STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County
Deadra L. Jefferson, Circuit Court Judge

THE STATE,

Respondent,

v.

STEPHEN C. STANKO,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

P.O. Drawer 1276
Conway, SC 29528-1276
(843) 915-5460

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County
Deadra L. Jefferson, Circuit Court Judge

THE STATE,

Respondent,

v.

STEPHEN C. STANKO,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

P.O. Drawer 1276
Conway, SC 29528-1276
(843) 915-5460
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

Brief Factual Summary

On April 8, 2005, Appellant Stephen Stanko murdered 15 year old Christina Ling's mother, Laura Ling, and brutally raped Christina. Stanko also attempted to kill Christina by smothering her and cutting her throat. Miraculously, Christina lived to testify at Appellant's trial. A Georgetown County jury convicted Stanko of all charges. The jury sentenced Appellant to death.

Respondent's Statement of Facts

(The Murder and Rape)

On the evening of April 7, 2005, Christina Ling was working on a term paper at her home in Murrell's Inlet, S.C. Ling went to bed around 11:00 p.m. (R. 1252; 8-7-06 Tr. p. 80, ll. 8-21) At approximately 1:15 a.m., she was awakened by Appellant, her mother's boyfriend, trying to sexually assault her. (R. 1253-56; 8-7-06 Tr. p. 81, l. 1- p. 84, l. 20) Christina fled to her mother's bedroom. (R. 1253-57; 8-7-06 Tr. p. 81, l. 1-p. 85, l. 11)

Christina found her mother semi-conscious between the bed and the bedroom wall with her hands tied behind her back. (R. 1257, 1407-08; 8-7-06 Tr. p. 85, ll. 12-22, p. 235, l. 20-p. 236, l. 24) Stanko followed Christina into her mother's bedroom and knocked Christina unconscious. (R. 1257-58; 8-7-06 Tr. p. 85, l. 21-p. 86, l. 11) When Christina regained consciousness, her arms were tied, she was gagged, and Appellant was sexually assaulting her.[1] (R. 1258-59; 8-7-06 Tr. p. 86, l. 12-p. 87, l. 24) Appellant beat Christina until she yielded to the sexual assault. (R. 1260; 8-7-06 Tr. p. 88, ll. 1-13) While Stanko raped Christina, Christina could hear her mother moaning on the

---

[1]Christina's mother was also gagged. (R. 1795; 8-7-06 Tr. p. 621, ll. 9-12) Her autopsy revealed she had been savagely beaten before her death. (R.1412-1415; 8-7-06 Tr. p. 240, l. 9-p. 243, l. 7) She died as a result of asphixia due to strangulation. (R. 1418; 8-7-06 Tr. p. 246, ll. 16-24) Her throat was also cut. (R. 1415; 8-7-06 Tr. p. 243, ll. 12-25)

floor beside the bed. (R. 1259; 8-7-06 Tr. p. 87, ll. 13-19) Stanko then turned Christina over and tried to smother her while he choked the life out of her mother with his free hand. (R. 1262-63; 8-7-06 Tr. p. 90, l. 4-p. 91, l. 14) Appellant then slit Christina's throat twice with a knife.[2] (R. 1264; 8-7-06 Tr. p. 92, ll. 6-18)

During the assault and after, Stanko spoke to Christina. Stanko held a sharp object to her throat and whispered to her, "..scream and I'll kill you both." (R. 1254; 8-7-06 Tr. p. 82, ll. 3-20) After killing her mother, Appellant told Christina that what had happened to her mother was her, Christina's, fault.[3] (R. 1264, 1291-92; 8-7-06 Tr. p. 92, l. 1 & p. 119, l. 23-p. 120, l. 12)

(The Robbery, Coverup and Flight)

After murdering Laura and raping Christina, Stanko showered, dressed, packed a suitcase, and went through Christina's and Laura's purses removing belongings.[4] (R 1265-66, 1268, 1541-42, 1575; 8-7-06 Tr. p. 93, ll. 6-14; p. 93, l. 20- p. 94, l. 23, & p. 96, ll. 11-25, p. 368, ll. 14-25, p. 369, ll. 1-11, p. 401, ll. 2-25) Appellant also removed a bracelet from Laura's dead body. (R. 1801, 1887; 8-7-06 Tr. p. 627, ll. 15-19, p. 713, ll. 7-11) Stanko locked the door as he left the house and

---

[2]The emergency room doctor testified that Christina's ear was almost completely severed from her head. (R. 1311; 8-7-06 Tr. p. 139, ll. 13-20)

[3]Appellant also taunted the minor victim during the sexual assault. When Christina told him she was going to be sick, Stanko told her "..well, you will just be sick on yourself." (R. 1261; 8-7-06 Tr. p. 89, ll. 1-3) When she told him her fear of getting pregnant, Stanko told her "[w]ell then, your going to be raising a baby by yourself..." (R. 1261; 8-7-06 Tr. p. 89, ll. 4-6) During the sexual assault, Stanko also accused the 15 year old victim of being promiscuous. (R. 1261; 8-7-06 Tr. p. 89, l. 8-11). After cutting her throat, Appellant told her to lie down on the floor next to her mother. (R. 1264; 8-7-06 Tr. p. 92, ll. 16-18).

[4] After her throat was cut, Christina used all her strength to sit up. When she did she saw Stanko packing the suitcase. While packing the suitcase, Appellant told Christina to "...no, no, no, lie back down." (R. 1265; 8-7-06 Tr. p. 93, ll. 6-14). Christina then passed out.

then left the crime scene driving Laura Ling's car. (R. 1236, 1246, 1249; 8-7-06 Tr. p. 64, ll. 13-25; p. 74, ll. 3-20; p. 77, ll. 14-16).

Appellant then made a large withdrawal from Laura's bank account using an ATM machine, used her credit card to make a purchase, and drove to a friend's residence in Conway, S.C., in Laura's car. (R. 1369-73, 1382, 1385, 1575-76; 8-7-06 Tr. p. 197, l. 13- p. 201, l. 9; p. 210, ll. 2-22; p. 213, ll. 4-7, p. 401, l. 12- p. 402, l. 2) Later that morning, Stanko called Laura's employer, the Socastee Library, and informed them that Laura would not be coming into work because she had suffered food poisoning and was hospitalized.[5] (R. 1374-80; 8-7-06 Tr. p. 202, l. 12-p. 208, l. 6) Appellant did not believe the bodies of Laura and Christine would be discovered for at least a week. (R. 1888; 8-7-06 Tr. p. 714, ll. 11-16)

That same day, Appellant murdered the friend he was staying with, Henry Turner, and fled to Columbia in Turner's truck.[6] (R. 1887, 1470-71; 8-7-06 Tr. p. 713, ll. 18-23; p. 297, l. 17-p. 298, l. 5) Stanko abandoned Laura Ling's car at the second murder victim's home in Conway. (R. 1381-85; 8-7-06 Tr. p. 209, l. 4-p. 213, l. 7)

---

[5]Unbeknownst to Stanko, Christina had survived and alerted authorities to her mother's murder by calling 911. (R. 1269-70; 8-7-06 Tr. p. 97, l. 7-p. 98, l. 25) Sheriff's deputies broke the lock on the front door and found Christina inside covered in blood. (R. 1237; 8-7-06 Tr. p. 65, ll. 1-23) As a result, the operator at the Socastee library was already aware of Laura's murder and notified authorities of Appellant's deceptive phone call. (R. 1376-80; 8-7-06 Tr. p. 204, l. 9-p. 208, l. 14)

[6]The State did not seek to introduce evidence of this murder in its case during the guilt phase. The trial judge refused to allow the State to cross-examine Appellant's psychiatric expert's about the Turner murder in the guilt phase. Evidence that Stanko committed this murder was not allowed in the penalty phase of the Ling murder trial either. The trial court only allowed the State to introduce evidence that Appellant left Ling's vehicle at Turner's residence and took Turner's truck to Columbia, S.C. and had Turner's gun & truck when arrested. The key fob to Ling's mustang was found in Turner's truck. (R. 2611; 8-14-06 Tr. p. 363, ll. 4-11) A notebook with Ling's name on it was also found in the truck. (R. 2615; 8-14-06 Tr. p. 367, ll. 10-13).

Stanko was seen that evening, April 8th, partying at a bar in the Congaree Vista area of Columbia, S.C. (R. 2550, 2552-53, 2554; 8-14-06 Tr. p. 302, ll. 21-23, p. 304, l. 16-p. 305, l. 18; p. 306, ll. 11-24). While there, Appellant represented himself variously to be a real estate magnate who had just closed a big deal, a graduate of The Citadel, and an employee of a company traded on the New York Stock Exchange. (R. 2543-44, 2559; 8-14-06 Tr. p. 295, l. 5-p. 296, l. 12; p. 311, ll. 7-23). Stanko was witnessed spending large amounts of money at this establishment and another. (R. 2545; 8-14-06 Tr. p. 297, ll. 2-5)

Shortly thereafter, Appellant drove to Augusta, Georgia, where the Master's golf tournament was occurring. On April 9th, Stanko was seen once again visiting a nightclub and began a new romance representing to others, including his new girlfriend, Dana Putnam, that he was the owner of several "Hooter's" restaurants in South Carolina. (R. 2562, 2564-65; 8-14-06 Tr. p. 314, ll. 1-14, p. 316, l. 3-p. 317, l. 13). Stanko gave Putnam the bracelet he had removed from Ling's wrist after her murder. (R. 2585-86, 2876; 8-14-06 Tr. p. 337, l. 8- p. 338, l. 2; 8-7-06 p. 627, ll. 17-19) After the passage of a few days, Appellant's new girlfriend recognized Stanko's photo in a newspaper article regarding the coastal South Carolina murders, and she immediately notified police. (R. 2588-90; 8-14-06 Tr. p. 340, l. 17-p. 342, l. 14) U.S. Marshalls were allowed to place a trace on her phone and Appellant was subsequently arrested at a shopping mall and extradited to South Carolina for both murders and the crimes against Christina. (R. 2603-06; 8-14-06 Tr. p. 355, l. 13-p. 358, l. 10) At the time of his arrest, Appellant was in possession of Turner's truck. (R. 2609-18; 8-14-06 Tr. p. 361, l. 11-p. 370, l. 13)

The Trial

Appellant's capital trial took place in July and August of 2006. Testimony was elicited in

both the guilt and penalty phases of the trial that Stanko had previously been convicted of tying up and assaulting another female victim in February of 1996. (R. 2430-31, 2870; 8-14-06 Tr. p. 182, l. 22-p. 183, l. 12; 8-7-06 p. 621, ll. 1-8) This victim was also gagged. (R. 2313, 1795; 8-14-06 Tr. p. 65, ll. 7-12; 8-7-06 p. 621, ll. 6-8) At the time that assault occurred, Stanko was on the verge of being arrested for several "scams" or "cons" he was committing in the Charleston area of South Carolina, and Stanko was in danger of being exposed to police by that female victim. (R. 2312-13, 2431-33; 8-14-06 Tr. p. 64, l. 9-p. 65, l. 21; p. 183, l. 13-p. 185, l. 14)

At the time of Laura Ling's murder, Stanko was once again running several scams, this time in the Myrtle Beach area of South Carolina. Stanko was representing himself to be a "lawyer," "paralegal," or "investigator" for law firms and as a result was able to obtain retainers from various clients around Murrell's Inlet.[7] (R. 2443-2475, 2476-79, 1799; 8-14-06 Tr. p. 195, l. 6-p. 227, l. 10; p. 228, l. 4-p. 231, l. 12; 8-7-06 p. 625, ll. 11-15) Reportedly, Stanko operated his "practice" out of the library where Laura Ling worked. (R. 1855-56; 8-7-06 Tr. p. 681, l. 15-p. 682, l. 20) In the days leading up to the Ling murder, once again Stanko's "cons" and "scams" were on the verge of being exposed. (R. 1394-95, 1763-64; 8-7-06 Tr. p. 222, l. 1-p. 223, l. 22; p. 589, l. 17-p. 590, l. 17) Victims of Stanko's latest schemes were demanding of him the return of their money and threatening to go to the police. (R. 2815, 2838-39; 8-14-06 Tr. p. 566, ll. 15-17; p. 589, l. 17-p. 590, l. 10).

The Guilt Phase

The evidence of Appellant's guilt was overwhelming. In addition to the testimony of

---

[7]According to one victim, Stanko forged a Circuit Judge's signature on a court document. (R. 2810-14; 8-14-06 Tr. p. 561, l. 25-p. 565, l. 5)

Christina, D.N.A. evidence linked Stanko to both the murder scene and the 15 year old victim. (R. 1395-98; 8-7-06 Tr. p. 223, l. 20-p. 226, l. 25) Surveillance photos from Laura's bank captured Stanko removing cash from Laura's account after the murder and rape. (R. 1371-72; 8-7-06 Tr. p. 199, l. 9-p. 200, l. 12). Appellant's briefcase was found in Laura's abandoned car at Turner's residence in Conway. (R. 1382, 1384, 1385; 8-7-06 Tr. p. 210, ll. 16-22; p. 212, ll. 8-23; p. 213, ll. 4-7)

At trial, Stanko alleged he was insane at the time of the Ling murder and the rape of Christina. Stanko called five experts regarding his sanity. Collectively they testified Stanko was a genius, however several opined that the portion of his brain that controls emotions or impulses was either not properly formed and/or did not function properly. These experts testified that due to these brain defects Stanko was a "psychopath" who could not distinguish moral and legal right from moral and legal wrong at the time of the murders.[8] (R. 1767; 8-7-06 Tr. p. 593, ll. 5-23)

The State called four experts in reply. The State's experts, reviewing the same M.R.I., P.E.T. scans, and evidence as Appellant's experts, testified there was nothing wrong or abnormal with Stanko's brain, and that Appellant suffered only from anti-social personality disorder and narcissism. (R. 3061, 2954-55; 8-7-06 Tr. p. 812, ll. 2-12; p. 705, l. 18-p. 706, l. 15) The State's psychiatric expert testified, based on the evidence, including Stanko's actions during and after the

---

[8]Appellant's expert Dr. Sachy testified that Appellant was a psychopath like Ted Bundy, John Wayne Gacy, or the fictional character Hannibal Lecter. (R. 1767, 1781-82, 1790, 1797-98; 8-7-06 Tr. p. 593, ll. 5-15; p. 607, l. 22-p. 608, l. 13; p. 616, ll. 17-21; p. 623, l. 22-p. 624, l. 4) In his *in camera* testimony, Sachy also compared Appellant to a great white shark. (R. 75, 82; 7-31-06 Tr. p. 75, ll. 6-10; p. 82, ll. 3-16) However, Dr. Sachy testified that Appellant was either born this way or it was thrust upon him, so it was not his fault that he could not distinguish moral right from moral wrong.

crimes, that Stanko was neither insane, nor guilty but mentally ill, at the time of these crimes.[9] (8-7-06 Tr. p. 715, ll. 9-21) After approximately seven (7) hours of deliberations, the jury agreed with the State's experts and not with Appellant's experts' regarding Stanko's sanity. Appellant was found guilty of all charges in the indictment.

The Penalty Phase

In the penalty phase of Appellant's trial, the State introduced Stanko's extensive criminal record. Appellant was convicted in 1995 of two counts of Breach of Trust and placed on probation. (8-14-06 Tr. p. 190, l. 24-p. 192, l. 12) Stanko was then convicted in 1996 of Kidnapping, ABHAN, several counts of Breach of Trust, and Obtaining Goods by False Pretenses. (R. 2440-42; 8-14-06 Tr. p. 192, l. 13-p. 194, l. 21) In the penalty phase, the State introduced testimony from Elizabeth Buckner, Stanko's first victim of Kidnapping and Assault. Buckner testified how Stanko had bound her and gagged her with a cloth soaked in Clorox. (R. 2312-13; 8-14-06 Tr. p. 64, l. 9-p. 65, l. 12) Appellant received a ten (10) year prison sentence for the crimes against Buckner and others, of which he served eight and one half (8 ½) years.

Appellant was released from prison approximately nine (9) months before the murder of Laura Ling and rape of Christina. Appellant was on supervised release at the time he was "conning" victims out of their money in Murrell's Inlet and at the time he murdered Ling and raped her daughter. The State also introduced several of the victims of Stanko's most recent "cons" including

---

[9]Dr. Pam Crawford, a forensic psychiatrist, pointed to several facts establishing Stanko's sanity including taking money from the bank, calling Laura's boss, switching cars, and after murdering Laura and cutting Christina's throat, taking things from the house including remembering to pack his electric guitar before leaving Murrell's Inlet. (R. 1887; 8-7-06 Tr. p. 713, ll. 7-23)

a mechanic and the widow of a deceased veteran.[10] (R. 2451-2467, 2468-2475; 8-14-06 Tr. p. 203, l. 5-p. 219, l. 22; p. 220, l. 16-p. 227, l. 10) Additionally, the State re-called the pathologist who testified to the "torture" of Laura Ling before her death. (R. 2645-2669; 8-14-06 Tr. p. 397, l. 8-p. 421, l. 25) The State was not allowed to elicit testimony regarding the Turner murder. (R. 2640; 8-14-06 Tr. p. 392, ll. 1-7) The State also called victim impact witnesses regarding characteristics of the victim and the impact of the murder of Laura on her friends and family. (R. 2672-2687, 2688-2704; 8-14-06 Tr. p. 424, l. 10-p. 439, l. 6; p. 440, l. 15-p. 456, l. 6)

In the penalty phase, Appellant recalled several of his medical and psychological experts regarding his mental deficiencies, but also called a victim of one of his financial schemes to testify that Appellant's behavior was "bizarre."[11] Appellant's trial counsel argued through this witness that some law enforcement or government agency should have stopped Appellant before he killed Laura Ling.[12] (R. 2836; 8-14-06 Tr. p. 587, ll. 11-25) Appellant also argued through his experts' and Price's testimony that he had diminished capacity at the time of the crime. Appellant also called an

---

[10]In addition to holding himself out as a legal professional, Appellant also solicited donations to a non-existent charity. This evidence was also admitted in the penalty phase of Stanko's capital trial. (R. 2443-49; 8-14-06 Tr. p. 195, l. 6-p. 201, l. 15)

[11]This witness, Connie Price, testified that she found Stanko's behavior bizarre because he would not show up for meetings, would show up after stating he was going to be late, repeatedly lied to her, and forged documents. (R. 2855-57; 8-14-06 Tr. p. 606, l. 19-p. 608, l. 25) Stanko forged Judge Victor Rawl's signature on documents he prepared for Ms. Price. (R. 2810-14; 8-14-06 Tr. p. 561, l. 25-p. 565, l. 5) She also testified she was afraid of Stanko. She did not trust him. (R. 2863; 8-14-06 Tr. p. 614, ll. 7-8)

[12]Appellant called several witnesses from various state and federal agencies who established that witness Price did complain about Appellant's criminal conduct before the murders. These witnesses could not testify regarding Appellant's conduct. Though Appellant's counsel claimed otherwise at trial, the sole purpose for calling these witnesses could only have been to bolster Price's testimony that nothing was done by anyone to stop Stanko before the murders.

expert in family dynamics who testified that Appellant's actions were in large part determined by the dysfunctional family from which he came. (R. 3277-3304; 8-14-06 Tr. p.1027, l. 17- p. 1054, l. 14) Additionally, Appellant called several high school teachers and his principal to testify to his character. Appellant also called family friends, who knew Appellant when he was a youth, to testify regarding his conduct and the dynamics of his family.

After deliberating approximately three and one half (3½) hours, the jury found the aggravating circumstances of kidnaping, criminal sexual conduct, armed robbery, larceny with a deadly weapon and torture. (R. 3518; 8-14-06 Tr. p. 1268, ll. 16-25) The jury recommended a sentence of death. (R. 3519; 8-14-06 Tr. p. 1269, ll. 8-20)

ISSUE I.

The trial judge could not have erred as alleged because Appellant explicitly abandoned any attempt or request to question jurors regarding whether they would "consider" an insanity defense conceding such voir dire was not proper and the issue was adequately covered by the trial judge's voir dire; rather Appellant requested that he be allowed to question certain potential jurors, who were otherwise disqualified, regarding an insanity defense in an attempt to qualify these jurors and was not prohibited from doing so, therefore he received the remedy he requested, and his trial was not fundamentally unfair.

Abandonment and Failure to Preserve

Appellant's request to voir dire certain jurors concerning insanity was explicitly abandoned by Appellant below. (R. 296, 298; 7-31-06 Tr. p. 296, ll. 12-25; p. 298, ll. 5-15) At trial, defense counsel Gerald Kelly abandoned his attempt to question a particular juror, and other similar jurors, regarding whether they could consider an insanity defense conceding the trial court's voir dire was sufficient. (R. 296, 298; 7-31-06 Tr. p. 296, ll. 12-25; p. 298, ll. 5-15) Because he abandoned this issue below, his present contention that the trial judge committed reversible error is a misunderstanding of the record by Appellant. Not only was this issue abandoned at trial, but this issue was also not preserved for appellate review by a contemporaneous objection. (R. 298-99; See 7-31-06 Tr. p. 298, l. 5-p. 299, l. 24)

A. How The Claim Was Abandoned

The first mention of Appellant's intention to question a juror regarding Appellant's mental state or insanity defense occurred during individual voir dire of Juror #191, Mable Morris Lambert.[13]

Juror Lambert was the 10th juror to be examined by the court and trial counsel during individual voir dire. Prior to this juror, there were no questions put to any juror regarding any mental mitigating circumstance or the defense of insanity, nor was there any request for any voir dire on

Because of the different progression of the issue, it is useful to review the voir dire in depth. The following took place during Appellant's examination of Juror Lambert.

> *Q:* And would you listen to all the evidence that's presented to you and give it equal weight?
>
> *A:* Yes, sir. I can.
>
> *Q:* So one of the issues that's in this case is the mental state of the Defendant at the time of the alleged crimes.
>
> Mr. Humphries: I'm going to object to any specific questions regarding that issue.
>
> The Court: And that would be sustained. I assume Mr. Kelly knows the parameters.
>
> Mr. Humphries: Thank you, Your honor.
>
> The Court: I'm going to listen to the whole question first, though.
>
> *By Mr. Kelly:*
> *Q:* The question is this, has to - - one of the issues is going to be the mental state of the Defendant as to whether or not he was insane–
>
> The Court: That would be an improper question, I've asked that you can consider mitigating circumstances and aggravating circumstances and I've deliberately given examples that were different from this - -
>
> Mr. Kelly: Outside the hearing of the juror, please?
>
> The Court: Certainly. Ma'am, if you would please go with the bailiff for me for a moment. And please do not discuss what we have been discussing with anyone.
> (Juror Out of Courtroom)
>
> The Court: And I apologize Mr. Kelly. I was sustaining the State's objection. I think that you can ask general questions. You cannot ask

---

these subjects submitted to the court during general voir dire of the panel or before the trial courts' individual voir dire of each juror. (R. 104-05, 122, 222-274; See 7-31-06 Tr. p. 104, l. 13 - p. 105, l. 7; p. 122, l. 18-p. 155, l. 22; p. 222, l. 22-p. 274, l. 13)

> specific questions that relate directly to the facts and circumstances of this case. It would be improper. And that is why when I asked about aggravating and mitigating circumstances, I deliberately from the list did not include anything that bore directly on the facts of this case. I picked examples that were not like this case for that very reason. I think you might be able to rephrase your question.
>
> Mr. Kelly: I'm merely asking for instruction from the bench in this matter and - - (R. 283-84; 7-31-06 Tr. p. 283, l. 1-p. 284, l. 16)

Discussion of this issue continues for approximately fourteen (14) more pages of the record with the trial court suggesting possible ways to frame the question:

> *The Court:* I think that you would have to rephrase it to say, could you consider affirmative defenses and list them all, but not insanity by itself. But I don't know that I could agree with that either. I'm going to have to do some research for a quick minute. (R. 286; 7-31-06 Tr. p. 286, ll. 6-11)

The trial judge also asked Appellant's counsel to submit any legal authority he had for asking this specific question. (R. 295; 7-31-06 Tr. p. 295, ll. 1-25) Trial counsel submitted no authority. During the colloquy the court explained her reasoning on this issue:

> ...I've asked her if she would apply the law as I charged it, and one of the things - - if I decide to charge insanity is insanity, and she indicated she can listen to it, she can apply it even if she disagrees with it. (R. 289; 7-31-06 Tr. p. 289, ll. 14-19).

While trial counsel initially indicated he wished to question Juror Lambert regarding whether she could *consider* an insanity defense, after the lengthy colloquy with the court, which included the court explaining why she believed the juror had already testified she would follow the law, which necessarily includes insanity, whether she agreed with the law or not, trial counsel conceded that the trial judge was correct regarding limiting voir dire of this juror given her responses to the court's

individual voir dire.[14] (R. 284, 296; 7-31-06 Tr. p. 284, ll. 20-23; p. 296, ll. 16-25) The record clearly bears this out:

> *The Court*: Could you repeat your question for me that you would be -
>
> *Mr. Kelly*: In this particular.
>
> *The Court*: Seeking to Ask?
>
> *Mr Kelly*: Ma'am in this particular case I agree with you as far as this witness [juror] is concerned. It would be enough in her case since she has said that she could consider all the factors.
>
> But in the case that is presented hypothetically by Mr. Diggs[15] where someone would say I've already made up my mind, I believe that would be different. And if she - - when she returns to the room, Ma'am, I will not pursue the - - any question that has to do with the affirmative defense. [insanity] (R. 296; 7-31-06 Tr. p. 296, ll. 12-25)

Appellant withdrew any request regarding Juror Lambert and asked only that they be allowed to probe jurors regarding an insanity defense, if a juror indicated during individual voir dire that they had a preconceived opinion about the case, in an attempt to qualify that juror. [16] (R. 289-90, 294;

---

[14]Appellant omits from his brief any mention of the fact that trial counsel withdrew its request to question Juror # 191 regarding whether she could "consider" insanity. (R. 283, 284, 298, 299; 7-31-06 Tr. p. 283, ll. 15-17; p. 284, ll. 20-23; p. 298, ll. 5-12; p. 299, ll. 3-15) Respondent recognizes that the expedited briefing in this matter may have caused this unfortunate, but critical omission.

[15]William Diggs was Appellant's other attorney at trial. During the lengthy colloquy, Diggs informed the court that he wished to voir dire any future juror on "insanity" who testified they had already made up their mind Appellant "did it", to see if the juror could then be open about deciding the case, i.e. be qualified. (R. 294; 7-31-06 Tr. p. 294, ll. 11-25)

[16]Appellant also omits from his brief any reference to his withdrawing any request to question any juror, regarding considering an insanity defense, who was similarly situated to Juror Lambert, i.e. the juror would follow the law even if they did not agree with the law and consider all the evidence including aggravating and mitigating circumstances. (R. 2987-31-06 Tr. p. 298, ll. 5-15) Additionally, Appellant fails to mention in his brief that he made no objection on the record regarding questioning Juror Lambert or any similarly situated juror.

7-31-06 Tr. p. 289, l. 20-p. 290, l. 23; p. 294, ll. 11-25)

With regard to Juror Lambert, the record concludes as follows:

> I will merely ask her having to do with whether or not she would follow your instructions in this particular witness [juror].
>
> The Court: Okay. But you're saying for the record that you're abandoning asking that - - the question we have been discussing of this juror.
>
> Mr. Kelly: Of this juror.
>
> The Court: Or any other Juror similarly situated, correct?
>
> Mr. Kelly: Any other juror similarly situated to Juror Lambert.
>
> The Court: Okay. And then that also gives me some time to do some research about the other situation. [Digg's hypothetical] (R. 298; 7-31-06 Tr. p. 298, ll. 5-15)

After Juror Lambert was brought back into the courtroom and instructed to disregard the question regarding consideration of insanity or mental state, she was asked again whether she would follow the judge's instructions on the law even if she thought the law should be something else and would she apply the law as instructed as she had promised to do under oath. She testified that she would do both. (R. 305-06; 7-31-06 Tr. p. 305, l. 7-p. 306, l. 11) Appellant did not object to the qualification of Juror Lambert. (R. 307; 7-31-06 Tr. p. 307, ll. 11-15)[17] No other objection was made by Appellant.

The affirmative defense of insanity was never mentioned again by Appellant during individual voir dire of any other juror. Appellant did question several jurors who testified they had already made up their minds about the case, whether if the Appellant had a defense recognized by

---

[17]Juror Lambert was not seated on Appellant's jury. She was struck by Appellant. (R. 1180; 8-7-06 Tr. p. 9, ll. 15-20)

the law, would this change their minds and could they be open about the case.[18] Only one juror with a pre-conceived opinion about the case was willing to reconsider and be open, however she could not be qualified for other reasons. In sum, Appellant received what he requested from the trial judge and there is nothing for this Court to review. Appellant may not now claim that the trial strategy he opted for warrants a new trial. State v. Bryant, Shearhouse Advance Sheets, Opinion No. 26278 (2007); *See* State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827 S.E.2d 827, 829 (1989) ("[A] party cannot complain of an error which his own conduct has induced.").

B. Analysis of Abandonment and Lack of Preservation

While Appellant does not mention this issue in his brief, he cannot seriously argue this issue is preserved for appeal. This case is no different than State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) where this Court held an issue was not preserved for appeal where the appellant agreed that the judge's decision limiting voir dire was fair and no objection was made. *See also* State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994) (contemporaneous objection must be made to

---

[18]After Lambert's qualification, there were sixteen jurors who stated they had a pre-formed opinion about the case based on facts they had heard or read outside the courtroom that Appellant did not ask any questions about an affirmative defense in an attempt to qualify the juror and allowed the juror to be excused without objection. Those jurors were juror #s 313, 38, 79, 206, 254, 298, 380, 107, 44, 337, 92, 384, 41, 64, 391, 306. (R. 353, 387456, 584, 786, 789, 870, 925, 932, 977, 1000, 1003, 1074, 1095, 1107; 7-31-06 Tr., p. 353, ll. 1-22, p. 387, ln. 4-388, ln. 4, p. 456, ll. 3-25, pp. 584, ln. 1-585, ln. 5, p. 786, ll. 5-23, pp. 789, ln. 18-790, ln. 7, pp. 870, ln. 1-871 ln. 3, p. 925, ln. 22-927, ln. 6, p. 932, ln. 22-935, ln. 3, p. 977, ln. 14-979, ln. 18, p. 1000, ll. 5-23, p. 1003, ll. 7-25, p. 1074, ll. 5-17, p. 1095 ll. 4-21, p. 1107, ln. 9-1108, ln. 1, p. 1151, ln. 25-1152, ln. 12) Appellant asked the following jurors with prefixed opinions whether knowledge of or consideration of an affirmative defense would allow them to be open about the case: #95, 292, 17, 260, 230 (R. 45, 856; 7-31-06 Tr., p. 45,1 ln. 1-452, ln. 20, p. 557, ln. 8-559, ln. 7, p. 621, ln. 11-625 ln. 10, p. 854, ln. 18-855, ln. 13, p. 856, ll. 6-25, p. 860, ln. 4-862, ln. 4) All responded negatively except #17; however #17 could not be qualified for death penalty reasons. Appellant also asked Juror # 374 about acceptance of an affirmative defense even though she had no pre-conceived opinion about the case. (R. 533; 7-31-06 Tr. p. 533, ll. 4-12) She said she could consider it.

preserve issue for review). Not only is this issue not preserved for appellate review, but it was explicitly abandoned by Appellant at trial. (R. 298; 7-31-06 Tr. p. 298, ll. 5-15) Even if Judge Jefferson had made a final ruling, which she did not, an issue is not preserved for review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection. [19] State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). There simply was no objection by Appellant. State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (contemporaneous objection is necessary in all trials to properly preserve errors for direct appellate review).

Improper Nature of the Question

Even if Appellant had not abandoned this issue, and this issue were somehow preserved for appellate review, it has no merit in capital jury qualification in South Carolina. The scope of voir dire and the manner in which it is conducted are within the trial judge's sound discretion. State v. David Mark Hill, 361 S.C. 297, 604 S.E.2d 696 (2004). The United States Supreme Court and Fourth Circuit Court of Appeals are in agreement with this principle of law. "[T]he trial court retains great latitude in deciding what questions should be asked on voir dire." MuMin v. Virginia, 500 U.S. 415, 424, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991); Ristaino v. Ross, 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976) ("Voir dire is conducted under the supervision of the court, and a great deal must, of necessity be left to its sound discretion."); Kasmi v. Angelone, 300 F.3d 487 (4th Cir. 2002); United States v. Lancaster, 96 F.2d 734, 739 (4th Cir. 1996) ("In the context of

---

[19]Judge Jefferson remained open throughout the lengthy discussion of this issue with Appellant's counsel even allowing them an opportunity to rephrase the question to Juror Lambert, suggesting possible rephrasing, and giving them an opportunity to submit case law in support of their position. Trial counsel instead chose to withdraw the question of Juror Lambert and pursue questions of future jurors in an attempt at *qualification* not to discover bias. (R. 283-307; 7-31-06 Tr. p. 283, l. 1-p. 307, l. 16)

cases...in which proposed voir dire questions does not address issues of racial or ethnic prejudice," the trial court " need not pursue a specific line of questioning on voir dire, provided the voir dire as a whole is reasonably sufficient to uncover bias or partiality of the venire."); United States v. Jones, 608 F.2d 1004, 1007 (4th Cir. 1979) ("It is well established, however that a trial court has 'broad discretion in conducting voir dire of the jury, and particularly in phrasing the questions to be asked.'"). Therefore the trial judge in this case had broad discretion in what questions could be asked and in the phrasing of those questions.

The United States Supreme Court has recognized only three instances where a criminal defendant is entitled to voir dire a jury with specific questions, and those are limited. Those instances are regarding death penalty qualification, pretrial publicity, and cross racial prejudice. Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); Mu'Min, supra (general voir dire on pretrial publicity met Due Process; defendant had no constitutional right to inquire into specific content of publicity); Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).[20] While the Constitution requires inquiry into the area of racial bias, it does not go so far as to direct that certain questions be asked. Mu'Min, supra.

Neither the United States Supreme Court nor this Court have recognized the exception that Appellant seeks in his brief. In fact, the United States Supreme Court refused to extend its

---

A capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of race. Turner v. Murray, 476 U.S. 28, 90 L.Ed.2d 27, 108 S.Ct. 1683 (1986). The Constitution requires inquiry into racial or ethnic prejudice when "special circumstances' indicate that 'racial issues [are] 'inextricably bound' up with the conduct of the trial.'" Rosales -Lopez, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) This Court has refused to extend this exception any further than cases involving "special circumstances." State v. Cason, 317 S.C. 430, 454 S.E.2d 888 (1995); State v. Vang, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003).

recognized exceptions any further in Mu'Min, supra (trial judge did not err in refusing to ask jurors about specific content of news reports they had read, because jurors who admitted reading articles were questioned about their ability to be impartial). Although the Constitution requires an impartial jury, it "does not dictate a catechism for voir dire." Morgan, 504 U.S. at 729. "A trial court's findings of juror impartiality may 'be overturned only for manifest error.' " Id. at 428-29. This Court has created no other special exception to the trial judge's authority to limit voir dire and has repeatedly reaffirmed this discretion.

The authority and responsibility of the trial court is to focus the scope of the voir dire examination as set forth in S.C. Code Ann. Section 14-7-1020 (Supp. 1995). State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). S.C. Code Ann. Section 16-3-20(D) (Supp. 1995) grants a capital defendant the right to examine jurors through counsel but does not enlarge the scope of voir dire permitted under Section 14-7-1020. State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987). The trial judge has the authority and duty to limit voir dire to 14-7-1020. State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982). The manner in which these questions are pursued and the scope of any additional voir dire are matters of trial court discretion. Id. The trial judge has discretion to prohibit questions. State v. Lucas, 285 S.C. 37, 328 S.E.2d 63 (1985). The method and scope of voir dire is within the trial judge's discretion and he can limit voir dire. State v. Thompson, 278 S.C. 1, 292 S.E.2d 586 (1982). "The scope of voir dire and the manner in which it is conducted are within the trial judge's discretion." David Mark Hill, 361 S.C. at 308; State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004). In addition to this Court's consistent holdings that the method and scope of voir dire are left to the sound discretion of the trial judge, this Court has limited the type of questions that can be asked of a juror during voir dire.

A juror may not be asked which or what type of witness he will believe. State v. Adams, 279 S.C. 228, 306 S.E.2d 208 (1983). "Inquiry as to the weight a juror would give one kind of witness [psychiatrist] over another invades the jury's province to determine credibility." Patterson, 324 S.C. at 16. What Appellant sought to do in this case is no different than what the appellant sought to do in Patterson, supra.

In Patterson, the appellant contended the trial judge erroneously limited his questioning on mitigating circumstances. "Appellant attempted to question Juror Marshall *about his feelings on* expert testimony, *particularly psychologists.*" Id. at 16 (emphasis added).[21] This Court held that asking such a question was inquiring into the weight a juror would give one kind of witness over another and invades the jury's province to determine credibility. Id. at 16; State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992). While Appellant characterizes his questions as probing bias, Appellant did not ask the juror if she had a bias against the insanity defense. Appellant sought to ask the juror if she would *consider* an insanity defense. (R. 284; 7-31-06 Tr. p. 284, ll. 20-23) Like the request in Patterson, this is nothing more than a disguised attempt to determine how a juror would *feel* about testimony from psychiatrists, neurologists, or psychologists regarding insanity and mitigators counsel intended to present in the case and to stake the juror out. The Patterson decision is in line with other decisions of this Court regarding similar attempts by defense counsel to stake out a juror. Davis, supra; State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993); Southerland, supra. (A juror may not be asked during voir dire if he would give more weight to the testimony of a police officer than a lay person.)

---

[21]The Court in Patterson pointed out that the Juror in question was not ultimately seated. Patterson, supra at 16, n.5. Juror Lambert was not seated in this case either. (R. 1180; 8-7-06 Tr. p. 9, ll. 15-20). She was excused by the Appellant.

Such specific *consider* questions have been rejected by this Court. This Court emphatically held that a defendant does not have a right to question of jurors as to whether they would *consider* specific mitigating circumstances or what their opinion is of any specific mitigating circumstance. United States v. Tipton, 90 F.3d 861 (4th Cir. 1996); State v. David Clayton Hill, 331 S.C. 94, 501 S.E.2d 122 (1998); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998). The underlying rationale for limiting such questioning is that asking a juror whether he would *consider* a specific mitigating circumstance might cause a juror to believe that he was pledged or committed by his answers to a future course of action when considering evidence of such mitigating circumstances. Powers, supra *citing* State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1995) (holding that Morgan does not require a defendant to be permitted to voir dire jurors on how they would be affected by specific mitigating circumstances such as evidence of mental impairment). The reasoning of these decisions is applicable to the issue before this Court, especially where Appellant's question was could a juror "consider" an insanity defense. Asking about a specific defense rather than defenses generally would be staking out a juror on a specific defense. Additionally, the reasoning of this Court's decisions is apposite in a capital case such as this where any evidence of insanity would become evidence of a mitigating circumstance in the penalty phase. Defendant requested and received charges on statutory mitigators (2) and (6). The trial court did not abuse its discretion in attempting to limit such questions. In fact, the judge followed long established precedent established by this Court.

This type question also carries over into another area prohibited by this Court, questioning a juror on a question of law. In its discussion of this issue with trial counsel, the trial court stated as follows:

The Court: They do. There is a case- - the case that I'm referring to,

> argue by extension is State v. Tucker, and there is a case that says you cannot question about presumption of innocence, reasonable doubt, right not to testify. It's all the same.
> (R. 295; 7-31-06 Tr. p. 295, ll. 8-13).

As the trial court pointed out, this Court has restricted specific voir dire questions regarding legal issues such as a juror's understanding of reasonable doubt, defendant's right not to testify, meaning of "life sentence", and others. State v. Mathews, 296 S.C. 379, 373 S.E.2d 587 (1988); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1996)(juror misconception on parts of the law should not be probed during voir dire. This is the reason jury instructions exist.). In Smart, supra, this Court implicitly stated that the voir dire questions concerning a juror's knowledge of the law, prior to any instruction by the trial judge, were improper. In the present case, the trial judge pointed out that insanity is the law and she would charge the law to the jury. (R. 289; 7-31-06 Tr. p. 289, ll. 14-19) The juror had already stated under oath she would follow the law even if she didn't agree with it. (R. 276; 7-31-06 Tr. p. 276, ll. 23-25) And there is a presumption that jurors follow the law as instructed. Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986).

Appellant's Trial Was Not Fundamentally Unfair

To constitute reversible error, a limitation on questioning must render the trial "fundamentally unfair." David Mark Hill, 361 S.C. at 308, citing Morgan v. Illinois, 504 U.S. 719, 730, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992); David Clayton Hill, 331 S.C. at 104 (1998). On review, a juror's responses must be examined in light of the entire voir dire, with the primary consideration being that the juror is unbiased, impartial, and capable of following instructions on the law. Hill, 361 S.C. at 309. A criminal defendant has no right to any particular jury, but only a right

to a trial by a competent and impartial jury. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed. 266 (1985). Appellant's trial was not rendered "fundamentally unfair" because of the trial judge's hesitancy to allow Appellant's fact specific question. In fact, the trial judge was careful throughout jury selection to insure that Appellant received a fair and impartial jury.

During general voir dire the jury panel was asked if anyone was related to or had a close personal relationship with Appellant or the victims. Any juror that had any bias as a result of such a relationship was excused. (R. 124-130; 7-31-06 Tr. p. 124, l. 1- p. 130, l. 4) Jurors were also asked if they had any relationship with the attorneys in the case. Any biased juror was removed. (R. 130; 7-31-06 Tr. p. 130, l. 23-p. 132, l. 8) Jurors were also asked if they had any connection with any witnesses, and any who could not disregard such a connection was not qualified. (R. 132-144; 7-31-06 Tr. p. 132, l. 8-p. 144, l. 9) During general voir dire of the jury, the jurors were also asked the following questions:

> Is there any member of the panel who has formed or expressed an opinion about this case; if so please stand at this time? (R. 144; 7-31-06 Tr. p. 144, ll. 21-23)

Each juror was questioned in more detail later and excused if they could not set aside their opinion and decide the case solely on the facts. The panel was further asked:

> Is there any member of the panel aware of any bias or prejudice in this case either for or against the State or the Defendant? If so, please stand.
>
> And we're going to follow the same procedure. I need you to give me your name and juror number and then take your seat. Starting on this side. Yes, ma'am. (R. 150; 7-31-06 Tr. p. 150, ll. 6-13)

Each juror who responded was questioned in more detail later by the court and counsel. Any juror

who could not be impartial was removed from the case. The entire panel was also asked:

> Is there any member of the panel that knows of any reason whatsoever why you could not give a fair trial to both the state and the defense? If so, please stand at this time. Yes. Ma'am. (R. 151; 7-31-06 Tr. p. 151, ll. 12-16)[22]

Each juror who responded to this question was also questioned in more detail during individual voir dire. Any juror who could not set aside any pre-conceived bias or perception and decide the case solely on the evidence presented in the courtroom was excused. Additionally, the only jurors who were qualified to serve in Appellant's case, testified under oath that they would listen to the law as the trial judge instructed them, apply the law to the facts and evidence they heard in the courtroom, and accept the law as the trial judge instructed them even if they did not agree with the law as stated by the trial judge. The following questions were asked of each juror during individual voir dire:

> Q: Could you listen to the law? (R. 276; 7-31-06 Tr. p. 276, l. 18)
>
> Q: Could you apply the law as I would instruct as the judge of the court? (R. 176; 7-31-06 Tr. p. 176, ll. 20-21)
>
> Q: Could you apply the law as I instruct even though you may disagree with it? (R. 276; 7-31-06 Tr. p. 276, ll. 23-24)
>
> Q: Could you decide this case based solely on the evidence presented here in the court - and disregard anything that you may have heard, read, or seen about this case?
> (R. 277; 7-31-06 Tr. p. 277, ll. 1-4)

Any juror who could not answer these questions in the affirmative was disqualified from service as a juror.

This kind of focused, searching, inquiry complies with this Court's requirements that a trial

---

[22]These questions or similar ones were asked by the trial judge and pointed to as significant by the appellate court in State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001).

judge focus the inquiry of voir dire, and also rendered Appellant's trial fundamentally fair.

Appellant has offered no evidence that the jurors who were seated in his case were not fair and impartial. Without any evidence to the contrary, this Court must conclude "..the jury members followed the trial judge's instructions to notify him of bias or prejudice any of them possessed." 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) *quoting* Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999)("A jury is presumed to have followed the trial judge's instructions.")

Furthermore, during individual voir dire, the trial judge instructed and explained to each juror the concepts of aggravating and mitigating circumstances listing examples. [23] (R. 278-79; 7-31-06 Tr. p. 278, l. 16-p. 279, l. 14).

Each juror was then asked, depending upon the particular facts and circumstances of the case, including the aggravating and mitigating circumstances, and the law that the judge would instruct them on which applies in this case, could they impose a life sentence without possibility of parole and a death sentence by electrocution or by lethal injection. (R. 279-80; 7-31-06 Tr. p. 279, l. 15-p. 280, l. 4) Unless a juror could answer both of these questions in the affirmative, the juror was not qualified to serve.

Judge Jefferson's reasoning behind her inclination to not allow specific questioning on insanity is born out by the record. She explained that she asked each juror if they could follow the law, and could they follow the law even if they disagreed with it. She also stated that insanity is part

---

[23]The trial judge intentionally avoided using any aggravating or mitigating circumstance in her individual voir dire that might be applicable in this case. (R. 284; 7-31-06 Tr. p. 284, ll. 8-14) The aggravating and mitigating circumstances which were listed were used as examples or frames of reference to ask the all important question regarding whether the juror could impose life and death depending on the facts.

of the law and each juror would be bound to follow the legal principle of insanity just like they would any other principle of law she charged. (R. 293-94; 7-31-06 Tr. p. 293, l. 5-p. 294, l. 4)

And the trial judge so stated in her charge to the jury in the guilt phase:

> I have the additional duty to charge you on the law applicable to this case. As the presiding judge, I am the sole judge of the law of this case and it is your duty as jurors to accept and apply the law as I now state it to you. If you have a preconceived idea as to what the law is or what the law ought to be in a case or in this case and it should not agree with what I now tell you the law is, you are obligated under the oath which you have taken to abandon this preconception on your part because you are sworn to accept the law and apply the law precisely as I now state it to you. (R. 2164-64; 8-7-06 Tr. p.989, l. 21-p. 990, l. 7)

Appellant's jury was then charged on the law of insanity and there is no contention that the trial judge's charge on insanity was erroneous. (R. 2185-90; 8-7-06 Tr. p. 1010, l. 23- p. 1015, l. 25) The jurors were bound to follow the law as the trial judge instructed.

Only jurors who testified under oath that they could follow the law as the judge gave it, even if they disagreed with it, were allowed to sit on Appellant's case. Further, each juror who sat on the case was sworn to follow the law as the Court instructed them. (R. 1188; 8-7-06 Tr. p. 16, ll. 15-17) A review of the entire record of voir dire reveals that the jurors who were seated on Appellant's jury were fair, impartial and had no bias against Appellant.

Appellant would have this Court extend the requirements specific voir dire to insanity. This Court has refused several times to extend the requirements of specific voir dire any further than those spelled out previously by the United States Supreme Court. In State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999), the appellant sought to conduct voir dire of the jury venire regarding their knowledge of two previous trials of that appellant. The trial judge denied Tucker's request not

wanting to plant any prejudicial information in the juror's minds. Tucker contended the denial of this additional voir dire was error. This Court, discussing MuMin v. Virginia, supra, pointed out that to constitute constitutional error, the proposed question must be more than helpful to the defendant, the failure to ask the question must render the trial "fundamentally unfair". This Court held the trial judge's refusal to allow Tucker's questions did not render his trial "fundamentally unfair."

Likewise in David Mark Hill, supra, the court's disallowing appellant's request to question jurors about their propensity to "go with the majority", did not render the trial "fundamentally unfair." This Court found there was no indication the limitation on questioning affected the selection of an impartial jury. This Court pointed out that a review of the "entire voir dire" revealed that the defendant had jurors who were impartial, unbiased, and capable of following the instructions of the law. Id. at 309-310.[24] The same is true in the present case, and Appellant can point to no juror who was seated who was not impartial.

This Court refused another attempt to extend Morgan and Mu'Min in David Clayton Hill, supra. In that case, the appellant argued the trial judge erred in not allowing him to ask jurors about whether they would "consider" specific mitigating circumstances. This Court pointed out that Morgan only required the judge to ask if the juror would consider mitigating circumstances generally. This Court held that the trial judge's only allowing general questions regarding mitigating circumstances did not render the appellant's trial "fundamentally unfair." Id., at 104 citing United

---

[24]The trial judge in Hill, asked of the jurors before voir dire the exact same questions as Judge Jefferson did in this case regarding which of 3 categories a juror would fall in. 361 S.C at 309 (R. 227; 7-31-06 Tr. p. 227, ll. 3-14). The Court in Hill pointed to these questions as significant in determining that appellant's trial was not "fundamentally unfair." Id. at 309. As in Hill, Appellant cannot point to one juror who was seated on his jury who was incapable of hearing all the evidence before making their decision.

States v. Tipton, 90 F.3d 861 (4th Cir. 1996)(where the defendant sought to question jurors regarding whether they would consider specific mitigating circumstances such as "limited intelligence and "brain dysfunction.").

Therefore, the failure to ask specific questions of a juror during individual voir dire about considering insanity, even if preserved, and even if proper under our case law, did not render Appellant's trial "fundamentally unfair". See also Wise, supra (excusal for cause of juror who could not sit in judgment of another did not render trial "fundamentally unfair"). This record is replete with inquiries and questions by the trial court to ferret out and determine any bias any juror had against Appellant. There was none. Appellant's jury was fair and impartial.[25] Appellant's trial was fundamentally fair.

Furthermore, Appellant's trial cannot be found to be fundamentally unfair because he was given the remedy he requested. After juror Lambert's qualification, when jurors testified during voir dire that they had some pre-formed opinion about the case, i.e. the Diggs hypothetical, trial counsel asked any of those jurors they chose if that particular juror's opinion would change and could they be open about the case if they were made aware that the defendant had a defense to the crimes. (R. 451-52, 860-62, 854-55, 856, 621-25, 557-59; 7-31-06 Tr. p. 451, l. 1-p. 452, l. 20; p. 860, l. 4-p. 862, l. 4; p. 854, l. 18-p. 855, l. 13; p. 856, ll. 6-25; p. 621, l. 11-p. 625, l. 10; p. 557, l. 8-p. 559, l. 7) Counsel chose to ask only a small portion of those jurors any questions about affirmative

[25]Appellant points to one juror who was excluded as evidence of impartiality, however "[a]ny claim that a jury was not impartial must focus on the jurors who were ultimately seated." Patterson, supra at 14. Not ones who were not seated. In fact, this one juror volunteered when asked if he had a fixed opinion about the case that he could not consider an insanity defense and was excused by the court without any questions from the Appellant. After this juror was excused, Appellant did not renew his request to question any jurors about considering an insanity defense.

defenses. Of those jurors questioned only one was willing to change their opinion and consider all the evidence, and that juror was not qualified because of her views on capital punishment. Appellant even asked one juror who did not have a fixed opinion about the case, whether she could consider an affirmative defense. (R. 533; 7-31-06 Tr. p. 533, ll. 4-12) She testified that she could.

Additionally, trial counsel did not mention "insanity" in questioning these jurors, however trial counsel was not prohibited from probing these jurors on the insanity defense and if it would remove their fixed opinions. (See 7-31-06 Tr. generally) Trial counsel simply chose not to ask those specific questions. There were at least sixteen jurors who fell into the category having a fixed factual opinion that Appellant by choice did not ask if knowledge of an affirmative defense would change their fixed opinion.[26]

Conclusion

The trial judge did not err as alleged, because Appellant explicitly abandoned any attempt or request to question jurors regarding whether they could consider an insanity defense. Appellant conceded this was not proper and was adequately covered by the trial judge's individual voir dire. Instead, Appellant sought to voir dire specific jurors, who indicated they were already of the opinion Appellant "did it", regarding whether a defense of insanity would open their minds and allow them to consider the case fairly. Appellant was not prohibited from this and therefore Appellant received the remedy requested. Therefore, there is no issue to review before this Court. Even if any such issue were preserved, Appellant's question as framed was not proper under South Carolina precedent, and given the voir dire that was conducted, the failure to inquire of jurors as to whether

[26]Clearly Appellant chose to try and rehabilitate or qualify some of these jurors but not others. Obviously, this was a strategic decision by trial counsel.

they could consider an insanity defense did not render this Appellant's trial fundamentally unfair.

ISSUE II.

The trial judge did not err in not charging statutory mitigator S.C. Code Section 16-3-20(C)(b)7: "The age or mentality of the defendant at the time of the crime.", because Appellant did not request such charge nor did Appellant object, therefore the issue is not preserved for appellate review; and even if such issue was preserved, the issue was adequately covered by other mitigators which were charged including 16-2-20(C)(b)(2), (6) and the court's instruction that the jury could consider any mitigating circumstance that it considered appropriate, therefore the failure to charge mitigator (7) was harmless.

At the close of the penalty phase, the trial judge held a charge conference. The trial judge informed counsel for both sides that she would charge mitigators (2) and (6).

> But I would charge–I mean, I will include, you may also consider the following mitigating circumstances. The murder was committed while the Defendant was under the influence of mental or emotional disturbance, the capacity of the defendant to appreciate the criminality of the conduct or to conform his conduct to the requirements of the law was substantially impaired. (R. 3348-49, 3351; 8-14-06 Tr. p. 1098, l. 24 - p. 1099, l. 6, p. 1100, ll. 4-6, 8)

Appellant did not object to the charge as worded nor request an additional charge on mitigator (7). (R. 3354, 3363, 3365; 8-14-06 Tr. p. 1104, l. 16; p. 1113, ll. 3-5; p. 1115, ll. 15-16, 20-21). The next morning the trial judge again reviewed the proposed charge with the trial attorneys.

> So again I appreciate you all's courtesies that you've extended to the court and those changes and modifications will be made. [unrelated]
> Are there any exceptions from the state?
> Humphries: None from te State, Your Honor.
> The Court: From the defense?
> Mr. Diggs: No, Your Honor. (R. 3380; 8-14-06 Tr. p. 1130, ll. 19-25)

The trial judge charged mitigators (2) and (6) to the jury prior to the jury's penalty phase deliberations.

> You may also consider the following mitigating circumstances.
>
> The murder was committed while the Defendant was under the

> influence of mental or emotional disturbance. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R. 3506; 8-14-06 Tr. p. 1256, ll. 1-8)

The Judge also charged the jury:

> You may also consider any other factor in mitigation of the offense and you can recommend the sentence of life imprisonment without the possibility of parole for no reason at all. (R. 3510; 8-14-06 Tr. p. 1260, ll. 1-4)

After charging the jury, the following took place:

> The Court: Any exceptions from the State?
> Mr. Hembree: None from the State, your honor?
> The Court: Any exceptions from the Defense?
> Mr. Diggs: No, Your Honor, Nothing beyond what we have already stated. [exception unrelated to mitigators]. (R. 3513; 8-14-06 Tr. p. 1263, ll. 4-5)

Appellant did not object to the trial judge's charge regarding mitigating circumstances nor request that the court charge any additional mitigating circumstances. Stanko now alleges error in the trial judge's failure to charge Section 16-3-20(C)(b)7.[27] This issue is not preserved for appellate review.

The proper procedure for the submission of statutory mitigating circumstances to the jury in the penalty phase of a capital case is found in State v. Victor, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989):

---

[27]Stanko concedes in his brief, as he must, that he did not request an instruction on mitigator (7) at the charge conference nor did he object to its omission from the judge's final instructions. (See App. Brief p. 15). Nor was there an objection after the charge to the jury omitting mitigator (7). In his brief, Appellant misquotes a statement made by his counsel during the state's presentation of its case during the penalty phase. The actual quote was as follows: "I think that one of the mitigating statutory circumstances is - - is the state of mind." This could apply to (2) and (6) and was not a request for charge or an objection to a charge but was made early in the sentencing phase. This Court has never held that such a vague statement made during the state's presentation of the penalty phase substitutes as a request for charge on a specific mitigator and substitutes for an objection for failure to charge.

> Once a trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence he wishes submitted to the jury.

This Court has emphatically stated in recent decisions that absent a request by counsel to charge a mitigating circumstance, the issue is not preserved for review. *See* State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006); State v. Humphries, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005); State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005); State v. Sapp, 366 S.C. 283, 621 S.E.2d 883, n. 3 (2005).[28]

The exact issue raised by Appellant in this appeal was dealt with by this Court in its opinion in Evans, supra. In Evans, the appellant, citing State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990), alleged the jury should have been charged statutory mitigator (6) *sua sponte* by the judge because there was psychiatric testimony he had a mental disorder. This Court, in its unanimous opinion, rejected this argument pointing out that Caldwell was decided under *in favorem vitae*. "We abolished the doctrine of *in favorem vitae* in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)." Evans, 371 S.C. at 30. "In Torrence we stated, a contemporaneous objection is necessary in all trials beginning after the date of this opinion to properly preserve errors for our direct appellate review.'" Id., at 30-31. This Court rejected appellant Evans' contention that a post-Torrence exception should exist for "..mitigators stemming from mental disorders." Id., at 31. "For the reasons previously stated, no such exception exists." Id. Therefore, Appellant Stanko's contention must be rejected as

---

[28]In fact, the Evans decision cleared up any misconception that there was a post-Torrence exception for preservation of error in jury charges in capital cases. There is not. See Evans, supra.

well. "By failing to make a contemporaneous objection or request for the capacity mitigator, Appellant did not properly preserve this issue for our review." Id. This issue is not preserved for appellate review.

Even if this issue were preserved for appellate review, any error in failing to charge mitigator (7) was harmless.[29] The jury in the present case was charged on statutory mitigators (2) and (6). These mitigators adequately cover the mental state of the Appellant and allowed the jury to consider as mitigation Appellant's mental state. Furthermore, the jury was additionally charged that they could consider any mitigating circumstance that they determined to be appropriate. (8-14-06 Tr. p. 1260, ll. 1-4) "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Any error in failing to charge mitigator (7) was harmless.[30] Appellant's mitigating evidence was not placed beyond the

---

[29]While this Court stated in State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) that the "failure to instruct is not harmless error," the context of that statement dealt with the failure of the trial judge to charge any of statutory mitigators (2), (6), & (7) where evidence of intoxication was present. Id. at 435. And while State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), cites State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991) for the proposition that a charge on one mitigator is insufficient to cover the others, that particular principle of law was not actually discussed in Young. Id. at 386. Similarly, Young dealt with the failure of the trial judge to charge (2), when there was evidence of intoxication and the court only charged (6) & (7). The Court held the failure to charge (2) was error because of the decisions of State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) and State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) requiring that all 3 mitigators must be charged when there is evidence of intoxication. Young, supra at 386 (citing Caldwell and Pierce and then stating "[a]ccordingly, failure to charge subsection 2 was error.").

[30]Trial counsel may have made a strategic decision not to request this mitigator given the testimony of his own experts that Appellant has a genius level I.Q., used his intelligence to trick people out of their money, and had no empathy for his victims. Appellant was also 38 years old. Given the extensive damaging testimony about Appellant's age and mentality from his own experts, this mitigator would have been a "double edged sword". Obviously, this is precisely the sort of thing that is explored in post-conviction relief.

jury's reach because the jury was charged that they could consider not only statutory mitigating circumstances (2) and (6) which deal with mental defects or impairment, but also any other mitigating circumstance. *See* Ayers v. Belmontes, 127 S.Ct. 469 (2006)(Jury not likely to believe itself barred from considering mitigating evidence where jury heard the evidence, counsel addressed it in their arguments, and the court instructed them they could consider all the evidence presented.); Johnson v. Texas, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed. 290 (1993)(Defendant's mitigating evidence was not beyond the reach of the jury because the jury was charged it could consider all the mitigating evidence presented.); State v. Jones, 332 S.C. 329, 504 S.E.2d 822 (1998)(Denial of P.C.R. where jurors heard testimony of defendant's mental condition and were given several mitigating factors through which to consider defendant's mental condition even though mitigator (2) was not charged.).

CONCLUSION

Appellant failed to request a charge on statutory mitigating circumstance (7) and did not object to the trial court's not charging (7), therefore this issue is not preserved for appellate review; and even if it were preserved for review any failure to charge statutory mitigator (7) was harmless given the charges on mitigating circumstances that were given.

For all the foregoing reasons, the appeal must be denied and dismissed.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

By: _____
J. Anthony Mabry

ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, SC 29211

August 8, 2007

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County
Deadra L. Jefferson, Circuit Court Judge

THE STATE,

Respondent,

v.

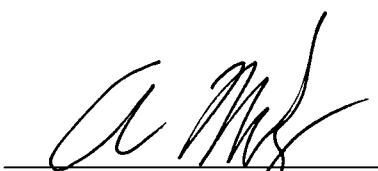
STEPHEN C. STANKO,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR 211(b).

This 8th day of August, 2007.



J. ANTHONY MABRY
Assistant Attorney General

ATTORNEY FOR RESPONDENT

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 Interagency Mail to Joseph L. Savitz, III, Chief Attorney and Kathrine H. Hudgins, Appellate Defender, S.C. Department of Indigency Defense, Appellate Defense Division, 1330 Lady Street, Ste. 401, Columbia, SC 29201 this 8th day of August, 2007.

J. ANTHONY MABRY