Diggs' representation of Stanko in this present case. As a result, this appellate ground has no merit and must be denied.

ARGUMENT III.

The trial court did not err in denying Stanko's motion to disqualify Juror #480 where the juror indicated under oath she would decide the case based solely on the evidence produced in the courtroom during the trial and not on any outside information, and she clarified under oath that where an aggravating circumstance was proved she could consider *and* impose either a life sentence or death sentence depending on the circumstances.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010), *cert. denied*; State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)(*citations omitted*). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Id.; Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

In a capital case, a defendant has no right to a trial by any particular jury, only a right to a trial by a competent and impartial jury. State v. Caldwell, 300 S.C. 494, 338 S.E.2d 816 (1990); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the duty of the trial judge to see that a jury of unbiased, fair, and impartial jurors are impaneled. State v. Mathews, 291 S.C. 339, 353 S.E.2d 444 (1986).

The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and not reversible on appeal unless wholly unsupported by the

evidence. State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2009) *citing* State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert denied* 498 U.S. 881 (1990); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The voir dire examination of a juror must be viewed in its entirety to determine whether the trial judge erred in his qualification or disqualification of a prospective juror. State v. Green; State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987).

A juror must be excused from service if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985)(*quoting* Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521 (1980). *See also* Green, 301 S.C. at 354, 392 S.E.2d at 160.

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do...If even one such juror is empaneled and the the death sentence imposed, the state is disentitled to execute the sentence.

Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992). General protestations that the juror will follow the law, without the opportunity for further inquiry by the defendant, are not sufficient for "[i]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so." Id. at 734-36, 112 S.Ct. 2222. *See also* State v. Bennett, 328 S.C. 251, 257-58, 493 S.E.2d 845, 848 (1997)(holding juror's general statements he could be fair and impartial and follow the law were not sufficient in light of his later, unequivocal statement that he would just "go with the majority.").

As this Court recently held in State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895 (2011):

> This inquiry, however, "cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Wainwright, 469 U.S. at 424, 105 S.Ct. 844. Thus, the record may not be entirely clear to the point of "unmistakable clarity" as to the juror's views, and situations will arise

> where a circuit court simply is left with a "definite impression" of a juror's qualifications following voir dire. Id. at 425-26, 105 S.Ct. 844. "[T]his is why deference must be paid to the trial judge who sees and hears the juror." Id. at 426, 105 S.Ct. 844. Therefore, determinations of whether a juror is qualified to serve on a panel are left to the sound discretion of the circuit court. Green, 301 S.C. at 354, 392 S.E.2d at 160. In reviewing the circuit court's decision, we must examine the juror's responses in light of the entire voir dire and will not reverse the court's decision unless it is wholly unsupported by the evidence. Id. at 354, 392 S.E.2d at 160-61

Id. This Court's holding in Dickerson is controlling on this issue. The entire voir dire of Juror 480 shows she misunderstood the question or the law in responding to counsel's initial questioning regarding aggravating circumstances. (R. 624-646, Nov. 9-12 Tr. pp. 624-646). Upon further questioning by the trial judge, her responses to the Court's questions demonstrate she was Witherspoon[11] qualified. **(R. 624-646, Nov. 9-12 Tr. pp. 624-646).**

The record of the voir dire of Juror #480 shows that while she was familiar with Stanko's prior murder conviction and sentence, she testified she could disregard anything she knew about the case and decide this case based solely on the facts and evidence presented in the courtroom. **(R. 624-646, Nov. 9-12 Tr. pp. 624-646).** She was properly qualified in this regard. State v. Woods, 382 S.C. 153, 157, 676 S.E.2d 128 (2009)(critical issue is whether the jurors could set aside what they had read, seen, or heard and decide the case based solely on the evidence adduced at trial); State v. Evins, 373 S.C. 404, 645 S.E.2d 904, *cert. denied*, 128 S.Ct. 662 (2007)(same); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(similar); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(similar).

Additionally, while she initially testified on examination by Stanko's attorney that she would be inclined to impose death where an aggravating circumstance were found, the record shows she

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[11] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

was confused, as was Judge John by Stanko's attorney's questions in this regard. **(R. 624-646, Nov. 9-12 Tr. pp. 624-646).** When the law was explained to the Juror by Judge John, and she understood that a juror is never required to sentence someone to death, even when there is an aggravating circumstance proven, the Juror testified she could consider either a life or death sentence if an aggravating circumstance was proven, *and* she could impose either a life or death sentence if an aggravating circumstance was proven. **(R. 640-646, Nov. 9-12 Tr. pp. 640-646).**[12] The juror also indicated in her questionnaire that she was a Type III juror, that she could impose either a life or death sentence depending on the evidence presented in the case. **(R. 640-646, Nov. 9-12 Tr. pp. 624-646).** This appellate ground has no merit and must be dismissed with prejudice. State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895 (2011)(although juror unquestionably displayed equivocation on how he might vote should the State prove an aggravating circumstance, the State's rehabilitation revealed this was more the result of a misunderstanding of the trial process than any firmly held belief that he would automatically vote for the death penalty).[13] There is no merit to this appellate ground. Id.

Stanko also argues that it was error for Judge John to qualify this juror because she had heard or read that Stanko had been convicted of another murder and sentenced to death. This same argument has been previously raised to this Court and rejected several times. State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990)(no error committed where trial judge qualified two jurors to serve,

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[12]Stanko argues in his brief that Judge John only asked the juror whether she could *consider* a life sentence if an aggravating circumstance were proven, and this was not sufficient to qualify her. (See IBOA, p.38, ll. 9-11). However, the record shows Judge John not only asked the juror whether she could consider a life sentence if an aggravating circumstance were proven, but also if she could *impose* a life sentence if an aggravating circumstance were proven. She testified she could do both. **(R. 641-643, Nov. 9-12 Tr. pp. 641-643).** The juror was properly qualified. Dickerson.

[13]Dickerson was decided after Stanko filed his Initial Brief in this appeal.

who admitted to reading a newspaper article revealing defendant's prior death sentence, where each juror when questioned, stated they could put aside their prior knowledge, and follow the law); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)(nine jurors who knew that defendant had been convicted in a separate capital case and received the death penalty, were properly qualified). *See also* State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)(trial judge did not err qualifying seven jurors that knew something about the case, including some who knew of the defendant's prior conviction and death sentence for the same murder, where each juror stated that they would set aside such knowledge and base their verdict on evidence presented). There is no merit to this argument. This ground of Stanko's appeal must be dismissed.

ARGUMENT IV.

Judge John did not err in denying Stanko's motion for a change of venue, and even assuming error Stanko cannot show any prejudice on this record.

Stanko alleges Judge John should have granted a change of venue because he had been convicted and sentenced to death in neighboring Georgetown County and there was widespread publicity. Judge John did not err in denying the motion to change venue, and Stanko cannot demonstrate prejudice on this record.

"When a trial judge grants or denies a motion for a change of venue after adequate *voir dire* of prospective jurors, the decision will not be overturned absent extraordinary circumstances." State v. Woods, 382 S.C. 153, 157, 676 S.E.2d 128 (2009); State v. Evins, 373 S.C. 404, 645 S.E.2d 904, *cert. denied*, 128 S.Ct. 662 (2007). "The moving party has the burden of demonstrating actual juror prejudice." Woods, 373 S.C. at 157; State v.Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

"When jurors have been exposed to pretrial publicity, a denial of a change of venue is not

error where the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial." Evins, 373 S.C. at 412; State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). Therefore, the mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Id.

While there was certainly publicity surrounding these crimes, as in any capital case, the jurors were each questioned individually regarding what they had heard about the case. Each juror who was qualified and selected to serve in this case, if they had heard, read, or seen anything about the case, testified under oath that they could set aside what they knew or had heard and decide the case based solely on the evidence they heard in the courtroom. **(R. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719, Nov. 9-12 Tr. pp. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719).** The alternates testified similarly. **(R. 730-742, 746-757, 826-840, 904-916, Nov. 9-12 Tr. pp. 730-742, 746-757, 826-840, 904-916**). Stanko has presented no reason to question the sworn testimony of these jurors. Additionally, Stanko has pointed to no juror, of those qualified and not selected as petit jurors, who testified they could not set aside what they had read or heard about the case or any preformed opinion and decide the case solely on the facts and evidence presented in the courtroom. (See IBOA, p. 41, n. 9).

This Court has clearly held that the safest guarantee of a fair and impartial jury is voir dire. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007). Evins was a capital murder case that involved extensive pre-trial publicity including the fact that Evins had previously been convicted of sexual assaults and had been charged with another brutal murder in addition to the murder for which he was on trial. Even though some of the jurors in Evins had read about the other crimes, this Court held

that the trial judge did not err in refusing to change venue, finding the court's instructions and the jurors' answers under oath sufficient to insure a fair and impartial jury. Id. Given the Evins holding, the trial court's instructions in this case, and the jurors' sworn answers under oath that they would disregard anything they had read, heard, or seen about the case, and decide the case solely on the evidence presented at trial, Stanko has failed to show error or prejudice. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(when jurors have been exposed to pretrial publicity, a denial of a change of venue is not error where the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial); State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(reversing trial court's grant of a change of venue based on pretrial publicity because no evidentiary facts supported a finding of actual juror prejudice, the better practice is to try and seat a jury prior to ruling on a change of venue motion); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(indicating a change of venue motion should be based on voir dire, not pre voir dire public opinion surveys); *See also* State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(change of venue not required where jurors are found to be able to lay aside exposure and base verdict on evidence at trial); State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998)(relevant inquiry is whether jurors have such fixed opinions that they cannot judge evidence impartially, and credibility of juror responses is for trial court). Given the jurors' responses under oath that they would decide the case based solely on the evidence introduced at trial, and this state's legal precedential standard for a change of venue, Judge John did not err in denying the motion for a change venue. State v. Kelsey, 331 S.C. 50, 68, 502 S.E.2d 63, 72 (1998)(finding no error by denying change of venue when nine of twelve seated jurors had heard some coverage of the case but told judge they could set aside what they heard and decide case on evidence presented);

see State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)(no abuse of discretion to deny venue change when eleven seated jurors and two alternates acknowledged exposure to media coverage but said they could be impartial and decide case on evidence presented). *See also* State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008)("issues involved in a change of venue motion were recently addressed with certitude in State v. Evins.").

The issue is not whether the jurors had heard something about the case or whether there was publicity about the crimes prior to trial. Evins; Tucker; Manning. The critical issue is whether the jurors could set aside what they had read, seen, or heard and decide the case based solely on the evidence adduced at trial. Evins, 373 S.C. at 412, 645 S.E.2d. at 908. This ground of Stanko's appeal has no merit and must be dismissed.

Lack of Prejudice

Additionally, Stanko has failed to demonstrate prejudice. Stanko was tried by a fair and impartial jury. **(R. 1407-1412, 1418-1423, Nov. 13 Tr. pp. 133-138, 144-149).**

A criminal defendant has no right to any particular jury or jurors, but only a right to a trial by a competent and impartial jury. State v. Gaskins, 284 S.C. 105, 114 326 S.E.2d 132, 138 (1985), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368 (1985) *overruled on other grounds* Torrence, *supra*; State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Stanko has shown none.

The record shows that of Stanko's petit jury panel only (2) jurors had heard or read about Stanko's prior crimes in Georgetown County and heard or read something about the Horry County case. Both testified they had not formed an opinion about the case, and could set aside whatever they

had read or heard and decide the case based solely on the evidence presented in the courtroom. **(R. 81-97, 624-646, Nov. 9-12 Tr. pp. 624-646).** The remainder of the ten (10) petit jury panel members, and the four (4) alternates, either knew nothing about the case or only had heard the name of the defendant. **(See R. 1418-1421, Nov. 13 Tr. pp. 144-147).**[14]

Each juror who was seated on the petit jury panel, if they knew anything about the case, testified they would set aside anything that they had heard or seen outside the courtroom and decide the case and issues therein based only on the evidence introduced at trial. **(R. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719, Nov. 9-12 Tr. pp. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719).** The alternates testified similarly. **(R. 730-742, 746-757, 826-840, 904-916, Nov. 9-12 Tr. pp. 730-742, 746-757, 826-840, 904-916).** Stanko has not shown any of the jurors in this case violated their oath or sworn testimony to disregard anything they heard or saw in the press and decide the case solely on the evidence produced in the courtroom.

Furthermore, the fact that Stanko committed the Georgetown murder and attempted murder could not have prejudiced the jury's ultimate determination of sentence. The jury was fully aware Stanko had murdered his girlfriend Laura Ling, and kidnapped, raped her daughter, and tried to murder her through the testimony elicited during the Horry County trial. **(R. 2603-2696, Tr. pp. 2193-2286).** The jury was also aware Stanko had stolen Ling's car and gone to her bank and

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[14]This paragraph was corrected from the Initial Brief of Respondent with the consent of opposing counsel because of a factual error. Judge John's summary of the jurors selected on R. 1418-19, Tr. pp. 144-145 that only one (1) juror knew about the case is incorrect. Judge John was relying on his notes. Two jurors actually had heard about the case. Both testified they could set this aside and decide the case solely on the facts and evidence presented in the courtroom.

withdrawn money from her bank account before going to Turner's residence. **(R. 1473-1531, 1533-1547, 1549-1557, 1559-1571, 1575-1602, 1634-1668, 1670-1676, 1857, 2594-2606, 2608-2616, 2631-2675, 2677-2696, Tr. pp. 199-257, 259-273, 275-283, 285-297, 301-328, 360-394, 396-402, 1449, 2184-2196, 2198-2206, 2221-2265, 2267-2286).** These facts were properly before the jury, therefore Stanko cannot show prejudice in the penalty phase. Evins, 373 S.C. at 414. Additionally, the fact that Stanko had previously been sentenced to death for the Ling murder was elicited *by Appellant Stanko* from one of his mitigation witnesses in the penalty phase; therefore, any prejudice in this regard was brought about by Stanko. **(R. 2768-2769, Tr. p. 2358, ll. 1-9, p. 2359, ln. 15-16).**

Accordingly, Stanko's complaint regarding prejudice is necessarily limited to the guilt phase. Id., at 414. Given the overwhelming evidence presented during that phase of his trial, Stanko cannot show prejudice. The guilt phase jury knew Stanko had taken Ling's car, driven to her bank and withdrawn money, and then driven all the way to Conway from Murrell's Inlet. The jury also knew Stanko had deceived the victim into admitting him into his home, waited until the victim was distracted before attempting to murder him, approached the victim surreptitiously from behind and shot the victim in the back using a pillow as a silencer, shot the victim again in the chest while he was on his knees, removed items from the victim's pocket after he rendered him helpless, stole the victim's truck leaving Ling's red Mustang behind, and fled the coastal area of South Carolina. Considering this evidence along with the State's medical expert testimony that Stanko was not insane and did not have any brain abnormality, Stanko cannot show he suffered any prejudice. Id., at 414.

Inasmuch as the trial court was able to select an unbiased jury pursuant to this Court's mandate in Manning; Evins, and Woods, there was no error in failing to grant a change of venue. **(R.**

1418-1421, Nov. 13 Tr. p. 144, ln. 15 - p. 149, ln. 14). *See* Woods, 382 S.C. at 158. *Accord* State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007)(grant or denial of change of venue after adequate *voir dire* of prospective jurors will not be overturned except in extra-ordinary circumstances). This appellate ground has no merit and must be dismissed.

ARGUMENT V.

Judge John did not err by allowing jurors over sixty-five 65 years of age to be excused from jury service pursuant to S.C. Code Ann. Section 14-7-840.

Stanko alleges Judge John erred by excusing those jurors who were sixty-five (65) years or older who requested that they be excused, because *allegedly* this constituted the systematic exclusion of a fair cross-section of the community. Stanko is wrong.

South Carolina recognizes a difference between "exemptions" and "disqualifications" from jury service. An exemption from jury duty does not disqualify a person from jury service, but rather, it is a personal privilege that the juror may claim or waive, and if he does not claim his privilege the parties have no right to object to him on this account. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), *overruled on other grounds* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001), *affirmed as modified on writ of cert.*, 353 S.C. 539, 579 S.E.2d 318 (2003); State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986); State v. Graham, 79 S.C. 116, 60 S.E.431 (1908); State v. Toland, 36 S.C. 515, 15 S.E. 599 (1892); State v. Merriman, 34 S.C. 16, 12 S.E. 619 (1891). Conversely, a disqualification prohibits a juror from serving, regardless of whether or not the person desires to serve as a juror. Hughey, *supra*..

Pursuant to S.C. Code Ann. Section 14-7-840, men and women sixty-five (65) years of age

or over are *exempt* from jury service if *they* so *choose*. Hughey. They are not disqualified.[15]

Under the Sixth Amendment to the Constitution of the United States, a person charged with a crime has a right to a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 697 (1975). To establish his claim, Stanko must show there has been a systematic exclusion of a distinctive group in the community. Lockhart v. McCree, 476 U.S. 162, 174, 106 S.Ct. 1758, 1765 (1986). To show a prima facie violation of a defendant's federal constitutional Sixth Amendment right to a jury selected from a fair cross-section of the community the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664 (1979). To be "distinctive," a group must: (1) show a quality or attribute that defines or limits membership in the group; (2) possess a cohesiveness of ideas, attitudes, or experiences that distinguishes the purported group from the rest of society; and (3) share a community of interest that may not be represented in other segments of the population. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859 (2002); State v. Price, 301 N.C. 437, 445-46, 272 S.E.2d 103, 109 (1980); Commonwealth v. Manning, 41 Mass. App. Ct. 696, 673 N.E.2d 73, 75 (1996). Once the defendant makes out a prima facie case, the State may rebut it if "a significant [S]tate interest" is "manifestly and primarily advanced by those aspects of the jury-selection process

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[15]Under the former provisions of Article V, Section 22 of the 1895 Constitution of the State of South Carolina, each juror had to be a qualified elector, and between the ages of twenty-one and sixty-five years; and therefore jurors sixty-five and older were disqualified. State v. Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958); State v. Jones, 90 S.C. 290, 73 S.E. 177 (1912). That is no longer the case. *See* current S.C. Constitution, Article V., Section 22.

...that result in the disproportionate exclusion of a distinctive group." Duren, 339 U.S. at 367-368, 99 S.Ct. at 670.

The objective to be furthered by the fair cross-section requirement is the "assurance of a diffused impartiality." Commonwealth v. Soares, 377 Mass 461, 480, 387 N.E.2d 499 (1979). A jury need not mirror the population statistically to effectuate this goal. *See* Taylor v. Louisianna, 419 U.S. at 538, 95 S.Ct. at 701. States retain "broad discretion" and "remain free to prescribe relevant qualifications for their jurors and provide reasonable exemptions." Taylor, 419 U.S. at 538, 95 S.Ct. at 701. "Because a true cross section is practically unobtainable, courts have tended to allow a fair degree of leeway in designating jurors so long as the [S]tate or community does not *actively* prevent people from serving or actively discriminate, and so long as the system is reasonably open to all"(emphasis in original). Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985), *cert. denied* 475 U.S. 1050, 106 S.Ct. 1272 (1986).

Stanko's claim fails for several reasons. First, while age is a clearly identifiable factor, courts have recognized that age by itself does not generate similarity in attitudes and ideas, or demonstrate a commonality of interests that cannot be represented by citizens of a different age. Courts across the country that have considered a fair-cross section Sixth Amendment challenge to the type of age-based jury exemption provision presented here have rejected the same. *See* Stewart v. Carroll, 214 Ariz. 480, 154 P.3d 382 (Ct. App. Div. 1 2007)(finding statutory provision allowing jurors 75 years of age and older to opt out of jury service did not violate Arizona's constitutional rights to due process and a fair jury trial because under Arizona law these rights are identical to the federal rights and defendant failed to show those over 75 years of age and older constituted a distinctive group); Brewer v. Nix, 963 F.2d 1111 (8th Cir. 1992)(Iowa law exempting those over 65 from jury service

did not violate fair cross-section requirement because the group was not a distinctive group under Duren standards)[16]; Commonwealth v. Manning, 41 Mass. App. Ct. 696, 673 N.E.2d 73 (1996)(no violation of fair cross-section requirement in permitting senior citizens to be excused from jury duty at age 70 if they so choose); State v. Rodgers, 355 N.C. 420, 562 S.E.2d 859 (2002)(holding citizens over age of 65 do not make up a "distinctive group" for the purposes of determining whether defendant was denied his right to have a jury selected from a fair cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution or N.C. state constitution); Sellers v. State, 809 P.2d 676 (Okla. Crim. App. 1991); State v. Blunt, 708 S.W.2d 415 (Tenn. Crim. App. 1985)(refusing to hold, as the defendant alleged, that those 65 years of age and older are a distinctive group under a Sixth Amendment analysis); Weaver v. State, 823 S.W.2d 371 (Tex. Ct. App. 1992)(finding persons over the age of sixty-five (65) years of age did not constitute a "distinctive" group for Duren purposes); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990)(exemption of persons over 70 did not violate fair cross section because persons over the age of seventy did not constitute a "distinctive group" for purposes of the Sixth Amendment). *See also* Commonwealth v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980)(jury under-representation of 18 to 34 year olds not violative of Sixth Amendment as age not identifiable group and no intentional discrimination).

Furthermore, in the present case, the jurors Stanko objects to being excused from jury service were not systematically excluded as Stanko alleges. The jurors could have served if they wanted to. They were not disqualified. The jurors exercised their personal right to be exempted from jury service. S.C. Code Ann. Section 14-7-840; Hughey.

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[16]For example, the Court in Brewer noted that they saw no reason to believe that the qualities brought to a jury by people over sixty-five (65) could not be adequately represented by sixty (60) or fifty-five (55) year old jurors.

The Court did not disqualify or exclude them from jury service. Each juror exercised their personal right to be exempted. Stanko cannot show a certain portion of the community was systematically excluded from jury service where each individual juror made an *individual* decision to exercise their right to the exemption and not serve. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000)(an exemption from jury service is not a disqualification, but rather a personal privilege of the prospective juror, which the juror may claim or waive when deciding to serve on jury duty), *overruled on other grounds,* Rosemond v. Catoe. *See also* State v. Blunt, 708 S.W.2d 415 (Tenn. Crim. App. 1986)(finding defendant failed to prove systematic exclusion of a group where exemption of jurors over sixty-five (65) years of age was personal to each juror and jurors were summoned for jury service).

Furthermore, the record shows two (2) jurors over the age of sixty-five (65) chose to waive their personal exemption and serve. One juror was disqualified for a totally unrelated reason. The other juror was qualified and struck by Stanko. **(R. 531-532, 535, 494-495 511, 1311, Nov. 9-12 Tr. pp. 531-532, 535, 494-495, 511, Nov. 13 Tr. p. 37).** This ground has no merit and must be dismissed because jurors composing a certain portion of the community were not systematically excluded from jury service, but each individual juror sixty-five (65) years or older made his or her own personal choice to serve or not serve during that term of court. This appellate ground has no merit and must be dismissed.

Even if Stanko could make out a prima facie case, his claim would have to be rejected. Stanko has failed to show that this historically common exemption deprived him of a fair and impartial jury or otherwise frustrated the purposes of the Sixth Amendment's fair cross-section requirement. Brewer v. Nix, 963 F.2d 1111 (8th Cir. 1992); Silagy v. Peters, 905 F.2d 986,1011 (7th

Cir. 1990)(ultimate concern of the fair cross-section requirement is to ensure that each criminal defendant be afforded his constitutional right to an "impartial jury."). Accordingly, Stanko has failed to prove a Sixth Amendment violation. Id.

Furthermore, the exemption attacked by Stanko is a reasonable exemption. *See* Commonwealth v. Manning, 41 Mass. App. Ct. 696, 673 N.E.2d 73 (Mass App. 1996)(holding it was not unreasonable for legislature to have determined that, after persons had been subject for fifty-two years to compulsory service on juries, their civic duty on that score had been discharged); Sellers v. State, 809 P.2d 676 (Okla. Ct. Crim. App. 1991)(finding age exemption for jurors reasonable given the higher rate of infirmities suffered by the elderly and the likelihood of substantial hardship if they are compelled to travel and serve lengthy jury terms justified exemption); Weaver v. Texas, 823 S.W.2d 371 (1992)(age based exemption bore a fair and substantial relation to the objects that the legislation was designed to accomplish); State v. Rogers, 355 N.C. 420, 562 S.E.2d 859 (2002)(rational basis of allowing trial judges to excuse jurors based on advanced age is readily apparent).

As a result of all of the foregoing, this appellate ground has no merit. It must be denied.

ARGUMENT VI.

Judge John did not err in ruling that appellant's death sentence was not a violation of the Eighth Amendment to the United States Constitution.

In this appellate ground, Stanko alleges Judge John erred in not vacating his death sentence because he is a mentally infirm person. This ground has no merit for several reasons.

First, Stanko does not fall under any classification that has been recognized that would exempt him from application of the death penalty. Stanko is not mentally retarded; he has an I.Q.

of 143. (R. 2233, Tr. p. 1825). *See* Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002)(Eighth Amendment prohibits the execution of mentally retarded); State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003)(defining mental retardation). Stanko was forty-seven (47) years old at the time of the murder of Henry Turner. *See* Roper v. Simmons, 543 U.S. 551,125 S.Ct. 1183 (2005)(Eighth Amendment prohibits execution of those under the age of 18 at the time of the crime). Furthermore, the State proved Stanko's sanity beyond a reasonable doubt. (R. 1707-1724, 1730-1746, 2278--2410, Tr. pp. 1299-1316, 1322-1338, 1870--2002). The jury rejected the verdict of insanity. (R. 2474-2476, 2482-2485, Tr. pp. 2066-2068, 2074-2077). Therefore, Stanko does not fall under this exemption. *See* Ford v. Wainwright, 477 U.S. 399 (1986)(Eighth Amendment precludes the execution of one who is insane).

Second, to date, Respondent is unaware of **any** majority decision by any state or federal court in the United States that would support such a classification as Stanko is suggesting. *See e.g.* State v. Irick, 320 S.W.3d 284, 297-98 (Tenn. 2010); Mays v. State, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); Johnston v. State, 27 So.3d 11, 26-27 (Fla. 2010); Commonwealth v. Baumhammers, 599 Pa. 1, 960 A.2d 59 (2008). *See also, e.g.* ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007); In re Neville, 440 F.3d 220, 221 (5th Cir. 2006)(*citing* In re Woods, 155 Fed. Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir., Nov. 17, 2005)(unpublished); State v. Ketterer, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006); Matheney v. State, 833 N.E.2d 454 (Ind. 2005); Hall v. Brannan, 284 Ga. 716, 670 S.E.2d 87 (2008); Coleman v. State, No. W2007-0267-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App., Jan 13, 2010)(unpublished), *reversed on other grounds* 341 SW3d 221 (Tenn. 2011). In fact, this Court has rejected a similar argument and held that a defendant found guilty but mentally ill or who pleads guilty but mentally ill may be sentenced to death. State v. Weik, 356 S.C. 76, 587

S.E.2d 683 (2002), *cert. denied June 16, 2003*; State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992).

Further, Stanko cannot demonstrate a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally disabled offenders. Mays, 318 S.W.3d at 379 & n. 25; Irick, *supra*; Johnston, 27 So.3d at 26-27.[17] Finally, Stanko has failed to show that whatever mental impairment he may have had at the time of the murder, if any, was so severe that he is necessarily and categorically less morally culpable than those who are not mentally disabled.[18] Mays, *supra*. Thus he cannot show error or prejudice. This appellate ground has no merit and must be dismissed.

Fourth, the jury rejected verdicts of both insanity and guilty but mentally ill. (R. 2482-2485, Tr. pp. 2074-2077). The jury determined Stanko was not mentally infirm.

As a result of all of the above, this ground has no merit. This ground of Stanko's appeal must be denied.

Proportionality Review

Respondent respectfully submits that pursuant to S.C. Code Ann. Section 16-3-25(c), the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(death sentence warranted where defendant convicted of murder

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[17]The Court in Irick pointed out that "Connecticut appears to be the only state that has adopted a statute barring the execution of offenders, who at the time of the offense, had a 'significantly impaired . . . ability to conform [their] conduct to the requirements of law.' Conn. Gen. Stat. Ann. 53a-46a(h)."

[18] The jury rejected verdicts of not guilty by reason of insanity and guilty but mentally ill. **(R. 2474-2476, 2482-2485 Tr. pp. 2066-2068, 2074-2077).**

and armed robbery and jury found aggravating circumstances of murder in commission of robbery with a deadly weapon and murder during commission of a larceny with a deadly weapon, and defendant confessed to separate murder prior to present trial); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996)(murder of store owner in commission of attempted armed robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996)(murder of convenience store owner during commission of an armed robbery); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981); State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996); State v. Damon; 285 S.C. 125, 328 S.E.2d 628 (1985).

CONCLUSION

For the above stated reasons, Stanko's convictions for murder and armed robbery and his sentences should be affirmed.

Respectfully submitted,

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By: _____
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July 23, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

STATE OF SOUTH CAROLINA,

Appellant,

v.

STEPHEN CHRISTOPHER STANKO,

Respondent

Appellate Case No. 2010-154746

CERTIFICATE OF COMPLIANCE

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

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July 23, 2012

CERTIFICATE OF SERVICE

I, J. Anthony Mabry, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the Interagency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 23rd day of July, 2012.

J. ANTHONY MABRY
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

July 23, 2012

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

Re: The State v. Stephen Christopher Stanko
Appellate Case No. 2010-154746

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the ***Final Brief of Respondent*** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosures

cc: Robert M. Dudek, Esquire
J. Gregory Hembree, Solicitor
Sandi Wofford, Victims Assistance