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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-000211

STEPHEN C. STANKO #6022.....PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the PCR Court erred in adopting the State's post-hearing brief with negligible changes despite the PCR judge's assertion that he would and did draft his own order with his own findings of fact and conclusions of law.

II.

Whether the PCR Court improperly applied *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), in assessing prejudice on remand by considering the decisions made, and evidence presented, by unqualified initial PCR counsel and the initial PCR court's rulings based on unqualified counsel's presentation.

III.

Whether the PCR Court erred in finding trial counsel were not ineffective where they presented dehumanizing evidence (such as labeling Applicant a psychopath and comparing him to infamous serial killers), pursued a legally impossible defense of not guilty by reason of insanity, and failed to investigate and present mitigating evidence related to Applicant's brain damage, mental illness, and life history.

IV.

Whether the PCR Court erred in finding trial counsel were not ineffective in failing to investigate and present mitigating evidence that Applicant had demonstrated good behavior in prison and the likelihood that he would not be a future danger while incarcerated.

STATEMENT OF THE CASES

Petitioner Stephen Stanko was charged with, and sentenced to death for, murder in both Georgetown and Horry counties. The Georgetown County trial—the subject of this post-conviction relief (PCR) appeal—occurred first in 2006. Lead trial counsel William Diggs recognized there was no question about whether Stanko was guilty of the charged offenses. Diggs nevertheless pursued a guilt phase defense of insanity, which was not legally viable, without conducting a thorough mitigation investigation. In doing so, trial counsel and the defense experts used dehumanizing labels and descriptions of Stanko before the jury, including repeatedly referring to him as a psychopath and comparing him to the devil, crocodiles, serial killers, and a tiger. Counsel’s theory of insanity was that Stanko suffered from brain damage that rendered him a psychopath unable to control his violent behavior. The jury rejected this proposition, finding Stanko guilty. Trial counsel presented little mitigation evidence, which was undermined by the dehumanizing defense presentation, and the jury sentenced Stanko to death. This Court upheld his conviction and sentence on appeal.

Stanko then filed a PCR application in Georgetown County where he was represented at a PCR hearing by appointed counsel Stuart Axelrod and Bobby Fredrick. The PCR court denied Stanko’s PCR application, and this Court appointed new counsel for the appeal. While preparing the appeal, PCR appellate counsel moved for remand based on indications that Stanko’s initial PCR counsel were not qualified pursuant the requirements for capital PCR counsel set forth in South Carolina Code Section 17-27-160(B) and *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). This Court remanded for a determination of initial PCR counsel’s qualifications.

On remand, the PCR judge found that initial PCR counsel were not qualified and held a hearing on whether their lack of qualifications prejudiced Stanko. This was the first hearing of its

kind following *Robertson*. At the prejudice hearing, newly appointed and qualified PCR counsel presented substantial mitigating evidence related to Stanko’s life history, biological limitations on his ability to cope with stressors, and compounding stressors leading up to the offenses that had not been uncovered or presented by trial counsel. The remand PCR judge ruled that Stanko failed to demonstrate prejudice by signing an order drafted by the Attorney General’s Office with only nominal changes. The remand PCR order is controlled by multiple errors of law and its factual findings are not supported by probative evidence. This Court should grant certiorari and reverse or remand for further proceedings for the remand PCR judge to make his own findings of fact and conclusions of law and to apply the proper legal standard for determining prejudice.

RELEVANT FACTS

I. TRIAL PREPARATION AND PROCEEDINGS.

a. *Pretrial Defense Theory Development.*

Stanko was arrested on April 11, 2005 and charged with the murder of his girlfriend, Laura Ling, and sexual assault of her minor daughter in Georgetown County and additional offenses in Horry County. The Georgetown County case proceeded to trial first, and the trial court appointed attorney William I. Diggs as Stanko’s lead counsel and Gerald Kelly as second chair counsel. App. 2987. As first chair, Diggs “set the agenda” for the defense.¹ App. 2987.

Prior to any expert evaluation of Stanko, Diggs settled on his defense theory—that Stanko was not guilty by reason of insanity (“NGRI”) because he was a psychopath with brain damage. Diggs stated he wanted to pursue his theory from “the first time [he] talked to” Stanko. See App. 3076. He presented his theory to Kelly “the first time [Kelly] ever met with [Diggs] at his office.”

¹ Since Stanko’s trial, Diggs has been disbarred in both North and South Carolina, where he was previously licensed to practice law. App. 3022.

App. 2989. Prior to conducting any investigation, Diggs informed the defense mitigation investigator, Dale Davis, of the defense theory at “the first meeting [they] had.” App. 3105.

Diggs identified Dr. Thomas Sachy, a psychiatrist from the Atlanta area, as a potential expert to support his theory.² On March 20, 2006, Diggs contacted Dr. Sachy by telephone. App. 3036–37, 3472. After this single thirty-minute telephone call, Diggs—without the benefit any expert evaluation—decided that “[Sachy] will be our expert” and noted the same on his time sheet.³ App. 3472. Diggs testified that he never explored any alternatives to raising the insanity defense in preparation for Stanko’s trial. App. 3038.

Prior to his involvement in Stanko’s case, Dr. Sachy served as a defense expert for Reinaldo Rivera in his Georgia capital case. App. 3556–61. In that case, Sachy testified that a “brain abnormality” turned Rivera “into a violent psychopath.” App. 3559. Sachy’s psychopathy theory, presented in support of a claim that Rivera was not guilty by reason of insanity, was rejected by a jury and the jury sentenced Rivera to death. *See* App. 3109–10. Despite the theory’s failure in Georgia, Diggs and Dr. Sachy presented the same defense—with the same experts—in Stanko’s case.

Though Diggs focused solely on pursuing an insanity defense to the crime, Kelly retained mitigation investigator Dale Davis to conduct a social history investigation. App. 2988. At the PCR hearing, Davis described Diggs as “focused on [h]is theory to the exclusion of all other

² Dr. Sachy pled guilty to federal drug charges in June 2021 and faces up to ninety-seven months in prison. *Jones County doctor pleads guilty before federal drug trial*, 13WMAZ (Jun. 22, 2001), <https://perma.cc/3TKJ-M3EH>.

³ Drs. Tora Brawley and Donna Schwartz-Watts were originally scheduled to conduct psychological evaluations of Stanko, but Diggs cancelled their evaluations before they met with Stanko because Diggs decided he wanted to rely on Sachy’s opinions and presentation. *See* App. 3052–53, 3553.

evidence.” App. 3110. Prior to trial, she told Diggs that she had concerns about the defense he planned to offer because “you can’t come in and describe your client in these terms [i.e. psychopath] and expect anyone to care what happens to them. . . . [T]he whole purpose of mitigation is . . . to show the humanity of the person.” App. 3110. Davis believed that the concerns she expressed “went over [Diggs’s] head.” App. 3110.

Davis conducted a social history investigation but did so with little input from or communication with trial counsel. See App. 3104. Even though she was not a mental health expert, Davis recognized red flags of mental illness and sent information regarding Stanko’s obsessive compulsive tendencies and hypergraphia (a compulsion to write associated with various mental health disorders) to trial counsel. App. 3115–16, 3572–76. Davis did not believe trial counsel passed that information on to any of the experts they hired, which was contrary to her experience in prior capital cases, where trial counsel provided the information that she collected to retained experts to aid in their evaluations. App. 3101, 3116–17.

b. Trial Guilt Phase.

During the guilt phase of the trial, Diggs presented the testimony of several experts selected by Sachy in an effort to prove that Stanko was legally insane at the time of the crime. Dr. Marc Einhorn testified that he administered Stanko’s positron emission (“PET”) scan. Dr. Joseph Wu reviewed the PET scan, which revealed abnormalities in the frontal lobe that reduced frontal lobe functioning at fifty to eighty percent (compared to a normal brain). App. 627. Neither Dr. Einhorn nor Dr. Wu conducted a clinic interview of Stanko or spoke to witness about Stanko’s functioning,

and neither were asked to opine on how the brain abnormality would have affected Stanko's functioning or behavior.⁴

Diggs then called Dr. Sachy as the "star" expert witness to describe the significance of the brain scan findings. Sachy testified Stanko has a "brain defect," App. 709, which manifests in his brain being "unresponsive to repeated threats and jailings by the criminal system and [] unresponsive to repeated psychiatric treatment." App. 730. He testified he was "100 percent certain" Stanko is a "psychopath," used the term "psychopath" many times throughout his testimony to describe Stanko, and Stanko him to "famous psychopaths in history," including Ted Bundy, John Wayne Gacy, the killer in Alfred Hitchcock's movie *Psycho*, and Hannibal Lecter from the *Silence of the Lambs*. App. 730, 743, 745, 760–61. Sachy elaborated on these comparisons with further dehumanizing testimony: "[Psychopaths] are terrifying. They are like evil. They are like the devil." App. 761. Based on this testimony, trial counsel argued that Stanko was not guilty by reason of insanity.

The State's guilt phase presentation included the testimony of Ms. Ling's daughter identifying Stanko as the man who raped and attempted to kill her and who she witnessed kill her mother. App. 200–234. A SLED DNA analysis also testified that blood found at Ms. Ling's house and semen from the daughter's rape kit matched Stanko. App. 351–56. To counter the defense's NGRI theory, the State called Dr. Pamela Crawford who testified that she diagnosed Stanko with a personality disorder not otherwise specified with narcissistic and antisocial features, App. 838, and that the South Carolina insanity statute explicitly excludes antisocial acts as possible evidence that a person meets the insanity criteria. App. 843. The State also called Drs. Tora Brawler,

⁴ Dr. Bernard Albiniak testified generally about brain functioning and regions of the brain. App. 400–44. Dr. James Thrasher testified about interviewing Stanko and about Stanko's birth records, which showed Stanko's survival was questionable around the time of his birth. App. 457, 463–66.

William Brannon, and Kenneth Spicer, who testified Stanko's neuropsychological testing was normal and that the brain imaging did not show any abnormalities. App. 884–985. At the conclusion of the guilt phase, the jury rejected the NGRI defense and found Stanko guilty on all counts.

c. Trial Penalty Phase.

During the penalty phase of the trial, Diggs essentially re-presented the evidence presented in the guilt phase, App. 1924–98, 2028–97, 2152–77, and Sachy testified that Stanko's psychopathy made him prone to violence and impulsivity. App. 2163. Kelly presented some evidence that, prior to the capital crimes, Stanko was involved in several schemes or cons that had been reported to various state agencies, but the agencies did nothing to prevent Stanko from committing additional crimes. *See, e.g.*, App. 1770–1825.

Kelly also presented brief testimony from three witnesses who worked at the Georgetown County Detention Center where Stanko was detained prior to trial: Corporal Michael Stanley, Officer Shirlease Maynard, and Sergeant Victoria Jones. App. 1714–28. Kelly asked the witnesses yes or no questions, and the witnesses generally responded with short answers agreeing with Kelly's statements that Stanko was not a problem in the jail. Kelly did not meet at least two of the three detention center witnesses prior to their testimony. App. 1714, 1725.

Finally, Diggs presented the testimony of Dr. Evelyn Califf, a Christian family counselor, who testified in generalities that Stanko had a dysfunctional family with a strict father. App. 2257–75. Califf affirmed Sachy's dehumanizing labels by testifying that Stanko “has tendencies for antisocial,” “has more narcissism than being a sociopath,” and “he certainly has a lot of psychopathic issues.” App. 2280–81. Califf testified she became involved in the case only two and a half weeks before testifying and was unable to get in contact with Stanko's family during that

time. App. 2276. No one from Stanko's family or childhood testified. After the defense presentation, the jury returned a verdict of death in approximately two hours. App. 2503–05.

On appeal, this Court upheld Stanko's conviction and sentence. *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008).

II. INITIAL POST-CONVICTION RELIEF PROCEEDINGS.

Stanko timely filed a PCR Application, and this Court appointed Judge J. Michael Baxley to oversee the matter, who initially appointed Everett P. Godfrey, Jr. and J. Andrew Ritner to represent Stanko. App. 2817. Prior to a hearing on the merits of Stanko's PCR claims, both attorneys were replaced by other attorneys: Stuart Mark Axelrod was substituted for Godfrey, and Bobby Frederick was substituted for Ritner as second chair counsel. App. 2818.

Axelrod and Frederick represented Stanko at the hearing on the merits of his claims. App. 2818. After the PCR hearing, Judge W. Jeffrey Young, who replaced Judge Baxley, signed a consent order adding attorney Tristan Shaffer as third-chair counsel of record. App. 2818. Judge Young denied relief on June 27, 2016. App. 2818.

Stanko timely filed a notice of appeal, and this Court appointed undersigned counsel Lindsey S. Vann to handle the appeal. While reviewing the initial PCR record, PCR appellate counsel discovered it appeared neither Axelrod nor Frederick met the qualification requirement set forth in South Carolina Code Section 17-27-160(B) and asked this Court to remand pursuant to *Robertson*. App. 2738–39. On December 14, 2017, this Court granted Stanko's motion and remanded the case to Judge Craig Brown to “conduct a hearing on whether the attorneys appointed to represent [Stanko] before the circuit court in this matter met the requirements of section 17-27-160.” App. 2738. If Judge Brown determined that counsel did not meet the qualification

requirement, this Court ordered “Judge Brown shall conduct an additional hearing to determine if [Stanko] was prejudiced by the attorneys’ lack of qualifications.” App. 2738.

III. POST-CONVICTION RELIEF PROCEEDINGS ON REMAND.

a. Initial PCR Counsel Were Unqualified.

Judge Brown held a hearing on January 9, 2018 to determine initial PCR counsel’s qualifications. App. 2740–2815. By an order dated January 16, 2018, Judge Brown found initial PCR counsel “failed to meet the requirements of Section 17-27-160.” App. 2824. Judge Brown determined it was undisputed that Axelrod was appointed as first-chair counsel and neither Frederick nor Shaffer met the requirements of Section 17-27-160. App. 2823. The court then found Axelrod “had not previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings” and failed to meet the alternative qualification requirement because Axelrod had not completed at least “twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.” App. 2824 (citing S.C. Code § 16-3-26(B); *id.* § 17-27-160). Therefore, the court found Axelrod “failed to meet the requirements of Section 17-27-160, S.C. Code.” App. 2824. Because failure to meet the qualification requirement “constitutes deficient performance per se” pursuant to *Robertson*, Judge Brown ordered a hearing “to determine if [Stanko] was prejudiced by Mr. Axelrod’s lack of qualifications.” App. 2824; *Robertson*, 418 S.C. at 521, 795 S.E.2d at 37 (holding that following a determination that initial PCR counsel were not qualified, establishing per se deficient performance, the PCR applicant still bears the burden of proving prejudice).

b. *Proceedings to Determine Prejudice.*

In advance of a hearing on prejudice, Judge Brown determined the prejudice standard would be the standard for prejudice set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and appointed a second attorney to represent Stanko, Henry (“Hank”) Anderson, in accordance with South Carolina Code section 17-27-160(B). App. 2842, 2843, 2860–61. The parties then engaged in discovery, and over Stanko’s objection, Judge Brown ordered counsel for Stanko to turn over initial PCR counsel’s time sheets, expenditures for experts, and investigation notes. App. 2932–33.

On January 28–29, 2019, Judge Brown held an evidentiary hearing on the question of prejudice. As described in more detail as relevant to the claims below, Stanko presented testimony from witnesses who described trial counsel’s inadequate trial preparation, as well as mitigating mental health, life history, and prison adaptability evidence that trial counsel failed to uncover and present. Over the State’s objection, Stanko also introduced the prior testimony and an affidavit of Russell Stetler, an expert in the professional norms for the investigation and presentation of mitigation and mental health evidence, describing the professional norms at the time of Stanko’s trial in 2006. App. 2943–44.

Over Stanko’s objection that his testimony was not relevant to the issues before the court, the State offered the testimony of Tristan Shaffer, one of Stanko’s initial PCR attorneys. App. 404. Stanko argued that Shaffer’s testimony was irrelevant and that Stanko had not waived attorney-client privilege with respect to Shaffer’s preparation and strategy in the initial PCR proceedings because, pursuant to *Robertson*, the finding that initial PCR counsel failed to meet the statutory qualification requirements constituted *per se* deficient performance. App. 3333. As such, initial

PCR counsel’s preparation and strategic decision-making—relevant only to the performance prong of *Strickland*—was not before Judge Brown for consideration at the prejudice hearing. App. 3333.

Following the hearing, the parties submitted post-hearing briefing. App. 3918–59, 3960–4050, 4051–57. Judge Brown initially indicated he would deny relief and asked the Attorney General’s Office to prepare a proposed order, but following Stanko’s objection to the State drafting the order, Judge Brown indicated he would draft it himself. App. 4174, 4176, 4178. Judge Brown later indicated that, though he had drafted his own 41-page order, he realized he did not include cites for portions of the order and intended to use the State’s post-hearing memorandum as a template. App. 4180. The next day, Judge Brown emailed counsel a 90-page Order, which was an almost verbatim adoption of the State’s memorandum, that he would ultimately sign as the order denying relief.⁵ App. 4182.

Stanko timely filed a Motion to Alter or Amend Judgment, App. 4148–53, 4154–82. Judge Brown denied the motion on June 9, 2021. App. 4282. This appeal follows.

⁵ The only changes made to the State’s brief were cosmetic—i.e. updating citations and changing phrases like “Respondent argues” to “the Court finds”—and adding two footnotes referring to how evidence was used in Applicant’s second trial in Horry County (footnotes 12 and 19). App. 4058–4147.

ARGUMENT

REASONS THE WRIT SHOULD BE GRANTED

I. THE PCR COURT ERRED IN ADOPTING THE STATE’S POST-HEARING BRIEF WITH NEGLIGIBLE CHANGES AS ITS ORDER DENYING POST-CONVICTION RELIEF.

Judge Brown’s adoption of the State’s post-trial memorandum as his order denying relief on remand is particularly troublesome in this case that addressed prejudice under *Robertson* for the first time. Instead of signing the order he drafted with his own findings of facts and conclusions of law, Judge Brown abdicated his duty as a judge assigned jurisdiction over a capital PCR proceeding by adopting the adversarial pleading of the State.

The Legislature and this Court have recognized the impropriety of a capital PCR judge adopting an order drafted by the State. The PCR statute requires a capital PCR judge to “in writing . . . make specific findings of fact and state expressly the judge’s conclusions of law relating to each issue.” See S.C. Code § 17-27-160(D); see also S.C. Code § 17-27-80 (governing post-conviction relief cases generally) (“The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented”). This Court has repeatedly expressed concerns with PCR courts issuing orders “that do not comply with section 17-27-80 and Rule 52(a), [SCRCP],” requiring that “the court shall find the facts specially and state separately its conclusions of law thereon.” See, e.g., *Fishburne v. State*, 427 S.C. 505, 515, 832 S.E.2d 584, 589 (2019); *Simmons v. State*, 416 S.C. 584, 592–93, 788 S.E.2d 220, 225 (2016). Especially given the seriousness of a death penalty case, this Court “strongly encourage[s]” judges presiding in capital cases to “draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004); see also *Woodson v. North Carolina*, 428 U.S. 280, 303–04, 305 (1976) (“Because of that qualitative difference [between a death sentence and any other

term of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

The adoption of the State’s memorandum is especially problematic in this case because: (1) it addresses questions of first impression related to prejudice determinations on remand after *Robertson*, and therefore allowed the State to craft the legal standard for the first time; (2) the Memorandum ultimately signed by the PCR court was drafted as legal advocacy on behalf of the State, not as an objective decision on the facts and law; (3) Judge Brown drafted his own order, which must have made different findings of fact and/or conclusions of law given the difference in length compared to the Order signed and filed (41 pages versus 90 pages); and, (4) Judge Brown did not give Stanko the opportunity to “review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order” as required in non-capital PCR cases where one party is asked to draft the order, *Fishburne*, 427 S.C. at 516, 832 S.E.2d at 589. Adoption of the State’s memo also resulted in the Order containing rulings contrary to Judge Brown’s prior oral findings—i.e., the Order discounted Stetler’s affidavit and prior testimony as irrelevant and inappropriate for consideration when Judge Brown overruled the same objection by the State at the prejudice hearing, App. 4087—and containing plainly erroneous findings—i.e., that Stanko presented no alternative mitigation evidence, App. 4101, and misinterpretation of Stanko’s claims as claims of ineffective assistance of experts. App. 4122. For these reasons, this Court should grant certiorari and remand for the judge to draft an order (or sign his previously drafted order) with his own findings of fact and conclusions of law.

II. THE PCR COURT ERRED ON REMAND IN ITS DETERMINATION OF PREJUDICE UNDER *ROBERTSON* AND *STRICKLAND* BY CONSIDERING UNQUALIFIED INITIAL PCR COUNSEL’S PERFORMANCE AND EVIDENTIARY PRESENTATION AND THE INITIAL PCR COURT’S RULING BASED ON THE SAME.

The PCR court on remand failed to properly implement *Robertson* by giving consideration to initial unqualified PCR counsel’s preparation and presentation of claims during the initial PCR hearing. Such consideration was inappropriate because the court had already determined that initial PCR counsel were not qualified, and therefore, under *Robertson*, they provided per se deficient performance as a matter of law. 418 S.C at 521, 795 S.E.2d at 37.

As *Robertson* held, “non-compliance with section 17-27-160(B) constitutes deficient performance per se.” 418 S.C at 521, 795 S.E.2d at 37. The Court reasoned that “[t]o rule otherwise . . . would render meaningless the Legislature’s intent to have *qualified* counsel appointed to capital PCR applicants.” *Id.* (emphasis in original). By narrowing the question of deficient performance to only initial PCR counsel’s qualifications, this Court removed from consideration the questions otherwise relevant to deficient performance, such as counsel’s investigation and strategic decision making. *See Strickland*, 466 U.S. at 690–91. Thus, the logical and most practical reading of *Robertson* is that once a court determines initial PCR counsel failed to meet the qualification requirements, the initial PCR hearing is effectively a nullity. The only question that remains, then, is whether claims raised by qualified successor PCR counsel have merit. *Id.* (“Nevertheless, a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel’s lack of qualification.”); *see also Strickland*, 466 U.S. at 694 (to prove prejudice, “a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). Accordingly, a comparison of the initial PCR hearing with the successor PCR hearing is unfounded, a waste of time and resources, and can only create the kind of confusion manifested in the lower court’s Order in this case.

Contrary to the *Robertson* standard, after finding initial PCR counsel were not qualified, the remand PCR court erroneously considered initial unqualified PCR counsel's performance in evaluating prejudice. Over Stanko's objections that initial PCR counsel's investigation, strategic decisions, and PCR presentation were not relevant to prejudice, the remand PCR court compelled Stanko to provide the State with discovery of initial PCR counsel's files, including their time sheets, payment of experts, and investigation notes and reports App. 2932–33. At the prejudice hearing, the court also erroneously allowed the testimony of initial PCR counsel Shaffer. App. 3337. The remand Order further diverged from the standard established in *Robertson* by repeatedly and improperly compared the claims and evidence presented by initial PCR counsel to that presented by qualified PCR counsel on remand.

The Order deemed “[a]ny portion of the previous record may form the basis for the finding requested by Respondent: that Applicant was not prejudiced by initial PCR counsel’s representation.” App. 4060. It then included four pages describing the initial PCR proceedings and claims. App. 4074–78. In addressing the claims presented on remand by qualified PCR counsel, the Order found that several of the claims were “an iteration” of claims raised by initial PCR counsel and noted “the initial PCR court denied this allegation in the first instance.” App. 4086. The Order then found it could rely on the initial PCR court’s denial of PCR claims in finding no prejudice: “This Court thus has before it these claims’ prior treatment, as well as the basis for these claims’ dismissal, which includes the court’s consideration of the balance of aggravating and mitigating circumstances presented at trial.” App. 4086.

By allowing discovery and testimony on initial unqualified PCR counsel’s performance and deferring to the initial PCR court’s rulings, the remand court ignored this Court’s pronouncement that lack of qualification proves per se deficient performance. To correct this error,

the Court should grant certiorari and, ultimately, remand for consideration without deference to unqualified initial PCR counsel's performance.

III. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL WERE NOT INEFFECTIVE IN PRESENTING DEHUMANIZING EVIDENCE AND FAILING TO PRESENT MITIGATING EVIDENCE.

On remand, the PCR court erred in finding Stanko's ineffective assistance of trial counsel claim—presented by qualified counsel on remand—was not meritorious and that initial unqualified PCR counsel did not prejudice Stanko. The PCR Order applied improper legal standards and failed to properly assess the evidence that trial counsel provided ineffective assistance by presenting dehumanizing characterizations of Stanko to the jury in support of a legally impossible NGRI defense and failing to investigate and present available mitigating evidence related to his brain damage, mental health, and life history.

a. Legal Standard.

To assess the merits of Stanko's underlying ineffective assistance of counsel claim, the Court must consider both *Strickland* components: “that counsel's performance was deficient, and that the deficiency prejudiced the defense.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 687).

i. Deficient Performance.

At the time of Stanko's trial, prevailing professional norms required trial counsel to conduct a thorough investigation of a capital defendant's life and background. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (“It is unquestioned that under the prevailing professional norms at the time of Porter's trial [in 1988], counsel had an ‘obligation to conduct a thorough investigation of the defendant's background.’”) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Among those “well-defined norms” is the requirement that trial counsel investigate “*all reasonably available* mitigating evidence,” including “medical history, educational history, employment and

training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences.”⁶ *Wiggins*, 539 U.S. at 524 (internal quotation marks omitted) (emphasis added). Where a defendant’s trial counsel “ignore[] pertinent avenues for investigation,” counsel lacks the information required to make strategic judgments. *Porter*, 558 U.S. at 39–40. Consequently, when counsel fails to conduct an adequate investigation, courts give no deference to counsel’s decisions concerning the selection and presentation of evidence. *Id.*; *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (“[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation.”) (quoting *Wiggins*, 539 U.S. at 532).

Consistent with this understanding of counsel’s duty to investigate, the Supreme Court has condemned “*post-hoc* rationalization of counsel’s conduct” by reviewing courts and established that it is reversible error to “merely assume[] that the investigation was adequate.” *Wiggins*, 539 U.S. at 526–27. Instead, a reviewing court must “conduct an assessment of whether [counsel’s] decision . . . actually demonstrated reasonable professional judgment.” *Id.* at 527. In doing so, the court must focus on whether the investigation supporting counsel’s decision not to investigate further was itself reasonable. *See id.* at 528; *Sears v. Upton*, 561 U.S. 945, 954 (2010) (describing *Williams*, 529 U.S. at 396, as “reject[ing] any suggestion that a decision to focus on one potentially reasonable trial strategy . . . [can be] justified by a tactical decision when counsel did not fulfill

⁶ Counsel’s duty to investigate exists even if a capital defendant and his family members do not cooperate with investigation or suggest that no mitigating evidence is available. *Porter*, 558 U.S. at 40 (“Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation”); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (noting that Rompilla was “uninterested in helping” and that he “was even actively obstructive” to the mitigation investigation before finding that counsel nonetheless had a duty to conduct constitutionally adequate investigation).

their obligation to conduct a thorough investigation of the defendant’s background” (internal quotation marks omitted)).

ii. *Prejudice.*

Prejudice analysis requires a “probing” inquiry during which the reviewing court must “consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation.” *Sears*, 561 U.S. at 955–56 (quoting *Porter*, 558 U.S. at 41). The test is not whether a defendant would have received a life sentence absent counsel’s deficient performance. *See Porter*, 558 U.S. at 44. Rather, the question is whether “undiscovered mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of [the petitioner’s] culpability.”⁷ *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (internal quotation marks omitted). Thus, a post-conviction petitioner establishes prejudice if he shows “a reasonable probability that at least one juror would have struck a different balance” between life and death. *Wiggins*, 539 U.S. at 537.

In the context of a claim of ineffective representation in a capital sentencing proceeding, a PCR court’s prejudice analysis must be conducted through the lens of the constitutional requirement “that ‘the sentencer in capital cases . . . be permitted to consider any relevant

⁷ In *Rompilla*, for example, the Court reviewed the totality of the mitigation evidence developed in post-conviction, compared it to the mitigation case presented at trial, and concluded:

This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, **that is not the test**. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of Rompilla’s culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing.

Id. at 393 (internal citations omitted) (emphasis added).

mitigating factor.” *Porter*, 558 U.S. at 42 (quoting *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). Thus, counsel’s failure to present a complete mitigation story prejudices the defendant if it keeps from the jury evidence that could “influence[] the jury’s appraisal of [the defendant’s] moral culpability.” *Id.* at 41 (quoting *Williams*, 529 U.S. at 398). Such evidence includes information “about the defendant’s background and character . . . because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation marks omitted), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Weik v. State*, 409 S.C. 214, 235, 761 S.E.2d 767, 768 (2014) (finding prejudice where “counsel failed to present even a skeletal version of petitioner’s social history even though there was abundant social history evidence available to them”); *Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 364 (2008) (finding Council was prejudiced by his attorney’s failure to investigate Council’s background); *Von Dohlen*, 360 S.C. at 608, 602 S.E.2d at 743 (finding Von Dohlen prejudiced by his attorney’s failure to adequately investigate and present evidence about his mental condition at the time of the crime).

Evidence of a defendant suffering brain damage in particular should be included in counsel’s complete mitigation story. The United States Supreme Court has repeatedly acknowledged that evidence of brain damage is mitigating. *See Sears*, 561 U.S. at 950 (identifying brain damage manifesting as “pronounced frontal lobe pathology” as a mitigating factor); *Porter*, 558 U.S. at 42–43 (determining state courts erred under *Eddings* in failing to consider “existence of a brain abnormality” in mitigation and that it was unreasonable not to consider the effect such evidence might have had on the jury); *Mills v. Maryland*, 486 U.S. 367, 370 n.1 (1988) (identifying

even “minimal brain damage” as a mitigating factor). Therefore, if counsel encounters evidence of neurological abnormalities, it is counsel’s responsibility to thoroughly investigate and present that evidence in a mitigating fashion.

Furthermore, when counsel’s performance is deficient in more than one way or more than one instance, the PCR court’s prejudice analysis must account for the collective impact of those various deficiencies on the jury’s appraisal of the issues. *See, e.g., Williams*, 529 U.S. at 397–98 (finding prejudice from counsel’s failure to counter an allegation of future dangerousness, failure to present evidence of a depraved childhood, and failure to present evidence of mental capacity). In other words, the jury must consider the effect of not only the addition of beneficial evidence that was not originally presented, but also the removal of harmful evidence.

b. Trial Counsel Rendered Ineffective Assistance of Counsel by Presenting Dehumanizing Evidence in Support of an NGRI Defense.

Throughout the trial, counsel presented evidence and testimony that dehumanized Stanko, making it more likely the jury would vote for death, contrary to the prevailing norms at the time. With his first expert defense witness, Diggs elicited testimony from Dr. Bernard Albiniaak comparing Stanko to “reptiles, like crocodiles and alligators and caiman”⁸ that “have no frontal lobes at all, so they can’t conform their behavior.” App. 424–24. Dr. James Thrasher, another defense expert, called Stanko a “con-man” who “tells lies upon lies”: “He’s a psychopath. He tells stories. . . . He’s not normal. He has the personality structure of an antisocial personality with a socialized overlie.” App. 498–500. In the guilt-phase closing, Kelly compared Stanko to the tiger that “mauled” Roy of Siegfried and Roy and “drug [sic] [Roy] off the stage by his head.” App. 1093. At sentencing, Kelly closed by telling the jury that Stephen was “a psychopathic personality.

⁸ A caiman is a reptile similar to alligators and crocodiles.

He's an ill, sick person." App. 2415. These arguments were a far cry from an effective defense presentation. In fact, this Court has expressly determined that statements by counsel that a client is a "sick" person "bolster the case against [a] client" and show that an attorney has "abandoned his role as defense counsel." *Nance v. Ozmint*, 367 S.C. 547, 557–58, 626 S.E.2d 878, 883 (2006) (determining that "counsel's statement that his client is a 'sick man' who has done 'sick things' points to the fact that he was not acting as defense counsel and failed to function . . . as the Government's adversary" and finding counsel's performance so egregiously deficient that a prejudice analysis was unnecessary (internal quotation omitted) (citing *Jones v. Barnes*, 463 U.S. 745, 758 (1983))).

The most damaging defense witness was Dr. Sachy, who testified in both the guilt and penalty phases of the trial. Sachy was the linchpin of Diggs' insanity-by-psychopathy defense, and he told the jury in no uncertain terms that Stanko was a psychopath: "[M]y diagnosis is that Mr. Stanko is a psychopath, and I'm 100 percent certain of that, and I believe we've proved it. We have shown that his brain—this is the brain of a psychopath." App. 730. Sachy described Stanko's brain damage in a dehumanizing way, saying Stanko was less than human due to the damage in his frontal lobe: "[T]he empathy part of a human being, the conscience, having a conscience, having guilt, having caring, it's this part of the brain right here [frontal lobe] that does that." App. 726. Like Albinia, Sachy compared Stanko to a reptile with no conscience or impulse control, and a brain similar to that of "a lizard or an alligator," telling the jury that Stanko's brain lacked "the difference that sets [humans] apart from lower creatures." App. 729. Sachy went so far as to describe to the jury all the ways that he thought Stanko ticked the boxes of the Hare Psychopathy Checklist, the most widely used measure of psychopathy: "[I]f we look at the Ha[re] Psychopathy Checklist, conning and manipulative behavior, pathological lying. Right from a young man he is

showing these hallmarks of being a psychopath.” App. 754. “I am circling something right here on the Ha[re] Psychopathy Checklist, impulsivity. He’s just acting on his impulses.” App. 764. Finally, Sacy explicitly compared Stanko to several infamous psychopathic serial killers, real and fictional: “[Psychopaths] are just charming. I think of Ted Bundy again. I think of John Wayne Gacy. I think of all the people they manipulated without difficulty. . . . But that’s the way their brain works.” App. 753. “Psychopaths are a specific subset of antisocials. They are the kind of people we’re terrified of . . . They’re the Hannibal Lecters from *Silence of the Lambs*.” App. 760–61. Sacy told the jury that people like Stanko “are like evil. They are the devil.” App. 761.

There was no valid reason for trial counsel to elicit dehumanizing, inherently aggravating testimony about Stanko. Trial counsel’s use of dehumanizing labels and testimony was objectively reasonable and thus constituted deficient performance. *See Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (“Counsel must articulate a *valid* reason for employing a certain strategy.”) (emphasis in original).

- i. *Prevailing professional norms reveal a widespread understanding that evidence of psychopathy is inherently aggravating.*

The overwhelming weight of legal authority establishes that evidence that a defendant has antisocial personality disorder or is a psychopath is viewed as inherently aggravating. *See, e.g., Kokal v. Secretary*, 623 F.3d 1331, 1349 (11th Cir. 2010) (explaining that a specific mental health evaluation “may have been potentially aggravating[] because it suggests that Kokal has antisocial personality disorder, which is a trait most jurors tend to look unfavorably [sic] upon and is not mitigating but damaging” (internal quotation marks omitted)); *Parker v. Secretary*, 331 F.3d 764, 788 (11th Cir. 2003) (holding that it was valid trial strategy not to present damaging psychological evidence that the defendant “was antisocial and a sociopath”); *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994) (“Antisocial personality disorder has been held not to be mitigating as a matter

of law.”); *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988); *Looney v. State*, 941 So.2d 1017, 1028–29 (Fla. 2006) (“[A] diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation.”).

A transcript of prior testimony and an affidavit from Russell Stetler,⁹ an expert on the professional norms governing the investigation and presentation of mitigation and mental health evidence, explained the capital defense community’s understanding that this type of evidence is inherently aggravating and not mitigating. App. 3376–3436. At the time of Stanko’s trial, the capital defense community recognized that “evidence that a capital defendant is a psychopath or has antisocial personality disorder is considered aggravating and defense counsel should be concerned about that evidence being offered by the prosecution.” App. 3386. “Such evidence is aggravating because it presents the client as lawbreaking, callous, and lacking empathy, which will dehumanize the defendant in the eyes of the jury.” App. 3386; *see also Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (“The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.”); *Looney*, 941 So.2d at 1028–29; *Parker*, 331 F.3d at 788; *Weeks*, 26 F.3d at 1035 n. 4; *Harris*, 885 F.2d at 1383.

Stetler’s testimony and affidavit were relevant and instructive on the issue of professional norms, and the PCR court erred in rejecting his opinions as “irrelevant, unpersuasive, and of inappropriate construct in the context of the instant case.” App. 4087. To the contrary, Stetler’s testimony and affidavit bore directly on key aspects of Stanko’s case and should have been

⁹ Stetler is the National Mitigation Coordinator for the federal death penalty projects. Prior to that, he was Director of Investigation and Mitigation at the New York Capital Defender Office and Chief Investigator at the California Appellate Project. He has investigated all aspects of capital cases since 1980. App. 3378–80.

considered by the PCR court under *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), and *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002).

The only expert opinions prohibited by *Green* and *McKnight* are opinions that “amount[] to a case-specific application of the *Strickland* test” to make “a legal argument as to why the PCR court should rule . . . trial counsel was ineffective.” *McKnight*, 378 S.C. at 57, 661 S.E.2d at 366; *Green*, 351 S.C. at 198, 569 S.E.2d at 325 (barring only expert testimony that “trial counsel’s actions fell below acceptable legal standards of competence.”). Such testimony, the Court reasoned, “was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel’s actions fell below an acceptable legal standard.” *Id.*; see also *McKnight* 378 S.C. at 56, 661 S.E.2d at 366 (prohibiting testimony about “how a lawyer practicing in accordance with the prevailing standards of South Carolina would handle certain factual scenarios derived directly from [the] case [at hand]”). Stetler’s affidavit and testimony do not offer opinions as to whether trial counsel’s performance was deficient; rather, they offer factual descriptions of the prevailing professional norms in capital trials and should not have been excluded under either *Green* or *McKnight*.

In accordance with the limitations set forth in *Green* and *McKnight*, the professional norms that Stetler discussed were factually relevant and necessary to inform the judge—who is not a capital defense attorney—about the professional norms of the capital defense community. Stetler’s affidavit and testimony would have provided a basis for the PCR court to identify the norms for preparing a capital case for trial in 2005 and 2006 when trial counsel were preparing and trying Stanko’s case so the judge could then make the ultimate legal determination regarding whether trial counsel’s performance met those norms.

Instead of relying on competent evidence of the prevailing standards at the time of Stanko's trial, the PCR court improperly relied on *State v. Caldwell* (predating Stanko's trial by a decade and a half) for the proposition that "antisocial personality disorder is recognized under South Carolina law as a diagnosis warranting a jury instruction on mitigating factors." App. 4096–97 (quoting *State v. Caldwell*, 300 S.C. 494, 506, 388 S.E.2d 816, 823 (1990)). This reliance on *Caldwell* is improper because *Caldwell* does not hold that antisocial personality disorder is mitigating. This Court in *Caldwell* was not addressing whether an attempt to present evidence of psychopathy as mitigating constituted ineffective assistance of counsel but was merely acknowledging the evidence presented at Caldwell's trial and the resulting instructional implications. Further, even if asserting psychopathy as mitigating evidence was acceptable in the 1980s, when Caldwell was tried, it was not acceptable at the time of Stanko's trial in 2006. By that time, the capital defense community had recognized that "psychopathy [or antisocial personality disorder] is not mitigating;" instead, it was considered to be aggravating and to "dehumanize the defendant in the eyes of the jury." App. 3386; see also John H. Blume & David P. Voison, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, *The Champion*, April 2000, at 69.

- ii. *Trial counsel's use of dehumanizing labels and testimony was objectively unreasonable.*

Contrary to the prevailing norms and against the advice of trial mitigation specialist Dale Davis, Diggs pursued an insanity defense based on the dehumanizing theory that Stanko was a psychopath, and actively sought to equate Stanko with psychopathy in the eyes of the jury. Davis, who, unlike Diggs, had attended many capital defense trainings prior to working on Stanko's case, recognized that "reference to [Stanko] being a psychopath and comparing him to serial killers and being called an alligator [or a] crocodile" would destroy Stanko's humanity in the eyes of the jury. App. 3105. She explained, "[Y]ou can't come in and describe your client in these terms and expect

anyone to care what happens to them.”¹⁰ App. 3110. Heedless of Davis’s warnings, Diggs presented Sachy, who repeatedly called Stanko a psychopath and compared him to serial killers. Diggs and Kelly themselves described Stanko as a psychopath, and Kelly compared him to wild animals.

At the prejudice hearing, Diggs insisted that he was unaware that Sachy was going to use the word “psychopath,” and that when Sachy called Stanko a psychopath, Diggs “cringed about it.” App. 3039. However, the trial and PCR record demonstrates that Diggs actually was aware that Sachy would use such language. In addition to his knowledge that Sachy’s nearly identical presentation in the Georgia trial of Reinaldo Rivera described Rivera as a psychopath, Sachy’s pretrial testimony at a hearing to determine the admissibility of his opinion in Stanko’s case referenced his research into “violent and psychopathic behavior,” App. 32, and opined Stanko’s “behaviors are absolutely consistent with the diagnosis of psychopathy.” App. 33. Sachy concluded, “My diagnosis [of Stanko] would be psychopathy with diminished or impaired activity in the frontal lobes of the brain.” App. 70. In all, at the pretrial hearing, Sachy used the term “psychopath” or “psychopathy” more than fifty-five (55) times and Diggs himself used the term “psychopath” in questioning Sachy. App. 19–126. The PCR Order erred in ignoring this record evidence that Diggs was aware that Sachy was going to present an aggravating description of Stanko prior to trial but did nothing to prevent the presentation of those dehumanizing labels. App. 4094 (“As for Dr. Sachy’s psychopath testimony, Diggs testified that characterization was not the defense that he had planned to portray. . . . [Diggs] ‘didn’t know [Dr. Sachy] was going to use that

¹⁰ To make the use of the aggravating “psychopathy” label worse, Dr. Joseph Wu testified that, in this case, the diagnosis of psychopathy or antisocial personality disorder was an inaccurate diagnosis because an underlying medical cause (brain damage) explained Stanko’s behavior. App. 3242–43.

work in that circumstance.”); App. 4100 (finding “the record and testimony established that counsel did not intentionally elicit these responses or comparisons”).

The PCR court also erroneously found that trial counsel made a “reasonable and professionally sound tactical decision to assign a medically diagnosed reason to [Stanko’s] wayward behavior,” App. 4096, and that testimony that Stanko was a psychopath was a necessary part of the defense presentation. App. 4101. On the contrary, it was not reasonable to present evidence of psychopathy and use dehumanizing labels, which directly contradicted prevailing professional norms and only added to the aggravation, rather than the available mitigation evidence, at Stanko’s trial. Had trial counsel avoided using these dehumanizing labels and presented the brain damage in a mitigating manner along with additional available mitigating evidence, as described below in Section III.c, there is a reasonable probability at least one juror would have struck a different balance between life and death. *See Wiggins*, 539 U.S. at 537.

iii. *Trial counsel’s decision to raise an NGRI defense was objectively unreasonable.*

Trial counsel asserted a strategic reason for presenting dehumanizing testimony—that it supported a claim of not guilty by reason of insanity. This strategy was objectively unreasonable because the evidence did not meet South Carolina’s legal criteria for a finding of NGRI and its presentation further aggravated the case, making a death sentence more likely.

As a preliminary matter, Diggs did not conduct sufficient investigation before selecting the NGRI/psychopathy defense in order to make a valid strategic decision. Diggs selected the NGRI/psychopathy defense almost immediately—before a thorough mitigation investigation and any expert evaluation were completed—and did not consider any alternatives as the case moved forward. Rather than adjusting his defense theory and hiring new experts as investigation proceeded, Diggs hired, and stuck with, Sachy, whose prior capital case experienced involved

presenting the psychopathy-insanity theory in the *Rivera* case and earning a death sentence from the state of Georgia. *See* App. 3108–10. Diggs unreasonably focused on this theory to the exclusion of all others. *See* App. 3110.

In pursuing an insanity defense based on psychopathy without considering any alternatives, Diggs failed to fulfill his duty to develop an informed, persuasive defense theory and present it effectively. Counsel bears the ultimate responsibility for overseeing the development of a mitigating defense theory and ensuring its effective presentation. *See, e.g., Winston v. Kelly*, 592 F.3d 535, 542 (4th Cir. 2010) (finding trial counsel ineffective in failing to present evidence of intellectual disability when they “were almost completely dependent” on expert); *Couch v. Booker*, 632 F.3d 241, 247 (6th Cir. 2011) (holding that the principle that trial counsel may rely on experts “does not give trial counsel a free ride when it comes to the obligation to undertake a ‘thorough investigation of law and facts relevant to plausible options’ for a defense.”). It is not enough for counsel to hire an expert and simply rely on the expert’s opinion without conducting their own review and determining the appropriateness of a defense based on the expert’s opinion. “Lead counsel bears overall responsibility for the performance of the defense team” and must use the investigation to “seek a [defense] theory that will be effective in connection with both the guilt and the penalty phase.” American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.10.1, 10.4.B (2003) [hereinafter ABA Guidelines]. The PCR Order improperly minimized counsel’s responsibilities for investigation and development of a mitigating strategy and did not address Stanko’s evidence and arguments that the selection of a defense theory and retention of experts prior to conducting the mitigation investigation is contrary to established professional norms at the time of Stanko’s trial. *See*

Strickland, 466 U.S. at 688 (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”).

Diggs’s decision was further unreasonable because the evidence presented at trial, even if it were believed by the jury, could not legally satisfy South Carolina’s definition of insanity. S.C. Code § 17-24-10(A) provides:

It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong, or to recognize the particular act charged as morally or legally wrong.

However, “[e]vidence of a mental disease or defect that is manifested *only by repeated criminal or other antisocial conduct* is not sufficient to establish the defense of insanity.” *Id.* § 17-24-10(C) (emphasis added).

Sachy supported his opinion on NGRI on his belief that he was “100 percent certain” Stanko was a psychopath, App. 730, and that “[p]sychopaths are a specific subset of antisocials.” App. 760. Describing the Hare Psychopathy Checklist, which Sachy considered in arriving at his diagnosis, he explained the checklist’s emphasis on conning and manipulative behavior, pathological lying, and repeated crimes. App. 754. These behaviors fall into the category of “repeated criminal or other antisocial conduct” and therefore do not constitute insanity under South Carolina law.¹¹ S.C. Code § 17-24-10(C).

Recognizing that such a defense was incompatible with South Carolina law, Kelly testified he did not think that “Stanko was insane at the time of the crime” or that Stanko “met the legal definition of insanity.” App. 2989–90. Rather, Kelly believed that, given the strong evidence

¹¹ Diggs acknowledged that “antisocial personality disorder is a pervasive pattern of repeated criminal or antisocial conduct.” App. 3057.

against Stanko, it would be better to use the guilt phase to get in as much evidence as they could in support of a life verdict during the inevitable penalty phase. App. 2991–92. In anticipation of trial, apparently recognizing that the evidence to be presented at trial did not meet the statutory definition of insanity, Diggs moved to have the insanity statute declared unconstitutional. He testified he believed the statute was too narrow and “wanted to broaden the statute” through this case. App. 3094. When this motion was denied, Diggs failed to change his strategy and continued to pursue an insanity defense.¹²

Pursuing an NGRI defense was especially unreasonable in this a capital case because of its near-certain failure and likelihood of alienating the jury who would decide between life and death at the penalty phase. Diggs testified that he did not know of any case in which the State contested an insanity defense where a jury found a defendant not guilty by reason of insanity. App. 3057. Such defenses are rare and unlikely to succeed. A study prior to Stanko’s trial found that “insanity is pleaded in less than one percent of all felony cases and is successful in only one-quarter of the cases in which it is pleaded.” Grant H. Morris, *Placed in Purgatory: Conditional Release of Insanity Acquittes*, 39 Ariz. L. Rev. 1061, 1063 (1997). Another study found that jurors in death penalty cases are particularly likely to reject insanity defenses:

While the vast majority of the people view the insanity defense with great skepticism, research has found that death-qualified venirepersons are even less receptive to it than are their excludable counterparts. Consequently, the aforementioned research concluded that capital defendants who plead NGRI face a particularly difficult challenge: attempting to prove their innocence to a jury

¹² Diggs testified that based on the evidence related to the crimes, he did not think that a life history defense would succeed and therefore chose to rely on the insanity defense. App. 3065. However, Diggs did not consider the mitigation evidence that could be presented in order to determine a possible alternative strategy. App. 3038 (stating he never explored any alternatives to the insanity defense). Strategic decisions made after an unreasonable failure to investigate are objectively unreasonable. *Wiggins*, 539 U.S. at 532 (“[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation.”).

[biased] toward conviction and in favor of the death sentence before the trial even begins.

Brooke Butler & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. Applied Soc. Psychol. 1744 (2006) (internal citations omitted).

Stetler explained why insanity defenses are especially problematic in capital cases:

[Insanity defenses] run[] contrary to the idea of a consistent and integrated defense theory because an insanity defense asks jurors in the guilt phase to find that the defendant should be excused from his conduct due to insanity—it is an affirmative defense. If that evidence is rejected by the jury in the merits phase, counsel must then use the same evidence in the penalty phase not as an excuse, but as a reason to spare the individual's life. By the time of the penalty phase, the jury has already rejected the evidence, likely for all purposes.

App. 3385. In other words, it is largely impossible to present a coherent, unified insanity theory in a capital case.

In finding that trial counsel made a reasonable strategic decision to rely on the insanity defense, the PCR court ignored Stanko's evidence that prevailing professional norms required defense counsel to present a unified defense theory between the guilt and sentencing phases. ABA Guidelines 10.10.1; App. 3384. Because the success of the insanity defense was legally impossible, jurors' hostility toward insanity defenses in capital cases, and the available mitigating evidence described below, it was unreasonable to pursue an insanity defense in Stanko's case. *See Wiggins*, 539 U.S. 510 (finding trial counsel deficient despite their proffered strategy decision to focus on proving the defendant's innocence rather than presenting mitigation); *Williams*, 529 U.S. 362 (finding trial counsel deficient in failing to investigate and present mitigation evidence despite their proffered strategy to rely primarily on the fact that the defendant confessed voluntarily); *Council*, 380 S.C. at 172–73, 670 S.E.2d at 363 (finding reliance on an accomplice theory “unreasonable” when “counsel should have been aware that the defense accomplice theory was

not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence.”).

c. Trial Counsel Were Ineffective in Failing to Investigate and Present Mitigating Evidence Related to Stanko’s Brain Damage, Mental Health, and Life History.

In addition to ineffectively presenting dehumanizing and aggravating evidence throughout the trial, trial counsel failed to present substantial mitigating evidence that could have swayed “at least one juror [to strike] a different balance” between life and death in sentencing. *Wiggins*, 539 U.S. at 537. Evidence presented at the prejudice hearing demonstrated that Stanko’s brain damage could be described in a mitigating fashion as it explained his violent behavior as an adult and that Stanko was ill-equipped to cope with the stressors facing him in the months leading up to the crimes due of environmental and social factors aggravating the effects of his brain damage. The evidence also showed that Stanko would not be dangerous in a structured prison setting. Stanko’s jury, however, did not hear this critical evidence.

i. Counsel failed to investigate and present mitigating evidence of Stanko’s life history.

At the prejudice hearing, several experts presented mitigating evidence that trial counsel failed to introduce or even investigate. To provide a detailed evaluation of Stanko’s life history, Dr. Arlene Andrews,¹³ qualified as an expert in social history assessment, reviewed many records relating to Stephen’s life and spoke with Stephen’s family and friends, including his closest brother

¹³ Dr. Andrews has a Master’s degree in community social work and a Ph.D. in Clinical-Community Psychology, both from the University of South Carolina. She is a licensed professional social worker and a distinguished professor emerita at the University of South Carolina. She has published six books and dozens of articles on social work, psychology, children’s rights, and community development and well-being. Dr. Andrews has also been qualified as an expert in social history assessments over twenty times in state and federal courts. App. 3276–81.

Jeff, who also testified at the prejudice hearing.¹⁴ She reported that Stephen's birth was complicated, with Stephen suffering oxygen deprivation. App. 3293–94. Stephen survived and grew up with his parents and four older siblings, two sisters and two brothers. App. 3144. Stephen was closest in age to Jeff, and the older siblings were all at least seven years older than Stephen and Jeff. App. 3144.

The family moved four times between Stephen's birth and third grade because their father was in the Navy. App. 3145. When Stephen was in third grade, Stephen, his two brothers, and his parents moved to Charleston, where they remained throughout Jeff and Stephen's middle and high school years. App. 3145–46, 3295–96. According to Jeff, Stephen got along well with his siblings and their parents. App. 3146. Stephen had great success in high school: He got very good grades, was popular with other students, and played on several sports teams. App. 3150. One of the sports that Stephen played was baseball, and because he was a catcher, he was subject to major collisions at home plate that forced him out of the game "[s]everal times." App. 3146.

Dr. Andrews reported that during Stephen's childhood, he lived in a "very predictable and protected environment" with a stable, two-parent family. App. 3288. Based on her review, "everything [she] saw in his record showed that [Stephen] was an exemplary student, well behaved, and a good performer. He participated in recreational sports and organized things in his community and was known as a . . . very sociable, very likeable, very helpful child." App. 3294. As a child, Stephen "was known as being socially responsible, not known for taking risks," and he graduated high school fifteenth in his class of 325 students. App. 3288–89.

¹⁴ In the following sections detailing Stanko's life history, he is referred to as "Stephen" to make it easier to distinguish between the members of the Stanko family.

Dr. Andrews' evaluation revealed that Stephen's father, William ("Bill") Stanko, had high expectations for his children, and if the children did not live up to those high standards, "he just wouldn't speak to them for days on end." App. 3295. Dr. Andrews explained that the family "put a lot of energy into not upsetting [Bill], which caused them not to communicate about a lot of things." App. 3289. Early in life, Stephen learned that his father would not accept failure to meet his expectations and would reject the children if he disapproved of their decisions. For example, when the family moved to Charleston, Stephen's oldest sister Peggy was going to move with the family but stayed behind in Chicago because Bill did not approve of the older man Peggy was dating. App. 3147–48. Jeff similarly found himself the target of Bill's ire. After Jeff graduated from high school, he went into the military and decided to get married at the age of 19. App. 3150–51. Jeff's fiancée was African American, and Bill did not approve of the interracial marriage. App. 3150–51. As a result, Bill did not attend Jeff's wedding and prevented Stephen and his mother from attending. App. 3150–51, 3298.

When Stephen was a sophomore in high school, he was traumatized by the murder of his oldest brother, Billy. App. 3148–50. Billy had moved out, but when Stephen was around fourteen years old, Billy moved back into the family home after suffering serious injuries in a motorcycle accident, and he and Stephen developed a close relationship. App. 3148–50, 3296. Billy was "someone that Stephen looked up to" and they "played games together, chess and things like that". App. 3296. Shortly after moving back home, Billy became addicted to painkillers and moved away from the family to Santee, South Carolina. App. 3148. On February 6, 1983, when Billy was twenty-three and Stephen fifteen, Billy's "extensively burned and charred body was found in a house fire in Summerton." App. 3690. Jeff recalled that a detective showed up at the home saying that Billy had died in a suspected arson. App. 216. After an autopsy, however, they determined

that Billy was murdered because he suffered two gunshot wounds and no smoke in his lungs, meaning that he was dead before the fire started. App. 3149. Billy's murderer was never identified. App. 3149.

Dr. Andrews explained that Billy's death was a "terrible trauma" that "impacted the family." App. 3289. It was a "very traumatic death" and "each person [Dr. Andrews] talked to has obviously been traumatized by that death." App. 3297. Stephen was particularly traumatized by Billy's death because he knew that Billy suffered from a drug addiction and was protective of Billy despite their age difference. For example, when Stephen was fifteen, "he found Billy while he was in their family home with a heroin needle between his toes passed out, and he realized that he had a serious drug problem at that point and decided not to tell his parents because he was afraid his father would kick Billy out of the home." App. 3296. Jeff described the death as particularly difficult for him as well:

[B]ased on the fire and his body, we had to have a closed casket. So I didn't necessarily get that closure for him. . . . I would see someone who had a similar body to my brother and, if I was walking through the mall, I would walk really quickly to catch up to him to try to see if it was him because sometimes I just didn't believe that it had occurred.

App. 3149.

Despite the trauma Billy's death caused their two youngest children—Stephen and Jeff—the parents did not talk to the kids about Billy's death. "There was never any discussion of what had happened or why." App. 3150, 3297. The circumstances surrounding Billy's addiction and death and the family's response—refusal to discuss what happened—"was an example of how the family just doesn't talk about uncomfortable things or negative things." App. 3297. As a result, after Billy's death, Stephen had no outlet through which to express his emotions and no support in processing the traumatic experience.

By the time Stephen was set to graduate from high school, he was the only child left in the home—Billy had been murdered, his sisters did not move to Charleston, and Jeff left home to join the military. Even though Stephen was successful in high school, took college preparatory classes, and was undoubtedly well-suited for college, his heart was set on attending the Air Force Academy, to which he was not admitted. App. 3151, 3299. After he was denied admission to the Air Force Academy, he “just seemed to give up on going to college.” App. 3299.

Further, on top of the injuries he sustained as a baseball catcher, Stephen suffered another serious head injury as a senior in high school. After a high school softball game, Stephen and some baseball teammates came to meet the softball team. App. 3439. One of the girls was dating an older guy, who started hitting her. Stephen and some other teammates intervened to protect the girl. App. 3439. During the course of the ensuing scuffle, another boy hit Stephen in the back of the head with a full beer bottle. App. 3439–40. When Stephen’s head started bleeding and he started talking “gibberish,” his friends put him in the car and took him to the hospital. App. 3440. Stephen’s mother believed that this injury was a turning point in Stephen’s life. App. 3299–30. She told a later psychiatric evaluator that it was not until after this injury that Stephen “started exaggerating and lying,” and she “thought [Stephen] lived in a fantasy world at that point.” App. 3299–30.

Around this same time, others also began noticing behavioral changes in Stephen. His brother Jeff noticed that after the injury, Stephen began to increasingly “brag on himself or what or whom he knew.” App. 3152. Stephen also started getting in trouble after the injury, beginning with an incident in which he sold a stolen computer to the father of a friend. App. 1246–48, 3152. Dr. Andrews testified that Stephen

began acting in grandiose ways and trying to impress people and saying things that didn’t make sense, and one person described as this: They said he was already really

accomplished. He was very popular. He had everything going for him. Why would he need to inflate other people's view of himself?

App. 3300.

After high school and into his twenties, Stephen held a number of sales jobs, including positions at Circuit City and various chemical cleaning product suppliers. App. 3151–52, 3300. However, he also began committing a series of ill-conceived frauds during this time, eventually getting himself \$25,000–\$30,000 in debt and needing his parents' help. App. 3300–01. In Dr. Andrews' opinion, Stephen's stealing and schemes "didn't make sense" because "he would steal from people he knew" and it "was obvious that he was the one doing it and it was obvious that he couldn't pay the money back. So he was bound to get detected. It didn't seem to fit with the intelligence that he had demonstrated early in his life. It was a very irrational kind of series of acts." App. 3303. Stephen was arrested for several of these frauds and ordered to attend therapy. App. 3301.

Stephen received some mental health treatment, but the therapy never addressed the underlying issues, including his "tendency for lying or stealing," even though the therapy "was ordered as a condition of his probation." App. 3301–02. Dr. Andrews explained that Stephen accurately self-reported his problems, but the treatment focused less on the behavior that led to the frauds than on helping him with his relationships with his then-girlfriend and her son. App. 3302. According to Dr. Andrews, the treatment was "off target for what his core problems were." App. 3302. While Stephen was on probation, he committed additional frauds and assaulted his girlfriend, Elizabeth. App. 3302–03. In the course of the assault, he tied Elizabeth up and was charged with kidnapping. App. 1398–99, 1401. These additional frauds and the assault were a violation of his probation, and Stephen was sentenced to ten (10) years in prison. App. 3303. As

discussed more fully below, Stephen did extremely well in prison and was released after eight and a half years.

- ii. *Trial counsel failed to fully investigate Stanko's brain damage and its implications and present that evidence in a mitigating fashion.*

Dr. Joseph Wu, an expert in psychiatry and the administration and interpretation of PET scans, testified at the prejudice hearing that Stephen suffers from significant brain damage that negatively impacts his cognitive functioning and ability to appropriately regulate his impulses, likely as a result of his earlier head injuries.¹⁵ Stephen's life history includes three incidents that could have caused his brain damage: (1) oxygen deprivation at birth; (2) collisions while playing baseball as a catcher; and (3) being hit in the back of the head with a full beer bottle during his senior year of high school. Stephen's brain damage has manifested in two ways: (1) His frontal orbital lobe has decreased metabolism, approximately twenty-five percent lower than a non-damaged brain, placing him in the bottom three percent of the population; and (2) he has undiagnosed temporal lobe epilepsy, causing "atrophy or shrinkage of tissues in the brain due to . . . electrotoxicity." App. 3226, 3229.

Because the frontal lobe is involved in controlling impulses, Dr. Wu opined that Stephen biologically has "greater difficulty with regulating impulses," a "greater tendency to act out aggressively, especially when provoked or stressed," and "a greater tendency to . . . not think about consequences resulting from his actions." App. 3242. Dr. Wu reviewed Stephen's records and

¹⁵ Dr. Wu has a Bachelor's degree in biology from Stanford University and a Doctorate in Medicine from the University of California, Irvine, and completed a fellowship focused on PET/MRI brain scans at the same institution. He is currently a professor emeritus at the University of California, Irvine. Dr. Wu is also board-certified in psychiatry and a distinguished lifetime fellow of the American Psychiatric Association. He has published over 60 academic articles and nine book chapters and has been qualified as an expert in dozens of cases from various jurisdictions. App. 268–78.

found that Stephen's frontal lobe damage played out in "some problems with impulse regulation" and that his frauds were consistent with frontal lobe damage. App. 3241–44. Dr. Wu further determined that Stephen's frontal lobe damage is treatable with cognitive therapy and the development of coping strategies to assist in controlling his impulses. App. 3247. Finally, Dr. Wu described how living in a prison setting would also serve to "treat" Stephen's brain injuries, explaining that the "structured environment" of prison acts as an "external frontal cortex," which would help Stephen control his impulses in a way he could not in the unpredictable outside world. App. 3249.

Dr. Wu concluded that Stephen's temporal lobe epilepsy ("TLE") was similarly likely to be caused by birth complications and/or by being hit in the head with a full beer bottle. TLE is a seizure disorder that can be aggravated by stress and can cause someone to act in an extremely aggressive manner when under emotional duress. App. 3237–41. A TLE diagnosis is consistent with the evidence that Dale Davis collected regarding Stephen's hypergraphia, or excessive and compulsive writing "much more so than normal," which is one of the symptoms of TLE. App. 3232–33. Dr. Wu further found that Stephen's memory gaps during the commission of the crimes, combined with the emotional duress that he was under at the time of the offense, are also telltale signs of TLE. App. 3237–41. Dr. Wu explained that in people with TLE, stress can cause seizures akin to an "electrical storm" in the "aggression center" of the brain, which "can cause an individual to act out in a very violent, irrational manner" and retain little to no memory of the episode. App. 3240. Stephen's TLE, had it been diagnosed, would also have been treatable with anticonvulsants that reduce the likelihood of an aggressive episode. App. 3246–47. According to Dr. Wu, because Stephen's brain damage can explain his behavior, a diagnosis of antisocial personality disorder or psychopathy is medically inaccurate. App. 3242.

- iii. *Trial counsel failed to investigate and present mitigating evidence of unpredictable pre-crime stressors, Stanko's limited capacity to cope, and Stanko's thwarted attempts to seek help.*

Stephen was released from prison at the end of July 2004, about eight months before the capital offenses. App. 3308. Stephen's prison records from his time at Turbeville Correctional Institution reveal that he did not receive any treatment for the issues that led him to be incarcerated, and he was therefore unprepared for his release. App. 3304, 3306–07. Jeff, who visited Stephen on several occasions over the course of his incarceration, reported that he did not learn that Stephen was being released until after he got out of prison. App. 3153. According to Jeff, Stephen's plans for after his release were to support himself by writing and off the royalties from a book he wrote during his incarceration. App. 3154. Dr. Andrews opined that Stephen's post-release expectations "were remarkably unrealistic." App. 3306–07.

Like his siblings before him, Stephen was cut off from his parents as a result of disappointing his father and shaming the family. His parents were "very traumatized by the fact that he had committed a violent offense." App. 3307. His father reacted by driving away when Stephen came to the house to collect his things after his release from prison. App. 3307. Thus, Stephen was not able to move back to live with his family. App. 3154. Instead, Stephen moved to Myrtle Beach, where, with the help of the mother of an inmate whom Stephen helped with legal work, he was able to stay in a hotel until he found housing (also with the help of the inmate's mother). App. 3153–54, 3308–09.

Upon his release, Stephen was under intensive community supervision and was required to pay for his supervision. App. 3309. Stephen was also incorrectly placed on the sex offender registry at the time of his release. App. 3310. A court order indicated he should not be included on the registry, but he was unable to get himself removed for some time after his release and had difficulty

finding a job as a result of the improper registration.¹⁶ App. 3310. Nevertheless, Stephen endeavored to comply with the requirements of his supervision and obtain a job, with limited success. App. 3310–11.

By October 2004, Stephen was overwhelmed. He sent an email to Jeff that that “he was scared that he was going to face things he couldn’t handle.” App. 3310. He asked Jeff for help, and Jeff offered to let Stephen move in with Jeff and his wife in North Carolina. App. 3169–70, 3311. Stephen began the paperwork to have his supervision transferred to North Carolina, but the approval was never completed (possibly because of the erroneous sex offender registration). App. 3169–70, 3311. Stephen then contacted the Department of Vocational Rehabilitation for assistance, which scheduled a psychological assessment for him, but there is no record that the assessment ever took place. App. 3311.

In November 2004, Stephen met Laura Ling at the Socastee Library where she worked. App. 3311. Jeff visited Stephen and Ms. Ling, thought they had a good and strong relationship, and saw great interactions between them. App. 3172–73. Stephen soon moved in with Ms. Ling and her daughter. Unfortunately, Stephen’s financial struggles and neurological problems led him to once again begin defrauding people by claiming to provide services (often legal) that he could not perform. App. 3311–13.

In January 2005, Ms. Ling contacted Jeff and Peggy because Stephen had threatened to commit suicide. App. 3311–13, 3907. Ms. Ling indicated that Stephen had been doing fairly well

¹⁶ Stephen’s incorrect sex offender registration was the result of a series of clerical errors. The judge who adjudicated Stephen’s kidnapping plea failed to put on the record the required finding that the kidnapping did not involve a sexual offense. Stephen worked with an attorney to resolve this issue during his time in Turbeville. However, even after Stephen obtained a court order indicating that he should not be included on the registry, the correction was never properly recorded, and when Stephen was released, he was still incorrectly placed on the sex offender registry. See App. 3800–01.

but had started to show some problems in January, so she applied to have Stephen added to her health insurance so that he could get mental health treatment. App. 3312–13, 3907. After the health insurance changes were initiated, Stephen attempted to contact a therapist, Louis Murden, but was never able to schedule an appointment for assessment or treatment. App. 3312–13, 3907.

In the two months leading up to the capital offense, Stephen was still involved in schemes that were “obviously going to lead to his detection and his getting in trouble.” App. 3313. Dr. Andrews explained:

Again, that is not consistent with his intelligence that he would be doing these things that are so transparent. It’s the same thing he did before that had gotten him into such serious trouble before and yet here he was repeating it again. . . . [H]is doing this said to me that he seemed unable to anticipate consequences because anyone could see that he was going to get in trouble.

App. 3313. Ms. Ling was concerned about Stephen’s behavior and its effect on her work at the library because Stephen was conducting some of his schemes with library patrons, and she called Jeff to express her concern. App. 3157, 3313. In the few weeks leading up to the capital offense, Stephen had at least three outstanding fraudulent schemes that were about to unravel, and he was in arrears on his probation fees. App. 3314. Stephen’s life history and brain injuries made him ill-equipped to handle these stressors, and because Stephen did not have therapy or medication to treat his brain damage, he simply did not possess the tools to adequately cope at the time of the offense.

- iv. *Failure to prepare and present this available mitigating evidence constituted ineffective assistance of counsel.*

“During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so.” *Weik*, 409 S.C. at 234, 761 S.E.2d at 767 (citing *Rompilla*, 545 U.S. at 390–93 and *Wiggins*, 539 U.S. at 538). As this Court has recognized, “[i]mportant sentencing phase considerations include a

defendant's 'medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Weik*, 409 S.C. at 234, 761 S.E.2d at 767 (quoting *Wiggins*, 539 U.S. at 524). At the time of Stanko's trial, counsel had a responsibility to conduct a thorough investigation of a capital defendant's life and background. *Porter*, 558 U.S. at 39 ("It is unquestioned that under the prevailing professional norms at the time of Porter's trial [in 1988], counsel had an 'obligation to conduct a thorough investigation of the defendant's background.") (quoting *Williams v. Taylor*, 529 U.S. at 396).

According to Stetler, "[a] thorough social history investigation is vital to presenting a mitigating defense in support of a life sentence." App. 3383. The mitigation investigation is also vitally important to the selection of mental health experts and completion of mental health evaluations. App. 3383. According to the professional norms for capital defense attorneys at the time of Stanko's trial,

[t]he social history investigation and any expert evaluations must *then be used by the defense team* to inform their selection of mitigation themes to present . . . as a defense in a capital trial. It is not appropriate to select defense / mitigation themes prior to conducting a thorough social history investigation and conducting any necessary expert evaluations.

App. 3383–84 (emphasis added).

Stanko's defense team violated each of these guidelines by failing to conduct and consider a mitigation investigation in developing their defense themes. Diggs had selected both his theory and his expert before any mitigation investigation had been completed. When some mitigation evidence was later collected, he failed to use that evidence to revise his theory of the case and instead pushed forward with that legally and scientifically unsupportable theory.

Trial counsel's sentencing phase presentation was insufficient to provide effective assistance of counsel. Califf, a Christian family counselor, was hired just two and a half weeks prior to testifying and presented the jury with only general testimony that Stanko had a dysfunctional family and a strict father. She did not provide any analysis of Stanko's life history and background or discuss the impact that it had on Stanko and his functioning around the time of the offense. App. 2257–2284. Califf further damaged the defense by reiterating the psychopathy narrative, stating that Stanko had “tendencies for antisocial” and “a lot of psychopathic issues.” App. 2280–81. Had trial counsel instead hired an appropriate social history expert with adequate time to prepare, the jury would have heard Stephen's detailed life history and its implications.

Additionally, trial counsel was ineffective in failing to present the mitigating behavioral implications of Stanko's brain damage or that his brain damage was treatable. Dr. Wu, who could have fully explained Stanko's brain damage to the jury, reported that counsel gave him “an unusually circumscribed” assignment in Stanko's case, asking him only to review the PET scan and determine whether there were any abnormalities. App. 3316. Had they asked Dr. Wu to testify to the behavioral aspects of the brain damage, Dr. Wu could have clarified that Stanko's brain damage provided a biological explanation for Stanko's inability to handle stressors, his failure to anticipate and learn from consequences, and his aggressive reaction to the stressors converging at the time of the offense. Dr. Wu would also have been able to explain that Stanko's neurological problems were treatable. However, as Dr. Wu reported, defense counsel had “no real interest in going further” than a superficial analysis of Stanko's brain. App. 3226.

In contrast, trial counsel presented only aggravating explanations of Stanko's brain damage by calling him a psychopath and comparing him to alligators, sharks, tigers, infamous psychopathic serial killers, and the devil. Had the jury heard a full explanation of Stanko's life and

brain damage history, they would have had a better understanding of his struggles and the fact that he sought treatment—which could have been successful—but was never able to obtain the treatment necessary to provide him with the tools he needed to cope with the numerous stressors facing him in the weeks and months leading up to the offense. Instead, defense counsel systematically dehumanized Stanko.

In assessing prejudice related to failure to present mitigating evidence, the PCR Order failed to consider the totality of the mitigating evidence presented at the prejudice hearing minus the evidence that would not have been included in the trial presentation—specifically, the dehumanizing labels and comparisons—and improperly found the testimony of the PCR prejudice hearing witnesses cumulative. A court evaluating prejudice must “evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding—in reweighing it against the evidence in aggravation.” *Williams*, 529 U.S. at 398–99. If the jury had heard that Stanko suffered from brain damage and childhood trauma that diminished his ability to successfully navigate the chaos in his life, which he attempted to treat, without the dehumanizing characterizations of the defense presentation, it is likely that “at least one juror would have struck a different balance” between life and death in determining the appropriate sentence. *Wiggins*, 539 U.S. at 536. The court compounded that error by disaggregating the mitigation evidence and reviewing the mitigation claims in isolation as opposed to considering the totality of the evidence.

Further, the PCR court erroneously found that Stanko presented no different testimony in post-conviction proceedings and offered no alternative theory to the one presented at trial. To the contrary, both Dr. Andrews and Dr. Wu provided significant detail that was not presented at trial and, most importantly, described the effects of Stanko’s life history and brain damage in mitigating

fashion. The PCR mitigation presentation included mitigating explanations for Stanko’s behavior, explanations of his neural functioning and its impact on his ability to cope with the many stressors he faced at the time of the crime, and ways in which Stanko could be treated to ensure that he did not pose a future danger.

At trial, Califf provided the jury with some facts about Stanko’s life but failed to place that information in the context of Stanko’s functioning at the time of the offense and further perpetuated the “psychopath” narrative. App. 2280–81. In contrast, Dr. Andrews testified at length about how Stanko’s life history left him unprepared to navigate life outside of a prison setting, and how something happened between Stanko’s childhood and adulthood that left him unable to think rationally. App. 3314–15, 3329–30. Dr. Andrews emphasized that Stanko never received treatment for his coping problems but adapts “remarkably” well in structured settings such as prison. App. 3301–02, 3304–05. Dr. Andrews answered questions relevant to the jury’s culpability and sentencing determinations that Califf did not—specifically, the impact of the more detailed life history on Stanko’s functioning at the time of the crime and that Stanko would not be a danger if sentenced to a term of life imprisonment.¹⁷ Similarly, Dr. Wu testified in mitigating fashion that there was a biological explanation for Stanko’s impulsive and violent behavior without creating additional aggravation through dehumanizing language. App. 3237–44. Dr. Wu also established

¹⁷ The PCR court also improperly discounted the testimony of Stephen’s brother Jeff. The court found that Jeff’s testimony that he would have attended Stephen’s trial was not credible. App. 4113. This finding ignores Jeff’s testimony that none of Stephen’s attorneys contacted him or asking him to provide testimony on behalf of his brother. App. 3136–37. The fact that Jeff did not attend the trial when the defense team made no effort to have him there or obtain testimony from him does not establish that Jeff would not have provided testimony if asked. The ABA guidelines recognize the importance of a team approach to “improving the relationship with the client and his family,” which trial counsel did not implement in their representation of Stanko. ABA Guidelines 10.4, commentary. As a result of this failure by trial counsel, none of Stanko’s family members testified at his trial, leaving the jury without humanizing stories or specific examples of how Stanko’s functioning devolved over time.

that antisocial personality disorder and psychopathy are inaccurate diagnoses when there is a medical explanation for behavior, such as brain damage. App. 3241–43.

The PCR court also erroneously found that the “facts established throughout both phases are too aggravating” to allow for a finding of prejudice. App. 4137. The facts of a case are not a bar to a finding of prejudice. The Supreme Court of the United States and this Court have found ineffective assistance of counsel for failure to adequately investigate and present mitigating evidence in other highly aggravated cases. *See, e.g., Rompilla*, 545 U.S. 374 (finding prejudice where the defendant was convicted of repeatedly stabbing and setting the victim on fire); *Council*, 380 S.C. 159, 670 S.E.2d 356 (finding prejudice where the defendant was convicted of sexually assaulting and killing a seventy-two-year-old woman by forcing her to ingest cleaning fluids). A more searching analysis is required than a finding that the crime was very aggravated and there can therefore be no prejudice. As *Williams* instructs, a post-conviction court must weigh the specific aggravation against the specific mitigation presented at trial and in post-conviction in order to make the prejudice determination. As set forth above, the mitigation in this case is substantial, and explains that Stanko’s behavior resulted from brain damage that was not his fault. The PCR court’s decision to disregard that mitigating evidence and rely solely on the facts established at trial was improper.

IV. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL WERE NOT INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT READILY AVAILABLE EVIDENCE THAT APPLICANT HAD A HISTORY OF GOOD BEHAVIOR IN PRISON AND WAS NOT LIKELY TO BE A FUTURE DANGER WHILE INCARCERATED.

Trial counsel were ineffective in failing to investigate and present significant evidence of Stanko’s adaptability to prison. Based on Stanko’s record in the South Carolina Department of Corrections (“SCDC”), trial counsel could have presented a compelling case that, if given a life sentence, Stanko would have adapted well to prison, was not likely to be a danger while

incarcerated, and could make positive contributions by working with SCDC staff and other inmates.

Kelly testified at the prejudice hearing that he did not recall developing an adaptability theory, and Diggs testified that he thought it was enough that the defense called witnesses from the Georgetown County Detention Center. App. 3013, 3057–59. Davis explained that she thought prison adaptability evidence would have been helpful and passed on the name of a prison adaptability expert to the defense team; counsel never responded. App. 3117–18. As a result, the three relevant witnesses the defense called were able to offer only limited insight into the least relevant period of Stanko’s incarceration—his relatively short pretrial detention while he was facing a death sentence—and the jury did not hear anything about Stanko’s behavior during his previous ten-year prison sentence. Instead, the jurors heard about Stanko’s previous incarceration only from the solicitor: In the state’s closing, Solicitor Hembree told the jury that “[Stanko] [d]oes that eight and a half years in prison. What did he learn from prison? What lessons did he get? He learned how to be a better con-man. He learned how to be a better criminal.” App. 2377.

a. At Stanko’s prejudice hearing, witnesses testified to ample evidence that Stanko adapts well to prison and is best able to conform his behavior in a prison environment.

Six witnesses testified at Stanko’s prejudice hearing regarding Stanko’s prior incarceration: (1) Ralph Beardsley, the warden of Turbeville Correctional Institution; (2) George Waite, the chief disciplinary officer at Turbeville; (3) George Windley, the senior pastor at Ebenezer Baptist Church and the chaplain at Turbeville; (4) Dr. James Austin, who was qualified as an expert in risk assessment and inmate classification;¹⁸ (5) Dr. Andrews; and (6) Dr. Joseph Wu. Each witness

¹⁸ Dr. Austin has a Master’s degree in sociology from DePaul University and a Ph.D. in sociology from the University of California. He worked for over a decade and a half at the National Council on Crime and Delinquency, where he served as the Executive Vice President, and he ran an institute on criminal justice policy at George Washington University. He currently serves as the

provided a different perspective on how Stanko would adapt to prison and why he would not be a threat to other inmates or staff if he were sentenced to life without the possibility of parole. Specifically, the experts discussed three aspects of Stanko's adaptability: (1) his extremely low risk of violence or future criminal behavior while incarcerated; (2) his unique responsiveness and adaptability to the structure of a prison environment; and (3) his ability to contribute positively to the prison system. Altogether, the evidence presented at the prejudice hearing overwhelmingly showed that Stanko was a model prison inmate who positively contributed to the prison environment and earned the widespread respect of prison staff.

- i. *Stanko presents an extremely low risk of future violence or criminal behavior while incarcerated.*

Dr. Austin, qualified as an expert in risk assessment, reviewed Stanko's prior incarcerations records from 1996 to 2004. App. 2976. Based on those records, Dr. Austin testified Stanko would be a low-risk inmate if he were to receive a life sentence, and when asked whether the nature of Stanko's capital offenses would change his opinion, Dr. Austin explained that a person's criminal behavior outside of prison is only "a small part" of a risk assessment. App. 2981. Instead, Dr. Austin explained, the best predictor of a person's future conduct in prison is his past conduct while incarcerated under similar circumstances—"how their behavior [in prison] is." App. 2981. For Stanko, that predictor was extremely positive because his past behavior was "very good." App. 2977. Indeed, under the South Carolina guidelines, Dr. Austin explained that during Stanko's first incarceration, Stanko "would have been in minimum custody under the system," but "the offense

president of the JFA Institute, a criminal policy organization that he founded and that has been the recipient of grants from various sources, including the MacArthur Foundation. Dr. Austin has been qualified as an expert in over twenty-five (25) legal matters and has published three books and dozens of articles on criminal policy. App. 2969–72, 3444–57.

for which he was convicted [kidnapping] blocked him from going to a minimum-security setting. But in terms of behavior,” Stanko was “behaving like a minimum-security inmate.” App. 2977.

Dr. Andrews, who reviewed Stanko’s institutional records through a social-history lens, confirmed Dr. Austin’s assessment from a behavioral perspective, explaining that Stanko’s prior prison record was spotless and that instead of being a risk to the institution, Stanko “contributed in major ways.” App. 3291. Specifically, in prison, Stanko did not engage in “the behaviors he was showing in the community,” such as stealing and running scams. App. 3304. Instead, Stanko “continued to be sociable, which he’s always been, and helpful, which he’s always been.” App. 3304. Additionally, Warden Beardsley explained that Stanko “wasn’t a disciplinary problem.” App. 2964. Rather, he was “the type of individual that most wardens would love to have . . . in their institution.” App. 2964. Stanko’s lack of a past prison record and ability to thrive in a carceral setting demonstrates that he presents a very low risk of future violence or criminal behavior in prison.

ii. *Stanko is uniquely responsive and adaptable to the structure of a prison environment.*

According to Dr. Austin, even though a sentence that ensured that Stanko would die in prison would be a “mundane kind of experience,” making life in prison especially punitive given Stanko’s “above average” intelligence,” App. 2979, 2980, Stanko would do (and had done) his time in “prison time well.” App. 2977. Dr. Wu explained why:

[I]t’s well known that individuals with brain injuries do better in structured environments. The structured environment acts kind of like an external frontal cortex [the part of the brain that regulates impulse control]. It helps to organize their world. It helps to regularize things. There [] is a certain routine and a predictability that an external structured environment provides, which allows people with brain injuries to actually do better than when they are in an unstructured everyday setting where there is unpredictability and where there are unpredictable stresses.

App. 3249; *see also* App. 3268 (“[Prison] can be structured in a way that the outside world is not structured and so it can actually be less stressful depending upon the personality.”). In other words, the predictable nature of prison life enables Stanko to successfully regulate and control his own behavior, even despite his neurological injuries.

Dr. Andrews explained that “in terms of social behavior,” Stanko was successful in prison because “he manages much better in a structured environment than in an unstructured environment, like in the community where he has multiple demands.” App. 3291. Dr. Austin’s and Dr. Wu’s predictions proved accurate: While incarcerated, Stanko revealed himself to be “remarkably adaptive.” In place of criminal behavior, Stanko “stayed gainfully employed. He had a number of prison jobs,” including “as a clerk [and as a] librarian,” and he wrote an academic book. App. 3304–05.

iii. *Stanko is a helpful and productive member of the prison community, and prison staff trust him to take on important roles.*

Warden Beardsley, Officer Waite, and Pastor Windley described how Stanko, unlike other inmates in Turbeville, used his positive attributes—including his writing skills, his organizational abilities, and his intelligence—to contribute to the prison community. For example, Warden Beardsley explained that when the prison was up for reaccreditation, Stanko was “very helpful in getting inmate crews organized” to assist the administrators with preparing the facility. App. 2961–62. Further, Stanko served as a model of positive behavior for young inmates at Turbeville and encouraged them to behave the same way. Warden Beardsley explained that at Turbeville, a prison with a large population of young men, Stanko “had many occasions to talk to the youthful offenders” and served as a mentor to younger inmates. App. 2958–59. Officer Waite recalled watching Stanko help younger inmates with their cases by “trying to give them their rights I would say when they came to the hearing.” App. 3184. Pastor Windley explained that many of the people

incarcerated at Turbeville are young men with limited familial support, and that Stanko was a great help in convincing those young men to attend services at the prison chapel. App. 3193–95.

Further, while at Turbeville, Stanko served as the chairman of the inmate relations counsel and as the inmate law clerk, and the prison officials at his PCR hearing described how Stanko’s work in these positions made their jobs easier. Warden Beardsley and Officer Waite explained that Stanko was selected for his position on the inmate relations council out of a pool of more than 1,000 prisoners, and that a board of prison staff members then had to confirm him in that position. App. 2963, 3183. Stanko “got no benefits” for serving on the inmate relations council, but Warden Beardsley and Officer Waite agreed that Stanko was “a major help” and “always respectful of staff,” and that the prison staff considered him “an aid[] to the inmates.” App. 2963, 3184, 3187. Specifically, Warden Beardsley recalled that “once Stephen started working as an inmate law clerk, the number of grievances started going down, and then he started working with [the] institutional grievance coordinator to resolve a lot of them.” App. 2963.

Dr. Austin confirmed that this kind of contribution was unusual but not unexpected from a person like Stanko, who has a set of skills that are unique among the prison population. Specifically, Dr. Austin explained that some people serving sentences of life without parole “can make tremendous contributions” by “counseling other inmates” and “develop[ing] programs” that “allow [the inmates] to make some kind of contribution back to society.” App. 2980. Stanko, Dr. Austin opined, would “certainly [be] able to do that. His intelligence is above average. He’s a good writer. So he can do some things that other people can’t that would make a contribution.” App. 2980.

b. Trial counsel were ineffective for failing to investigate and present evidence of Stanko's adaptability to prison.

After Stanko's prejudice hearing, the Order improperly found that trial counsel was not ineffective in failing to present prison adaptability evidence in their mitigation case. To the contrary, trial counsel's failure to adequately investigate and present available mitigating evidence related to Stanko's prison adaptability was objectively unreasonable under prevailing professional norms for capital sentencing proceedings in 2006. See *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (establishing that "evidence finding that a defendant would not pose a danger if spared . . . must be considered potentially mitigating" and "may not be excluded from the sentencer's consideration"); *Nance*, 367 S.C. at 556–58, 626 S.E.2d at 883 (finding counsel ineffective for failing to present easily discoverable evidence of Nance's model behavior in prison and concluding that counsel was so ineffective that prejudice must be presumed). Specifically, trial counsel failed to investigate or present any evidence of Stanko's highly favorable prison record from the eight-plus years that he served prior to the capital offense—the most relevant and persuasive evidence to rebut questions of his future dangerousness. Similarly, trial counsel's presentation of Stanko's relatively short jail conduct failed to present his history of making positive contributions to the prison system while incarcerated.

For over thirty years, the United States Supreme Court has recognized the importance of prison adaptability to a jury's decision between life and death. "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing" because "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Skipper*, 476 U.S. at 5 (quoting *Jurek v. Texas*, 482 U.S. 262, 275 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Thus, future dangerousness and prison adaptability are always

implicitly part of a jury’s sentencing consideration. In cases like Stanko’s, in which future dangerousness is a key component of sentencing considerations, mitigating evidence on the issue is particularly crucial. *Compare Skipper*, 476 U.S. at 5 n.1 (explaining that prison adaptability testimony was especially important because of “the prosecutor’s closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison”) *with* App. 2377 (arguing that the “lessons” Stanko had learned from his eight-plus years in prison were in “how to be a better criminal”).

Here, trial counsel’s response to the allegation that Stanko would not be sufficiently constrained by a sentence of life without parole was wholly insufficient. Trial counsel presented the testimony of three witnesses, none of whom could speak to Stanko’s *prison* behavior—clearly the most persuasive and important evidence related to Stanko’s future *prison* conduct.¹⁹ Counsel’s failure to present important and highly persuasive mitigating evidence—evidence that countered a key argument of the prosecution, no less—was objectively unreasonable.

Taken together, the expert witnesses and lay witnesses who testified at the PCR hearing painted an entirely different picture of Stanko’s prison adaptability than what the jury heard in his trial. There was no strategic reason for trial counsel not to present evidence of Stanko’s prison adaptability and low risk of future criminal behavior, and counsel did not offer one at the prejudice

¹⁹ This distinction is especially relevant because inmates have more freedom in the prison setting than in county jails, App. 2967, making it easier for some inmates to cause problems within the prison setting.

hearing.²⁰ This failure was professionally unreasonable under *Skipper* and under prevailing professional norms at the time of Stanko's trial.²¹

c. Trial counsel's failure to investigate and present mitigating evidence of prison adaptability prejudiced Stanko.

"[E]vidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." *Skipper*, 476 U.S. at 7 n.2. Had the jury heard evidence of Stanko's excellent behavior in prison and that he would be an asset to the prison system if sentenced to life without parole, it is reasonably likely that "at least one juror would have struck a different balance" between life and death. *See Wiggins*, 539 U.S. at 537.

First, a reasonable jury would have been left to wonder about Stanko's conduct during his more than eight years in prison, given that the defense presented testimony only on his conduct for a much shorter period of time—while he was in jail facing capital charges. By failing to present testimony on how Stanko behaved in prison (while presenting extremely limited testimony on how he behaved in jail), trial counsel invited the jury to assume that Stanko's conduct was poor. Indeed,

²⁰ On the contrary, Diggs recognized the benefit of prison adaptability testimony by calling witnesses who interacted with Stanko during his initial incarceration during Stanko's second capital trial in Horry County. *See App.* 3058.

²¹ Even if counsel had offered a strategic reason for not calling witnesses to discuss historical evidence of Stanko's adaptability, it would not be reasonable because counsel did not conduct an investigation into Stanko's prison adaptability. *See, e.g., Sears*, 561 U.S. at 954 ("We rejected any suggestion that a decision to focus on one potentially reasonable trial strategy . . . [can be] justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." (internal quotation marks omitted)). Kelly testified that he did not consider presenting evidence that Stanko was adaptable to prison, did not know if any prison officials had been interviewed, and did not consider calling an expert to testify about Stanko's adaptability to prison. *App.* 2994–95. Diggs testified that he did not consider calling an expert to testify about prison adaptability. *App.* 3058. Davis testified that she did not conduct any interviews of prison staff about Stanko. *App.* 3117.

particularly given the inaccurate aggravating evidence presented by Stanko's own counsel combined with the prosecution's contention that Stanko would simply become a better "con-man" in prison, the jury would have been left with little other choice.

Secondly, the time that Stanko spent in prison for a factually similar crime is logically more relevant to the question of his future conduct than the time he spent in jail while awaiting a capital trial. As the Supreme Court has explained in an analogous context:

Deciding the key issue of [the defendant's] dangerousness involve[s] an unusual inquiry. The jurors [are] not asked to determine a historical fact concerning [the defendant's] conduct, but to render a predictive judgment inevitably entailing a degree of speculation. [This defendant], all agreed, had committed acts of terrible violence. Would he do so again? [The defendant's] prior violent acts had occurred outside of prison, and within the context of romantic relationships with women. If the jury did not impose a death sentence, [the defendant] would be sentenced to life in prison, and no such romantic relationship would be likely to arise. A jury could conclude that those changes would minimize the prospect of future dangerousness.

Buck v. Davis, 137 S. Ct. 759, 776 (2017). All of those factors were present in Stanko's case: It was clear from the evidence presented at Stanko's prejudice hearing that the stressors under which Stanko engaged in violent behavior were not present in prison, and that he was helpful and cooperative rather than dangerous while incarcerated. This evidence would likely have been particularly persuasive to the jury because Stanko's previous incarceration was under nearly identical circumstances to those under which the jury was contemplating sentencing him. The defense had at its disposal evidence of Stanko's behavior in prison after being convicted of a similar offense—the single most important predictor of future prison behavior—that they did not present.

Further, trial counsel prejudiced Stanko by failing to explain why Stanko is uniquely situated to adapt well to prison. The three witnesses that trial counsel called could offer only limited testimony about Stanko's politeness and respectfulness in jail. At trial, even when Dr.

Sachy briefly mentioned that Stanko could adapt to a structured environment, he only discussed adaptability in the context of the harmful “psychopath” label while also opining that a psychopath would be manipulative in prison, using the system to his advantage. App. 2166. Had anyone instead explained to the jury that Stanko had a history of being a model inmate who had earned the respect of prison staff, they would likely have developed a more accurate picture—one of a helpful and generous person who could make lasting positive contributions to the prison environment.

At Stanko’s prejudice hearing, Dr. Austin, Dr. Wu, and Dr. Andrews painted a complete picture of why Stanko does prison time well. The Department of Corrections officials had observed Stanko’s behavior over a longer period of time, in the setting in which Stanko would be living after his conviction and for the rest of his life, than the Detention Center employees who testified at trial. As Dr. Wu explained, a structured environment, like prison, would help “organize [Stanko’s] world” and allow him “to actually do better than when [he is] in an unstructured everyday setting where there is unpredictability and where there are unpredictable stresses.” App. 3249. Although Dr. Wu testified at Stanko’s trial, counsel never asked him (or any other expert) to explain how Stanko’s brain injuries might relate to his future conduct in prison. Drs. Wu and Andrews independently testified that Stanko would not be likely to cause harm in the prison system,²² and this evidence was corroborated and strengthened by other PCR testimony from Dr. Austin, who

²² The PCR court improperly relied on the fact that some of the prison adaptability evidence presented at the PCR hearing was presented at the Horry County trial, where Stanko also received a death sentence. This analysis fails to account for the fact that expert evidence was presented at the PCR hearing (from Drs. Wu, Austin, and Andrews) that was not presented at the Horry County trial and to consider the totality of the evidence adduced at trial and at PCR *in this case*. See *Williams*, 529 U.S. at 397–98.

opined that Stanko could be safely housed in the Department of Corrections and could actually benefit the institution if he received a life sentence. App. 2977–80.

In comparing the testimonies offered at trial and at the prejudice hearing, the PCR court incorrectly found that the testimony from the detention center employees was sufficiently similar to the testimony from the SCDC officials and chaplain. This finding ignores the substantial differences between these testimonies resulting from the SCDC officials’ ranks and experience with Stanko. The SCDC employees were able to provide specific examples of ways in which Stanko, during his previous incarceration, worked for the benefit of the institution, staff, and other inmates. *See* App. 2954–65 (Warden Ralph Beardsley); App. 3181–86 (Officer George S. Waite); App. 3191–96 (Pastor George Windley). This testimony extended far beyond the trial testimony of three staff members from the Georgetown County Detention Center, who briefly testified only that Stanko was respectful and did not cause problems. App. 1714–28. The SCDC officials were able to testify not only that Stanko did not create problems while incarcerated, but that he was a benefit to the prison institution.

Defense counsel also failed to present any evidence of how Stanko could contribute to the prison community by helping other inmates and staff. This failure is especially significant in light of the fact that the state focused on Stanko’s intelligence as a component of his future dangerousness. *See, e.g.*, App. 2377 (“[Stanko] [d]oes that eight and a half years in prison. What did he learn from prison? What lessons did he get? He learned how to be a better con-man. He learned how to be a better criminal.”). By directing attention to Stanko’s intellect and his involvement in “cons,” the State invited the jury to conclude that Stanko would find ways to continue his manipulative behavior in prison—the implication was that instead of adapting, he would “learn[] how to be a better con-man” and act on that knowledge. *See State v. Stone*, 350

S.C. 442, 451–52, 567 S.E.2d 244, 249 (2002) (explaining that the state put future dangerousness at issue by arguing generalized dangerousness and a risk of escape). Trial counsel could easily have countered this implication by presenting testimony of Stanko’s past behavior that indicated that he would use his intelligence in service of both staff and inmates in prison and could help the prison run more smoothly by facilitating communication between staff and inmates, as he did at Turbeville. Again, counsel had at its disposal persuasive evidence of how and why Stanko would be a helpful inmate rather than a dangerous or manipulative one and did not present it.

Evidence of Stanko’s ability to adapt well and contribute to the prison environment would have been especially powerful in addition to the mitigating evidence discussed above that was not provided to the jury. Taken together, the jury would have learned that Stanko’s life history and brain injuries created great difficulties for Stanko in managing unpredictable stressors in everyday life, but that he does extremely well in the structured prison setting and can benefit the staff and other inmates within a prison institution. *See Williams*, 529 U.S. at 397–98 (requiring a court to account for all of the ways in which counsel’s deficiencies affected the jury’s appraisal of the issues). Had the jury heard this testimony, it is reasonably likely that “at least one juror would have struck a different balance” between life and death. *Wiggins*, 539 U.S. at 537.

CONCLUSION

For the reasons stated above, the PCR Order was improperly drafted and adopted by the PCR court on remand. Its conclusions are governed by errors of law and are not supported by evidence in the record. This Court should, therefore, grant certiorari to correct these errors.

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Respectfully submitted,

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