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DEATH PENALTY RESOURCE & DEFENSE CENTER



January 20, 2015

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JAN 21 2015

S.C. SUPREME COURT

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

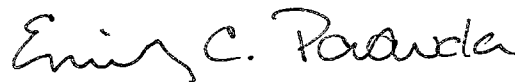
Re: *Stephen C. Stanko, SK6022 v. State of South Carolina*, 2014-CP-26-035

Dear Mr. Shearouse:

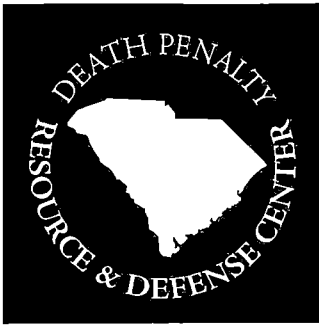
Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. I was appointed on February 4, 2014. I am currently working to prepare for an evidentiary hearing. The hearing date has been scheduled for March 2, 2015.

If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,



Emily C. Paavola



November 19, 2014

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

Re: *Stephen C. Stanko, SK6022 v. State of South Carolina*, 2014-CP-26-035

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. I was appointed on February 4, 2014. I am currently working to prepare for an evidentiary hearing. The hearing date has been scheduled for March 2, 2015.

If you have any questions or require any additional information, please do not hesitate to contact me.

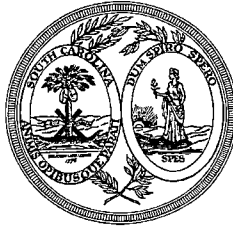
Sincerely yours,

Emily C. Paavola

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NOV 20 2014

S.C. SUPREME COURT



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

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

October 17, 2014

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Rosalyn W. Frierson, Director
Court Administration, S.C. Judicial Department
1015 Sumter St., Suite 200
Columbia, SC 29201-3739

RECEIVED

OCT 21 2014

S.C. SUPREME COURT

RE: *Stephen C. Stanko v. State of South Carolina*
Case Number: 2014-CP-26-035

Dear Ms. Frierson and Mr. Shearouse:

Pursuant to the Supreme Court order dated 11/7/2013 regarding the above referenced capital PCR action, I provide the following status of this case:

1/6/2014: The application for post-conviction relief is filed with the clerk of court for Horry County, SC.

2/4/2014: Emily C. Paavola is appointed lead counsel and Lindsey Vann is appointed second counsel for the applicant by order dated 2/4/2014.

2/21/2014: Status conference held in judge's chambers at Horry County Judicial Center. Emily C. Paavola, Lindsey S. Vann and Anthony Mabry attended the status conference.

A scheduling order was issued.

4/2/2014: The court issues its order setting this case for date-certain trial to commence 11/3/2014.

The Honorable Daniel E. Shearouse, Clerk of Court, S.C. Supreme Court
Roselyn W. Frierson, Director, Court Administration, S.C. Judicial Department
October 17, 2014
Page Two

- 4/29/2014: The court issued an Amended Scheduling Order. This Amended Scheduling Order rescinded the order setting of this case for date-certain trial commencing 11/3/2014.
- 6/16/2014: Applicant amends Application for Post-Conviction Relief.
- 7/10/2014: State files Return to Amended Application for Post-Conviction Relief and Motion to Dismiss.
- 9/25/2014: Court issues order setting the case for date-certain trial commencing 3/2/2015 and amending scheduling order to extend deadline for completing discovery.
- Court issues order denying Respondent's Motion to Dismiss without a trial.
- 9/30/2014: Applicant mails Final Amended Application For Post-Conviction Relief for filing.

With kindest regards, I remain

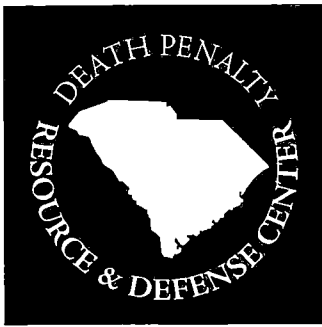
Very truly yours,


Benjamin H. Culbertson

BHC/bhc

pc: Hon. Melanie Huggins-Ward, Horry County Clerk of Court
Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
Anthony Mabry, Asst. Attorney General
Jimmy A. Richardson, Solicitor

Stephen C. Stanko, #6022
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472



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SEP 17 2014

September 16, 2014 **S.C. SUPREME COURT**

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

Re: *Stephen C. Stanko, SK6022 v. State of South Carolina*, 2014-CP-26-035

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. I was appointed on February 4, 2014. I am currently working to prepare for an evidentiary hearing. The hearing date has been scheduled for on or before February 28, 2015

If you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely yours,

Emily C. Paavola

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott

* Certified Public Accountant

604 Sixteenth Avenue North
Myrtle Beach, SC 29577
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635 East Bay Street
Charleston, SC 29403
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RECEIVED

FEB 27 2014

S.C. SUPREME COURT

February 21, 2014

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

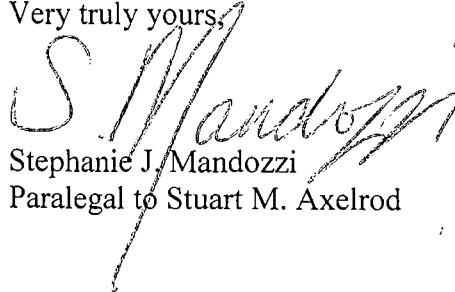
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that as of today's date, the above-referenced case is still in the discovery stage.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



Stephanie J. Mandozzi
Paralegal to Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
Bobby Frederick, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III

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DEC 30 2013

December 23, 2013

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

S.C. Supreme Court

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

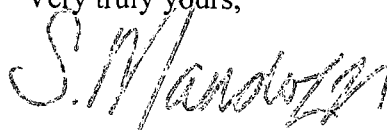
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With kind regards, I am

Very truly yours,



Stephanie J. Mandozzi
Paralegal to Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
Bobby Frederick, Esquire

AXELROD & ASSOCIATES, P.A.**Attorneys and Counselors at Law**

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RECEIVED

OCT 28 2013

October 24, 2013

S.C. SUPREME COURT

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

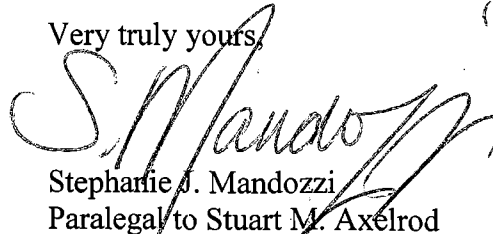
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Please be advised that as of today's date, the above-referenced case is still in the discovery stage.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



Stephanie J. Mandozzi
 Paralegal to Stuart M. Axelrod

cc: Honorable J. Michael Baxley
 J. Anthony Mabry, Esquire
 Bobby Frederick, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

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RECEIVED

AUG 30 2013

August 27, 2013

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

S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

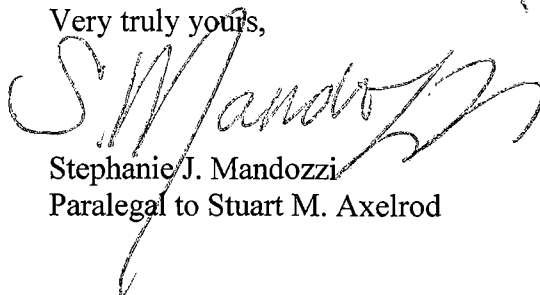
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Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



Stephanie J. Mandozzi
Paralegal to Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
Bobby Frederick, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

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* Certified Public Accountant

RECEIVED

June 28, 2013

JUL 03 2013

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

S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

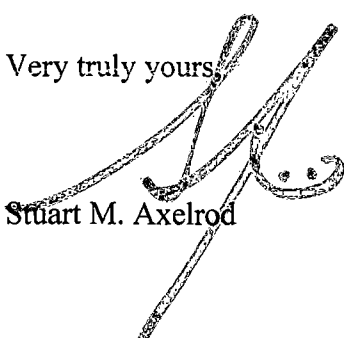
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Please be advised that as of today's date, the above-referenced case is in the discovery stage.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,


Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
Bobby Frederick, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Sara A. Turner
Jarrett S. Calder

* Currently on Active Military Leave

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RECEIVED

April 29, 2013

MAY 02 2013

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

S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that on April 22, 2013 Judge Baxley signed an Order relieving J.A. Ritner, Esquire as second chair counsel and appointing Bobby G. Frederick, Esquire as new second-chair counsel. At this time, the parties are moving forward with the case as the issue of second-chair counsel has been resolved.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



Stephanie J. Mandozzi
Paralegal to Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire

2006-036252
or 26442

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Sara A. Turner
Jarrett S. Calder

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RECEIVED

February 26, 2013

MAR 01 2013

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

S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

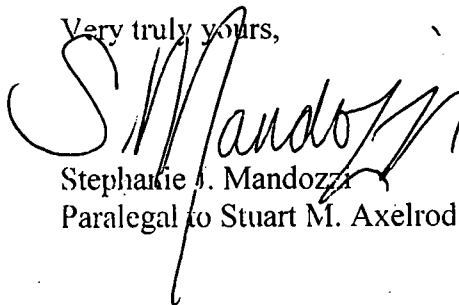
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that a hearing was held on January 23, 2013 in regards to the above-referenced matter in which second chair counsel, J.A. Ritner, Esquire was removed from the case. At this time, the appointment of a new second chair is still pending with Judge Baxley.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



Stephanie J. Mandozza
Paralegal to Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire

AXELROD & ASSOCIATES, P.A. 2006036252
Attorneys and Counselors at Law 26442

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Sara A. Turner
Jarrett S. Calder

RECEIVED

DEC 31 2012

S.C. Supreme Court

604 Sixteenth Avenue North
Myrtle Beach, SC 29577
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* Currently on Active Military Leave

December 28, 2012

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

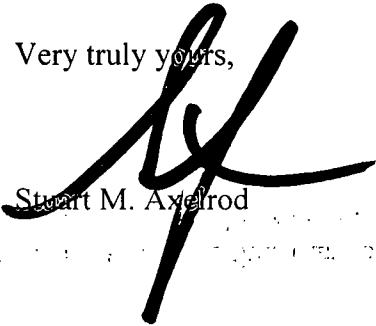
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that it has been brought to my attention that our second chair counsel, J.A. Ritner, Esquire, has requested to be removed from the case due to a conflict. The request is still pending with Judge Baxley.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,


Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
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Carlton E. Elliott
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Christopher D. Helms
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RECEIVED

NOV 05 2012

October 30, 2012

S.C. SUPREME COURT

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

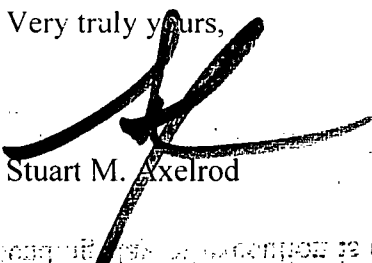
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that I met with my client on October 24, 2012 at which time various issues regarding this case were discussed at great length.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,


Stuart M. Axelrod

cc:

Honorable J. Michael Baxley

J. Anthony Mabry, Esquire

J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott
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Sara A. Turner

* Currently on Active Military Leave

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SEP 06 2012
S.C. SUPREME COURT

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September 4, 2012

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

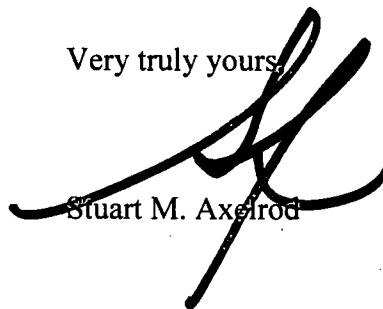
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that as of today's date this office has scheduled a face-to-face meeting with our client for September 5, at which time various issues regarding this case will be discussed at great length.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Christopher D. Helms

* Currently on Active Military Leave

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JUL 11 2012

S.C. SUPREME COURT

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July 6, 2012

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse:

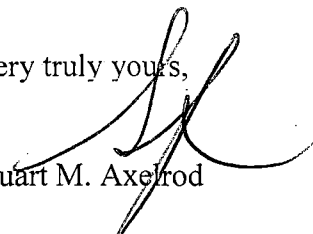
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Please be advised that as of today's date this office has met with co-counsel and is presently working on responding to discovery requests propounded by the Attorney General.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,


Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
R. Paul Taylor
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Christopher D. Helms

RECEIVED

MAY 11 2012

9:0: SUPREME COURT

604 Sixteenth Avenue North
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* Currently on Active Military Leave

May 9, 2012

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that as of today's date this office has met with Judge Baxley to discuss the outstanding issues that need to be addressed so that the case may begin to move forward. We have come to an agreement with OID concerning the case's funding and are meeting with our client on May 23, 2012 to expeditiously move this case forward.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,



Jarrett S. Calder, Paralegal
Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

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635 East Bay Street
Charleston, SC 29403
Phone: (843) 805-7200
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RECEIVED

MAR 10 2012

March 13, 2012

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

S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

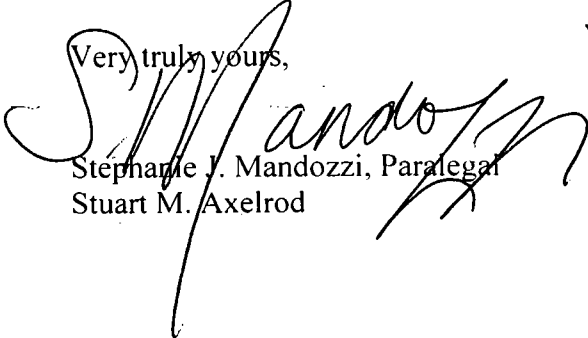
Dear Mr. Shearouse,

Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that as of today's date this office has requested a meeting with Judge Baxley to discuss the outstanding issues that need to be addressed so that the case may begin to move forward.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,


Stephanie J. Mandozzi, Paralegal
Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
R. Paul Taylor
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Christopher D. Helms

* Currently on Active Military Leave

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January 13, 2012

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

RECEIVED
JAN 17 2012
S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

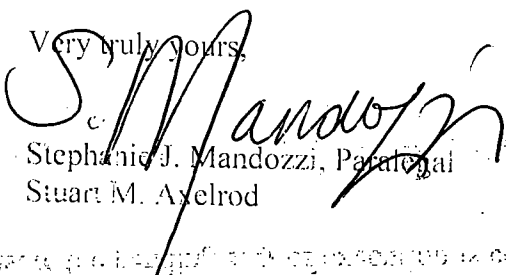
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for our client, Stephen C. Stanko, #6022.

Please be advised that at the present time, Mr. Axelrod has an Order of Protection awarded by Honorable Larry B. Hyman, Jr. until February 05, 2012 so that he may actively engage in the preparation of another capital case appointed to our office. I am attaching a copy of such for your reference.

Please also be advised, that it has been brought to Mr. Axelrod's attention that our second chair counsel, J.A. Ritner, Esquire, has requested to be removed from the case. The request is still pending with Judge Baxley.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,


Stephanie J. Mandozzi, Paralegal
Stuart M. Axelrod

Honorable J. Michael Baxley, Judge
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

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R. Paul Taylor
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Amy E. Burke

* Currently on Active Military Leave

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November 16, 2011

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

RECEIVED

NOV 17 2011

S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

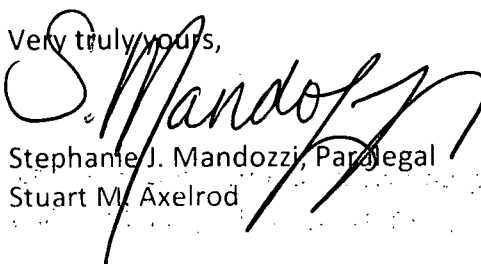
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for my client, Stephen C. Stanko, #6022.

Please allow this letter to advise your office that our office was just awarded funding on this case on October 26, 2011. We have contacted our experts and have provided them with information on the case.

We are still awaiting the return of our appointed co-counsel, Andrew Ritner. Mr. Ritner was granted an Order of Protection as he is attending training with the United States Army. Mr. Ritner has indicated that he will contact our office immediately upon his return so we may discuss strategy on the case.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,


Stephanie J. Mandozzi, Paralegal
Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

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Myrtle Beach, SC 29577

* Certified Public Accountant

August 17, 2011

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

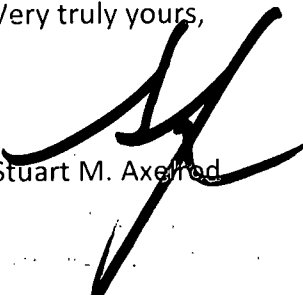
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for my client, Stephen C. Stanko, #6022.

Please allow this letter to advise your office that as of today my office is still waiting for funding to be awarded by Judge Baxley for the above-referenced case.

I would also like to advise you that I am writing this letter earlier than the sixty (60) day requirement as I will be out of the office on August 29, 2011 when the this letter is actually due to your office.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,


Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

RECEIVED

AUG 22 2011

S.C. SUPREME COURT

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
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Myrtle Beach, SC 29577

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RECEIVED

JUL 01 2011

June 29, 2011

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

S.C. Supreme Court

RE: **Stephen C. Stanko, #6022 vs. State of South Carolina**
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

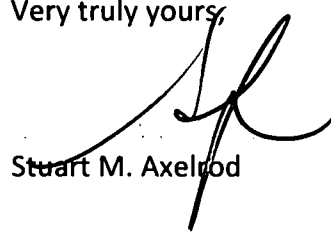
Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for my client, Stephen C. Stanko, #6022.

Please allow this letter to advise your office that as of today my office is still awaiting funding for the above-referenced case.

I would also like to advise you that my co-counsel, J.A. Ritner, has received Orders from the United States Army to report to Basic Training for the dates of July 05, 2011 through November 15, 2011. Once my office receives his Order of Protection from the Court of Common Pleas I will forward it to your office for your file.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,


Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

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Myrtle Beach, SC 29577

* Certified Public Accountant

May 3, 2011

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

RE: **Stephen C. Stanko, #6022 vs. State of South Carolina**
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for my client, Stephen C. Stanko, #6022.

Please be advised that as of today our office does not have an updated status from the status that was provided to you in our March 03, 2011 letter as we are still waiting on Funding.

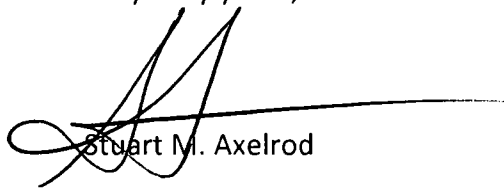
Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,

RECEIVED

MAY 04 2011

S.C. SUPREME COURT


Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

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RECEIVED

MAR 04 2011

March 3, 2011

S.C. SUPREME COURT

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

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

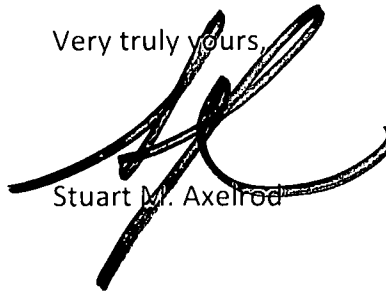
Dear Mr. Shearouse,

Pursuant to In.Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for my client, Stephen C. Stanko, #6022.

Please be advised that as of today our office does not have an updated status from the status that was provided to you in our January 05, 2011 letter as we are still waiting on Funding.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,



Stuart M. Axelrod

cc: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
W. Chris Castro *
Joshua A. Bailey

* Certified Public Accountant

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604 Sixteenth Avenue North
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January 5, 2011

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

RECEIVED

JAN 07 2011

S.C. Supreme Court

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

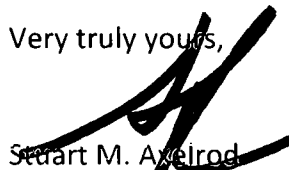
Dear Mr. Shearouse,

Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for my client, Stephen C. Stanko, #6022.

Please be advised that as of today we are still waiting on our Ex Parte Motion and Order for Expert Investigative Funding which was submitted to Judge Baxley on November 05, 2010 to be returned to our office. Until our office is in receipt of this Motion we are halted on proceeding with this case.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,


Stuart M. Axelrod

CC: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

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604 Sixteenth Avenue North
Myrtle Beach, SC 29577

October 14, 2010

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

RECEIVED
OCT 19 2010
S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

Pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), I am writing to the Court to provide a status of the above-referenced case to ensure the pending stay of execution is continued for my client, Stephen C. Stanko, #6022.

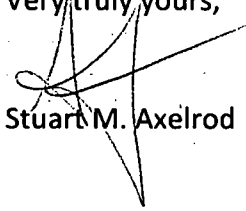
Please be advised that on September 09, 2010 I went and met with my client, Stephen C. Stanko, and began to go over the details of his defense. Since then, I have been in active contact with my client by way of letters and telephone calls and have begun to work diligently on the different aspects of his defense.

I was also awarded attorney's fees in a Motion and Order for Attorney's Fees in a capital PCR case by Judge Baxley on September 27, 2010. I have also send over other Ex-Parte Motions for various funding needs and am currently waiting to hear back from Judge Baxley's chambers as to a date when he will be able to meet with me to discuss the same.

Judge Baxley has also indicated to Attorney Mabry as well as myself, by an email on October 7, 2010, that it will be after reviewing my various funding issues that he will attempt to proceed at a scheduling order on the case.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,


Stuart M. Axelrod

CC: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

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* Certified Public Accountant

August 17, 2010

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

RECEIVED

AUG 18 2010

S.C. SUPREME COURT

RE: Stephen C. Stanko, #6022 vs. State of South Carolina
Case No.: 2008-CP-22-1446

Dear Mr. Shearouse,

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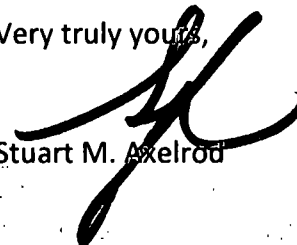
Please be advised that on July 21, 2010 I requested the original file of E.P. "Bill" Godfrey, Esquire, original first chair counsel, and J.A. Ritner, Esquire, current co-counsel, so that I may review their case files. I will need their case files to see what work has been done on the file and the progress of the case so far. To date, I have not received either.

I am also scheduled to see my client, Stephen C. Stanko #6022, on September 09, 2010 at the Lieber Correctional Institution, to review and discuss the case with him.

I also spoke with opposing counsel, J. Anthony Mabry, Esquire, and informed him that I would speak with him after my meeting with my client on the above such date.

Thank you for your assistance with this matter and if you have any questions, please do not hesitate to contact me.

Very truly yours,



Stuart M. Axelrod

CC: Honorable J. Michael Baxley
J. Anthony Mabry, Esquire
J.A. Ritner, Esquire



Godfrey Law Firm L.L.C.

10 East Avenue
Greenville, SC 29601

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E.P. "Bill" Godfrey
Attorney at Law
State & Federal Criminal Law

Mary Alice H. Godfrey
Attorney at Law
Certified Family Court Mediator
December 9, 2009

Elizabeth D. Medlin
Attorney at Law
Certified Guardian Ad Litem

FAX and MAIL (803) 734-1499

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

RECEIVED
DEC 11 2009
S.C. SUPREME COURT

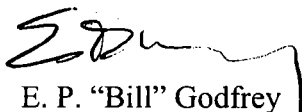
Re: Status of pending Capital Post-Conviction Relief Case
Stephen C. Stanko, 6022 v. State of South Carolina
2008-CP-22-1446

Dear Mr. Shearouse:

Pursuant to In re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996), I advise the Court of the current status of the above captioned case as follows:

It appears that the case is on track to be tried in early 2010. There are a couple of issues pending, but I believe that those issues can be resolved without affecting a trial in early 2010.

Sincerely,


E. P. "Bill" Godfrey

EPG/kwh

cc: The Honorable J. Michael Baxley (Mail Only)
J. Anthony Mabry (Mail Only)

**Godfrey Law Firm L.L.C.**

10 East Avenue
Greenville, SC 29601

E.P. "Bill" Godfrey
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December 9, 2009

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

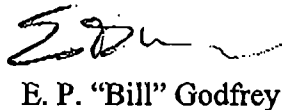
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Stephen C. Stanko, 6022 v. State of South Carolina
2008-CP-22-1446

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E. P. "Bill" Godfrey

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cc: The Honorable J. Michael Baxley (Mail Only)
J. Anthony Mabry (Mail Only)

RECEIVED
DEC 10 2009
S.C. SUPREME COURT



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Elizabeth D. Medlin
Attorney at Law
Certified Guardian Ad Litem

September 15, 2009

RECEIVED

SEP 17 2009

S.C. SUPREME COURT

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

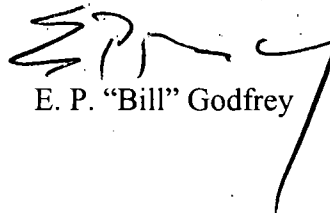
Re: Status of pending Capital Post-Conviction Relief Case
Stephen C. Stanko, 6022 v. State of South Carolina
2008-CP-22-1446

Dear Mr. Shearouse:

I respectfully apologize about the late status letter on the Stephen Stanko Capital Post-Conviction Relief case. I meant no disrespect to the Court, Judge Baxley, your office, the attorney general, and especially to my client.

The fault in the delay is totally mine, and, again, I apologize. I assure you that it will not happen again.

Sincerely,


E. P. "Bill" Godfrey

EPG/kwh



Godfrey Law Firm L.L.C.

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September 15, 2009

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Clerk, South Carolina Supreme Court
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RECEIVED

SEP 17 2009

S.C. SUPREME COURT

Re: Status of pending Capital Post-Conviction Relief Case
Stephen C. Stanko, 6022 v. State of South Carolina
2008-CP-22-1446

Dear Mr. Shearouse:

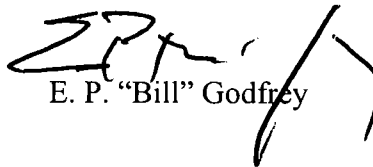
Pursuant to In re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996), I advise the Court of the current status of the above captioned case as follows:

An Amended Scheduling Order has been consented to by the parties. The Amended Scheduling Order became necessary due to the previous illness of Applicant's attorney.

Pursuant to the Amended Scheduling Order the Final Amended Post-Conviction Relief Application is due on or before October 10, 2009, and the case shall be set for a merits hearing on January 4, 2010 or as soon thereafter as the case may be heard.

No further delays or continuances are expected. Counsel has recovered almost one hundred percent from his illness. If you need any additional information, please do not hesitate to contact me.

Sincerely,


E. P. "Bill" Godfrey

EPG/kwh

cc: The Honorable J. Michael Baxley (Mail Only)
J. Anthony Mabry (Mail Only)

**Godfrey Law Firm L.L.C.**

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September 15, 2009

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FAX and MAIL (803) 734-1499

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

RECEIVED
SEP 15 2009
S.C. SUPREME COURT

Re: Status of pending Capital Post-Conviction Relief Case
Stephen C. Stanko, 6022 v. State of South Carolina
2008-CP-22-1446

Dear Mr. Shearouse:

Pursuant to In re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996), I advise the Court of the current status of the above captioned case as follows:

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Pursuant to the Amended Scheduling Order the Final Amended Post-Conviction Relief Application is due on or before October 10, 2009, and the case shall be set for a merits hearing on January 4, 2010 or as soon thereafter as the case may be heard.

No further delays or continuances are expected. Counsel has recovered almost one hundred percent from his illness. If you need any additional information, please do not hesitate to contact me.

Sincerely,

E. P. "Bill" Godfrey

EPG/kwh

cc: The Honorable J. Michael Baxley (Mail Only)
J. Anthony Mabry (Mail Only)



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Elizabeth D. Medlin
Attorney at Law
Certified Guardian Ad Litem

May 28, 2009

RECEIVED

JUN 01 2009

S.C. SUPREME COURT

FAX and MAIL (803) 734-1499

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

Re: Status of pending Capital Post-Conviction Relief Case
Stephen C. Stanko, 6022 v. State of South Carolina
2008-CP-22-1446

Dear Mr. Shearouse:

Pursuant to In re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996), I advise the Court of the current status of the above captioned case as follows:

We have determined all of the issues for the Amended Post-Conviction Relief Application, and we are continuing to interview witnesses and research the issues in preparation for trial and for briefing purposes.

I am preparing a proposed Funding Order so we can retain a mitigation investigator specialist to help obtain and verify records and talk with potential witnesses. We are considering an additional proposed Funding Order to retain the services of a Board Certified Forensic Psychologist to help us understand and prepare for the mental health issue that is looming in this case.

At this time, it appears that we are clearly on schedule for a trial on the merits to begin August 3, 2009.

If you need any additional information, please do not hesitate to contact me.

Sincerely,



E. P. "Bill" Godfrey

EPG/kwh

cc: The Honorable J. Michael Baxley (Mail Only)
J. Anthony Mabry (Mail Only)

**Godfrey Law Firm L.L.C.**

10 East Avenue
Greenville, SC 29601

(864) 467-9196
(864) 467-9427

E.P. "Bill" Godfrey
Attorney at Law
State & Federal Criminal Law

Mary Alice H. Godfrey
Attorney at Law
Certified Family Court Mediator

Elizabeth D. Medlin
Attorney at Law
Certified Guardian Ad Litem

RECEIVED

MAY 06 2009

March 24, 2009

S.C. SUPREME COURT

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

Re: Status of pending Capital Post-Relief Case
Stephen C. Stanko, 6022 v. State of South Carolina
2008-CP-22-1446

Dear Mr. Shearouse:

Pursuant to In re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996), I advise the Court of the current status of the above captioned case as follows:

Assistant Attorney General Anthony Mabry and I have consented to a Scheduling Order in this case. We have agreed that the trial on the merits shall begin on August 3, 2009 or as soon thereafter as the case may be heard.

I have read the transcript, and I have interviewed Stephen Stanko. At this time, Stanko's team is researching the issues which Stanko has presented along with spotting issues that Stanko did not mention. We are beginning to interview witnesses and verify records which were collected by trial counsel.

At this time, it appears that we are clearly on schedule for a trial on the merits to begin August 3, 2009.

If you need any additional information, please do not hesitate to contact me.

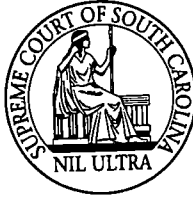
Sincerely,


E. P. "Bill" Godfrey

RECEIVED

MAY 06 2009
EPG/kwh

cc: The Honorable J. Michael Baxley
S.C. SUPREME COURT Anthony Mabry



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 4, 2009

Everett P. Godfrey, Jr., Esquire
Godfrey Law Firm, LLC
10 East Ave.
Greenville, SC 29601

J. A. Ritner, Esquire
J. Andrew Ritner Law, LLC
PO Box 2733
Myrtle Beach, SC 29578-2733

Re: Stanko, Stephen C. v. State

Dear Counsel:

As you know, the execution in this matter has been stayed pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E2d. 140 (1996), to allow the defendant to pursue post-conviction relief, and you represent him in that PCR action which is filed as 2008-CP-22-1446. Under In re Stays of Execution in Capital Cases, the defendant must serve and file "a letter setting forth the status of the post-conviction relief matter every sixty (60) days. . . . If the Court determines this letter fails to show that the defendant is diligently pursuing the post-conviction relief action, the Court may issue an order dissolving the stay or setting forth additional requirements the defendant must meet to maintain the stay."

In the present case, you have not filed the required status letter. Therefore, it will be necessary for you to serve and file the required status letter within ten (10) days of the date of this letter. If you fail to do so or fail to serve and file a status letter every sixty (60) days thereafter, an execution notice may be issued.

Everett P. Godfrey, Jr., Esquire
J. A. Ritner, Esquire
Page Two
May 4, 2009

Very truly yours,

A handwritten signature in black ink, appearing to read "D. DES", with a long horizontal flourish extending to the right.

CLERK

DES/dmh

cc: Assistant Attorney General J. Anthony Mabry
The Honorable J. Michael Baxley



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 7, 2008

Chief Appellate Defender Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Assistant Attorney General J. Anthony Mabry
The Honorable John Gregory Hembree
The Honorable J. Michael Baxley
Motte L. Talley, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v.

Stephen C. Stanko,

Appellant.

ORDER

Appellant was convicted of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery, and he was sentenced to death. This Court affirmed appellant's convictions and sentence. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). The United States Supreme Court denied appellant's petition for a writ of certiorari on October 6, 2008.

Appellant now seeks a stay of execution so that he can pursue post-conviction relief (PCR). The State has filed a return in opposition to the petition for a stay of execution. Appellant has filed a reply to the return.

In In re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996), this Court stated that if the action of the United States Supreme Court on a capital defendant's petition for a writ of certiorari does not invalidate the

sentence of death, the Clerk of this Court shall issue an execution notice.¹ If the defendant desires a stay to pursue state PCR, he must, within ten days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the PCR application, after which this Court will assign a circuit judge to the case and issue a stay of execution. Id.

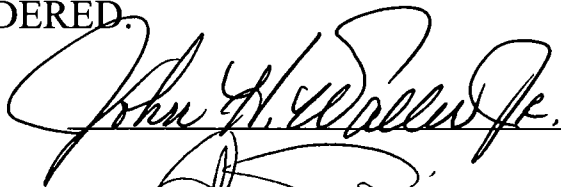
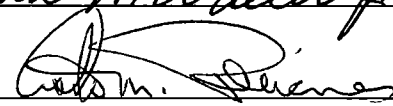
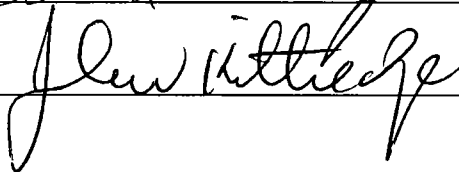
While we find the issue appellant states he intends to raise in his PCR application is without merit, as appellant points out in his reply, he can, and states he intends to, amend his PCR application to include additional allegations upon further investigation of the case by appointed counsel. Accordingly, we grant appellant's request for a stay of execution. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases.

The Honorable J. Michael Baxley, is hereby assigned to the PCR action appellant has filed. Judge Baxley shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled. Judge Baxley shall conduct a hearing on

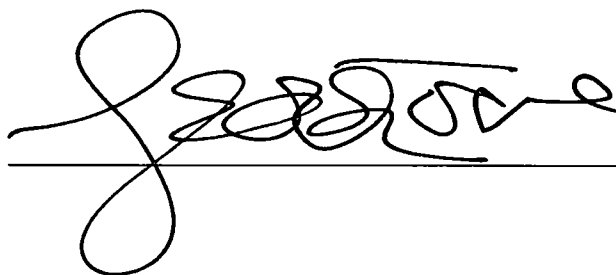
¹ An execution notice has not been issued in this case.

appellant's desires regarding counsel within thirty days of the date of this order.

IT IS SO ORDERED.

 J.
 J.
 J.
 J.

I would deny the petition for a stay of execution based on the fact that the issue appellant states he will raise in his PCR application is patently without merit.

 C.J.

Columbia, South Carolina

November 7, 2008

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 28, 2008

RECEIVED

OCT 28 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Stephen C. Stanko

Dear Mr. Shearouse:

This letter is in response to the State's opposition to the petition for stay of execution that was filed on Mr. Stanko's behalf. The State asserts that a proposed ground for post conviction relief was addressed by the Court in direct appeal. As noted in the petition for stay of execution, the PCR action will raise this issue at a minimum. As the court is aware, Mr Savitz and I do not represent Mr. Stanko in his PCR action. We are not in a position to investigate and identify all other potential grounds for PCR and Mr. Stanko is not in the position to complete that investigation without the assistance of counsel. Counsel for Mr. Stanko will not be appointed until after this Court grants the stay.

Counsel understands that Mr. Stanko wrote the Court and specifically expressed his intent to go forward with the PCR action and requested that counsel be appointed. Additionally, Mr. Stanko informed appellate counsel that he intends to allege ineffective assistance of appellate counsel in failing to challenge the constitutionality of the South Carolina insanity law based on due process grounds. Such an allegation needs to be explored by PCR counsel. Based on that information, counsel submits that the Court should grant the requested stay of execution.

By copy of this letter we are informing Anthony Mabry, of the Attorney General's Office.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathrine H. Hudgins". The signature is fluid and cursive, with the first name "Kathrine" and last name "Hudgins" clearly distinguishable.

Joseph L. Savitz, III
Chief Appellate Defender

Kathrine H. Hudgins
Appellate Defender

JLS,III/kde

cc: Anthony Mabry
Stephen C. Stanko

OCTOBER 23, 2008

THE HONORABLE DANIEL E. SHEAROUSE
CLERK, S.C. SUPREME COURT
P.O. Box 11330
Columbia, S.C. 29211

RE: The State v. Stephen C. Stanko (Capital Case)
PCR - Georgetown County
Appointment of Counsel

Honorable Mr. Shearouse,

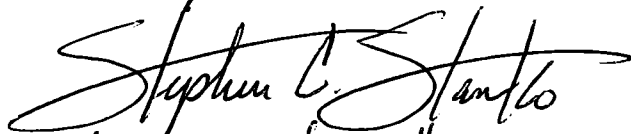
As you are aware, I am an inmate on Death Row at Lieber C.I. Immediately after being notified that my appeal had been dismissed in the U.S. Supreme Court, a Post-Conviction Relief (PCR) Application was filed on my behalf as was a Motion for Stay of Execution.

I am now asking you to have, please, appointment of counsel done on said PCR. I have numerous claims of Ineffective Assistance of Counsel which must be amended/added to said application but require PCR Counsel's assistance in the research of these issues and perfecting the application.

Given the State's Response Opposing the Motion for Stay of Execution, I respectfully ask that this be done as soon as possible.

Thank You, for all of your cooperation and efforts.

Sincerely,



Stephen C. Stanko #6022

Lieber C.I. (RB #218)

P.O. Box 205

Ridgerville, S.C. 29472

RECEIVED
OCT 27 2008
S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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

RECEIVED

OCT 20 2008

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

STEPHEN C. STANKO,

Appellant.

RETURN TO PETITION FOR STAY OF EXECUTION

On October 9, 2007, Stephen C. Stanko served the State with his Petition for Stay of Execution so that he may file an application for post-conviction relief. The State objects to the stay of execution for the following reasons.

In his petition requesting a stay, Stanko asserts only one ground of ineffective assistance of counsel. Stanko states that at post-conviction relief he will at a minimum assert "he did not receive effective assistance of either trial or appellate counsel because the Court held that failure to instruct the jury on the statutory mitigating circumstance of age or mentality of the defendant at the time of the crime as provided by S.C. Code Ann. Section 16-3-20 (C)(b)(7) was not preserved for appellate review." (See Petition page 2 paragraph III.). Based on this Court's opinion in *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008), Stanko is not entitled to a stay of execution pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Stanko is not entitled to a stay of execution because he has failed to assert a ground of

ineffective assistance of counsel in this petition for which he could be entitled to relief. First, appellate counsel could not have been ineffective regarding this mitigating circumstance issue because, as this Court specifically found, this underlying issue was not preserved at the trial level by a timely objection or request. Second, in this Court's opinion denying Stanko's direct appeal, this Court dealt with the merits of this issue and found no prejudice by the failure to instruct on "age or mentality." This Court stated as follows:

Notwithstanding any preservation issues, we note that Appellant was not prejudiced by the absence of this statutory mitigating factor. Appellant's mental condition was the focus of the guilt phase and was also a main issue in the penalty phase. The jury heard extensive expert testimony regarding Appellant's alleged mental disorders, and the trial court charged the jury on two other mitigating factors through which they could consider Appellant's mental condition. Thus, the jury was clearly aware that they could consider Appellant's mentality in determining whether the death sentence was warranted. In spite of this evidence, the jury found the existence of five statutory aggravating factors beyond a reasonable doubt and recommended Appellant be sentenced to death. Therefore, the absence of this statutory mitigating factor did not preclude the jury from considering Appellant's mentality in the penalty phase, and there is no reasonable probability that had the trial court charged the jury on this additional mitigating factor, the jury would have returned a different recommendation.¹ See *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendant's mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors).

Stanko, 371 S.C. at 578. Therefore, there could not be any merit to this ground as a ground of ineffective assistance of trial or appellate counsel at post-conviction relief because the Court applied

¹We do not base our finding of no prejudice on the fact that the jury found the existence of five aggravating factors. (Court's footnote).

the second prong of *Strickland v. Washington* is assessing whether there was prejudice in the failure to instruct. Since Stanko has asserted no other grounds for post-conviction relief in this petition, his Petition for a Stay of Execution should be denied.

Respectfully submitted,

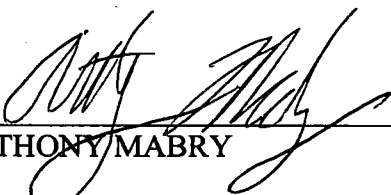
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

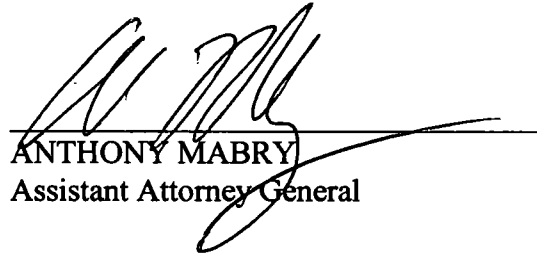
By: 
ANTHONY MABRY

P.O. Box 11549
Columbia, SC 29211

October 20, 2008

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the *Return to Petition for Stay of Execution* in the foregoing action by depositing copies in the InterAgency mail to Kathrine H. Hudgins, Esquire, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 20th day of October, 2008.



ANTHONY MABRY
Assistant Attorney General

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Judge

RECEIVED

OCT - 9 2008

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

STEPHEN C. STANKO,

APPELLANT

PETITION FOR STAY OF EXECUTION

Counsel for Stephen Stanko petition the Court for a stay of execution, pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), to allow Stanko the opportunity to seek post-conviction relief in the lower court.

I

Stanko's conviction for murder and death sentence were affirmed by the Court in *State v. Stephen C. Stanko*, Opinion No. 26442, filed February 25, 2008. The Supreme Court denied rehearing March 19, 2008. The United States Supreme Court denied certiorari October 6, 2008.

II

In the *Capital Cases* opinion, 471 S.E.2d at 141, the Court stated, "If the [capital] defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the

date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief.”

III

At a minimum, Stanko will argue in post-conviction relief that he did not receive effective assistance of either trial or appellate counsel because the Court held that the failure to instruct the jury on the statutory mitigating circumstance of the age or mentality of the defendant at the time of the crime as provided by *S.C. Code Section 16-3-20 (C)(b)(7)* was not preserved for appellate review.

A claim that the post-conviction relief applicant did not receive effective assistance of counsel is cognizable under *S.C. Code Section 17-27-20(a)(1)*: “the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State.” See, also, *Strickland v. Washington*, 466 U.S. 668 (1984), and *Everts v. Lucey*, 469 U.S. 387 (1985).

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

Kathrine H. Hudgins
Appellate Defender

Attorneys for Appellant

This 9th day of October, 2008.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Judge

THE STATE,

RESPONDENT,

V.

STEPHEN C. STANKO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion for stay of execution in the above entitled case has been served upon Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 9th day of October, 2008.

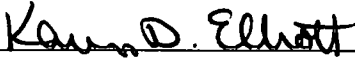


Joseph L. Savitz, III
Chief Appellate Defender

Kathrine H. Hudgins
Appellate Defender

Attorneys for Appellant

SWORN TO BEFORE ME this 9th day
of October, 2008.



(L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017.



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

OCT 20 2008

S.C. SUPREME COURT

October 20, 2008

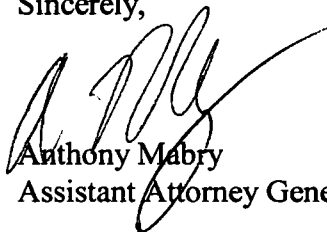
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Stephen C. Stanko

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Petition for Stay of Execution* in the above-referenced matter for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,


Anthony Mabry
Assistant Attorney General

AM/lbb
Enclosure

cc: Kathrine H. Hudgins, Esquire
Sandi Wofford, Victims Assistance



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 9, 2008

RECEIVED

OCT - 9 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, SC Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: The State v. Stephen C. Stanko

Dear Mr. Shearouse:

Enclosed is our petition for stay of execution.

Please do not hesitate to contact me if you have any questions or I may be of further assistance.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/kde

cc: Anthony Mabry
Stephen C. Stanko

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

October 6, 2008

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Stephen Christopher Stanko
v. South Carolina
No. 07-11542
(Your No. 26442)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

RECEIVED

OCT 15 2008

S.C. SUPREME COURT

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

June 24, 2008

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED
JUN 27 2008
S.C. SUPREME COURT

Re: Stephen Christopher Stanko
v. South Carolina
No. 07-11542
(Your No. 26442)

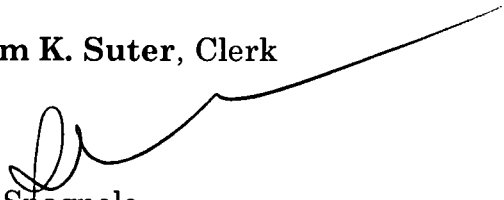
Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on June 16, 2008 and placed on the docket June 24, 2008 as No. 07-11542.

Sincerely,

William K. Suter, Clerk

by


Sandy Spagnolo
Case Analyst



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

JUN 16 2008

June 16, 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

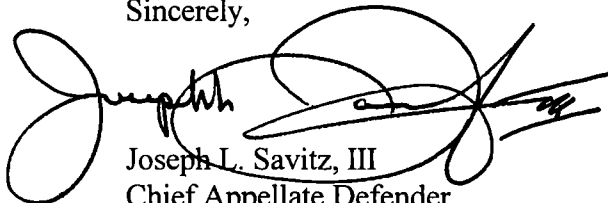
Re: Stephen Christopher Stanko v. State of South Carolina

Dear Mr. Shearouse:

Please be advised that I have filed a petition for writ of certiorari, appendix, motion for leave to proceed in forma pauperis in this case with the United States Supreme Court today. I have attached a copy of that petition.

Please contact me if you have any questions.

Sincerely,



Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosure

cc: Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

JUN 16 2008

June 16, 2008

S.C. SUPREME COURT

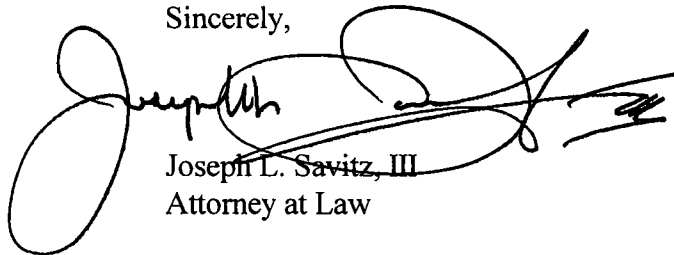
Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Stephen Christopher Stanko v. State of South Carolina

Dear Mr. Suter:

Enclosed is petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,



Joseph L. Savitz, III
Attorney at Law

JLS,III:kde

Enclosure

cc: Donald J. Zelenka, Esquire
Honorable Daniel E. Shearouse, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 08-_____

STEPHEN CHRISTOPHER STANKO

PETITIONER

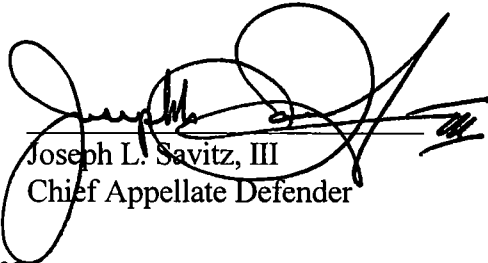
versus

STATE OF SOUTH CAROLINA

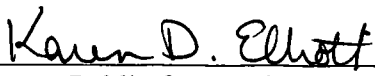
RESPONDENT

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on June 16, 2008, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.


Joseph L. Savitz, III
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 16th day of June, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 08 - _____

STEPHEN CHRISTOPHER STANKO

PETITIONER

versus

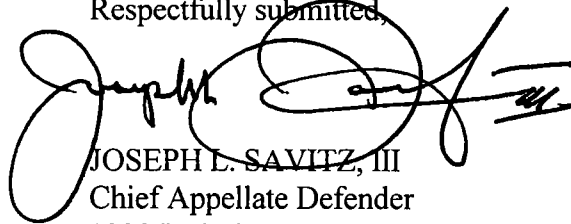
STATE OF SOUTH CAROLINA

RESPONDENT

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

Stephen Christopher Stanko requests leave to proceed in forma pauperis, in accordance with the provisions of Title 28 U.S.C. §1915. The affidavit of petitioner in support of this motion is attached, along with the petition for writ of certiorari.

Respectfully submitted,



JOSEPH L. SAVITZ, III
Chief Appellate Defender
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

This 16th day of June, 2008

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

October Term, 2008

No. 08 - _____

STEPHEN CHRISTOPHER STANKO,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

AFFIDAVIT OF STEPHEN CHRISTOPHER STANKO
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Stephen Christopher Stanko, being duly sworn, state that I am the petitioner in this case; that because of my poverty I am unable to pay the costs of or give security for this proceeding; that I believe I am entitled to redress.

The responses to the questions and instructions below relating to my ability to pay costs or give security are true.

1. Are you presently employed? No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

- b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

N/A

2. Have you received within the past twelve months any income from a business, progression or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

No

- a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No

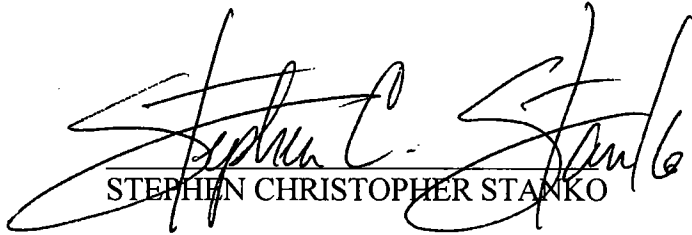
- a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

- a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.


STEPHEN CHRISTOPHER STANKO

SWORN to and subscribed before me
this 11th day of June, 2008.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: September 22, 2008.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

RECEIVED

JUN 16 2008

S.C. SUPREME COURT

STEPHEN CHRISTOPHER STANKO

PETITIONER

versus

STATE OF SOUTH CAROLINA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

JOSEPH L. SAVITZ, III
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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Is a capital defendant who relies solely on the defense of insanity at the guilt phase of his murder trial entitled, under the Sixth and Fourteenth Amendments, to question prospective jurors about their possible bias against that defense?

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SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 08-

STEPHEN CHRISTOPHER STANKO

PETITIONER

versus

STATE OF SOUTH CAROLINA

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

Counsel for Stephen Christopher Stanko request a writ of certiorari so the Court may review the opinion of the South Carolina Court Supreme Court affirming Stanko's convictions for murder, kidnapping, criminal sexual conduct and assault and battery with intent to kill, which resulted in a sentence of death for murder.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as *State v. Stephen Christopher Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008), and is reproduced in the Appendix to this petition at pages A1–A7.

JURISDICTION

The final judgment of the South Carolina Supreme Court was entered February 25, 2008, and it denied rehearing March 19, 2008. (The petition for rehearing and order denying rehearing are reproduced at pages A10–A12 in the Appendix.)

Stanko and counsel invoke the Court’s jurisdiction pursuant to 28 U.S.C §1257(a), as he is asserting the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case raises an issue under the Sixth Amendment to the United States Constitution, which affords a criminal defendant “the right to ... trial, by an impartial jury.”

It also involves the Fourteenth Amendment to the Constitution, which provides that “no state shall ... deprive any person of life, liberty, or property without due process of law.”

STATEMENT OF FACTS

The only issue at the guilt phase of Stephen Stanko's death penalty trial was whether or not he was insane when he murdered his girlfriend and then raped her daughter and slit her throat. (The daughter survived to become the State's key witness against Stanko.) Stanko's trial proved to be a contest between defense and prosecution experts. Defense experts testified that Stanko was insane at the time of the offenses due to a brain defect. Prosecution experts countered that Stanko's brain was normal and that his crimes were the product of controllable behavioral problems.

Specifically, defense experts in psychology and psychiatry testified that "50 to 80%" of the frontal lobe of Stanko's brain was missing. ROA p. 1664, lines 13-19. They advanced two theories to account for how this might have occurred: oxygen deprivation at birth, in which the case the frontal lobe never fully developed, or a blow to the head in his early teens, in which the case it atrophied. Regardless, the effect on Stanko's behavior was the same.

The frontal lobe separates human beings from the so-called "lower" animals, such as reptiles, who either fight or flee when threatened. It controls atavistic, preconscious impulses originating deep within the primeval regions of the brain. In terms of evolution, this capacity is a fairly recent development. One defense expert described the frontal lobe as "[t]he emergency brake for the brain." ROA p. 1728, lines 6 and 7. It governs "our ability to have empathy for another human being" and "our moral values." ROA p. 1506, line 25 – p. 1507, line 10.

Ruled by a defective brain, the defense experts explained, Stanko attempted to make his way through life by mimicking "what normal people do," but in his case this meant manipulation and "lies upon lies." ROA p. 1535, lines 3-13. When threatened with exposure, this abnormality also meant that he was powerless to control the violent impulses erupting from within the core of

his brain. ROA p. 1603, lines 1-13; ROA p. 1764, line 25 – p. 1766, line 2.

Most important for this case, the frontal lobe of the brain also appears to govern the capacity to distinguish right from wrong. ROA p. 1450, lines 15-25; ROA p. 1729, line 25 – p. 1730, line 2.

Two defense psychiatrists testified that, because of his brain defect, Stanko was quite insane at the time he committed his crimes. ROA p. 1522, lines 15-18; ROA p. 1731, line 25 – p. 1732, line 14.

On reply, the State's experts testified that Stanko's brain – including his frontal lobe – was within normal limits. ROA p. 1920, lines 5-10; ROA p. 1927, lines 10-21; ROA p. 1937, line 7 – p. 1938, line 5; ROA p. 1974, line 18 – p. 1975, line 1. Their psychiatrist stated that Stanko was neither "[l]egally insane" nor mentally ill, merely narcissistic and antisocial. ROA p. 1874, line 16 – p. 1880, line 24; ROA p. 1889, lines 13-15.

Based on the defense evidence, the trial judge instructed the jury on the defense of insanity. ROA p. 2185, line 23 – p. 2187, line 9. The State did not object to this charge. ROA p. 2192, line 24 – p. 2200, line 21.

How the federal issue was raised below

As insanity was to be the central issue at Stanko's guilt phase, defense counsel sought to ask prospective jurors if they could find a defendant not guilty by reason of insanity. ROA p. 283, lines 4-6; ROA p. 284, lines 20-23. (The portion of the trial transcript covering this issue is reproduced at pages A27-A62.) The State objected. ROA p. 283, lines 7 and 8. The judge sustained the objection. ROA p. 284, line 20 – ROA p. 285, line 3.

On direct appeal to the South Carolina Supreme Court, Stanko argued:

The trial judge erred in refusing to allow counsel, during *voir dire*, to ask potential jurors about their feelings and viewpoints concerning the defense of insanity when insanity was raised as an affirmative offense and the question was asked to reveal juror bias.

Brief of Appellant, p. 4. The Court disagreed and held:

[Stanko] was not entitled to ask potential jurors about their specific views of the insanity defense during *voir dire*. The trial court allowed [Stanko] to explore the issue of affirmative defenses during voir dire, and permitting either side to ask anymore case-specific questions would have veered close to allowing the parties to stake out a jury. ... [T]he trial court permitted [Stanko] to ask potential jurors whether they would be able to apply the law in favor of [Stanko] with the facts provided for a defense. [Stanko] presented no evidence showing the limitation of questioning impacted his right to a fair and impartial jury and failed to present evidence that the jury was biased or incapable of following instructions on the law. Accordingly, under the facts of this case, there is no indication that [Stanko's] trial was rendered fundamentally unfair by the trial court's limit of *voir dire*.

658 S.E.2d at 97. Incongruously, the Court added, "our holding in no way imposes an absolute ban on questioning jurors about their views on the insanity defense." *Id.*

In a Petition for Stay of Execution filed with the South Carolina Supreme Court, counsel sought a stay "to allow Mr. Stanko to seek certiorari from the United States Supreme Court or, alternatively, to seek post-conviction relief in [State court]." Counsel petitioned the Court in the alternative because its opinion was unclear whether it relied on a procedural bar to affirm. Although the Court "question[ed] whether this issue is preserved for review," it nevertheless reached the merits of the issue. 658 S.E.2d at 96. In its Return, the State argued that the issue was barred procedurally.

The Court granted a stay of execution and allowed Stanko to "either file a petition for a writ of certiorari in the United States Supreme Court or ... a PCR application in the circuit court." Counsel informed the Court that it intended to seek a writ of certiorari in the United States Supreme Court.

WHY THE WRIT SHOULD BE GRANTED

whether or not the insanity defense is constitutionally required, *Clark v. Arizona*, 548 U.S. 735 (2006), it is recognized in South Carolina. *S.C. Code Section 17-24-10* provides that “[t]he defendant has the burden of proving the defense of insanity by a preponderance of the evidence.”

In a capital case, South Carolina allows defense counsel to question potential jurors individually. *Section 16-3-20(D)*. Counsel is permitted to conduct “an inquiry into juror bias or prejudice.” *State v. Owens*, 293 S.C. 161, 359 S.E.2d 275 (1987), and *Section 14-7-1020*.

The Sixth and Fourteenth Amendments also require trial by an impartial jury. *Morgan v. Illinois*, 504 U.S. 719 (1992). “[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.” *Id.* at 729. “As with any other trial situation where an adversary wishes to exclude a juror because of bias ... it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality.” *Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

“[T]he State’s obligation to the defendant to impanel an impartial jury generally can be satisfied by less than inquiry to a specific prejudice feared by the defendant.” *Ristaino v. Ross*, 424 U.S. 589, 595 (1976) (footnote omitted). However, some cases present “special circumstances” in which due process demands, where requested, questioning of prospective jurors about specific prejudices. *Turner v. Murray*, 476 U.S. 28, 36 (1986). The classic example is racial bias. See, for example, *Ham v. South Carolina*, 409 U.S. 524 (1973). Nevertheless:

To be constitutionally compelled ... it is not enough that such questions might be helpful. Rather, the ... failure to ask these questions must render the defendant’s trial fundamentally unfair.

Mu’Min v. Virginia, 500 U.S. 415, 425-426 (1991).

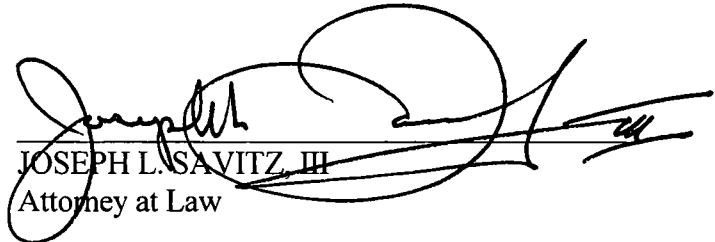
The insanity defense may also be a special circumstance requiring specific inquiry into jury bias. In states which permit an insanity defense, prospective jurors who indicate that they are not willing to return a verdict of not guilty by reason of insanity, even if the defendant proves he was insane at the time of his crimes, are not qualified. See, for example, *State v. Leonard*, 296 N.C. 58, 248 S.E.2d 853 (1978). *Clark v. Arizona* explicitly acknowledges the widespread bias against insanity as a defense. To many, it is the prototypical legal “loophole.”

In a case such as *Stanko*’s, limited *voir dire* on prospective juror bias against the insanity defense is necessary to guarantee a defendant’s right to an impartial jury and its omission renders the trial fundamentally unfair.

CONCLUSION

For this reason, the Court should grant certiorari and ultimately reverse Stephen Christopher Stanko's convictions and sentences, including the sentence of death.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

June 16, 2008

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 08-_____

STEPHEN CHRISTOPHER STANKO

PETITIONER

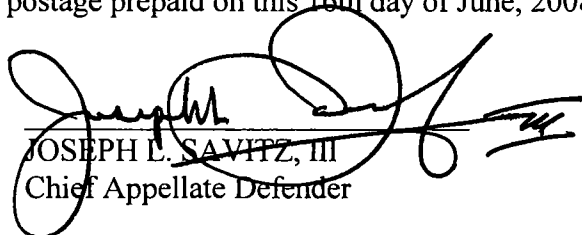
versus

STATE OF SOUTH CAROLINA

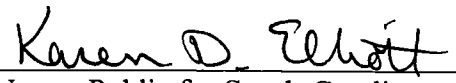
RESPONDENT

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari, appendix, and the motion for leave to proceed in forma pauperis in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 16th day of June, 2008.


JOSEPH L. SAVITZ, III
Chief Appellate Defender

SWORN TO BEFORE me this 16th day
of June, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 08 -

STEPHEN CHRISTOPHER STANKO

PETITIONER

versus

STATE OF SOUTH CAROLINA

RESPONDENT

A P P E N D I X

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ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Stephen Christopher Stanko,

Appellant.

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

Opinion No. 26442

Heard September 20, 2007 – Filed February 25, 2008

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender Katherine H. Hudgins, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor John Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: A jury convicted Appellant Steven C. Stanko of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery and recommended Appellant be sentenced to death. In his appeal, Appellant raises issues regarding 1) the limitation of the scope of *voir dire* and 2) the omission of a statutory mitigating factor from the jury charges in the penalty phase. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of two brutal attacks in a string of violent crimes committed in Georgetown County. The State alleged Appellant strangled his girlfriend and attempted to murder her daughter by slitting her throat in the course of a robbery and sexual assault of the two women. At trial, Appellant did not deny committing the crimes, but alleged that he was insane.

During *voir dire*, Appellant attempted to question a potential juror as to her views on the insanity defense. The State immediately objected to this line of questioning. The trial judge sustained the objection and ruled that Appellant could ask potential jurors whether they could consider affirmative defenses “and list them all,” but could not ask jurors whether they would consider the specific affirmative defense of insanity. After the parties discussed the issue, Appellant indicated he was “abandoning” asking potential jurors questions specifically regarding the insanity defense.

After the State presented its case in chief, Appellant presented expert witnesses in order to prove his insanity defense. The experts testified that medical examinations of Appellant’s brain revealed a frontal lobe abnormality. Three of Appellant’s experts testified that the frontal lobe abnormality impaired his ability to control his impulses and exercise proper judgment. One of Appellant’s experts testified that he was unable to distinguish between right and wrong as required under South Carolina law. *See State v. Pittman*, 373 S.C. 527, 577-78, 647 S.E.2d 144, 170 (2007) (a defendant is considered legally insane if, at the time of the offense, he lacked the capacity to distinguish moral or legal right from wrong). In rebuttal, the State presented experts who testified that Appellant was able to distinguish

between right and wrong and, therefore, could be held criminally responsible for his actions. The trial court submitted a jury charge on the insanity defense and instructed the jury that, in order to be found not guilty by reason of insanity, Appellant had to show by a preponderance of the evidence that he had a mental disease or defect that made him unable to distinguish right from wrong. See S.C. Code Ann. § 17-24-10 (2006). At the conclusion of the guilt phase, the jury declined to find Appellant not guilty by reason of insanity and returned a guilty verdict as to all counts.

The trial proceeded to the penalty phase, and during the conference to determine the appropriate jury charges, the trial court informed the parties that it intended to charge the jury on two statutory mitigating factors provided in S.C. Code Ann. §§ 16-3-20(C)(b)(2) and (6).¹ Appellant did not request a charge on any additional statutory mitigating factors and indicated that he had no objection to the jury charges.

At the conclusion of the penalty phase, the jury recommended Appellant be sentenced to death. This appeal followed, and Appellant raises the following issues for review:

- I. Did the trial court err in refusing to allow Appellant to ask potential jurors about their feelings and viewpoints concerning the defense of insanity during *voir dire*?
- II. Did the trial court err in failing to instruct the jury on an additional and unrequested statutory mitigating circumstance?

¹ These mitigating factors provide: "The murder was committed while the defendant was under the influence of mental or emotional disturbance" and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." S.C. Code Ann. §§ 16-3-20(C)(b)(2) and (6).

LAW/ANALYSIS

I. *Voir Dire*

Appellant argues the trial court erred in refusing to allow him to question potential jurors about their feelings on the insanity defense during *voir dire*. We disagree.

Initially, we question whether this issue is preserved for review. After the trial court ruled that Appellant could not ask potential jurors about their views on the insanity defense, Appellant indicated that he was “abandoning” this line of questioning, thereby suggesting he accepted the trial court’s ruling. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911 (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).

In any event, Appellant’s argument fails on the merits. The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court. *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004). An abuse of discretion occurs when the trial court’s ruling is based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A capital defendant’s right to *voir dire*, while grounded in statutory law, is also rooted in the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Id.* To constitute reversible error, a limitation on questioning must render the trial “fundamentally unfair.” *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991); *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004).

Appellant argues that he was deprived of his right to a fair trial by an impartial jury as a result of the trial court’s ruling precluding counsel from questioning potential jurors on their view of the insanity defense. Appellant claims the insanity defense is a controversial legal issue and that some members of the jury may have been unable to follow the law in regard to the defense. We disagree.

Appellant was not entitled to ask potential jurors about their specific views of the insanity defense during *voir dire*. The trial court allowed Appellant to explore the issue of affirmative defenses during *voir dire*, and permitting either side to ask any more case-specific questions would have veered close to allowing the parties to stake out a jury. See *State v. Poindexter*, 314 S.C. 490, 493, 431 S.E.2d 254, 255 n.2 (1993) (*voir dire* is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions).² While the Sixth and Fourteenth Amendments to the United States Constitution provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. “The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.” *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

Our review of the entire *voir dire* process shows the qualified jurors were impartial, unbiased, and capable of following the law. Prior to trial, potential jurors completed a questionnaire indicating whether they were the type of person who: (1) would automatically impose the death penalty; (2) would never impose the death penalty; or (3) would listen to the evidence and apply the law in deciding whether to impose the death penalty. The trial court excused any individual who indicated that he fell into the first or second category. The trial court asked the potential jurors if anyone had bias or prejudice regarding the case and dismissed those who stated they could not remain fair or unbiased. Additionally, the trial court confirmed that each qualified juror would apply the law as charged, even if they disagreed with it, which necessarily includes the law of the insanity defense. Finally, the trial court permitted Appellant to ask potential jurors whether they would be able to apply the law in favor of Appellant if the facts provided for a defense.

² We disagree with the dissent that *Poindexter* stands for the proposition that questioning jurors about their bias against the insanity defense is appropriate. Nonetheless, the issue in this case is not whether it is appropriate, but rather, the issue is whether the trial court’s ruling precluding such questioning rendered Appellant’s trial “fundamentally unfair.” See *Hill*, 361 at 310, 604 S.E.2d at 703 (affirming trial court’s ruling that limited *voir dire* questioning where such limitation did not render the defendant’s trial fundamentally unfair).

Appellant presented no evidence showing the limitation of questioning impacted his right to a fair and impartial jury and failed to present evidence that the jury was biased or incapable of following instructions on the law. Accordingly, under the facts of this case, there is no indication that Appellant's trial was rendered "fundamentally unfair" by the trial court's limit of *voir dire*.

In conclusion, contrary to the dissent's view, our holding in no way imposes an absolute ban on questioning jurors about their views on the insanity defense. Rather, we hold that the trial court's ruling limiting the scope of *voir dire* did not deprive Appellant of a fair trial.

II. Mitigating Factor Charge

Appellant argues that the trial court erred by failing to instruct the jury on the statutory mitigating circumstance provided in § 16-3-20(C)(b)(7): "The age or mentality of the defendant at the time of the crime." We disagree.

In *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989), we set forth the proper procedure for submission of statutory mitigating factors to the jury in the penalty phase of a capital case:

Once the 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 that he wishes submitted to the jury.

Absent a request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for review. *State v. Evans*, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).

In this case, after the trial court informed the parties that it would charge the mitigating factors in §§ 16-3-20(C)(b)(2) and (6), Appellant stated

that he had no objection to the decision and did not request that the court charge any additional statutory mitigating factors. Moreover, after charging the jury, Appellant indicated he had no objection to the charge. Accordingly, this issue is not preserved for our review.

Notwithstanding any preservation issues, we note that Appellant was not prejudiced by the absence of this statutory mitigating factor. Appellant's mental condition was the focus of the guilt phase and was also a main issue in the penalty phase. The jury heard extensive expert testimony regarding Appellant's alleged mental disorders, and the trial court charged the jury on two other mitigating factors through which they could consider Appellant's mental condition. Thus, the jury was clearly aware that they could consider Appellant's mentality in determining whether the death sentence was warranted. In spite of this evidence, the jury found the existence of five statutory aggravating factors beyond a reasonable doubt and recommended Appellant be sentenced to death. Therefore, the absence of this statutory mitigating factor did not preclude the jury from considering Appellant's mentality in the penalty phase, and there is no reasonable probability that had the trial court charged the jury on this additional mitigating factor, the jury would have returned a different recommendation.³ *See Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendant's mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors).

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence 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. *See State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007) (death

³ We do not base our finding of no prejudice on the fact that the jury found the existence of five aggravating factors.

sentence warranted where defendant was convicted of murder, kidnapping, criminal sexual assault, and grand larceny); *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004) (death sentence upheld where jury found aggravating factors of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996) (death sentence upheld where defendant was convicted of murder, criminal sexual conduct, armed robbery, and grand larceny of a motor vehicle).

CONCLUSION

For the foregoing reasons, we affirm Appellant's convictions and sentence.

MOORE, WALLER and BEATTY, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, a capital defendant who will interpose a diminished capacity or insanity defense is entitled to *voir dire* the jurors whether they entertain any bias against such a defense. In fact, this Court has already recognized the appropriateness of such inquiry. See State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993), footnote 2. The trial judge, of course, must be careful not to allow such questioning to veer into improper “pre-educating or indoctrinating,” but I cannot agree with the majority’s absolute ban. Moreover, I am not clear what evidence the majority believes was available to appellant to demonstrate either the impact of the denial of his *voir dire* request, or that the jury was in fact biased or incapable of following the instructions. Having been denied the opportunity to probe potential jurors’ bias, I would not require that appellant demonstrate its existence in order to obtain relief.

I agree with the majority that the issue whether the jury should have been charged on the statutory mitigating circumstance found in S.C. Code Ann. § 16-3-20 (C)(b)(7) is not preserved for our review and therefore the merits should not be addressed on direct appeal. State v. Stone, S.C. Sup. Ct. Op. No. 26408 filed December 20, 2007. Moreover, since South Carolina is not a “weighing” state, State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004), the fact that the jury found five statutory aggravators is simply not relevant to whether appellant was prejudiced by the absence of a single mitigator, and I specifically decline to join that part of the majority’s decision which cites this as a fact in support of its decision to affirm the unpreserved issue.

I would reverse appellant’s convictions and sentences, and remand for a new trial.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 26442

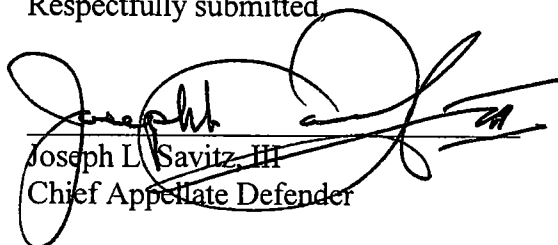
PETITION FOR REHEARING

Counsel for Stephen Christopher Stanko petitions for rehearing, pursuant to *Rule 221(a)*, *SCACR*, of the Court's ruling that Stanko was not prejudiced by the absence of an instruction to the jury on the statutory mitigating circumstance provided by *S.C. Code Section 16-3-20(C)(b)(7)*: "The age or mentality of the defendant at the time of the crime." Counsel believes that the Court's analysis represents a substantial departure from its own firmly-established capital jurisprudence. See, for example, *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002), and *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). Before now, the Court has wisely rejected the State's attempts to weaken or dilute the requirement of charging all three applicable mitigators where supported by

evidence a capital defendant was mentally unbalanced at the time of the murder. See, for example, *Stone and State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000).

For this reason, the Court should grant rehearing, vacate Stephen Stanko's death sentence and remand for resentencing.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over the printed name and title.

Joseph L. Savitz, III
Chief Appellate Defender

Kathrine H. Hudgins
Appellate Defender

This 27th day of February, 2008.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

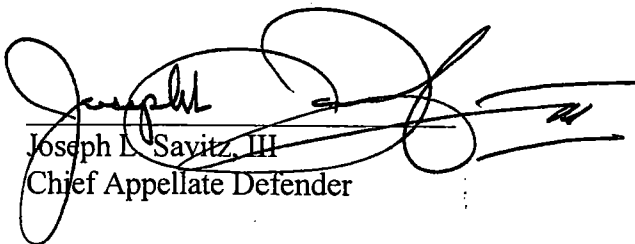
V.

STEPHEN C. STANKO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, this 27th day of February, 2008.



Joseph L. Sayitz, III
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of February, 2008.

Karen D. Elliott (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

February 27, 2008

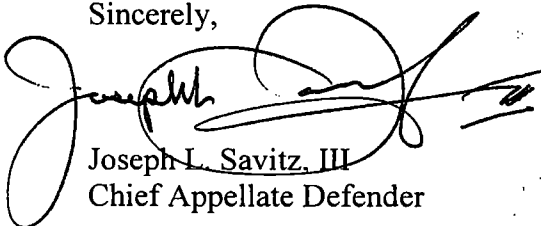
Mr. Stephen C Stanko
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

Re: Your appeal

Dear Mr. Stanko:

Enclosed is a copy of the petition for rehearing that I filed today on your behalf in the S.C. Supreme Court. Feel free to contact me if you have any questions.

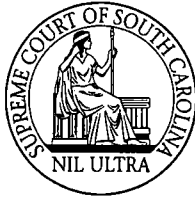
Sincerely,



Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosure



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 19, 2008

✓ Chief Attorney Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

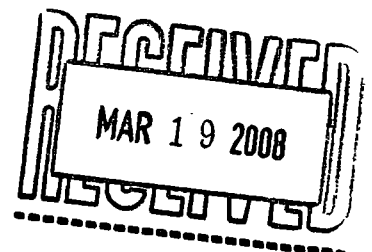
s/ Donald W. Beatty J.

Justice James E. Moore,
not participating

March 19, 2008.”

A14

The remittitur is today being forwarded to the lower court.



Chief Attorney Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
Page Two
March 19, 2008

Very truly yours,

A handwritten signature in black ink, appearing to be "D. L. S.", with a long horizontal line extending to the right.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
The Honorable John Gregory Hembree

THE 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

PETITION FOR STAY OF EXECUTION

Counsel for Stephen Stanko petition for a stay of execution pursuant to this Court's order *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Counsel seek a stay to allow Mr. Stanko to seek certiorari from the United States Supreme Court or, alternatively, to seek post-conviction relief in Georgetown County. Counsel make this motion in the alternative because it is unclear whether the Court relied upon a procedural bar to dispose of the following issue, taken from the Brief of Appellant:

The trial judge erred in refusing to allow [trial] counsel, during voir dire, to ask potential jurors about their feelings and viewpoints concerning the defense of insanity when insanity was raised as an

affirmative defense and the question was asked to reveal juror bias.

Although the Court “question[ed] whether this issue is preserved for review,” it nevertheless then reached the merits of the issue. *State v. Stanko*, Opinion No. 26442, decided February 25, 2008. If the Court held that this issue was not in fact precluded from review by a procedural bar, counsel intend to petition the United States Supreme Court for writ of certiorari, as the issue involves the application of the Sixth and Fourteenth Amendments to the United States Constitution. See *United States Supreme Court Rule 23.3*.

If, on the other hand, the Court holds that the issue was unpreserved for review, Mr. Stanko intends to file an application in post-conviction relief arguing that trial counsel did not provide effective assistance under the Sixth and Fourteenth Amendments and *Strickland v. Washington*, 466 U.S. 668 (1984), due to their failure to preserve the issue for review. Moreover, Mr. Stanko has informed counsel that he intends to allege that they were ineffective during his direct appeal pursuant to the Sixth and Fourteenth Amendments and *Evitts v. Lucy*, 469 U.S. 387 (1985), due to counsels’ failure to argue that South Carolina’s insanity statute, *S.C. Code Section 17-24-10*, violates the Due Process Clause of the Fourteenth Amendment and that he was in any event entitled to a directed verdict on his defense of insanity. In a letter dated July 26, 2007, counsel wrote Mr. Stanko and “emphatically stat[ed] that you did not waive these issues nor did we abandon them as a matter of appellate strategy.” (Obviously, by making this motion counsel does not intend to limit the grounds on which Mr. Stanko might allege that both trial and appellate counsel were prejudicially deficient. To attempt to do so would create an actual conflict of interest. Counsel merely note that they are informed and believe that Mr. Stanko intends to raise allegations of ineffective assistance of counsel at post-conviction relief.) With regard to stays of execution in such cases, the Court has stated:

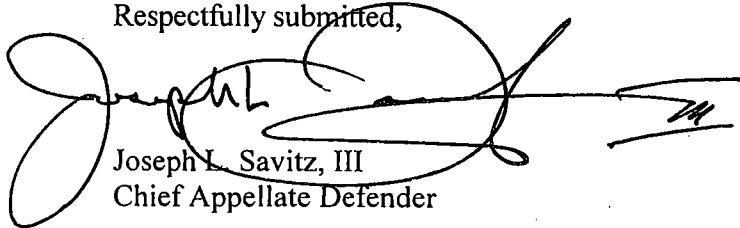
If the defendant desires a stay to pursue state post-conviction relief,

the defendant must ... file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief.

471 S.E.2d at 141. Counsel reasonably believe and assert in good faith that Mr. Stanko is entitled to a stay of execution pursuant to the Court's order.

Accordingly, counsel for Stephen Stanko petitions for a stay of execution, pursuant to this Court's order *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over the typed name and title.

Joseph L. Savitz, III
Chief Appellate Defender

Kathrine Hudgins
Appellate Defender

Attorneys for Appellant

This 20th day of March, 2008.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

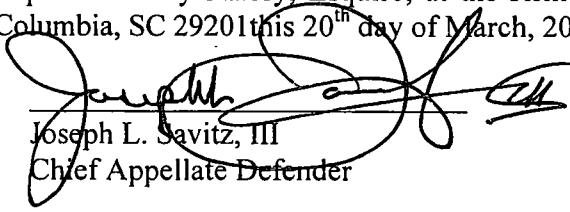
V.

STEPHEN C. STANKO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion for stay of execution in the above entitled case has been served upon Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 20th day of March, 2008.



Joseph L. Savitz, III
Chief Appellate Defender

Attorney for Appellant

SWORN TO BEFORE ME this 20th day
of March, 2008.

Karen D. Elliott (L.S.)

Notary Public for South Carolina

My Commission Expires: March 19, 2017.

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.

RETURN TO PETITION FOR STAY OF EXECUTION

On March 20, 2008, counsel for Stephen Stanko filed a petition for stay of execution pursuant to this Court's order *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Counsel seeks a stay to seek certiorari from the United States Supreme Court, or in the alternative to seek post-conviction relief in Georgetown County if this Court previously determined Stanko's first issue on appeal was not preserved for appellate review. Respondents oppose the issuance of a stay because the issue the petitioner intends to raise on certiorari is not appropriate for certiorari consideration because it was not preserved because of the abandonment at trial as an independent state law ground of decision.

Stanko asserted on appeal that the trial judge erred in not allowing him to question jurors about the insanity defense. This Court affirmed Stanko's conviction and death sentence. *State v. Stanko*, Opinion No. 26442, *Shearhouse Advance Sheets* (decided February 25, 2008). In its

Opinion, this Court stated regarding preservation of this issue:

During *voir dire*, Appellant attempted to question a potential juror as to her views on the insanity defense. The State immediately objected to this line of questioning. The trial judge sustained the objection and ruled that Appellant could ask potential jurors whether they could consider affirmative defenses "and list them all," but could not ask jurors whether they would consider the specific affirmative defense of insanity. After the parties discussed the issue, Appellant indicated he was "abandoning" asking potential jurors questions specifically regarding the insanity defense.

Initially, we question whether this issue is preserved for review. After the trial court ruled that Appellant could not ask potential jurors about their views on the insanity defense, Appellant indicated that he was "abandoning" this line of questioning, thereby suggesting he accepted the trial court's ruling. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903 911 (1996)(no issue is preserved for appellate review if the objecting party accepts the trial courts ruling and does not contemporaneously make an additional objection).

The claim was therefore recognized by this Court as abandoned.¹ Therefore it is not preserved for consideration in certiorari proceedings before the United States Supreme Court.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). The subsequent discussion by this Court concerning the voir dire issue was therefore *dicta* and an alternative holding on the issue.

Respondent reasserts its position taken in its Final Brief of Respondent and during its oral argument that this issue was not preserved for appellate review because the issue was abandoned by trial counsel and not preserved by any objection in accordance with state law. If the state court decision rests on adequate and independent state grounds, it does not lose the procedural default even if it alternately considers the merits of the federal question as well. Harris v. Reed, 489 U.S. 255, 264, n. 10 (1989). Accord, Ashe v. Styles, 39 F.3d 80, 87 (4th Cir. 1994)(going to the merits

¹The Petitioner is asking this Court to clarify its ruling. Respondent submits that for certiorari purposes, the opinion is not ambiguous and plainly concludes that the issue was abandoned. Thus, no clarification is necessary. Merely making alternate holdings does not remove the issue of preservation of a claim.

after a default does not erase the default merely by use of the phrase “the court further concludes”); Glenn v. Bartlett, 98 F.3d 721, 725 (2d Cir. 1996) (“in any event” language does not waive the independent procedural bar where the state court goes on to address the merits). Thus, the matter is not preserved for certiorari in the United States Supreme Court.²

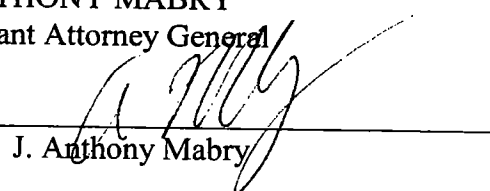
Respondent respectfully asks this Court to deny the motion to stay pending certiorari in the United States Supreme Court.³

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

By: 

J. Anthony Mabry

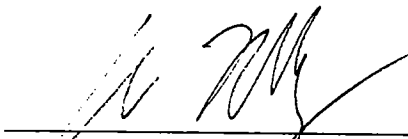
ATTORNEYS FOR RESPONDENT

²Respondent adopts and incorporates herein by reference its Final Brief of Respondent, p. 9-28 addressing the basis of the abandonment found by this Court.

³To the extent the Petitioner may be seeking a stay to allow filing a state PCR action, he has not made a sufficient showing. In the order of In Re: Stays, supra, the Court stated: “If the defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief. **If the general nature of the issues are appropriate for post-conviction relief**, this Court will assign a circuit judge to the case and issue a stay of execution.” The Petitioner has failed to set forth such grounds because the stated free-standing constitutional voir dire ground for certiorari is not appropriate for state PCR actions. Without prejudice to a further filing, it must be denied at this time.

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served Respondent's *Return to Petition for Stay of Execution* in the foregoing action by depositing copies in the InterAgency Mail to Joseph L. Savitz, III, Chief Attorney, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 28th day of March, 2008.



ANTHONY MABRY
Assistant Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v.

Stephen Christopher Stanko,

Appellant.

ORDER

Appellant was convicted of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery, and was sentenced to death. This Court affirmed his convictions and sentence. State v. Stanko, Op. No. 26442 (S.C. Sup. Ct. filed February 25, 2008). The remittitur was sent to the lower court on March 19, 2008. Appellant now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) to *either* seek certiorari from the United States Supreme Court *or* seek post-conviction relief (PCR).

The State opposes the issuance of a stay pending the filing of either a petition for a writ of certiorari to the United States Supreme Court or the filing of a PCR application.

In order for a capital defendant to obtain a stay of execution

following the conclusion of his direct appeal and pending a petition for a writ of certiorari to the USSC, he must, within ten days of the date of the execution notice,¹ make an appropriate motion for this Court to stay the execution under United States Supreme Court Rule 23.3. In re Stays of Execution in Capital Cases, supra. The motion must set forth the federal question(s) the defendant intends to raise in the petition for a writ of certiorari. Id. As long as one of the federal questions asserted has been adequately preserved under state law so that it can be reviewed by the USSC, this Court will grant a stay of execution for ninety days from the date the remittitur was sent for the appellant to file a petition for a writ of certiorari. Id.

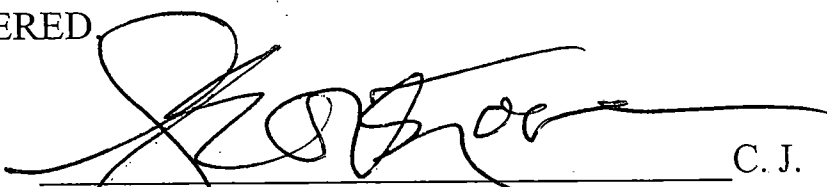
If a capital defendant desires a stay to pursue state PCR, he must, within ten days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the PCR application, after which this Court will assign a circuit judge to the case and issue a stay of execution. Id. Within thirty days of the date of the order granting a stay, the judge shall determine the defendant's desires regarding counsel and issue an order which either sets forth the name of

¹ An execution notice has not been issued in this case.

retained counsel, appoints counsel for the defendant if he or she is indigent, or determines the defendant will be allowed to proceed pro se based on a knowing and intelligent waiver of the right to counsel after being warned of the dangers and disadvantages of proceeding pro se. Id.

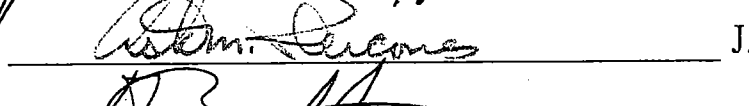
We hereby grant a stay of execution for ninety days from the date the remittitur was sent, in which time appellant may either file a petition for a writ of certiorari in the United States Supreme Court or file a PCR application in the circuit court. If appellant chooses the latter, he must, upon filing the application, notify this Court, and a PCR judge will be assigned to the case and the stay extended according to the terms of In re Stays of Execution in Capital Cases.

IT IS SO ORDERED


C. J.


J.


J.


J.


J.

Columbia, South Carolina

April 16, 2008

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

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

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

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

14 Q SPECIFICALLY WHAT KIND OF EMOTIONS ARE GENERATED -- I
15 ASSUME GENERATED WOULD BE AN APPROPRIATE WORD?

16 A YES.

17 Q WHAT KIND OF EMOTIONS ARE GENERATED IN THE LIMBIC
18 SYSTEM?

19 A THE FULL GAMUT OF--

20 Q CAN YOU GIVE US SOME EXAMPLES?

21 A ANGER, DISGUST, HAPPINESS, SADNESS, ET CETERA. SO
22 WHEN A PERSON ENCOUNTERS A STIMULUS, THE LIMBIC SYSTEM
23 NOTICES THAT FIRST AND INFORMS THE FRONTAL LOBES ABOUT
24 WHAT THAT STIMULUS IS. THE FRONTAL LOBES HAVE TO MAKE A
25 DECISION ABOUT WHETHER TO BEHAVE THAT WAY OR NOT.

1 Q NOW, WOULD FEAR BE AN EMOTION OUT OF THE LIMBIC
2 SYSTEM?

3 A CERTAINLY.

4 Q ALL RIGHT. AND AGAIN, ALL OF THESE -- DO WE HAVE ANY
5 CONTROL TO -- OR AN ABILITY TO THINK ABOUT THOSE EMOTIONS
6 AT THE LIMBIC SYSTEM LEVEL?

7 A NO. THEY ARE AUTOMATIC AT THE LIMBIC SYSTEM LEVEL.

8 Q WOULD YOU SAY THEY'RE AUTOMATIC JUST LIKE MAYBE A
9 HEARTBEAT OR A...

10 A YES.

11 Q RESPIRATION?

12 A ALL THOSE FUNCTIONS ARE AUTOMATIC.

13 Q ALL RIGHT. DO WE KNOW ANYTHING ABOUT THE STRENGTH OF
14 THE EMOTIONS, IN PHYSICAL TERMS?

15 A I WILL TELL YOU ONE EXAMPLE. ONE OF THE STRUCTURES
16 IN THE LIMBIC SYSTEM THAT DENOTES FEAR AND ANXIETY AND
17 THREAT IS THE AMYGDALA, A -- PART OF THE LIMBIC SYSTEM.

18 IF A PERSON ENCOUNTERS A MILDLY THREATENING STIMULUS,
19 IT WOULD BE SOME PRIOR TO THE AMYGDALA, BUT NOT A GREAT
20 DEAL. THE FRONTAL LOBES CAN CONTROL THAT. THE PERSON
21 DOESN'T ACT OUT.

22 BUT IF THERE'S TREMENDOUS STIMULATION OF THE
23 AMYGDALA, THAT CAN OVERRIDE THE FRONTAL LOBES AND THE
24 PERSON WILL BEHAVE AGGRESSIVELY.

25 Q I WAS GOING TO ACTUALLY ASK YOU. THE STRENGTH OF

1 THAT EMOTION COMING OUT OF THE LIMBIC SYSTEM AND THE
2 AMYGDALA AND THAT SITUATION COMPARED TO THE RELATIVE
3 ABILITIES OF THE -- OF A POWER OR THE ABILITY OF THE
4 FRONTAL LOBES TO REGULATE THAT, DO YOU KNOW -- CAN YOU
5 TELL US ANYTHING ABOUT HOW THE RELATIVE STRENGTHS OF THOSE
6 SIGNALS THAT ARE GENERATED IN THE BRAIN?

7 A THE LIMBIC SYSTEM CAN AND OFTEN TIMES DOES OVERPOWER
8 THE FRONTAL LOBES. THE FRONTAL LOBES HAVE BEEN THE LAST
9 PART OF THE BRAIN TO EVOLVE. THE LIMBIC SYSTEM HAS BEEN
10 AROUND FOR MILLIONS OF YEARS.

11 ALL ANIMALS HAVE A LIMBIC SYSTEM. ALL ANIMALS CAN
12 BEHAVE EMOTIONALLY. HUMANS HAVE RECENTLY EVOLVED THE
13 FRONTAL LOBE SYSTEM THAT CONTAINS SOME OF THAT
14 EMOTIONALITY, BUT IT'S NOT PERFECT BY ANY MEANS.

15 Q ALL RIGHT. WHERE IS THE CAPACITY TO DISTINGUISH
16 RIGHT FROM WRONG IN THE BRAIN?

17 A PROBABLY FRONTAL LOBE.

18 Q AND WHY DO YOU SAY PROBABLY?

19 A IT'S A HIGHER -- WHAT WE CALL A HIGHER MENTAL
20 FUNCTION. THOSE ARE ALL LOCATED IN THE FRONTAL LOBE. SO
21 THE FRONTAL LOBE -- OVER A LOT OF THINGS. IT MAKES
22 DECISIONS OF WHAT'S APPROPRIATE BEHAVIOR. IT CONTROLS
23 EMOTIONALITY. IT'S PROBLEM-SOLVING. IT'S ALL THOSE
24 HIGHER FUNCTIONS OF WHICH TELLING RIGHT FROM WRONG IS ONE
25 OF THOSE.

1 Q DO YOU KNOW IN YOUR FIELD WHAT A HEALTHY BRAIN SHOULD
2 LOOK LIKE?

3 A YES.

4 Q IN OTHER WORDS, A LOT OF TIMES YOU HEAR, WELL, IS HE
5 NORMAL? AND EVERYONE SAYS, WELL, WHAT IS NORMAL? BUT DO
6 WE KNOW WHAT A NORMAL, HEALTHY BRAIN LOOKS LIKE AND HOW IT
7 SHOULD BE STRUCTURED?

8 A YES. THE DATABASE NOW FOR MENTAL -- OR FOR BRAIN
9 STRUCTURE ARE HUGE.

10 Q HOW MANY -- WHAT DO YOU MEAN BY HUGE?

11 A THEY HAVE BEEN DOING THESE SCANS NOW FOR ABOUT 20
12 YEARS, SO THEY HAVE A HUGE DATABASE OF NORMAL BRAIN
13 STRUCTURE. THEY KNOW WHAT THAT LOOKS LIKE.

14 Q AND WHAT DO THESE SCANS LOOK LIKE? IF YOU LOOK AT
15 THEM, HOW DO THEY -- WHAT DO THEY LOOK LIKE?

16 A ALL RIGHT. DEPENDS ON WHETHER ITS AN MRI SCAN, THEN
17 IT WILL BE IN HIGH DETAIL DEFINITION, VERY, VERY HIGH
18 DETAILED DEFINITION. YOU CAN SEE TUMORS, YOU CAN SEE
19 MINUTE DISTURBANCES IN STRUCTURE.

20 IF IT'S A PET SCAN, YOU WILL SEE COLORS. BLUE MEANS
21 CELLS ARE ALMOST NON-ACTIVE. RED MEANS CELLS ARE VERY
22 ACTIVE. SO YOU HAVE TO LOOK AT WHICH SCAN OR BOTH SCANS.

23 Q NOW, ARE THERE NORMAL RANGES IN TERMS OF WHAT SIZE OF
24 THE PARTICULAR AREAS OF THE BRAIN SHOULD BE?

25 A YES. THOSE HAVE BEEN STANDARDIZED, YEAH.

1 Q AND WOULD THAT BE APPLICABLE TO THE FRONTAL LOBE?

2 A FRONTAL LOBES ESPECIALLY.

3 Q AND HOW -- CAN YOU SAY THAT THERE IS A -- A HEALTHY
4 OR STANDARD SIZE PRETTY MUCH?

5 A YES.

6 Q WITH RESPECT TO THE FRONTAL LOBES?

7 A YES, IN BOTH FUNCTION AND STRUCTURE.

8 Q IN FUNCTION AND STRUCTURE. NOW AND AGAIN, IF YOU
9 WANT TO LOOK AT WHAT THE FUNCTIONAL ABILITY IS, CAPACITY,
10 WITH RESPECT TO THE NORMAL HEALTHY BRAIN, HOW WOULD YOU
11 MAKE THAT DETERMINATION?

12 A YOU WOULD DO A PET SCAN.

13 Q OKAY.

14 A UNDER CIRCUMSTANCES WHERE A PERSON IS INVOLVED, WHILE
15 THEY SCAN THEM, THEY ARE INVOLVED IN A FRONTAL LOBE
16 FUNCTION. THEY ARE INVOLVED IN A TASK THAT REQUIRES A
17 FRONTAL LOBE. THE FRONTAL LOBE SHOULD WORK WELL THEN. SO
18 IF YOU SEE BLUE, OR -- THE FRONTAL LOBES ARE NOT WORKING.

19 Q AND IS THERE STANDARD PROTOCOL, PROCEDURE IN
20 JOURNALS--

21 A YES.

22 Q -- PUBLISHED ARTICLES ON HOW TO DO THAT?

23 A YES, THOSE HAVE BEEN STANDARDIZED.

24 Q SO WHEN THESE DATABASES ARE PUT TOGETHER, THEY ARE
25 GOING TO HAVE PET SCANS OF INDIVIDUALS WHO ARE -- WHO HAVE

1 BEEN DETERMINED TO BE HEALTHY?

2 A YEAH.

3 MR. HEMBREE: YOUR HONOR, I'M GOING TO OBJECT TO
4 THIS LINE OF QUESTIONING AGAIN ABOUT THE PET SCANS.
5 THIS IS OUTSIDE THE SCOPE OF DR. ALBINIAK'S
6 EXPERTISE.

7 MR. DIGGS: WELL--

8 THE COURT: NO SPEAKING OBJECTIONS. PLEASE
9 APPROACH.

10 (WHEREUPON A BENCH CONFERENCE WAS HELD.)

11 THE COURT: THE OBJECTION IS SUSTAINED.
12 FOUNDATION.

13 BY MR. DIGGS:

14 Q WITHIN YOUR FIELD OF EXPERTISE, DOCTOR, WHEN YOU ARE
15 DOING PROJECTS AT WORK AND IN CLASSES AND SO FORTH, DO YOU
16 USE PET SCANS IN ORDER TO DETERMINE BRAIN INJURY, TRAUMA,
17 AND FUNCTION?

18 A I USE THEM AS A TEACHING TOOL.

19 Q YES.

20 A YEAH.

21 Q OKAY. AND HOW ABOUT WITH RESPECT TO THE STRUCTURE?

22 A YES, MRI SCANS.

23 Q MRI?

24 A MRI SCANS.

25 Q AND WITH THE USE OF PET SCANS AND MRI SCANS AND OTHER

1 TYPES OF SCANS, WITHIN THE SCOPE OF YOUR EXPERTISE, ARE
2 YOU ABLE TO MAKE OPINIONS, FORM OPINIONS, ABOUT THE STATUS
3 OR STATE OF A PARTICULAR BRAIN?

4 A YES.

5 Q NOW, CAN -- HAVE YOU LOOKED AT INFORMATION PERTAINING
6 TO MR. STANKO?

7 A YES. I HAVE SEEN PET SCANS AND MRIS WHICH WERE
8 EVALUATED BY OTHER EXPERTS.

9 Q ALL RIGHT. AND DO YOU HAVE AN OPINION ON THE
10 FUNCTION AND THE STRUCTURE OF MR. STANKO'S BRAIN?

11 A BOTH STRUCTURE AND FUNCTION OF FRONTAL LOBE AREAS ARE
12 ABNORMAL.

13 Q NOW, WHY DO YOU SAY THAT?

14 A THE -- THE VOLUME OF THE LEFT FRONTAL LOBE DONE BY
15 DR. GUR, THE ANALYSIS DONE BY -- IS SUBSTANTIALLY REDUCED.
16 IN OTHER WORDS, THERE'S TISSUE MISSING IN THE LEFT FRONTAL
17 LOBE OVER HERE.

18 THERE IS ALSO A LOT OF FLUID IN HIS BRAIN. THERE'S
19 MORE FLUID IN HIS BRAIN THAN IS NORMAL. THE CSF,
20 CEREBROSPINAL FLUID IS ELEVATED. WHEN THE CEREBROSPINAL
21 FLUID IS ELEVATED, THAT MEANS THERE IS TISSUE MISSING.

22 Q NOW, ARE MRIS SOMETHING THAT WERE NORMALLY USED BY
23 PERSONS IN YOUR FIELD OF EXPERTISE?

24 A OFTEN TIMES, YES.

25 Q AND WOULD IT HELP YOU TO LOOK AT DR. GUR'S REPORT

1 RIGHT NOW--

2 A PROBABLY SO.

3 Q -- TO EXPLAIN TO US THIS ISSUE ABOUT THE--

4 A PROBABLY SO.

5 Q LET ME SHOW YOU...

6 MR. HEMBREE: YOUR HONOR, THIS IS DEFENSE
7 EXHIBIT ONE. WE HAVE NO OBJECTION TO ITS
8 INTRODUCTION.

9 THE COURT: MARKED AND ADMITTED WITHOUT
10 OBJECTION.

11 MR. DIGGS: THANK YOU.

12 THE COURT: YOU'RE WELCOME.

13 (WHEREUPON, DEFENSE EXHIBIT 1 WAS ADMITTED INTO
14 EVIDENCE.)

15 BY MR. DIGGS:

16 Q LET ME ASK YOU TO TURN AROUND AND LOOK AT THAT, DR.
17 ALBINIAK. JUST GIVE US AN EXPLANATION, PLEASE SIR, ABOUT
18 WHAT WE'RE LOOKING AT HERE.

19 A WHAT -- WHAT DR. GUR DID -- DR. GUR IS A BRAIN
20 SCANNER AT THE UNIVERSITY OF PENNSYLVANIA, A FULL
21 PROFESSOR, BEEN THERE 30 YEARS. HE DOES THIS ALL THE
22 TIME. HE DID WHAT WE CALL A VOLUMETRIC ANALYSIS OF THE MR
23 DATA THAT MUSC SENT HIM.

24 Q ALL RIGHT. SO AN MRI WAS DONE ON MR. STANKO?

25 A AT MUSC.

1 Q AT MUSC HERE IN SOUTH CAROLINA?

2 A THEY SENT THE DATA TO DR. GUR. HE DID THE COMPUTER
3 ANALYSIS. IT'S ALL DONE BY THE COMPUTER. HE DOESN'T DO
4 IT. THE COMPUTER'S SOFTWARE SORT OF DOES THE PROPER
5 THING.

6 Q ALL RIGHT. HOW DOES HE GO ABOUT ANALYZING THAT MRI
7 DATA?

8 A HE COMPARES MR. STANKO'S BRAIN WITH 42 NORMAL BRAINS,
9 SO YOU HAVE A SAMPLE OF 42 NORMAL BRAINS.

10 Q IS THAT A SIGNIFICANT SAMPLE?

11 A THAT'S A LARGE SAMPLE. THIRTY WOULD BE ADEQUATE.
12 THIRTY WOULD BE ADEQUATE.

13 Q ALL RIGHT. FOR STATISTICAL PURPOSES?

14 A FOR STATISTICAL PURPOSES, YEAH.

15 Q ALL RIGHT.

16 A WHAT WE FOUND, IF I CAN DEMONSTRATE, THE THIN LINE IS
17 THE LEFT HEMISPHERE, THIS SIDE OF THE BRAIN. THE RED LINE
18 IS THE RIGHT HEMISPHERE, THIS SIDE OF THE BRAIN. THAT
19 FIRST POINT IS THE FRONTAL LOBE. IT'S NORMAL ON THE RIGHT
20 SIDE. I SHOULD -- I GUESS HAVE TO DO -- THIS WOULD BE
21 CONSIDERED NORMAL, ANYWHERE IN THIS REGION.

22 THEN THE LEFT FRONTAL LOBE IS DECIDEDLY SMALLER IN
23 VOLUME MEANING THERE'S TISSUE MISSING. THIS IS THE
24 CEREBROSPINAL FLUID, MARKEDLY ELEVATED, MARKEDLY ELEVATED.

25 AGAIN, THIS IS THE FRONTAL LOBE, THE LEFT FRONTAL

1 LOBE. SIGNIFICANT LOSS OF TISSUE FOR SOME REASON. DON'T
2 KNOW WHY. THIS IS THE CEREBROSPINAL FLUID ELEVATED. THE
3 ONLY WAY YOU COULD HAVE MORE FLUID IN THE BRAIN IS TISSUE
4 MISSING.

5 THIS IS THE MEDIAL GRAY MATTER, SUBSTANTIALLY LOWER
6 HERE AND SIGNIFICANTLY LOWER THERE.

7 Q DOC, LET'S PULL THIS OUT AND PUT IT -- SEE IF WE CAN
8 PUT IT IN A LITTLE BETTER POSITION -- POSITION TO BE SEEN
9 BETTER.

10 A AGAIN, THIS IS DR. GUR'S WORK. HE TOOK THE MUSC MRI
11 DATA WHICH IS STRUCTURE OF THE BRAIN SENT TO HIM. HE
12 COMPUTER ANALYZED IT. HE WAS LOOKING FOR DIFFERENCES IN
13 REGIONS OF THE BRAIN. HE COMPARED THIS BRAIN TO --
14 MR. STANKO'S BRAIN TO 42 NORMAL BRAINS AS A GROUP.

15 WHAT HE FOUND IS HE -- HE ANALYZED THE DATA FOR THE
16 LEFT HEMISPHERE WHICH IS THE LEFT SIDE OF THE PATIENT'S
17 HEAD, AND THE RIGHT HEMISPHERE.

18 THE LEFT HEMISPHERE, THE FRONTAL LOBE SHOWS DECIDEDLY
19 LESS TISSUE THAN IS NORMAL. THE RIGHT FRONTAL LOBE
20 ADEQUATE. THIS AGAIN, CEREBROSPINAL FLUID. THE FLUID IS
21 ELEVATED IN THE BRAIN WHICH MEANS THERE'S A LOSS OF TISSUE
22 THROUGHOUT THE BRAIN.

23 AND THAT WAS MARKEDLY HIGHER, A LOT -- EXCUSE ME --
24 YEAH, MARKEDLY HIGHER. THIS IS THE MEDIAL GRAY AREA.
25 GRAY TISSUE IN THE BRAIN ARE NERVE CELLS. WHITE TISSUE IS

1 FIBERS IN THE BRAIN. SO THE MIDDLE PART OF HIS BRAIN HAS
2 LOST GRAY TISSUE, GRAY -- GRAY NERVE CELLS DUE TO SOME
3 FACTOR.

4 THE ONLY THING DR. GUR CAN'T TELL US IS HOW DID THIS
5 HAPPEN. WE KNOW THAT THERE'S A LOSS OF TISSUE, THERE'S A
6 SUBSTANTIAL LOSS OF TISSUE. HOW THAT OCCURRED IS UNCLEAR.

7 Q DR. ALBINIAK, LOOK AT THE CHART ON THE LEFT HAND
8 MARGIN. YOU HAVE NUMBERS THERE. WOULD YOU EXPLAIN TO US
9 WHAT THOSE NUMBERS MEAN?

10 A ALL RIGHT. THIS IS KIND OF STATISTICAL, SO I WILL
11 TRY TO DO THE BEST I CAN.

12 Q OKAY.

13 A THIS IS NORMAL. IN OTHER WORDS, A NORMAL BRAIN
14 SHOULD HAVE ALL THESE MARKS AROUND THIS LINE. PERFECTLY
15 NORMAL BRAIN. REMEMBER, THIS IS ONLY MR. STANKO'S BRAIN.
16 THE COMPARISON BRAINS ARE NOT THERE.

17 A NORMAL BRAIN WOULD HAVE TO FALL BETWEEN THESE TWO
18 LIMITS. THIS IS ONE STANDARD DEVIATION BELOW NORMAL.
19 THIS IS ONE STANDARD DEVIATION ABOVE NORMAL. THIS POINT
20 WHERE HIS FRONTAL -- LEFT FRONTAL LOBES ARE IS ABOUT TWO
21 AND A THIRD STANDARD DEVIATIONS BELOW NORMAL.

22 THAT WOULD MEAN THE CHANCES OF AN AVERAGE BRAIN BEING
23 THAT IMPAIRED WOULD BE ABOUT 1 PERCENT. IT'S A VERY LOW
24 PROBABILITY. THIS IS EVEN WORSE. THIS IS ABOUT TWO AND A
25 HALF STANDARD DEVIATIONS. MEANS THAT'S LESS THAN

1 1 PERCENT. THIS IS A FAIRLY ABNORMAL BRAIN.

2 Q ALL RIGHT. AND HOW ABOUT THIS, GOING DOWN FOUR--

3 A YEAH, THIS -- OVER FOUR. THAT IS--

4 Q OVER FOUR.

5 A THAT IS--

6 COURT REPORTER: I'M SORRY. I DIDN'T HEAR HIM.

7 BY MR. DIGGS:

8 Q WOULD YOU REPEAT THAT FOR THE COURT REPORTER, PLEASE.

9 A THE MEDIAL RIGHT -- THE MEDIAL RIGHT HEMISPHERE IS
10 DOWN AT ABOUT FOUR STANDARD DEVIATION UNITS WHICH WOULD BE
11 LESS THAN TWO TENTHS OF 1 PERCENT. IN OTHER WORDS, TWO
12 TENTHS OF 1 PERCENT OF THE BRAIN WOULD BE THAT DIFFERENT.

13 Q WHAT ROLE DOES THE MEDIAL -- WHAT DO YOU CALL THAT?

14 A THE MEDIAL GRAY IS THE AREA OF THE BRAIN ABOVE THE
15 LIMBIC SYSTEM WHICH IS INVOLVING EMOTIONAL BEHAVIOR.
16 THERE HAS BEEN LOSS OF BRAIN TISSUE THERE.

17 Q THERE IS -- AND IT'S INVOLVED IN WHAT?

18 A EMOTIONAL BEHAVIOR.

19 Q EMOTIONAL BEHAVIOR. AND CAN YOU GIVE US KIND OF A --
20 AN EXPLANATION OF WHAT HAPPENS TO BRAIN SIGNALS WHEN THEY
21 GENERATE IN THE LIMBIC SYSTEM? DO THEY GO THROUGH THE
22 MEDIAL TO THE FRONTAL?

23 A YEAH, THEY WILL GO FROM THE LIMBIC SYSTEM TO WHAT WE
24 CALL THE CINGULATE CORTEX WHICH IS PART OF THIS MEDIAL
25 GRAY AREA. FROM THE CINGULATE CORTEX TO THE FRONTAL LOBE.

1 THE FRONTAL LOBE NOW KNOWS IT'S AN EMOTIONAL STIMULUS THAT
2 THEY CONFRONTED, AND THE FRONTAL LOBE NOW HAS TO DECIDE
3 WHAT TO DO.

4 Q DO WE KNOW---

5 A ACT ON IMPULSE OR NOT.

6 Q DO WE KNOW -- OKAY. SO THE EMOTION WOULD COME OUT OF
7 THE LIMBIC SYSTEM IN THE AMYGDALA?

8 A EXACTLY.

9 Q INITIALLY GO THROUGH THE MEDIAL GRAY--

10 A GRAY.

11 Q -- WHICH MR. STANKO HAS--

12 A QUITE DEFICIENT.

13 Q -- DEFICIENT IN THE STRUCTURE?

14 A IN THE STRUCTURE, CELL BODIES.

15 Q DOES IT -- DOES IT -- CAN YOU TELL US WHAT THE
16 PURPOSE OF THE MEDIAL GRAY--

17 A IT'S REALLY BASICALLY TO TRANSFER INFORMATION TO THE
18 FRONTAL LOBE.

19 Q TRANSFERRING INFORMATION?

20 A ABOUT EMOTIONAL EVENTS. NOW, WHAT HE DIDN'T DO IS HE
21 DIDN'T SCAN THE AMYGDALA WHICH IS A SUBPART OF THE LIMBIC
22 SYSTEM. I WOULD LIKE TO HAVE SEEN THAT. HE DID NOT DO
23 THAT.

24 Q SO IT GOES THROUGH THE MEDIAL GRAY?

25 A TO THE FRONTAL LOBE.

1 Q WHERE HE -- WHERE MR. STANKO IS DEFICIENT?

2 A YES.

3 Q AND IT GOES UP TO THE FRONTAL LOBE WHERE AGAIN HE IS
4 DEFICIENT?

5 A YEAH.

6 Q IN GRAY MATTER?

7 A IN GRAY MATTER.

8 Q AND AGAIN, JUST STATISTICALLY, HOW LIKELY WOULD IT BE
9 THAT WE WOULD FIND ANOTHER PERSON WITH A BRAIN STRUCTURE
10 LIKE MR. STANKO?

11 A DR. GUR IN HIS CORRESPONDENCE WITH ME SAID THE
12 CHANCES OF A PERSON ON THE STREET BEING SCANNED AND HAVE A
13 BRAIN THIS ABNORMAL WOULD BE LESS THAN 2 PERCENT.

14 Q LESS THAN 2 PERCENT?

15 A LESS THAN 2 PERCENT.

16 Q AND THAT WOULD BE THROUGHOUT THE--

17 A THROUGHOUT THE--

18 Q -- DATA?

19 A -- BASE.

20 Q ALL RIGHT. YOU CAN RETURN. NOW, IS THERE ANYTHING
21 ELSE ABOUT MR. STANKO'S BRAIN STRUCTURE THAT YOU TOOK INTO
22 ACCOUNT?

23 A I -- I WANTED TO KNOW PERSONALLY WHY THIS WOULD
24 HAPPEN, HOW DID THIS OCCUR.

25 Q WERE THERE ANY OTHER SCANS THAT WERE DONE THAT YOU

1 TOOK INTO ACCOUNT?

2 A I DON'T RECALL ANY OTHER SCANS OTHER THAN -- PICTURES
3 OF SCANS.

4 Q ALL RIGHT. YOU SAW -- ALL RIGHT. YOU SAW PET SCAN--

5 A I KNOW THERE'S A PET SCAN.

6 Q AND WHAT CAN YOU TELL US ABOUT THE INFORMATION THAT
7 YOU GAINED FROM THE PET REPORTS THAT YOU RECEIVED?

8 MR. HEMBREE: YOUR HONOR, ONCE AGAIN I OBJECT.
9 IT'S OUTSIDE THE SCOPE OF DR.--

10 THE COURT: PLEASE APPROACH.

11 (WHEREUPON A BENCH CONFERENCE WAS HELD.)

12 THE COURT: MADAM FORELADY, LADIES AND
13 GENTLEMEN, I NEED TO TAKE UP A MATTER OF LAW WITH THE
14 ATTORNEYS. IT SHOULD BE VERY BRIEF. IF YOU WILL GO
15 WITH THE BAILIFFS. PLEASE DO NOT DISCUSS THE CASE
16 DURING THIS BREAK. THIS SHOULD BE VERY BRIEF.

17 (JURY LEFT THE COURTROOM AT 5:02 PM.)

18 THE COURT: WE'LL BE AT EASE FOR JUST A FEW
19 MOMENTS. DOCTOR, YOU CAN STEP DOWN. PLEASE DON'T
20 DISCUSS YOUR TESTIMONY WITH ANYONE.

21 THE WITNESS: YES, MA'AM.

22 (WHEREUPON A RECESS WAS HAD.)

23 THE COURT: OKAY. DOCTOR, IF YOU WILL RE-TAKE
24 THE STAND. IS THE STATE READY TO PROCEED?

25 MR. HEMBREE: YES, YOUR HONOR.

1 THE COURT: IS THE DEFENSE READY TO PROCEED?

2 MR. KELLY: YES, MA'AM.

3 THE COURT: IF YOU WILL BRING IN THE JURY.

4 (JURY ENTERED THE COURTROOM AT 5:29 PM.)

5 THE COURT: YOU MAY BE SEATED. LADIES AND
6 GENTLEMEN, WE TRULY APPRECIATE YOUR PATIENCE. WE'LL
7 NOW RESUME THE TESTIMONY. MR. DIGGS, YOU MAY PROCEED
8 WHEN YOU'RE READY.

9 MR. DIGGS: THANK YOU, YOUR HONOR.

10 BY MR. DIGGS:

11 Q DR. ALBINIAK, DO YOU HAVE AN OPINION, AN EXPERT
12 OPINION, ON FUNCTION WITH RESPECT TO MR. STANKO'S BRAIN?

13 A YES, I DO.

14 Q WHAT IS THAT?

15 A HIS FRONTAL LOBE FUNCTION WOULD BE SUB-NORMAL.

16 Q SUB-NORMAL?

17 A RIGHT, PARTICULARLY -- THERE ARE DIFFERENT AREAS OF
18 THE FRONTAL LOBE. THE FRONTAL LOBE AREA THAT'S MOST
19 INVOLVED IN HIS BRAIN DEFICIENTLY (SIC) IS THE ORBITAL
20 FRONTAL LOBE. THAT'S THE PART OF THE FRONTAL LOBE THAT
21 INHIBITS THE LIMBIC SYSTEM. SO THE IMPAIRMENT WOULD BE
22 MOSTLY INHIBITING LIMBIC RESPONSES.

23 Q ALL RIGHT. NOW, THIS IS THE FUNCTIONAL -- AGAIN,
24 TELL US THE DIFFERENCE.

25 A ALL RIGHT. THE PET SCAN IS--

1 Q BETWEEN -- LET ME FINISH THE QUESTION. TELL ME THE
2 DIFFERENCE BETWEEN THE -- THE ABNORMAL FUNCTION AS OPPOSED
3 TO THE ABNORMAL STRUCTURE.

4 A OKAY. THE PET SCAN SHOWS ABNORMAL FUNCTION OF THE
5 CELLS IN THE ORBITAL FRONTAL LOBE. MEANING WHEN YOU PET
6 SCAN THE BRAIN, YOU SEE SHADES OF BLUE IN THE ORBITAL
7 FRONTAL LOBE. AS A MATTER OF FACT, MARKEDLY BLUE. THAT
8 MEANS THOSE CELLS ARE NOT FIRING LIKE THEY SHOULD NORMALLY
9 FIRE.

10 YOU SEE OTHER AREAS OF HIS BRAIN THAT ARE RED MEANING
11 THOSE CELLS ARE FIRING AT A -- AT A NORMAL RATE.

12 Q ALL RIGHT. AND AGAIN, WITH RESPECT TO THE VOLUME AND
13 THE STRUCTURE, IS THAT A DIFFERENT DEFECT?

14 A THAT'S A DIFFERENT ANALYSIS, BUT IT REACHES A SIMILAR
15 CONCLUSION. DR. GUR, HIS DATA SHOW, THAT THE FRONTAL
16 LOBE, THE LEFT FRONTAL LOBE, IS DECIDEDLY DEFICIENT IN
17 VOLUME MEANING THERE'S BRAIN TISSUE MISSING. IT'S BEEN
18 DAMAGED OR -- OR WHAT COULD HAPPEN.

19 Q ALL RIGHT. ARE THERE ANY WAYS WHERE WE COULD
20 SIMULATE -- SAY IF WE WANTED TO SIMULATE HOW MR. STANKO
21 WOULD FUNCTION WITH THIS ABNORMAL STRUCTURE AND FUNCTION.
22 HOW -- COULD WE DO THAT IN SOME FASHION?

23 A NOT IN THE HUMAN. YOU CAN'T DO IT IN A HUMAN. THE
24 WAY THEY STUDY FRONTAL LOBE FUNCTIONS OF HUMANS, THEY FIND
25 HUMANS WHO HAVE FRONTAL LOBE DAMAGE OR VETERANS,

1 COMMONLY -- UNFORTUNATELY WAR VETERANS HAVE FRONTAL LOBE
2 DAMAGE IN MANY CASES. THEY STUDY THOSE INDIVIDUALS.

3 Q DO THEY ENGAGE IN ABNORMAL BEHAVIOR?

4 A THEY TEND TO BE HIGHLY IMPULSIVE. THEY TEND TO BE --
5 THEY DON'T PLAN THEIR ACTIVITIES VERY LOGICALLY. THEY
6 DON'T CONSIDER THE CONSEQUENCES OF THEIR BEHAVIOR.

7 Q ALL RIGHT. NOW, WOULD YOU CHARACTERIZE THE
8 DIMINISHED OR LACK OF FUNCTION IN THE FRONTAL LOBE AND THE
9 LACK OF VOLUME IN THE STRUCTURE BOTH WITH THE MEDIAL GRAY
10 AND THE FRONTAL LOBE AS A MENTAL DEFECT OR DISEASE?

11 A IT'S CERTAINLY A DISEASED STATE OF THE BRAIN. IT'S
12 NOT REPAIRABLE. YOU'RE NOT GOING TO REPAIR IT --
13 STRUCTURAL DAMAGE.

14 Q SO IT'S A BRAIN DEFECT?

15 A IT'S A BRAIN DEFECT.

16 Q AND HOW, AGAIN, WOULD THIS TYPE OF IMPAIRMENT,
17 FUNCTIONAL AND STRUCTURAL, TRANSLATE INTO BEHAVIOR
18 PROBLEMS?

19 A UNDER NORMAL CIRCUMSTANCES YOU WOULDN'T SEE ANY
20 EVIDENCE PROBABLY. BUT UNDER STRESSFUL OR THREATENING
21 CIRCUMSTANCES WHERE THE THREAT IS PERCEIVED, YOU WILL SEE
22 IMPAIRED INHIBITORY RESPONSES ON THE FRONTAL LOBE, SO YOU
23 HAVE TO HAVE CERTAIN CONDITIONS WHERE YOU WOULD SEE THE
24 MANIFESTATIONS.

25 Q DO WE HAVE ANY IDEA WITH MR. STANKO HOW THESE

1 DEFORMITIES OR DEFECTS CAME INTO BEING?

2 A THERE'S SOME EVIDENCE THAT AT BIRTH -- HE HAD A
3 DIFFICULT BIRTH APPARENTLY. HE WAS BORN IN CUBA AT
4 GUANTANAMO BAY. THE DOCTORS AT THE TIME OF HIS BIRTH --
5 HIS -- HIS MOTHER WAS GOING TO HAVE A TUBAL LIGATION.
6 THEY SUGGESTED SHE NOT HAVE ONE. THEY DIDN'T THINK HE
7 WOULD SURVIVE.

8 THEY WERE FAIRLY CERTAIN HIS CONDITION NEUROLOGICALLY
9 WAS SO BAD THAT HE MIGHT NOT SURVIVE. HE DID SURVIVE,
10 OBVIOUSLY.

11 Q COULD...

12 A BUT POSSIBLY BRAIN DAMAGED.

13 Q ALL RIGHT. NOW, LET ME ASK YOU, THE FRONTAL LOBE --
14 ARE HUMANS THE ONLY LIVING BEINGS ON THE PLANET THAT HAVE
15 A FRONTAL LOBE?

16 A NO. NO.

17 Q AND WHAT--

18 A ALL THE GREAT--

19 Q WHAT TYPE OF ANIMAL--

20 A ALL THE GREAT APES HAVE FRONTAL LOBES. THEY HAVE
21 LESS THAN WE DO.

22 Q IS THERE A HIERARCHY SYSTEM?

23 A THERE'S A HIERARCHY, RIGHT.

24 Q WHAT WOULD THAT BE?

25 A IF YOU GO DOWN THE HIERARCHY TO THE REPTILIANS, LIKE

1 CROCODILES AND ALLIGATORS AND CAIMAN, THEY HAVE NO FRONTAL
2 LOBES AT ALL, SO THEY CAN'T CONFORM THEIR BEHAVIOR. THEY
3 ACT ON INSTINCT. THEY HAVE NO FRONTAL LOBES.

4 Q SO THEY HAVE NO CAPACITY TO DISTINGUISH--

5 A NO CAPACITY.

6 Q -- THEY EITHER MAKE A DECISION TO EAT, FOR EXAMPLE,
7 OR NOT?

8 A AND THAT'S AN INSTINCTIVE DECISION.

9 Q AND IS THAT A LOT DIFFERENT FROM THE LIMBIC SYSTEM IN
10 THE HUMAN?

11 A NO. THE LIMBIC STRUCTURES ARE ABOUT THE SAME, THE
12 REPTILIAN BRAIN AND THE HUMAN BRAIN.

13 Q CAN THE LIMBIC SYSTEM EMOTIONS DRIVE CONDUCT?

14 A CERTAINLY.

15 Q AND CAN YOU TELL US HOW THAT COULD BE -- OR UNDER
16 WHAT CIRCUMSTANCES?

17 A UNDER ANY EMOTION PROVOKING CIRCUMSTANCE, UNDER ANY
18 EMOTION PROVOKING CIRCUMSTANCE THE LIMBIC STRUCTURES ARE
19 ACTIVE, AND IF THERE'S NO FRONTAL LOBE TO OFFSET THOSE,
20 YOU GET EMOTIONAL BEHAVIOR, YOU GET THE OUTPUT OUT OF THE
21 LIMBIC SYSTEM.

22 Q AND AGAIN, THE LIMBIC SYSTEM IS NOT CAPABLE OF MAKING
23 JUDGMENTS?

24 A NO. NO.

25 Q OR DISTINCTIONS?

1 A NO.

2 Q OTHER THAN--

3 A IT'S SIMPLY RECOGNIZING -- IT'S RECOGNIZING EMOTION,
4 LIKE FEAR OR ANGER.

5 Q LET ME ASK YOU, DOES THE LIMBIC SYSTEM ACT IN A
6 RATIONAL MANNER?

7 A NO. BY DEFINITION ITS THE EMOTIONAL CENTER OF THE
8 BRAIN, SO IT'S BY DEFINITION NOT RATIONAL.

9 Q AND SO IF A PERSON'S CONDUCT WAS BEING DRIVEN BY A
10 LIMBIC SYSTEM PRODUCED EMOTION, WOULD YOU EXPECT IT TO BE
11 IRRATIONAL?

12 A YES, IF THERE WERE NO OFFSETTING FRONTAL LOBE IN
13 THE--

14 Q AND MAKE NO SENSE?

15 A YEAH, MAKE -- BE IRRATIONAL.

16 Q WHERE DO OUR DREAMS COME FROM?

17 A FROM? I DIDN'T UNDERSTAND.

18 Q OUR DREAMS. WHEN WE'RE ASLEEP, FOR EXAMPLE--

19 A THE NEWEST LITERATURE INDICATES THAT WHEN A PERSON
20 GOES TO SLEEP AND ENTERS REM SLEEP, THE FRONTAL LOBES SHUT
21 DOWN. THERE'S VIRTUALLY NO ACTIVITY IN THE FRONTAL LOBES.
22 SO DREAMS ORIGINATE MOSTLY IN LIMBIC SYSTEM. THAT'S WHY
23 THEY HAVE A HIGH CONTENT OF ANGER AND AGGRESSION AND
24 SEXUALITY, AND THEY SEEM TO BE REALLY UNUSUAL.

25 THE FRONTAL LOBES HAVE NO INFLUENCE OVER THAT

1 PROCESS. WHEN YOU COME OUT OF THE DREAM STATE, THE
2 FRONTAL LOBES ARE ACTIVE AGAIN.

3 Q SO THEY DON'T MAKE -- IS THAT WHY OUR DREAMS
4 SOMETIMES DON'T MAKE SENSE?

5 A DON'T MAKE SENSE.

6 Q JUST SILLY, CRAZY?

7 A DISCONNECTED PIECES.

8 Q ALL RIGHT. LET ME ASK YOU, IF YOUR CONDUCT OR IF AN
9 INDIVIDUAL'S CONDUCT IS BEING DRIVEN BY THE LIMBIC SYSTEM
10 EMOTIONS, WOULD THEY STILL BE ABLE TO TALK AND SAY THINGS?

11 A SURE.

12 Q CARRY ON A CONVERSATION?

13 A OF COURSE.

14 Q HOW COULD THAT BE?

15 A GIVE YOU AN EXAMPLE. A SLEEPWALKING PERSON. PEOPLE
16 WHO SLEEPWALK WILL TYPICALLY, OFTEN TIMES HAVE A
17 CONVERSATION, THEY'LL GO TO THE REFRIGERATOR, GET A PIECE
18 OF CAKE, THEY WILL GO BACK TO BED AND NOT REMEMBER ANY OF
19 THOSE THINGS.

20 Q AND THAT CONDUCT IS BEING DRIVEN...

21 A BY BRAIN AREAS OTHER THAN THE FRONTAL LOBES.

22 Q OTHER THAN THE FRONTAL LOBES?

23 A THE CONVERSATION IS CONTROLLED BY THE TEMPORAL LOBE.

24 Q AND SO ONE WOULD NOT HAVE TO BE CONSCIOUS IN ORDER TO
25 ENGAGE IN THE CONVERSATION?

1 A CERTAINLY, UNDER CERTAIN CIRCUMSTANCES.

2 Q AND THAT MIGHT -- IT MIGHT BE THAT ONE WHO IS
3 CONVERSING WITH SOMEONE IN THAT STATE MIGHT NOT REALIZE
4 THAT PERSON'S--

5 A CORRECT.

6 Q DR. ALBINIAK, I APPRECIATE YOUR TIME. ANSWER ANY
7 QUESTIONS THAT COUNSEL MAY HAVE.

8 A CERTAINLY.

9 THE COURT: YOU MAY PROCEED.

10 MR. HEMBREE: THANK YOU, YOUR HONOR.

11 CROSS-EXAMINATION

12 BY MR. HEMBREE:

13 Q DR. ALBINIAK, YOU'RE NOT SUGGESTING THAT STEPHEN
14 STANKO WAS SLEEPWALKING WHEN HE RAPED--

15 A NO, CERTAINLY NOT.

16 Q -- CHRISTINA LING AND KILLED LAURA LING?

17 A NO, SIR. CERTAINLY NOT.

18 Q OKAY. LET ME KIND OF CUT TO THE CHASE. YOUR
19 TESTIMONY ABOUT DR. GUR -- I MEAN, ESSENTIALLY YOU'RE JUST
20 PARROTING WHAT INFORMATION WAS --

21 A YES.

22 Q -- PROVIDED TO YOU BY DR. GUR?

23 A EXACTLY.

24 Q I MEAN, YOU'RE NOT -- THIS WASN'T AN INDEPENDENT
25 ANALYSIS THAT YOU CONDUCTED?

1 A CERTAINLY.

2 Q YOU DIDN'T BRING IN 42 BRAINS AND STUDY THEM?

3 A CERTAINLY NOT.

4 Q DID YOU HAVE THE BENEFIT OF SEEING THE -- THE MRIS ON
5 THE 42 BRAINS THAT HE USED IN--

6 A NO, I DID NOT.

7 Q YOU DID NOT?

8 A NO.

9 Q SO AS FAR AS YOU KNOW, YOU MIGHT HAVE HAD -- BRAIN
10 NUMBER SEVEN MIGHT HAVE BEEN UP HERE ON THIS PARTICULAR --
11 THE MEDIAL AXIS, AND BRAIN NUMBER 24 COULD HAVE BEEN DOWN
12 HERE ON THE TEMPORAL AXIS. I MEAN, THIS IS SIMPLY AN
13 AVERAGE.

14 A WELL, THAT'S STANKO'S BRAIN. HE COMPARED HIS -- HIS
15 BRAIN TO THE AVERAGE OF THE 42 BRAINS.

16 Q RIGHT. WHAT I'M TRYING TO GET AT, THOUGH, IS THE --
17 THE AVERAGE THAT DR. GUR ESTABLISHED HERE WAS -- HE TOOK
18 42 BRAINS WITH -- HE HAD MEASUREMENTS IN ALL THESE--

19 A ALL MEASUREMENTS.

20 Q -- DIFFERENT AREAS OF THE BRAIN?

21 A RIGHT.

22 Q AND HE AVERAGED THEM?

23 A CORRECT.

24 Q AND HE CAME UP WITH THIS AVERAGE THAT, HERE'S THE
25 AVERAGE BRAIN?

1 A RIGHT. BUT THEN HE DID ONE OTHER THING. I DON'T
2 WANT TO INTERRUPT YOU.

3 Q IT'S OKAY.

4 A HE COMPARED EACH NORMAL BRAIN WITH STANKO'S
5 INDIVIDUALLY. HE WENT THAT FAR TO DO THAT. HE FOUND ONE
6 OF 42 BRAINS WAS ABNORMAL AS STANKO'S BRAIN. THE OTHER 41
7 WERE NOT.

8 Q OKAY. SO -- YEAH. I DON'T KNOW WHAT THAT MEANS, BUT
9 I UNDERSTAND WHAT YOU'RE SAYING, BUT--

10 A HE--

11 Q -- CAME UP WITH AN AVERAGE?

12 A YEAH.

13 Q HE CAME WITH AN AVERAGE. SO THERE WERE PEOPLE THAT
14 HAD -- HAD OTHER AREAS THAT WERE NOT WITHIN THAT AVERAGE?

15 A SOME, YEAH.

16 Q OKAY. NOW, YOU TESTIFIED DR. GUR SAID THAT 2 PERCENT
17 OF THE POPULATION HAS SAME BRAIN--

18 A OR THAT MUCH BRAIN ABNORMALITY.

19 Q CONDITION, ABNORMALITY--

20 A YES.

21 Q -- AS STEPHEN STANKO'S?

22 A YEAH.

23 Q SO THE 300 PEOPLE IN THE UNITED STATES, HOW MANY
24 PEOPLE WOULD THAT BE? 2 PERCENT OF THE POPULATION OF THE
25 UNITED STATES OF AMERICA?

1 A PROBABLY -- NOT A GOOD MATHEMATICIAN, BUT SEVERAL
2 HUNDRED THOUSAND.

3 Q HOW ABOUT 6 MILLION? DOES THAT SOUND ABOUT RIGHT?

4 A SOUNDS ABOUT RIGHT.

5 Q 1 PERCENT OF 300 MILLION WOULD BE 3 MILLION, AND
6 2 PERCENT WOULD BE 6 MILLION PEOPLE?

7 A EXACTLY.

8 Q AS A MATTER OF FACT, ISN'T IT TRUE THAT THERE'S
9 SOMEBODY ELSE IN THIS ROOM--

10 A POSSIBLY, CERTAINLY.

11 Q -- JUST LIKE THIS GUY?

12 A (NODDED HEAD).

13 Q THE INTELLIGENCE IN THE BRAIN, CONTAINED IN THE
14 FRONTAL LOBES?

15 A MORE DISTRIBUTED, THOUGH, IN ALL LOBES. AND
16 INTELLIGENCE IS A VERY VAGUE FUNCTION. IT'S IN ALL THE
17 LOBES OF THE BRAIN. TO A LARGE DEGREE IN THE FRONTAL
18 LOBES--

19 Q TO A LARGE DEGREE?

20 A TO A LARGE.

21 Q TO A LARGE DEGREE IN THE FRONTAL LOBES. BECAUSE THE
22 FRONTAL LOBES ARE THE -- YOU KNOW, THEY EXECUTE ON THINGS.
23 THEY PLAN THINGS; CORRECT?

24 A EXECUTIVE FUNCTIONS.

25 Q AND THEN DO EXECUTIVE FUNCTIONS AND CARRY OUT THOSE

1 PLANS?

2 A EXACTLY.

3 Q AND SO IF YOUR FRONTAL LOBES ARE WORKING PROPERLY,
4 THEN YOU'RE TAKING STEPS, YOU'RE DOING THINGS, YOU'RE --
5 YOU'RE MAKING A PLAN?

6 A MAKING CORRECT CHOICES.

7 Q YEAH. AND YOU -- AND YOU MAKE CHOICES. YOU MAKE
8 CHOICES--

9 A RIGHT.

10 Q -- THAT ARE GOAL-DIRECTED?

11 A GOAL-DIRECTED.

12 Q OKAY. SO IF YOU HAVE AN OBJECTIVE AND A GOAL, THEN
13 YOU MAKE THOSE CHOICES THAT ARE CONSISTENT WITH THAT GOAL,
14 IF YOUR FRONTAL LOBES ARE--

15 A IF, RIGHT--

16 Q -- FUNCTIONING?

17 A -- FRONTAL LOBE--

18 Q IF YOUR FRONTAL LOBES ARE FUNCTIONING?

19 A RIGHT.

20 Q SO, IF YOU HAVE GOT A GUY WHO IS -- WHO HAS COMMITTED
21 MURDER, TO STEAL A CAR, OBTAIN MONEY, AND -- AND PROVIDE

22 A -- AN EXCUSE WHY THE VICTIM WON'T SHOW UP AT WORK THE
23 NEXT DAY, IT WOULD APPEAR THAT THOSE -- THERE'S A PLAN
24 GOING ON; WOULD IT NOT?

25 A ALL RIGHT. THAT -- THAT FUNCTION OF THE FRONTAL LOBE

1 MAY BE INTACT, THE PLANNING FUNCTION, BUT THE INHIBITION
2 OF EMOTION MAY NOT BE. REMEMBER, THE FRONTAL LOBES
3 CONTAIN VARIOUS AREAS WITH VARIOUS FUNCTIONS, SO YOU CAN
4 HAVE AN INTELLIGENT PERSON WHO HAS NO EMOTION CONTROL.

5 Q AND YOU KNOW, TYPICALLY IN A EMOTIONAL RESPONSE WILL
6 BE AN IMMEDIATE, QUICK, BAM.

7 A TYPICALLY.

8 Q RIGHT. TYPICALLY. AND THEN IT DISSIPATES.

9 A WITH SOME DEGREE OF TIME, YEAH.

10 Q WITH SOME DEGREE OF TIME. AND OFTEN TIMES QUICKLY.

11 A OFTEN TIMES QUICKLY.

12 Q OKAY. BECAUSE THE FRONTAL LOBES KIND OF KICK BACK
13 IN; DON'T THEY?

14 A OFTEN TIMES.

15 Q YOU HAVE THAT FIGHT OR FLIGHT, THAT IMMEDIATE -- YOU
16 CAN EVEN FEEL IT SOMETIMES; CAN'T YOU?

17 A SURE.

18 Q YOU CAN PHYSICALLY FEEL IT THAT YOU'VE GOT THIS --
19 THIS TRIGGER.

20 A THE URGE.

21 Q THE URGE, WHATEVER IT MIGHT BE.

22 A UH-HUH.

23 Q AND THEN -- BUT THEN YOUR FRONTAL LOBES RE-ENGAGE?

24 A AGAIN, MORE NORMAL FRONTAL LOBES RE-ENGAGE.

25 Q MORE NORMAL. BUT NORMAL FRONTAL LOBES RE-ENGAGE?

1 A ENGAGE--

2 Q AND THEY SAY--

3 A -- INHIBIT BEHAVIOR.

4 Q THEY INHIBIT THE BEHAVIOR. EVEN IF YOU ACTED OUT.

5 A YES.

6 Q EVEN IF YOU HAVE DONE SOMETHING WRONG.

7 A YEAH.

8 Q THEN THOSE FRONTAL LOBES TYPICALLY QUICKLY BRING YOU

9 BACK.

10 A GAIN CONTROL.

11 Q GAIN SOME CONTROL. GAIN CONTROL. NOW, WERE YOU

12 AWARE THAT MR. STANKO HAS AN IQ OF 143?

13 A I HAD READ THAT IN THE REPORTS.

14 Q YOU HAVE READ THAT IN THE REPORTS. COULD YOU TELL

15 THIS JURY WHAT -- IS THAT SIGNIFICANT -- IS -- WHAT -- IS

16 THAT A GENIUS?

17 A IQ IS MEASURED ON A HUNDRED POINT SCALE. 130 WOULD

18 BE TWO STANDARD DEVIATIONS ABOVE THE MEAN, SO THAT WOULD

19 PUT HIM IN THE UPPER HALF OF 1 PERCENT. THAT WOULD BE IN

20 THE GENIUS CATEGORY.

21 Q OKAY. SO HE'S IN -- HE'S GOT THE INTELLIGENCE OF

22 A -- HE IS HIGHLY--

23 A HIGHLY INTELLIGENT.

24 Q ALL RIGHT. A LOT OF THAT INTELLIGENCE, LOT OF THAT

25 INTELLIGENCE YOU HAVE ALREADY TESTIFIED IN THE FRONTAL

1 LOBES. THAT'S WHERE THAT COMES FROM?

2 A YES.

3 Q ISN'T IT TRUE -- I'M GOING TO GET IN TROUBLE ON THIS,
4 BUT I'M GOING TO ASK ANY WAY. ISN'T IT TRUE THAT WOMEN'S
5 FRONTAL LOBES ARE SMALLER THAN MEN'S FRONTAL LOBES?

6 A ON AVERAGE, YEAH, ON AVERAGE.

7 Q BUT THAT DOESN'T MEAN THEY ARE INSANE?

8 A NO, CERTAINLY NOT.

9 Q THEY'RE NOT PSYCHOPATHS BECAUSE THEIR--

10 A NO, NO.

11 Q -- FRONTAL LOBES ARE SMALL?

12 A NO.

13 Q AND IT'S NOT YOUR TESTIMONY -- IT'S NOT YOUR
14 TESTIMONY, AS I UNDERSTAND, THAT THIS DEFENDANT IS A
15 PSYCHOPATH BECAUSE HE MAY HAVE SOME FRONTAL LOBE ISSUE?

16 A IT'S IN HIS RECORDS THAT HE IS. I DON'T--

17 Q WELL, IT'S NOT YOUR OPINION.

18 A NO.

19 Q THAT'S NOT YOUR--

20 A NO, I HAVEN'T FORMED AN OPINION.

21 Q I'M NOT TALKING ABOUT WHAT SOMEBODY ELSE MIGHT -- AN
22 OPINION WE MIGHT HAVE FROM SOMEBODY ELSE LATER. NOW,
23 HE'S -- YOU'RE NOT SAYING -- IT'S NOT YOUR OPINION THAT HE
24 HAS NO FRONTAL LOBE FUNCTION?

25 A NO.

1 Q I MEAN, IT'S CLEAR THAT HE'S ABLE TO CONTROL HIMSELF
2 AND--

3 A AND--

4 Q -- BEHAVE PROPERLY AND, YOU KNOW, ACT THE WAY PEOPLE
5 EXPECT HIM TO ACT, OTHERS EXPECT HIM TO ACT?

6 A CERTAINLY.

7 Q SO, YOU WOULD -- WOULD IT BE FAIR TO SAY THAT THE
8 FUNCTIONING -- IS IT YOUR TESTIMONY THAT THE FUNCTIONING
9 OF HIS FRONTAL LOBES IS DIMINISHED, HIS CAPACITY FOR HIS
10 FRONTAL LOBES TO FUNCTION IS DIMINISHED?

11 A IMPAIRED.

12 Q IMPAIRED?

13 A WHATEVER WORD YOU WANT--

14 Q LESSER THAN--

15 A LESS.

16 Q -- LESSER THAN SOME PEOPLE?

17 A NOT OBLITERATED.

18 Q RIGHT. GREATER THAN SOME, LESSER THAN OTHERS.

19 A YES.

20 Q SOMEWHERE YOU JUST SAID, BUT SOMEWHERE.

21 A CERTAINLY.

22 Q NOW, YOU WERE MENTIONING THE BEHAVIORS. MR. DIGGS
23 WAS TALKING TO YOU ABOUT THE BEHAVIORS YOU MIGHT EXPECT TO
24 FIND OR BEHAVIORS OF SOMEONE WITH THIS -- THIS SITUATION,
25 THIS SITUATION.

1 BUT THAT'S REALLY NOT YOUR -- YOU -- THAT'S REALLY
2 THE AREA OF PSYCHIATRY, IS IT NOT? ISN'T THAT MORE ALONG
3 THE LINES OF THE STUDY OF PSYCHIATRY AS OPPOSED TO YOUR
4 STUDYING THE FUNCTION AND STRUCTURE OF THE BRAIN?

5 A WELL, THE ULTIMATE OUTCOME OF THE BRAIN IS BEHAVIOR,
6 SO IF A PERSON HITS ANOTHER PERSON WITH A BRICK BECAUSE
7 THEY GOT ANGRY, THAT'S A BEHAVIORAL EVENT.

8 Q RIGHT. BUT ISN'T THAT -- ISN'T THAT REALLY WHAT THE
9 STUDY OF PSYCHIATRY IS ALL ABOUT?

10 A I THINK IT CROSSES BOTH FIELDS ACTUALLY.

11 Q OKAY. THAT'S FAIR. NOW, YOU DIDN'T -- YOU TESTIFIED
12 THAT THIS MAN HAS BIRTH DEFECTS. WHAT'S YOUR AUTHORITY
13 FOR THAT TESTIMONY?

14 A I READ THE MEDICAL REPORT THAT SUGGESTED THAT IT
15 MIGHT CONTRIBUTE. THE REPORTS OF GUANTANAMO BAY, CUBA.

16 Q OKAY. I WANT TO JUST HAVE YOU TAKE A LOOK AT THOSE
17 REPORTS.

18 MR. HEMBREE: YOUR HONOR, I DO NOT INTEND TO
19 OFFER THESE AT THIS TIME. I JUST WANT TO HAVE THEM
20 IDENTIFIED BY THE WITNESS AT THIS POINT IN TIME.

21 BY MR. HEMBREE:

22 Q THESE ARE LISTED AS COURT'S EXHIBITS FIVE AND SIX.
23 AND ASK IF YOU WILL TAKE A LOOK AT THOSE AND--

24 A YEAH, ONE WAS THE MOTHER, ONE WAS THE CHILD. YEAH.

25 Q OKAY. IS THIS -- AND IF YOU NEED TO TAKE A LOOK AT

1 THEM, DO THAT, BUT--

2 A YEAH, THESE ARE THE ONES I...

3 Q ALL RIGHT. IS THAT THE -- IS THAT THE COMPLETE
4 FILE--

5 A YES.

6 Q -- THE EXTENT OF THE DOCUMENTS YOU REVIEWED--

7 A YES.

8 Q -- TO REACH THE CONCLUSION OR TO OFFER THE CONCLUSION
9 TODAY THAT MR. STANKO'S GOT BIRTH DEFECTS?

10 A WELL, I WOULDN'T SAY HAS. I'D SAY IT WAS A
11 POSSIBILITY.

12 Q OKAY.

13 A POSSIBILITY.

14 Q OKAY.

15 A HE WAS HOSPITALIZED I RECALL FOR FIVE DAYS WHICH IS
16 UNUSUAL FOR AN INFANT TO BE HOSPITALIZED THAT LONG -- OR
17 FOUR OR FIVE DAYS. SO I THOUGHT THE PHYSICIANS WERE
18 CONCERNED WITH HIS--

19 Q THAT WAS BACK IN 1968, THOUGH. DIDN'T THEY KEEP MAMA
20 AND BABY A LITTLE LONGER BACK IN THE DAY?

21 A I THINK HER BIRTH WAS VAGINAL, SO THEY WOULDN'T HAVE
22 HAD TO KEEP HER A LONG TIME. SO I WAS -- I -- I
23 INTERPRETED THAT TO MEAN THEY WERE CONCERNED ABOUT THE
24 BABY.

25 Q WENT IN ON THE 14TH, CHECKED OUT ON THE 18TH?

1 A YEAH. AND SHE -- HE WAS JAUNDICED AT BIRTH WHICH
2 MEANS LIVER INVOLVEMENT.

3 Q LOTS OF BABIES ARE JAUNDICED AT BIRTH; AREN'T THEY?

4 A YES, BUT IT'S NOT A GOOD SIGN.

5 Q PRETTY COMMON. YEAH, IT'S SOMETHING TO BE CONCERNED
6 ABOUT, BUT DOESN'T MEAN BIRTH DEFECTS. IT MEANS--

7 A NOT NECESSARILY, BUT I THINK WHAT STRUCK ME MOST IS
8 SOME OF HIS REFLEX BEHAVIORS WERE NOT NORMAL. SO IF A
9 BABY'S GOT ABNORMAL REFLEX BEHAVIORS, THAT TELLS ME THE
10 BRAIN HASN'T COMPLETED ITS DEVELOPMENT.

11 NOW, IT MIGHT CONTINUE DEVELOPING AFTER BIRTH, BUT
12 THAT WAS A LITTLE BIT OF A CONCERN.

13 Q NOW, DID YOU -- DOES THAT SOMETIMES -- THAT
14 DEVELOPMENT THAT CONTINUES, IS THAT -- TAKE PLACE IN JUST
15 A MERE FEW DAYS? CAN IT BE VERY QUICK?

16 A USUALLY IT WOULD TAKE WEEKS. IT WILL TAKE WEEKS OR
17 MONTHS.

18 Q BUT THAT'S THE EXTENT OF THE DOCUMENTS--

19 A YEAH, THAT'S THE EXTENT--

20 Q -- THAT YOU REVIEWED--

21 A YEAH.

22 Q -- TO OFFER THAT OPINION?

23 A YES.

24 Q OKAY. THE -- DOCTOR, MR. DIGGS ASKED YOU SOME
25 QUESTIONS ABOUT SORT OF THE EMOTIONAL BEHAVIORS OR THE,

1 YOU KNOW, THAT EMOTIONAL -- WELL, EMOTIONAL BEHAVIOR CAN
2 OVERRIDE THE FRONTAL LOBES. AND THAT--

3 A YEAH.

4 Q -- THAT THAT LIMBIC SYSTEM CAN JUST BE SO POWERFUL--

5 A YES.

6 Q -- THAT IT CAN CAUSE SOMEONE TO DO SOMETHING THEY
7 MIGHT NOT NORMALLY DO. IS THAT A FAIR--

8 A I GIVE YOU AN EXAMPLE? ROAD RAGE.

9 Q OKAY.

10 A THAT'S ROAD RAGE -- PROBABLY LIMBIC SYSTEM OVERRIDING
11 FRONTAL LOBE FUNCTIONING.

12 Q RIGHT.

13 A TEMPORARILY.

14 Q BUT YOU'RE NOT SAYING THAT EVERYONE WHO HAS
15 EXPERIENCED ROAD RAGE IS A PSYCHOPATH; ARE YOU?

16 A NO, CERTAINLY NOT.

17 Q OH, NO. CERTAINLY NOT. SO -- AND YOU'RE NOT
18 SUGGESTING OR SAYING TO THIS JURY THAT EVERYBODY THAT HAS
19 ROAD RAGE HAS FRONTAL LOBE PROBLEMS; ARE YOU?

20 A CERTAINLY NOT.

21 Q NO. SO THESE ARE NORMAL FOLK--

22 A YES.

23 Q -- THAT HAVE -- THAT HAVE EMOTIONAL OUTBURSTS?

24 A EPISODE OF EMOTIONALITY.

25 Q AND THEY'RE RESPONSIBLE FOR THEMSELVES. YOU'RE

1 NOT -- ARE YOU SUGGESTING -- LET ME ASK YOU THIS. ARE YOU
2 SUGGESTING TO THIS JURY THAT BECAUSE IT'S AN EMOTIONAL
3 OUTBURST, THAT THE PERSON IS NOT RESPONSIBLE FOR THEIR
4 ACTIONS, THAT THEY--

5 A NO, NOT ASSUMING INTACT BRAIN. ASSUMING A NORMAL
6 BRAIN, NO, THEY'RE RESPONSIBLE.

7 Q OKAY. THEY'RE RESPONSIBLE?

8 A YES.

9 Q EVEN THOUGH -- EVEN THOUGH THEY LOST CONTROL?

10 A AND THEY DO SOMETHING BAD, YES.

11 Q OKAY. AND MR. STANKO'S BRAIN IS DIMINISHED AND
12 YOU'RE SAYING BECAUSE IT'S DIMINISHED, HIS CAPACITY TO--

13 A IT MAY HAVE PLAYED A FACTOR.

14 Q -- TO -- THAT BECAUSE HIS BRAIN IS SOMEHOW
15 DIMINISHED, THAT IT MAY HAVE -- MAY NOT HAVE -- AND I
16 HAVEN'T NOTHING -- I MEAN, WE'RE NOT -- WE DON'T HAVE AN
17 INSANITY ISSUE HERE.

18 A EXACTLY.

19 Q BUT IF IT DID, IT JUST DIMINISHED HIS ABILITY TO
20 CONTROL HIMSELF.

21 A TO CONTROL THAT IMPULSIVE BEHAVIOR.

22 Q BECAUSE HE IS ABLE TO DO THAT.

23 A UNDER MOST CIRCUMSTANCES.

24 Q ALL RIGHT. DR. ALBINIAK, THANK YOU. MR. DIGGS HAS A
25 FEW FOLLOW-UP.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender
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May 6, 2008

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MAY 6 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

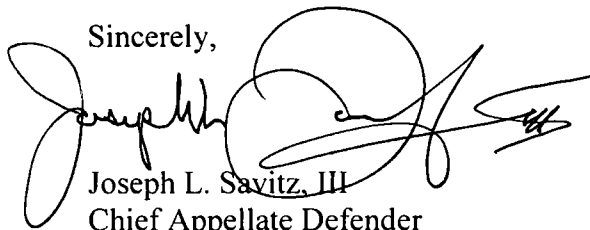
Re: The State v. Stephen C. Stanko

Dear Mr. Shearouse:

This letter is to advise the Court that we will be filing a petition for writ of certiorari in this case to the United States Supreme Court.

By copy of this letter we are informing Anthony Mabry, of the Attorney General's Office.

Sincerely,

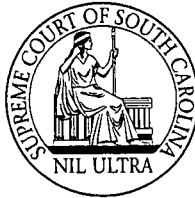


Joseph L. Savitz, III
Chief Appellate Defender

Kathrine Hudgins
Appellate Defender

JLS,III/kde

cc: Anthony Mabry
Stephen C. Stanko



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 16, 2008

Chief Appellate Defender Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Assistant Attorney General J. Anthony Mabry
The Honorable John Gregory Hembree

The Supreme Court of South Carolina

The State,

Respondent,

v.

Stephen Christopher Stanko,

Appellant.

ORDER

Appellant was convicted of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery, and was sentenced to death. This Court affirmed his convictions and sentence. State v. Stanko, Op. No. 26442 (S.C. Sup. Ct. filed February 25, 2008). The remittitur was sent to the lower court on March 19, 2008. Appellant now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) to *either* seek certiorari from the United States Supreme Court *or* seek post-conviction relief (PCR).

The State opposes the issuance of a stay pending the filing of either a petition for a writ of certiorari to the United States Supreme Court or the filing of a PCR application.

In order for a capital defendant to obtain a stay of execution

following the conclusion of his direct appeal and pending a petition for a writ of certiorari to the USSC, he must, within ten days of the date of the execution notice,¹ make an appropriate motion for this Court to stay the execution under United States Supreme Court Rule 23.3. In re Stays of Execution in Capital Cases, supra. The motion must set forth the federal question(s) the defendant intends to raise in the petition for a writ of certiorari. Id. As long as one of the federal questions asserted has been adequately preserved under state law so that it can be reviewed by the USSC, this Court will grant a stay of execution for ninety days from the date the remittitur was sent for the appellant to file a petition for a writ of certiorari. Id.

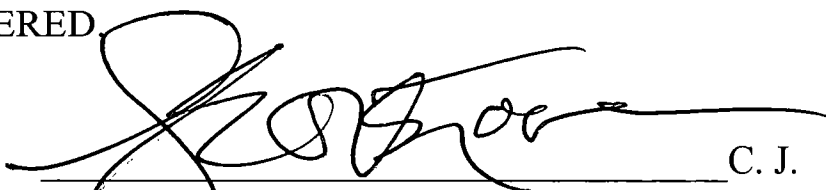
If a capital defendant desires a stay to pursue state PCR, he must, within ten days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the PCR application, after which this Court will assign a circuit judge to the case and issue a stay of execution. Id. Within thirty days of the date of the order granting a stay, the judge shall determine the defendant's desires regarding counsel and issue an order which either sets forth the name of

¹ An execution notice has not been issued in this case.

retained counsel, appoints counsel for the defendant if he or she is indigent, or determines the defendant will be allowed to proceed pro se based on a knowing and intelligent waiver of the right to counsel after being warned of the dangers and disadvantages of proceeding pro se. Id.

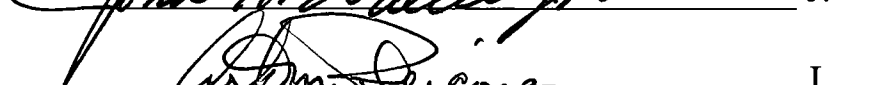
We hereby grant a stay of execution for ninety days from the date the remittitur was sent, in which time appellant may either file a petition for a writ of certiorari in the United States Supreme Court or file a PCR application in the circuit court. If appellant chooses the latter, he must, upon filing the application, notify this Court, and a PCR judge will be assigned to the case and the stay extended according to the terms of In re Stays of Execution in Capital Cases.

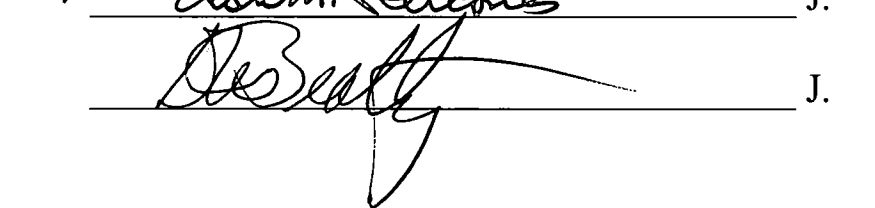
IT IS SO ORDERED.


C. J.


J.


J.


J.


J.

Columbia, South Carolina

April 16, 2008



HENRY McMASTER
ATTORNEY GENERAL

March 28, 2008

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MAR 31 2008

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

S.C. SUPREME COURT

Re: The State v. Stephen C. Stanko

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of Respondent's *Return to Petition for Stay of Execution* in the above-referenced case for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,



J. Anthony Mabry
Assistant Attorney General

JAM/lbb

cc: Joseph L. Savitz, III, Esquire
Sandi Wofford, Victims Assistance

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.

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MAR 31 2008

S.C. SUPREME COURT

RETURN TO PETITION FOR STAY OF EXECUTION

On March 20, 2008, counsel for Stephen Stanko filed a petition for stay of execution pursuant to this Court's order *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Counsel seeks a stay to seek certiorari from the United States Supreme Court, or in the alternative to seek post-conviction relief in Georgetown County if this Court previously determined Stanko's first issue on appeal was not preserved for appellate review. Respondents oppose the issuance of a stay because the issue the petitioner intends to raise on certiorari is not appropriate for certiorari consideration because it was not preserved because of the abandonment at trial as an independent state law ground of decision.

Stanko asserted on appeal that the trial judge erred in not allowing him to question jurors about the insanity defense. This Court affirmed Stanko's conviction and death sentence. *State v. Stanko*, Opinion No. 26442, *Shearhouse Advance Sheets* (decided February 25, 2008). In its

Opinion, this Court stated regarding preservation of this issue:

During *voir dire*, Appellant attempted to question a potential juror as to her views on the insanity defense. The State immediately objected to this line of questioning. The trial judge sustained the objection and ruled that Appellant could ask potential jurors whether they could consider affirmative defenses “and list them all,” but could not ask jurors whether they would consider the specific affirmative defense of insanity. After the parties discussed the issue, Appellant indicated he was “abandoning” asking potential jurors questions specifically regarding the insanity defense.

Initially, we question whether this issue is preserved for review. After the trial court ruled that Appellant could not ask potential jurors about their views on the insanity defense, Appellant indicated that he was “abandoning” this line of questioning, thereby suggesting he accepted the trial court's ruling. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903 911 (1996)(no issue is preserved for appellate review if the objecting party accepts the trial courts ruling and does not contemporaneously make an additional objection).

The claim was therefore recognized by this Court as abandoned.¹ Therefore it is not preserved for consideration in certiorari proceedings before the United States Supreme Court.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). The subsequent discussion by this Court concerning the voir dire issue was therefore *dicta* and an alternative holding on the issue.

Respondent reasserts its position taken in its Final Brief of Respondent and during its oral argument that this issue was not preserved for appellate review because the issue was abandoned by trial counsel and not preserved by any objection in accordance with state law. If the state court decision rests on adequate and independent state grounds, it does not lose the procedural default even if it alternately considers the merits of the federal question as well. Harris v. Reed, 489 U.S. 255, 264, n. 10 (1989). Accord, Ashe v. Styles, 39 F.3d 80, 87 (4th Cir. 1994)(going to the merits

¹The Petitioner is asking this Court to clarify its ruling. Respondent submits that for certiorari purposes, the opinion is not ambiguous and plainly concludes that the issue was abandoned. Thus, no clarification is necessary. Merely making alternate holdings does not remove the issue of preservation of a claim.

after a default does not erase the default merely by use of the phrase “the court further concludes”); Glenn v. Bartlett, 98 F.3d 721, 725 (2d Cir. 1996) (“in any event” language does not waive the independent procedural bar where the state court goes on to address the merits). Thus, the matter is not preserved for certiorari in the United States Supreme Court.²

Respondent respectfully asks this Court to deny the motion to stay pending certiorari in the United States Supreme Court.³

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

By: _____

J. Anthony Mabry

ATTORNEYS FOR RESPONDENT

²Respondent adopts and incorporates herein by reference its Final Brief of Respondent, p. 9-28 addressing the basis of the abandonment found by this Court.

³To the extent the Petitioner may be seeking a stay to allow filing a state PCR action, he has not made a sufficient showing. In the order of In Re: Stays, supra, the Court stated: “If the defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief. **If the general nature of the issues are appropriate for post-conviction relief**, this Court will assign a circuit judge to the case and issue a stay of execution.” The Petitioner has failed to set forth such grounds because the stated free-standing constitutional voir dire ground for certiorari is not appropriate for state PCR actions. Without prejudice to a further filing, it must be denied at this time .

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served Respondent's *Return to Petition for Stay of Execution* in the foregoing action by depositing copies in the InterAgency Mail to Joseph L. Savitz, III, Chief Attorney, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 28th day of March, 2008.



ANTHONY MABRY
Assistant Attorney General



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
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Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 20, 2008

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MAR 20 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, SC Supreme Court
Post Office Box 11330
Columbia, SC 29211

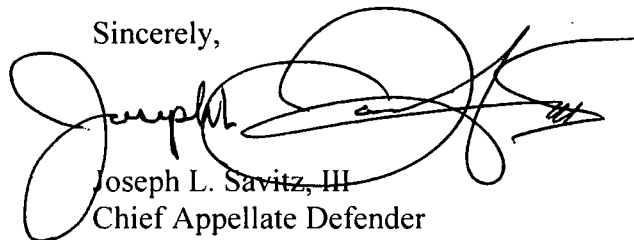
Re: The State v. Stephen Stanko

Dear Mr. Shearouse:

Enclosed is our petition for stay of execution.

Please do not hesitate to contact me if you have any questions or I may be of further assistance.

Sincerely,



Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

cc: Anthony Mabry
Stephen Stanko

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 20 2008

S.C. SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN C. STANKO,

APPELLANT

PETITION FOR STAY OF EXECUTION

Counsel for Stephen Stanko petition for a stay of execution pursuant to this Court's order *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Counsel seek a stay to allow Mr. Stanko to seek certiorari from the United States Supreme Court or, alternatively, to seek post-conviction relief in Georgetown County. Counsel make this motion in the alternative because it is unclear whether the Court relied upon a procedural bar to dispose of the following issue, taken from the Brief of Appellant:

The trial judge erred in refusing to allow [trial] counsel, during voir dire, to ask potential jurors about their feelings and viewpoints concerning the defense of insanity when insanity was raised as an

affirmative defense and the question was asked to reveal juror bias.

Although the Court “question[ed] whether this issue is preserved for review,” it nevertheless then reached the merits of the issue. *State v. Stanko*, Opinion No. 26442, decided February 25, 2008. If the Court held that this issue was not in fact precluded from review by a procedural bar, counsel intend to petition the United States Supreme Court for writ of certiorari, as the issue involves the application of the Sixth and Fourteenth Amendments to the United States Constitution. See *United States Supreme Court Rule 23.3*.

If, on the other hand, the Court holds that the issue was unpreserved for review, Mr. Stanko intends to file an application in post-conviction relief arguing that trial counsel did not provide effective assistance under the Sixth and Fourteenth Amendments and *Strickland v. Washington*, 466 U.S. 668 (1984), due to their failure to preserve the issue for review. Moreover, Mr. Stanko has informed counsel that he intends to allege that they were ineffective during his direct appeal pursuant to the Sixth and Fourteenth Amendments and *Evitts v. Lucy*, 469 U.S. 387 (1985), due to counsels’ failure to argue that South Carolina’s insanity statute, *S.C. Code Section 17-24-10*, violates the Due Process Clause of the Fourteenth Amendment and that he was in any event entitled to a directed verdict on his defense of insanity. In a letter dated July 26, 2007, counsel wrote Mr. Stanko and “emphatically stat[ed] that you did not waive these issues nor did we abandon them as a matter of appellate strategy.” (Obviously, by making this motion counsel does not intend to limit the grounds on which Mr. Stanko might allege that both trial and appellate counsel were prejudicially deficient. To attempt to do so would create an actual conflict of interest. Counsel merely note that they are informed and believe that Mr. Stanko intends to raise allegations of ineffective assistance of counsel at post-conviction relief.) With regard to stays of execution in such cases, the Court has stated:

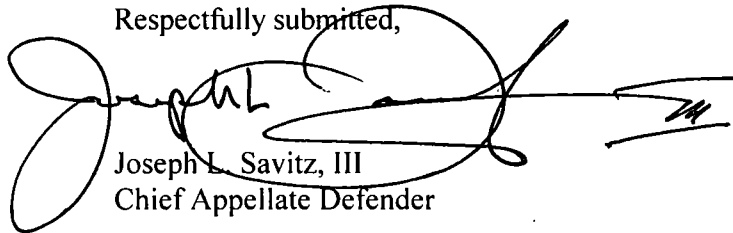
If the defendant desires a stay to pursue state post-conviction relief,

the defendant must ... file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief.

471 S.E.2d at 141. Counsel reasonably believe and assert in good faith that Mr. Stanko is entitled to a stay of execution pursuant to the Court's order.

Accordingly, counsel for Stephen Stanko petitions for a stay of execution, pursuant to this Court's order *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over the typed name and title.

Joseph L. Savitz, III
Chief Appellate Defender

Kathrine Hudgins
Appellate Defender

Attorneys for Appellant

This 20th day of March, 2008.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

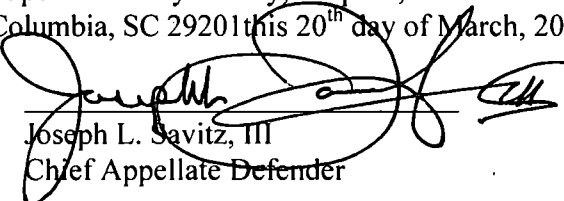
V.

STEPHEN C. STANKO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion for stay of execution in the above entitled case has been served upon Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 20th day of March, 2008.

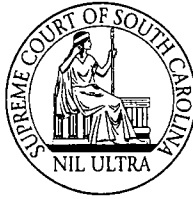


Joseph L. Savitz, III
Chief Appellate Defender

Attorney for Appellant

SWORN TO BEFORE ME this 20th day
of March, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 19, 2008

REMITTITUR

The Honorable Alma Y. White
Clerk of Court, Georgetown County
PO Drawer 421270
Georgetown, SC 29442-1270

Re: The State v. Stanko, Stephen C.
2005-GS-22-00918

Dear Ms. White:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

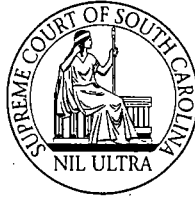
Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Chief Attorney Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
The Honorable John Gregory Hembree



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 19, 2008

Chief Attorney Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

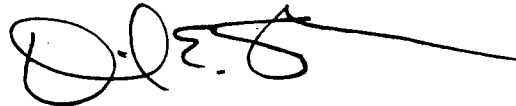
Justice James E. Moore,
not participating

March 19, 2008.”

The remittitur is today being forwarded to the lower court.

Chief Attorney Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
Page Two
March 19, 2008

Very truly yours,

A handwritten signature in black ink, appearing to be "D. L. S.", followed by a long horizontal line extending to the right.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
The Honorable John Gregory Hembree

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

THE STATE,

FEB 27 2008

RESPONDENT,
S.C. SUPREME COURT

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 26442

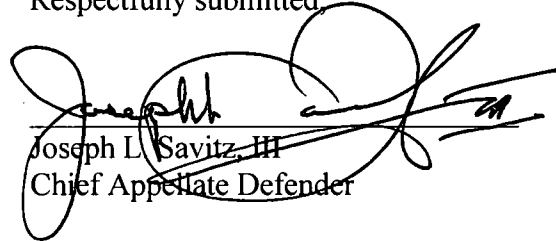
PETITION FOR REHEARING

Counsel for Stephen Christopher Stanko petitions for rehearing, pursuant to *Rule 221(a)*, *SCACR*, of the Court's ruling that Stanko was not prejudiced by the absence of an instruction to the jury on the statutory mitigating circumstance provided by *S.C. Code Section 16-3-20(C)(b)(7)*: "The age or mentality of the defendant at the time of the crime." Counsel believes that the Court's analysis represents a substantial departure from its own firmly-established capital jurisprudence. See, for example, *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002), and *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). Before now, the Court has wisely rejected the State's attempts to weaken or dilute the requirement of charging all three applicable mitigators where supported by

evidence a capital defendant was mentally unbalanced at the time of the murder. See, for example, *Stone and State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000).

For this reason, the Court should grant rehearing, vacate Stephen Stanko's death sentence and remand for resentencing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III
Chief Appellate Defender

Kathrine H. Hudgins
Appellate Defender

This 27th day of February, 2008.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

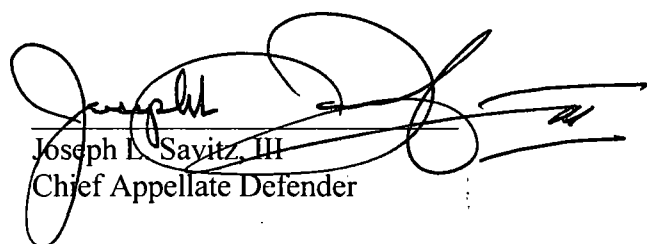
V.

STEPHEN C. STANKO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, this 27th day of February, 2008.

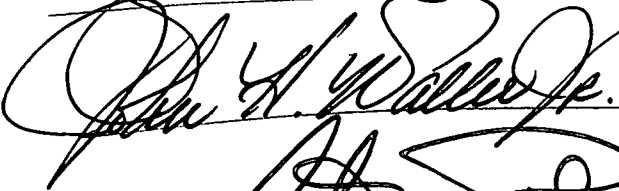
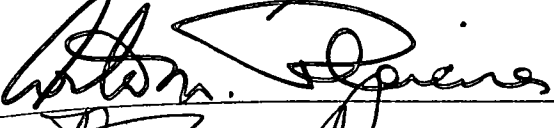
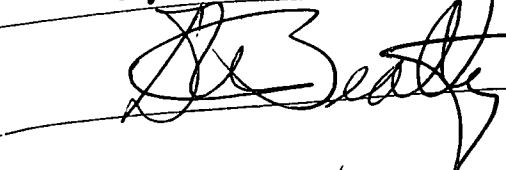


Joseph L. Sayitz, III
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of February, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017.

Petition for Rehearing is denied.

 C.J.
 J.
 J.
 J.

Justice James L. Moore, not participating

March 19, 2008

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

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

Opinion No. 26442
 Heard September 20, 2007 – Filed February 25, 2008

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender Katherine H. Hudgins, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor John Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: A jury convicted Appellant Steven C. Stanko of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery and recommended Appellant be sentenced to death. In his appeal, Appellant raises issues regarding 1) the limitation of the scope of *voir dire* and 2) the omission of a statutory mitigating factor from the jury charges in the penalty phase. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of two brutal attacks in a string of violent crimes committed in Georgetown County. The State alleged Appellant strangled his girlfriend and attempted to murder her daughter by slitting her throat in the course of a robbery and sexual assault of the two women. At trial, Appellant did not deny committing the crimes, but alleged that he was insane.

During *voir dire*, Appellant attempted to question a potential juror as to her views on the insanity defense. The State immediately objected to this line of questioning. The trial judge sustained the objection and ruled that Appellant could ask potential jurors whether they could consider affirmative defenses “and list them all,” but could not ask jurors whether they would consider the specific affirmative defense of insanity. After the parties discussed the issue, Appellant indicated he was “abandoning” asking potential jurors questions specifically regarding the insanity defense.

After the State presented its case in chief, Appellant presented expert witnesses in order to prove his insanity defense. The experts testified that medical examinations of Appellant’s brain revealed a frontal lobe abnormality. Three of Appellant’s experts testified that the frontal lobe abnormality impaired his ability to control his impulses and exercise proper judgment. One of Appellant’s experts testified that he was unable to distinguish between right and wrong as required under South Carolina law. *See State v. Pittman*, 373 S.C. 527, 577-78, 647 S.E.2d 144, 170 (2007) (a defendant is considered legally insane if, at the time of the offense, he lacked the capacity to distinguish moral or legal right from wrong). In rebuttal, the State presented experts who testified that Appellant was able to distinguish

between right and wrong and, therefore, could be held criminally responsible for his actions. The trial court submitted a jury charge on the insanity defense and instructed the jury that, in order to be found not guilty by reason of insanity, Appellant had to show by a preponderance of the evidence that he had a mental disease or defect that made him unable to distinguish right from wrong. See S.C. Code Ann. § 17-24-10 (2006). At the conclusion of the guilt phase, the jury declined to find Appellant not guilty by reason of insanity and returned a guilty verdict as to all counts.

The trial proceeded to the penalty phase, and during the conference to determine the appropriate jury charges, the trial court informed the parties that it intended to charge the jury on two statutory mitigating factors provided in S.C. Code Ann. §§ 16-3-20(C)(b)(2) and (6).¹ Appellant did not request a charge on any additional statutory mitigating factors and indicated that he had no objection to the jury charges.

At the conclusion of the penalty phase, the jury recommended Appellant be sentenced to death. This appeal followed, and Appellant raises the following issues for review:

- I. Did the trial court err in refusing to allow Appellant to ask potential jurors about their feelings and viewpoints concerning the defense of insanity during *voir dire*?
- II. Did the trial court err in failing to instruct the jury on an additional and unrequested statutory mitigating circumstance?

¹ These mitigating factors provide: “The murder was committed while the defendant was under the influence of mental or emotional disturbance” and “[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.” S.C. Code Ann. §§ 16-3-20(C)(b)(2) and (6).

LAW/ANALYSIS

I. *Voir Dire*

Appellant argues the trial court erred in refusing to allow him to question potential jurors about their feelings on the insanity defense during *voir dire*. We disagree.

Initially, we question whether this issue is preserved for review. After the trial court ruled that Appellant could not ask potential jurors about their views on the insanity defense, Appellant indicated that he was “abandoning” this line of questioning, thereby suggesting he accepted the trial court’s ruling. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911 (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).

In any event, Appellant’s argument fails on the merits. The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court. *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004). An abuse of discretion occurs when the trial court’s ruling is based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A capital defendant’s right to *voir dire*, while grounded in statutory law, is also rooted in the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Id.* To constitute reversible error, a limitation on questioning must render the trial “fundamentally unfair.” *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991); *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004).

Appellant argues that he was deprived of his right to a fair trial by an impartial jury as a result of the trial court’s ruling precluding counsel from questioning potential jurors on their view of the insanity defense. Appellant claims the insanity defense is a controversial legal issue and that some members of the jury may have been unable to follow the law in regard to the defense. We disagree.

Appellant was not entitled to ask potential jurors about their specific views of the insanity defense during *voir dire*. The trial court allowed Appellant to explore the issue of affirmative defenses during *voir dire*, and permitting either side to ask any more case-specific questions would have veered close to allowing the parties to stake out a jury. See *State v. Poindexter*, 314 S.C. 490, 493, 431 S.E.2d 254, 255 n.2 (1993) (*voir dire* is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions).² While the Sixth and Fourteenth Amendments to the United States Constitution provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. “The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.” *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

Our review of the entire *voir dire* process shows the qualified jurors were impartial, unbiased, and capable of following the law. Prior to trial, potential jurors completed a questionnaire indicating whether they were the type of person who: (1) would automatically impose the death penalty; (2) would never impose the death penalty; or (3) would listen to the evidence and apply the law in deciding whether to impose the death penalty. The trial court excused any individual who indicated that he fell into the first or second category. The trial court asked the potential jurors if anyone had bias or prejudice regarding the case and dismissed those who stated they could not remain fair or unbiased. Additionally, the trial court confirmed that each qualified juror would apply the law as charged, even if they disagreed with it, which necessarily includes the law of the insanity defense. Finally, the trial court permitted Appellant to ask potential jurors whether they would be able to apply the law in favor of Appellant if the facts provided for a defense.

² We disagree with the dissent that *Poindexter* stands for the proposition that questioning jurors about their bias against the insanity defense is appropriate. Nonetheless, the issue in this case is not whether it is appropriate, but rather, the issue is whether the trial court’s ruling precluding such questioning rendered Appellant’s trial “fundamentally unfair.” See *Hill*, 361 at 310, 604 S.E.2d at 703 (affirming trial court’s ruling that limited *voir dire* questioning where such limitation did not render the defendant’s trial fundamentally unfair).

Appellant presented no evidence showing the limitation of questioning impacted his right to a fair and impartial jury and failed to present evidence that the jury was biased or incapable of following instructions on the law. Accordingly, under the facts of this case, there is no indication that Appellant's trial was rendered "fundamentally unfair" by the trial court's limit of *voir dire*.

In conclusion, contrary to the dissent's view, our holding in no way imposes an absolute ban on questioning jurors about their views on the insanity defense. Rather, we hold that the trial court's ruling limiting the scope of *voir dire* did not deprive Appellant of a fair trial.

II. Mitigating Factor Charge

Appellant argues that the trial court erred by failing to instruct the jury on the statutory mitigating circumstance provided in § 16-3-20(C)(b)(7): "The age or mentality of the defendant at the time of the crime." We disagree.

In *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989), we set forth the proper procedure for submission of statutory mitigating factors to the jury in the penalty phase of a capital case:

Once the 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 that he wishes submitted to the jury.

Absent a request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for review. *State v. Evans*, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).

In this case, after the trial court informed the parties that it would charge the mitigating factors in §§ 16-3-20(C)(b)(2) and (6), Appellant stated

that he had no objection to the decision and did not request that the court charge any additional statutory mitigating factors. Moreover, after charging the jury, Appellant indicated he had no objection to the charge. Accordingly, this issue is not preserved for our review.

Notwithstanding any preservation issues, we note that Appellant was not prejudiced by the absence of this statutory mitigating factor. Appellant's mental condition was the focus of the guilt phase and was also a main issue in the penalty phase. The jury heard extensive expert testimony regarding Appellant's alleged mental disorders, and the trial court charged the jury on two other mitigating factors through which they could consider Appellant's mental condition. Thus, the jury was clearly aware that they could consider Appellant's mentality in determining whether the death sentence was warranted. In spite of this evidence, the jury found the existence of five statutory aggravating factors beyond a reasonable doubt and recommended Appellant be sentenced to death. Therefore, the absence of this statutory mitigating factor did not preclude the jury from considering Appellant's mentality in the penalty phase, and there is no reasonable probability that had the trial court charged the jury on this additional mitigating factor, the jury would have returned a different recommendation.³ *See Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendant's mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors).

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence 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. *See State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007) (death

³ We do not base our finding of no prejudice on the fact that the jury found the existence of five aggravating factors.

sentence warranted where defendant was convicted of murder, kidnapping, criminal sexual assault, and grand larceny); *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004) (death sentence upheld where jury found aggravating factors of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996) (death sentence upheld where defendant was convicted of murder, criminal sexual conduct, armed robbery, and grand larceny of a motor vehicle).

CONCLUSION

For the foregoing reasons, we affirm Appellant's convictions and sentence.

MOORE, WALLER and BEATTY, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, a capital defendant who will interpose a diminished capacity or insanity defense is entitled to *voir dire* the jurors whether they entertain any bias against such a defense. In fact, this Court has already recognized the appropriateness of such inquiry. See State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993), footnote 2. The trial judge, of course, must be careful not to allow such questioning to veer into improper “pre-educating or indoctrinating,” but I cannot agree with the majority’s absolute ban. Moreover, I am not clear what evidence the majority believes was available to appellant to demonstrate either the impact of the denial of his *voir dire* request, or that the jury was in fact biased or incapable of following the instructions. Having been denied the opportunity to probe potential jurors’ bias, I would not require that appellant demonstrate its existence in order to obtain relief.

I agree with the majority that the issue whether the jury should have been charged on the statutory mitigating circumstance found in S.C. Code Ann. § 16-3-20 (C)(b)(7) is not preserved for our review and therefore the merits should not be addressed on direct appeal. State v. Stone, S.C. Sup. Ct. Op. No. 26408 filed December 20, 2007. Moreover, since South Carolina is not a “weighing” state, State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004), the fact that the jury found five statutory aggravators is simply not relevant to whether appellant was prejudiced by the absence of a single mitigator, and I specifically decline to join that part of the majority’s decision which cites this as a fact in support of its decision to affirm the unpreserved issue.

I would reverse appellant’s convictions and sentences, and remand for a new trial.



HENRY McMASTER
ATTORNEY GENERAL

September 20, 2007

RECEIVED
SEP 20 2007
S.C. SUPREME COURT

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

Re: The State v. Stephen Stanko

Dear Mr. Shearouse:

Enclosed please find a copy of the unnamed California case, *People v. Fields*, 673 P.2d 680 (Cal. 1984) which I mentioned in today's oral argument on the above-referenced case. The issue is discussed beginning on page 28 and ending on page 32. Additionally, I was incorrect about the date of the case. The case was decided in 1984. I am also enclosing copies for each Justice.

Sincerely,

J. Anthony Mabry
Assistant Attorney General

JAM/lbb
Enclosure

cc: Kathrine Hudgins, Esquire (w/enclosure)

Westlaw.

673 P.2d 680

35 Cal.3d 329, 673 P.2d 680, 197 Cal.Rptr. 803
(Cite as: 35 Cal.3d 329, 673 P.2d 680)

Page 1

▷

People v. Fields
Cal., 1983.

Supreme Court of California.
The PEOPLE, Plaintiff and Respondent,
v.
Stevie Lamar FIELDS, Defendant and Appellant.
Cr. 21126.

Dec. 29, 1983.
As Modified on Denial of Rehearing March 27,
1984.

Defendant was convicted before the Superior Court, Los Angeles County, Bonnie Lee Martin, J., of robbery murder, robbery, kidnapping and rape, and was sentenced to death, and he appealed. The Supreme Court, Broussard, J., held that: (1) group of persons who would automatically vote against death penalty at sentencing phase, but who profess impartiality at guilt phase are not a cognizable group, the exclusion of which makes a jury unrepresentative and unconstitutional; (2) a juror who resolved in advance not to impose death penalty in a case before him, whatever his views might be in other cases, may be dismissed for cause without violating constitutional doctrines prohibiting courts from excluding jurors for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; (3) evidence sustained finding that victim was murdered during commission of a robbery; and (4) for purposes of insanity test providing that a person is legally insane if, as a result of mental disease or defect, he lacks substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to requirements of law, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Affirmed.

Kaus, J. concurred specially and filed opinion.

Bird, C.J., dissented and filed opinion.

Reynoso, J., dissented and filed opinion.
West Headnotes

[1] Jury 230 ⇐ 33(1.10)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.2) Particular Groups,

Inclusion or Exclusion

230k33(1.10) k. In General. Most

Cited Cases

(Formerly 230k33(1.2))

Groups defined by race, gender, or religion qualify as "distinctive" groups for purposes of establishing a prima facie violation of the fair-cross section requirement for jury service. (Per Broussard, J., with two Judges concurring and one Judge concurring in result.)

[2] Jury 230 ⇐ 33(1.1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.1) k. Representation of

Community, in General. Most Cited Cases

Groups recognized as cognizable classes, for purposes of the fair-cross section requirement for jury service, are generally relatively large and well defined groups in the community whose numbers may, because of common background or experience, share a distinctive viewpoint on matters of current concern; courts do not generally recognize an otherwise heterogeneous group as cognizable merely because its members agree on one particular matter. (Per Broussard, J., with two Judges concurring and one Judge concurring in result.)

673 P.2d 680

Page 2

35 Cal.3d 329, 673 P.2d 680, 197 Cal.Rptr. 803
(Cite as: 35 Cal.3d 329, 673 P.2d 680)

[3] Jury 230 ⇐33(2.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(2) Competence for Trial of Cause

230k33(2.15) k. View of Capital Punishment. Most Cited Cases

(Formerly 230k33(2.1))

Group of persons who would automatically vote against death penalty at sentencing phase, but who profess impartiality at guilt phase are not a cognizable group, the exclusion of which makes a jury unrepresentative and unconstitutional. (Per Broussard, J., with two Judges concurring and one Judge concurring in result.) U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 16.

[4] Constitutional Law 92 ⇐3831

92 Constitutional Law

92XXVI Equal Protection

92XXVI(G) Juries

92k3831 k. Method of Selection. Most Cited Cases

(Formerly 92k250.2(4))

The equal protection clauses of the State and Federal Constitutions bar the arbitrary exclusion of any person or groups of persons from jury service, whether or not they comprise a cognizable class. (Per Broussard, J., with two Judges concurring and one Judge concurring in result.) U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 1, § 7.

[5] Jury 230 ⇐33(5.20)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.20) k. Standing and Waiver. Most Cited Cases

(Formerly 230k33(5.2))

Defendant who did not claim to be a member of the

class of persons who would automatically vote against the death penalty but who was a member of the class of death penalty defendants, had standing to challenge a classification which distinguished between such defendants and other defendants, compelling only the former to submit to trial before a jury that excludes persons who would not be willing to vote for the death penalty but who asserted that they could be impartial on the question of guilt. (Per Broussard, J., with two Judges concurring and one Judge concurring in result.)

[6] Jury 230 ⇐108

230 Jury

230V Competency of Jurors, Challenges, and Objections

230k104 Personal Opinions and Conscientious Scruples

230k108 k. Punishment Prescribed for Offense. Most Cited Cases

State's interest in maintaining a unitary trial for both the guilt and punishment phases of trial was sufficient to justify exclusion from jury service of persons who would automatically vote against death penalty at sentencing phase but who profess impartiality at the guilt phase. (Per Broussard, J., with two Judges concurring and one Judge concurring in result.) U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 1, § 7.

[7] Jury 230 ⇐108

230 Jury

230V Competency of Jurors, Challenges, and Objections

230k104 Personal Opinions and Conscientious Scruples

230k108 k. Punishment Prescribed for Offense. Most Cited Cases

A juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath; however, State may insist that jurors consider and decide the facts impartially and conscientiously apply the law as charged by the court.

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[8] Jury 230 ⇨ 131(8)

230 Jury

230V Competency of Jurors, Challenges, and Objections

230k124 Challenges for Cause

230k131 Examination of Juror

230k131(8) k. Personal Opinions and Conscientious Scruples. Most Cited Cases

A juror who resolved in advance not to impose death penalty in a case before him, whatever his views might be in other cases, may be dismissed for cause without violating the constitutional doctrines prohibiting courts from excluding jurors for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; therefore, trial court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 16.

[9] Jury 230 ⇨ 108

230 Jury

230V Competency of Jurors, Challenges, and Objections

230k104 Personal Opinions and Conscientious Scruples

230k108 k. Punishment Prescribed for Offense. Most Cited Cases

When court excludes a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases, it must take care to avoid violation of Supreme Court's command that a juror can be dismissed for cause only if he would vote against capital punishment without regard to any evidence that might be developed at the trial of the case; if prospective juror has been informed on evidence to be presented, his asserted automatic vote may be based on that information, in which case exclusion of juror because of his views on the death penalty would be unlawful. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 16.

[10] Criminal Law 110 ⇨ 1166.16

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1166.5 Conduct of Trial in General

110k1166.16 k. Impaneling Jury in General. Most Cited Cases

Defendant was not prejudiced by prosecutor's question to prospective juror during voir dire as to whether the prospective juror felt that "the defense of insanity is the last refuge of a scoundrel," because the conduct related to a single question asked of one juror, trial court directed prosecutor to reframe the question, and he did so, and the juror involved did not serve on the jury.

[11] Criminal Law 110 ⇨ 273.1(2)

110 Criminal Law

110XV Pleas

110k272 Plea of Guilty

110k273.1 Voluntary Character

110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

Testimony of witness to the effect that, as part of a plea bargain, she had agreed to testify in accord with her last statement to police, and her further testimony that she had agreed only to tell the truth, was insufficient to demonstrate either that the plea bargain required the witness to testify in accord with her statement to the police regardless of its truth, or that witness so understood the agreement.

[12] Constitutional Law 92 ⇨ 4590

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)4 Proceedings and Trial

92k4585 Pleas

92k4590 k. Plea Agreements. Most Cited Cases

(Formerly 92k265.5)

Criminal Law 110 ⇨ 273.1(2)

110 Criminal Law

110XV Pleas

110k272 Plea of Guilty

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110k273.1 Voluntary Character

110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

A plea agreement which requires only that witness testify fully and truthfully as a prosecution witness at the trial of another is valid, and requirements of due process are met if the agreement permits witness to testify freely at trial and respond to any claim that he breached the agreement by showing that the testimony he gave was a full and truthful account.

[13] Criminal Law 110 ⇨ 723(1)

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Counsel

110k722 Comments on Character or Conduct

110k723 Appeals to Sympathy or Prejudice

110k723(1) k. In General. Most Cited Cases

Criminal Law 110 ⇨ 1171.1(6)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171. Arguments and Conduct of Counsel

110k1171.1 In General

110k1171.1(2) Statements as to Facts, Comments, and Arguments

110k1171.1(6) k. Appeals to Sympathy or Prejudice; Argument as to Punishment. Most Cited Cases

Prosecutor's closing argument inviting jury to depart from their duty to view the evidence objectively, and instead to view the case through the eyes of the victim was improper, because it was an appeal to the jurors to permit sympathy for the victim to influence their verdict; however, the misconduct of prosecutor and trial court's erroneous failure to sustain defendant's objection thereto did not prejudice defendant, in view of the overwhelming evidence of defendant's guilt.

[14] Criminal Law 110 ⇨ 723(1)

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Counsel

110k722 Comments on Character or Conduct

110k723 Appeals to Sympathy or Prejudice

110k723(1) k. In General. Most Cited Cases

Appeals to the sympathy or passions of jury are inappropriate at the guilt phase of a criminal trial, but appeals to sympathy may be proper at the penalty phase of trial.

[15] Criminal Law 110 ⇨ 1172.1(2)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1172 Instructions

110k1172.1 In General

110k1172.1(2) k. Particular Instructions. Most Cited Cases

In homicide prosecution, in which jury was instructed on both premeditated and felony-murder, the unnecessary and inappropriate reference to "hot flight" in jury instruction relating to when a robbery is still in progress did not prejudice defendant, because if the instruction misled the jurors to believe that "hot flight" was essential to a finding that the murder occurred in the commission of a robbery, defendant would have gained a benefit to which he was not entitled.

[16] Homicide 203 ⇨ 1163

203 Homicide

203IX Evidence

203IX(G) Weight and Sufficiency

203k1162 Homicide in Commission of or with Intent to Commit Other Unlawful Act

203k1163 k. In General. Most Cited Cases

(Formerly 203k235)

Evidence in homicide prosecution sustained finding that victim was murdered during a commission of a

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robbery.

[17] Criminal Law 110 48

110 Criminal Law

110VI Capacity to Commit and Responsibility for Crime

110k47 Insanity

110k48 k. In General. Most Cited Cases

For purposes of **insanity** test providing that a person is legally **insane** if, as a result of mental disease or defect, he lacked substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to requirements of law, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise **antisocial** conduct; if defense expert can point to no symptom, no manifestation, of defendant's condition except repeated criminal or **antisocial** acts, that condition cannot be considered grounds for finding defendant **insane**.

[18] Sentencing and Punishment 350H 318

350H Sentencing and Punishment

350HII Sentencing Proceedings in General

350HII(F) Evidence

350Hk318 k. Documentary Evidence.

Most Cited Cases

(Formerly 110k986.6(3))

At penalty phase of homicide prosecution, trial court did not abuse its discretion in admitting two photographs of the battered body of manslaughter victim who was beaten to death with a metal bar in order to show the violence of defendant's prior criminal act.

***806 *335 **683 Howard Schwab, Los Angeles, for plaintiff and respondent.

Allen J. Ruby, San Jose, for defendant and appellant.

BROUSSARD, Justice.

This case arises on an automatic appeal from a death sentence imposed under the 1977 death penalty statute. (Former Pen.Code, § 190 et seq.; Stats.1977, ch. 316.) As is typical in automatic appeals, the case raises a variety of contentions, some presenting issues of general import while

others involve matters relevant only to this particular appeal. *336 Among the more important issues are: (1) whether the exclusion of jurors who would automatically vote against the death penalty denies defendant a representative jury at the guilt phase of the trial; (2) whether a person who states that he could not vote for the death penalty in the case before him, but might conceivably in another case, can be excluded from the jury; (3) whether the execution-murder of a robbery victim after the killer has secured possession of the victim's property can fall within the special circumstance of murder "during the commission" of a robbery; and (4) whether a psychopath is legally insane. We have reviewed these and all other issues raised by defendant, and find no prejudicial error in the proceedings below. We therefore affirm the judgment finding defendant guilty of first degree murder, with the special circumstance of murder during the commission of a robbery, and imposing the death penalty.

I. Summary of proceedings.

On September 13, 1978, defendant was paroled from prison after serving a sentence for manslaughter. In the next three weeks, he became a one-man crime wave. He was eventually convicted in this proceeding of the following offenses: The robbery murder of Rosemary C., with the special circumstance of willful, deliberate, and premeditated murder during the commission of a robbery; the robbery of Clarence G.; the kidnaping for robbery and forced oral copulation of Cynthia S.; the kidnaping for robbery and robbery of Gwendolyn B., as well as rape, forcible oral copulation, and assault with a deadly weapon on Gwendolyn; the kidnaping, robbery, forcible oral copulation, and rape of Colleen C.

The jury determined that defendant was sane, and fixed the punishment at death. The trial court denied defendant's motion for new trial and for modification of the verdict. The case comes to us on automatic appeal.

II. Summary of the evidence.

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(a) *The murder and robbery of Rosemary C.*

Rosemary C. was a 26-year-old black woman who worked as a student librarian at the University of Southern California. On September 27, Gail Fields, defendant's sister, saw Rosemary and defendant at the Fields residence. The next morning Gail entered defendant's bedroom; defendant was standing by the door and Rosemary was naked in the bed. Defendant handed Gail a check signed by Rosemary C. for \$185. Defendant then examined Rosemary's checkbook and said that she probably had more money. Defendant called ***807 Rosemary a "bitch" and told her to write another check for \$222 and some cents. He then told Rosemary he would "bump her off" *337 because "she run a game on him," by writing a check for less than the balance of her account. Gail took the \$222 check, cashed it at a bank, and gave the money to defendant, who returned \$22 to her.

About 1 p.m. on September 28, Debbie M., a 16-year-old girl who was the former girlfriend of defendant's brother, went to the Fields residence. Debbie saw Rosemary and defendant go into defendant's bedroom. A short while later, defendant came out and asked Debbie if she wanted to see how he punished his girl friends. Debbie said "no," but defendant pushed her to the bedroom door where she saw Rosemary naked and bound to the bed. A short while later Debbie**684 saw defendant enter the bedroom with a gun, tell Rosemary that he would kill her if she did not give him money, and say that he was going to take her on a long trip "and she wasn't never going to come back."

Later in the afternoon Gail borrowed a car from Clifton B., Debbie's godfather. Debbie saw defendant, Gail, and Rosemary leave the house; Rosemary was dressed and carrying her purse. Gail testified that defendant and Rosemary got in the back seat of B.'s car. Defendant told Gail to drive them toward the Santa Monica freeway. As the car entered the on-ramp, Gail heard a shot. Rosemary cried out, "Oh, God." Defendant told Gail to keep on driving. Gail heard more shots. Defendant then said that Rosemary was not dead

and he had to make sure she was dead. Gail then heard the noise of a blow. Rosemary died of five gunshot wounds and a blunt injury to the head.

Gail drove to an alley near the Fields residence. Defendant removed the body from the car and left it in the alley while Gail covered the car's license plates. They drove to a car wash and cleaned the blood from the car. Debbie saw defendant and Gail return without Rosemary. When she heard police sirens, Debbie went to the alley and saw the body. She walked back to the house and asked defendant if the body was the girl who had been at the house. He laughed and said, "She was going on a long trip and was never coming back."

The prosecution introduced additional evidence to corroborate the testimony of Gail and Debbie. Clifton B. attested to the loan of the car, and said when it was returned it had two bullet holes in it. A prosecution witness described seeing a car in the alley which matched the description of B.'s car. Other witnesses described the discovery of Rosemary's body.

A bank official verified the \$222 check from Rosemary to Gail Fields. Police officers who searched the Fields house discovered Rosemary's purse, *338 driver's license, and a torn check from Rosemary C. to Gail Fields for \$185.

(b) *The robbery of Clarence G.*

Clarence G. testified that on the evening of October 2, 1978, he parked his Trans Am Pontiac outside a drug store. When he returned to the car, defendant and another man approached. Defendant was armed with a gun, and demanded the car keys. Clarence handed the keys to the other man and started to leave, but defendant called him back and asked for money. Clarence gave him what he had, about \$4 or \$5. The victims of defendant's subsequent crimes all observed defendant driving the Trans Am.

(c) *Crimes against Gwendolyn B. and Cynthia S.*

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Gwendolyn B. and Cynthia S. were prostitutes. Early in the morning on October 5, 1978, they saw defendant and William ("Popeye") Blackwell, a 17-year-old friend of defendant, drive by in a Trans Am. Defendant and Blackwell, who had a gun, walked up to Gwendolyn and Cynthia, and ordered the two women into the car. As they entered the car, defendant asked if they had any money.

Defendant drove the car to an alley near the Fields residence. He took the gun ***808 from Blackwell and directed the women to enter the house and go to the upstairs bedrooms. Defendant ordered Gwendolyn to remove her clothes and took \$50 she had hidden in her stockings. He inspected her for venereal disease, told her to do whatever his friend Blackwell wanted, then left the room. Blackwell then raped Gwendolyn. Defendant took Cynthia into another room, compelled her to disrobe, and took about \$100 from her.

Later defendant, Blackwell, and the two women assembled in the same room and smoked marijuana. Defendant told Gwendolyn to have oral sex with Cynthia. After she complied, he then directed her to perform anal sex. Gwendolyn refused, and defendant struck her with the gun, breaking Gwendolyn's jaw and the handle of the gun. Defendant then raped Gwendolyn, while Blackwell raped Cynthia.

**685 Gwendolyn passed out on a mattress in the bedroom. When she awoke on the blood-stained mattress, she saw Blackwell with a knife. Defendant told Blackwell, "Man, go and cut the bitch up. You can't just leave her laying there." Blackwell did not comply, and defendant then ordered Cynthia to clean up the blood from Gwendolyn's injury.

Defendant and Blackwell compelled the women to dress and accompany them in the Trans Am to pick up more prostitutes to rob. They found two *339 more women and defendant compelled them at gun point to get into the car.^{FN1} After they returned to the Fields house, defendant permitted Gwendolyn and Cynthia to leave.

FN1. Defendant was not charged with this kidnaping. The victims' identities are not disclosed by the record; they did not testify at the trial.

Cynthia took Gwendolyn to a hospital for treatment of the injury to her jaw. At the hospital, Gwendolyn used the name of Cynthia S. so she could use Cynthia's Medi-Cal card, while Cynthia used the alias of Nichole Williams.

The search of the Fields residence turned up Gwendolyn's wig and blouse and Cynthia's identification card. The police also observed extensive blood stains on the mattress where Gwendolyn had lain.

(d) *Crimes against Colleen C.*

A few hours after releasing Gwendolyn and Cynthia, defendant and Blackwell found another victim.

Colleen C., an 18-year-old student at U.S.C., parked her car in a restaurant parking lot. Defendant and Blackwell, who was armed with a gun, approached and ordered her into a Trans Am parked in the alley near the restaurant. Blackwell drove to the Fields house.

Defendant took the gun from Blackwell and ordered Colleen to go into the bedroom. Blackwell asked for the keys to Colleen's car, and defendant demanded that she give them to Blackwell. When Blackwell left with the keys, defendant looked through Colleen's purse, took about \$12, and asked if she had a checking account. Colleen said she did but it only contained \$30.

Defendant ordered Colleen to remove her clothes, and struck her for not removing them fast enough. He then required her to perform oral sex on him and to submit to intercourse.

When the sexual acts were finished, defendant demanded more money. Colleen said she could withdraw \$2,000 from a Crocker Bank savings account through a computerized night teller. She

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tore a page from the phone book giving the address for local Crocker Bank branches, and she, defendant, and Blackwell drove to one of the branches. Defendant decided there were too many people around, and so returned to the Fields house without withdrawing the money.

340** Defendant rolled marijuana cigarettes and insisted that Colleen smoke them. He then told Colleen to call a girlfriend and ask her to bring money. She called her roommate, Cathy K., told Cathy her car had broken down, and asked Cathy to come **809** to pick her up. Cathy and her brother drove to the address and honked, but because Cathy's brother was present defendant decided not to respond.

Defendant told Colleen that he would have to kill her because she had too many counts on him. Colleen begged him not to kill her. When Debbie M. knocked on the door, distracting defendant, Colleen tried to escape by throwing herself backwards through the closed window. She broke the window and cut her back, but defendant grabbed her and pulled her back into the house. Debbie M. calmed Colleen by putting the gun in another room, then left to get bandages for Colleen's back. Defendant then told Colleen that he would not kill her unless she tried to escape. He went to sleep; Colleen remained with him, awake, until morning.

In the morning defendant asked Colleen to prostitute for him. When she agreed, he ****686** said he would let her go if she would do him a favor. At defendant's request, she drove him to a location about four blocks away and purchased marijuana for him. Defendant gave Colleen back her car, watch, jewelry, and some of her clothes. She drove directly to her apartment and called her sister, who notified the police.

When the police arrived at the Fields house, defendant had left. He and Blackwell appeared later that day at Debbie's house, and stayed with her for two days. On October 9, 1978, defendant was arrested at the Greyhound bus station.

A police search of the stolen Trans Am revealed a torn page from the telephone book giving the

Crocker Bank offices.^{FN2} The book itself, minus the missing page, was found in the Fields residence. Defendant's mother appeared at the preliminary hearing wearing Colleen's blouse.

FN2. The police discovered the gun used to threaten Gwendolyn, Cynthia and Colleen (and perhaps also used to kill Rosemary) in the glove box of a car driven by Lonnie Fields. The record does not indicate the relationship between Lonnie and defendant. The handle of the gun was broken, the result of the blow that broke Gwendolyn's jaw; Gwendolyn, Cynthia and Colleen all identified the weapon.

(e) Defense testimony.

Defendant himself did not testify. His counsel called a number of witnesses whose testimony cast some doubt on aspects of the prosecution testimony.

***341** Cathy K., Colleen's roommate, testified that when Colleen phoned her from the Fields residence, Colleen said she was "loaded" and sounded intoxicated. Two officers who talked to Clarence G. said that victim told them that one of the persons who robbed him stuttered; so far as the record reveals, neither defendant nor Blackwell stutters. The officers who interviewed Gwendolyn and Cynthia testified to accounts which differed in some minor particulars from those witnesses' trial testimony. Gwendolyn also told both an officer and her boyfriend that she and Cynthia had smoked marijuana "dusted" with PCP.

(f) Sanity phase testimony.

Dr. Ronald Markman, a psychiatrist, testified for the defense that defendant had an "antisocial personality," a mental disorder previously referred to as psychopathology or sociopathology. Defendant was incapable of benefiting from experience, and lacked interest in conforming to social rules. Dr. Markman stated that in his opinion defendant, although capable of appreciating the criminality of his behavior, was unable to

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conform to legal requirements, and thus was insane under the test of insanity in effect at the time of the trial. (See *People v. Drew* (1978) 22 Cal.3d 333, 339, 149 Cal.Rptr. 275, 583 P.2d 1318.)

On cross-examination, Dr. Markman was asked, "[I]f the law were such that a mental disease or mental defect would not include an abnormality manifested only by repeated or otherwise antisocial conduct, Doctor, your opinion would be the defendant would be sane?" He replied, "[B]y definition what you are saying with that question is that you are excluding the antisocial personality. If you exclude the antisocial***810 personality from the definition, sir, it certainly would change my conclusion."

The prosecution called two psychiatric witnesses, Dr. Donald Trockman and Dr. Saul Faerstein. Both agreed with Dr. Markman's diagnosis of "antisocial personality," but stated that in their opinion defendant was nevertheless capable of conforming to legal requirements.

(g) *Penalty phase testimony.*

The parties stipulated that defendant was convicted on December 28, 1976, of the voluntary manslaughter of Albert A. The investigating officer in that case testified as to defendant's confession, in which defendant admitted hitting Albert with a dumbbell bar when Albert made a homosexual advance. The prosecution also introduced a photograph of Albert's body. Defendant presented no evidence at the penalty phase.

*342 **687 III. *Issues relating to selection of the jury.*

Defendant raises three issues relating to the voir dire and selection of the jury. He contends (1) that the exclusion of persons who said they would automatically vote against the death penalty in this case resulted in a guilt phase jury which was not a representative cross-section of the community; (2) that the court improperly limited his voir dire of

jurors concerning capital punishment and improperly excluded at least one prospective juror because of his views on that subject; (3) that the prosecutor committed misconduct when he asked whether jurors believed that insanity "was the last refuge of the scoundrel" and that the court erred in not sustaining an objection to that question.

The first issue, the denial of a representative jury, affects both the guilt and sanity phases of this trial. The second issue bears primarily upon the penalty phase. The final jury selection issue relates principally to the sanity phase. Nevertheless, the jury selection issues are so closely related that we believe it would be most convenient to consider them as a group before turning to the issues arising at the trial itself.

(a) *Denial of a representative jury.*

Defendant claims that the exclusion for cause of persons opposed to capital punishment from the guilt phase of the trial violates his right to jury trial under the Sixth Amendment of the United States Constitution and article I, section 16, of the California Constitution. Recent cases have identified three related, yet analytically distinct, contentions which could be advanced in support of that claim. (*People v. Pacheco* (1981) 116 Cal.App.3d 617, 628, 172 Cal.Rptr. 269; see generally *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301.) First, a defendant could contend that the exclusion of jurors who would automatically vote against death but assert that they could be impartial on the question of guilt—a group we described in *Hovey* as the "guilt phase includables" (28 Cal.3d 1, 17, fn. 36, 168 Cal.Rptr. 128, 616 P.2d 1301)—results in a jury biased in favor of the prosecution. Second, a defendant could contend that the exclusion of this group impairs the purpose and function of a criminal jury. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (five-person jury unconstitutional).) Finally, he could contend that the exclusion abridges his right to a jury chosen from a representative cross-section of the community.

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The first and second of these contentions require empirical proof of the effect of excluding the "guilt phase includables" upon the neutrality and performance of the jury. We considered the available evidence in ***343***Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301, and held it insufficient to demonstrate the unconstitutionality of the exclusion; defendant before us today does not challenge that holding. The petitioner in *Hovey*, however, did not raise the question of an unrepresentative jury, and neither *Hovey* nor any other ruling by this court since the ****811** 1977 restoration of the California death penalty has resolved this question.^{FN3}

FN3. The Attorney General argues that we decided the cross-section jury issue in *People v. Jackson* (1980) 28 Cal.3d 264, 168 Cal.Rptr. 603, 618 P.2d 149 and *People v. Harris* (1981) 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240. He notes that in *Jackson*, we said that defendant contended "that exclusion of these jurors resulted in a jury adjudicating guilt which was *unrepresentative of the community* and unduly biased in favor of conviction. Identical contentions were raised and rejected very recently in *Hovey v. Superior Court* [citation omitted], and accordingly need not be reexamined here." (28 Cal.3d p. 313, 168 Cal.Rptr. 603, 618 P.2d 149; italics added.) Similarly, in *Harris* we said that "[d]efendant contends the exclusion of jurors opposed to capital punishment results in an *unrepresentative jury* on the issue of guilt and substantially increases the risk of conviction. This contention ... lacks merit. (*Hovey v. Superior Court* [citation omitted].)" 28 Cal.3d p. 960, 171 Cal.Rptr. 679, 623 P.2d 240; (all italics after "guilt" added.) *Hovey*, the decision cited in both *Jackson* and *Harris*, rejected only the claim that a jury which excluded the "guilt phase includables" was biased in favor of guilt; it expressly avoided deciding the claim that such a jury violated the constitutional rule against exclusion of a cognizable

group. (See 28 Cal.3d 1, 18, fn. 38, 168 Cal.Rptr. 128, 616 P.2d 1301.) The quoted language from *Jackson* and *Harris* refers to that holding, and was not intended to resolve the representative jury issue raised by defendant in the present case.

****688** California courts applying earlier death penalty statutes did consider, but unanimously rejected, the contention that exclusion of the group in question violated constitutional guarantees. Before 1957, when the jury in a capital case in California decided both guilt and penalty in a single trial, a juror who could not be impartial on the penalty issue was necessarily excluded from the jury. (*People v. Riser* (1956) 47 Cal.2d 566, 575-576, 305 P.2d 1.) After the Legislature required a bifurcated trial, a number of cases considered whether this innovation should alter the holding of *Riser*. We concluded that even under the new procedure, exclusion of jurors opposed to capital punishment from the guilt trial did not deny the defendant a fair and impartial jury. (*People v. Gilbert* (1965) 63 Cal.2d 690, 711-712, 47 Cal.Rptr. 909, 408 P.2d 365; *People v. Smith* (1966) 63 Cal.2d 779, 789, 48 Cal.Rptr. 382, 409 P.2d 222; *People v. Thomas* (1967) 65 Cal.2d 698, 706, 56 Cal.Rptr. 305, 423 P.2d 233; *People v. Nicolaus* (1967) 65 Cal.2d 866, 882, 56 Cal.Rptr. 635, 423 P.2d 787; *People v. Gonzales* (1967) 66 Cal.2d 482, 498-499, 58 Cal.Rptr. 361, 426 P.2d 929.) The last of these decisions, *People v. Gonzales*, collected and set out the reasons advanced to justify excluding these jurors: that jurors opposed to capital punishment might not be impartial at the guilt phase of the trial; that the state had a valid interest in having a single jury try both guilt and penalty; and that the exclusion did not prejudice the defendant because jurors who favored capital punishment were also excluded.

***344** In 1968 the United States Supreme Court decided *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, and added a new constitutional dimension to jury selection in capital cases. *Witherspoon* ruled that a state may exclude jurors for cause because of their views on capital punishment only if the jurors "made unmistakably clear (1) that they would *automatically* vote against

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the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (Pp. 522-523, fn. 21, 88 S.Ct. pp. 1776-1777, fn. 21.) By excluding not only that limited group, but also "all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle" (p. 520, 88 S.Ct. p. 1776), Illinois produced "a jury uncommonly willing to condemn a man to die.... a tribunal organized to return a verdict of death." (P. 521, 88 S.Ct. p. 1776.) "No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Pp. 522-523, 88 S.Ct. pp. 1776-1777.)

Witherspoon had been convicted, as well as sentenced, by a jury from whom all with doubts or scruples about capital punishment had been excluded. Yet the Supreme ***812 Court reversed only the penalty. With respect to guilt, it stated only that "[t]he data adduced by the petitioner ... are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude ... that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." (Pp. 517-518, 88 S.Ct. pp. 1774-1775.) ^{FN4}

FN4. In a footnote the court added that "a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence-given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another

to fix punishment. That problem is not presented here, however, and we intimate no view to its proper resolution." (P. 520, fn. 18, 88 S.Ct. p. 1776, fn. 18.)

****689** By linking the question of an unrepresentative jury to the availability of empirical proof of a non-neutral jury, the *Witherspoon* opinion appears to overlook the argument that an unrepresentative jury is itself a violation of a constitutional right. Yet the court was not unaware of that issue, for Justice Douglas argued in a concurring opinion that the verdict of guilt should be reversed because *Witherspoon* was tried by an unrepresentative jury. (P. 531, 88 S.Ct. p. 1782.) Consequently, *Witherspoon's* affirmance*345 of the guilt verdict in that case can be viewed as an implied holding that exclusion of persons opposed to capital punishment does not deny a defendant a representative jury at the guilt trial. (*Grigsby v. Mabry* (E.D.Ark.1980) 483 F.Supp. 1372, 1385, modified(8th Cir.1980) 637 F.2d 525.)

Following the *Witherspoon* decision, we reconsidered our prior decisions but concluded that "[A]ssuming that the jurors otherwise met the standards for exclusion for cause under *Witherspoon* they were properly excused despite their ability to fairly and impartially determine defendant's guilt." (*People v. Washington* (1969) 71 Cal.2d 1061, 1089-1090, 80 Cal.Rptr. 567, 458 P.2d 479.) Subsequent decisions adhered to this conclusion. In *People v. King* (1970) 1 Cal.3d 791, 804, 83 Cal.Rptr. 401, 463 P.2d 753, we held that exclusion of a juror whose opposition to capital punishment was founded upon religious belief did not infringe constitutional protection of the free exercise of religion. And in *People v. Thornton* (1974) 11 Cal.3d 738, 753-754, 114 Cal.Rptr. 467, 523 P.2d 267, we held that a defendant convicted under an unconstitutional death penalty statute was not entitled to a new guilt trial even though "guilt phase includable" jurors had been excluded from his jury.

Thornton was the last decision of this court to address the representative jury issue. The Courts of Appeal, however, have considered that issue on several occasions and consistently upheld the exclusion of the "guilt phase includables." (*People*

Defendant points out, however, that the United States Supreme Court has developed a new method for determining whether the exclusion of a group of jurors denies a defendant his right to a representative jury. The new format focuses, first, on whether the group in question constitutes a distinct and "cognizable" class and, if it so qualifies, on whether the state can show sufficient justification for excluding that class. No decision of this court, and no ***813 controlling precedent from the Supreme Court, has addressed the exclusion of "guilt phase includable" jurors under this analytic structure. Accordingly, despite the unanimous weight of precedent against defendant's *346 claim, we think it necessary to reappraise the validity of that exclusion in light of current constitutional doctrine.

We begin our analysis with *Taylor v. Louisiana* (1975) 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690, in which the court held unconstitutional a Louisiana statute which excluded women unless they volunteered for jury service. Justice White explained that “[t]he purpose of a jury is to guard against the exercise of arbitrary power-to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [Citation.] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.... Restricting jury service ****690** to only special groups or excluding identifiable segments playing

Louisiana had argued that women and men do not vote as distinctive groups, and thus that the exclusion of women from the jury would not affect its deliberation and verdict. Quoting *Ballard v. United States* (1946) 329 U.S. 187, 193-194, 67 S.Ct. 261, 264-265, 91 L.Ed. 181, the court replied that " 'the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both ... a flavor, a distinct quality is lost ... The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.' " (419 U.S. pp. 531-532, 95 S.Ct. p. 698.)

Louisiana finally argued that excluding women served a rational purpose because women were more likely to qualify for child care exemption than men, and excusing all women was more convenient than making a juror by juror determination. The court responded that “[t]he right to a proper jury cannot be overcome on merely rational grounds. There must be weightier reasons if a distinctive class ... is ... to be excluded from jury service.” (P. 534, 95 S.Ct. p. 699.)

Four years later, in *Duren v. Missouri* (1979) 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579, the court held invalid a statute under which women were called for jury service, but automatically excused if they so requested. In reaching this result, the court set out a specific three-part test: "In order to establish a prima facie violation of the fair-cross section requirement, 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 *347 (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." (P. 364, 99 S.Ct. p. 668.) Once defendant sets out a prima facie case within these standards, the burden shifts to the state to show that "a significant state interest

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parallel to that between cognizable and noncognizable groups.

In holding the use of peremptory challenges to exclude a cognizable group violated the California Constitution, we stated that "when a party presumes that certain jurors are biased merely because they are members of an identifiable*348 group distinguished on racial, religious, ethnic, or similar grounds-we may call this 'group bias'-and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose, as we have seen, is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority." (P. 276, 148 Cal.Rptr. 890, 583 P.2d 748.)

We contrasted the proper use of peremptory challenge for specific bias, a bias “relating to the particular case on trial or the parties or witnesses thereto” (p. 276, 148 Cal.Rptr. 890, 583 P.2d 748) and “essentially neutral with respect to the various groups represented on the venire.” (*Id.*) The opinion offered several examples of challenges for specific bias: “both blacks and whites may have prior arrests, both rich and poor may have been crime victims, both young and old may have relatives on the police force, both men and women may believe strongly in law and order, and members of any group whatever may alienate a party by ‘bare looks and gestures.’ ” (P. 276, 148 Cal.Rptr. 890, 583 P.2d 748.) Implicit in this list of examples is that persons previously arrested, crime victims, believers in law and order, etc. are not identifiable groups whose representation is essential to a constitutional venire.

We returned to the question of defining a cognizable class in *Rubio v. Superior Court* (1979) 24 Cal.3d 93, 154 Cal.Rptr. 734, 593 P.2d 595, which concerned disqualification of ex-felons and aliens. Justice Mosk wrote the dispositive opinion,

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joined by Justice Manuel; Justices Richardson and Clark concurred in the result. The opinion by Justice Mosk states that "[t]wo requirements must ... be met in order to qualify an asserted group as 'cognizable' for purposes of the representative cross-section rule. First, its members must share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely *because* they are members of that group. It is not enough to find a characteristic possessed by some persons in the community but not ***815 by others; the characteristic must also impart to its possessors a common social or psychological outlook on human events." (P. 98, 154 Cal.Rptr. 734, 593 P.2d 595.) Second, it states "[t]he party seeking to prove a violation of the representative cross-section rule must also show that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded." (*Id.*) ^{FN5} *349 The opinion concluded that the excluded groups-ex-felons and aliens-failed the second part of this test and therefore were not cognizable groups.

FN5. The application of the second part of the *Rubio* test to the present controversy is unclear. On a penalty jury, it is obvious that the perspective of persons who would automatically vote against death would be inadequately represented by those who feel less strongly and might in some circumstances vote for death. But the question whether opponents of capital punishment bring a different perspective to the guilt trial is debatable. (The issue closely resembles the problem of proving that exclusion results in a biased jury which we discussed in *Hovey v. Superior Court*, supra, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301.) If that group does offer a different perspective on the issues at the guilt trial, then presumably excluding those members who take the strongest and most uncompromising view would dilute that perspective both in strength and proportional representation.

[2] The foregoing precedents do not resolve the

issue before us, but they provide guidance in defining the concept of a cognizable class. It is clear that the groups recognized as cognizable classes are generally**692 relatively large and well defined groups in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern. Generally speaking, the courts have not recognized an otherwise heterogeneous group as cognizable merely because its members agree on one particular matter.^{FN6} *Wheeler*, for example, suggested that persons who favor "law and order" are not a cognizable class (22 Cal.3d 258, 276, 148 Cal.Rptr. 890, 583 P.2d 748); by the same token, opponents (or proponents) of capital punishment would not comprise a cognizable group.

FN6. The one exception is *Schowgurow v. State* (1965) 240 Md. 121, 213 A.2d 475, holding unconstitutional a Maryland practice of excluding atheists from juries. Although the court treated atheists as a cognizable class, the decision could also be justified on grounds of establishment of religion or of denial of equal protection.

[3] Persons who would not be willing to vote for the death penalty come from diverse backgrounds and experiences, and may have diverse views on all other matters. Their unwillingness to vote for death may come from many sources: religious conviction, political alignment, moral philosophy, refusal to take such an awesome responsibility, or simply a feeling that "I just couldn't live with it." They do not comprise a distinctive, self-conscious group; one's identity is defined in part by his or her gender, race, religion, and other matters, but not generally by one's views on the single question of whether one would vote against death if chosen as a juror in a capital case. We conclude that the class of persons united only by their determination to vote automatically against the death penalty-a class divided in all else, including even their reasons for refusing to consider the death penalty-is not a cognizable class under the past appellate decisions defining that concept.^{FN7}

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FN7. Defendant further argues that even if the "guilt phase includables" are not a cognizable group, their exclusion disproportionately excludes recognized cognizable groups. In *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, 54-57, 168 Cal.Rptr. 128, 616 P.2d 1301, we observed that exclusion of opponents of capital punishment would exclude a higher percentage of women and blacks than of men and whites. An amicus brief from the American Friends Service Committee asserts that it would also exclude a high percentage of Quakers and other religious groups opposed to capital punishment. The affected groups-women, blacks, certain religious sects-are unquestionably cognizable groups under the controlling constitutional test.

With regard to women and blacks, defendant's contention fails for the same reason that the petitioner in *Hovey* failed to prove his case. California practice excludes not only those persons who would automatically vote against the death penalty, but also those who would automatically vote in favor of death for any person convicted of first degree murder with special circumstances. We know of no evidence that the net effect of excluding both automatic vote groups will be to significantly reduce the proportion of women and blacks on the jury.

With regard to religious groups, the issue is different, for the exclusion of one group could not be justified by excluding another sect with opposite views. Again, however, defendant has failed to provide any data to indicate which groups are opposed to capital punishment, what percentage of their members would always vote against the death penalty regardless of the evidence, and whether such members would be willing to vote impartially at the guilt phase knowing that their vote might be a crucial link in the chain of events leading to the defendant's execution.

***816 *350 Two recent federal district court

decisions, *Grigsby v. Mabry* (E.D.Ark.1983) 569 F.Supp. 1273, and *Keeten v. Garrison* (W.D.N.C.1984) 578 F.Supp. 1164, have reached a contrary conclusion. Both decisions assume that a cognizable class does not require a common background and experience giving rise to a distinctive, self-conscious group, but requires only shared views and attitudes on related issues of social and legal policy-a position we reject. Both cases are subject to further appellate review, and we may look forward to a definitive ruling resolving this difficult controversy.

[4][5] Our conclusion that the "guilt phase includables" are not a distinct, identifiable, cognizable class as that concept is defined in *Taylor*, *Duren*, and other controlling precedent does not dispose of defendant's claim that exclusion of this class abridges constitutional rights. One of the reasons for requiring a representative jury "is to achieve an overall impartiality by allowing the interaction of ... diverse beliefs and values...." (***693People v. Wheeler*, *supra*, 22 Cal.3d 258, 276, 148 Cal.Rptr. 890, 583 P.2d 748.) The exclusion of members of a diverse, noncognizable group united only by their views on a particular issue will still exclude from the jury that particular viewpoint, and, to that extent, will necessarily diminish the representative character of the jury. Moreover, the equal protection clauses of the United States and California Constitutions bar the arbitrary exclusion of any person or groups of persons from jury service, whether or not they comprise a cognizable class. (See *Rubio v. Superior Court*, *supra*, 24 Cal.3d 93, 101-105, 154 Cal.Rptr. 734, 593 P.2d 595; *Adams v. Superior Court*, *supra*, 12 Cal.3d 55, 60-63, 115 Cal.Rptr. 247, 524 P.2d 375.)^{FN8}

FN8. Defendant does not claim to be a member of the class of persons who would automatically vote against the death penalty. (See discussion in *Rubio v. Superior Court*, *supra*, 24 Cal.3d 93, 103, 154 Cal.Rptr. 734, 593 P.2d 595.) He is, however, a member of the class of death penalty defendants, and therefore has standing to challenge a classification which

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distinguishes between such defendants and other defendants, compelling only the former to submit to trial before a jury that excludes the "guilt phase includables."

[6] In fact, persons who would automatically vote against the death penalty routinely serve on California noncapital cases, and all parties and ***351** amicus alike assume that such persons could not constitutionally be excluded. The question before us, in terms of equal protection-and of the right to a representative jury, if that right can be asserted on behalf of a noncognizable group-is whether the state can justify excluding this group from the guilt phase of death penalty cases.

The state first asserts the long established legislative preference for a single jury qualified to try both phases of the trial (see *People v. Gonzales, supra*, 66 Cal.2d 482, 499, 58 Cal.Rptr. 361, 426 P.2d 929), and notes the expense and inconvenience involved in any departure from this practice. If, for example, the penalty jury were not selected until after the first jury had found guilt and special circumstances, it would not have heard the guilt-phase evidence. Since the penalty jury must take into account "[t]he circumstances of the crime of which the defendant was convicted ... and the existence of any special circumstance found to be true" (former Pen.Code, § 190.3, subd. (a)), the case would have to be retried in major part before the new jury. If, on the other hand, both juries were empaneled at the onset of the guilt trial, the state would incur the delay of double voir dire and the expense of maintaining two juries in all capital cases, even *****817** though many cases terminate before reaching the penalty phase.

Perhaps the most practical approach would be to select alternate jurors to replace the "guilt phase includables" at the commencement of the penalty phase. (See Winick, op. cit. *supra*, 81 Mich.L.Rev. 1, 57, fn. 194.) We held in *People v. Collins* (1976) 17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742, that if necessary an alternate juror could join the jury after deliberations had begun, but that the jury must be instructed to disregard all past deliberations and begin anew. (P. 694, 131 Cal.Rptr. 782, 552 P.2d 742.) The proposal before

us, however, envisions an alternate joining the jury after it had deliberated on the issues of guilt and special circumstances and reached a verdict. He would be joining a group which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty. The resulting deliberations between old members who have already considered the evidence and may have arrived at tentative conclusions on some aspects of the case, and new members ignorant of those discussions and conclusions, would depart from the requirement that jurors "reach their consensus through deliberations which are the common experience of all of them." (*People v. Collins, supra*, 17 Cal.3d 687, 693, 131 Cal.Rptr. 782, 552 P.2d 742.) ^{FN9}

FN9. We recognize that unforeseen circumstances may require substitution of a juror at the penalty phase of a capital trial, even though the alternate did not take part in the guilt phase deliberations. (See *People v. Green* (1971) 15 Cal.App.3d 524, 528-529, 93 Cal.Rptr. 84.) But in view of the discussion in *People v. Collins, supra*, 17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742, we should not adopt a policy which contemplates substitution of alternate jurors after the guilt trial as a routine procedure.

***352 **694** In this context, moreover, the preference for a single jury goes well beyond considerations of administrative convenience or expense and reflects a legitimate attempt to assure-insofar as possible-that the decision-making process of a death penalty case is a coherent whole. The preference for a single jury is by no means a one-sided matter; such a procedure may provide distinct benefits for both the prosecution and the defense. From the prosecution's point of view, the use of a single jury to determine both guilt and penalty may make it less likely that a juror's belief as to the inappropriateness of the death penalty will improperly skew the determination of guilt or innocence; as the drafters of the Model Penal Code's death penalty provision observed, "a juror's

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knowledge that he may not be in a position to control sentencing may induce him to hold out against conviction even when liability is plain." (1 Model Pen.Code, com. to § 210.6, pp. 146-147 (1980).) From defendant's perspective, the use of a single jury may help insure that the ultimate decision-maker in capital cases acts with full recognition of the gravity of its responsibility throughout both phases of the trial and will also guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations. (Cf. 1 Model Pen.Code, § 210.6(1)(f) and com., pp. 107, 134 (1980) [death penalty should not be imposed when "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt"].) Thus, there are a number of weighty considerations to support the statutory preference for a single jury in capital cases.

How should we describe these state interests? They certainly constitute a rational basis for the state's policy, which is all that is required under the equal protection clause. (See *Rubio v. Superior Court*, *supra*, 24 Cal.3d 93, 101, 154 Cal.Rptr. 734, 593 P.2d 595; *Adams v. Superior Court*, *supra*, 12 Cal.3d 55, 62, 155 Cal.Rptr. 247, 524 P.2d 375.) Arguably they constitute the "weightier reasons" (*Taylor v. Louisiana*, *supra*, 419 U.S. 522, 534, 95 S.Ct. 692, 699), the "significant state interest" (*Duren v. Missouri*, *supra*, 439 U.S. 357, 99 S.Ct. 664), required in the representative jury cases. They would not, we are certain, justify a suspect classification excluding persons on grounds of race or gender. ***818 But the crucial fact in our opinion is that the interests advanced by the state-interests, let us say, of moderate weight and significance-nevertheless outweigh those interests asserted in favor of permitting the "guilt phase includables" to serve on the jury which tries guilt and special circumstance.

Defendant's right to a fair and impartial jury is not at issue here. We rejected the contention that the exclusion of the automatic vote groups from the guilt phase jury results in a prosecution prone jury in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301, and defendant disclaims any intention to reassert that contention.

He does not claim that he was in fact prejudiced by the jury selection procedure-that a more representative jury would likely have *353 reached a different result. On the record before us, it is unlikely that any unbiased jury would fail to find defendant guilty of a premeditated murder committed during the commission of a robbery.

All that defendant can claim is that the jury was deprived of an elusive but "distinct quality" or "flavor" (*Taylor v. Louisiana*, *supra*, 419 U.S. 522, 531, 95 S.Ct. 692, 698) by the exclusion of the "guilt phase includables," which in some uncertain and undefinable way might have affected the jury's deliberations. His interest in this "quality" or "flavor" is constitutionally cognizable under *Taylor*, but it is not a very substantial interest.

The interest of the excluded group is of no greater weight. Opponents of capital punishment are not traditional victims of discrimination. Their exclusion from capital**695 juries is not a badge of servitude or an assertion of inferiority (compare *Carter v. Jury Commission* (1970) 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549, [Blacks]), nor a perpetuation of obsolete stereotypes (compare *Duren v. Missouri*, *supra*, 439 U.S. 357, 99 S.Ct. 664 [women]). Service on a capital jury is not a sought-after position, but an onerous obligation, and so long as exclusion denotes no stigma of inferiority, few persons would complain.

In sum, we conclude that the group of persons who would automatically vote against death at the penalty phase, yet profess impartiality at the guilt phase-the "guilt phase includables"-are not a cognizable group, the exclusion of which makes a jury unrepresentative and unconstitutional. The interest of the state in maintaining a unitary jury for both phases of the trial is sufficient to justify the exclusion of this noncognizable group.

(b) *Limitation of voir dire of prospective jurors, and exclusion of jurors.*

The Supreme Court decision in *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1776, held that a court may not exclude jurors for

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cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (P. 522, 88 S.Ct. P. 1776.) The only jurors who may be dismissed are those "who make it unmistakably clear ... that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (*Id.*, at fn. 21.) Relying on this holding, defendant maintains that the trial court improperly limited his voir dire of juror Harris and subsequent jurors, preventing him from showing that the jurors should not have been dismissed; and that the dismissal of juror Rumbo violated the *Witherspoon* test. As we shall explain, both the court's order limiting the voir dire of Harris and its *354 exclusion of Rumbo present the same issue: whether the court may dismiss for cause a juror who will automatically vote against death *in the case before him*, but might consider the death penalty in other cases.

The trial judge asked Mrs. Harris and most of the other jurors a series of standard questions concerning their views on capital punishment. Question number three, the first question relating to the penalty phase, was: "Regardless of whatever evidence might be presented at the penalty phase of the trial, should we get ***819 that far along, will you automatically and absolutely refuse to vote for the death penalty or a verdict of death *in the case involving these charges and special circumstances?*" Mrs. Harris responded unequivocally, asserting that she would automatically vote against the death penalty in a case "involving these charges and special circumstances," and adhered to that position on further questioning.

Counsel, however, asked Mrs. Harris: "Are you saying that it is this particular case that you would not follow the law?" She replied, "Yes." Counsel then inquired: "*So that it is not an all-encompassing refusal to follow the law as it relates to the death penalty, but only in this particular case?*" She again replied, "Yes." FN10

FN10. Mrs. Harris was not asked to

explain her distinction between the present case and other capital cases. Her view rejecting capital punishment in the present case, but not in all cases, would make sense if she believed that penalty appropriate only in a case involving some special circumstances, such as multiple murder or murder by torture, not charged in this case.

At this point, juror Harris had made clear that she was absolutely opposed to the death penalty in this case, but not necessarily in every case. Counsel attempted to illustrate the point through an example: "If Adolf Hitler were on trial charged with murdering six million people" The court refused to permit the question, saying that "I don't think it is fair to ask a juror to speculate what they might do with Adolf Hitler. We are concerned with a particular case before this court, and I think the inquiry should be restricted to following the law, [and] any conscientious objections in this case here today." It then granted the **696 prosecutor's motion to dismiss juror Harris. FN11

FN11. The trial court posed the same standard question, with its emphasis on the charges and special circumstances in the particular case at hand, to most of the other jurors. Nine jurors who affirmed that they would automatically vote against the death penalty in this case were dismissed for cause. In each instance defense counsel sought to rehabilitate the juror by showing that he would consider the death penalty in a case involving Hitler or some other hypothetical defendant; the court consistently refused to permit counsel to do so. Thus the issue discussed with respect to Mrs. Harris arises also with respect to these other jurors.

We do not endorse the trial court's standard question. By departing from the language of *Witherspoon*, and emphasizing the charges and special circumstances of the particular case at hand, the court risked misunderstanding and reversible error.

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*355 Juror Rumbo's initial answers were less definite than Mrs. Harris'. To the court's standard question-whether he would automatically refuse to vote for the death penalty-he replied, "I probably would, Your Honor. It would be very difficult for me to vote for the death penalty. Almost impossible, sorry."

The voir dire continued:

"THE COURT: Do you feel that your mind is open to consider that possibility ... and deliberate with your fellow jurors ...?"

"JUROR RUMBO: I could deliberate it and so forth. But casting that ballot I don't think I could do it.... [¶] ... I can do as I am told up to that point, Your Honor. I would try. But I know I would let you down."

The court explained that it was not a matter of letting anyone down, but of taking the responsibility for making the penalty decision. Rumbo answered, "I can't take that responsibility to that extent. I don't want to. That is putting me in an awful position."

The trial judge and the prosecutor then attempted to obtain unequivocal answers. The judge asked Rumbo, "Can you set aside personal views and render your decision based on the evidence and the instructions of law?" Rumbo replied, "No." The prosecutor asked, "Are you of such a mind, sir, that you would never vote to impose the death penalty under any circumstances *in this case*?" Rumbo replied, "Yes." The court then excused the juror for cause.

Rumbo's initial answers-that he "probably" would automatically vote against the death penalty; that it would be "very difficult" for him to vote for death-are clearly insufficient to permit his disqualification ***820 under *Witherspoon*. (*People v. Risenhoover* (1968) 70 Cal.2d 39, 55-56, 73 Cal.Rptr. 533, 447 P.2d 925; *People v. Vaughn* (1969) 71 Cal.2d 406, 412-413, 78 Cal.Rptr. 186, 455 P.2d 122; *People v. Velasquez* (1980) 26 Cal.3d 425, 440, 163 Cal.Rptr. 306, 606 P.2d 341.) *Witherspoon* permits disqualification only if the

juror makes his position "unmistakably clear" (391 U.S. at p. 523, fn. 21, 88 S.Ct. at p. 1777, fn. 21); uncertain, hedged, or ambiguous responses do not meet that test. (See *People v. Lanphear* (1980) 26 Cal.3d 814, 841, 163 Cal.Rptr. 601, 608 P.2d 689 and cases there cited.)

On subsequent questioning, however, Rumbo stated unequivocally that he would not follow the law at the penalty phase and that he would automatically vote against the death penalty in the case before him. The People rely upon those answers to justify his exclusion.

*356 We faced a similar issue in *People v. Floyd* (1970) 1 Cal.3d 694, 83 Cal.Rptr. 608, 464 P.2d 64. Juror Rogers in *Floyd* at first stated that the death penalty was a question of "degree" on which she would "have to get all the facts," but later replied "no" to the question whether she would have the courage to vote for death in a proper case. We upheld her exclusion on two grounds. First, we relied on the rule that "[w]here a prospective juror gives conflicting answers to questions relevant to his impartiality, the trial court's determination as to his state of mind is binding upon an appellate court." (1 Cal.3d at p. 725, 83 Cal.Rptr. 608, 464 P.2d 64, quoting *People v. Linden* (1959) 52 Cal.2d 1, 22, 338 P.2d 397.) Alternatively, we concluded that "Miss Rogers made it unmistakably clear that under no circumstances would she impose the death penalty."***697 (1 Cal.3d p. 725, 83 Cal.Rptr. 608, 464 P.2d 64.) Applying the analysis in *Floyd*, we conclude that the trial court in the present case could properly determine that Rumbo's later, unequivocal answers correctly stated the juror's views. In answer to the prosecutor's question, Rumbo had clearly and unmistakably affirmed that he would never vote to impose the death penalty *in this case*. If that answer is sufficient to permit exclusion under *Witherspoon*, then the trial court did not err in dismissing Rumbo.

The exclusion of Rumbo thus raises the question whether the dismissal of a juror who would automatically vote against the death penalty in the case at hand, but not necessarily in some other case, violates *Witherspoon*. The court's ruling limiting the voir dire of juror Harris and subsequent jurors

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raised the identical issue.

The United States Supreme Court has not decided whether a juror who affirms only that he would automatically vote against death in the case before him can be excluded for cause. Language in both *Witherspoon* and *Adams v. Texas* (1980) 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581, however, suggests that exclusion of such a juror violates no constitutional constraints.

In *Witherspoon*, the court noted that jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." (391 U.S. at p. 522, fn. 21, 88 S.Ct. at p. 1777, fn. 21.) The implication of this language is that a juror who is not willing to consider *357 the death penalty in the case before him, but is irrevocably committed before trial to vote against that penalty, can be excluded for cause.

[7] In *Adams v. Texas*, *supra*, 448 U.S. 38, 100 S.Ct. 2521, the Supreme Court reviewed the *Witherspoon* decision and later cases following that precedent. The *Witherspoon* test, the court stated, "seems clearly designed to accommodate the ***821 State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (P. 44, 100 S.Ct. p. 2525.) Thus, under *Witherspoon* and subsequent cases, "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (P. 45, 100 S.Ct. p. 2526.)

[8] The jurors at issue here were called to decide a case arising under the 1977 death penalty statute. The Legislature had determined that death was a possible punishment for premeditated murder during the commission of robbery, and required the jury in deciding the question to "consider, take into account, and be guided by" listed aggravating and mitigating facts. A juror who resolved in advance not to impose the death penalty in the case before him, whatever his views might be in other cases, could not "conscientiously apply the law as charged by the court" (*Adams v. Texas*, *supra*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526) because he had already determined the penalty without considering the relevant aggravating and mitigating factors. It follows that such a juror may be dismissed for cause without violating the constitutional doctrine expounded in *Witherspoon* and *Adams*.^{FN12}

FN12. The California decisions following *Witherspoon* have not discussed that doctrine in terms of the juror's ability to follow his oath and carry out the instructions of the court. We have, however, expressed our disapproval of the use of hypothetical cases to test a juror's views on capital punishment. (See *People v. Velasquez*, *supra*, 26 Cal.3d 425, 440, fn. 11, 162 Cal.Rptr. 306, 606 P.2d 341; *People v. Vaughn*, *supra*, 71 Cal.2d 406, 413, 78 Cal.Rptr. 186, 455 P.2d 122; *People v. O'Brien* (1969) 71 Cal.2d 394, 404-405, 79 Cal.Rptr. 313, 456 P.2d 969; *People v. Risenhoover*, *supra*, 70 Cal.2d 39, 55-56, 73 Cal.Rptr. 533, 447 P.2d 925.)

The tenor of those decisions is that a juror's view of other cases is largely irrelevant to the *Witherspoon* standard because such views would not make it unmistakably clear whether the juror would automatically vote against death in the case to be tried. Thus, the California cases support the trial judge's ruling in the present case barring defense counsel from questioning the jurors about extreme or hypothetical cases.

****698** [9] We therefore conclude that a court may

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properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. We also conclude that a court may properly excuse a prospective juror who would automatically vote against the death *358 penalty in the case before him, regardless of his willingness to consider the death penalty in other cases.^{FN13}

FN13. When the court excludes a juror on this ground, however, it must take care to avoid violation of *Witherspoon's* command that a juror can be dismissed for cause only if he would vote against capital punishment "without regard to any evidence that might be developed at the trial of the case" (391 U.S. at p. 522, fn. 21, 88 S.Ct. at p. 1777, fn. 21.) If a prospective juror has been informed of the evidence to be presented, his asserted automatic vote may be based upon this information, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon*. For example, a juror who announces that he would automatically vote against death in the case before him because he has been told (whether true or not) that the prosecution case rests entirely on circumstantial evidence is not casting a vote without regard to the evidence, and cannot be excluded under the *Witherspoon* formula.

In the present case, each of the excluded jurors unequivocally asserted that he would automatically vote against the death penalty in the case before him regardless of the evidence. None even hinted that his vote was based upon a preconception of the evidence. With the exception of juror Harris, none suggested that his opposition to the death penalty was limited to this specific case, and Harris knew nothing of the evidence in this case except what she could infer from the charges and special circumstances. On this record, we can only conclude that each excluded juror would have cast an automatic vote against

the death penalty regardless of the evidence, and thus were properly excluded for cause.

(c) *Voir dire of a juror concerning the insanity defense.*

[10] In questioning juror Tuey, the prosecutor asked her if she believed a person charged with committing a crime such ***822 as defendant's must be insane. She replied, "No." He then asked, "On the other hand, do you feel that the defense of insanity is the last refuge of a scoundrel?"

Defendant objected, and the court, commenting that "it is colorful language," asked the prosecutor to reframe the question. He did so, asking the juror whether "to use less colorful language, do you feel there could be such a thing as a person who is legally insane?" The juror responded that "There could be."

The scope of the question was proper, since the juror's views on the insanity defense was a suitable subject for voir dire. In *People v. Williams* (1981) 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869, however, we observed that although the court "cannot exclude questions proper in scope, it is free to require that they be phrased in neutral, nonargumentative form." (P. 408, 174 Cal.Rptr. 317, 628 P.2d 869.) Thus the court correctly required the prosecutor to rephrase the question to the juror.

Defendant contends that the asking of the question by the prosecutor was misconduct, designed to prejudice the jurors against the insanity defense. But whether or not it was misconduct, we do not believe defendant was prejudiced by the question. The issue relates to a single question asked *359 of only one juror. The court directed the prosecutor to reframe the question, and he did so. The juror involved did not serve on the jury. To find prejudice, we would have to conjecture that other members of the panel who did serve paid attention to the voir dire of Ms. Tuey, that hearing this question led them to wonder whether the insanity defense was merely "the last refuge of a scoundrel," and that such reasoning**699 led them to reject

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defendant's insanity evidence. This train of causation is entirely too speculative to support a finding of prejudice under the *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 299 P.2d 243), which requires a showing that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (P. 836, 299 P.2d 243.)

IV. Guilt phase and special circumstances issues.

(a) The plea bargain and testimony of Gail Fields.

[11] Gail Fields, defendant's sister, entered into a plea bargain under which she agreed to testify as a witness for the People in the present case. The district attorney in return agreed to permit her to plead guilty to being an accessory to murder and to recommend that she serve no additional time beyond the date of sentencing. Gail was informed that the judge reserved the right to nullify the bargain if, after hearing the entire evidence, he concluded that it was unfair.

In the present trial, Gail Fields disclosed the plea bargain on direct examination. On cross-examination the following dialogue occurred:

"Q. Now, it was part of the deal that you would testify in here today according to the statement that you gave the court reporter last night in the lockup?

"A. Yes.

"Q. Is it your understanding that if you took the stand this morning and you told the story different this morning from what you told them yesterday that the deal would fall through?

"A. If I told a different story, that it would-

"Q. There'd be no more deal.

"A. Yeah.

*360 "Q. And you understand that what they expected you to testify to is what you told them

back in the back yesterday in order to get a deal; isn't that right?

"A. Yes."

On redirect examination the prosecutor returned to the witness' understanding of the plea bargain:

"Q. The final statement you gave Investigator Mattingly, was that the truth?

"A. Yes.

"Q. I asked you today to testify to the truth, did I not?

***823 "A. Yes.

"Q. I never said, 'Testify to a certain story,' did I?

"A. No."

Defendant contends that the testimony of Gail Fields should have been excluded, citing *People v. Medina* (1974) 41 Cal.App.3d 438, 116 Cal.Rptr. 133. In *Medina*, three witnesses testified under a grant of immunity " 'subject to the conditions that the witness not materially or substantially change her testimony from her tape-recorded statement already given to the law enforcement officers' " (P. 450, 116 Cal.Rptr. 133.) The court acknowledged that a grant of immunity could be conditioned on a requirement that the witness testify fully and fairly to the facts, but held that when the terms of the immunity place the witness "under a strong compulsion to testify in a particular fashion" (p. 455, 116 Cal.Rptr. 133), the testimony is tainted and inadmissible.

We do not believe the *Medina* rule is applicable to the present case. The record of the plea of Gail Fields discloses that the specific bargain, as put to her and accepted by her, was "to testify as a witness on the part of the People of the State of California as to the truth of those events that occurred on September 28, 1978." Defense counsel claims Gail's testimony recounting that bargain was inconsistent: in response to his questions she said she agreed to testify in accord with her last

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statement to the police, but in response to the district attorney's questions she said she agreed only to tell the truth. Contrary to defendant's contention, however, Gail's trial testimony is not necessarily inconsistent; if the last statement**700 she gave the police was the truth, then by agreeing to testify truthfully she has in fact agreed *361 to testify in accord with that statement. Moreover, even if we were to view her testimony as inconsistent, the inconsistency arises not from her own words, but from her failure to dispute leading questions as put by counsel for both sides. The testimony is not sufficient to demonstrate either that the plea bargain required Gail Fields to testify in accord with her statement regardless of its truth, or that Gail so understood the agreement.

[12] We recognize that a witness in Gail Fields' position is under some compulsion to testify in accord with statements given to the police or the prosecution. The district attorney in the present case obviously believed that Gail's last statement was a truthful account, and if she deviated materially from it he might take the position that she had breached the bargain, and could be prosecuted as a principal to murder. But despite this element of compulsion, it is clear, and the cases so hold (see, e.g., *People v. Dixon* (1979) 24 Cal.3d 43, 53, 154 Cal.Rptr. 236, 592 P.2d 752) that an agreement which requires only that the witness testify fully and truthfully is valid, and indeed such a requirement would seem necessary to prevent the witness from sabotaging the bargain. We believe the requirements of due process, as explained in *Medina*, are met if the agreement thus permits the witness to testify freely at trial and to respond to any claim that he breached the agreement by showing that the testimony he gave was a full and truthful account.

(b) *Improper closing argument.*

[13] Defendant contends that the prosecutor committed misconduct by appealing to the jury's sympathy for the victim in his closing argument, and that the trial court erred in overruling his objection to that presentation. We quote the relevant passages from the reporter's transcript:

"[DISTRICT ATTORNEY]: Now, think of yourself as Rosemary [C.] A young librarian from the University of Southern California; a quiet girl, not outgoing. You haven't been seen with a boyfriend. You take the bus to work. You are either a virgin, or you have had very minimal sexual activity in your lifetime....

"It is now the late evening of September 27th, early morning hours of September 28th. You find yourself in the defendant's residence at 2706 South La Salle in Los Angeles.

***824 "... [T]he defendant demands that you write him out a check payable to his sister, Gail Fields. The defendant threatens to kill you unless you give him the money. You are now naked and tied to the bed rails of the defendant's bed. You are forced to write several checks. The defendant *362 looks at your checkbook and figures out certain amounts of money on paper. You finally write out a check to Gail Fields for \$222.81."

The district attorney continued to describe the murder from the victim's perspective:

"The defendant directs Gail to drive onto the Santa Monica Freeway, and all of a sudden the defendant shoots you on the side and you yell, 'Oh, God.' You hear Gail beg the defendant not to shoot you again, and the defendant shoots you again."

Finally, defense counsel objected, but the court overruled the objection. The district attorney continued his narrative:

"Do you wonder about heaven, about God? You know there is no escape. The defendant shoots you more times. He states that you are not dead, and he has to make sure you are dead, and he hits you with an object on your head leaving triangular marks, probably the gun. And there are now four lacerations on your head. And it takes 10 or 15 minutes for you to die. Blood meanwhile spatters on your face.

"For this the defendant is charged with the murder and the robbery of Rosemary [C.]"

[14] It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial.^{FN14} (See *People v. Carlin* (1968) 261 Cal.App.2d 30, 67 Cal.Rptr. 557; *People v. Leach* (1934) 137 Cal.App. 753, 31 P.2d 449; *People v. Botkin* (1908) 9 Cal.App. 244, 98 P. 861; CALJIC 1.00.) We recognize that *363 the prosecutor “may vigorously argue his case and is not limited to ‘Chesterfieldian politeness’ ” (*People v. Bandhauer* (1967) 66 Cal.2d 524, 529, 58 Cal.Rptr. 332, 426 P.2d 900; see *People v. Ross* (1960) 178 Cal.App.2d 801, 808), 3 Cal.Rptr. 170, but the bounds of vigorous argument do not permit appeals to sympathy or passion such as that presented here.

FN14. Appeals to sympathy may be proper at the penalty phase of the trial. In *People v. Haskett* (1982) 30 Cal.3d 841, 180 Cal.Rptr. 640, 640 P.2d 776, the prosecutor in his penalty phase argument invited the jurors to “put themselves in the shoes of Mrs. Rose [the victim] and imagine suffering the acts inflicted on her.” (P. 863, 180 Cal.Rptr. 640, 640 P.2d 776.) We said that “[a]lthough appeals to the sympathy or passions of the jury are inappropriate at the guilt phase [citation], at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury’s moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant’s background against those that may offend the conscience.” (*Id.*)

(c) Jury instructions and evidence on felony murder.

Former Penal Code section 190.2 provided that a defendant found guilty of first degree murder may be sentenced to death if he "was personally present during the commission of the act or acts causing ***825 death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists: [¶] (3) The murder was willful, deliberate, and premeditated and was committed *during the commission* or attempted commission of any of the following crimes: [¶] (i) *Robbery*, in violation of Section 211" (Italics added.)

In *People v. Green* (1980) 27 Cal.3d 1, 61, 164 Cal.Rptr. 1, 609 P.2d 468, we explained the basis of the felony murder special circumstance under the 1977 law. "At the very least," we said, "the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant committed a 'willful, deliberate and premeditated' murder 'during the commission' of a robbery or other listed felony. [Citation.] The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose"

In other words, while either premeditation or a

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killing during the commission of a felony will raise the crime to first degree murder, neither standing alone rendered a defendant liable to the death penalty. Both elements were essential to a felony murder special circumstance. By this requirement, the 1977 death penalty law limited the number of those persons *364 who would face special circumstance proceedings and avoided**702 arbitrary infliction of the death penalty upon defendants of lesser culpability.

The jury in the present case, instructed on both premeditated and felony murder, found defendant guilty of the first degree murder of Rosemary C. It also found him guilty of robbery of Rosemary. Finally, it found true the special circumstance allegation of premeditated murder "during the commission of a robbery." Defendant contends that no substantial evidence supports this finding, and that the jury was improperly instructed on this subject.

We briefly recapitulate the undisputed evidence bearing on the felony murder issue. Defendant robbed Rosemary C. by compelling her to write a check to Gail Fields, who cashed the check and turned over most of the money to defendant. Several hours later defendant, Gail, and the victim entered a car. While Gail drove, defendant shot and struck Rosemary, killing her. He then dumped the body in an alley near his house. The testimony suggests two possible motives for the killing: (1) revenge because Rosemary tried to frustrate the robbery-in defendant's words, to "run a game" on him-by writing a check for less than the maximum possible; or (2) to eliminate her as a witness against him.

After hearing this evidence, the court instructed the jury that: "A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in hot flight, that is, while in possession of the stolen property he is fleeing in an attempt to escape.... [¶] A robbery is complete when the perpetrator ... has reached a place of temporary safety and is in unchallenged possession of the stolen property after having effected an escape with such property." (CALJIC No. 9.15 as modified by the court.)

As defendant observes, this instruction, even as modified by the court, was ill-adapted to assist the jury in determining whether defendant murdered Rosemary C. "during the commission" of a robbery. In deciding that question, the jury could properly consider that defendant might not have reached a place of temporary safety or attained unchallenged possession of the stolen property when he was still encumbered with Rosemary, a victim who at first opportunity might call the police. But it is clear that defendant was not in "hot flight, fleeing with the stolen property."

[15] The unnecessary and inappropriate reference to "hot flight" in the jury instruction,**826 however, could not have prejudiced defendant. Had this instruction misled the jurors to believe that "hot flight" was essential to a finding that the murder occurred in the commission of a robbery, defendant would *365 have gained a benefit to which he was not entitled. The case in this respect is analogous to *People v. Salas* (1972) 7 Cal.3d 812, 824, 103 Cal.Rptr. 431, 500 P.2d 7, in which we said that "[a]lthough the introduction in the instructions to the jury of concepts of immediate pursuit together with scrambling possession ... may have been erroneous, no prejudice resulted to defendant *as in any event the jurors were compelled to find that the homicide was committed before defendant had reached a place of safety*. The introduction of the pursuit and scrambling concepts did in fact confer benefits to which defendant was not entitled." (Italics added.)

[16] We turn therefore to the question whether substantial evidence supports the jury's finding that Rosemary C. was murdered "during the commission of the robbery." FN15 A sizeable body of California decisions**703 have discussed the duration of the crime of robbery and the relationship of that crime to some other offense which occurs after the exact moment when the property changed hands. Although some of these cases arise under statutes whose wording differs from the statute at issue here, they address a problem common to this case-whether the relationship between a robbery and another crime is sufficiently close to justify an enhanced punishment. We therefore look to these cases for guidance in our analysis of the felony murder issue

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in the present case.

FN15. The Attorney General emphasizes the evidence that Rosemary took her purse with her when she went with defendant and Gail, and that the purse was later discovered in the Fields house. He argues that the robbery of the purse, contemporaneous with the murder, alone is sufficient to support the special circumstance finding.

In *People v. Green*, *supra*, 27 Cal.3d 1, 60-61, 164 Cal.Rptr. 1, 609 P.2d 468, we explained that a robbery which is merely incidental to a murder will not support a felony murder special circumstance finding. Whenever a defendant kills a clothed victim and takes possession of the body to dispose of it, he acquires possession of the victim's clothes and any personal effects the victim may have been carrying. Unless, however, the killer has an independent felonious purpose to acquire those items, this possession, wholly incidental to the killing, will not support a felony murder finding. In the present case, we find no evidence that defendant killed Rosemary with the independent felonious purpose of robbing her of her purse.

In *People v. Carroll* (1970) 1 Cal.3d 581, 83 Cal.Rptr. 176, 463 P.2d 400, defendant robbed Gulsvig in a restroom, pursued him into a bar and shot him. He was convicted of inflicting great bodily injury on Gulsvig "in the course of the commission of the robbery." (Former Pen.Code, § 213.) We said that "[t]he fact that defendant was not engaged in the asportation of any loot at the time he shot Gulsvig is immaterial. He became angry after discovering no money in the wallet and having the rest room door slammed in his face. His purpose in running into the bar appears to have been to exact his revenge from Gulsvig. Under the circumstances, the robbery and shooting of Gulsvig constituted one indivisible transaction" (Pp. 584-585, 83 Cal.Rptr. 176, 463 P.2d 400.)

*366 In *People v. Laursen* (1972) 8 Cal.3d 192, 104 Cal.Rptr. 425, 501 P.2d 1145, fleeing robbers kidnaped a motorist and compelled him to drive them from the scene of the robbery. We held defendant could be found guilty of kidnaping "to commit robbery" (Pen.Code, § 209); "[t]he assault of the victim, the seizure of his property and the robber's escape to a location of temporary safety are all phases in the commission of the crime of robbery linked not only by a proximity of time and distance, but a single-mindedness of the culprit's purpose as well." (Pp. 199-200, 104 Cal.Rptr. 425, 501 P.2d 1145.)

In *People v. Green*, *supra*, 27 Cal.3d 1, 164 Cal.Rptr. 1, 609 P.2d 468, when we explained the basis for the felony murder special circumstance, we illustrated that special circumstance by describing a killing resembling the present case, e.g., a murder by a defendant "who carried out an execution-style***827 slaying of the victim of or witness to a holdup, a kidnaping, or a rape." (P. 61, 164 Cal.Rptr. 1, 609 P.2d 468.)

Finally, in the recent case of *People v. Ramos* (1982) 30 Cal.3d 553, 180 Cal.Rptr. 266, 639 P.2d 908, defendant and his partner compelled two workers at a restaurant to go into the walk-in refrigerator. When the robbers had finished taking money from the safe, defendant reentered the refrigerator and shot both workers, killing one of them. We upheld the jury's finding that the murder occurred during the commission of the robbery under section 190.2, stating that "[i]n the instant case, the killing occurred at the same location as the robbery and within a short time after the money was taken from the safe. Moreover, the jury could well have concluded that the purpose of the killing was to eliminate a witness to the robbery." (P. 587, 180 Cal.Rptr. 266, 639 P.2d 908.)

Two decisions of the Court of Appeal present an even closer analogy to the present case. The first, *People v. Powell* (1974) 40 Cal.App.3d 107, 115 Cal.Rptr. 109, was described in the book *The Onion Field*. Defendants in *Powell* kidnaped two police officers in Los Angeles, took their guns and money, and drove them to Kern County where defendant Powell shot and killed one officer. The court held

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the felony murder rule (based on the robbery of the guns and money) applicable because as long as the defendants were accompanied by and saddled with the officers they had not reached a place of temporary safety. (P. 164, 115 Cal.Rptr. 109.)

The second case is *People v. Sirignano* (1974) 42 Cal.App.3d 794, 117 Cal.Rptr. 131. **704 Defendant lured the victim to a hotel room, struck him, and robbed him. "Long after it was apparent that no additional money would be forthcoming from the victim, the persons involved, including defendant, continued to assault him; when he was dead, the group took steps to avoid apprehension for the robbery and death." (P. 801, 117 Cal.Rptr. 131.) Defendant contended that the robbery was completed before the killing, and that she had reached a place of temporary safety. The court, noting the inference that defendant *367 planned to kill the victim so he would not be able to testify, held that "[t]here was substantial evidence to support the conclusion that the events of the evening formed one 'continuous transaction,' and such a finding clearly results in felony-murder, in the first degree." (P. 802, 117 Cal.Rptr. 131.) FN16

FN16. We note also *People v. Manson* (1976) 61 Cal.App.3d 102, 132 Cal.Rptr. 265 (another case which inspired a book), in which the evidence indicated that Manson and his followers entered the La Bianca house, subdued the residents, and took Mrs. La Bianca's wallet. Defendant left the house before his followers killed the residents. The court held that the question whether the robbery terminated before the murders was properly submitted to the jury, stating that assuming the La Biancas were still alive when defendant left the house, "the proximity in time of their subsequent death is sufficient to cement together the burglary-robbery and the homicides as one indivisible transaction." (Pp. 208-209, 132 Cal.Rptr. 265.)

Defendant, on the other hand, calls our attention to *People v. Ford* (1966) 65 Cal.2d 41, 52 Cal.Rptr.

228, 416 P.2d 132, but we find that decision distinguishable.^{FN17} Explaining why we could not uphold a conviction of first degree murder under the felony-murder rule, we said that "[i]n the present case ..., many hours elapsed between the time of the robbery and the shooting of Officer Stahl. [T]here was here no direct evidence that defendant was endeavoring to escape the robbery when he shot the deputy; on the contrary, there is strong evidence that he was not.... Additionally, it should be pointed out that defendant had the opportunity to and did spend some of his loot prior to the shooting; ***828 that during the period of approximately four hours between the robbery and the killing he drove aimlessly over a great distance; and that, with respect at least to the robbery, he had won his way to places of temporary safety before he committed the homicide. Considering the facts as a whole, it must be held that the robbery and escape therefrom did not motivate defendant's subsequent conduct, but were merely incidental to his primary objectives. Thus, it cannot be held that the homicide can be promoted to murder of the first degree on the theory that the homicide was committed in the perpetration of a robbery." (Pp. 56-57, 52 Cal.Rptr. 228, 416 P.2d 132.)

FN17. Defendant also cites *Jones v. Superior Court* (1981) 123 Cal.App.3d 160, 176 Cal.Rptr. 430. *Jones* held that a defendant who raped a woman, then transported her two miles before killing her, did not commit murder while "engaged in the commission of" rape, but instead while "engaged in ... the immediate flight after committing" rape. The distinction between the commission of a crime and immediate flight comes from the 1978 death penalty initiative and, as *Jones* recognized, is inconsistent with prior felony-murder cases.

On the basis of the cases discussed, we conclude that the jury finding of special circumstances in the present case should be sustained. We recognize that when Gail Fields returned with the proceeds of Rosemary's check and gave them to defendant, he had control of the robbery proceeds in his own

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residence. That residence, however, was not a place of safety so long as Rosemary was held prisoner. (See *People v. Powell*, *supra*, 40 Cal.App.3d 107, 115 Cal.Rptr. 109.) In an unguarded moment, she might escape, notify the police, and render the Fields residence quite unsafe for defendant. In order *368 to complete a successful escape with the robbery proceeds, defendant either had to dispose of her, which he did, or flee to some other place which she could not identify for the police. Thus, the trier of fact could reasonably find that defendant's murder was a continuation of the robbery, done because until the robbery victim**705 was killed, Fields' home was not a place of even temporary safety.^{FN18}

FN18. The fact that defendant took Rosemary away from the residence to kill her is also suggestive. Defendant may have wanted to prevent other persons, such as Debbie M., from witnessing the killing, or avoid having evidence of the killing in the house, because the existence of such witnesses or evidence would also render the house an unsafe refuge.

Moreover, despite the span in space and time between the taking and the murder (see *People v. Ford*, *supra*, 65 Cal.2d 41, 52 Cal.Rptr. 228, 416 P.2d 132), defendant's purpose in killing his victim serves to link the two crimes. As we noted, the record suggests two motives: to prevent her from reporting the crime (compare *People v. Ramos*, *supra*, 30 Cal.3d 553, 587, 180 Cal.Rptr. 266, 639 P.2d 908; *People v. Sirignano*, *supra*, 42 Cal.App.3d 794, 801-802, 117 Cal.Rptr. 131); and to punish her for attempting to frustrate the robbery (compare *People v. Carroll*, *supra*, 1 Cal.3d 581, 584-585, 83 Cal.Rptr. 176, 463 P.2d 400). Such motives would not enable a court to find a killing occurred during the commission of a robbery if it took place days later and in a far distant locale. But here the murder occurred within a few hours of the robbery, and at a site only a few miles distant, and the events are linked not only by defendant's motives but by his continued control over the victim, forcing her to remain at his house and then transporting her to the murder site. We conclude

that the evidence supports the verdict finding the special circumstance of murder during the commission of robbery.

V. Insanity and penalty phase issues.

(a) "Antisocial personality" as a form of insanity.

[17] Defendant, after presenting no defense of significance at the guilt phase of the trial, offered a defense of insanity. He presented evidence that he had an "antisocial personality" which, he claimed, constituted a form of insanity under the American Law Institute (ALI) test we endorsed in *People v. Drew* (1978) 22 Cal.3d 333, 339, 149 Cal.Rptr. 275, 583 P.2d 1318. Under this test, a person is legally insane if "as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."^{FN19}

FN19. An initiative measure effective June 8, 1982, enacted a statutory definition of insanity (see Pen.Code, § 25, subd. (b)) which resembles the M'Naghten test rejected by this court in *People v. Drew*. The considerations of policy barring extension of the insanity defense to psychopaths discussed in this opinion apply with equal force to cases arising under the new statutory definition.

***829 *369 We noted in *Drew* that "[s]ubdivision 2 of the American Law Institute test provides that 'the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.' This language, designed to deny an insanity defense to psychopaths and sociopaths, is not relevant to the present case. The question whether to adopt subdivision 2 of the ALI test is one which we defer to a later occasion." (22 Cal.3d at p. 345, fn. 8, 149 Cal.Rptr. 275, 583 P.2d 1318.) Forecasting that the California Supreme Court would adopt subdivision 2 of the ALI test, the trial judge in the

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present case instructed the jury in accord with that provision. The present case thus presents the issue we deferred deciding in *Drew*.

Defense counsel called as his only expert witness Dr. Ronald Markman, who testified that defendant suffered from an "antisocial personality" (the current psychiatric term for psychopaths and sociopaths),^{FN20} that this condition is a "mental disease," and that because of this disease defendant was unable to conform his behavior to legal requirements. He described defendant as a person who lacks the interest, concern, or ability to conform to social roles, and was unable to benefit from experience. On **706 cross-examination, however, he was asked whether his views would change if the term "mental disease" did not include an abnormality "manifested only by repeated or otherwise antisocial conduct." Markman replied that under this definition defendant would not be insane.

FN20. The terms "psychopath" and "sociopath" are used interchangeably in the psychiatric literature; the newer term "antisocial personality" is roughly equivalent although, as we will explain later in this opinion, the profession has attempted to establish specific criteria for use of this term which may make it narrower than the earlier designations.

When the trial judge, over defendant's objection, instructed the jury on subdivision 2 of the ALI test, the defense case was destroyed. As the prosecutor pointed out to the jury, under subdivision 2's definition of mental disease, Dr. Markman agreed with the prosecution experts that defendant was sane, and no testimony whatever supported the insanity defense.

Before explaining our reasons for approving the court's instruction based on subdivision 2, it is important to note what that subdivision does and does not do. Although it was designed to deny an insanity defense to psychopaths and sociopaths (see *People v. Drew*, *supra*, 22 Cal.3d 333, 345, fn. 8, 149 Cal.Rptr. 275, 583 P.2d 1318; Model

Pen.Code, § 4.01(2), com. (Tent.Draft No. 4, 1955)), it does not have that precise effect. What it does is prevent consideration of a mental illness if that illness is manifested only by a series of criminal or antisocial acts. If that illness manifests itself in some other way as well, then it can be considered as a "mental disease" under the ALI test, and instances of criminal or antisocial conduct can be ascribed to that disease or cited as evidence of its severity. (Thus Dr. Markham may have been mistaken when, *370 in response to a question excluding consideration of "an abnormality manifested only by repeated or otherwise antisocial conduct," he stated that "by definition, you are excluding the antisocial personality.")

In effect, subdivision 2 operates to define a *prima facie* case for an **insanity** defense: if the defense expert can point to no symptom, no manifestation, of defendant's condition except repeated criminal or **antisocial** acts, that condition cannot be considered grounds for finding defendant **insane**.^{FN21} (See *United States v. Freeman* (2d Cir.1966) 357 F.2d 606, 625.)^{FN22} Whether this ***830 requirement denies the **insanity** defense to a person with an "**antisocial** personality" will depend upon the individual case, and on the ability of the psychiatrist to base a diagnosis upon facts additional to a list of defendant's criminal or **antisocial** acts.^{FN23}

FN21. Defense counsel cites studies suggesting that persons with "antisocial personalities" may have electrical or chemical disorders. Proof of such a disorder in the case of a particular defendant might provide the *prima facie* showing that would avoid application of subdivision 2.

FN22. As stated in *Freeman*: "There may be instances where recidivists will not be criminally responsible, but this will be for determination in each individual case depending upon other evidence of mental disease augmenting mere recidivism with the ultimate determination dependent upon the proper application of the standards we have adopted. But, we stress, repeated

FN25. The only other decision rejecting subdivision 2, *United States v. Smith* (6th Cir.1968) 404 F.2d 720, 727, footnote 8, did so because the psychiatric profession did not agree on the correctness of the subdivision. The language from DSM-II and DSM-III, quoted earlier in this memorandum, however, indicates that the majority view in the profession supports the subdivision.

Against this asserted advantage of an insanity finding-an advantage which is nonexistent when the underlying crime carries a sentence of life imprisonment-we must balance a substantial disadvantage. To classify persons with "antisocial personality" as **insane** would put in the mental institutions persons for whom there is currently no suitable treatment (Uhlmen, *op. cit.* ****708** *supra*, 14 Loyola L.A.L.Rev. 1, 20-21), and who would be a constant danger to the staff and other inmates. Mental hospitals are not designed for this type of person; prisons are.

Indeed, the "antisocial personality" is the classic criminal; our prisons are largely populated by such persons. To classify such persons as insane would

radically revise the criminal law-insanity, instead of a rare exception to the rule of criminal accountability, would become the ordinary defense in a felony trial. Absent a better understanding of the disorder of "antisocial personality" and some effective treatment for this condition, such an expansive role for the insanity defense would work more harm than good.

(b) *Admissibility of photograph at penalty phase.*

[18] At the penalty phase, the prosecution proved that defendant was convicted in 1976 of manslaughter of Albert A. The prosecutor then offered two photographs of the manslaughter victim. The judge examined the photographs and admitted one of them. Its gruesome character can be inferred from the fact that it depicts the battered body of the victim, who was beaten to death with a metal bar.

“The admission of photographs of victims lies primarily within the discretion of the trial judge who determines whether their probative value is outweighed by their prejudicial effect. [Citations.] Photographs which disclose the manner in which a victim was wounded are ‘relevant on the issues of malice [citations] and aggravation of the crime and the penalty [citations].’ ” (*People v. Frierson* (1979) 25 Cal.3d 142, 171, 158 Cal.Rptr. 281, 599 P.2d 587 (opn. of Richardson, J.))

***373** The trial judge exercised her discretion, holding one of the offered photographs admissible “for the purpose of showing the violence of defendant's prior criminal act.” On the record before us, we cannot find an abuse of discretion.

(c) *Constitutionality of the death penalty.*

Defendant asks us to reconsider our decision in *People v. Jackson*, *supra*, 28 Cal.3d 264, 168 Cal.Rptr. 603, 618 P.2d 149, holding the 1977 death penalty legislation constitutional. He presents no new arguments, but simply urges the views advanced by the dissenting justices in that case. We see no reason to reopen the issue.

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***832 VI. *Summary and Conclusion.*

Defendant was found guilty of the murder of Rosemary C. and 13 other offenses. The jury found the special circumstance of murder during the commission of a robbery, determined that defendant was sane, and fixed the penalty at death. Substantial evidence supports the jury's verdict in all respects.

On appeal, defendant raised constitutional issues concerning the selection of the jury, claiming (a) that certain prospective jurors were improperly excluded because of their views on capital punishment, and (b) that the exclusion of jurors on that basis from the guilt phase of the trial denied him his right to a representative jury. We have concluded, however, that the jurors in question were properly excluded because they would automatically vote against the death penalty in the present case regardless of the evidence. The exclusion of such jurors serves the state's interest in selecting a single jury to try both guilt and penalty, and in eliminating jurors who might not render an impartial verdict. It does not abridge any right of defendant under the state or federal Constitutions.

Defendant also questioned the instruction and sufficiency of the evidence as to the special circumstance of felony murder. As we have explained, however, any instructional error was to defendant's benefit. The evidence that defendant killed Rosemary C. to punish her for resisting the robbery and to prevent her from reporting that crime demonstrates that the robbery and murder were part of a continuous transaction, and thus that the killing occurred "during the commission" of the robbery.

Defendant relied primarily on a defense of insanity. His appeal raised the question whether the ALI test of insanity as applied in this state at date of trial excludes abnormalities manifested only by repeated criminal acts. We hold that it does exclude such conditions, and thus that the trial court did *374 not err in so instructing the jury. With that holding, defendant's only defense evaporates.

In light of the evidence that defendant murdered

Rosemary C. wilfully, deliberately, with premeditation and during the commission of a robbery, and that defendant was sane when he committed this act, minor errors relating to the voir dire of one juror and to the guilt phase argument of the **709 prosecutor did not prejudice the outcome of the case.

The judgment is affirmed.

MOSK and RICHARDSON, JJ., concur. KAUS, Justice, concurring.

I concur in full in the reasoning and conclusions of the majority opinion with the exception of part III(a).^{FN1} With respect to that part, I concur only in the result.

FN1. My concurrence in part III(b) rests on my understanding that in light of footnotes 11 and 13, pages 819, 821 of 197 Cal.Rptr., pages 696-698 of 673 P.2d the majority does not intend to approve the routine framing of the *Witherspoon* inquiry in the form of a question which asks prospective jurors whether they would consider the death penalty "in this case," but rather that the opinion simply finds no prejudice here where it appears that the jurors to whom the question was posed had no knowledge of any facts of this case beyond the bare language of the charged special circumstances. I certainly agree that the trial court did not err in precluding defendant from attempting to rehabilitate *Witherspoon*-excludable jurors by asking such hypothetical questions as whether they would consider the death penalty if the defendant were Adolf Hitler.

Assuming, as I must in light of *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301, that it has not yet been established that the "death qualification" procedure results in a jury that is biased against a defendant on the issue of guilt or innocence, I believe that the state's interest in having a single jury determine the defendant's guilt or innocence and decide whether he should

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live or die, is sufficient to justify the exclusion from the guilt phase of those jurors who cannot sit at the penalty phase because they are unalterably opposed to the death penalty. As the majority recognizes (ante, p. 817 of 197 Cal.Rptr.,***833 p. 693 of 673 P.2d), the use of a single jury in capital cases serves a number of significant substantive purposes beyond the more obvious savings in time and expense.

I would rest the holding in part III(a) solely on the weightiness of the justifications supporting a single jury procedure in death penalty cases, without deciding whether "guilt phase includables" are in the abstract-a "cognizable class" for *Duren* purposes. In addition, because of the obvious differences between peremptory challenges and broad statutory exclusions, I would not suggest that simply because an individual who holds a particular *375 viewpoint may properly be the subject of a peremptory challenge under *Wheeler*, no cross-sectional-jury problems would be raised by a statutory across-the-board exclusion of all individuals who entertain similar views. As I see it, the constitutional standards governing the two situations-peremptory challenges, on the one hand, and statutory exclusions, on the other-are not necessarily the same.^{FN2}

FN2. As in *People v. Easley* (1983) 34 Cal.3d 858, 196 Cal.Rptr. 309, 671 P.2d 813, the State Public Defender has filed an amicus brief in support of a grant of a rehearing in this case in which he raises a host of issues that were not presented by appointed counsel before we filed our opinion in this case. Although in *Easley* I felt that the seriousness and fundamental nature of the errors raised by the Public Defender necessitated a grant of a rehearing, in this case I believe that the general interest in an orderly presentation and resolution of issues would be best served by leaving defendant free to raise the newly-discovered issues in appropriate collateral proceedings. (E.g., *In re Banks* (1971) 4 Cal.3d 337, 93 Cal Rptr. 591, 482 P.2d 215; *In re Smith* (1970) 3 Cal.3d

192, 90 Cal.Rptr. 1, 474 P.2d 969; *In re Saunders* (1970) 2 Cal.3d 1033, 88 Cal.Rptr. 633, 472 P.2d 921; cf. *People v. Lang* (1974) 11 Cal.3d 134, 141, 113 Cal.Rptr. 9, 520 P.2d 393.) The Public Defender's voluminous brief here-coming so quickly on the heels of the similar presentation in *Easley*-suggests to me that it is unrealistic to expect us to unearth all potentially meritorious claims of error on our own in cases of this length and complexity. Granting a rehearing whenever a new claim of error is presented has the disadvantage of denying lower courts the benefit of this court's definitive resolution of those issues which we have already considered and addressed. Because many of these issues continue to arise in current death penalty litigation, guidance on which trial courts can rely is particularly important. Given these considerations, I have concluded that I should vote to deny the petition for rehearing.

BIRD, Chief Justice, dissenting.

When an individual is accused of a noncapital crime in California, the jurors who decide the question of guilt or innocence are drawn from virtually the entire population of fair and impartial, English-speaking adults in the community. (See Code Civ.Proc., §§ 198-202.5; Pen.Code, §§ 1071-1074.) However, when an individual's life hangs in the balance, the state alters that jury pool. Excluded for all purposes is any adult who would not vote for a death sentence even though that person could fairly decide the question of guilt or innocence.

**710 In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301, this court attempted to determine whether significant and relevant differences exist between the jury pool used for the trial of the "usual" criminal case and the more limited "death-qualified" pool used for the determination of guilt or innocence in a death penalty case. The evidence presented in *Hovey* focused on the effect of the state's exclusion of those fair and impartial jurors who would be unwilling to consider imposing a death sentence.

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That evidence established, and this court acknowledged, that this group-called the "guilt phase includables"-differed on the average from the remaining fair and impartial jurors in such important matters as (1) its votes on guilt or innocence, (2) its attitudes toward the law and the criminal justice system, (3) its racial and sexual composition, (4) its *376 evaluation of evidence, and (5) its assessment of the "reasonable doubt" standard. In each instance, the "guilt phase includable" group was less prosecution-prone-or more defense-oriented-than the remaining jurors.

Nevertheless, this court rejected the contention, based on *Witherspoon v. Illinois* (1968) 391 U.S. 510, 520, footnote 18,***83488 S.Ct. 1770, 1776, footnote 18,20 L.Ed.2d 776, that a death-qualified jury pool is "less than neutral with respect to guilt" when compared with the jury pool employed in other criminal cases in California. (See *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 63-69,168 Cal.Rptr. 128, 616 P.2d 1301.) The fundamental defect in petitioner's showing was his failure to recognize that a death-qualified jury pool differs from the usual criminal jury pool not only with respect to the exclusion of individuals unalterably *opposed* to voting for death but those who would always vote *in favor of* death. The studies presented by petitioner erroneously assumed that the latter group-the "automatic death penalty" group-was eligible to serve on capital juries. The date was not capable of being adjusted to account for that assumption, since neither the size, the behavior, nor the characteristics of the group were established.

Petitioner's showing made it impossible to ascertain whether the exclusion of the "automatic death penalty" group would offset the effects of the exclusion of the "guilt phase includable" group and hence leave the jury pool in death penalty cases identical to the jury pool in nondeath cases. In view of this problem and the fact that the burden lay with petitioner to make a prima facie showing of unconstitutionality, petitioner's *Witherspoon* contention was "rejected as not established by the record presently before this court." (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 61, 168 Cal.Rptr. 128, 616 P.2d 1301.)

The petitioner in *Hovey* declined to argue, and this court specifically reserved for a future case, whether the exclusion of the "guilt phase includable" group violated the fair cross-section requirement of our state and/or federal Constitutions. (Cal. Const., art. I, § 16; U.S. Const., 6th Amend. See *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 17-18, fn. 38,168 Cal.Rptr. 128, 616 P.2d 1301.) A primary difference between a fair cross-section analysis and the "neutral jury" analysis of *Witherspoon* and *Hovey* is that under cross-section principles, the state cannot justify its exclusion of a " 'distinctive' group in the community" FN1 by claiming that the removal of another group "offsets" the effects of the challenged exclusionary policy. (Accord, maj. opn., *ante*, at p. 815 fn. 7 of 197 Cal.Rptr., p. 692 fn. 7 of 673 P.2d; *People v. Wheeler* (1978) 22 Cal.3d 258, 283, fn. 30,148 Cal.Rptr. 890, 583 P.2d 748.) For example, a jury pool from which blacks were excluded would not fairly represent the community if prejudiced *377 whites were also removed, nor would the exclusion of misogynists restore cross-sectional balance to a jury pool devoid of women.

FN1. *Duren v. Missouri* (1979) 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579.

A majority of this court today admit that under a cross-section analysis, "the exclusion of one group could not be justified by excluding another sect with opposite views." (Maj. opn., *ante*, at p. 815 fn. 7 of 197 Cal.Rptr., p. 692 fn. 7 of 673 P.2d.) **711 Nevertheless, they manage to reject the argument that exclusion of the "guilt phase includable" group violates fair cross-section principles. They do this by concluding that the "guilt phase includable" group is not "distinctive," i.e., that its members are "united only by their determination to vote automatically against the death penalty [and are as] divided in all else" as persons permitted to serve on capital juries. (*Id.*, at p. 815 of 197 Cal.Rptr., p. 692 of 673 P.2d.)

These conclusions are entirely unsupported in the majority opinion and, in fact, are unsupportable. They are flatly contradicted by the *Hovey* decision

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and by the consistent results of each of the two dozen studies discussed therein. Unfortunately, all of this empirical data and precedent are simply ignored by today's majority.

By any of the standards heretofore used by this court for determining a "cognizable class" or a "distinctive group in the community" under a fair cross-section analysis, the "guilt phase includables" would qualify as cognizable or distinctive. In order to hold that they do not, the majority must ***835 ignore not only precedent and proof, but leave behind common sense as well.

As the reader may have surmised, I respectfully dissent.^{FN2}

FN2. Since I would reverse appellant's conviction for the fair cross-section violation, I do not address the other issues discussed in the majority opinion.

I.

The right to a jury drawn from a representative cross-section of the community is guaranteed by both the state and federal Constitutions. (*People v. Wheeler, supra*, 22 Cal.3d at p. 272, 148 Cal.Rptr. 890, 583 P.2d 748; *Taylor v. Louisiana* (1975) 419 U.S. 522, 528, 530, 95 S.Ct. 692, 696, 697, 42 L.Ed.2d 690.) However, not every exclusionary jury selection practice of a state is barred by cross-section principles. To establish a prima facie cross-sectional violation, an individual challenging a particular state practice must show, inter alia, that it adversely affects what the United States Supreme Court has variously called an "identifiable class of citizens,"^{FN3} a "'distinctive' group in the community,"^{FN4} a *378 "large, distinctive group[],"^{FN5} and a "minorit[y] or other identifiable group []."^{FN6}

FN3. *Taylor v. Louisiana, supra*, 419 U.S. at page 525, 95 S.Ct. at page 695.

FN4. *Duren v. Missouri, supra*, 439 U.S. at page 364, 99 S.Ct. at page 668; accord,

Taylor v. Louisiana, supra, 419 U.S. at page 538, 95 S.Ct. at page 701.

FN5. *Id.*, at page 530, 95 S.Ct. at page 697; accord, *People v. Wheeler, supra*, 22 Cal.3d at page 269, 148 Cal.Rptr. 890, 583 P.2d 748.

FN6. *Ballew v. Georgia* (1978) 435 U.S. 223, 236-237, 98 S.Ct. 1029, 1037-1038, 55 L.Ed.2d 234.

This court, in turn, has looked for a "common thread running through the excluded group—a basic similarity of attitudes, ideas or experience among its members" (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60, 115 Cal.Rptr. 247, 524 P.2d 375; *Rubio v. Superior Court* (1979) 24 Cal.3d 93, 97-98, 154 Cal.Rptr. 734, 593 P.2d 595 (lead opn. of Mosk, J.).) Frequently the term "cognizable" class or group has been employed to describe this aspect of the representative cross-section requirement.^{FN7} The court has observed that "economic, sexual, social, religious, racial, political, or geographical groups" are cognizable. (*Adams v. Superior Court, supra*, 12 Cal.3d at p. 60, 115 Cal.Rptr. 247, 524 P.2d 375; see also *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181.) It is significant for the consideration of this case that of these several groups, only two are defined by reference to an immutable characteristic (i.e., sex and race). The remainder are defined by some shared attribute which can change from year to year, or even day to day.

FN7. See, e.g., *People v. Wheeler, supra*, 22 Cal.3d at page 280, 148 Cal.Rptr. 890, 583 P.2d 748; *Adams, supra*, 12 Cal.3d at page 60, 115 Cal.Rptr. 247, 524 P.2d 375.

Even more to the point, several of these cognizable or distinctive groups—e.g., the religious and political groups—are defined **712 solely by reference to their members' attitudes and beliefs. Indeed, in *Adams v. Superior Court, supra*, 12 Cal.3d at page 60, 115 Cal.Rptr. 247, 524 P.2d 375, this court refused to find a group to be cognizable precisely

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because its members lacked a "basic similarity of attitudes, ideas or experience" This is so because "the goal of the cross-section rule is to enhance the likelihood that the jury will be representative of significant community attitudes, not of groups per se." (*Rubio v. Superior Court*, *supra*, 24 Cal.3d at p. 98, 154 Cal.Rptr. 734, 593 P.2d 595, original emphasis (lead opn. of Mosk, J.)). Thus, in the present case, the fact that the "guilt phase includable" group is defined by reference to its members' attitudes and beliefs would seem to support a finding that it is a "cognizable class" or a "distinctive group in the community." FN8

FN8. In *Adams*, this court suggested that persons opposed to the death penalty constitute a cognizable class. (12 Cal.3d at p. 60, 115 Cal.Rptr. 247, 524 P.2d 375.) It is therefore doubly perplexing to find in today's majority opinion the assertion that the United States Supreme Court's decision in *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, "can be viewed as an implied holding that exclusion of persons opposed to capital punishment does not deny a defendant a representative jury at the guilt trial." (Maj. opn., *ante*, at p. 812 of 197 Cal.Rptr., p. 689 of 673 P.2d.)

First, *Witherspoon* was not a fair-cross-section case. The federal fair cross-section requirement flows out of the Sixth Amendment. (*Taylor v. Louisiana*, *supra*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690.) At the time of *Witherspoon*'s trial, the Sixth Amendment was not applicable to the states. (*DeStefano v. Woods* (1968) 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308; *Duncan v. Louisiana* (1968) 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491.) This court has previously noted that *Witherspoon* was decided on due process "neutrality" principles and involved an analysis different from that of the cross-section requirement. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 17-18, fn. 38, 168

Cal.Rptr. 128, 616 P.2d 1301.) A "neutrality" analysis need not involve cognizable classes. (*Id.*, at p. 20, fn. 45, 168 Cal.Rptr. 128, 616 P.2d 1301.)

Moreover, even if *Witherspoon* were viewed as a cross-section case, the majority's interpretation of the case would be puzzling, since in *Adams v. Superior Court*, *supra*, 12 Cal.3d at page 60, 115 Cal.Rptr. 247, 524 P.2d 375, this court suggested that *Witherspoon* supports the opposite interpretation. *Adams* cited *Witherspoon* for the proposition that "the exclusion of other groups [in addition to economic, sexual, social, etc. groups] might also be improper." Today's majority leaps to a contrary conclusion without even acknowledging our discussion in *Adams*.

A recent federal court decision notes that the "*Witherspoon* argument" utilized by today's majority "keeps cropping up despite the obviousness of the answer thereto." (*Grigsby v. Mabry* (E.D.Ark.1983) 569 F.Supp. 1273, 1286.)

The *Grigsby* court points out that the argument not only erroneously views *Witherspoon* as a Sixth Amendment case, but also conflicts with the fundamental premise underlying *Witherspoon* that "[i]nclusion, not exclusion [of community groups], must be the basic rule." (569 F.Supp. at p. 1284. See also *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 19-20, 21, and 66, fn. 113, 168 Cal.Rptr. 128, 616 P.2d 1301.) Under *Witherspoon*, penalty phase juries must be "as representative as can be" and include "all of those, but only those, who can honestly swear that they are able and willing to try the penalty issue in accordance with law of the state and the evidence presented." (569 F.Supp. at pp. 1286-1287.)

***836 *379 Nevertheless, this court today refuses to hold that the "guilt phase includables" comprise a "cognizable" or "distinctive" group. It is the basic contention of the majority that the members of this group have only a single attitude or belief in

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common-i.e., their "unwillingness to vote for death" -and that this shared attribute is insufficient to render them a "cognizable" or "distinctive" group. (Maj. opn., ante, at p. 815 of 197 Cal.Rptr., p. 692 of 673 P.2d.) This contention cannot withstand close scrutiny.

At the outset, the premise underlying the majority's reasoning is the belief that "the courts have not recognized an otherwise heterogeneous group as cognizable merely because its members agree on one particular matter." (Maj. opn., ante, at p. 815 of 197 Cal.Rptr., p. 692 of 673 P.2d.) The majority purport to rely on *People v. Wheeler*, supra, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, but *Wheeler* actually refutes their premise. There, in suggesting how a litigant might establish that peremptory challenges were being used improperly to exclude jurors for group association, this court indicated that the litigant might demonstrate that the excluded jurors "share **713 only this one characteristic-their membership in the group-and that in all other aspects they are as heterogeneous as the community as a whole." (22 Cal.3d at p. 280, 148 Cal.Rptr. 890, 583 P.2d 748.)

Moreover, the majority's belief that an "otherwise heterogeneous group" cannot be cognizable was expressly rejected as "fallacious" in Justice Mosk's lead opinion in *Rubio v. Superior Court*, supra, 24 Cal.3d at page 99, 154 Cal.Rptr. 734, 593 P.2d 595. Responding to the contention that ex-felons and resident aliens were not *380 cognizable groups because they were "heterogenous in all other respects," Justice Mosk wrote, "[t]he argument is fallacious, and proves too much: it could equally well be applied to the women excluded in *Taylor v. Louisiana*, supra, the blacks in *Peters v. Kiff* (1972) 407 U.S. 493 [92 S.Ct. 2163, 33 L.Ed.2d 83] and our decision in *Wheeler*, and the daily wage earners excluded in *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217 [66 S.Ct. 984, 90 L.Ed. 1181]." (24 Cal.3d at p. 99.)

Not only is the majority's underlying premise questionable, the logic of the opinion is unsupportable on its face.

***837 The majority hold that the distinctiveness of

the "guilt phase includables" is limited to the group's unwillingness to vote for a death sentence. In "all other matters," the group is said to be the same as the remaining jury pool. As an initial hypothesis, this assertion is, I suppose, arguable in the abstract. However, a few moments of thought should suggest it is not very plausible.

As amicus curiae observe, we are dealing here with values or beliefs so deeply held that the individuals holding them will forthrightly refuse to act against them, even in the face of the law's insistence that they serve as jurors if they can consider voting for a death sentence in at least some cases. Values this strongly felt are likely to be an integral part of an individual's basic system of beliefs and overall outlook. It is not very likely that such values will exist in random isolation, like a preference for strawberry ice cream which has no interrelationship with individuals' attitudes, values, and beliefs about the world around them. Therefore, as an abstract proposition, the majority's assumption about the limited differences between the "guilt phase includables" and the other persons remaining in the jury pool seems to contradict common sense.

However, it is quite unnecessary to debate about what "seems" to be more likely. For, just three years ago, this court found, based on the uniform results of over 20 empirical studies, that the "guilt phase includables" tend to differ from the rest of the jury pool in many matters in addition to their unwillingness to vote for a death sentence. (*Hovey v. Superior Court*, supra, 28 Cal.3d at pp. 26-69, 168 Cal.Rptr. 128, 616 P.2d 1301.)

Thus, the court found that the "guilt phase includables" tend to differ in (1) the votes they cast on guilt or innocence and on lesser included offenses (28 Cal.3d at pp. 26-42, 168 Cal.Rptr. 128, 616 P.2d 1301); (2) their attitudes toward the criminal justice system, toward basic principles of criminal law, and toward the litigants (*id.*, at pp. 43-54, 168 Cal.Rptr. 128, 616 P.2d 1301); and (3) their evaluation of evidence and their assessment of the reasonable doubt standard (*id.*, at pp. 57-60, 168 Cal.Rptr. 128, 616 P.2d 1301). In each respect, the "guilt phase includables" were found to be less prosecution-oriented on the average than the

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remaining jurors. In addition, the "guilt phase includable" *381 group was found to contain a higher percentage of blacks and women than the rest of the jury pool. (*Id.*, at pp. 54-57, 168 Cal.Rptr. 128, 616 P.2d 1301.)

Without reiterating this evidence in detail, it is sufficient to observe that the evidentiary support for these findings was both consistent and overwhelming. The court even noted the "boring regularity" and the "almost monotony of the results," which were consistent regardless of what categories of people were studied or how the study was designed. (28 Cal.3d at pp. 40, 57, 63, **714 168 Cal.Rptr. 128, 616 P.2d 1301.) ^{FN9} As one commentator has subsequently observed, "[t]hese studies clearly establish that an individual's attitude toward capital punishment is not an isolated phenomenon, but rather is closely related to other deeply held attitudes and values." (Winick, ***838 *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis* (1982) 81 Mich.L.Rev. 1, 71 [hereafter, *Winick*].) ^{FN10}

FN9. The issue in *Hovey* was whether the exclusion of the "guilt phase includable" group resulted in a nonneutral jury on the issue of guilt or innocence. *Hovey* rejected that claim, but not on the basis that the "guilt phase includables" were indistinguishable from the remaining jurors on matters other than willingness to impose a death sentence.

Rather, as I have explained, the *Hovey* court found that the "guilt phase includable" group was distinctive but that petitioner had failed to account for the possibility that this distinctiveness might be offset by the state's exclusion of another group with possibly *opposite* attitudes and tendencies—the "automatic death penalty" group. Obviously, this possibility in no way casts doubt upon the conclusion that the "guilt phase includables" are themselves a distinctive class.

FN10. See *Grigsby v. Mabry*, *supra*, 569

F.Supp. 1273. There, the court reviewed the *Hovey* studies and found that death penalty attitudes are "intimately tied to other attitudes and views which are directly implicated when jurors determine the guilt or innocence of a defendant in a criminal trial." (*Id.*, at p. 1283.) In striking down as a cross-section violation the same jury exclusionary practices that are involved in the present case, the *Grigsby* court found that "those excluded by death qualification are a distinct group and that no other of the death-qualified groups, not even those who hold milder scruples against the death penalty, can adequately represent their point of view or life perspective." (*Id.*, at pp. 1293, 1304.)

If this evidence is considered, it is virtually impossible to conclude that the "guilt phase includable" group is not "distinctive" or that it does not differ from the remaining jurors on many significant matters in addition to an unwillingness to vote for a death sentence. Indeed, today's majority do not attempt to harmonize their assumptions with this evidence. They simply ignore it.

The result is a court decision premised on an assumption that has already been demonstrated to be incorrect, and one which is at odds not only with common sense but with reality.

II.

The majority go on to suggest that even if the "guilt phase includables" were distinctive or cognizable, the state's interests in excluding the group *382 would outweigh any competing interests in having them included in the guilt phase jury pool. ^{FN11} I disagree. The state's interests turn out to be insubstantial or fictitious, whereas the competing interests in an accurate verdict, when an individual is on trial for his or her life, are paramount.

FN11. These various interests are discussed by the majority in the context of an equal protection challenge to the

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exclusion of the "guilt phase excludables" in capital cases. The majority apparently apply the "rational basis" standard to reject this claim, but they recognize that a stricter standard would apply if a prima facie cross-section violation were established. As the United States Supreme Court has held, "[t]he right to a proper jury cannot be overcome on merely rational grounds, *id.*, at 534. Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process ... that result in the disproportionate exclusion of a distinctive group." (*Duren v. Missouri*, *supra*, 439 U.S. at pp. 367-368, 99 S.Ct. at pp. 670-671, fn. omitted, quoting *Taylor v. Louisiana*, *supra*, 419 U.S. at p. 534, 95 S.Ct. at p. 699.)

Since the majority reject appellant's cross-section claim on the ground that the "guilt phase includable" group is not distinctive, they do not reach the question as to whether the state can justify the exclusion of this group under cross-section principles. However, I assume that they would find basically the same interests to be involved in the cross-section context as in the equal protection setting. Whether the stricter standard would cause them to arrive at a different result than they reach under their equal protection analysis, I would hesitate to predict.

The first concern that the majority speak to is "the expense and inconvenience involved" in any departure from the practice of using the same 12 jurors to decide both guilt and penalty. (Maj. opn., *ante*, at p. 816 of 197 Cal.Rptr. at p. 693 of 673 P.2d.) **715 However, the majority overlook the fact that "restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive one of it, are always inconvenient to the authority so restricted." (*In re Oliver* (1948) 333 U.S. 257, 280-281, 68 S.Ct. 499, 511, 92 L.Ed. 682 (conc. opn. of Rutledge, J.).)

In fact, the additional expense would appear to be relatively modest, for these trials are but miniscule

in number and are a very small percentage of the total trials statewide. Further, the potential number of death penalty trials always exceeds the actual penalty phase trials since, as the majority opinion notes, "many cases terminate before reaching the penalty phase." (*Ante*, at p. 816 of 197 Cal.Rptr., at p. 693 of 673 P.2d.)

The attempt to justify the exclusionary policy on financial grounds fails for another reason. As one commentator has observed, "precisely these interests were held insufficient for a state's attempt to reduce the size of misdemeanor juries to five members." (*Winick, op. cit. supra*, 81 Mich.L.Rev. at p. 58, citing ***839 *Ballew v. Georgia*, *supra*, 435 U.S. at p. 244, 98 S.Ct. at p. 1041.) "The five-member jury would have applied in all misdemeanor trials, an enormous number of cases, and therefore would have resulted in considerable cost savings to the state even if the savings in each individual case were minimal. As capital cases make up a relatively small *383 number of criminal trials, the savings here would be considerably less. Moreover, in view of the [United States Supreme] Court's inclination to demand more in the way of due process in capital cases than in any other kind of case, it would seem that if the greater cost savings accomplished in the five-member misdemeanor jury context were deemed insufficient justification for the resulting infringement on defendant's jury trial rights, then *a fortiori* the lesser savings would be deemed insufficient in the capital punishment context." (*Winick, op. cit. supra*, 81 Mich.L.Rev. at pp. 58-59. See also *Grigsby v. Mabry*, *supra*, 569 F.Supp. at pp. 1319-1321.)

The final justification offered to support the exclusion of the "guilt phase includable" group is a claimed interest in excluding jurors whose "belief[s]" as to the inappropriateness of the death penalty will improperly skew the determination of guilt or innocence" (Maj. opn., *ante*, at p. 817 of 197 Cal.Rptr., at p. 694 of 673 P.2d.) Although the "guilt phase includables" swear they will be fair and impartial in deciding guilt or innocence, the majority distrust their declarations, apparently believing that they will in fact have difficulty rendering an impartial verdict at the guilt and special circumstances phase of a death penalty trial.

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Initially, this asserted state interest cannot be used to justify a state exclusionary policy unless it "can realistically be ascribed to the Legislature." (See *Cooper v. Bray* (1978) 21 Cal.3d 841, 854, 148 Cal.Rptr. 148, 582 P.2d 604.)^{FN12} The Legislature has never expressed any concern that individuals who are unalterably opposed to the imposition of a death sentence are likely to be biased on the question of guilt or innocence. Indeed, language contained in the relevant statutory provision clearly suggests the contrary. (See Pen.Code, § 1074, subd. 8.)

FN12. *Cooper v. Bray* involved an equal protection challenge to a statute, and the court applied the "rational basis" test. *Cooper* was not a representative cross-section case.

There is no reason to refuse to apply *Cooper's* "actual purpose of the Legislature" test in the present context since a cross-sectional analysis requires the application of a stricter standard of review than merely "rational basis." (See *ante*, at p. 819, fn. 11 of 197 Cal.Rptr., at p. 696, fn. 11 of 673 P.2d.)

The Legislature has required the exclusion of any juror "entertaining ... such conscientious opinions as would preclude his finding the defendant guilty ..." in a death penalty case. (Pen.Code, § 1074, subd. 8.) The very wording of the statute reveals a legislative judgment that not all "conscientious opinions" would "preclude [a juror from] finding the defendant guilty." If the Legislature had believed that jurors with conscientious opinions could not be ****716** trusted to find a defendant guilty when warranted by the evidence, it would not have limited this exclusionary policy to only those individuals "entertaining ...such conscientious opinions as would preclude [their] finding the defendant guilty." Obviously, the Legislature does ***384** not share the unsupported conjecture of the majority that the "guilt phase includables" will deliberately lie or are deluding themselves when they swear they can be fair and impartial on the issue of guilt or innocence.

Nor would such a concern be consistent with other statutory provisions or legal principles. The general rule is that a juror's declaration that he or she can be fair and impartial "must be presumed to be true." (*People v. Preston* (1973) 9 Cal.3d 308, 313, 107 Cal.Rptr. 300, 508 P.2d 300.) Indeed, the Legislature has extended this principle so far that even when a juror has actually formed or expressed an opinion concerning guilt prior to trial, the juror cannot be excluded for cause if "it appear[s] to the court, upon [the juror's] declaration, under oath or otherwise, that he *****840** can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." (Pen.Code, § 1076.) Clearly, subdivision 8 of section 1074 does not embody a legislative judgment that "guilt phase includables" cannot be trusted when they swear to be fair on the question of guilt.

This court, too, has recognized on several occasions that the "guilt phase includables" can act impartially as to a determination of guilt. Although the court has previously upheld the exclusion of the group from capital trials, it has specifically noted "their ability to fairly and impartially determine defendant's guilt." (*People v. Washington* (1969) 71 Cal.2d 1061, 1089-1090, 80 Cal.Rptr. 567, 458 P.2d 479.) Recently, the court reiterated its view that "many jurors who are unable to be fair and impartial at the penalty phase would be capable of giving a fair hearing as to the issues of guilt or innocence. Therefore, it follows that when a 'death-qualified' jury pool is used to select jurors for the guilt phase of a [capital] trial, prospective jurors are excluded who could be fair and impartial at that phase." (*Hovey v. Superior Court, supra*, 28 Cal.3d at p. 22, fn. 54, 168 Cal.Rptr. 128, 616 P.2d 1301.)

There are sound reasons why neither the Legislature nor this court has taken the position that "guilt phase includables" find it difficult to be impartial when deciding guilt or innocence. Simply put, "[i]t in no way follows that people who have strong feelings against the death penalty do not wish to see persons guilty of capital crimes convicted and punished." (*Grigsby v. Mabry, supra*, 569 F.Supp. at p. 1313.) The members of this group

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forthrightly declare their inability to serve at the penalty phase, and these statements are accepted at face value. Why then would their sworn declarations as to the guilt phase be called into question? Do the majority truly believe that these jurors, having openly excluded themselves from the penalty determination, will nevertheless strive to sit on the guilt phase jury just to thwart a capital prosecution or that they have abruptly lost the capacity to assess their own abilities? I submit such a view is unwarranted.

***385** Jurors who strongly oppose capital punishment cannot even be excluded from the penalty trial unless they "ma[k]e unmistakably clear" that they would automatically vote against a death sentence or would be biased as to the issue of guilt. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 522-523, fn. 21, 88 S.Ct. at pp. 1776-1777, fn. 21.) Death penalty opponents are trusted to make that judgment despite their views on capital punishment. Do jurors suddenly lose the ability to speak truthfully just because they declare-truthfully-that they cannot vote to impose death? ^{FN13}

FN13. If there is a valid concern that individual members of the "guilt phase includable" group may not be impartial, that can be explored through voir dire.

Even when prospective jurors "frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt," they may not constitutionally be excluded from the ****717** jury on that basis. (*Adams v. Texas* (1980) 448 U.S. 38, 50, 100 S.Ct. 2521, 2528, 65 L.Ed.2d 581.) "Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." (*Ibid.*) If a venireperson making the explicit declarations discussed in *Adams* cannot constitutionally be excluded for alleged bias, then it is difficult to understand the majority's assertion in the present case that persons who do not

make such admissions *may* be constitutionally excluded for the identical alleged bias.

In the end, this entire issue concerning alleged juror nullification by death penalty opponents is a red herring. When the United States Supreme Court decided in *Witherspoon* that many individuals who had doubts about the death penalty should be allowed to serve on capital case juries, *****841** prosecutors claimed that the inclusion of this group would mean the de facto end of capital punishment. (See Meltsner, *Cruel and Unusual* (1973) p. 124.) How wrong they were. The reasoning of today's majority is nothing more than an unsubstantiated assertion of those same unjustified claims. ^{FN14}

FN14. As Justice Jackson, a former prosecutor, has written, "prosecutors seldom fail to stress, if not exaggerate, the importance of the case before them to the whole social, if not the cosmic, order." (*Frazier v. United States* (1948) 335 U.S. 497-515, 69 S.Ct. 201-210, 93 L.Ed. 187 (dis. opn.).)

Justice Mosk of this court, himself a former California Attorney General, concurs with Justice Jackson. (See *People v. Uhlemann* (1973) 9 Cal.3d 662, 670, 108 Cal.Rptr. 657, 511 P.2d 609 (dis. opn.).)

The majority find the accused's interest to be "not a very substantial [one]." (Maj. opn., *ante*, at p. 817 of 197 Cal.Rptr., at p. 694 of 673 P.2d.) It is said to be merely an interest in having "an elusive but 'distinct quality' or 'flavor' " brought to the jury ***386** room by the "guilt phase includables." (*Ibid.*) This view ignores the studies which indicate that the "guilt phase includables" would tend to bring to many juries distinctive attitudes and viewpoints which have a bearing on how the evidence should be evaluated, credibility judged, and reasonable doubt assessed. (See *Winick, op. cit. supra*, 81 Mich.L.Rev. at p. 66.)

Moreover, even if the "guilt phase includable" group brought nothing more than a certain "quality" or "flavor" to the jury room, that would be a

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sufficient constitutional interest. Indeed, the United States Supreme Court, in striking down statutes which excluded women from criminal juries, found that " 'a flavor, a distinct quality is lost if either sex is excluded.' " (*Taylor v. Louisiana*, *supra*, 419 U.S. at p. 532, 95 S.Ct. at p. 698, quoting *Ballard v. United States* (1946) 329 U.S. 187, 194, 67 S.Ct. 261, 264, 91 L.Ed. 181.) If such an interest was sufficient to sustain a cross-section challenge in *Taylor*, why not here? ^{FN15}

FN15. The majority opinion suggests that use of a single, death-qualified jury will actually benefit the accused, because it will guarantee that the penalty phase jury is aware of "lingering doubts" that may have survived the guilt phase deliberations. (Maj. opn., *ante*, at p. 817 of 197 Cal.Rptr., p. 694 of 673 P.2d.) This idea is similar to one expressed in a Fifth Circuit decision, which opined that empanelling a second jury for a penalty trial would deprive the accused of the benefits of whatever "whimsical doubt" as to guilt the jury might carry over into its penalty deliberations. (*Smith v. Balkcom* (1981) 660 F.2d 573, 579-582.) Whether this doubt is "lingering" or "whimsical," it is an unsatisfactory basis for upholding the single-jury scheme.

First, there is not the slightest indication that such a defendant-protective purpose was ever contemplated by our Legislature in enacting the statute which authorizes the removal of the "guilt phase includables." (Pen.Code, § 1074, subd. 8.) Indeed, the words of the statute contradict such a conclusion. The statute orders the removal of any prospective juror whose death penalty views "preclude his finding the defendant guilty," and it is difficult to view such exclusions as intended to benefit the defendant.

Moreover, as Professor Winick has written, "whether a capital defendant would be more disadvantaged by the destruction of the 'whimsical doubt' that

would accompany the bifurcated trial remedy than he would by a unitary trial system in which 'automatic life imprisonment' jurors would be excluded from the determination of guilt is itself an unexplored empirical question. In any event, the ["lingering" or "whimsical" doubt] approach seems unduly paternalistic. The state's substantial interest in a penalty jury capable of imposing capital punishment in accordance with the state's statutory scheme can be satisfied either by removal of 'automatic life imprisonment' jurors from participation in the determination of both guilt and punishment, or by the bifurcated trial mentioned in *Witherspoon*. As the state's interest in avoiding added costs should not itself justify the existing system, it would seem appropriate to allow a defendant himself to resolve the question as to which alternative would be more consistent with his own interests." (*Winick, op. cit. supra*, 81 Mich.L.Rev. at pp. 60-61, fns. omitted.)

****718** It should be remembered that the defendant is on trial for his life in these cases. That alone should cause this court to be careful in its assessment of the competing interests. If only one of the interests identified by the accused was held to be sufficient in *Taylor v. Louisiana, supra*, and there are a number of other important interests asserted, the balance would ***387** appear to clearly support including rather than excluding the "guilt phase includable" group.

*****842** Since I sincerely believe that the majority have misapplied the law, I must respectfully dissent. REYNOSO, Justice, dissenting. I agree fully with the analysis found in the Chief Justice's dissenting opinion: the exclusion of the jurors who do not believe in the death penalty ^{FN1} violates the fair cross-section requirement of our state and federal Constitutions.

FN1. The artless term "guilt phase includables" is used to describe these

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jurors.

This separate dissent proposes what appears to me to be a practical response to the long lasting quandary: how can we assure a fair jury yet accommodate the required dual procedure, a guilt hearing followed, if needed, by the penalty phase. Rather than urging two separate juries, I would replace some of the original jurors with alternates. Views on the death penalty should not be a basis for removal of jurors in the guilt phase. However, at the penalty phase jurors who cannot enforce the death penalty may be replaced. Thus, one jury is preserved.

The availability of such a procedure would render particularly insubstantial the state's interests in completely excluding such a group from capital juries. Administrative convenience and fiscal conservation, advanced by the state to justify the exclusion, would not be significantly impinged by impaneling one jury with sufficient alternates able to fully participate in the penalty phase. At the same time capital defendants would be assured that their guilt or innocence would be determined by a representative jury.

I

The majority recognizes the practicality of this solution. It rejects substitution of alternate jurors out of concern for the requirement that jurors "reach their consensus through deliberations which are common to all of them," which this court discussed in *People v. Collins* (1976) 17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742 (Maj. opn., ante, at pp. 816-817 of 197 Cal.Rptr., pp. 693-694 of 673 P.2d.) I believe the concern based on *Collins* is misplaced in a situation, such as that at bench, where the penalty verdict must be decided separately from the verdict on guilt.

Let us look at *Collins*. There, after the cause had been submitted to the jury and deliberations among the jurors had begun, one of the jurors asked to be dismissed. The issue posed was whether substitution of an alternate *388 during the jury's final deliberations violated a defendant's

constitutional right to a unanimous verdict by 12 jurors. The court expressed concern that unless all 12 jurors fully participated in the deliberations the requirement of a unanimous verdict could not be met. The court concluded that the substitution did not necessitate a retrial. The constitutional mandate, according to the *Collins* court, is satisfied when: (1) the deliberations begin anew upon substitution of the alternate, (2) the jury actually is instructed to set aside past deliberations and begin anew, and (3) each of the 12 jurors reaching the verdict participates**719 in the entire deliberative process. The procedure we suggest is consistent with *Collins*.

Penal Code section 190.1 provides that the question of the defendant's guilt shall first be determined. Thereafter, if the defendant is guilty of a crime which may subject him to the penalty of death, a separate proceeding is conducted on the question of penalty. At the penalty proceeding, the jury will hear further evidence relating solely to that issue. After having heard and considered argument by counsel, the jury must consider the evidence introduced at the separate penalty proceeding and weigh the aggravating and mitigating circumstances to determine the appropriate penalty. Thus, at the close of the penalty proceeding the jury must begin entirely new deliberations. These are based on consideration of new evidence which may not have been relevant at the guilt phase and on reconsideration of other matters presented at the guilt phase in light of the unique function of selecting punishment.

***843 Under the proposal advanced in this dissent the 12 jurors who will determine the penalty will have heard all of the evidence presented at both the guilt and penalty proceedings and will have fully participated in the deliberations leading to the penalty determination. The jury will be instructed to disregard prior deliberations, and to begin anew after the guilt proceeding. A consensus on the penalty will be reached through deliberations which are the common experience of all of the jurors.

II

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SEP 19 2007

FORM 1

S.C. SUPREME COURT MEDIA COVERAGE OF COURT PROCEEDINGSSTATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT Supreme

vs.

Steven Stanko

Request for Electronic and Photographic Coverage
Of Judicial Proceedings

Pursuant to Rule 605, South Carolina Appellate Court Rules, the undersigned hereby requests permission to use equipment in order to record, photograph or televise all or portions of the proceedings in the above captioned case.

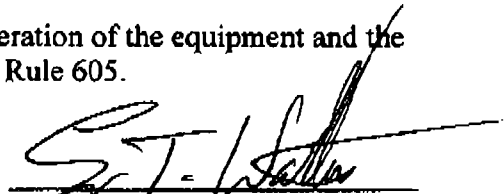
Consistent with Rule 605, the undersigned desires to use the following equipment:
Camera, microphone, and tripod

The proceedings that the undersigned desires to record, photograph or televise commence on: September 20, 2007

The personnel who will be responsible for the operation of this equipment are:
Jody Barr and Curtis Graham

The undersigned hereby certifies that the operation of the equipment and the conduct of the personnel will be in conformity with Rule 605.

This 19 day of September, 2007.

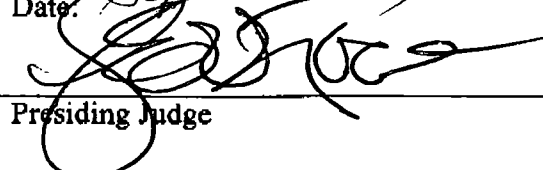

(Individual Signature)

WBTW News 13
(Representing/Firm)

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Managing Editor
(Position)

Date: September 19, 2007


Presiding Judge

3430 North TV Rd Florence SC 29501
(Address)
843-317-1342
(Telephone Number)

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SEP 19 2007

FAX TRANSMITTAL SUPREME COURT

WBTW
News 13

Coverage You Can Count On.

Date:	9/19/2007	Pages	(including cover)2
From:	Eric Walters	TO	Brenda F. Shealy
Phone:	843-317-1313	Phone:	803-734-1080
Fax:	843-317-1418	Fax:	803-734-1499

☒ Urgent☒ For Review☐ For Maintenance☐ Please Comment☒ Please Reply

Re:

NOTES: Please call me as soon as the Judge gives the thumbs up or down. Thanks, Eric Walters 843-8103642 cell

**Storm
Tracker 13**

WBTW-NEWS 13, Media General, Inc.

Florence: 3430 N. TV Road, Florence, SC, 29501

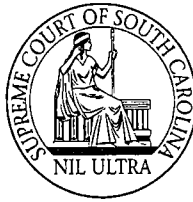
Myrtle Beach: 101 McDonald Court, Myrtle Beach, SC, 29588

Lumberton: 3571 Lackey St, Lumberton, NC, 28359

Florence Weatherline (843) 665-0000

Myrtle Beach Weatherline (843) 293-6600

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The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 13, 2007

Chief Attorney Joseph L. Savitz, III
Appellate Defender Katherine H. Hudgins
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

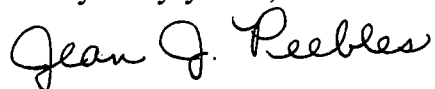
Appellant	20 minutes
Respondent	20 minutes
Appellant in Reply	10 minutes

Chief Attorney Joseph L. Savitz, III
Re: The State v. Stanko, Stephen C.
September 13, 2007
Page two

Reminder:

This case is scheduled for hearing at 10:30 a.m. on Thursday, September 20, 2007.

Very truly yours,

A handwritten signature in cursive script that reads "Jean J. Peebles".

Administrative Assistant

DES/jjp

cc: Solicitor John Gregory Hembree



HENRY McMASTER
ATTORNEY GENERAL

August 8, 2007

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AUG 8 2007

S.C. SUPREME COURT

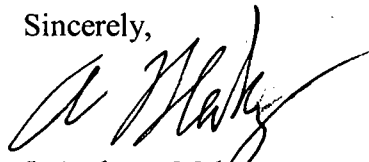
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Stephen C. Stanko

Dear Mr. Shearouse:

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

Sincerely,



J. Anthony Mabry
Assistant Attorney General

JAM/lbb
Enclosure

cc: Joseph L. Savitz, III, Esquire
Kathrine H. Hudgins, Esquire
J. Gregory Hembree, Solicitor
Sandi Wofford, Victims Assistance

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

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JUL 27 2007

S.C. SUPREME COURT
RESPONDENT,

THE STATE,

V.

STEPHEN C. STANKO,

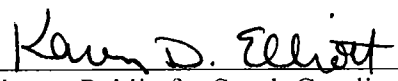
APPELLANT

CERTIFICATE OF SERVICE

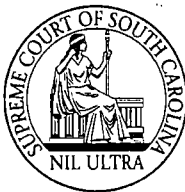
I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 27th day of July, 2007.


Warren T. Ferguson
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 27th day of July, 2007.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

July 26, 2007

Chief Attorney Joseph L. Savitz, III
Assistant Appellate Defender Katherine H. Hudgins
South Carolina Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

This responds to your letter dated July 16, 2007. The question that you have asked involves the internal discussion and decision making process between the Court and its staff, and these matters are absolutely privileged. Therefore, I will be unable to provide the information that you have requested.

Very truly yours,

CLERK

cc: Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Chief Attorney Joseph L. Savitz, III
Assistant Appellate Defender Katherine H. Hudgins
From: Daniel E. Shearouse
Date: July 17, 2007
RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of September 18, 19, and 20, 2007. Please notify this office in writing prior to July 24, 2007 as to any scheduling conflicts for the September term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Stanko, Stephen C.



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: John Gregory Hembree, Esquire
From: Daniel E. Shearouse
Date: July 17, 2007
RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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The State v. Stanko, Stephen C.



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry

From: Daniel E. Shearouse

Date: July 17, 2007

RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of September 18, 19, and 20, 2007. Please notify this office in writing prior to July 24, 2007 as to any scheduling conflicts for the September term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Stanko, Stephen C.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

July 16, 2007

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JUL 17 2007

S.C. SUPREME COURT

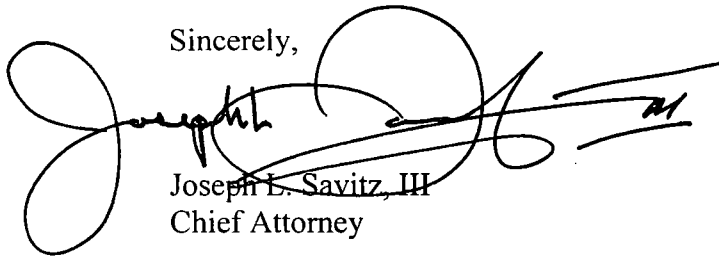
The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: State v. Stephen C. Stanko

Dear Mr. Shearouse:

With all due respect, we believe that we would be remiss in our ethical and professional obligations to Mr. Stanko if we neglected to inquire why the Court has decided to expedite this particular capital appeal. If the matter is not addressed now, it is certain to become an issue at some future date.

Sincerely,



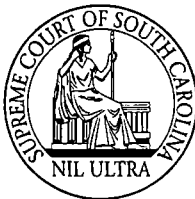
Joseph L. Savitz, III
Chief Attorney



Kathrine H. Hudgins
Appellate Defender

JLS,III/kde

cc: Stephen C. Stanko
Donald J. Zelenka
William I. Diggs



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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FAX (803) 734-1499

July 3, 2007

Chief Attorney Joseph L. Savitz, III
Assistant Appellate Defender Katherine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry

The Supreme Court of South Carolina

The State,

Respondent

v.

Stephen Christopher Stanko,

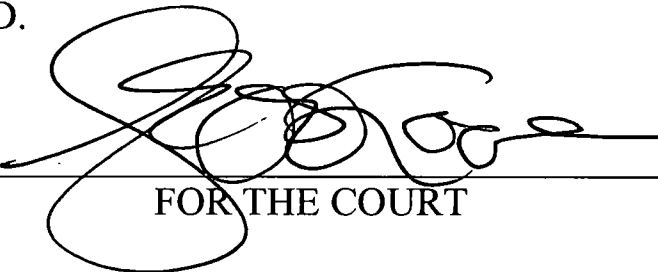
Appellant.

ORDER

If any initial reply brief is to be filed in this matter, it is currently scheduled to be served and filed no later than July 12, 2007. Thereafter, I find that it is appropriate to expedite this appeal as follows:

- (1) The record on appeal shall be served and filed by July 27, 2007. The number of copies to be served and filed shall be that specified by Rule 210, SCACR.
- (2) The final briefs shall be served and filed by August 13, 2007. The number of copies to be served and filed shall be that specified in Rule 211, SCACR.

IT IS SO ORDERED.



FOR THE COURT C. J.

Columbia, South Carolina

July 3, 2007



HENRY McMASTER
ATTORNEY GENERAL

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S.C. SUPREME COURT

July 2, 2007

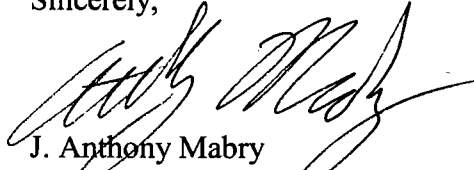
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Stephen C. Stanko

Dear Mr. Shearouse:

Enclosed please find the *Initial Brief of Respondent and Designation of Matter* in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,



J. Anthony Mabry
Assistant Attorney General

JAM/lbb
Enclosure

cc: Joseph L. Savitz, III, Esquire
J. Gregory Hembree, Solicitor
Sandi Wofford, Victims Assistance

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

JUL 2 2007

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

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

STEPHEN C. STANKO,

Appellant.

INITIAL 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
ATTORNEYS FOR RESPONDENT

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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. (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. (8-7-06 Tr. p. 81, l. 1- p. 84, l. 20) Christina fled to her mother's bedroom. (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. (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. (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 (8-7-06 Tr. p. 86, l. 12-p. 87, l. 24) Appellant beat Christina until she yielded to the sexual assault. (8-7-06 Tr. p. 88, ll. 1-13) While Stanko raped Christina, Christina could hear her mother moaning on the floor beside the bed. (8-7-06 Tr. p. 87, ll. 13-19) Stanko then

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

turned Christina over and tried to smother her while he choked the life out of her mother with his free hand. (8-7-06 Tr. p. 90, l. 4-p. 91, l. 14) Appellant then slit Christina's throat twice with a knife.² (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." (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 (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 (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. (8-7-06 Tr. p. 627, ll. 15-19, p. 713, ll. 7-11) Stanko locked the door as he left the house and then left the crime scene driving Laura Ling's car. (8-7-06 Tr. p. 64, ll. 13-25; p. 74, ll. 3-20; p. 77, ll. 14-16).

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

³Appellant 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." (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..." (8-7-06 Tr. p. 89, ll. 4-6) During the sexual assault, Stanko also accused the 15 year old victim of being promiscuous. (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. (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." (8-7-06 Tr. p. 93, ll. 6-14). Christina then passed out.

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. (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 - 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(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. (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 (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. (8-7-06 Tr. p. 209, l. 4-p. 213, l. 7)

Stanko was seen that evening, April 8th, partying at a bar in the Congaree Vista area of Columbia, S.C. (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

⁵Unbeknownst to Stanko, Christina had survived and alerted authorities to her mother's murder by calling 911. (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. (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. (8-7-06 Tr. p. 204, l. 9-p. 208, l. 14)

⁶The 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. (8-14-06 Tr. p. 363, ll. 4-11) A notebook with Ling's name on it was also found in the truck. (8-14-06 Tr. p. 367, ll. 10-13).

deal, a graduate of The Citadel, and an employee of a company traded on the New York Stock Exchange. (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. (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. (8-14-06 Tr. p. 314, l. 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. (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. (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. (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. (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. (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. (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. (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 (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. (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. (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. (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 Christina, D.N.A. evidence linked Stanko to both the murder scene and the 15 year old victim. (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. (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. (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

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

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 (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. (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 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

⁸Appellant’s expert Dr. Sachy testified that Appellant was a psychopath like Ted Bundy, John Wayne Gacy, or the fictional character Hannibal Lecter. (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. (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.

⁹Dr. 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. (8-7-06 Tr. p. 713, ll. 7-23)

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. (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. (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 a mechanic and the widow of a deceased veteran.¹⁰ (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. (8-14-06 Tr. p. 397, l. 8-p. 421, l. 25) The State was not allowed to elicit testimony regarding the Turner murder. (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. (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

¹⁰In 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. (8-14-06 Tr. p. 195, l. 6-p. 201, l. 15)

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 (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 expert in family dynamics who testified that Appellant's actions were in large part determined by the dysfunctional family from which he came. (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 (3 ½) hours, the jury found the aggravating circumstances of kidnaping, criminal sexual conduct, armed robbery, larceny with a deadly weapon and torture. (8-14-06 Tr. p. 1268, ll. 16-25) The jury recommended a sentence of death. (8-14-06 Tr. p. 1269, ll. 8-20)

¹¹This 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. (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. (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. (8-14-06 Tr. p. 614, ll. 7-8)

¹²Appellant 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.

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. (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 regarding whether they could consider an insanity defense conceding the trial court’s voir dire was sufficient. (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. (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 these subjects submitted to the court during general voir dire of the panel or before the trial courts’ individual voir dire of each juror. (See 7-31-06 Tr. p. 104, l. 13 - p. 105, l. 7; p. 122, l. 18-

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 specific questions that relate directly to the facts and circumstances of this case. It would be improper. And that is why when I asked

p. 155, l. 22; p. 222, l. 22-p. 274, l. 13)

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 - - (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. (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. (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. (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 (7-31-06 Tr. p. 284, ll. 20-23; p. 296, ll. 16-25) The record clearly bears this

¹⁴Appellant 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. (7-31-06 Tr. p.

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. Diggs¹⁵ 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] (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 (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:

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.

¹⁵William 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. (7-31-06 Tr. p. 294, ll. 11-25)

¹⁶Appellant 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. (7-31-06 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.

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] (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. (7-31-06 Tr. p. 305, l. 7-p. 306, l. 11) Appellant did not object to the qualification of Juror Lambert. (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 the law, would this change their minds and could they be open about the case.¹⁸ Only one juror with

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

¹⁸After 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

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 preserve issue for review). Not only is this issue not preserved for appellate review, but it was explicitly abandoned by Appellant at trial. (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

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. (7-31-06 Tr., p. 353, ll. 1-22, pp. 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, pp. 925, ln. 22-927, ln. 6, pp. 932, ln. 22-935, ln. 3, pp. 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, pp. 1107, ln. 9-1108, ln. 1, pp. 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 (7-31-06 Tr., pp. 45,1 ln. 1-452, ln. 20, pp. 557, ln. 8-559, ln. 7, pp. 621, ln. 11-625 ln. 10, pp. 854, ln. 18-855, ln. 13, p. 856, ll. 6-25, pp. 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. (7-31-06 Tr. p. 533, ll. 4-12) She said she could consider it.

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 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,

¹⁹Judge 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. (7-31-06 Tr. p. 283, l. 1-p. 307, l. 16)

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 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

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).

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. (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.)

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.

²¹The 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. (8-7-06 Tr. p. 9, ll. 15-20). She was excused by the Appellant.

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.
(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. (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. (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. (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. (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. (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? (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. (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. (7-31-06 Tr. p. 151, ll. 12-16)²²

²²These 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).

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? (7-31-06 Tr. p. 276, l. 18)

Q: Could you apply the law as I would instruct as the judge of the court? (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? (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?
(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 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 (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. (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 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. (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

²³The trial judge intentionally avoided using any aggravating or mitigating circumstance in her individual voir dire that might be applicable in this case. (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.

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. (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. (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. (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 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

²⁴The 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 (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.

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. (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 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. (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

²⁵Appellant 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.

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

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

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. (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). (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. (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. (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. (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]. (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)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):

²⁷Stanko 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

²⁸In 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

²⁹While 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.”).

³⁰Trial 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

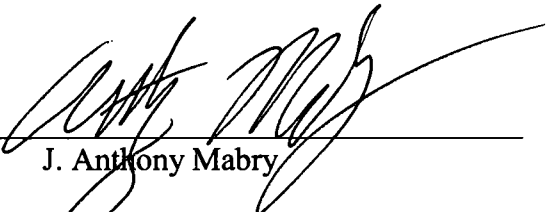
JOHN W. McINTOSH
Chief Deputy Attorney General

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

July 2, 2007

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

JUL 2 2007

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

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

STEPHEN C. STANKO,

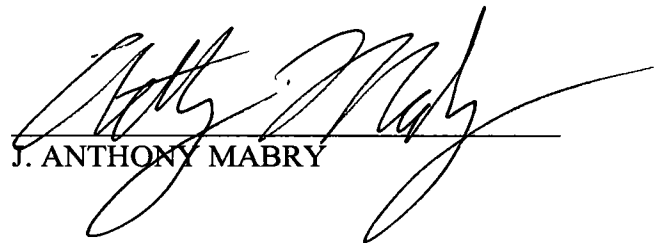
Appellant.

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Respondent proposes the following be included in the Record on Appeal:

1. Verdict forms in guilt phase

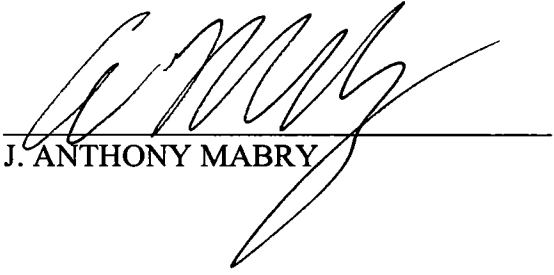
I certify that this Designation contains no matter which is irrelevant to this appeal.


J. ANTHONY MABRY

July 2, 2007

CERTIFICATE OF SERVICE

I, **J. Anthony Mabry**, hereby certify that I have served the *Initial Brief of Respondent and Designation of Matter* in the foregoing action by depositing copies in Interagency Mail to Joseph L. Savitz, III, Chief Attorney, S.C. Department of Indigency Defense, Appellate Defense Division, 1330 Lady Street, Ste. 401, Columbia, SC 29201 this 2nd day of July, 2007.



J. ANTHONY MABRY

RECEIVED
JUL 2 2007
S.C. SUPREME COURT

June 20, 2007

Joseph L. Savitz, III - Chief Attorney
South Carolina Commission on Indigent Defense
P.O. Box 11589
Columbia, S.C. 29211

RECEIVED

JUN 29 2007

S.C. SUPREME COURT

Re: The State v. Stanko, Stephen C.

Mr. Savitz,

On June 12, 2007, I spoke with Ms. Kathrine Hudgins concerning the Initial Brief of Appellant filed on my behalf and my June 5th correspondence to you. My main concern being the fact that no issues were raised dealing with the Motions surrounding the Insanity Defense of my case and respective statutes.

While Ms. Hudgins' explanations of your decisions, in not briefing said issues, were concise and appeared to make sense at the time, I have since researched the matter to better understanding of the affects of such a waiver. I now feel that these issues may need to be brought up at this time, and if you do not agree, I can only give you my understanding of what must be done:

(A) If you won't brief them, I must. Because of the Chief Justice's apparently unprecedented decision to allow extensions in this case (as is directed by the Clerk's May 24, 2007 letter and the subsequent ORDER of the Court), I am already filing a Motion to Supplement. No extensions in a CAPITAL CASE still baffles my understanding of the appellate process.

(B) This only other option being that you, Kathrine and Bill Dwyer, Esq., my Defense Counsel in the pending trial, arrange a meeting

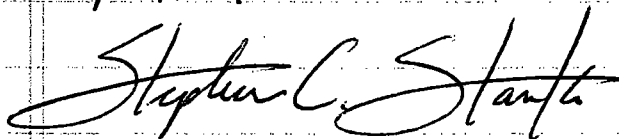
here at Lieber to resolve the legal options and/or ramifications of presenting or waiving presentation of the issues. Such a meeting is the only viable option, in my opinion, to determine the best course of action that would insure I am prejudiced neither now nor later.

Knowing your's and Bills levels of integrity and professionalism and commitment to your client's welfare, I hope we can arrange this resolution.

In the meantime, I would ask, respectfully, that you notify the Court of this concern

Thank You, for your cooperation, considerations and efforts in this matter and my case, and I anxiously await your earliest possible response.

Respectfully... I am,



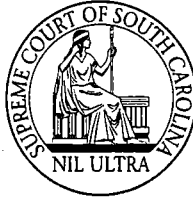
Stephen C. Stanko #6022
Lieber C.I. (RB #218)

P.O. Box 205

Ridgerville, S.C. 29472

cc: file

Daniel Shearouse, Clerk, S.C. Supreme Court
Bill Diggs, Esq.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 28, 2007

Mr. Stephen C. Stanko, #6022
Lieber Correctional Institution
P. O. Box 205
Ridgeville, SC 29472

Re: The State v. Stanko, Stephen C.

Dear Mr. Stanko:

This responds to your Motion to Supplement Brief of Appellant with Request for Extension in the above entitled matter. Since you are represented by counsel in this matter, no action will be taken on your pro se motion. Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Any concerns you have about this matter should be raised to the Division of Appellate Defense. The address for that Office is P.O. Box 11589, Columbia, SC 29211, and their phone number is 803-734-1343.

Very truly yours,

CLERK

DES/dmh

cc: Chief Attorney Joseph L. Savitz, III
Assistant Appellate Defender Katherine H. Hudgins
Assistant Deputy Attorney General Donald J. Zelenka

June 25, 2007

The Supreme Court of South Carolina
Attn: Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

Re: State v. Sfanko, Stephen C.

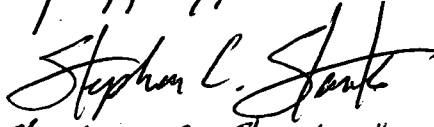
Hon. Mr. Shearouse,

Enclosed please find the original and copies of my MOTION
TO SUPPLEMENT BRIEF OF APPELLANT (w/ REQUEST FOR EXTENSION)
in the above-referenced case.

One copy each has been forwarded to Mr. Savitz (SCLID)
and Mr. Zelenka (Office of the Attorney General).

Please file the original and return a copy to me "clock-
stamped" for my records in the matter.

Respectfully,


Stephen C. Sfanko #6022
Lieber C.I. (RB #218)
P.O. Box 205
Kidgewille, S.C. 29472

RECEIVED

JUN 28 2007

S.C. SUPREME COURT

cc: file
Joseph L. Savitz, III, (SCLID)
Donald J. Zelenka (Off. of Atty. Gen.)
William Diggs, Esq.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

Case No. 2005-GS-22-918

The State,

Respondent.

v.

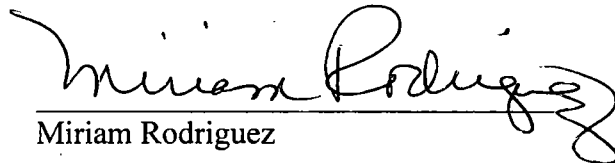
Stephen Christopher Stanko,

Appellant

CERTIFICATE OF SERVICE

This is to certify that I have this 27th day of June, 2007, deposited in the U.S. Postal Service one copy of the Appellant's Motion to Supplement Brief of Appellant in the above case with postage prepaid and addressed to opposing counsel at the following address:

Donald J. Zelenka, Esquire
Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211


Miriam Rodriguez

Sworn to Before me this 27th day of
June, 2007

RECEIVED

JUN 28 2007



NOTARY PUBLIC FOR SOUTH CAROLINA

Expires 05/17/2015

Pamela R. Aubin
Notary Public
State of South Carolina
My Commission Expires 05/17/2015

S.C. SUPREME COURT

S E 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.

MOTION TO SUPPLEMENT BRIEF OF APPELLANT
(W/ REQUEST FOR EXTENSION)

The Initial Brief of Appellant in the above case was filed by Appellate Counsel (Joseph L. Savitz, III, Chief Attorney of the South Carolina Commission on Indigent Defense (SCCID) and Kathrine H. Hudgins, Asst. Appellate Defender) on May 23, 2007. The Appellant received his copy of said Brief on or about May 25, 2007.

Appellant's review of said Brief determined that Appellate Counsel had not contained any issues concerning Motions filed by Defense Counsel (William I. Diggs, Esq.) and denied by the Trial Court pertaining to matters on the Insanity Defense and its respective statutes.

Appellant communicated these immediate concerns to Appellate Counsel via U.S. Mail on June 5, 2007. Kathrine H. Hudgins called

Lieber Correctional Institution (Lieber C.I.) and spoke with the Appellant concerning the SCCID's decisions in not briefing these issues.

During said conversation, Ms. Hudgins further informed the Appellant of a May 24, 2007 letter from Daniel Shearouse, Clerk of Court for the Supreme Court of South Carolina, and a subsequent ORDER by the Chief Justice of the Supreme Court in which Chief Justice Toal directed the parties in this case that extensions should "not" be expected in this case, an appeal involving a Capital conviction. Further, the Chief Justice stated her urgency to get this matter scheduled for oral arguments.

Having done further research into the subject of these issues not being briefed on direct appeal, the Appellant now fears that, if not briefed, the waiver to do so could cause extreme prejudices on future appellate procedures. Unable to contact Appellate Counsel (SCCID) via telephone, the Appellant has forwarded written communication to Mr. Savitz expressing these immediate concerns.

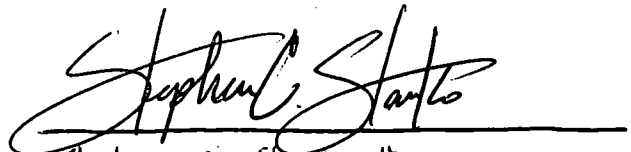
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THAT the requests be granted in the interest of justice and fundamental fairness. Should the Appellant be denied the opportunity and ability to do so, it would result in prejudice against him in future appellate filings.

IT IS SO MOTIONED AND REQUESTED.


Stephen C. Stanko #6022
Lieber C.I. (CRB #218)
P.O. Box 205
Ridgerville, S.C. 29472

June 25, 2007
Ridgerville, S.C.

June 25, 2007

The Supreme Court of South Carolina
Attn: Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

Re: State v. Sfanko, Stephen C.

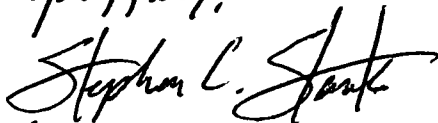
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One copy each has been forwarded to Mr. Savitz (SC110)
and Mr. Zelenka (Office of the Attorney General).

Please file the original and return a copy to me "clock-
stamped" for my records in the matter.

Respectfully,



Stephen C. Sfanko #6022
Liber C.I. (RB #218)
P.O. Box 205
Ridgewood, S.C. 29472

cc: file

Joseph L. Savitz, III, (SC110)
Donald J. Zelenka (Off. of Atty. Gen.)
William Diggs, Esq.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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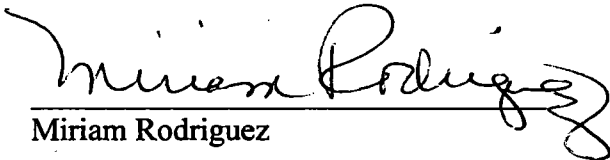
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Donald J. Zelenka, Esquire
Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211


Miriam Rodriguez

Sworn to Before me this 27th day of
June, 2007



NOTARY PUBLIC FOR SOUTH CAROLINA

Expires 05/17/2015

Pamela R. Aubin
Notary Public
State of South Carolina
My Commission Expires 05/17/2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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RESPONDENT,

V.

STEPHEN C. STANKO,

APPELLANT.

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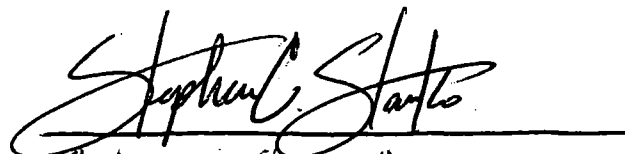
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IT IS SO MOTIONED AND REQUESTED.



Stephen C. Stanko #6022

Lieber C.I. (RB #218)

P.O. Box 205

Ridgew. Hc., S.C. 29472

June 25, 2007

Ridgew. Hc., S.C.

June 25, 2007

The Supreme Court of South Carolina
Attn: Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

Re: State v. Sfanko, Stephen C.

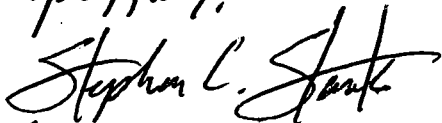
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Respectfully,



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Lieber C.I. (RB #218)
P.O. Box 205
Ridgewood, S.C. 29472

cc: file

Joseph L. Savitz, III, (SC110)
Donald J. Zelenka (Off. of Atty. Gen.)
William Diggs, Esq.

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In The Supreme Court**

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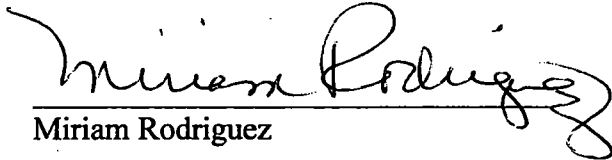
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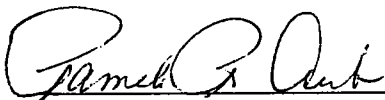
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Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211


Miriam Rodriguez

Sworn to Before me this 27th day of
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NOTARY PUBLIC FOR SOUTH CAROLINA

Expires 05/17/2015

Pamela R. Aubin
Notary Public
State of South Carolina
My Commission Expires 05/17/2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Deandre L. Jefferson, Circuit Court Judge

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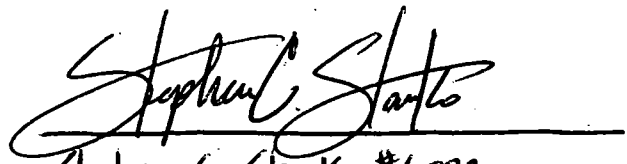
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Stephen C. Stanko #6022

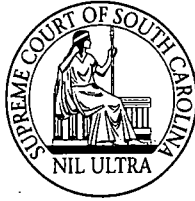
Lieber C.I. (RB #218)

P.O. Box 205

Ridgerville, S.C. 29472

June 25, 2007

Ridgerville, S.C.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 24, 2007

Chief Attorney Joseph L. Savitz, III
Assistant Appellate Defender Katherine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

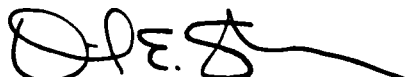
Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

While I know that one extension has been granted since this Court's order of March 29, 2007, the Chief Justice has directed me to emphasize to the parties that they should not expect that extensions will be granted in this matter. Further, she has withheld the authority to grant any extensions in this matter to herself or the full Court. It is her intent to schedule this case for oral argument as soon as possible.

Very truly yours,


CLERK

ORIGINAL

RECEIVED

MAY 23 2007

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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APPELLANT

INITIAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Attorney

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to allow counsel, during voir dire, to ask potential jurors about their feelings and viewpoints concerning the defense of insanity when insanity was raised as an affirmative defense and the question was asked to reveal juror bias?

2. Did the trial judge commit reversible error at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by S.C. Code Section 16-3-20(C)(b)(7): “The age or mentality of the defendant at the time of the crime?”

STATEMENT OF FACTS

In August of 2005, a Georgetown County Grand Jury returned a six count indictment (05-GS-22-918) charging Stephen Stanko with murder, assault and battery with intent to kill, criminal sexual conduct first degree, two counts of kidnapping and armed robbery. The victims were Stanko's girlfriend, Laura Ling, and her fifteen year old daughter. The daughter was the sole eye-witness and testified at trial.

The State sought the death penalty relying on numerous aggravating circumstances. (Notice of evidence in aggravation). The defense noticed the State of Stanko's intention to assert an insanity defense. On August 7 through August 11, 2006, Judge Deadra L. Jefferson presided at Stanko's jury trial. During voir dire, the judge made no mention of the insanity defense and refused to allow defense counsel to question potential jurors about their views of the insanity defense. Stanko pursued an insanity defense at trial.

During the guilt/innocence phase, the defense presented the testimony of five medical experts: Dr. Bernard Albinak, Dr. James Thrasher, Dr. Marc Einhorn, Dr. Joseph C. Wu, and Dr. Thomas Sachy. Dr. Albinak, an expert in physiological psychology, testified that Stanko's frontal lobe function was sub-normal. (Tr. p. 290, lines 11-22). Dr. Thrasher, an expert in forensic psychiatry, testified that Stanko had both a structural brain abnormality and decreased functioning in the frontal lobe. (Tr. p. 341, lines 3- p. 342, lines 1-7). Dr. Thrasher concluded that Stanko was insane at the time of the offenses. (Tr. p. 349, lines 15-18). Dr. Einhorn, an expert in neuropsychology, at the request of another expert witness, Dr. Sachy, ruled out impairment of the higher cortical functioning. (Tr. p. 438, lines 4-21). Dr. Wu, an expert in psychiatry and in the acceptability, usefulness, administration and interpretation of PET scans, testified that the PET scan imaging of

Stanko's brain revealed an abnormal decrease in function in addition to the decreased size of the frontal lobe as detected by Dr. Gur.

Dr. Sachy was the final defense expert witness. Dr. Sachy testified as an expert in forensic psychology and neuropsychiatry. He recounted the famous case of Phineas Gage, a railway worker who suffered a traumatic injury to his brain in an explosion. Although Gage survived, his behavior changed dramatically following the injury. A once quiet and godly man, after the injury Gage became loud, profane, combative and began abusing alcohol. (Tr. p. 548, lines 5-25). Dr. Sachy testified that Phineas Gage's case was one of the first known cases linking damage to the frontal lobe of the brain with behavioral "dyscontrol." (Tr. p. 547, lines 12- p. 548, lines 1-3).

Dr. Sachy concluded that, as a result of a defect in Stanko's frontal lobe, Stanko was insane at the time of the offenses. (Tr. p. 557, line 25 – p. 558, lines 1-14). Dr. Sachy testified, "He [Stanko] crosses the line into insanity when his violent, aggressive impulses gain complete dominance of his brain. He cannot be controlled by that emergency brake. Adrian Raine said this is the emergency brake of the brain. He doesn't have a good - - or maybe he doesn't even have an emergency brake." (Tr. p. 624, lines 23- p. 625, lines 1-4).

Dr. Sachy attributed Stanko's brain defect to complications at birth at Guantanamo Naval Base. (Tr. p. 581, lines 19 – p. 585, lines 1-21). Dr. Sachy testified, "Something happened to his brain at birth. There is no doubt about that. The doctors document it. I believe that his brain did not form correctly from that point on. And one of the proofs of that is the side portions of his brain didn't grow right, there's more water in his brain than there should be because there's less meat in his brain." (Tr. p. 648, lines 19-25).

In reply, the State's experts testified that Stanko was sane at the time of the offense. (Tr. p. 700, line 16 – p. 706, line 24; tr. p. 715, lines 13-15). The jury returned verdicts of guilty on all counts. During the sentencing phase, the Defense introduced additional expert testimony in regard to Stanko's mental state at the time of the offense.

At the close of all evidence the judge instructed the jury on two statutory mitigators: (1) the murder was committed while the defendant was under the influence of mental or emotional disturbance; and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The judge did not instruct the jury that they may consider the age or mentality of the defendant at the time of the crime a mitigating factor. The jury found aggravating circumstances and recommended a death sentence. The judge affirmed their verdict and sentenced Stanko to death. This appeal follows.

ARGUMENT

1. The trial judge erred in refusing to allow counsel, during voir dire, to ask potential jurors about their feelings and viewpoints concerning the defense of insanity when insanity was raised as an affirmative defense and the question was asked to reveal juror bias.

A capital defendant's right to voir dire, while grounded in statutory law, is also rooted in the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Morgan v. Illinois, 504 U.S. 719, 729, 503(1992). "Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory strikes." Mu'Min v. Virginia, 500 U.S. 415, 431, (1991). South Carolina Code Section 14-7-1020 provides that the court shall examine jurors to determine bias or prejudice. South Carolina Code Section 16-3-20(D) provides, "Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror shall be examined by the attorney for the defense."

The scope and duration of such examination is committed to the sound discretion of the trial judge. State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986). In State v. Smart, 278 S.C. 515, 299 S.E.2d 686, 523 (1982) the Supreme Court wrote, "The function of voir dire examination, however, is to determine specific and real bias or interest in jurors and not to develop personality profiles. The capital defendant is clearly entitled to the former but has no claim of right to the latter." In Smart, jurors were asked questions about their hobbies, sports, favorite movies and television shows without a showing that such questions were designed to reveal bias as to a specific issue in the case. Discussing the issue in Smart, the authors of the Criminal Law of South Carolina wrote, "Generally, any questions must go to some relevant point in dispute.

As both guilt and punishment are at issue in a capital case, questions as to the bias and prejudice of any juror regarding either of these issues are relevant.” McAninch & Fairey, The Criminal Law of South Carolina 152 (4TH Ed. 2002).

During voir dire counsel for Stanko, through questioning, tried to determine if a juror would consider an insanity defense. (Tr. p. 283, lines 1- 17; p. 284, lines 20-23). The State objected. (Tr. p. 283, lines 7-8). The question was designed to reveal juror bias toward an insanity defense, a specific issue in the case. The State objected. (Tr. p. 283, lines 7-8). The judge sustained the objection. (Tr. p. 283, lines 9-10; p. 284, lines 3-14). She stated, “I was sustaining the State’s objection. I think that you can ask general questions. You cannot ask 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.” (Tr. p. 284. lines 3-11). In questioning the jurors, the judge provided examples of statutory aggravating and mitigating factors, excluding any reference to the statutory mitigators¹ dealing with mental and emotional disturbances and mental impairment. (Tr. p. 279, lines 1-14).

Trial counsel argued that an insanity defense was not a mitigating or aggravating circumstance. (Tr. p. 285, lines 10-11). Counsel then stated, “Am I to understand, Ma’am, the bench is saying that if a juror later on in the trial may determine that she could never have considered a defense of insanity, that that’s proper before the court?” (Tr. p. 285, lines 15-19). The judge observed that the defendant is entitled to specific

¹ South Carolina Code Section 6-3-20(C)(b).

questions only if the failure to ask the questions would render the trial fundamentally unfair. (Tr. p. 285, lines 20-25).

In State v. Wise, 359 S.C. 14, 596 S.E.2d 475, 479 (2004), the Court, discussing the individual voir dire issue, wrote, “To be constitutionally compelled, it is not enough that a question may be helpful. Rather, the trial court’s failure to ask or allow a question must render the defendant’s trial fundamentally unfair.” The judge’s refusal to allow defense counsel to ask jurors if they would consider an insanity defense rendered Stanko’s trial fundamentally unfair. The question was not asked in order to determine if the juror would consider insanity mitigating. Instead, the question was asked to determine if the juror could consider the insanity defense. If the juror could never consider insanity as a defense, then they would not be qualified to serve as a juror.

A juror must be excused if her opinions would prevent or substantially impair the performance of her duties as a juror in accordance with her oath and instructions. Wainwright v. Witt, 469 U.S. 412, (1985). The test of a juror’s qualification under South Carolina Code Section 16-3-20 is ability to both reach a verdict of either guilt or innocence and, if necessary, to vote for death sentence. State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). A juror’s inability to return a verdict of guilty renders her incapable of fulfilling her basic responsibilities as a juror. State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). Likewise, a juror’s inability to return a verdict of not guilty by reason of insanity renders her incapable of fulfilling her basic responsibilities as a juror.

In State v. Green, 301 S.C. 347, 392 S.E.2d 157, 159 (1990), the South Carolina Supreme Court, citing Turner v. Murray, 476 U.S. 28 (1986) wrote, “In order to protect the

capital defendant's right to an impartial jury, he is entitled to have prospective jurors informed of the race of the defendant and questioned on their racial biases." The issue in Green was whether the trial judge erred in refusing to disqualify a juror who exhibited racial bias during the voir dire process. The Court found error in the judge's failure to disqualify the juror. The Court, however, found that the defendant received a fair trial despite the trial court's error. Green used a peremptory strike to have the juror excused and neither of the two jurors seated after Green exhausted all of his peremptory strikes was challenged for cause. Unlike in Green, the trial judge's ruling deprived Stanko of the right to a fair trial by an impartial jury.

Just as the capital defendant is entitled to question jurors in regard to racial bias, so too should the capital defendant be entitled to question jurors in regard to an insanity defense. Counsel for Stanko was prohibited from ascertaining juror bias as to an insanity defense. The trial judge's refusal to allow the line of questioning prevented the court from determining if all of the jurors were qualified and prevented counsel from intelligently exercising peremptory strikes, the precise dual purposes for which voir dire was meant to address. Mu'Min v. Virginia, 500 U.S. 415, 431, 509 (1991).

The trial judge should have allowed defense counsel to question jurors about their potential bias in regard to the insanity defense. The defense of insanity is a controversial legal issue and some members of the jury may simply be unable to follow the law in regard to the defense. An excused juror's response during voir dire illustrates the point. When asked if he had a fixed opinion about the facts of the case, the juror responded, "My personal opinion is that if someone is pleading insanity that means they are looking for a way out." (Tr. p. 889, lines 9-11). The juror admitted that he could not put his bias against

the insanity defense aside and apply the law. (Tr. p. 890, lines 15-22). The juror was properly excused. This particular juror advised the judge of his bias against the insanity defense without specific questioning. It is unclear how the juror knew that insanity would be an issue in the case, although the juror admitted to listening to talk radio. (Tr. p. 888, lines 11-18). Defense counsel should have been permitted to question all potential jurors to determine if they had bias against the insanity defense as this juror did.

Bias toward the insanity defense was well noted following the trial of John Hinckley, Jr. for his attempted assassination of President Ronald Reagan. Public pressure from the verdict of not guilty by reason of insanity persuaded Congress and most states, including South Carolina, to enact major reforms in the law governing the insanity defense. Despite reform, the insanity defense is still a controversial legal issue.

Other jurisdictions have found error in the trial court's refusal to ask defendant's requested voir dire questions in regard to insanity. In People v. Stack, 112 Ill.2d 301, 493 N.E.2d 339, 343 (1986), a non-capital case, the trial court refused to ask several questions proposed by defense counsel including: "Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case? If so, what?" Finding error, the Illinois Supreme Court wrote, "Just as the State is allowed to probe the venire for jurors who would not follow the law of capital punishment, the defendant should be allowed to identify and challenge those jurors who would refuse to follow the statutory law of the insanity defense. As noted by the appellate court, 'parties have the right to have jurors examined concerning their attitudes toward the insanity defense when such is involved in a case.'" Stack at 343, citing People v. Robinson, 58 Ill.Dec. 23, 429 N.E.2d 1356 (1981); People v. Witted, 34 Ill.Dec. 393, 398 N.E.2d 68 (1979); see United States v. Allsup, 566 F.2d 68 (9th Cir. 1977);

Washington v. State, 371 So.2d 1108 (Fla.App. 1979); State v. Olson, 156 Mont. 339, 480 P.2d 822 (1971); State v. Sanders, 161 W.Va. 399, 242 S.E.2d 554 (1978)(reversed on other grounds); but see State v. Logan, 394 Md. 378, 906 A.2d 374 (2006).

In Stack the Illinois Supreme Court found that the inquiry into the defense of insanity was appropriate because “. . . the jury was going to be asked to apply an extraordinarily controversial legal requirement against which many members of the community may have been prejudiced.” Stack at 344. The court further noted, “Inquiry into the feeling or viewpoint of the venire regarding such controversial legal propositions is consistent with a *bona fide* examination conducted so that the parties can intelligently exercise their prerogatives to challenge. Furthermore, a defendant’s Sixth and Fourteenth Amendment rights to an impartial jury (U.S. Const. amends. VI, XIV) are diminished when jurors are prejudiced against an appropriate verdict of not guilty by reason of insanity.” Stack at 344. In People v. Moore, 6 Ill.App.3d 568, 286 N.E.2d 6, 8 (1972), the court wrote, “Where insanity is to be an issue the parties have a right to examine jurors concerning their attitude on an insanity defense.” Moore at 8, citing 50 C.J.S. Juries s 275. In People v. Robinson, 102 Ill. App.3d 884, 429 N.E.2d 1356 (1981), the court wrote, “. . . it is undisputed that parties have the right to have jurors examined concerning their attitudes toward the insanity defense when such is involved in a case . . .”

In United States v. Allsup, 566 F.2d 68 (9th Cir. 1977), the United States Court of Appeals wrote, “Allsup had the right to have prospective jurors questioned about their ability objectively and fairly to evaluate the evidence of insanity or lack of mental capacity. (Cf. United States v. Jackson, (7th Cir. 1976) 542 F.2d 403, 413; Brundage v. United States, (10th cir. 1966) 365 F.2d 616, 618).” The District Court of Appeal of Florida, Fourth

District found that it was error to prohibit voir dire examination of jurors concerning the insanity defense. Washington v. State, 371 So.2d 1108 (Fla.App. 1979). The Montana Supreme Court found that the refusal to permit voir dire examination concerning the insanity defense constituted a violation of due process. State v. Olson, 156 Mont. 339, 480 P.2d 822 (1971). The Supreme Court of Appeals of West Virginia found that, upon request, the judge should have asked jurors if they have a bias or prejudice against psychiatrists or persons suspected of having a mental defect. State v. Sanders, 161 W.Va. 399, 242 S.E.2d 554 (1978)(reversed on other grounds).

The trial judge should have allowed defense counsel to question jurors about their potential bias in regard to the insanity defense. Stanko's convictions and death sentence should be reversed and the case remanded for a new trial.

2. The trial judge committed reversible error at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by S.C. Code Section 16-3-20(C)(b)(7): “The age or mentality of the defendant at the time of the crime.”

“Steven was insane” when he committed his offenses, the defense told the jury in their opening statement at Stanko’s trial. (Tr. p. 52, line 17). Although Stanko has a genius-level IQ of 143 [Tr. p. 303, lines 11-23; tr. p. 597, lines 14 and 15], these particular crimes – unlike his many financial scams – were not those of wit and deception. One witness pointed out the obvious: they were not particularly “well thought-out.” (Tr. p. 626, lines 19-22). The State contended that Stanko was simply a borderline sociopath who pragmatically chose to eliminate those people in his life in a position to expose his various schemes. (Tr. p. 745, lines 1-10).

Stanko’s trial proved to be a contest between defense and prosecution experts. Defense experts testified that Stanko was insane at the time of the offenses due to a brain defect. Prosecution experts countered that Stanko’s brain was perfectly normal and that his misdeeds were the product of controllable behavioral problems.

Specifically, defense experts in psychology and psychiatry (including neuropsychology and neuropsychiatry) disclosed that “50 to 80%” of the frontal lobe of Stanko’s brain was missing. (Tr. p. 490, lines 13-19). They advanced two theories to explain how this might have occurred: oxygen deprivation at birth, in which case the frontal lobe never fully developed, or a blow to the head in the early teens, in which case it atrophied. Regardless, the effect on Stanko’s behavior was the same.

The frontal lobe separates human beings from the so-called “lower” animals, such as reptiles, who either fight or flee when threatened. To varying degrees it controls atavistic,

pre-conscious impulses originating deep within the primeval regions of the brain. In terms of evolution, this capacity is a fairly recent development. (Tr. p. 277, lines 8-10). One defense expert described the frontal lobe as “[t]he emergency brake for the brain.” (Tr. p. 554, lines 6-7). It governs in some fashion “our ability to have empathy for another human being” and “our moral values.” (Tr. p. 333, line 25 – p. 334, line 10).

Ruled by a defective brain, Stanko attempted to make his way through life by mimicking “what normal people do,” but in his case this meant manipulation and “lies upon lies.” (Tr. p. 362, lines 3-13). Facing extreme circumstances, this abnormality also meant that he was powerless to control the violent impulses welling up from the core of his brain. (Tr. p. 429, lines 1-14; tr. p. 590, lines 25 – p. 592, line 2).

The frontal lobe also appears to govern the capacity to distinguish right from wrong. (Tr. p. 277, lines 15-25; tr. p. 555, line 25 – p. 556, line 2). Two defense psychiatrists testified that because of his brain defect, Stanko was quite insane at the time he committed his offenses. (Tr. p. 349, lines 15-18; tr. p. 557, line 25 – p. 558, line 14).

On reply, the State’s experts testified that Stanko’s brain – including his frontal lobe – was with normal limits. (Tr. p. 746, lines 5-10; tr. p. 753, lines 10-21; tr. p. 763, line 7 – p. 764, line 5; tr. p. 799, line 18 – p. 800, line 1). Their psychiatrist stated that Stanko was neither “[l]egally insane” nor mentally ill, merely narcissistic and antisocial. (Tr. p. 700, lines 16 – p. 706, line 24; tr. p. 715, lines 13-15).

Based on the defense evidence, the trial judge instructed the jury on the defense of insanity. (Tr. p. 1010, line 23 – p. 1012, line 9). At the State’s request, she also charged guilty but mentally ill. (Tr. p. 857, lines 25 – p. 861, line 6; tr. p. 1013, lines 3 – 11).

(Defense counsel objected to the GBMI instruction. Tr. p. 872, line 24 – p. 873, line 3; tr. p. 879, line 12 – p. 871, line 14.)

On motion of both parties, the guilt/innocence evidence was incorporated at sentencing. (Tr. p. 181, line 23 – p. 182, line 7). The State’s additional sentencing evidence depicted Stanko as an incorrigible con-artist who scammed money by pretending to be, among other things, a lawyer, a real estate developer and a car salesman. (Tr. p. 184, line 11 – p. 185, line 3; tr. p. 195, line 14 – p. 197, line 19; tr. p. 205, lines 9 – p. 206, line 8; tr. p. 221, lines 7-18; tr. p. 228, line 19 – p. 229, line 12; tr. p. 295, line 13 – p. 296, line 2). He convinced one gullible woman he had a degree in chemical engineering and also owned a lucrative chain of Hooters restaurants. (Tr. p. 316, line 3 – p. 317, line 5). (“God chose me to bring him down,” she believed. Tr. p. 342, lines 10 – 13.)

The defense experts reiterated their opinion that Stanko’s crimes were the product of his faulty brain and questioned the methodology of the State’s experts who found him merely antisocial. (Tr. p. 705, line 22 – p. 706, line 5; tr. p. 862, line 22 – p. 863, line 1). One defense psychiatrist characterized Stanko’s behavior as a “textbook” example of the effect of frontal lobe damage. (Tr. p. 931, lines 17-24). (Sadly, Stanko’s parents, both of whom were living in the area, did not attend his trial and refused to help shed any light on his condition. Tr. p. 673, line 23 – p. 674, line 1; tr. p. 1038, lines 10-14; tr. p. 1046, lines 12-17.)

Midway through the State’s case at sentencing, defense counsel informed the judge “that one of the mitigating statutory circumstances ... is the state of mind.” (Tr. p. 288, lines 14 – 16). The judge subsequently informed the parties that she intended to charge the following two statutory mitigators:

S.C. Code Section 16-3-20(C)(b)(2): “The murder was committed while the defendant was under the influence of mental or emotional disturbance,” and

Section (C)(b)(6): “The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.”

(Tr. p. 1098, line 15 – p. 1099, line 9; tr. p. 1113, lines 3-5). She omitted the mitigator found at Section (C)(b)(7): “The age or mentality of the defendant at the time of the crime.” Defense counsel did not object to its absence. (Tr. p. 1104, lines 16 – 17; tr. p. 1115, lines 15 – 21).

The judge accordingly charged only the two statutory mitigating circumstances she had indicated at the charge conference. (Tr. p. 1256, lines 3 – 8). Once again, defense counsel took no exception. (Tr. p. 1263, lines 3 – 5).

The proper procedure for the submission of statutory mitigators to the jury in the sentencing phase of a capital trial is set forth in State v. Victor, 300 S.C. 220, 387 S.E.2d 248, 250 (1989):

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 that he wishes submitted to the jury.

The judge must submit any statutory mitigating circumstances supported by the evidence. S.C. Code Section 16-3-20(C); see, also, State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

The evidence in this case supported an instruction on all three statutory mitigators provided by Section 16-3-20(C)(b)(2), (6) and (7). See, for example, State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), and State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Defense experts testified at both phases that Stanko was literally out of his mind at the time of his offenses.

In State v. Evans, 371 S.C. 27, 637 S.E.2d 313, 314-15 (2006), the Court stated that, “absent a request by counsel to charge a mitigating circumstance at trial, the issue whether the mitigator should have been charged is not preserved for review.” This procedural requirement specifically applies “to mitigators stemming from mental disorders.” *Id.*

Although defense counsel told the judge that “state of mind” was at issue earlier during sentencing, they did not specifically request an instruction on the “age or mentality” mitigator at the charge conference, nor did they object to its omission from the judge’s final instructions. In the event the Court determines counsel’s request was premature and thus procedurally-barred, Stanko would be entitled to pursue this issue at post-conviction relief as an allegation of ineffective assistance of counsel. See, for example, State v. Evans.

In either case, the omission was error. The Court has wisely rejected the State’s attempts to have it weaken or dilute the requirement of charging all three mitigators where supported by evidence the defendant was intoxicated or deranged. See State v. Stone and State v. Rogers, 338 S.C. 435, 527 S.E.2d 101 (2000).

For this reason, the Court should vacate Steven Stanko’s death sentence and remand for resentencing.

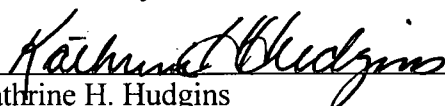
CONCLUSION

As to the first argument, the Court should reverse Stephen Stanko's convictions, vacate his death sentence and remand for a new trial. As to the second, it should vacate his death sentence and remand for resentencing.

Respectfully submitted,



Joseph L. Savitz, III
Chief Attorney



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of May, 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

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial transcript
- (2) Pretrial transcripts
- (3) Indictment
- (4) Notice of intent to seek death penalty
- (5) Statutory aggravators and mitigators
- (6) Finding of statutory aggravators
- (7) Recommendation of death
- (8) Death sentence

I certify that this designation contains no matter which is irrelevant to this appeal.

May 23rd, 2007



Joseph L. Savitz, III
Chief Attorney

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

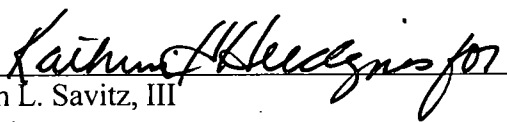
V.

STEPHEN C. STANKO,

APPELLANT

CERTIFICATE OF SERVICE

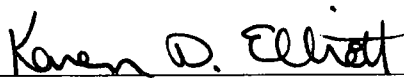
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of May, 2007.



Joseph L. Savitz, III
Chief Attorney

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 2007.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: March 19, 2017 .



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 23, 2007

Chief Attorney Joseph L. Savitz, III
Assistant Appellate Defender Katherine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

Daniel E. Shearouse
ES

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent,

v.

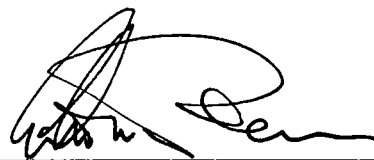
Stephen Christopher Stanko,

Appellant.

ORDER

Appellant seeks a thirty day extension of time in which to serve and file his initial brief and designation of matter to be included in the record. The motion is granted. Appellant shall serve and file his initial brief and designation of matter to be included in the record on appeal within thirty days of the date of this order.

IT IS SO ORDERED.



J.

FOR THE COURT

Columbia, South Carolina

April 23, 2007

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

APR 20 2007

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

STEPHEN C. STANKO,

APPELLANT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Stephen C. Stanko, Chief Attorney Joseph L. Savitz, III, and Appellate Defender Kathrine H. Hudgins, request an extension of 30 days, until May 23, in which to file the initial brief and designation of matter in this capital direct appeal. They have not previously requested any extensions of time in this case. In support of this motion, counsel show:

(1) This is the direct appeal of Mr. Stanko's first capital trial. The trial transcript contains approximately 3600 pages. The Division of Appellate Defense received the trial transcript from the court reporter February 20 and the case was assigned to counsel the following day.

(2) On December 15, 2006, the Clerk of the Supreme Court wrote the Executive Director

of Indigent Defense that “[the Court] expects the transcripts and other documents to be reviewed before the first extension is requested to determine if any additional transcripts or exhibits must be obtained.” In accordance with this letter, the Chief Attorney began, on February 1, requiring the Appellate Defense attorneys “to review the transcripts and other documents before a first extension is requested to determine (a) the existence of a conflict of interest or (b) the absence of necessary transcripts, documents, etc., so an appropriate motion can be filed or other action can be taken before an extension is requested.” He notified the Clerk of Court of his action January 29, 2007. As a result, counsel for Stanko had planned on reading the transcript within the initial sixty days allotted, or by April 23.

(3) As of March 22, Chief Attorney Savitz had an overall caseload of approximately 225 appeals, including additional capital appeals, totaling approximately 60,000 pages of transcript. Appellate Defender Hudgins, who has been with Appellate Defense just over a year, had a caseload on that date of approximately 170 cases, or 20,000 transcript pages. (South Carolina Bar Ethics Advisory Opinion 04-12 suggests that an appellate attorney should handle no more than “25 appeals” per year.) In the period between February 21 and March 29, Chief Attorney Savitz filed 8 initial briefs. Appellate Defender Hudgins filed 5 briefs and 10 certiorari petitions during that time.

(4) On March 29, the Court issued an order “find[ing] it appropriate to expedite [the Stanko] appeal.” The order then stated that “no extensions of time for the preparation and filing of materials will be granted in this appeal absent extraordinary circumstances.” In essence, the Court ordered counsel for Mr. Stanko to complete and file the initial brief and designation of matter in his case within 25 days. Counsel had not been informed that the Court was contemplating this action, nor were they afforded an opportunity to bring countervailing considerations – including ethical concerns – to the Court’s attention.

(5) Nevertheless, upon receipt of the Court's March 29 order, the undersigned immediately and diligently began working on the appeal in an effort to comply with the Court's order. They have not been able to do so despite their best efforts. Counsel have read the transcript and tentatively identified the issues to be raised in the Brief of Appellant. Chief Attorney Savitz has spoken briefly with one of Mr. Stanko's trial attorneys, William I. Diggs, by telephone to ascertain that the transcript is complete and to discuss possible issues on appeal. Counsel have undertaken preliminary legal research on the issues they have identified. They have not yet traveled to Georgetown County to review the exhibits introduced during the trial, nor have they consulted with Mr. Stanko.

(6) Mr. Stanko also faces a trial for capital murder in Horry County. His defenses at both trials may overlap, so appellate counsel have agreed to work closely with trial counsel, who represented Mr. Stanko in Georgetown County and is presently representing him on the Horry County charges. Mr. Diggs will appear on the Brief of Appellant in the present appeal, along with the undersigned.

(7) In the present case, Mr. Stanko's defense was insanity, caused by a deficiency in the frontal lobe of his brain. Appellate counsel anticipate that this appeal will also focus on aspects of that defense, from voir dire to jury instructions.

(8) At present, Chief Attorney Savitz and Deputy Chief Attorney for Capital Appeals Robert M. Dudek handle virtually all of the capital direct appeals filed in this State. In the past, in capital cases the Court has always allowed 3 extensions of 30 days each to file the initial brief and designation of matter. The decision to expedite this particular capital appeal is unprecedented and therefore unanticipated.

(9) Counsel for Mr. Stanko cannot possibly render effective assistance of counsel within the time constraints set by the Court's March 29 order. As the Chief Justice herself has noted:

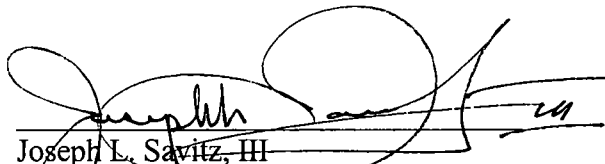
The attorney cannot expect that the first draft of the appellate brief will be the paragon of clarity and lucidity. Good writing is really the business of good rewriting. The brief has to be reviewed a number of times to refine the organization, flow, and wording. ... After reviewing and editing the brief, the attorney should set it aside for a few days. Reviewing it after some time has passed will allow him to see errors that were previously unapparent.

Toal, Vafai and Muckenfuss, *Appellate Practice in South Carolina* (2nd Ed.), pp. 228 and 229.

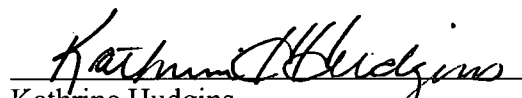
(10) This request is made in good faith and not for the purpose of delay. Counsel have made every reasonable effort to comply with the Court's order of March 29.

WHEREFORE, counsel for appellant requests an additional 30 days, until May 23, in which to file the initial brief and designation of matter in this death penalty case.

Respectfully submitted,



Joseph L. Savitz, III
Chief Attorney



Kathrine Hudgins
Appellate Defender

Attorneys for Appellant

This 19th day of April, 2007

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

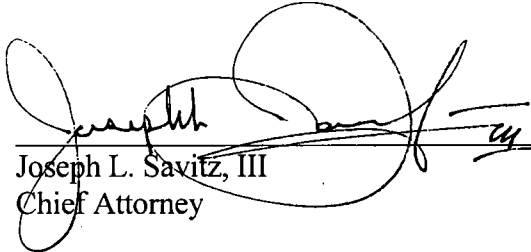
V.

STEPHEN C. STANKO,

APPELLANT

CERTIFICATE OF SERVICE

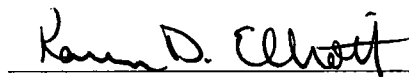
The undersigned attorney hereby certifies that a true copy of the petition for extension of time in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, this 19th day of April, 2007.

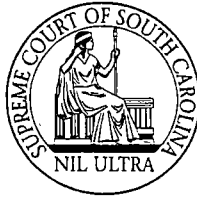


Joseph L. Savitz, III
Chief Attorney

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 19th day of April, 2007.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080
FAX (803) 734-1499

March 29, 2007

Chief Attorney Joseph L. Savitz, III
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Stanko, Stephen C.

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

The Supreme Court of South Carolina

State of South Carolina,

Respondent,

v.

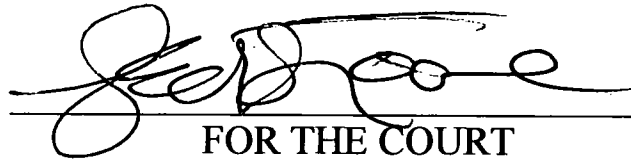
Stephen C. Stanko,

Appellant.

ORDER

The appeal in the above-referenced case is currently pending in this Court. We find it appropriate to expedite this appeal. As the court reporter has prepared and delivered the transcript to both this Court and to the State, and as the parties are currently in the initial briefing period, we will not schedule a timeline more expeditious than that imposed by the appellate court rules. We hereby order, however, that no extensions of time for the preparation and filing of materials will be granted in this appeal absent extraordinary circumstances.

IT IS SO ORDERED.



FOR THE COURT C. J.

Columbia, South Carolina

March 29, 2007



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIPT

I, Dorrie M. Hopkins, of the South Carolina Supreme Court, have received the following original trial transcript(s) in the death penalty case of State v. Stephen Christopher Stanko

1. ✓ March 17, 2006 (Brenda R. Babb)
2. ✓ June 22, 2006 – Closed Session – Ex Parte Hearing (Susan Perron)
3. ✓ June 22, 2006 – Motions Hearing (Susan Perron)
4. ✓ August 14 – 18, 2006 (Kathleen Richardson)
5. ✓ August 7 – 11, 2006 (Kathleen Richardson)
6. ✓ July 31 – August 4, 2006 (Kathleen Richardson)

Date: March 13, 2007

Dorrie M. Hopkins
(Name)



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

RECEIVED

FEB 21 2007

February 21, 2007

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

The State v. Stephen C. Stanko

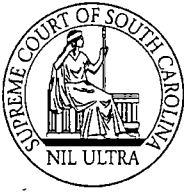
2/20/2007

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long
Legal Assistant



South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MARY S. SCHROEDER
DEPUTY DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1800
FAX: (803) 734-0269

MEMORANDUM

TO: Melinda Long
FROM: Desiree R. Allen *WA*
RE: Status Request – Late letters - February 9, 2007
DATE: February 20, 2007

RECEIVED

FEB 21 2007

S.C. SUPREME COURT

Pursuant to your two letters, I was able to confirm the status of the following transcripts from this particular case. It appears that Ms. Richardson has lumped both of these requests into one.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>	<u>Status</u>
Kathleen Richardson	2.3.07	Stephen C. Stanko	Ext. to 3.3.07

CC: S.C. Supreme Court ✓
Office of Attorney General
Kathleen Richardson



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

February 9, 2007

FEB 9 2007

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Kathleen M. Richardson	2/3/07	Stephen C Stanko

Trial Date: August 18, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

February 9, 2007

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

RECEIVED

FEB 9 2007

S.C. SUPREME COURT

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Kathleen M. Richardson	1/3/07	Stephen C Stanko

Trial Date: August 11, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

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Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

December 18, 2006

RECEIVED

DEC 18 2006

S.C. SUPREME COURT

Ms. Debbie Hopkins
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Stephen C. Stanko (Capital Case)

Dear Debbie:

We received the July 13, 2006 trial transcript on Wednesday, December 13, 2006. However we are still waiting on a transcript from the August 18, 2006 hearing and a transcript from the August 11, 2006 hearing. I will let you know once these have been received by our office.

Please let me know if you have any questions or concerns.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

December 18, 2006

RECEIVED

DEC 18 2006

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Kathleen M. Richardson	12/3/06	Stephen C Stanko

Trial Date: August 18, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

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Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

DEC 18 2006

December 18, 2006

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

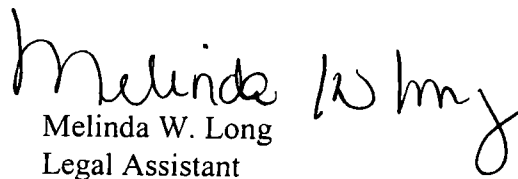
Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Kathleen M. Richardson	12/3/06	Stephen C Stanko

Trial Date: August 11, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MARY S. SCHROEDER
DEPUTY DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1800
FAX: (803) 734-0269

MEMORANDUM

RECEIVED

NOV 16 2006

TO: Kathleen Richardson
FROM: Desiree R. Allen *DR*
RE: Appellate Defense Inquiry – *Stephen C. Stanko* transcript
DATE: November 15, 2006

S.C. SUPREME COURT

I have enclosed three letters received by me from the Office of Appellate Defense. I am unable to confirm the status of this transcript. The request date is not listed on your report. Please contact that office in writing as to the status of this transcript. Kindly copy me on the correspondence. For expedience, you may fax it to me at (803) 734-0269. Please respond promptly. Thank you.

Enclosure

CC: Melinda Long, Office of Appellate Defense
Supreme Court ✓
Office of Attorney General

RECEIVED

NOV 16 2006

RECEIVED



Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

November 8, 2006

NOV - 8 2006

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

S.C. SUPREME COURT

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Kathleen M. Richardson	10/30/06	Stephen C Stanko

Trial Date: August 18, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

November 8, 2006

RECEIVED

NOV - 8 2006

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Kathleen M. Richardson	10/30/06	Stephen C Stanko

Trial Date: August 11, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
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Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

November 8, 2006

RECEIVED

NOV - 8 2006

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Kathleen M. Richardson	10/30/06	Stephen C Stanko

Trial Date: July 31, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

September 1, 2006

RECEIVED

SEP 1 2006

S.C. SUPREME COURT

Ms. Brenda R. Babb
Circuit Court Reporter
4668 River Road
Little River, SC 29566-7927

Dear Ms. Babb:

Our office has been requested to perfect the appeal arising out of:

The State v. Stephen C. Stanko

Indictment #: 2005-GS-22-918

County: Georgetown

Date of Trial: March 17, 2006

Presiding Judge: Deadra L. Jefferson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

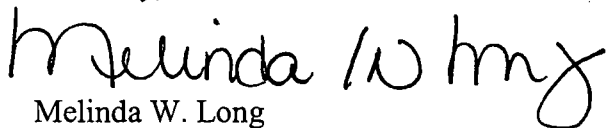
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Brenda R. Babb
September 1, 2006
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, followed by "W." and "Long". The signature is positioned to the right of the typed name and title.

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

August 29, 2006

RECEIVED

AUG 29 2006

S.C. SUPREME COURT

Ms. Susan Mia Perron
Circuit Court Reporter
PO Box 841
Johns Island, SC 29457-0841

Dear Ms. Perron:

Our office has been requested to perfect the appeal arising out of:

The State v. Stephen C. Stanko

Indictment #: 2005-GS-22-918

County: Georgetown

Date of Trial: June 22, 2006

Presiding Judge: Deadra L. Jefferson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

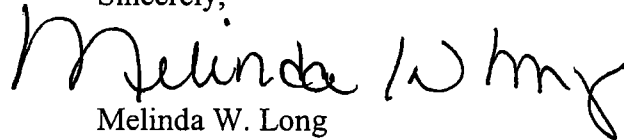
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Susan Mia Perron
August 29, 2006
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written with a large, looped 'M' and a trailing 'a'. The last name "Long" is written with a large, looped 'L' and a trailing 'g'.

Melinda W. Long
Legal Assistant

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August 29, 2006

RECEIVED

AUG 29 2006

S.C. SUPREME COURT

Ms. Kathleen M. Richardson
Circuit Court Reporter
90 Heather Court
Sumter, SC 29154-6160

Dear Ms. Richardson:

Our office has been requested to perfect the appeal arising out of:

The State v. Stephen C. Stanko

Indictment #: 2005-GS-22-918

County: Georgetown

Date of Trial: July 31, 2006

Presiding Judge: Deadra L. Jefferson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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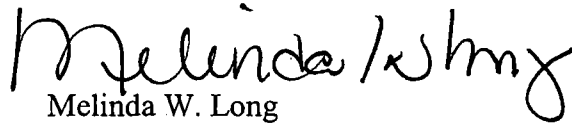
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Ms. Kathleen M. Richardson
August 29, 2006
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent than the last name "Long".

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
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Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

August 29, 2006

RECEIVED

AUG 29 2006

S.C. SUPREME COURT

Ms. Kathleen M. Richardson
Circuit Court Reporter
90 Heather Court
Sumter, SC 29154-6160

Dear Ms. Richardson:

Our office has been requested to perfect the appeal arising out of:

The State v. Stephen C. Stanko

Indictment #: 2005-GS-22-918

County: Georgetown

Date of Trial: August 11, 2006

Presiding Judge: Deadra L. Jefferson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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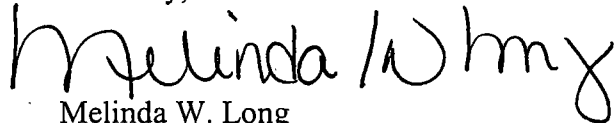
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Ms. Kathleen M. Richardson
August 29, 2006
Page Two

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Sincerely,

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Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



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Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

August 29, 2006

RECEIVED

AUG 29 2006

S.C. SUPREME COURT

Ms. Kathleen M. Richardson
Circuit Court Reporter
90 Heather Court
Sumter, SC 29154-6160

Dear Ms. Richardson:

Our office has been requested to perfect the appeal arising out of:

The State v. Stephen C. Stanko

Indictment #: 2005-GS-22-918

County: Georgetown

Date of Trial: August 18, 2006

Presiding Judge: Deadra L. Jefferson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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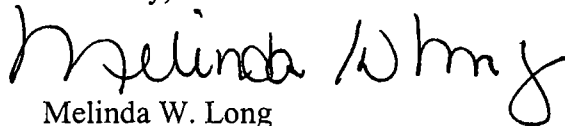
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Ms. Kathleen M. Richardson
August 29, 2006
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Melinda W. Long". The signature is written in dark ink and is positioned above the printed name and title.

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



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

DEADRA L. JEFFERSON
JUDGE

CHARLESTON COUNTY JUDICIAL CENTER
100 BROAD STREET, SUITE 336
CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 958-5147
FAX: (843) 958-5148
E-MAIL: djeffersonj@sccourts.org

August 22, 2006

Hon. Daniel E. Shearouse
Clerk
SOUTH CAROLINA SUPREME COURT
P.O. Box 11330
Columbia, SC 29211

Re: State of SC v. Stephen C. Stanko
Indictment Number: 2005-GS-22-918

Dear Mr. Shearhouse:

Please find enclosed herewith the Report of the Trial Judge for the above captioned capital case. The report was transmitted to both the defense and state's counsel on August 21, 2006 for comment. Both have advised that they have no comments. By copy of this letter I am providing counsel with a copy of the Final Report.

If you have any questions or require further clarification please do not hesitate to contact me. With best regards, I am

Sincerely,

A handwritten signature in cursive script that reads "Deadra L. Jefferson".

Deadra L. Jefferson

DLJ/ms

Enclosure

cc: John G. Hembree, Esquire
Fran Humphries, Esquire
William I. Diggs, Esquire
Gerald A. Kelly, Esquire

RECEIVED

AUG 24 2006

S.C. SUPREME COURT

REPORT OF THE TRIAL JUDGE
IN THE COURT OF GENERAL SESSIONS
GEORGETOWN COUNTY, SOUTH CAROLINA
THE STATE
VS
STEPHEN CHRISTOPHER STANKO
Case No. 2005-GS-22-918

A. DATA CONCERNING THE DEFENDANT

1. Name: STEPHEN CHRISTOPHER STANKO
2. Date of Birth [REDACTED]
Month Day Year
3. Social Security Number [REDACTED] [] Unknown
4. Sex: Male ☒ 5. Race: White ☒
Female ☐ Black ☐
Other ☐
6. Education - Highest Grade Completed:
1 2 3 4 5 6 7 8 9 10 11 12 / GED 13 14 15 16
(Circle One) (College)
7. Do you have an opinion as to the Defendant's intelligence level?
Yes ☒ No ☐
- If so, is it
- a. Below Average ☐
b. Average ☐
c. Above Average ☒

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AUG 24 2006

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S.C. SUPREME COURT

8. Was a psychiatric evaluation performed? Yes ☒ No ☐
- a. If performed, by whom? Dr. Pamela Crawford (Forensic Psychiatrist), Dr. J. W. Thrasher, Jr. (Forensic Psychiatrist), Dr. Thomas H. Sachy (Neuropsychiatric Evaluation), Dr. Wu (Psychiatrist/Brain Scan Analysis)
- b. If performed, is defendant
1. Able to distinguish right from wrong? Yes ☒ No ☐
2. Able to cooperate intelligently in his own defense? Yes ☒ No ☐
- c. If performed, were character or behavior disorders found? Yes ☒ No ☐

Personality Disorder, Not Otherwise Specified with Narcissistic and Antisocial Features, Psychopath and Low Frontal Lobe Volumetric Mass and Inactivity relating to the Defendant's defense of Insanity.

9. Does the Defendant have a record of prior convictions? Yes ☒ No ☐
- a. If so, either attach hereto a record manifesting such prior convictions(s) or list the offenses(s), the date(s) of such offense(s) and the sentence(s) imposed:
- | | <u>Offense</u> | <u>Date of Offense</u> | <u>Sentence imposed</u> |
|----|-----------------------|------------------------|-------------------------|
| 1. | <u>See Exhibit A.</u> | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |
| 6. | | | |

10. Was the defendant a resident or non-resident of the county in which the trial was held?

Resident ☒

Non-Resident ☐

B. DATA CONCERNING PRE-TRIAL MATTERS

1. The defendant was arrested on April 12, 2005.
2. Was a preliminary hearing requested? Yes ☒ No ☐
3. Was a preliminary hearing conducted? Yes ☒ No ☐
4. The defendant was indicted at the August 24, 2005 term of the Court of General Sessions for Georgetown County, South Carolina.
5. List each charge alleged in the indictment.
 - a. Murder
 - b. Assault and Battery with Intent to Kill
 - c. Criminal Sexual Conduct in the First Degree
 - d. Kidnapping
 - e. Kidnapping
 - f. Armed Robbery
6. The defendant was arraigned on June 22, 2006.
 - a. If not arraigned, did the defendant waive arraignment?
Yes ☐ No ☐ N/A ☒
7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?
Yes ☒ No ☐
 - a. If not, did the defendant waive this right to a three day sight of the indictment?
Yes ☐ No ☐ N/A ☒

8. Did the solicitor notify the defendant at least thirty days before trial that the State would seek imposition of the death penalty upon the defendant?

Yes ☒

No ☐

9. Did the solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

Yes ☒

No ☐

10. Did the defendant move for a change of venue.

Yes ☐

No ☒ *

- a. If so, was the venue changed?

Yes ☐

No ☐ N/A ☒

- (1) If so, designate County.

*The Defendant made a cursory oral Motion to Change Venue during the June 22, 2006 pretrial hearing but acknowledged that such a motion was premature at that time. After the Jury was qualified the Defendant did not make or renew a Motion to Change Venue.

C. DATA CONCERNING THE TRIAL

1. The defendant was brought to trial in the Court of General Sessions for Georgetown County, South Carolina on August 1, 2006, during the General Sessions term of that Court.

2. How did the defendant plead?

Guilty ☐

Not Guilty ☒ *

*The Defendant entered a plea of Not Guilty by Reason of Insanity pursuant to SC Code Ann. Section 17-24-10.

3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

a. The offense(s) of which the defendant was convicted:

1. Murder
2. Assault and Battery with Intent to Kill
3. Criminal Sexual Conduct in the First Degree
4. Kidnapping
4. Kidnapping
5. Armed Robbery

b. The offense(s) of which the defendant was acquitted:

1. _____
2. _____
3. _____
4. _____
5. _____

4. On what date and at what time did the conviction(s) occur?

____ August 11, 2006 at 8:00 p.m. _____

D. DATA RELATING TO SENTENCING PROCEEDING

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury ☒ the trial judge ☐

a new jury ☐ a new trial judge ☐

a. If conducted before the trial jury,

1. On what date and at what time was the sentencing proceeding held?

Beginning August 14, 2006 at 9:30 o'clock A.M.

Concluding August 18, 2006 at 4:03 o'clock P.M.

- a. If such proceeding was conducted less than twenty four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [] No [] N/A [X]

- b. If conducted before the trial judge or a new trial judge,

1. And if the defendant was convicted by a jury,

- a. Did the defendant and the State waive having the trial jury recommend sentence

Yes [] No [] N/A [X]

If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes [] No [] N/A [X]

- b. On what date and what time was the sentencing proceeding held?

_____, 20__ at _____ o'clock ____.

M.

If such proceeding was conducted less than twenty four hours after the defendant's conviction, did the defendant waive the twenty four hour waiting period.

Yes [] No []

And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

_____, 199_____

c. If conducted before a new jury,

1. On what date was the sentencing proceeding held?

_____, 199_____ N/A [X]

2. Was such a proceeding conducted by the same judge who presided over the defendant's trial.

Yes [] No []

2. Which of following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

(A) Murder was committed while in the Instructed Found
commission of

1. Criminal sexual conduct, First degree,	[X]	[X]
2. Kidnapping	[X]	[X]
3. Burglary, _____ degree	[]	[]
4. Robbery while armed with a deadly weapon.	[X]	[X]
5. Larceny with use of a deadly weapon.	[X]	[X]
6. Killing by poison	[]	[]

7.	Physical torture	☒	☒
B.	Murder was committed by a person with a prior record of conviction for murder.	☐	☐
C.	The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	☐	☐
D.	The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	☐	☐
E.	the murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	☐	☐
F.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	☐	☐
G.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	☐	☐
H.	Murder wherein two or more persons are murdered by the		

defendant by one act or pursuant to one scheme or course of conduct.

[]

[]

- I. The murder of a child eleven years of age or under.

[]

[]

3. Was (were) the aggravating circumstance(s) found supported by the evidence?

Yes [X]

No []

4. Was there evidence of mitigating circumstances found supported by the evidence?

Yes [X]

No []

5. If so, which of the following mitigating circumstances was in evidence?

[] 1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

[X] 2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.

[] 3. The victim was a participant in the defendant's conduct or consented to the act.

[] 4. The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

[] 5. The defendant acted under duress or under the domination of another person.

[X] 6. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

- ☐ 7. The age or mentality of the defendant at the time of the crime(s).
- ☐ 8. the defendant was provoked by the victim into committing murder.
- ☐ 9. the defendant was below the age of eighteen at the time of the crime(s).
- ☒ 10. Other. Please explain if 10 is checked.

Non-Statutory Mitigation: The Defense presented evidence that the Defendant was in violation of his Community Supervision and engaged in other illegal activities including the unauthorized practice of law. The Defense contended that had the Solicitor's office and SCDPPPS followed through on complaints regarding his activities this would have prevented the offenses committed by the Defendant.

Family Dysfunction through the testimony of family counselor Dr. Evelyn Kaliff.

6. If tried with a jury, was the jury instructed to consider the circumstances in number 5 as mitigating circumstances?

Yes ☒ No ☐

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes ☒ No ☐

8. As a trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes ☒

No ☐

E. DATA RELATING TO OFFENSE(S)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes ☐ No ☒

b. Under the influence of narcotics or other dangerous drugs? Yes ☐ No ☒

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes ☒

No ☐

a. If so, check each weapon used

1. Poison ☐

2. Pistol ☐

3. Rifle ☐

4. Shotgun ☐

5. Blunt instrument ☒

Describe –

_Defendant's hands_____

6. Sharp instrument ☒

Describe - _Knife_____

7. Motor vehicle ☐

8. Other ☒

Describe-

_Ordinary Objects_____

3. Cause of death.

Asphyxia and blunt force trauma _____

4. County in which the body was found.

Georgetown County, South Carolina _____

5. County in which the murder occurred if different from county in which the body was found.

N/A [X]

F. DATA RELATING TO VICTIM

1. What were the victims' ages?

Laura Ling – 43 years old _____

Christina Ling- 15 years old _____

2. Was the victim related by blood or marriage to the defendant?

Yes []

No [X]

- a. If so, what was the relationship?

3. Were the victims the same race as the defendant? Yes [X] No []

4. Were the victims the same sex as the defendant? Yes [] No [X]

5. Were the victims physically harmed or tortured? Yes [X] No []

If yes, state nature of harm or extent of torture.

Laura Ling was bound with neckties and incapacitated. She suffered severe multiple blunt force trauma to her head and body, three stab wounds to neck, and ligature marks on the wrists. Her cause of death was Asphyxia by strangulation and blunt force trauma. The medical examiner testified that her

death would have been slow and that the majority of the injuries were inflicted while she was alive and in considerable pain. Christina Ling was bound and raped. She suffered severe blunt force trauma to her head resulting in her ear being severed. Her neck was also slit in two areas. The record supports that the assaults took place within inches of her mother. The record also supports that the assaults took place simultaneously.

G. DATA CONCERNING DEFENSE COUNSEL

1. Who was (were the defendant's attorney(s) and what was (were) his (their mailing address(es)?

	<u>Name</u>	<u>Mailing Address</u>
a.	William Diggs	1700 D Oak Street, Myrtle Beach, SC 29577
b.	Gerald Kelly	4760 Yemassee Highway Varnville, SC 29944

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by Defendant	☐
Appointed by Court	☒

- a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

	<u>Name</u>	<u>Date retained or appointed</u>	<u>Years experience as attorney</u>	<u>Years felony trial experience</u>
1.	William Diggs	9/2005	25 Years	15 Years
2.	Gerald Kelly	9/2005	24 Years	24 Years

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.
N/A

4. Did each counsel serve throughout the trial?

Yes ☒

No ☐

- a. If not, explain in detail.

H. GENERAL CONSIDERATIONS.

1. Was race raised by the defense as an issue in the trial? Yes ☐ No ☒
2. Did race otherwise appear as an issue in the trial? Yes ☐ No ☒
3. Were members of the defendant's race represented on the petit jury? Yes ☒ No ☐
4. Were members of the defendant's race represented on the jury venire? Yes ☒ No ☐
5. Was there any evidence that members of the Defendant's race were systematically excluded from the jury? Yes ☐ No ☒
6. Was the jury instructed to exclude race as an issue? Yes ☐ No ☒
7. Was there extensive publicity in the community

- concerning this case? Yes ☒ No ☐
8. Was the jury instructed to disregard such publicity? Yes ☒ No ☐
9. Was the jury sequestered? Yes ☒ No ☐
10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes ☒ No ☐
11. Your general comments concerning the appropriateness of the sentence imposed in this case.

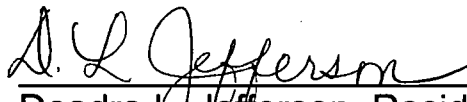
The sentence in this case was proportionate to and clearly supported by the record. The sentence was not the result of passion, prejudice, sympathy or any arbitrary factor.

12. If the defendant is a female, is she currently pregnant? Yes ☐ No ☐
- a. If so, the anticipated delivery date is
 N/A.
13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and
- a. His (their) comments are attached ☐
- b. He (they) stated he (they) had no comments ☒
- c. He has (they have) not responded ☐

This form was sent to the Defendant's Counsel at the same time it was sent to the Court.

CHRONOLOGY OF CASE

		<u>Elapsed Days</u>
1.	Date of offense April 8, 2005	<u>0</u>
2.	Date of arrest April 12, 2005	<u>5</u>
3.	Date trial began August 1, 2006	<u>475</u>
4.	Date sentence imposed August 18, 2006	<u>492</u>
5.	Date post trial motions ruled on August 18, 2006	<u>492</u>
6.	Date trial judge's report completed August 21, 2006	<u>495</u>
7.	*Date received by Supreme Court _____	_____
8.	*Date sentence review completed _____	_____
9.	*Total elapsed Days _____	_____
	*To be completed by Supreme Court	



Deadra L. Jefferson, Resident Judge

Date: August 22, 2006

NAME-STANKO, STEPHEN C .STOPHER SEX-M RACE-W
HEIGHT-603 WEIGHT-195 EYES-BRO HAIR-BRO SKIN-MED BORN-CC
FPC-PO141116061813141912 HENRY-14 0 1 U 000 6
L 17 U 000

PHOTOGRAPH AVAILABLE

1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAFIS

* DNA - TAKEN

DATE RECORD ENTERED--08/06/1993

DATE OF LAST UPDATE--04/08/2005

ADDITIONAL IDENTIFIERS

NAME	BIRTH DATES	MARKS	SOC SEC	MISC NUM
STANKO, STEVE	[REDACTED]	SC CHIN	[REDACTED]	

CONTRIBUTOR/SUBJECT

DOA/RCVD CHARGE/DISPOSITION/ETC

STANKO, STEPHEN CHRISTOPHER 07/07/1993
SC0100100 CHARLESTON POLICE DE
CASE-141080
WARR-D652634

ARREST CHARGE 01-GRAND LARCEN

Y
PHOTOGRAPH AVAILABLE

WARR-D652632

ARREST CHARGE 02-BREACH OF
TRUST

WARR-D652633

ARREST CHARGE 03-BREACH OF
TRUST

CIT-16-13-230

DOC-93GS1006592 WARR-D652632

COURT CHARGE 01-BREACH OF
TRUST W/FRAUDULENT INTENT
COURT DISP-CONVICTED;30 DYS
SUS 12 MOS PROB-CONCURRENT
COURT DATE-03/08/1995

CIT-16-13-230

DOC-93GS1006593 WARR-D652633

COURT CHARGE 02-BREACH OF
TRUST W/FRAUDULENT INTENT
COURT DISP-CONVICTED;30 DYS
SUS 12 MOS PROB-CONCURRENT
COURT DATE-03/08/1995

CIT-16-13-30 UNCLASSIFIED

DOC-93GS1006594 WARR-D652634

COURT CHARGE 03-LARCENY (GRAN
D)

COURT DISP-CONVICTED;3 YRS
SUS 12 MOS PROB-200 HRS
PS-REST \$2020.00
COURT DATE-03/08/1995

STANKO, STEPHEN CHRISTOPHER 08/08/1994
SC0100000 CHARLESTON CNTY SO
CASE-93074149B
WARR-D597422

ARREST CHARGE 01-BREACH OF
TRUST

OFFENSE DATE-08/08/1994
PHOTOGRAPH AVAILABLE

COURT CHARGE 01-BREACH OF
TRUST W/ FRAUD INTENT

COURT DISP-NON-CONVICTION;NO
BILL

COURT DATE-03/16/1995 000082

WARR-D597422

CASE-960204450
WARR-E755773 *

WARR-E755774 *

WARR-E755765 *

WARR-E755797

WARR-E755798

WARR-E755799

WARR-E755800

WARR-E755801

WARR-E755802

CIT-16-3-910 FELONY
DOC-96GS0800545 WARR-E755773

CIT-16-13-240(1) FELONY
DOC-96GS0800556 WARR-E755797

CIT-16-13-240(1) FELONY
DOC-96GS0800557 WARR-E755798

CIT-16-13-230(B)(3) FELONY
DOC-96GS0800547 WARR-E755799

CIT-16-13-230(B)(3) FELONY
DOC-96GS0800548 WARR-E755800

ARREST CHARGE 01-KIDNAPPING
OFFENSE DATE-02/20/1996
PHOTOGRAPH AVAILABLE

ARREST CHARGE 02-BREACH OF
TRUST
OFFENSE DATE-02/20/1996

ARREST CHARGE 03-BREACH OF
TRUST
OFFENSE DATE-02/20/1996

ARREST CHARGE 04-BREACH OF
TRUST
OFFENSE DATE-02/20/1996

ARREST CHARGE 05-BREACH OF
TRUST

ARREST CHARGE 06-BREACH OF
TRUST

ARREST CHARGE 07-BREACH OF
TRUST

ARREST CHARGE 08-ASSAULT AND
BATTERY

ARREST CHARGE 09-GRAND LARCEN
Y OF MOTOR VEHICLE

COURT CHARGE 01-KIDNAPPING
COURT DISP-CONVICTED;10YRS
CONCURRENT
COURT DATE-07/29/1996

COURT CHARGE 02-OBTAIN SIGNAT
URE/PROP.FALSE PRETENSE>\$5
.000

COURT DISP-CONVICTED;5YRS
CONCURENT REST \$1800
COURT DATE-07/29/1996

COURT CHARGE 03-OBTAIN SIGNAT
URE/PROP.FALSE PRETENSE>\$5
.000

COURT DISP-CONVICTED;5YRS
CONCURRENT RESTITUTION
\$2362.28
COURT DATE-07/29/1996

COURT CHARGE 04-BREACH OF
TRUST W/FRAUD INTENT,VALUE
>\$5,000

COURT DISP-CONVICTED;5YRS
CONCURREN
COURT DATE-07/29/1996

COURT CHARGE 05-BREACH OF
TRUST W/FRAUD INTENT,VALUE
>\$5,000

COURT DISP-CONVICTED;5YRS

000083

DOC-96GS0800549 WARR-F755801

COURT CHARGE 06-BREACH OF
TRUST W/FRAUD INTENT, VALUE
>\$5,000
COURT DISP-CONVICTED; 4YRS
CONCURRENT
COURT DATE-07/29/1996

CIT-16-13-230(B)(3) FELONY
DOC-96GS0800550 WARR-E755802

COURT CHARGE 07-BREACH OF
TRUST W/FRAUD INTENT, VALUE
>\$5,000
COURT DISP-CONVICTED; 5YRS
CONCURRENT
COURT DATE-07/29/1996

STANKO, STEPHEN CHRISTOPHER A02/23/1996
SC0230000 GREENVILLE CNTY SO
CASE-144807
WARR-E755773 *

ARREST CHARGE 01-KIDNAPPING
PHOTOGRAPH AVAILABLE

WARR-E755774 *

ARREST CHARGE 02-ASLT & BATT
W/INT TO KILL

WARR-E755765 *

ARREST CHARGE 03-GRAND LARCEN
Y AUTO

SC018025C LIEBER RECT EVAL CT 08/06/1996 CUSTODY STATUS-RECEIVED
CASE-235278
CIT-16-3-910 FELONY
START DATE-08/06/1996

COURT CHARGE 01-KIDNAPPING
COURT DISP-CONVICTED; 10Y

CIT-C/L,

COURT CHARGE 02-ASSAULT/BATTE
RY OF HIGH AND AGGRAVATED
NATURE
COURT DISP-CONVICTED; 8Y CC

CIT-16-13-230(B)(3) FELONY

COURT CHARGE 03-BREACH OF
TRUST W/FRAUD INTENT, VALUE
>\$5,000
COURT DISP-CONVICTED; 5Y CC 8
CTS

CIT-16-13-230(B)(3) FELONY

COURT CHARGE 04-BREACH OF
TRUST W/FRAUD INTENT, VALUE
>\$5,000
COURT DISP-CONVICTED; 4Y CC

CIT-16-13-240(1) FELONY

COURT CHARGE 05-OBTAIN SIGNAT
URE/PROP.FALSE PRETENSE>\$5
,000
COURT DISP-CONVICTED; 5Y CC 2
CTS

* - WARRANT OCCURS IN MORE THAN ONE ARREST CYCLE UNDER THIS SID NUMBER

BASED ON SEARCH OF SCLED CJICS CCH FILE USING FBI/581530TA6
REQUESTED FOR CRIMINAL JUSTICE PURPOSES

SCLED CJICS RECORD INDICATES SUBJECT HAS OUT OF STATE ARREST INFORMATION
REQUEST FORWARDED TO NCIC FOR OUT-OF-STATE INFORMATION
INFORMATION FROM OTHER STATES TO FOLLOW THRU NLETS VIA YOUR TERMINAL

000084

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING HANDGUN IN
SOUTH CAROLINA

INFORMATION SUBMITTED TO SLED CCH PURSUANT TO 16-23-10 (C) AND 23-31-110
(C) OF THE SOUTH CAROLINA CODE OF LAWS INDICATES THIS INDIVIDUAL HAS BEEN
CONVICTED OF A CRIME OF VIOLENCE AND IS NOT PERMITTED TO POSSESS OR
ACQUIRE A HANDGUN.

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING FIREARM OR AMMUNITION
PURSUANT TO FEDERAL GUN CONTROL ACT OF 1968

INFORMATION SUBMITTED TO SLED CCH INDICATES THIS INDIVIDUAL HAS BEEN
CONVICTED OF A FELONY ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS.
THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT, OR RECEIVE ANY
FIREARM OR AMMUNITION AFFECTED BY INTERSTATE OR FOREIGN COMMERCE, AS
DEFINED BY THE GUN CONTROL ACT OF 1968 (18.U.S.C. 922(G)).

** S C CJICS END OF RECORD **

*

=====

DATE: 04-09-2005 12:58:34 PM Type: Recv
SUBJECT: QH From III
Message:
Reference: UNKNOWN
Msg Key : QH
Date/Time: 20050409125832
Source : III

UNKNOWN.III.QH.20050409125832.

TO: HRRCC002-00030960 20050409 12:58:32 00352A9774
FROM: III 20050409 12:58:32
7L01156D0034952QH
SC0260400

THIS NCIC INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR
INQUIRY ON NAM/STANKO,STEPHEN CHRISTOPHER SEX/M RAC/W DOB/19680113
PUR/C

NAME	FBI NO.	INQUIRY DATE
STANKO,STEPHEN CHRISTOPHER	581530TA6	2005/04/09

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	BIRTH PLACE	PHOTO
M	W	[REDACTED]	603	195	BRO	BRO	CUBA	N

FINGERPRINT CLASS
PD 14 11 16 06
18 13 14 19 12

ALIAS NAMES
STANKO,STEVE

OTHER SCARS-MARKS-
BIRTH DATES TATTOOS SOCIAL SECURITY
1968/01/18 SC CHIN [REDACTED]

IDENTIFICATION DATA UPDATED 2005/04/08

000085

FOLLOWING:

SOUTH CAROLINA - STATE ID/SC00910315
FBI - FBI/581530TA6

THE RECORD(S) CAN BE OBTAINED THROUGH THE INTERSTATE IDENTIFICATION INDEX BY USING THE APPROPRIATE NCIC TRANSACTION.

END

=====

DATE: 04-09-2005 12:58:31 PM Type: Recv
SUBJECT: ICHS From SCCH
Message:
Reference: 01HH00002Q
Msg Key : ICHS
Date/Time: 20050409125830
Source : SCCH

01HH00002Q.SCCH.ICHS.20050409125830.
TO: HRRCC002-00030958 20050409 12:58:30 003F0F83DC
FROM: SCCH 20050409 12:58:30
ICHS/QH INQUIRY OF SCLED CCH FILES USING:
ATN-JONES, MAURICE
ORI-SC0260400 PUR-C
NAM-STANKO, STEPHEN CHRISTOPHER
SEX-M RAC-W DOB-19680113

DATE-04/09/2005 TIME-12:59 PAGE-01 OF 01
ORI-SC0260400
SCLED IDENT RESPONSE TO ICHS/QH INQUIRY
THIS RESPONSE CONTAINS POSSIBLE HITS ONLY AND DOES NOT IMPLY A POSITIVE MATCH WITH THE INDIVIDUAL IN QUESTION

NAME-STANKO, STEPHEN CHRISTOPHER SEX-M RACE-W
HEIGHT-603 WEIGHT-195 EYES-BRO HAIR-BRO SKIN-MED BORN-CC
FPC: HENRY-14 0 1 U 000 6 NCIC-P0141116061813141912
L 17 U 000
SID-SC00910315 FBI-581530TA6
PHOTOGRAPH AVAILABLE
1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAFIS
DATE RECORD ENTERED--08/06/1993 DATE OF LAST UPDATE--04/08/2005

ALIAS NAMES-STANKO, STEVE

BIRTH DATES-[REDACTED]

MARKS, ETC-SC CHIN

SOC SEC NUMBERS-[REDACTED]
SCLED CJICS RECORD INDICATES SUBJECT HAS OUT-OF-STATE ARREST INFORMATION

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING HANDGUN IN SOUTH CAROLINA

000086

INFORMATION SUBMITTED TO SLED CCH PURSUANT TO 16-23-10 (C) AND 23-31-110 (C) OF THE SOUTH CAROLINA CODE OF LAWS INDICATES THIS INDIVIDUAL HAS BEEN

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING FIREARM OR AMMUNITION
PURSUANT TO FEDERAL GUN CONTROL ACT OF 1968

INFORMATION SUBMITTED TO SLED CCH INDICATES THIS INDIVIDUAL HAS BEEN
CONVICTED OF A FELONY ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS.
THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT, OR RECEIVE ANY
FIREARM OR AMMUNITION AFFECTED BY INTERSTATE OR FOREIGN COMMERCE, AS
DEFINED BY THE GUN CONTROL ACT OF 1968 (18.U.S.C. 922(G)).

** END OF IDENT **

REQUESTED FOR CRIMINAL JUSTICE PURPOSES MAY OCCUR DAILY A NEW INQUIRY SHOULD
MADE AND NO SUBSEQUENT USE OF
THIS RECORD IS ALLOWED.

FOR COMPLETE CRIMINAL HISTORY, PERFORM ICHR INQUIRY USING SID NUMBER OR
FBI NUMBER.

REQUEST FORWARDED TO NCIC
ANY OUT-OF-STATE IDENT INFORMATION TO FOLLOW FROM NCIC VIA YOUR TERMINAL
** END OF MESSAGE **

000087



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 21, 2006

The Honorable Deadra L. Jefferson
100 Broad St., Suite 336
Charleston, SC 29401

Re: The State v. Stanko, Stephen C.

Dear Judge Jefferson:

As you know, the trial judge must submit a Death Penalty Sentencing Report to the Supreme Court on all death penalty cases.

Please find enclosed a copy of this questionnaire for your convenience in completing the report in the above matter.

Very truly yours,

Brenda F. Shealy
CHIEF DEPUTY CLERK

BFS/dmh

Enclosure



Law Offices of

WILLIAM ISAAC DIGGS

Licensed in NC & SC

1700 Oak Street, Suite D
Myrtle Beach, SC 29577

843.626.4243
843.626.5123 Fax

www.MyrtleBeachLaw.com

August 19, 2006

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: The State of South Carolina vs. Stephen C. Stanko
Case No: 2005-GS-22-918

Dear Mr. Shearouse:

Enclosed for filing please find the original and two copies of the Appellant's Notice of Intent to Appeal in the above capital prosecution along with our Certificate of Service showing service on opposing counsel. Please note that defense counsel were court appointed in this case.

If you have any questions or require anything further, please don't hesitate to contact me.

Sincerely yours,



William Isaac Diggs

WID/jn

cc: Greg Hembree, Solicitor
Post Office Box 1276
Conway, SC 29528

Joseph L. Savitz, Chief Attorney
S.C. Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, SC 29201

Gerald Kelly, Esquire

RECEIVED
AUG 21 2006
S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

RECEIVED

AUG 21 2006

S.C. SUPREME COURT

Deadra L. Jefferson, Circuit Court Judge

Case No. 2005-GS-22-918

The State,

Respondent.

v.

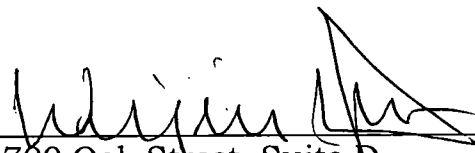
Stephen Christopher Stanko,

Appellant

NOTICE OF INTENT TO APPEAL

COMES NOW THE APPELLANT, by and through his undersigned counsel who would give notice of his intent to appeal the jury verdict rendered in his case on August 11, 2006 (guilt phase) and on August 18, 2006 (sentencing phase) in Georgetown County Court of General Sessions wherein he was sentenced to death by the Honorable Deadra L. Jefferson presiding judge.

**WILLIAM ISAAC DIGGS
ATTORNEY AT LAW**


1700 Oak Street, Suite D
Myrtle Beach, SC 29577
(843)-626-4243

Gerald Kelly, Esquire
4760 Yemassee Highway
Varnville, SC 29944
803.943.0510

ATTORNEYS FOR THE APPELLANT

Other Counsel of Record:

Greg Hembree
Solicitor for the 15th judicial circuit
Post Office Box 1276
Conway, SC 29528

ATTORNEY FOR THE RESPONDENT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

RECEIVED

AUG 21 2006

Deadra L. Jefferson, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2005-GS-22-918

The State,

Respondent.

v.

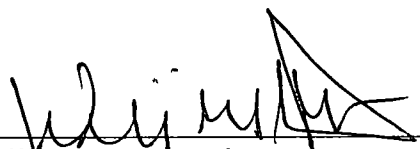
Stephen Christopher Stanko,

Appellant

**CERTIFICATE OF SERVICE
NOTICE OF APPEAL**

This is to certify that I have this 19th day of August, 2006, deposited in the U.S. Postal Service one copy of the Appellant's Notice of Appeal in the above case with postage prepaid and addressed to opposing counsel at the following address:

J. Gregory Hembree, Solicitor
PO Box 1276
Conway, SC 29526



William Isaac Diggs

Myrtle Beach, South Carolina