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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

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Appeal from Georgetown County
The Honorable W. Jeffrey Young, Circuit Court Judge

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STEPHEN C. STANKO,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2017-000211

**[Volume 1]**

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# PROPOSED SUPPLEMENTAL APPENDIX

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THE 15th JUDICIAL CIRCUIT |
| COUNTY OF GEORGETOWN | ) | |
| | ) | Case No.: 2008-CP-22-1446 |
| STEPHEN C. STANKO # 6022, | ) | THIRD FINAL AMENDED APPLICATION |
| | ) | FOR POST-CONVICTION RELIEF |
| Applicant, | ) | |
| vs. | ) | |
| THE STATE OF SOUTH CAROLINA, | ) | |
| Respondent. | ) | |

FILED
GEORGETOWN COUNTY, S.C.
2015 APR 21 AM 9:12
ALMA Y. WHITE
CLERK OF COURT

1. Place of detention: Death Row, Lieber Correctional Institution, P.O. Box 205, Ridgeville, South Carolina, 29472

2. Name and location of Court which imposed sentence: Georgetown County Court of General Sessions, Deadra L. Jefferson presiding.

3. Name(s) of co-defendant(s) (if any): None.

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2005-GS-22-0918; Murder, Assault and Battery with Intent to Kill (ABWIK), Kidnapping (2 Counts), Armed Robbery, and Criminal Sexual Conduct - First Degree.

5. The date upon which sentence was imposed and the terms of the sentence: August 1, 206, Death Sentence.

6. Check whether a finding of guilty was made: after a plea of not guilty.

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Supreme Court

ii. United States Supreme Court

(b) the result in each such Court to which you apealed:

i. Sentence and conviction afirmed.

ii. Certiorari denied.

(c) the date of each such result:

i. February 25, 2008, rehearing denied March 19, 2008.

ii. October 06, 2008.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State of Stephen Stanko, 376 S.C. 571, 658 S.E. 2d 94 (2008).

9. If you answered "no" to (7), state your reasons for not so appealing: Not Applicable.

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Trial Counsel in violation of Applicant's Sixth and Fourteenth Amendment rights.

(i) Pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), Applicant was constructively denied assistance of counsel when Trial Counsel failed to present a meaningful challenge to the State's case at both the guilt and sentencing phases.

(ii) Trial Counsel was ineffective for presenting a defense of not guilty by reason of insanity.

(iii) Trial Counsel was ineffective for failing to object to the characterization of Applicant as an evil person.

(iv) Trial Counsel was ineffective for allowing the introduction of evidence concerning Applicant's prior bad acts at the guilt phase.

(v) Trial Counsel was ineffective in failing to request a jury charge on the lesser included offense of Voluntary Manslaughter.

(vi) Trial Counsel was ineffective in failing to request copies of the images and data analyzed by Dr. Spicer.

(vii) Counsel was ineffective for abandoning the argument and issue as to whether jurors could be questioned concerning their views surrounding the insanity defense.

(viii) Trial counsel failed entirely to properly Motion for a Change of Venue in Applicant's trial.

(ix) Defense counsel failed to investigate, research and challenge State expert. Pamela Crawford, and her role not only as an expert examining for competency and insanity but also as the investigative official she played prior to being legally assigned to the case.

(x) Trial Counsel abandoned the Applicant during Pamela Crawford's multiple interviews.

(xi) Trial Counsel was ineffective in failing to investigate and present mitigating evidence at the sentencing phase.

(xii) Trial Counsel was ineffective in failing to properly investigate matters concerning his past mental health history.

(xiii) Trial Counsel was in effective in failing to object to the Court's decision not to charge S.C. Code § 16-3-20(C)(b)(8).

(xiv) Trial Counsel was ineffective for failing to argue that the evidence in the record supported a charge on the statutory mitigating circumstance of provocation.

(b) Prosecutorial Misconduct that Violated Applicant's Right to Due Process.

(i) The prosecution knowingly and willingly initiated, presented and allowed false and inaccurate testimony.

(ii) The prosecution knowingly withheld evidence in violation of *Brady* and Rule 5, SCRCrimP.

(c) Ineffective Assistance of Appellate Counsel.

(i) Pursuant to *Cronic*, Applicant was denied effective assistance of appellate counsel due to the unreasonable time restraints placed on Appellate Counsel.

(ii) Appellate Counsel was ineffective for failing to brief the improper suppression of the testimony of Dr. Wu concerning the validity of Dr. Spicer's methodology in the sentencing phase.

(iii) As an alternative ground to those listed in Issue 10(a)(xiii) and 10(a)(xiv), Appellate Counsel was ineffective in failing to argue that the trial court erred in failing to instruct the jury on the statutory mitigating circumstance of provocation contained in S.C. Code § 16-3-20(C)(b)(8).

(d) Other Violations of Constitutional Rights.

(i) The Chief Justice of the S.C. Supreme Court violated the Applicant's rights concerning due process and fundamental fairness by ordering an expedited appeal in the Applicant's direct appeal.

(ii) Applicant was denied his right to Due Process in the ways addressed in this Application and such other ways as will be raised at an evidentiary hearing.

(iii) Applicant was denied Due Process by the failure of the Court to instruct the jury on the statutory mitigating circumstance of provocation contained in S.C. Code § 16-3-20(C)(b)(8).

(iv) The cumulative effect of all issues listed above as well as those that will be shown at an evidentiary hearing had the cumulative effect of deny applicant his right to counsel, his right to a fair trial, and his right to due process under the state and federal constitutions.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Ineffective Assistance of Trial Counsel:

(i) Pursuant to United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984), Applicant was constructively denied assistance of counsel when Trial Counsel failed to present a meaningful challenge to the State's case at both the guilt and sentencing phases. Trial Counsel's chosen defense prejudiced Applicant in both the guilt and sentencing phases.

(ii) Trial Counsel's defense strategy failed to meet the standard of insanity provided for under S.C. Code § 17-24-10. Trial Counsel's only evidence to support the defense of not guilty by reason of insanity was "[e]vidence of a mental disease or defect that [was] manifested only by repeated criminal or other antisocial conduct." Under South Carolina law the evidence was "not sufficient to establish the defense of insanity." *See* S.C. Code § 17-24-

10(c). Therefore, Trial Counsel was ineffective in presenting the defense of not guilty by reason of insanity. Applicant was prejudiced by this defense both in the guilt and sentencing phases.

(iii) Throughout the trial, Trial Counsel allowed witnesses and the opposing counsel to refer to Applicant in a negative light including calling his a psychopath and great white shark.

(iv) Trial Counsel was ineffective for failing to object to the admission of the facts surrounding the assault on Elizabeth McLendon; evidence of his prior frauds; and other such evidence that will be presented at an evidentiary hearing.

(v) Trial Counsel failed to request a jury charge despite the fact that the record contained evidence that would have supported such a charge.

(vi) Trial Counsel was ineffective in failing to investigate by failing to obtain copies of the images and data analyzed by Dr. Spicer. This inhibited Trial Counsel's ability to impeach this evidence.

(vii) Counsel was ineffective for abandoning the argument and issue as to whether jurors could be questioned concerning their views surrounding the insanity defense. Subsequent to the Court's ruling on the State's objection, counsel indicated he was "abandoning" this line of questioning. Not only did counsel's abandonment fail to preserve the issue for appellate review, but this failure and gross ineffectiveness also denied defense's ability to address and question later jurors on the same and/or similar maters. Applicant will also prove this allegation through other such evidence that will be presented at and evidentiary hearing.

(viii) Trial counsel failed entirely to properly Motion for a Change of Venue in Applicant's trial. Applicant was prejudiced by the inability to have a fair and unbiased jury. Applicant will show this through demonstrating that of the 116 potential jurors questioned, 72 were excused with 50 people claiming "fixed opinions" in Voir Dire. Applicant will also prove this allegation through other such evidence that will be presented at and evidentiary hearing.

(ix) Defense counsel failed to investigate, research and challenge State expert. Pamela Crawford, and her role not only as an expert examining for competency and insanity but also as the investigative official she played prior to being legally assigned to the case. Prior to being assigned to the case, Pamela Crawford had literally traveled to Columbia, SC and Augusta, GA and had interviewed multiple witnesses, viewed multiple scenes which would later be discussed at trial., approaching said individuals as a representative of SLED. Having acted in an investigative process of this case, Pamela Crawford could not possibly take an unbiased and/or fair approach to this case. The Applicant will show that Pamela Crawford routinely acts for the State in multiple positions with multiple departments. Pamela Crawford is a prosecutorial tool of the State whose hats, business cards, and lettered wind-breakers change entirely depending on what she is needed for at any given point in a case.

(x) Trial Counsel abandoned the Applicant minutes into Pamela Crawford's multiple interviews. Had counsel stayed for even ten (10) minutes at any of the numerous examinations, he could have and would have seen that

Pamela Crawford had in her possession the Applicant's "journals" and other miscellaneous documents that had been provided to her by the prosecution but were not provided in Discovery to the Defense. unsel, however, abandoned the Applicant which later allowed Pamela Crawford to make numerous false and highly prejudicial statements during her Court testimony that could not be rebutted.

(xi) Trial Counsel was ineffective in failing to investigate and present mitigating facts at the sentencing phase. This mitigating evidence includes but it not limited to: information concerning Applicant's past; the possible murder of his brother; and favorable information contained in the DPPPS records; favorable information concerning Applicant's adaptability to prison life; and other such evidence that will be presented at the evidentiary hearing.

(xii) Defense counsel failed to give investigators the additional time and resources to continue in investigating and researching specific relevant matters such as birth records, health/medical records, Dr. Randy Waid (MUSC) and mental health sessions with the Applicant. health/medical/mental records from the Berkeley County Mental Health Department involving the Applicant, facts and information surrounding a 1986 incident, and other relevant issues.

(xiii) Trial Counsel did not object to the Trial Court's decision not to charge S.C. Code § 16-3-20(C)(b)(8).

(xiv) Trial Counsel failed to remind the Trial Court that the evidence in the record supported a charge on the statutory mitigating circumstance of provocation.

(b) Prosecutorial Misconduct.

(i) The prosecution knowingly allowed false testimony concerning the following: Applicant's DPPPS records; Applicant's sanity; Defense witness qualification; and such other evidence that will be demonstrated at trial.

(ii) The prosecution failed to provide Discovery materials, in their possession, to the Defense including, but not limited to, items taken from the victim's residence (both documentary and electronic file), documents surrounding an incident in which the Applicant was struck in the head by an unopened bottle of beer while he was stopping a fight between two individuals (these documents being extremely relevant as related to the Applicant's defense and because investigators were unable to obtain copies from the small court that addressed the case and public officials), and other documents to be presented at PCR hearing.

(c) Ineffective Assistance of Appellate Counsel

(i.) Pursuant to *Cronic*, Applicant was denied effective assistance of appellate counsel due to the unreasonable time restraints placed on Appellate Counsel. The South Carolina Supreme Court expedited the appeal of this case and in doing so denied Applicant effective assistance of appellate Counsel under *Cronic*.

(ii.) Appellate Counsel was ineffective for failing to brief the improper suppression of the testimony of Dr. Wu concerning the validity of Dr. Spicer's methodology in the sentencing phase.

(iii.) Appellate Counsel failed to argue that the Trial Court erred in failing to instruct the jury on the statutory mitigating circumstance of provocation contained in S.C. Code § 16-3-20(C)(b)(8).

(d) Other Violations of Constitutional Rights

(i) The Chief Justice of the S.C. Supreme Court violated the Applicant's rights concerning due process and fundamental fairness by ordering an expedited appeal in the Applicant's direct appeal.

(ii) Applicant was denied his right to Due Process in the ways addressed in this Application and such other ways as will be raised at an evidentiary hearing.

(iii) Applicant was denied Due Process by the failure of the Court to instruct the jury on the statutory mitigating circumstance of provocation contained in S.C. Code § 16-3-20(C)(b)(8).

(iv) The cumulative effect of all issues listed above as well as those that will be shown at an evidentiary hearing had the cumulative effect of deny applicant his right to counsel, his right to a fair trial, and his right to due process under the state and federal constitutions.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or Application: Not Applicable.

14. Has any ground set forth in (10) been previously presented to this or any other State or Federal, in any petition, motion or application which you have filed? No.

15. If you answered "yes" to (14) identify: Not Applicable.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Issue was not preserved for appellate review.

(b) All other issues were only appropriate for post-conviction relief review.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. William 1. Diggs, 1700 Oak Street, Suite D, Myrtle Beach, SC 29577

ii. Gerald Kelly_, 4760 Yemassee Hwy, Varnville, SC 29944

iii. Joseph L. Savitz, III, 1330 Lady Street, Suite 401, Columbia, SC 20201

iv. Katherine H. Hudgins, 1330 Lady Street, Suite 401, Columbia, SC 29201

(b) the proceedings at which each such attorney represented you:

i. Trial

ii. Trial

iii. Appeal

iv. Appeal

19. State clearly the relief you seek in filing this application: New trial and sentencing.

20. Are you now under sentence from any other court that you have not challenged? No.

RESPECTFULLY SUBMITTED,

Stuart M. Axelrod
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4701 Oleander Drive
Myrtle Beach, SC 29577
(843) 916-9300
stuart@gotaxelrod.com

Attorney for Applicant

April 20, 2015

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN | ) | IN THE COURT OF COMMON PLEAS |
| Stephen C. Stanko, #6022, | ) | **C/A No. 08-CP-22-1446** |
| Petitioner, | ) | |
| v. | ) | |
| State of South Carolina, | ) | **RESPONDENT'S RETURN TO THE SECOND FINAL AMENDED PCR APPLICATION AND MOTION TO DISMISS** |
| Respondents. | ) | |

The Respondent, above-named, through below-signed counsel, hereby makes a Return to the Second Final Amended Application for Post-Conviction Relief filed on October 27, 2014. This proceeding is brought pursuant to S.C. Code Ann. Section 17-27-160 and the November 7, 2008 Order of the S.C. Supreme Court staying the Order of Execution of Georgetown County death row inmate Stephen C. Stanko to allow him to pursue potential state post-conviction relief (PCR). The S.C. Supreme Court has assigned the Honorable Jeffrey Young, Circuit Court Judge, with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. Respondent denies all of the allegations of the Second Final Amended Application, and requires strict proof thereof.

**I.**

The applicant, Stephen C. Stanko ("Stanko"), was indicted by the Georgetown County Grand Jury on August 24, 2005 in a multi-count indictment (05-GS-22-0918) for murder, two (2) counts of kidnapping, assault and battery with intent to kill (ABWIK), criminal sexual conduct in the first degree (CSC 1st), and armed robbery. The charges arose from the April 8, 2005 death of Laura Ling and the rape and attempted murder (ABWIK) of her daughter ("the daughter") on the

same date. The State served a notice of intent to seek the death penalty. Stanko was appointed William "Bill" Diggs, Esquire, and Gerald Kelly, Esquire, to represent him on the charges. The State was represented by Solicitor Greg Hembree and Deputy Solicitor Fran Humphries.

***The Guilt Phase***

On August 7, 2006 through August 11, 2006, Stanko was tried by a jury for the indicted charges before the Honorable Deadra L. Jefferson, Circuit Court Judge. At the conclusion of the guilt phase, the jury found Stanko guilty of all charges in the indictment.

***The Penalty Phase***

After the required statutory twenty-four (24) hour waiting period, the sentencing phase began on August 14, 2006 and ended on August 18, 2006. At its conclusion, the jury found the State had proven all of the statutory aggravating circumstances it alleged: (1) the murder was committed while in the commission of criminal sexual conduct in any degree; (2) the murder was committed while in the commission of kidnapping; (3) the murder was committed in the commission of robbery while armed with a deadly weapon; (4) the murder was committed while in the commission of larceny with the use of a deadly weapon; and (5) the murder was committed while in the commission of physical torture. On the murder charge, the jury recommended a sentence of death. On August 18, 2006, Judge Jefferson, following the jury's recommendation, sentenced Stanko to death for the murder of Laura Ling. Judge Jefferson also sentenced Stanko to twenty (20) years confinement for assault and battery with intent to kill (ABWIK), thirty (30) years for criminal sexual conduct in the first degree (CSC 1st), thirty (30) years for the kidnapping of the daughter, and thirty (30) years for armed robbery. Pursuant to South Carolina law, Judge Jefferson did not sentence Stanko on the kidnaping charge for Laura Ling.

***The Direct Appeal***

Stanko appealed his convictions and sentences to the S.C. Supreme Court. Stanko was represented in his appeal by Joseph L. Savitz, Chief Appellate Defender, and Katherine Hudgins, Assistant Appellate Defender, of the South Carolina Office of Appellate Defense. Respondent was represented by Assistant Attorney General J. Anthony Mabry, Esq. On direct appeal, Stanko raised two (2) issues:

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

2. Did the trial judge commit reversible error at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by S.C. Code Section 16-3-20(C)(b)(7): "The age or mentality of the defendant at the time of the crime?"

On February 25, 2008, the S.C. Supreme Court affirmed Stanko's convictions and death sentence in a published opinion. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). Stanko filed a Petition for Rehearing. The S.C. Supreme Court denied the Petition for Rehearing on March 19, 2008.

Stanko subsequently filed a Petition for a Stay of Execution. Respondent filed a Return to the Petition for a Stay of Execution opposing the request. On April 16, 2008, the Supreme Court entered an Order staying Stanko's execution for ninety (90) days so that he could either seek certiorari to the U.S. Supreme Court or file an application for post-conviction relief (PCR) in the state circuit court of common pleas.

Stanko subsequently filed a Petition for Writ of Certiorari in the U.S. Supreme Court. Stanko raised only issue one (1) above in his Petition for Certiorari to the U.S. Supreme Court.

Stanko was represented in this appeal by the same appellate counsel. Respondent filed a Brief in Opposition to the Petition for Certiorari. Respondent was represented in this appeal by Deputy Attorney General Donald J. Zelenka and Assistant Attorney Mabry.[1] On October 6, 2008, the U.S. Supreme Court denied certiorari.

The S.C. Supreme Court subsequently issued an Order of Execution to carry out Stanko's death sentence. Stanko's appellate counsel, Katherine Hudgins, Esq., of the S.C. Office of Appellate Defense, filed a Petition for Stay of Execution dated October 9, 2008. The Petition to Stay Stanko's execution was based on Stanko's desire to pursue post-conviction relief (PCR). The State filed a Return opposing the granting of a Stay of Execution pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) on the ground that the sole ground alleged in Stanko's Petition for Stay of Execution was a ground the S.C. Supreme Court found to be completely without merit in the direct appeal. Stanko's appellate counsel filed a letter Reply to the State's Return stating Stanko intended to offer other grounds of ineffective assistance of counsel later, after the appointment of counsel, and investigation by them. While four (4) members of the Supreme Court agreed with the State's position that Stanko had asserted no claim of ineffective assistance of counsel except one (1) the Court found on direct appeal to be without merit, those members of the Court granted the Stay request anyway on November 7, 2008 stating Stanko could file additional grounds of ineffective assistance of counsel later. Chief Justice Toal disagreed with the Court's decision and would have denied the Stay request pursuant to In re Stays of Execution in Capital Cases, because the only claim asserted in the Petition for Stay of Execution was patently without merit.

[1]Mr. Zelenka was counsel of record before the United States Supreme Court.

**Attachments**

Respondents previously attached and now incorporates herein by reference the following materials:

1. Record on Appeal
2. Final Brief of Appellant
3. Final Brief of Respondent
4. State v. Stanko, 376 S.C. 571, 654 S.E.2d 98 (2008)
5. Petition for Rehearing
6. Order of South Carolina Supreme Court Denying Petition for Rehearing
7. Petition for Stay of Execution to seek certiorari from the United States Supreme Court
8. Return to Petition for Stay of Execution
9. Order of South Carolina Supreme Court Granting Stay to pursue certiorari or PCR
10. Petition for Writ of Certiorari/United States Supreme Court
11. Brief in Opposition to Petition for Certiorari/United States Supreme Court
12. Order of United States Supreme Court Denying Petition for Certiorari
13. Petition for Stay of Execution
14. Respondent's Return to Petition for Stay of Execution
15. Letter Reply to Respondent's Return to Petition for Stay of Execution
16. Order of South Carolina Supreme Court dated November 7, 2008
17. Original Application for Post-Conviction Relief *[2]
18. Respondent's Return to Application for PCR and Motion to Dismiss*

* Attachments 17 through 24 were not included with Respondent's original Return, however they were included with the last Return.

19. (1st) Final Amended Application for Post-Conviction Relief *
20. Respondent's Return to the (1st) Final Amended Application for PCR*
21. Order of South Carolina Supreme Court Expediting Appeal*
22. Motion for an Extension of Time to File Initial Brief and Designation of Matter*
23. Order Granting 30 Day Extension of Time to File Initial Brief and Designation*
24. Respondent's Return to the Final Amended Application.*

***Factual Summary***

On the evening of April 7, 2005, the fifteen (15) year old daughter of Laura Ling was working on a term paper at her home in Murrell's Inlet, S.C. The daughter went to bed around 11:00 p.m. (R. 1252, ll. 8-21). At approximately 1:15 a.m., she was awakened by Applicant, "Stanko", her mother's boyfriend, trying to sexually assault her. (R. 1253, l. 1 - 1256, l. 20 ). The daughter fled to her mother's bedroom. (R. 1253, l. 1 - 1257, l. 11).

She found her mother semi-conscious between the bed and the bedroom wall with her hands tied behind her back. (R. 1257, ll. 12-22, 1407, l. 20 - 1408, l. 24). Stanko followed the daughter into her mother's bedroom and knocked the daughter unconscious. (R. 1257, l. 21 - 1258, l. 11 ). When the daughter regained consciousness, her arms were tied, she was gagged, and Stanko was sexually assaulting her.[3] (R. 1258, l. 12 - 1259, l. 24 ).

Stanko beat the daughter until she yielded to the sexual assault. (R. 1260, ll. 1-13). While Stanko raped her, the daughter could hear her mother moaning on the floor beside the bed. (R. 1259, ll. 13-19). Stanko then turned the daughter over and tried to smother her while he choked the

[3]Laura Ling was also gagged. (R. 1795, ll. 9-12). Her autopsy revealed she had been savagely beaten before her death. (R.1412, l. 9 - 1415, l. 7 ). She died as a result of asphyxia due to strangulation. (R. 1418, ll. 16-24). Her throat was also cut. (R. 1415, ll. 12-25).

life out of her mother with his free hand. (R. 1262, l. 4 - 1263, l. 14 ). Stanko then slit the daughter's throat twice with a knife. (R. 1264, ll. 6-18 ). The emergency room doctor who later treated the daughter testified that her ear was almost completely severed from her head. (R. 1311, ll. 13-20 ).

During the assault and after, Stanko spoke to the daughter. Stanko held a sharp object to her throat and whispered to her, "..scream and I'll kill you both." (R. 1254, ll. 3-20). After killing her mother, Stanko told the daughter that what had happened to her mother was her, the daughter's, fault. (R. 1264, l. 1, 1291, l. 23 - 1292, l. 12 ). Stanko also taunted the minor victim during the sexual assault. When the daughter told him she was going to be sick, Stanko told her "..well, you will just be sick on yourself." (R. 1261, ll. 1-3). When she told him her fear of getting pregnant, Stanko told her "[w]ell then, your going to be raising a baby by yourself..." (R. 1261, ll. 4-6). During the sexual assault, Stanko also accused the fifteen (15) year old victim of being promiscuous. (R. 1261, ll. 8-11). After cutting the daughter's throat, Stanko told her to lie down on the floor next to her mother. (R. 1264, ll. 16-18).

After murdering Laura and raping the daughter and cutting her throat, Stanko showered, dressed, packed a suitcase, and went through the daughter's and Laura's purses removing belongings.[4] (R 1265, ll. 6-14, 1265, l. 20 - 1266, ll. 23, 1268, 1541-42, 1575, ll. 2-25 ). Stanko also removed a bracelet from Laura's dead body. (R. 1801, ll. 15-19, 1887, ll. 7-11 ). Stanko locked the door as he left the house and then left the crime scene driving Laura Ling's car. (R. 1236, ll. 13-25, 1246, ll. 3-20, 1249, ll. 14-16 ).

[4] After her throat was cut, the daughter used all her strength to sit up. When she did she saw Stanko packing the suitcase. While packing the suitcase, Stanko told the daughter to "...no, no, no, lie back down." (R. 1265, ll. 6-14). The daughter then passed out.

Stanko drove Ling's car to a local bank, Ling's bank. He then made a large withdrawal from Laura's bank account using an ATM machine, used her credit card to make a purchase, and drove to a friend's residence in Conway, S.C., in Laura's car. (R. 1369, l. 13, - 1373, l. 9, 1382, ll. 2-22, 1385, ll. 4-7, 1575, l. 12 - 1576, l. 2).

Later that morning, Stanko called Laura's employer, the Socastee Library, and informed them Laura would not be coming in to work because she had suffered food poisoning and was hospitalized. (R. 1374, l. 12 - 1380, l. 6). At the time, Stanko did not believe the bodies of Laura and the daughter would be discovered for at least a week. (R. 1888, ll. 11-16).

Unbeknownst to Stanko, the daughter had survived the assault and alerted authorities to her mother's murder by calling 911. (R. 1269, l. 7 - 1270, l. 25). Sheriff's deputies broke the lock on the front door and found the daughter inside her home covered in blood. (R. 1237, ll. 1-23). As a result, when Stanko called the library, the operator at the Socastee library was already aware of Laura's murder and notified authorities of Stanko's deceptive phone call. (R. 1376, l. 9 - 1380, l. 14).

That same day, Stanko shot and killed the friend he was staying with, Henry Turner, and fled to Columbia, S.C. in Turner's truck.[5] (R. 1887, ll. 18-23, 1470, l. 17 - 1471, l. 5). Stanko abandoned Laura Ling's car at Turner's home in Conway, S.C. (R. 1381, l. 4 - 1385, l. 7).

After he drove to Columbia, Stanko was seen that evening, April 8th, partying at a bar in the

[5]The State did not seek to introduce evidence of this murder in its case during the guilt phase. The trial judge refused to allow the State to cross-examine Stanko's psychiatric expert's about the Turner murder in the guilt phase. Evidence that Stanko committed this murder was not allowed in the penalty phase of the Ling murder trial either. The trial court only allowed the State to introduce evidence that Stanko left Ling's vehicle at Turner's residence in Conway and took Turner's truck to Columbia, S.C. and had Turner's gun & truck when arrested. Personal property of Laura Ling was found in Turner's truck. ( R. 2611, ll. 4-11 & R. 2615, ll. 10-13). Stanko was subsequently tried and convicted in Horry County of the Turner murder in 2009 and sentenced to death. His convictions and death sentence for that murder were affirmed by the S.C. Supreme Court. That case is presently on PCR.

Congaree Vista area of Columbia, S.C. (R. 2550, ll. 21-23, 2552, l. 16 - 2553, l. 18, 2554, ll. 11-24). While there, Stanko represented himself variously to be a real estate magnate who had just closed a big deal, a graduate of The Citadel, and an employee of a company traded on the New York Stock Exchange. (R. 2543, l. 5 - 2544, l. 12, 2559, ll. 7-23 ). Stanko was witnessed spending large amounts of money at this establishment and another. (R. 2545, ll. 2-5).

Shortly thereafter, Stanko drove from Columbia to Augusta, Georgia, where the Master's golf tournament was occurring. On April 9th, Stanko was seen once again visiting a nightclub and began a new romance representing to others, including his new girlfriend, Dana Putnam, that he was the owner of several "Hooter's" restaurants in South Carolina. (R. 2562, ll. 1-14, 2564, l. 3 - 2565, l. 13). Stanko gave Putnam the bracelet he had removed from Ling's wrist after her murder. (R. 2585, l. 8 - 86, l. 2, 2876, ll. 17-19 ).

After the passage of a few days, Stanko's new girlfriend recognized Stanko's photo in a newspaper article regarding the coastal South Carolina murders, and she immediately notified police. (R. 2588, l. 17 - 2590, l. 14). U.S. Marshals placed a trace on her phone and Stanko was subsequently arrested at a shopping mall in possession of Turner's truck. (R. 2609, l. 11 - 2618, l. 13). The key fob to Laura Ling's car and a notebook with Ling's name on it were found in the truck. (R. 2615, ll. 10-13 & 2611, ll. 4-11). Stanko was extradited to South Carolina for both murders and the crimes against the fifteen (15) year old daughter. (R. 2603, l. 13 - 2606, l. 10).

Stanko had previously been convicted of tying up and assaulting another female victim in February of 1996. (R. 2430, l. 22 - 2431, l. 12, 2870, ll. 1-8). This victim was also gagged. (R. 2313, ll. 7-12, 1795, ll. 6-8). At the time that assault occurred, Stanko was on the verge of being arrested for several "scams" or "cons" he was committing in the Charleston area of South

Carolina, and Stanko was in danger of being exposed to police by that female victim. (R. 2312, l. 9 - 2313, l. 21, 2431, l. 13-2433, l. 14).

At the time of Laura Ling's murder, Stanko was once again running several scams, this time in the Myrtle Beach area of South Carolina. Stanko was representing himself to be a "lawyer," "paralegal," or "investigator" for law firms and as a result was able to obtain retainers from various clients around Murrell's Inlet. (R. 2443, l. 6 - 2475, l. 10, 2476, l. 4 - 2479, l. 12, 1799, ll. 11-15). Reportedly, Stanko operated his "practice" out of the library where Laura Ling worked. (R. 1855, l. 15 - 1856, l. 20). In the days leading up to the Ling murder, once again Stanko's "cons" and "scams" were on the verge of being exposed. (R. 1394, l. 1 - 1395, l. 22, 1763, l. 17 -1764, l. 17). Victims of Stanko's latest schemes were demanding of him the return of their money and threatening to go to the police. (R. 2815, ll. 15-17, 2838, l. 17 - 2839, l. 10). Stanko was under community supervision for the Charleston kidnapping at the time he was committing the Myrtle Beach area scams and at the time he committed the brutal crimes against Laura Ling and her daughter.

In addition to the testimony of the daughter, who survived her rape and attempted murder, D.N.A. evidence linked Stanko to both the murder scene and the fifteen (15) year old rape victim. (R. 1395, l. 20 - 98, l. 25). Surveillance photos from Laura's bank captured Stanko removing cash from Laura's account after the murder and sexual assault. (R. 1371, l. 9 - 72, l. 12). Stanko's briefcase was also found in Laura's abandoned car at Turner's residence in Conway, S.C. (R. 1382, ll. 16-22, 1384, ll. 8 - 23, 1385, ll. 4-7).

**II.**

On October 17, 2008, Stanko, through appellate counsel Katherine Hudgins, made an

application for post-conviction relief (2008-CP-22-1446). In the Application, Stanko alleged only one ground. The State filed a Return and Motion to Dismiss denying the sole allegation of this appolication. The State moved to dismiss on the basis the underlying issue was found to be completely without merit by the South Carolina Supreme Court in its published opinion in this case, State v. Stanko, *supra* and in the Supreme Court's Order subsequently staying any Order of Execution. This Court, with the State's consent, reserved ruling on the State's Motion to Dismiss pending the appointment of collateral counsel and the filing of a Final Amended Application. Stanko reasserted this same ground in his 1st Final Amended Application and in this Final Amended Application.

***The 1st Final Amended Application***

On October 17, 2009, Stanko, through appointed collateral counsel, Everette P. "Bill" Godfrey and Andrew Ritner, filed a Final Amended Application pursuant to this Court's Scheduling Order. In the Final Amended Application, Stanko alleged several grounds. The State filed a Return and Motion to Dismiss denying the allegations of this application.

***The 2nd Final Amended Application***

Shortly before this case was to be tried at the originally scheduled merits hearing, Attorney Godfrey was removed from the case because of personal illness. Mr. Ritner was removed from the case by his own motion because he is now employed with the Attorney General's Office, though not with the capital litigation section. This Court subsequently appointed Stuart Axelrod, Esquire and Bobby Fredrick, Esquires, to represent Stanko is this PCR action. After an extensive delay so that new PCR counsel could thoroughly investigate the matter on Stanko's behalf, on December 17, 2013, Stanko filed his Final Amended Application for post-conviction relief [which was

actually Stanko's 2nd Final Amended Application but the 1st filed by Mr. Axelrod] alleging numerous grounds. Respondent filed a Return and Motion to Dismiss denying the allegations of this application.

On October 27, 2014, Mr. Axelrod and Mr. Fredrick filed this Second Final Amended Application for post-conviction relief [actually Stanko's 3rd Final Amended Application for post-conviction relief] but the 2nd filed by Mr. Axelrod on behalf of Stanko alleging the following grounds:

**10/11 (a)** Ineffective assistance of Trial Counsel in violation of Applicant's Sixth and Fourteenth Amendment rights.

**(i)** Pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), Applicant was constructively denied assistance of counsel when trial counsel failed to present a meaningful challenge to the State's case at both the guilt and sentencing phases

Supporting facts: Pursuant to United States v. *Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), Applicant was constructively denied assistance of counsel when trial counsel failed to present a meaningful challenge to the State's case at both the guilt and sentencing phases.

**10/11(a)(ii)** Trial counsel was ineffective for presenting a defense of not guilty by reason of insanity.

Supporting facts: Trial counsel's defense strategy failed to meet the standard of insanity provided for under S.C. Code Ann. Section 17-24-10. Trial counsel's only evidence to support the defense of not guilty by reason of insanity was "[e]videnc of a mental disease or defect that [was] manifested only by repeated criminal or other anti-social conduct." Under South Carolina law the evidence was "not sufficient to establish the defense of insanity." See S.C. Code Ann. Section 17-24-10(c). Therefore, trial counsel was ineffective in presenting the defense of not guilty by reason of insanity. Applicant was prejudiced by this defense both in the guilty and sentencing phases.

**10/11(a)(iii)** Trial counsel was ineffective for failing to object to the characterization of applicant as an evil person.

Supporting facts: Throughout the trial, trial counsel allowed witnesses and the opposing counsel to refer to applicant in a negative light including calling him a psychopath and great white shark.

**10/11(a)(iv)** Trial counsel was ineffective for allowing the introduction of evidence concerning applicant's prior bad acts at the guilt phase.

Supporting facts: Trial counsel was ineffective for failing to object to the admission of the facts surrounding the assault on Elizabeth McLendon; evidence of his prior frauds; and other such

evidence that will be presented at an evidentiary hearing.

**10/11(a)(v)** Trial counsel was ineffective for failing to request a jury charge on the lesser included offense of Voluntary Manslaughter.

Supporting facts: Trial counsel failed to request a jury charge despite the fact that the record contained evidence that would have supported such a charge.

**10/11(a)(vi)** Trial counsel was ineffective in failing to request copies of the images and data analyzed by Dr. Spicer.

Supporting facts: Trial counsel was ineffective in failing to investigate by failing to obtain copies of the images and data analyzed by Dr. Spicer. This inhibited trial counsel's ability to impeach this evidence.

**10/11(a)(vii)** Counsel was ineffective for abandoning the argument and issue as to whether jurors could be questioned concerning their views surrounding the insanity defense.

Supporting facts: Counsel was ineffective for abandoning argument and issue as to whether jurors could be questioned concerning their views surrounding the insanity defense. Subsequent to the Court's ruling on the State's objection, counsel indicated he was "abandoning" this line of questioning. Not only did counsel's abandonment fail to preserve the issue for appellate review, but this failure also denied defense's ability to address and question later jurors on the same and/or similar matters. Applicant will also prove this allegation through other such evidence that will be presented at an evidentiary hearing.

**10/11(a)(viii)**Trial counsel failed entirely to properly Motion for a Change of Venue in Applicant's trial.

Supporting facts: Trial counsel failed entirely to properly Motion for a Change of Venue in Applicant's trial. Applicant was prejudiced by the inability to have a fair and unbiased jury. Applicant will show this through demonstrating that of the 116 potential jurors questioned, 72 were excused with 50 people claiming "fixed opinions" in Voir Dire. Applicant will also prove this allegation through other such evidence that will be presented at an evidentiary hearing.

**10/11(a)(ix)** Defense counsel failed to investigate, research and challenge State expert, Pamela Crawford, and her role not only as an expert examining for competency and insanity but also as the investigative official she played prior to being legally assigned to the case.

Supporting facts: Defense counsel failed to investigate, research and challenge State expert Pamela Crawford in her role not only as an expert examining for competency and insanity but also as the investigative official she played prior to being legally assigned to the case. Prior to being assigned to the case, Pamela Crawford traveled to Columbia, SC and Augusta, GA to interview witnesses. She approached individuals identifying herself representative of SLED. Having acted in an investigative process of case, Pamela Crawford could not possibly taken an unbiased and/or fair approach to this case. The applicant will show that Pamela Crawford acts for the State in multiple positions with multiple departments. Pamela Crawford is a prosecutorial tool of the State whose hats, business cards, and lettered wind-breakers change entirely depending on what she is needed for at any given point in a case.

**10/11(a)(x)** Trial counsel abandoned the applicant during Pamela Crawford's multiple interviews.

Supporting facts: Trial counsel abandoned the applicant minutes into Pamela Crawford's multiple interviews. Had counsel stayed for even ten (10) minutes at any of the numerous examinations, he could have and would have seen that Pamela Crawford had in her possession the applicant's "journals" and other miscellaneous documents that had been provided to her by the prosecution but were not provided in discovery to the Defense. Counsel, however, abandoned the applicant which later allowed Pamela Crawford to make numerous false and highly prejudicial statements during her court testimony that could not be rebutted.

**10/11(a)(xi)**Trial counsel failed to impeach Irby Walker.

Supporting facts: Applicant will present impeachment evidence that trial counsel had in his possession but failed to utilize.

**10/11(a)(xii)** Trial counsel was ineffective in failing to investigate and present mitigating evidence at the sentencing phase.

Supporting facts: Trial counsel was ineffective in failing to investigate and present mitigating facts at the sentencing phase. This mitigating evidence includes but is not limited to: information concerning applicant's past; the possible murder of his brother; and favorable information contained in the DPPPS records; favorable information concerning applicant's adaptability to prison life; and other such evidence that will be presented at the evidentiary hearing.

**10/11(a)(xiii)** Trial counsel was ineffective in failing to properly investigate matters concerning his past mental health history.

Supporting facts: Defense counsel failed to give investigators the additional time and resources to continue in investigating and researching specific relevant matters such as: birth records; medical records; records from mental health sessions with Dr. Randy Waid; records from the Berkeley County Mental Health Department; information surrounding the 1986 incident involving applicant; and other relevant records.

**10/11(b)** Prosecutorial Misconduct that Violated Applicant's Right to Due Process:

**(i)** The prosecution knowingly and willingly initiated, presented and allowed false and inaccurate testimony.

Supporting facts: The prosecution knowingly allowed false testimony concerning the following: Applicant's DPPS records; Applicant's sanity; Defense witness qualification; and such other evidence that will be demonstrated at the evidentiary hearing

**10/11(b)(ii)** The prosecution knowingly withheld evidence in violation of Brady and Rule 5, SCRCRmP.

Supporting facts: The prosecution failed to provide discovery materials, in their possession, to the defense including, but not limited to, items taken from the victim's residence (both documentary and electronic file), documents surrounding an incident in which the applicant

was struck in the head b an unopened bottle of beer while he was stopping a fight between two individuals (these documents being extremely relevant as related to the Applicant's defense and because investigators were unable to obtain copies from the small court that addressed the case and public officials), and other documents to be presented at the evidentiary hearing.

**10/11(c)** Ineffective assistance of appellate counsel

**(i)**Pursuant to *Cronic*, applicant was denied effective assistance of appellate counsel due to the unreasonable time restraints placed on Appellate counsel.

Supporting facts: Pursuant to *Cronic*, applicant was denied effective assistance of appellate counsel due to the unreasonable time restraints placed on appellate counsel. The South Carolina Supreme Court expedited the appeal of this case in doing so denied applicant effective assistance of appellate counsel under *Cronic*.

**10/11(c)(ii)** Appellate counsel was ineffective for failing to brief the improper suppression of the testimony of Dr. Wu concerning the validity of Dr. Spicer's methodology in the sentencing phase.

Supporting facts: Appellate counsel was ineffective for failing to brief the improper suppression of the testimony of Dr. Wu concerning the validity of Dr. Spicer's methodology in the sentencing phase.

**10/11(d)** Violation of Due Process[6]

**(i)** The Chief Justice of the S.C. Supreme Court violated the applicant's rights concerning due process and fundamental fairness by ordering an expedited appeal in the Applicant's direct appeal

Supporting facts: The Chief Justice of the S.C. Supreme Court violated the applicant's rights concerning due process and fundamental fairness by ordering an expedited appeal in the applicant's direct appeal.

**10/11(d)(ii)** Applicant was denied his right to Due Process in the ways addressed in this application and such other ways as will be raised at an evidentiary hearing.

Supporting facts: Applicant was denied his right to Due Process in the ways addressed in this application and such other ways as will be raised at an evidentiary hearing.

Respondent denies each of the above allegations and requires strict proof thereof. Further, Respondent moves to dismiss several of the allegations because they are not cognizable on post-conviction relief (PCR) and fail to state a claim upon which this Court can grant relief. Rule 12(b)(6), SCRCP.

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6 This ground was actually mis-labeled "10/11(e)." Respondent has corrected the error to correctly reflect this ground is 10/11(d).

## III.

### Standard of Review/Allegations of Ineffective Assistance

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). In order to prove counsel was ineffective, the applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id., *citing* Strickland v. Washington, 466 US. 668 (1984). Applicant must show his attorney's representation fell below an objective standard of reasonableness, and the applicant must show prejudice. Id.; Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006).

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 1690. "There are countless ways to provide effective assistance in any given case," and the simple fact that counsel's strategy was ultimately unsuccessful does not render counsel's assistance ineffective. Strickland, 466 U.S. 689; Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688; Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993).

To effect a fair review of counsel's performance, a reviewing court must eliminate the distorting effects of hindsight and attempt to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; Butler v. State, 286 S.C. 444-45, 334 S.E.2d 815 (1985). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment," Strickland, 466 U.S. at 690; Butler, 286 U.S. at 455, 334 S.E.2d at 815-16, and an applicant claiming error bears the burden of showing counsel's conduct did not constitute reasonable assistance. Strickland, 466 U.S. at 689; Butler, 286 S.C. at 443; 334 S.E.2d at 814. As set out above, counsel must be given latitude in the art of advocacy, which necessarily, allows for strategic decisions. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006), *citing* Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (19992). This is true as long as counsel's strategic decision was objectively reasonable under the circumstances. Strickland, 466 U.S. at 689 (objectively reasonable trial strategy decisions cannot be the basis of a claim of ineffective assistance of counsel). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), *quoting* Ingle v. State, 384 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

In the context of a capital sentencing proceeding, the applicant must also show deficient performance. Cullen v. Pinholster, 131 S.Ct. 1388 (2011); Bobby v. Van Hook, 558 U.S. 4, 130 S.Ct. 13 (2009).

Lastly, as noted, relief will not be granted on a showing of mere error. Prejudice must also be shown. Strickland, 466 U.S. at 687. The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In the context of a capital sentencing proceeding, applicant must prove that "there is a

reasonable probability that ...the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. *See also* Wiggins v. Smith, 539 U.S. at 537; Jones v. State, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30. Again, [a] reasonable probability is a probability sufficient to undermine confidence in the outcome. Jones, 504 S.E.2d at 823-24. The United States Supreme Court in Wong v. Belmontes, 130 S.Ct. 383 (2009) made clear the burden *is not on the State* to prove the lack of prejudice, but the burden is on the applicant to prove prejudice. Id. To establish prejudice, the applicant "must show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., *quoting* Strickland, 466 U.S. at 694. That showing requires the applicant to establish that had counsel acted competently, there is a reasonable probability the jury would have returned with a different sentence. Id., *quoting* Wiggins v. Smith, 539 U.S. 510, 535, 536 (2003). Such a showing requires a substantial, not just a conceivable likelihood of a different result. Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011), *citing* Harrington v. Richter, 131 S.Ct. at 791 (2011).

## IV.

## RESPONDENT'S RESPONSES TO EACH GROUND

**10/11 (a)** Ineffective assistance of Trial Counsel in violation of Applicant's Sixth and Fourteenth Amendment rights.

**(i)** Pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), Applicant was constructively denied assistance of counsel when trial counsel failed to present a meaningful challenge to the State's case at both the guilt and sentencing phases

Supporting facts: Pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), Applicant was constructively denied assistance of counsel when trial counsel failed to present a meaningful challenge to the State's case at both the guilt and sentencing phases.

Respondent denies the allegations of this ground and requires strict proof thereof.

Furthermore, there is no merit to this ground. Stanko was not constructively denied assistance of counsel because counsel did not fail to present a meaningful challenge to the State's case at the guilt and sentencing phases. (See Record). Stanko will be unable to show deficient performance or resulting prejudice. As a result, this ground has no merit. Strickland; Belmontes; Cronic.

**10/11(a)(ii)** Trial counsel was ineffective for presenting a defense of not guilty by reason of insanity.

Supporting facts: Trial counsel's defense strategy failed to meet the standard of insanity provided for under S.C. Code Ann. Section 17-24-10. Trial counsel's only evidence to support the defense of not guilty by reason of insanity was "[e]vidence of a mental disease or defect that [was] manifested only by repeated criminal or other anti-social conduct." Under South Carolina law the evidence was "not sufficient to establish the defense of insanity." See S.C. Code Ann. Section 17-24-10(c). Therefore, trial counsel was ineffective in presenting the defense of not guilty by reason of insanity. Applicant was prejudiced by this defense both in the guilt and sentencing phases.

Respondent denies the allegations of this ground and requires strict proof thereof. Furthermore, there is no merit to this ground. Strickland. Counsel presented evidence of insanity, including documentary evidence and expert witness' testimony, and obtained a jury instruction on the defense of insanity; however, the jury found the State's testimony more credible and that the State had disproved insanity beyond a reasonable doubt. However, based on the record, and the information available to counsel, including counsel's investigation and his experts' opinions, counsel also made an objectively reasonable trial strategy decision under the circumstances in presenting an insanity defense given this record. Petitioner cannot prove deficient performance or prejudice under this ground in the guilt or penalty phase. Strickland; Belmontes. As a result, this ground has no merit. *See* Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995)(decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible sentencing outcomes).

**10/11(a)(iii)** Trial counsel was ineffective for failing to object to the characterization of applicant as an evil person.

Supporting facts: Throughout the trial, trial counsel allowed witnesses and the opposing counsel to refer to applicant in a negative light including calling him a psychopath and great white shark.

Respondent denies the allegations of this ground and requires strict proof thereof. Strickland. Furthermore, there is no merit to this ground. Stanko will not be able to prove deficient performance or prejudice under this ground. Strickland; Belmontes. Furthermore, Stanko's own experts diagnosed him as suffering from psychopathy and as a "psychopath" and testified to the same. The characterizations of or references to Stanko were legitimately related to his diagnosed mental illness or personality disorder and defense or mitigating circumstances and/or were supported by the evidence of his character introduced at trial. As a result, this ground has no merit. Strickland; Belmontes.

**10/11(a)(iv)** Trial counsel was ineffective for allowing the introduction of evidence concerning applicant's prior bad acts at the guilt phase.

Supporting facts: Trial counsel was ineffective for failing to object to the admission of the facts surrounding the assault on Elizabeth McLendon; evidence of his prior frauds; and other such evidence that will be presented at an evidentiary hearing.

Respondent denies the allegations of this ground and requires strict proof thereof. Furthermore, there is no merit to this ground. Strickland; Belmontes. Stanko will not be able to prove deficient performance or prejudice under this ground on this record. Strickland; Belmontes. Additionally, the evidence was admissible, given this record, so it was not ineffective assistance to fail to object to the admission of such evidence. Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance of counsel claims for failure to object are tied to the admissibility of the underlying evidence; if the evidence was admissible in any event, there is no ineffective assistance of counsel as counsel's performance was not deficient nor was the defendant prejudiced). Further,

Stanko's references to other such evidence presented at the evidentiary hearing is vague and ambiguous and must be dismissed with prejudice. It is impossible for Respondent to respond to this vague and ambiguous claim.

**10/11(a)(v)** Trial counsel was ineffective for failing to request a jury charge on the lesser included offense of Voluntary Manslaughter.

Supporting facts: Trial counsel failed to request a jury charge despite the fact that the record contained evidence that would have supported such a charge.

Respondent denies the allegations of this ground and requires strict proof thereof. Furthermore, there is no merit to this ground. Stanko will not be able to show deficient performance or prejudice under this ground. Strickland; Belmontes. Further, Stanko was not entitled to an instruction on voluntary manslaughter given this record. Furthermore, to the extent counsel did not request an instruction on voluntary manslaughter that decision was objectively reasonable under the circumstances. Strickland. Finally, even had counsel requested an instruction on voluntary manslaughter and one been given, Stanko cannot show there is a reasonable probability the jury would have returned with a different verdict given this record. Id. As a result, this ground has no merit.

**10/11(a)(vi)** Trial counsel was ineffective in failing to request copies of the images and data analyzed by Dr. Spicer.

Supporting facts: Trial counsel was ineffective in failing to investigate by failing to obtain copies of the images and data analyzed by Dr. Spicer. This inhibited trial counsel's ability to impeach this evidence.

Respondent denies the allegations of this ground and requires strict proof thereof. Furthermore, there is no merit to this ground. "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of

witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). *See generally* Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995)(standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions were an appropriate and necessary trial strategy). Stanko will not be able to prove deficient performance or prejudice under this ground. Strickland; Belmontes. Stanko will not be able to show deficient performance or prejudice under this ground on this record. (See Record). Id. As a result, this ground has no merit. Id.

**10/11(a)(vii)** Counsel was ineffective for abandoning the argument and issue as to whether jurors could be questioned concerning their views surrounding the insanity defense.
Supporting facts: Counsel was ineffective for abandoning argument and issue as to whether jurors could be questioned concerning their views surrounding the insanity defense. Subsequent to the Court's ruling on the State's objection, counsel indicated he was "abandoning" this line of questioning. Not only did counsel's abandonment fail to preserve the issue for appellate review, but this failure also denied defense's ability to address and question later jurors on the same and/or similar matters. Applicant will also prove this allegation through other such evidence that will be presented at an evidentiary hearing.

Respondent denies the allegations of this ground and requires strict proof thereof. Further, there is no merit to this Ground. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). In its Opinion in this case the South Carolina Supreme Court specifically ruled the question Applicant wanted to ask was not proper. "Appellant was not entitled to ask potential jurors about their specific views of the insanity defense during *voir dire*." Id. *See also* United States v. Tipton, 90 F.3d 861 (4th Cir. 1996); State v. Hill, 331 S.C. 94, 501 S.E.2d 116 (1998); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998). Further, the record shows the Supreme Court found the jury was

impartial, unbiased, and capable of following the law, including the insanity defense. Id. Applicant cannot show deficient performance or prejudice under Strickland and Wong in this regard. Further, the record will show counsel conducted adequate *voir dire* of the jurors to insure there was no bias and Stanko received a fair and impartial jury and trial. (See Record). Further, the record shows the evidence of Stanko's guilt was overwhelming, the jury found the evidence of insanity was not credible, and the evidence in aggravation was overwhelming justifying and necessitating a death sentence. (See Record). Stanko cannot show deficient performance or prejudice in this regard on this record. Strickland; Wong. Finally, individual capital *voir dire* is not for the purpose of creating a personality profile as Stanko alleges above. State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982).

**10/11(a)(viii)** Trial counsel failed entirely to properly Motion for a Change of Venue in Applicant's trial.

Supporting facts: Trial counsel failed entirely to properly Motion for a Change of Venue in Applicant's trial. Applicant was prejudiced by the inability to have a fair and unbiased jury. Applicant will show this through demonstrating that of the 116 potential jurors questioned, 72 were excused with 50 people claiming "fixed opinions" in Voir Dire. Applicant will also prove this allegation through other such evidence that will be presented at an evidentiary hearing.

Respondent denies this allegation and requires strict proof thereof. Furthermore, this ground is without merit as well. Further, the last sentence of this ground is vague and ambiguous.

While there was certainly publicity surrounding these crimes, as there is in any capital case, the jurors were each questioned individually regarding what they had heard about the case. Each juror who was qualified to serve in this case, if they had heard, read, or seen anything about the case, testified under oath that they could set aside what they read or heard about the case and decide the case based solely on the evidence they heard presented in the courtroom. Furthermore, any juror who was qualified to serve, who had a pre-formed opinion about the case, testified they

could set aside that opinion and decide the case based solely on the facts and evidence introduced during the trial. Applicant has presented no reason to question the sworn testimony of these jurors. Petitioner cannot show deficient performance or prejudice.

Our Supreme Court has clearly held that the safest guarantee of a fair and impartial jury is voir dire. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007), *cert. denied*, 128 S.Ct. 662, (2007). Evins was a capital murder case that involved extensive pre-trial publicity including the fact that Evins had previously been convicted of sexual assaults and had been charged with another brutal murder in addition to the murder for which he was on trial. Even though some of the jurors in Evins had read about the other crimes, our Supreme Court held that the trial judge did not err in refusing to change venue, finding the court's instructions and the jurors answers under oath sufficient to insure a fair and impartial jury. Given the Evins holding, the trial court's instructions in this case, and the jurors' sworn answers under oath that they would disregard anything they had read, heard, or seen about the case, and disregard any preformed opinion about the case, and decide the case solely on the evidence presented at trial, Stanko has failed to show counsel was ineffective in failing to more effectively move for a change of venue. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(when jurors have been exposed to pretrial publicity, a denial of a change of venue is not error where the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial). *See also* State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(reversing trial court's grant of a change of venue based on pretrial publicity because no evidentiary facts supported a finding of actual juror prejudice, the better practice is to try and seat a jury prior to ruling on a change of venue motion); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(indicating a

change of venue motion should be based on voir dire, not pre voir dire public opinion surveys), *and* State v. Parker, Shearhouse Advance Sheets, Opinion No. 4475 (Ct. App. Filed December 23, 2008)("issues involved in a change of venue motion were recently addressed with certitude in State v. Evins").

Nor can applicant establish prejudice under Strickland. Even had counsel made an additional or further motion to change venue in this case, Respondent submits the trial judge would not have granted it given our case law and given the voir dire responses of the jurors under oath. Tucker; State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(reversing grant of change of venue based on pretrial publicity because no evidentiary facts supported a finding of actual juror prejudice, better practice is to try and seat a jury before ruling on a motion for change of venue); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(indicating a change of venue motion should be based on voir dire, not pre voir dire public opinion surveys). The issue is not whether the jurors had heard something about the case or formed an opinion about the case. The critical issue is whether the jurors could set aside what they had read, seen, or heard, or any preformed opinion, and decide the case based solely on the evidence adduced at trial. Evins. Given the qualified jurors' responses under oath that they would decide the case based solely on the evidence introduced at trial, and this state's standard for a change of venue, the trial judge would not have granted a change of venue even had one been made or further evidence been presented in support of the motion for a change of venue. Id.

Nor can Stanko demonstrate actual prejudice. A criminal defendant has no right to any particular jury or jurors, but only a right to a trial by a competent and impartial jury. State v. Gaskins, 284 S.C. 105, 114 326 S.E.2d 132, 138 (1985), *cert. denied*, 471 U.S. 1120 (1985)

*overruled on other grounds* State v. Torrence; State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Stanko has shown none.

Applicant was tried by a fair and impartial jury. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008)(finding this Applicant's jury was fair and impartial). Applicant cannot show and has not shown any of the jurors in this case violated their oath or sworn testimony to disregard anything they heard in the press, or any pre-formed opinion, and decide the case solely on the evidence produced in the courtroom. Nor has Applicant shown the trial judge's voir dire was inadequate in qualifying an impartial jury. Id. Nor has Stanko shown if counsel had moved for a further change of venue with additional supporting documents as alleged above, the trial court would have granted the same. Not on this record. Id. Applicant has failed to show deficient performance or prejudice from counsel's failure to move for a change of venue as he alleges. Strickland; Wong. This ground must be dismissed with prejudice.

Further, Respondent is informed and believes Stanko was fully satisfied with the jury that was seated in this case at the time of trial based on its composition and the issues to be tried. Therefore, Stanko will not be able to show deficient performance or prejudice in this regard. As a result, this ground must be dismissed with prejudice.

Stanko previously alleged trial counsel was ineffective for seating 5 (five) jurors on the panel who allegedly had formed opinions; and one (1) juror who allegedly knew and was close friends with the minor victim's principal and was acquainted with a detective. Stanko alleges the five (5) jurors are as follows: Donald Horton, 161, Stephen Walters, 343, David Dubois, 84, Patricia Wofford, 363, and Larry Drake, 82. Stanko does not allege who the juror was who

allegedly knew the victim's principal and was acquainted with a detective was. Stanko also alleges trial counsel was deficient in seating Carroll Eugene Baker, 368, who allegedly was formerly Captain of the Fire and Rescue Squad. Respondent denies the allegations of this ground and requires strict proof thereof.

Furthermore, there is no merit to this ground. The fact that Juror Baker had formerly been the Captain of a Fire and Rescue Squad, if true, does not mean he would not have made a good juror. This allegation, even if true, does not establish the juror was not fair and impartial or violated his oath to decide the case not on what he had heard, read, or seen outside the courtroom, but only on the evidence presented to the jury. The allegations regarding this juror simply do not rise to the level of deficient performance. Nor do the allegations of this ground demonstrate prejudice. This portion of this ground must be dismissed with prejudice. Furthermore, on information and belief, Juror Baker was not present at the crime scene. Respondent is informed and believes trial counsel seated this juror for other objectively reasonable strategic reasons than this juror had been the Captain of a Fire and Rescue Squad, true or false. *See* Strickland.

Additionally, this juror disclosed that he knew several of the witnesses listed by the Court and even though this juror knew several of the witnesses listed by the Court, the juror indicated under oath he could be fair and impartial and decide the case based solely on the evidence presented in the courtroom and the law as the Court would charge it. (R. 144). Stanko has not shown deficient performance or prejudice with regard to his allegations.

With regard to the juror who allegedly knew and was friends with the minor victim's principal and was acquainted with a detective, Stanko has not alleged who this juror was and has not alleged or shown that this juror was not fair and impartial. Nor has Stanko alleged who this

principal is or who the detective is. The fact that the juror knew or was friends with the minor victim's school principal or was acquainted with a detective, if true, does not establish that the juror was not fair and impartial. Stanko carries the burden of proof on this issue. The record does not show that this juror could not judge this case fairly or impartially. The record shows the minor victim's principal, whoever they are, did not testify in Stanko's trial. Nor can one tell from Stanko's allegation whether the detective alleged above testified as a witness in the trial. Furthermore, any such juror who was seated in this case, testified under oath that they could set aside whatever they knew or had read or seen about this case and decide the case based solely on the evidence produced in the courtroom, and each juror who was seated, who testified they had any preformed opinion, testified they could set aside any pre-formed opinion and decide the case solely based on the evidence adduced at trial. Respondent is informed and believes trial counsel seated this juror for other objectively reasonable strategic reasons than this juror's acquaintance or relationship with the victim's principal or a detective, true or false. Strickland.

With regard to this juror, Respondent is informed and believes Stanko is referring to Juror Patricia Wofford. The fact that Juror Wofford knew or was acquainted with the minor victim's principal and/or a detective does not mean or establish the Juror could not be fair and impartial in this case. In fact, the record shows that Juror Wofford disclosed to the Court on her own during her individual voir dire out of an abundance of caution that she was acquainted with the minor victim's principal. (R. 444). The trial court questioned Juror Wofford about this acquaintance, and Juror Wofford testified that it would not affect her impartiality in the case or affect her ability to decide the case based solely on the evidence introduced in court and the law as the court instructed. (R. 445). The record also shows no principal of the minor victim testified in this case. Petitioner

cannot show deficient performance or prejudice in this regard. The record also shows that Juror Wofford testified that she knew someone else who knew the minor victim, a Keith Brown. The record shows no Keith Brown testified as a witness in this case. The fact that Juror Wofford knew someone who knew the minor victim does not establish the Juror was not fair and impartial. Nor can one tell from Stanko's allegations that the detective alleged above testified as a witness in this case. The fact that Juror Wofford was acquainted with a detective does not establish the Juror was not fair and impartial. Additionally, Juror Wofford testified under oath that she would decide this case based on the evidence presented in the courtroom, and disavow herself of anything she had read, seen, or heard, about the case, and she also testified she would disavow any pre-formed opinion she had about the case and decide the case based on the evidence presented in court. Stanko has not shown deficient performance or prejudice. Strickland.

Additionally, Respondent is informed and believes trial counsel seated this Juror for an objectively reasonable strategic reason, other than her acquaintance with the minor victim's principal or her alleged acquaintance with a detective. Strickland.

With regard to the joint allegation directed at jurors Donald Horton, Stephen Walters, David Dubois, Patricia Wofford, and Larry Drake, even if these jurors had previously formed opinions about the case, there testimony under oath was that they would put aside those opinions and decide the case solely on the facts and evidence presented in the courtroom, which is the relevant test.[7] State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007), *cert. denied*, 128 S.Ct. 662, (2007). Stanko cannot demonstrate deficient performance or prejudice under Strickland in this regard.

[7]Respondent does not concede that each of these jurors had a preformed opinion about the case. The record will reflect whether or not they had a pre-formed opinion about the case.

The record will show a juror or jurors who testified they had preformed opinions, had preformed opinions about whether Stanko committed the acts. At trial, Stanko admitted he committed the acts; he alleged only that he was not guilty by reason of insanity or that he had diminished mental capacity and should not he put to death. Respondent is informed and believes trial counsel seated juror(s) with a preformed opinion about whether Stanko committed the acts for some other objectively reasonable strategic reason. *See* Strickland.

Respondent is informed and believes trial counsel exercised Stanko's peremptory challenges in Stanko's best interests given these jurors responses, the other qualified jurors, their *voir dire* responses, the statutory limitation of strikes, and counsel's desire to seat these jurors for other objectively reasonable strategic reasons than the allegations Stanko alleges above. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," Strickland, 466 U.S. at 690; Butler v. State, 286 S.C. 444-45, 455, 334 S.E.2d 815, 815-816 (1985).

Further, Respondent is informed and believes the jury strikes were exercised and the seating of jurors was done in consultation with Stanko, and Stanko was fully satisfied with the jury that was selected at the time of trial/sentencing. As a result, he cannot show deficient performance or prejudice. Strickland; Wong.

Given this record, Stanko cannot show deficient performance or prejudice in seating any such juror alleged in this ground. Strickland; Wong.

**10/11(a)(ix)** Defense counsel failed to investigate, research and challenge State expert, Pamela Crawford, and her role not only as an expert examining for competency and insanity but also as the investigative official she played prior to being legally assigned to the case.

Supporting facts: Defense counsel failed to investigate, research and challenge State expert Pamela Crawford in her role not only as an expert examining for competency and insanity but also as the investigative official she played prior to being legally assigned to the case. Prior to being

assigned to the case, Pamela Crawford traveled to Columbia, SC and Augusta, GA to interview witnesses. She approached individuals identifying herself representative of SLED. Having acted in an investigative process of case, Pamela Crawford could not possibly taken an unbiased and/or fair approach to this case. The applicant will show that Pamela Crawford acts for the State in multiple positions with multiple departments. Pamela Crawford is a prosecutorial tool of the State whose hats, business cards, and lettered wind-breakers change entirely depending on what she is needed for at any given point in a case.

Respondent denies the allegations of this ground and requires strict proof thereof. Further, there is no merit to this Ground.

"In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). *See generally* Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995)(standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions were an appropriate and necessary trial strategy).

The record shows that everyone involved in this case knew of Ms. Crawford's role in the case prior to being asked by the Court to conduct a competency and criminal responsibility examination. (See Record). Further, her testimony was not biased, she was not a prosecution tool, and counsel was not deficient in its investigation, research, or challenge to her testimony. Further, counsel adequately and properly cross-examined Dr. Crawford at trial and/or sentencing. Further,

given this record, applicant cannot show any prejudice from any alleged deficient performance. Strickland; Belmontes. Applicant cannot show had counsel further challenged her testimony, the trial judge would have excluded it from the trial. Further, given counsel's representation in this case, Applicant cannot show deficient performance or prejudice in this regard. (See Record). Strickland; Belmontes. Finally, Applicant cannot show that, but for counsel's *alleged* deficient performance under this ground, there is a reasonable probability the jury would have returned with a different verdict or sentence. Strickland; Belmontes. Not on this Record.

**10/11(a)(x)** Trial counsel abandoned the applicant during Pamela Crawford's multiple interviews.

Supporting facts: Trial counsel abandoned the applicant minutes into Pamela Crawford's multiple interviews. Had counsel stayed for even ten (10) minutes at any of the numerous examinations, he could have and would have seen that Pamela Crawford had in her possession the applicant's "journals" and other miscellaneous documents that had been provided to her by the prosecution but were not provided in discovery to the Defense. Counsel, however, abandoned the applicant which later allowed Pamela Crawford to make numerous false and highly prejudicial statements during her court testimony that could not be rebutted.

Respondent denies the allegations of this ground and requires strict proof thereof. Furthermore, there is no merit to this ground. Applicant cannot show deficient performance or prejudice. Strickland; Wong. Applicant noticed the State that it was offering an insanity defense at trial, and did offer an insanity defense at trial through numerous experts. The State was entitled to its own examination by a qualified forensic psychiatric examiner, which Dr. Crawford was. Dr. Crawford was entitled to conduct a proper forensic examination, which she did, and to which counsel could not object. Dr. Crawford did not make numerous false or highly prejudicial statements during her court testimony but testified pursuant to the Court ordered examination which she conducted and to her findings pursuant to the same. Further, Respondent is informed and believes the State fully complied with discovery in this case, and Stanko was personally aware

of documents he himself authored, which he may or may not have been questioned about. Further, the record will show counsel reasonably and effectively cross-examined Dr. Crawford at trial and or sentencing. Stanko cannot show deficient performance or prejudice in this regard. Strickland.

**10/11(a)(xi)** Trial counsel failed to impeach Irby Walker.
Supporting facts: Applicant will present impeachment evidence that trial counsel had in his possession but failed to utilize.

Respondent denies the allegations of this ground and requires strict proof thereof. Further, there is no merit to this ground. "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). *See generally* Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995)(standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions were an appropriate and necessary trial strategy).

The record will show there is no merit to this ground. Strickland; Belmontes. Counsel adequately cross-examined witnesses, including Irby Walker, but counsel is not a miracle worker. Counsel could not disprove the fact Stanko was a con-man because Stanko had previously been convicted of several counts of breach of trust and served prison time for the same, and at the time this murder occurred the record shows Stanko was engaged in similar conduct including

representing himself to be someone that he was not and defrauding individuals of money. Some of Stanko's own experts testified to his confidence schemes and fraudulent activities. Further, Stanko will not be able to show prejudice from any alleged deficient performance in cross-examining Irby Walker. Stanko will not be able to show if counsel had further cross-examined, impeached, or examined Walker, and the information he alleges would have come out had come out, there is a reasonable probability that the result of the guilt or sentencing proceeding would have been different. Strickland; Belmontes. The evidence of Stanko's guilt was overwhelming, the evidence of his alleged insanity or mental defect was found not credible, and the evidence in aggravation justifying and necessitating a death sentence was overwhelming, including his previous convictions for breach of trust for which he served prison sentences. Id. Further, if counsel did not examine or cross-examine Irby Walker on some issue, counsel made an objectively reasonable trial strategy decision in doing so. Strickland.

Furthermore, this ground has no merit because the testimony of Irby Walker, a defense witness, was not contested by the State, and cumulative to the stipulation of the Solicitor before the jury. Mr. Walker, an attorney, testified to Stanko's struggle to have his sex offender registry for his 1996 kidnapping lifted. (R. 3249-3256). Mr. Walker testified the requirement that Mr. Stanko register as a sex offender for his 1996 kidnapping conviction was ultimately lifted by order of a circuit judge. The State did not contest Mr. Walker's testimony on this issue. Furthermore, the Solicitor stipulated Mr. Stanko should not have been required to register as a sex offender for the 1996 kidnapping. (See R. 3249-3256). Petitioner cannot show deficient performance or prejudice due to the failure of trial counsel to introduce records or more information which would have been only cumulative to uncontested testimony and the stipulation of the Solicitor before the jury. *See*

*e.g.* Huffington v. Nuff, 140 F.3d 572 (4th Cir. 1998)(even if counsel was ineffective for failing to contact impeachment witnesses identified by defendant, there was no prejudice in part because testimony was cumulative); Jones v. State, 504 S.E.2d 822 (S.C. 1998)(no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial). This ground has no merit.

**10/11(a)(xii)** Trial counsel was ineffective in failing to investigate and present mitigating evidence at the sentencing phase.

Supporting facts: Trial counsel was ineffective in failing to investigate and present mitigating facts at the sentencing phase. This mitigating evidence includes but is not limited to: information concerning applicant's past; the possible murder of his brother; and favorable information contained in the DPPPS records; favorable information concerning applicant's adaptability to prison life; and other such evidence that will be presented at the evidentiary hearing.

Respondent denies the allegations of this ground and requires strict proof thereof. Further, there is no merit to this ground.

The record will show counsel conducted a reasonable and thorough mitigation investigation and presented a reasonable and thorough mitigation case on applicant's behalf. Porter v. McCollum, 130 S.Ct. 447 (2009); Sears v. Upton, 130 S.C.t 3259 (2010); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins.

Respondent is informed and believes that to the extent counsel did not call certain mitigation witnesses or elicit certain mitigation testimony, there was an objectively reasonable trial strategy decision for not doing so. Belmontes. Further, trial counsel could not disprove Stanko was a con-man when Stanko was previously convicted of several counts of breach of trust and served prison time for the same, and Stanko was engaged in similar behavior while under community supervision at the time of or shortly before the murder in this case. Further,

Respondent is informed and believes Stanko withheld information from counsel or the defense team or provided false or misleading information regarding mitigation or aggravating information. Stanko will be unable to show deficient performance or prejudice. Strickland; Belmontes.

Furthermore, Stanko will not be able to show, had counsel presented more mitigation witnesses, and they testified to the mitigation he alleges they would have testified to, there is a reasonable probability of a different result in either the guilt or sentencing proceeding. Strickland; Belmontes. The evidence of Stanko's guilt of these crimes was overwhelming, Stanko's evidence of alleged of insanity was found not to be credible, and the evidence in aggravation justifying and necessitating a death sentence was overwhelming. This ground must be dismissed with prejudice.

Stanko alleges trial counsel failed to investigate, research and present favorable or mitigating information such as the Department of Probation, Parole & Pardon Services file and other information to the prejudice of Stanko.

First, the last sentence of this ground is vague and ambiguous. Stanko does not allege what favorable or mitigating evidence he is referring to other than a vague reference to evidence be introduced at the merits hearing. Given the vagueness of these allegations, without any specificity at all, it is impossible for Respondent to respond to this portion of this ground and this portion of this ground should be dismissed with prejudice.

Furthermore, to the extent Stanko is referring to some record in the Department of Probation, Parole & Pardon Services file that may state he reported regularly or was a good supervisee, Respondent would point out that had trial counsel introduced any such record, it would have only highlighted the fact that while on community supervision for his previous kidnapping conviction, Stanko was involved in financial scams or "confidence schemes" to defraud

individuals out of their money, unbeknownst to the Department of Probation, Parole & Pardon Services. The record shows, Stanko was not complying with the law while he was on supervision. Finally, while on community supervision, Stanko murdered Laura Ling and raped her 15 year old daughter. Stanko cannot show deficient performance or prejudice in this regard. Strickland; Belmontes.

Additionally, Stanko cannot show deficient performance or prejudice because any such favorable or mitigating information from the Department of Probation, Parole, and Pardon Services file would have been cumulative to the testimony of Stanko's community supervision officer who testified during the trial. (R. 3198-3239). Trial counsel called Gloria Wilson, who supervised Stanko, during most of the time he was on community supervision, and she testified extensively to his behavior and comportment during his community supervision. (See R. 3198-3239). She also testified to matters that occurred prior to her personal supervision of Stanko. (See R. 3198-3239). On cross-examination, Ms. Wilson recited from the Department of Probation, Parole, and Pardon Services records regarding Stanko's community supervision. (See R. 3198-3239). Therefore, this ground has no merit and must be dismissed with prejudice. *See e.g.* Huffington v. Nuff, 140 F.3d 572 (4th Cir. 1998)(even if counsel was ineffective for failing to contact impeachment witnesses identified by defendant, there was no prejudice in part because testimony was cumulative); Jones v. State, 504 S.E.2d 822 (S.C. 1998)(no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial).

Furthermore, Stanko previously conceded that counsel had adequately investigated and researched this issue and planned to present the same. Further, the jury was specifically aware of Stanko's wrongful classification as a sexual offender from his 1996 conviction for kidnapping.

Irby Walker testified to this. The Solicitor also stipulated to this. (See Record).

Further, if counsel chose not to present something from the DPPPS file, he made an objectively reasonable trial strategy decision to do so. Strickland.

Furthermore, counsel could not be deficient for failing to "blame DPPPS" for Stanko's commission of the murder of Laura Ling, the rape of her minor daughter, or theft of Henry Turner's truck. Such a claim would have been rejected by the jury or found not to be persuasive. As would any claim DPPPS was responsible for Stanko's criminal behavior while on community supervision.

Further, counsel could not disprove Stanko was a con-man through use of DPPPS records. Stanko had previously been convicted of several counts of breach of trust for which he served prison time. And, Stanko was engaged in cons and confidence schemes while on community supervision. Stanko cannot show deficient performance or prejudice in this regard. Strickland. With regard to any other records, not specifically described in this ground, those allegations are vague and ambiguous and should be dismissed with prejudice.

With regard to Stanko's alleged adaptability to prison, the record will show counsel was neither deficient nor was Stanko prejudiced by counsel's performance. Wiggins; Strickland. Counsel introduced evidence of Stanko's good behavior in prison and adaptability to prison life, and evidence Stanko would offer at this time would be merely cumulative. Further, Stanko cannot show had counsel offered more evidence of adaptability to prison, there is a reasonable probability the result of the proceeding would have been different. Strickland; Belmontes.

With regard to the alleged possible murder of Stanko's brother, this evidence is speculative. Further, even if this evidence contained some mitigation value, counsel made an

objectively reasonable trial strategy decision in not offering this evidence. Strickland. Further, Stanko cannot prove on this record that but for the alleged failure to offer this possible mitigation evidence, there is a reasonable probability the result of the sentencing proceeding would have been different. Strickland; Belmontes.

Respondent is informed and believes Stanko *is alleging* documents provided by Stanko and/or a defense investigator would have established Stanko suffered from some other mental illness than those testified to at trial. However, Stanko's own experts testified he suffered from psychopathy and narcissism. The State's experts testified Stanko suffered from anti-social personality disorder and narcissism. There was no testimony at Stanko's capital trial that he suffered from dis-associative disorder. Additionally, Stanko chose not to testify at trial, and his mitigation investigator was not qualified to give an expert psychiatric or psychological opinion, nor did she testify at trial on whether Stanko suffered from some other mental illness or personality disorder. This ground has no merit.

Finally, given the overwhelming evidence of aggravation introduced in this case, Stanko cannot show Strickland prejudice from the failure to introduce other alleged evidence of mitigation. There is no reasonable probability the result of the proceeding would have been different if counsel would have introduced some other known information. Strickland; Belmontes. The evidence of Stanko's guilt was overwhelming, the evidence of alleged insanity was found not to be credible by the jury, and the evidence in aggravation justifying and necessitating a death sentence was overwhelming. (See Record).

**10/11(a)(xiii)** Trial counsel was ineffective in failing to properly investigate matters concerning his past mental health history.
Supporting facts: Defense counsel failed to give investigators the additional time and resources to continue in investigating and researching specific relevant matters such as: birth records; medical records; records from mental health sessions with Dr. Randy Waid; records from the Berkeley County Mental Health Department; information surrounding the 1986 incident involving applicant; and other relevant records.

Respondent denies the allegations of this ground and requires strict proof thereof. Furthermore, there is no merit to this ground. The record itself will disprove this ground. Respondent is informed and believes ounsel did provide their investigators adequate time to investigate these matters. The record will show counsel was not deficient in this regard, nor was Stanko prejudiced in this regard. Strickland.

Further, Stanko was competent to stand trial. And, the credible evidence in the record shows Stanko was not insane at the time of the crime and was not *guilty but mentally ill.*

Further, Stanko will not be able to establish deficient performance or resulting prejudice in this regard. Strickland; Belmontes. The evidence of Stanko's guilt of the crimes was overwhelming, his evidence of alleged insanity or mental defect was found not to be credible, and the evidence in aggravation justifying and necessitating a death sentence was overwhelming. (See Record). And, Stanko will not be able to establish but for counsel's alleged deficient performance under this ground, i.e. more mitigation evidence [if such exists], there is a reasonable probability the jury would have returned with a different verdict or sentence. Strickland; Belmontes.

Counsel completely and properly investigated, researched, and became knowledgeable of all aspects of Stanko's alleged brain defect and mental health history and presented the same in the guilt phase and as mitigation in the penalty phase through numerous experts and records.

Furthermore, Stanko cannot show prejudice given the cumulative nature of this testimony

and the other evidence introduced in his trial/sentencing proceeding. Stanko cannot show that had this evidence been admitted there is a reasonable probability the result of the guilt or penalty phase would have been different. Strickland; Belmontes.

Furthermore, trial counsel was entitled to rely on retained psychiatric experts regarding Stanko's mental state. Trial counsel was entitled to rely on retained psychiatric, medical, and psychological experts' diagnosis of what Stanko suffered from and what he did not suffer from. Trial counsel certainly was entitled to make an objectively reasonable strategic decision not to pursue a mental health defense that counsel's own experts did not find Stanko suffered from. *See generally* Savino v. Murray; 82 F.3d 593, 599 (4th Cir. 1996)(if there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995)(decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible outcomes); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(habeas petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). This ground must be dismissed with prejudice.

Further, the record shows counsel adequately cross-examined or impeached witnesses; however, counsel could not disprove Stanko was a "con-man" since Stanko had been previously convicted and served a prison sentence for several counts of breach of trust, involving a con or scheme, and Stanko was engaged in additional cons and confidence schemes while on community supervision. Stanko will not be able to establish deficient performance or prejudice under this ground. Strickland; Wong.

Further, if counsel did not cross-examine a witness on some fact or issue counsel was

aware of, counsel made an objectively reasonable trial strategy decision in doing so. Strickland.

Further, to the extent, counsel did not call certain mitigation witnesses, Respondent believes the record will show counsel made an objectively reasonable trial strategy decision not to call those witnesses. Strickland; Wong. Further, Stanko will not be able to show if counsel had presented additional evidence, there is a reasonable probability the result of the guilt or sentencing proceeding would have been different. Id. Not on this record.

Further, Respondent is informed and believes investigators had sufficient time and resources to investigate and research specific and relevant matters, and counsel was not deficient nor was Stanko prejudiced by any alleged failure to obtain more time for investigators to investigate any matters alleged above. Furthermore, based on this record, Stanko will not be able to establish prejudice. Strickland; Wong. Stanko will not be able to show that but for any alleged deficient performance under this ground, there is a reasonable probability the result of the guilt or sentencing proceeding would have been different. Belmontes; Strickland. The evidence of Stanko's guilt of these crimes was overwhelming, Stanko's claim of insanity was not credible and was found to be not credible, and the evidence in aggravation justifying and necessitating a death sentence was overwhelming. Id.

**10/11(b) Prosecutorial Misconduct that Violated Applicant's Right to Due Process:**
(i) The prosecution knowingly and willingly initiated, presented and allowed false and inaccurate testimony.
Supporting facts: The prosecution knowingly allowed false testimony concerning the following: Applicant's DPPS records; Applicant's sanity; Defense witness qualification; and such other evidence that will be demonstrated at the evidentiary hearing

Respondent denies the allegations of this ground and requires strict proof thereof. First, this ground is not cognizable because it could have been presented at trial and on direct appeal. *See* Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Drayton v. Evatt, 312 S.C. 4,

430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981). As a result, it also fails to state a claim upon which relief may be granted by this Court. Rule 12(b)(6), SCRCP. It should be dismissed because it is not cognizable on PCR, and fails to state a claim upon which relief may be granted by this Court. Id.

Second, a portion of this ground is vague and ambiguous and must be dismissed, because applicant does not refer to what testimony was knowingly false. It is impossible for Respondent to respond to this portion of this allegation.

Further, based on Respondent's investigation, there is no merit to this ground. (See Record on Appeal). The prosecution did not knowingly and willingly initiate, present, and allow any witnesses including expert witnesses to present false testimony to the jury pool as alleged. And, the State's experts did not in an attempt to degrade, negate, and or impeach the defense experts knowingly give false testimony as alleged. (See Record on Appeal). Respondent denies the remaining allegations as well and requires strict proof thereof. With regard to the remainder of the allegations, Respondent believes applicant is mischaracterizing testimony in the record. (See Record on Appeal). Respondent denies there was any prosecutorial misconduct. Applicant will not be able to meet his burden of proof on this ground either.

Further, based on Respondent's investigation, the prosecution did not knowingly and willingly initiate, present, and allow false and inaccurate testimony from witnesses representing DPPPS. And, said witnesses did not knowingly present testimony contradictory to not only their efforts overseeing Applicant while he was under community supervision but their file which logged information surrounding supervision. Furthermore, to the extent any witness from DPPPS testified to anything inconsistent with records of DPPPS, that testimony was the witness'

testimony, and the witness was subject to cross-examination by defense counsel regarding anything inconsistent with the witness' testimony and records of DPPS. Respondent is informed and believes the State fully complied with all discovery. Applicant will not be able to meet his burden of proof to show error or prejudice. Applicant will not be able to meet his burden of proof on this ground.

Based on Respondent's investigation, the prosecution did not knowingly and willingly present witnesses who provided false testimony concerning applicant in an attempt to belittle, degrade, defame, and impeach Stanko, his witnesses, and the defense. The prosecution did not design or coach witnesses to make Applicant appear as a sane, yet deceptive individual. The prosecution did not present lies, falsehoods, and deceptions by State's witnesses or present such and grossly prejudice applicant's case. Applicant will not be able to meet his burden of proof to show error or prejudice. Applicant will not be able to meet his burden of proof on this ground. There is no merit to this ground.

Further, to the extent applicant is referring in this ground to Dr. Crawford, the Court was fully aware of Ms. Crawford's involvement in the case before she was appointed. (See Record). And, she was appointed by the Court. The record shows Crawford was an unbiased witness. Her testimony is completely credible and supported by the credible evidence in the record. Furthermore, Petitioner cannot show any prosecutorial misconduct in this regard because she was appointed by the Court and based on the record. Further, Petitioner cannot show any error or prejudice in this regard. Any potential bias of Crawford was brought out on direct and cross-examination of the witness. Petitioner will not be able to meet his burden of proof on this ground either. Strickland.

**10/11(b)(ii)** The prosecution knowingly withheld evidence in violation of Brady and Rule 5, SCRCRmP.

Supporting facts: The prosecution failed to provide discovery materials, in their possession, to the defense including, but not limited to, items taken from the victim's residence (both documentary and electronic file), documents surrounding an incident in which the applicant was struck in the head by an unopened bottle of beer while he was stopping a fight between two individuals (these documents being extremely relevant as related to the Applicant's defense and because investigators were unable to obtain copies from the small court that addressed the case and public officials), and other documents to be presented at the evidentiary hearing.

Respondent denies the allegations of this ground and requires strict proof thereof.

Additionally, this ground is without merit. Stanko does not allege what documents or material he is referring to except for a very few. United States v. Robinson, 585 F.2d 274, 281 (7th Cir. 1978)("It is simply impossible for a court to rule on an alleged Brady violation unless a defendant identifies with reasonable particularity the evidence to be considered"). Nor does he allege how he was entitled to these unspecified documents or material other than vague references to discovery documents, statutory requirements and rules of procedure. *See e.g.* Lockhart v. McCotter, 782 F.2d 1275 (5th Cir. 1986)(habeas corpus petitioner did not establish prejudice because he failed to allege what exculpatory evidence would have been produced had counsel made a Brady motion). Nor does he allege how these documents would have changed the result at trial. This allegation of Stanko's PCR application is deficient. The ground is vague and ambiguous as to the unspecified documents and should be dismissed for this reason.

Furthermore, Respondent is informed and believes Stanko is referring to notes, files, and documents of Stanko seized by police from the crime scene. Respondent is informed and believes Stanko will allege these documents contain mitigation evidence. Respondent is informed and believes there was no discovery, Brady or Rule 5 violation with regard to these documents; some of these documents were seized and taken into custody by police. Respondent is informed and

believes these documents, files, etc., were available for inspection, made available to, and/or were inspected by trial counsel prior to the trial of Stanko's trial. Therefore, this ground has no merit and must be dismissed with prejudice. Any other documents not taken into possession by police or the State would have been in the possession of someone else and could have been subpoenaed by Stanko. So, there was no prosecutorial misconduct regarding any such documents.

Furthermore, Respondent is informed and believes the entry of any of these documents into evidence by Stanko would have made relevant and would have opened the door to the admission of all of the documents, some of which would have established Stanko's bad character, fascinations, or propensities.

Furthermore, Stanko was aware of the existence of these documents because they were his own, therefore, he cannot establish a Brady violation. *See* McClesky v. Zant, 499 U.S. 467, 502 (1991)(if petitioner knows about the material notwithstanding its non-disclosure, no cause will be found). *See also* Basden v. Lee, 290 F.3d 602 (4th Cir. 2002); Holleman v. Cotton, 301 F.3d 737 (7th Cir. 2003).

Furthermore, to the extent Stanko is referring to documents relating to Stanko being hit in the head with a bottle, Respondent is informed and believes these documents and the State's investigation of this incident were provided to defense counsel or available for inspection and there was no discovery, Brady, or Rule 5 violation. As a result, Stanko cannot show error or prejudice. Further, testimony was introduced in Stanko's sentencing proceeding regarding this very incident, and Stanko cannot show prejudice. (See Record).

Further, this claim, prosecutorial misconduct, is not cognizable because it could have been raised at trial. *See* Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Drayton v. Evatt,

312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981). As a result, it fails to state a claim upon which relief can be granted by this Court. Rule 12(b)(6), SCRCP.

As a result, there is no merit to this ground, and it must be dismissed. Applicant will not be able to meet his burden of proof on this ground either. Respondent moves to dismiss this ground with prejudice.

**10/11(c)** Ineffective assistance of appellate counsel

(i)Pursuant to *Cronic*, applicant was denied effective assistance of appellate counsel due to the unreasonable time restraints placed on Appellate counsel.

Supporting facts: Pursuant to *Cronic*, Applicant was denied effective assistance of appellate counsel due to the unreasonable time restraints placed on appellate counsel. The South Carolina Supreme Court expedited the appeal of this case in doing so denied applicant effective assistance of appellate counsel under *Cronic*.

Respondent denies the allegations of this ground and requires strict proof thereof.

Furthermore, there is no merit to this ground. This ground actually raises a claim of appellate court error, not ineffective assistance of appellate counsel, and is therefore not cognizable in post-conviction relief. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981). As a result, it must be dismissed with prejudice. Respondent moves to dismiss this ground as not cognizable in post-conviction relief. Id. Further, this entire Ground fails to state a claim upon which relief may be granted by this Court [the PCR Court]. Rule 12(b)(6), SCRCP. Therefore, this ground must be dismissed with prejudice. To the extent this ground is not dismissed, Respondent denies the allegations of this ground and requires strict proof thereof. Further, there is no merit to any of this ground if it were cognizable. (See Record). Stanko cannot show error or prejudice given this record. (See Record

on Appeal). This ground must be dismissed with prejudice.

A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify, argue and present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted).[8] Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Id., *quoting* Gray, 800 F.2d at 646. *See also* Bell v. Jarvis, 236 F.3d 149, 164 (4th

[8] *See also* Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

Cir.2000) (en banc). Given the paucity of applicant's allegation, he cannot make this difficult showing. This ground must be dismissed with prejudice.

Counsel is not ineffective for failing to file a "kitchen sink" brief. Smith v. Stewart, 140 F.3d 1267, 1274, n. 4 (9th Cir. 1988); *See also* Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); *See also* Jones v. Barnes, 463 U.S. 745, 751 (1983) (appellate counsel may make a reasonable strategic decision not to appeal every non-frivolous argument requested by the defendant, and noting the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible"). It is clear appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Further, under the two part test of Strickland, *supra*, a defendant must show not only that counsel's performance was deficient, but that this deficiency prejudiced defendant. Smith v. Robbins; Jones v. Barnes, 463 U.S. at 751 (stating that appellate counsel may make reasonable strategic decision not to appeal every non-frivolous argument requested by defendant and noting "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible"); Thrift v. State. *See also* Smith v. Stewart, 140 F.2d 1267, 1274 n. 4 (9th Cir. 1988)(Counsel is not ineffective for failing to file a "kitchen sink" brief). Stanko has failed to show the issue he asserts should have been raised on appeal [see next ground below] was clearly more meritorious than the issue or issues raised and argued on appeal. (See Record). This ground of Stanko's application must be dismissed with prejudice.

Furthermore, Respondent is informed and believes appellate counsel made an objectively reasonable strategic decision not to raise the issue he now alleges should have been raised because

it was not meritorious and weaker than the issue or issues raised on appeal. Jones v. Barnes. Therefore, it cannot be the basis of a claim of ineffective assistance of counsel. Id.; Strickland.

Further, Respondent is informed and believes the trial court did not commit any errors regarding witness testimony, evidence, and other matters of law. (See Record on Appeal). And, even assuming *arguendo* the trial court committed some error, Stanko cannot prove prejudice on this record. (See Record on Appeal). Further, Stanko cannot show deficient performance or prejudice under this ground given this record. Barnes.

Stanko alleges his right to counsel was violated by appellate counsel not receiving sufficient time to research, write, and prepare the appeal. Respondent denies the allegations of this ground and requires strict proof thereof. Stanko alleges this occurred in light of Chief Justice Jean Toal's Order that the appeal should be expedited and that no extensions would be granted absent extraordinary circumstances and that such extensions were to be granted only by Chief Justice Toal or the full Court.

There is no merit to this ground. Stanko has not shown a Sixth Amendment violation or he was denied assistance of appellate counsel pursuant to *Cronic*.

The South Carolina Supreme Court did not provide for no extension(s), but stated only that no extensions would be granted except upon showing of extraordinary circumstances. Stanko cannot establish a due process violation.

Furthermore, the record will show appellate counsel did request an extension from the South Carolina Supreme Court and did obtain the same. On April 19, 2007, appellate counsel filed a Motion for an Extension of Time in which to File the Initial Brief of Appellant and Designation of Matter. (See attached). On April 23, 2007, the South Carolina Supreme Court by Order granted

the Motion and **granted a thirty (30) day extension to appellate counsel to file the initial brief** and designation of matter. (See attached Order granting Motion for Extension, signed by Justice Costa Pleicones). The record shows appellate counsel had sufficient time to brief the arguable issues of merit on direct appeal. Applicant cannot show deficient performance or prejudice in this regard. Furthermore, **the South Carolina Supreme Court did not prevent or prohibit appellate counsel from requesting another extension**, and appellate counsel could have obtained one if needed. Therefore, this ground must be dismissed with prejudice.

Stanko cannot show he was denied the assistance of appellate counsel as alleged on this record. (Record on Appeal). As a result, this ground has no merit and must be dismissed with prejudice.

**10/11(c)(ii)** Appellate counsel was ineffective for failing to brief the improper suppression of the testimony of Dr. Wu concerning the validity of Dr. Spicer's methodology in the sentencing phase. Supporting facts: Appellate counsel was ineffective for failing to brief the improper suppression of the testimony of Dr. Wu concerning the validity of Dr. Spicer's methodology in the sentencing phase.

Respondent denies the allegations of this ground and requires strict proof thereof. Further, there is no merit to this ground. (See Record). Stanko will not be able to prove deficient performance or prejudice on the part of appellate counsel. Jones v. Barnes. As a result, this ground must be dismissed with prejudice.

A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State. Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. at 752. Rather, appellate counsel has a

professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State. In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify, argue and present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. at 285 (citation omitted).[9] Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Id., *quoting* Gray, 800 F.2d at 646. *See also* Bell v. Jarvis, 236 F.3d at 164. Given the paucity of applicant's allegation, he cannot make this difficult showing. This ground must be dismissed with prejudice.

Counsel is not ineffective for failing to file a "kitchen sink" brief. Smith v. Stewart, 140 F.3d at 1274, n. 4; *See also* Thrift v. State; *See also* Jones v. Barnes (appellate counsel may make a reasonable strategic decision not to appeal every non-frivolous argument requested by the defendant, and noting the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible"). It is clear appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment

[9] *See also* Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

not to pursue a particular issue on appeal. Griffin v. Aiken. Further, under the two part test of Strickland, *supra*, a defendant must show not only that counsel's performance was deficient, but that this deficiency prejudiced defendant. Smith v. Robbins; Jones, 463 U.S. at 751 (stating that appellate counsel may make reasonable strategic decision not to appeal every non-frivolous argument requested by defendant and noting "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible"); Thrift v. State. *See also* Smith v. Stewart. Stanko has failed to show the issue he asserts should have been raised on appeal was clearly more meritorious than the issues raised and argued on appeal.

Furthermore, Respondent is informed and believes appellate counsel made an objectively reasonable strategic decision not to raise this issue because it was not meritorious and weaker than the issues raised on appeal. Jones v. Barnes. Therefore, it cannot be the basis of a claim of ineffective assistance of counsel. Id.; Strickland.

Further, Respondent is informed and believes the trial court did not commit any errors regarding witness testimony, evidence, and other matters of law. And, even assuming *arguendo* the trial court committed some error, Stanko cannot prove prejudice on this record. (See Record on Appeal). Further, Stanko cannot show deficient performance or prejudice under this ground given this record. Barnes.

**10/11(d) Violation of Due Process**

(i) The Chief Justice of the S.C. Supreme Court violated the applicant's rights concerning due process and fundamental fairness by ordering an expedited appeal in the Applicant's direct appeal. Supporting facts: The Chief Justice of the S.C. Supreme Court violated the applicant's rights concerning due process and fundamental fairness by ordering an expedited appeal in the applicant's direct appeal.

Respondent denies the allegations of this ground and requires strict proof thereof.

First, this claim has no merit because it is a direct appeal claim or one that should have been

raised to the S.C. Supreme Court. It is not cognizable on post-conviction relief (PCR). *See* Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981). It must be dismissed with prejudice. See also Rule 12(b)(6), SCRCP.

Furthermore, there is absolutely no merit to this ground. As Stanko sets forth above, the South Carolina Supreme Court did not provide no provision for extensions in this case, but only stated an extension would not be granted except upon extraordinary circumstances. This is not a due process violation. Stanko cannot show one. This ground must be dismissed with prejudice.

Furthermore, the record will also show appellate counsel did file a request for an extension on April 19, 2007. The record will also show **appellate counsel did obtain an extension** in this case. The Court did not prevent appellate counsel from requesting such an extension, and in fact, appellate counsel did so. The record will show that by Order dated April 23, 2007, the South Carolina Supreme Court **granted a thirty (30) day extension** to Stanko's appellate counsel, Joseph Savitz and Katherine Hudgins, to file the initial brief and designation of matter in this case. Nor was there anything preventing or prohibiting appellate counsel from filing an additional request had one been needed or necessary. The record shows appellate counsel had adequate time to brief the arguable issues of merit on appeal. (Record on Appeal). Stanko cannot show his due process rights were violated by the South Carolina Supreme Court or resulting prejudice. Additionally, the provisions regarding an extension in this case were equally applicable to the State as well as applicant.

Finally, Stanko has not set forth in what way his appeal was not complete, other than to allege above that counsel should have briefed the suppression of Dr. Wu's testimony. As set forth

under that ground, and incorporated fully herein, there is no merit to that appellate issue. Strickland. Nor can he establish prejudice in this regard. Strickland; Belmontes. Therefore, this ground must be dismissed with prejudice.

Further, this ground fails to state a claim upon which relief may be granted by this Court. Rule 12(b)(6), SCRCP. It must be dismissed with prejudice. Respondent also moves to dismiss this ground with prejudice.

**10/11(d)(ii)** Applicant was denied his right to Due Process in the ways addressed in this application and such other ways as will be raised at an evidentiary hearing.

Supporting facts: Applicant was denied his right to Due Process in the ways addressed in this application and such other ways as will be raised at an evidentiary hearing.

Respondent denies the allegations of this ground and requires strict proof thereof. Furthermore, this ground is vague and ambiguous must be dismissed with prejudice. Furthermore, this is a claim of trial court error or a direct appeal claim that is not cognizable on post-conviction relief. *See* Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981). It must be dismissed with prejudice. This ground also fails to state a claim upon which relief can be granted. Rule 12(b)(6), SCRCP. Respondent moves to dismiss this ground.

**IV.**

Each and every allegation contained within the Second [Actually 3rd] Final Amended Application is hereby expressly denied and strict proof required thereof. To the extent Respondent has failed to address any allegation in the "Second Final Amended Application," that allegation is denied and strict proof required thereof. Respondent reserves the right to amend this Return as discovery continues.

**V.**

WHEREFORE, having made Return, the Respondent moves and requests that those allegations of the Second Final Amended Application that are not cognizable or fail to state a claim upon which relief may be granted in post-conviction relief (PCR) be dismissed with prejudice. Respondent requests the Court convene an evidentiary hearing into each matter or ground not dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
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December 1, 2014

**CERTIFICATE FOR SERVICE**

**I, Anthony Mabry,** hereby certify that I have served the ***Respondent's Return to Second Final Amended PCR Application and Motion to Dismiss*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Stuart Axelrod, Esquire
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604 Sixteenth Avenue North
Myrtle Beach, SC 29577

Bobby Frederick, Esquire
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Myrtle Beach, SC 29578-8219

This 1st day of December, 2014

ANTHONY MABRY
Assistant Attorney General

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF GEORGETOWN** | ) | **2008-GS-22-01446** |
| STEPHEN STANKO, | ) | |
| | ) | |
| Applicant, | ) | **Transcript of Record** |
| | ) | |
| vs. | ) | |
| | ) | April 27-28, 2015 |
| STATE OF SOUTH CAROLINA, | ) | |
| | ) | |
| Respondent. | ) | |

**B E F O R E:**

Honorable W. Jeffrey Young
Georgetown County Courthouse
Georgetown, South Carolina

**A P P E A R A N C E S:**

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Bobby Frederick, Esquire
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Carolina M. Scrantom, Esquire
**Attorney for Respondent**

Kay H. Richardson
**Circuit Court Reporter**

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**(APRIL 27, 2015 - 10:04 A.M.)**

THE COURT: Good morning, everyone. Please take your seats. All right. This is the case of Stephen C. Stanko, Number 6022, versus State of South Carolina under docket number 2008-CP-22-1446. Present and appearing are the Petitioner along with his attorneys Mr. Stuart Axelrod and Mr. Bobby Frederick and they soon to be added young man ---

MR. SHAFFER: Tristan Shaffer, Your Honor.

THE COURT: --- Tristan Shaffer, here for the Petitioner. The State is represented by Mr. ---

MR. MABRY: Mabry, Anthony Mabry, Your Honor.

THE COURT: Anthony Mabry.

MR. MABRY: Caroline Scrantom.

THE COURT: --- and Ms. Scrantom, yes, ma'am.

All right. Is there anything we need to put on the record before we start testimony? Yes, Mr. Axelrod?

MOTIONS:

MR. AXELROD: Your Honor, I have a matter of housekeeping to take up that I mentioned which you may -- we can come back to -- I had submitted an order to the Court for additional funding to cover my expenses of $9500.

THE COURT: Yes, sir.

MR. AXELROD: Your Honor, we have kind of calculated everything, 3500 will suffice me through this ---

THE COURT: Okay. And what I was gonna say is that I

checked with OID on your accounts and you still have some money on there, they said, but if you want to just submit a final bill when it's all over with, we'll take care of that.

MR. AXELROD: According to OID, because there are very strict with me now, I'm sitting right now with $895 on the plus side. I would ask the Court to amend the order and scratch out the 95 to 35, that will cover me, because Hugh says that I have to have your order prior to it and if I -- if I go into the negative, I can never recover anything.

THE COURT: Okay. I'll be happy to sign that order then.

MR. AXELROD: Okay. And I just wanted to let the Court know ---

THE COURT: And I will be signing the one for the additional $1,000 for costs and then there were some minor investigator's fees and I will sign that one as well.

MR. AXELROD: And Mr. Skidmore is here with the file. We just had -- you know, we weren't able to just get the file. The Supreme Court made us go through a lot of hoops and Mr. Skidmore actually has to sit with the file the entire time.

THE COURT: All right. We'll make those available. If you have an order, Mr. Shaffer, appointing you to this case, I be glad to sign it at this point in time.

MR. SHAFFER: Thank you, Your Honor. I will provide you one in just a few minutes.

THE COURT: Thank you.

MR. SHAFFER: Your Honor, I had spoken with Mr. Mabry last week about possibly -- instead of having Mr. Skidmore actually it here the entire time, maybe hand-off the file to the Clerk of Court and have it in the courtroom this whole time. Obviously, we're not going to touch it, just so that it's available and Mr. Skidmore doesn't have to it here.

MR. MABRY: That's fine with us, Judge.

THE COURT: I think that's the smart thing to do.

MR. MABRY: They can just lock it in the courtroom.

THE COURT: Yeah, because we're the only ones holding court here this week, I think, so...

MR. MABRY: We've done that before and it will be perfectly fine with us.

THE COURT: All right. Mr. Skidmore, you are now relieved of possession of that.

MR. SKIDMORE: Thank you, Your Honor.

MR. SHAFFER: Does the State need any questioning regarding ---

MR. MABRY: No, I trust you on that.

MR. SHAFFER: Thank you, Your Honor.

MR. MABRY: Not always but I trust him on that.

THE COURT: Now, there had been an issue about one of your witnesses. Do y'all need to wait and call him on Wednesday and we'll just play it as we go?

MR. SHAFFER: Your Honor, I spoke with the witness. He

is having surgery today.

THE COURT: Okay.

MR. SHAFFER: He did tell me that if we give him transportation, he should be able to show up tomorrow morning.

THE COURT: Okay.

MR. SHAFFER: So, we're having an investigator pick him up and drive him tomorrow.

THE COURT: All right. Very well.

MR. AXELROD: Your Honor, Mr. Skidmore asks that he get his hand truck back.

THE COURT: All right.

MR. SKIDMORE: Thank you, sir.

MR. FREDERICK: Judge, just a couple of more things to put on the record. We did request funding in this case for a Dr. -- I'm not sure how to pronounce his name.

THE COURT: It's the doctor from Harvard?

MR. FREDERICK: Yes, sir, Your Honor. B -- I think it was B-U-R-S-Z-T-A-J-N, Bursztajn, and that order was not signed by the Court ---

THE COURT: Right, and it was denied.

MR. FREDERICK: Yes, sir. I just want to put that on the record. As far as the motion that we forwarded to the Court, that motion has not been filed, and with the Court's permission -- I don't have it with me today, I'll bring it tomorrow and just make it a defense exhibit for the purposes

of the record, if that's okay.

THE COURT: Very well.

MR. FREDERICK: Judge, I don't know that we need to do this but just out of caution ---

THE COURT: Well, whatever you need to do, we've got time. Let's make sure it's done right.

MR. FREDERICK: Yes, sir. We'll renew the motion to recuse Your Honor.

THE COURT: Yes, sir.

MR. FREDERICK: And that motion was filed, it's a part of the court record, but just -- I don't know if we need to do that now or not.

THE COURT: It's been filed and it's denied.

MR. FREDERICK: Yes, sir. Just for the record, we are renewing that motion.

THE COURT: Yes, sir.

MR. FREDERICK: And that's all I have, Judge.

THE COURT: Mr. Mabry?

MR. MABRY: Yeah, just a few preliminary, Judge. In these cases we usually start with -- I have the Record on Appeal from the actual trial here in Georgetown and I would move that in as Respondent's Exhibit One.

THE COURT: Any objection?

MR. AXELROD: Without objection, sir.

THE COURT: Without objection, Respondent's Exhibit

Number One is admitted.

RESPONDENT'S EXHIBIT NUMBER ONE

ADMITTED INTO EVIDENCE

MR. MABRY: Sorry to turn my back on you. It's a long way between the tables.

THE COURT: This is not a stage where you have to never turn your back on the audience.

MR. MABRY: Yes, sir. Our second motion, Your Honor, pretrial motion, preliminary motion is to sequester the witnesses. This is a -- the magnitude of this case, as the Court is aware, the State does not want anybody conforming their testimony or hearing the direct or the problems so we move to sequester the witnesses in this case.

THE COURT: Any objection to that, gentlemen?

MR. FREDERICK: We have no objection, Judge.

THE COURT: All the witnesses, anyone who is going to testify in this case will need to be out in the hallway during the testimony. After you testify, you are welcome to sit here but you cannot be in the courtroom prior to the testimony.

MR. MABRY: Thank you, Your Honor. Our next motion, Your Honor, and this is our last pretrial motion, I don't know when -- they have indicated to me they plan on calling a Dr. Susan Knight. She is not a medical doctor; she is a doctor -- PhD in psychology. Just to give you a little background, Judge, she was not involved in this case at all. She has

never met with Mr. Stanko. She has never -- she has not diagnosed him with anything new. The indication was -- let me make sure she left the courtroom -- is she here? I don't know if Dr. Knight is here. But the indication was -- what she did was she went over the testimony in the trial and maybe some documents that they sent her and she has an opinion as a psychologist that's Mr. Stanko does not meet the definition of insanity. Our motion is to exclude her testimony and the reason is it is simply not relevant. We're talking about an expert ten years after the fact. She was not a retained expert by trial counsel, she was not even a consulting expert. I don't know how familiar the Court is with the record in this case but trial counsel had two psychiatrists, one psychologist, a neuroradiologist and I think one more expert that he consulted with and they gave him -- he also consulted with another psychiatrist Broadley (spelled phonetically) and also Dr. Schwartz-Watts. All these psychiatrists or who he consulted with and they gave them what their opinion was and they testified. Dr. Thrasher and Dr. Sachy testified during the trial that Mr. Stanko was insane. Dr. Wu, who is a neurologist, testified that the PET scan showed that he had a malformed brain. What they would like to do now is bring Dr. Knight in post hoc, ten years after the fact, and basically say, you know, if they had talked to me I would have said this doesn't fit the definition of insanity. Plus, she's drawing a

legal conclusion that only the Court can make and Judge Jefferson actually, after hearing the testimony at pretrial, ruled that it could go to the jury and she would instruct on insanity. So, we move to exclude her testimony. I've got numerous cases I can hand up to the Court, you can see the stack in my hand, it's about three or four inches pick. But basically, what these cases hold or that trial counsel has a right to rely on the experts that they retain. There is no right to ineffective or effective assistance of an expert; it's ineffective assistance of counsel.

THE COURT: Right.

MR. MABRY: The lawyers in this case are not psychiatrists and psychologists. They retain these experts and these experts, you know, look at the information and say this is my opinion. If they want to bring in a psychologist ten years after the fact or nine years after the fact and to say this case doesn't fit insanity, we don't think it's relevant and we believe it should be excluded.

THE COURT: All right. Would you like to argue that?

MR. SHAFFER: Yes, Your Honor. First of all, just for clarification ---

THE COURT: When is she scheduled to testify?

MR. SHAFFER: Tomorrow, you Your Honor.

THE COURT: Okay. That gives me -- go ahead. All right.

MR. SHAFFER: She actually did not diagnose Mr. Stanko

and she is not giving a clinical diagnosis. What she is is an expert in criminal responsibility examinations in South Carolina and under South Carolina law, and how they ---

THE COURT: So, she's telling me what the law is in this state?

MR. SHAFFER: No, Your Honor, that's not actually it. Obviously, you can make a judgment on the law. What she is here to do is to discuss the elements and the basis that they cited for their final conclusion. Ultimately, what we're saying in this case is that these experts made a conclusion that is not consistent with the law. Okay? But what they did, they basically laid the groundwork for a guilty but mentally ill finding. They laid a groundwork that he had impulse control, he had problems with impulse. And then they decided -- their final conclusion for whatever reason they said it, they tried to say he is insane even know what they had was evidence of impulse control. Essentially, all the factors that they cited to go to their final conclusion, they go to a completely different final conclusion. And what she's here to do is to help the Court sort of muddle through this scientific evidence. You know, obviously, that's the point of any expert is to help the trier of fact understand it. In this situation, obviously, you are the judge of the law but what she's here to do is explain some of the, I guess, ingredients to what they ended up creating or what their final

conclusion was.

THE COURT: Mr. Mabry, what would be the prejudice to your side if she testified? It's not like we have a jury here; it's me there trying to convince.

MR. MABRY: Well, the prejudice is that it shouldn't even be considered. The Court -- I understand the Court is the trier of the facts but the prejudice is an expert, ten years after the fact -- there are also cases that I can supply the Court with that the fact that you can find an expert five, six, seven years after the trial to say something different than what the trial counsel's expert said is not ineffective assistance of counsel, it's what their experts told them at the time and that's exactly what they're trying to do.

THE COURT: All right. Well, if you can pass up that bundle of cases, will review them and I'll give y'all a ruling first thing in the morning.

MR. SHAFFER: Thank you.

THE COURT: Thank you. Any other housekeeping matters before we begin our testimony?

MR. MABRY: No, sir. Actually, Mr. Diggs was still in here, Judge, I was making sure he left before the testimony started.

THE COURT: All right.

MR. MABRY: We're ready.

MR. AXELROD: One little housekeeping matter myself, Your

Honor, I know we have -- Mr. Savitz is here as our first witness. We have subpoenaed -- Mr. Skidmore is here. We did a subpoena of Gerald Kelly, we did a subpoena on Gerald Kelly to be here now because he's gonna be one of our next witnesses. I don't see Mr. Kelly here.

THE COURT: Somebody make a call to Mr. Kelly and have him ---

MR. AXELROD: I have my office ---

THE COURT: Has anyone seen him here?

MR. MABRY: I have not, Your Honor.

MR. AXELROD: I'm gonna go out in the hallway and call his name but I just want to let the Court know that I expected him here. We had him subpoenaed -- how long ago, Mr. Skidmore?

MR. SKIDMORE: Probably ten days ago.

MR. MABRY: We deposed him as well, Your Honor.

THE COURT: Say what?

MR. MABRY: We deposed him as well. He is aware of this hearing.

THE COURT: All right. Well, go make a phone call, we'll take a ten-minute recess.

MR. AXELROD: Thank you, sir.

MR. MABRY: I did have one more matter, Judge.

THE COURT: Okay.

MR. MABRY: You want to wait? I didn't want you to

leave -- I, in my return to the application, Respondent moved to dismiss any grounds that are not ineffective assistance and I renew that motion. One of those grounds is the Supreme Court violated ---

THE COURT: Yeah, I can't -- that's not my move.

MR. MABRY: We move to dismiss that ground.

THE COURT: I'm gonna grant that motion. This is strictly a regular PCR.

MR. MABRY: There are also *Brady* claims or prosecutorial misconduct claims that could've been raised on direct appeal that weren't raised and we would move to dismiss those as well.

THE COURT: Anything that's not a normal PCR is dismissed. Thank y'all.

MR. MABRY: Okay. Thank you, Your Honor.

MR. FREDERICK: Judge, we need some more clarification on that. Specifically, what issues is the Court dismissing before the hearing begins?

THE COURT: Basically, anything that's not a normal PCR or an ineffective assistance of counsel, unless you have new evidence or something like that.

MR. FREDERICK: I think we need to lock down what the Court means by not a normal PCR.

THE COURT: Well, okay, go through -- which ones are you objecting to? Let's put them on the record.

MR. MABRY: Your Honor, we're moving to, we're moving to dismiss -- I've got a find the first number -- I think it's 10(b)(i) and (ii). The first one is, The prosecution knowingly and willingly initiated, presented and allowed false and inaccurate testimony. In the second one is, The prosecution knowingly withheld evidence in violation of *Brady* and Rule 5.

MR. FREDERICK: Judge, I think it's clear, and I don't have the cases in front of me, but prosecutorial misconduct and *Brady* violations are proper for PCR. Mr. Shaffer is telling me *Riddle v. State* -- *Riddle v. Ozmint*, that's right.

MR. MABRY: They can be proper claims, but you have to show, as the Court stated a moment ago, something new that wasn't uncovered. If there was testimony during the trial, Say the State presented certain testimony, then that -- and you claim that's false evidence that you presented, you've got to raise that on direct appeal or a *Brady* claim ---

THE COURT: Or otherwise, right.

MR. MABRY: A *Brady* claim, you had to ---

THE COURT: Were these raised on direct appeal or were they in the actual, original file?

MR. MABRY: I don't know what they're claiming -- my understanding is there claiming -- the *Brady* claim deals with personal journals of Mr. Stanko, that the Sheriff's office took possession of when he was arrested, stuff he had written

over the years. My understanding is that -- all those materials were shown to him before the trial. The actually had a day where they took them over and he went through them. I haven't seen any evidence from them that there's anything new that they claim that the prosecution didn't turnover prior to the trial.

THE COURT: Yes, sir.

MR. FREDERICK: That's the purpose of this hearing. I think it's appropriate if there is something that is just not grounds for PCR and could not conceivably be grounds for PCR. It would be appropriate for the Court to dismiss that before beginning but the claims, while they may not pan out, Judge, the Court may say, no, this is not grounds for PCR after the Court hears the claim. I think it's inappropriate for you to dismiss ---

THE COURT: And, again, the prejudice on some of these, if they're close, I would probably err on the side of going ahead and hearing them and taking them into my evaluation as to whether they are valid or not. I mean, I'm gonna give them the benefit of the doubt in this manner, so ---

MR. MABRY: If they could -- I'm sorry -- if they present something new, I'm just, I'm telling the Court I haven't seen anything, I haven't seen anything about presenting false testimony or evidence other than what's in the record and that should've been raised on direct appeal if

it's something that occurred in the trial.

MR. FREDERICK: Judge, if we don't prove it, we don't prove it, but it is a cognizable claim for PCR.

THE COURT: Well, again, as I have said in this trial and in others, we've got plenty of time. I'd rather do -- take longer to do it right then try to cut corners and do it wrong.

MR. MABRY: Thank you.

THE COURT: Thank you. All right.

MR. MABRY: You want me to continue with the grounds, Judge?

THE COURT: Let's just bring them up -- as he brings them up, as they present evidence, let's take them at that point in time.

MR. MABRY: Okay.

THE COURT: There's no sense in arguing and making decisions on stuff that really is not yet before the Court.

MR. MABRY: Okay. As long as our motion continues.

THE COURT: Your motion continues throughout this trial.

MR. MABRY: Thank you. Yes, sir.

THE COURT: All right. Let's take a ten-minute recess and see if y'all can't find your first witness.

MR. MABRY: Yes, sir.

MR. FREDERICK: Thank you, Judge.

(RECESS - 10:22 A.M.)

*******OFF THE RECORD*******

**On the Record - 10:48 A.M.)**

THE COURT: All right. Petitioner may call their first witness.

MR. MABRY: I'm sorry, Judge.

THE COURT: Yes, sir.

MR. MABRY: Before we get started, I understand Mr. Savitz is going to be the first witness and I know the Court is already ruled on the claim that the Supreme Court violated Mr. Stanko's due process rights and I think most of his testimony is going to that. So, we move to exclude his testimony on that. I understand they may want to make a proffer on that issue. They also have an ineffective assistance of appellate counsel, which I understand they have a right to present. But anyway, that's our motion.

THE COURT: All right. You may proceed.

MR. SHAFFER: Applicant calls Joe Savitz.

THE COURT: Come forward, Mr. Savitz, and be sworn.

JOESEPH L. SAVITZ, III, HAVING BEEN DULY SWORN, TESTIFED AS FOLLOWS:

THE COURT: When you're seated, please state your name for the record.

MR. SAVITZ: Good morning. My name is Joseph L. Savitz, S-A-V-I-T-Z, III.

DIRECT EXAMINATION OF JOSEPH L SAVITZ, III, BY MR. SHAFFER:

Q: Mr. Savitz, you represented Stephen Stanko on his appeal,

correct?
A: Yes, I did.
Q: How did you come about representing him?
A: I was the -- I think at the time I was still the Chief Attorney at Appellate Defense. I did half of the capital cases -- we did most of the capital cases on appeal. I did half of them and I was assigned -- me and another guy, Bob Dudek that worked there, just kind of went back and forth doing and I was assigned this one.
Q: And at time you represented him, how long had you been practicing law?
A: This is about 2007, so I would've been practicing law -- I was practicing law since 1982, so ---
Q: Okay.
A: And I've been at Appellate Defense since 1985.
Q: And approximately how many capital cases had you handled up at that point?
A: I have no idea; it's a lot of them.
Q: A lot?
A: Yeah.
Q: The majority of them capital cases through Appellate Defense?
A: Yes, and I did half of them, so -- there were fewer in the beginning. I started doing them in 1985. There were fewer in the beginning and then there were more and more. So, at this

time, I think I was doing maybe three or four a here.
Q: Now, is this case different then the case you had in the past, capital cases?
A: In what sense?
Q: Specifically, the timeframe.
A: Yes, yes. It was extremely different than the ones I had before or since then, nor do I know if any other cases in which the amount of time given to the appeal was this short.
Q: What -- and in general case, and I'm not talking about this case specifically, what was your general practice for preparing to do a brief?
A: Well, what we'd do, there would be the trial and depending upon the court reporter situation, it would usually be several months before the transcript would get to us. I don't remember how long this transcript is but it looks pretty long sitting there, but it would take several months. We would get it and normally, you couldn't begin working on it immediately because we were doing like one death penalty case -- I was doing like half the death penalty cases, half the noncapital cases and then several other types of cases as well. So, I was working on cases as well, the transcript would arrive, and it was routine to get extensions to do these things. And, normally it would take, you know, several months to get it done, between -- usually about six months, I guess, after we got the transcript if not longer.

Q: Would you generally read the entire transcript?
A: Yeah, yeah, we -- what I did, my practice was to, I would get the transcript and read through it once to kind of get an idea of what was happening in the case and then I would read it a second time to you, you know, to spot the issues that I was gonna raise and then I would do the research and kind of go through the transcript again as I was writing the brief. So, you know, ultimately, I would read the transcript, I guess, maybe two, three times.
Q: And do you know approximately how long it would take you generally to read a 3700 page transcript?
A: That's probably about three days, three, four or a week or so. It depends, it depends on -- this case, you know, had a lot of like technical expert witness stuff which is always kind of hard to get through, typically, when they are referring to things that aren't, you know, clearly apparent from the record. So, I don't remember how long this -- we didn't have a whole lot of time to read this one but it would normally take, you know, you could read -- and it's about -- 3,000 pages seems like a lot but, you know, you could get through with if that's all you did. It would take a week or two.
Q: Now, during the time period that you are preparing this, did you have the case is going on at the same time?
A: Yes.

Q: Other deadlines to meet?
A: Yes.
Q: And how many times did you get to read this transcript?
A: I got through this transcript one time.
Q: Okay. Do you believe that possibly there could be issues you missed in the transcript?
A: I don't know. I don't know. I know that I read it quickly. We had to -- we were given like the initial thirty days to do it. I requested another extension, I had got another, you know, twenty days or so, I'm not sure. It seems like it was, you know, two months, fifty days, something like that. But the first thirty days, I didn't really do anything on it. I was working on other stuff. And, you know, we, Ms. Hudgins and I just, you know, kinda blasted through this thing in really no time at all and I haven't read it since then. So, I don't know, you know, there could be issues -- I mean, I wouldn't be surprised if there were issues in there but, I mean ---
Q: Were you the lead attorney on the case?
A: Yes.
Q: And what was Ms. Hudgins' role in this?
A: She -- we both read the transcript independently of each other and then got together and kind of decided on the issues that we wanted to raise and, I mean, there weren't, you know, a lot of issues that jumped out at this but, you know, the

ones that we had we split up the writing of it. I don't remember who had what.

Q: And did you have any conversations with trial counsel concerning this case?

A: Bill Diggs, yes, I did.

Q: Okay. If you could, tell us what the -- was he trying to you give input or were you asking advice from him?

A: Well, Bill actually hired me at Appellate Defense, so it's not like we didn't know each other before this appeal. I know Bill well and we would talk anyway but we did talk about this case and he had issues that he felt -- the insanity was a matter of law issue that he felt particularly strongly about and we talked about that mostly. We talked about other issues as well.

Q: Now, why is it that you did not raise that issue?

A: Insanity as a matter of law. I just -- I did not -- I mean, I saw, I saw the argument. I did not see that it rose to the level of insanity as a matter of law.

Q: Okay. Now, pretrial he had made several motions to have the murder statute, the insanity statute and the GMI statute declared unconstitutional.

A: Uh-huh (affirmative response).

Q: Did you review those issues?

A: Yes.

Q: Okay. Why didn't you brief those issues?

A: For the same reason I didn't see, to me, the argument that they were trying to make was that the insanity law had to reflect findings of neuroscience, that it had to kinda follow whatever neuroscientists were saying about the brain and I don't think that's -- I did not think that's the law, still do not think that's the law and I think I wrote -- maybe wrote Mr. Stanko a letter saying that this is why I'm not racing is. You know, it wasn't like, you know, hey, I got a great strategy, I know this could be a good issue, I'm not gonna raise it, it was just I didn't see it as the law and today do not see that is the law.

Q: Okay. What issues did you raise on appeal?

A: I think we raised a -- it's been awhile since I looked at this stuff but I believe we raised a juror issue and maybe even Ms. Hudgins raised that one. And then the other one was an unpreserved sentencing phase mitigator, I believe.

Q: Okay. And that sentencing phase mitigator would you disagree with me if I said that it was related to his mental illness?

A: That's correct.

Q: Did you ever look and see if there was another sentencing phase mitigator?

A: I mean, I read through the transcript but I didn't see any other sentencing phase issues, but like I say, it's not like I had a lot of time to sit down and, you know, I went through

the transcript maybe one time. So, I mean, there can be stuff in this record that I knew nothing about.

Q: Okay. What I'm going to do, I'm actually going to give you and it should come up on the screen -- I'm gonna go to Page 3348 in the transcript. I'm showing you 3348 in the transcript.

A: Yes, sir.

Q: If you could ---

A: I am familiar with this part of the transcript, Mr. Mabry, I think it's the part he handed me the other day when I talked with him.

Q: Okay. Can you review 15 through 23?

A: Yes.

Q: Does this appear to be the Judge's charge at the sentencing phase?

A: Yes, it does.

Q: And the Judge said she was not going to include the mitigating circumstance of provocation?

A: That's right.

Q: Did you see this issue whenever you are reviewing the case?

A: No.

Q: If you had've seen it, would you have phrased it?

A: Probably so, you know, I mean it's not like we had all these other great issues that, you know, I raised. If I had

seen that as an issue, yeah, I probably would've raised that.
Q: Okay. Now, the Judge says that is not supported in the evidence. Now, what I would like to do is actually go to the -- that it wasn't supported in the guilt phase, correct?
A: I think -- I thought she was saying that there was some evidence of provocation at the guilt phase, but ---
Q: The guilt phase, I apologize; I misspoke.
A: But at the sentencing phase, whatever came out there, she didn't see it anymore.
Q: Do you recall whether the evidence at the guilt phase was incorporated into the sentencing phase?
A: No, I assumed it was. I assume that that's done automatically now.
Q: What I would like to do is refer you to Page 2429. Now, if you would review that starting at Line 23 and I'll go to the next page whenever you're ready.
A: Okay. Okay. That looks like it's Solicitor Humphries. Yeah, I see. He's incorporating all of the guilt phase evidence into the sentencing phase.
Q: Okay. And let's acknowledge the next page at 2430; is that correct?
A: That's right.
Q: Okay. Based on that, if there was evidence of provocation at the guilt phase, shouldn't it be charged at the sentencing phase?

A: Yes, sir.

MR. MABRY: Objection, leading.

THE COURT: Overruled.

Q: Now, Mr. Savitz, is there any reason that you would not have raised that on appeal?

A: The only reason that I can think of is -- I don't remember what happened in I was doing this case as far as that issue goes. Whether I saw it -- I can imagine that I saw it and said, hey, that's not really provocation and did I -- I assume that I just didn't see it. If I knew then what I know now, I would've raised it.

Q: Okay. And you mentioned that the evidence might not've been provocation -- I refer you to 1782. If you could, read in the transcript starting at Line 18.

A: Okay.

Q: Would you like me to ---

A: You can turn the page, if you would like.

Q: Okay. Could you actually read into the record Line 18?

A: Let's see. Yeah. That's just kinda hard to see on the ---

MR. AXELROD: Your Honor, if it's possible, maybe to put them microphone down, it's just hard to hear right now.

THE COURT: These angles on the screens are horrible.

A: Okay. I guess this is from Mr. Diggs, Doctor, do you have any idea of how this happened, how this emotion got started in

Mr. Stanko's situation? Answer, Mr. Stanko told me that he and the girlfriend, Laura, Laura had -- there had been some conflict to do with the daughter and there was conflict he told me between the daughter and the mother and he was kind of getting involved in the middle and getting mixed up and -- okay -- now, was someone able to carry on a conversation ---

Q: I think we skipped a page.

A: All right. We were -- he was getting involved in the middle and getting mixed up and trying to keep things down but that things essentially were going okay but because of that conflict he decided he was going to move out and he told me he told -- he told me that Ms. Ling became angry and threatened to expose him as a child molester. That he had -- that he had tried to molest the young daughter, the victim and -- now, did you have any evidence to support that as being true, that he'd tried to molest Christina? No. Okay, go ahead. So, later that night, he went to her bedside and she said she was going to expose him if he left, et cetera. And he had a cigarette he told me and she slapped him and the cigarette burned the medial portion of his eye but that's when, I guess, essentially he saw red and he has no memory of or great memory -- where are we ---

Q: That's sufficient.

MR. MABRY: No, it's not. I'd like for him to finish reading.

Q: 1783.
A: All right. Let's see. Okay. We were up to where, It burned the medical portion of his eye and that's when he -- I guess, he essentially saw red and he has no memory or great memory of what happened. In your professional opinion, medical opinion, within a reasonable degree of medical certainty, could that invoke a limbic system emotion that could set off a chain of events that would produce the results that we have here.
Q: And that's sufficient. I'll let Mr. Mabry ask you the rest the questions.
A: Okay.
Q: Do you think that that was evidence involving provocation?
A: Well, I mean, it's hearsay evidence but it's in without objection, so it's evidence. I mean, evidence is evidence and that's evidence of provocation.
Q: Okay. So, the fact that it's hearsay doesn't really matter if they didn't object to it?
A: Nope, evidence is evidence if it's not objected to.
Q: Okay. After reading that, do you believe that you should've raised the issue involving provocation?
A: That's evidence of provocation.
Q: Okay. Do you believe that it was preserved?
A: No. I've looked at the -- well, I mean, the Judge obviously ruled on it, so I mean, insofar as the purpose of

objection is to obtain a ruling from the Judge. I mean, she ruled. She said I don't see it; I'm not gonna charge it. But so the question becomes whether or not the Defense counsel has to ask for it, which they didn't, do or object to her, herself saying I'm not gonna raise it if -- they have to object and so, wait a minute, Judge, there's evidence of provocation, which they also didn't do. So, my guess is is that the Court would say that it is not reserved.

Q: Okay. But if it was properly reserved, do you think that you should've raised that?

A: If I had seen it while I was reading the trans -- Yeah, I mean, I raised an unpreserved sentencing phase or sentencing charge issue anyway so I was raising that type of issue. The only thing I can think of is I just didn't see it.

Q: Now, I'm actually going to direct your attention to Page 2965.

A: Yes, sir.

Q: And actually, I believe the objection is probably on the page right beforehand.

A: Right. This -- I've read this part too, as well. Mr. Mabry also gave me that part of the transcript.

Q: Okay. Could you summarize what happens here in this part of the transcript?

A: This, I understand to be from -- not having the read the whole transcript but that they were gonna call a witness

basically to say -- there was some issue about some tests they did on Mr. Stanko's head. And the Defense said one thing that proved he was crazy and the results of this test were that he was crazy and the State said, no -- their expert said no, it didn't, no, it doesn't. And to a large extent they both relied upon this test they had done to his head which was something about colors or something, I don't really understand the stuff myself but I understand there was a difference in how you interpret the test and how you do the test, the methodology. And that the interpretation could be flawed because the methodology used was flawed and that they -- the Defense wanted to call their expert to say the State's expert was wrong about what he was saying because he did the methodology was wrong and thus his interpretation of Mr. Stanko's head was wrong and she -- the Judge ruled that that was witness pitting and said you can't pit witnesses against each other, I'll let you ask questions, you know, about how he did it and kind of stay away from witness pitting, which, you can't pit witnesses, so nothing wrong with that. And he got to ask a series of questions about it but not saying the other guy was just wrong, you know, mistaken about what he had done.

Q: Well, did he get to ask about the methodology at least by the other ---

A: I thought that he did. I mean, I skimmed through this, I didn't read it closely. Mr. Mabry did give me the part of the

transcript and I skimmed through it and that's what I am saying is based upon me skimming through this over the weekend. I thought he got to say that this is how you do the test, this is what the difference is.

Q: Okay.

A: But I mean, I could be mistaken, though.

Q: Do you think that it's pitting to have one expert comment on the methodology of another expert?

A: I don't know -- I don't know that what she -- I don't know that what they wanted to do was witness pitting. Witness pitting is saying, so, this other guy is lying, right? That's what witness pitting is, is where you have to -- you have witnesses calling each other liars and stuff. I mean, it's -- I don't know that an expert -- well, say the State calls somebody that used a Ouija board, I don't think it would be witness pitting for the defense expert to get up here and say Ouija boards a unreliable, they're not scientific. That's not the way we do things. I'm not sure that's witness pitting, you know, commenting on the methodology that another expert uses.

Q: Okay. Now, if you could, I'm gonna direct your attention at 2965. Now, I want you read the Court's explanation between 15 and 19.

A: Okay. Truthfulness by its very nature, you're saying his methodology was flawed in some way; that's voracity, that's

truthfulness, that's believability and credibility. I don't think they get around it.

Q: So, essentially, the Court's ruling that he can't directly attack the methodology?

A: That's what it sounds like.

Q: Okay. That issue was not raised ---

A: No.

Q: --- on appeal?

A: No.

Q: Okay. Was it preserved?

A: Yeah. That issue looks like it was preserved.

MR. SHAFFER: Court's indulgence.

THE COURT: Yes, sir.

BY MR. SHAFFER:

Q: No further questions.

A: Thank you.

THE COURT: Mr. Mabry?

MR. MABRY: Yes, Your Honor.

CROSS EXAMINATION OF JOSEPH L. SAVITZ, III BY MR. MABRY:

Q: Good morning, Mr. Savitz; how you doing?

A: Good morning, Mr. Mabry.

Q: You were not the only attorney working on this case; is that correct?

A: That's correct.

Q: Okay. Is -- was that something that was normally done in

a capital case or what that because this case had been expedited?
A: Probably -- I can't -- I don't remember if this -- I mean, it was something that we -- not just this case but we had so many capital cases and we had basically two lead attorneys doing all of the capital appeals. And so what we ended up having to do was like to try to bring in attorneys that weren't doing capital cases to kind of sit second and kind of help us just so we could process this things. That was a problem before this -- there was a problem with capital cases, there were too many of them, there were too few lawyers doing them; that was a problem. When this case was expedited, that was in addition to the problems we were already having in getting these things done.
Q: But you were the chief of Appellate Defense at that time?
A: Yes, yes.
Q: So, Mr. Stanko had the chief of Appellate Defense representing him on appeal?
A: That's correct.
Q: And he also had Ms. Hudgins representing him on his case?
A: Correct.
Q: Is Ms. Hudgins here today? Have you seen her?
A: I talked with her but I haven't seen her here. I don't think she's here. I'm assuming she's at work.
Q: She's not subpoenaed as a witness?

A: Huh?
Q: Is she here as a witness is what I'm asking you?
A: I haven't subpoenaed her.
Q: And you said you read the transcript and you know at least one time all the way through?
A: That's correct.
Q: So, you read the part about the provocation mitigator?
A: Yes.
Q: Where the Judge said I don't see charging that?
A: Yes.
Q: All right. And Ms. Hudgins also read the transcript?
A: I cannot speak for her. I assume that she read it, yes.
Q: I mean, that was her job to read it as well?
A: Was to read the transcript.
Q: Both of you were gonna read it and identify issues in the case?
A: That was our plan, yes.
Q: And she did not bring up that you should raise this provocation mitigator?
A: That's correct.
Q: Tell the Court what the problem is with raising this provocation mitigate.
A: The conversation you and I had the other day, what we were talking about?
Q: Yeah. Tell -- but you don't have to tell the Court the

problem with raising that ---
A: Okay. Well, I'll tell the Court what you and I talked about the other day was that whether or not -- I believe that we discussed this and we were talking about it, first, in the context of voluntary manslaughter, whether or not this supported voluntary manslaughter. And I said, well, hey, that looks like provocation to me, classic provocation for voluntary manslaughter. What you pointed out after that was that there was possibly a problem with a cooling-off period. That yes, even if you have provocation, you know, in a sudden heat of passion, there was possibly a fax that didn't support -- well, actually, there was a cooling-off period and the facts didn't really support voluntary manslaughter.
Q: Correct. And in this case, Mr. Stanko tied up -- if I'm reading the record, he tied up Laura Ling, the murder victim, correct?
A: That's -- I have not read this transcript. I did read the opinion to see, you know, kinda summarize the facts. I remember the facts that you told me and I believe you represented them accurately based in my recollection, which is ---
Q: Her hands were bound and feet were bound.
A: Uh-huh, (affirmative response).
Q: She was beaten from the top of her head all the way to her feet.

A: Bad facts.
Q: And she was also jabbed in the throat was some kind of sharp object?
A: I think that's correct.
Q: And before she even died, Mr. Stanko in the next room and grabbed her fifteen-year-old daughter and brought her back in the room where her mother was still alive and bound; is that correct?
A: That is correct.
Q: And he tied her up or first beat her unconscious and then tied her up and raped her?
A: That's right.
Q: And while he was raping her, he reached over and grabbed the mother by the throat and checked the life out of her?
A: I believe that is correct.
Q: And then cut the daughter's throat?
A: Yes.
Q: And left her for dead?
A: Yes.
Q: And you and I discussed this and you told me you did not believe that was voluntary manslaughter, that wasn't gonna work, was it?
A: Well, I think there's a problem with the cooling-off. But what he was asking me about was the sentencing phase, the mitigator.

Q: Well, the problem -- the provocator this case is you might be able to get the instruction if you ask for it but what is the jury gonna think -- isn't the jury going to think you're trying to blame the victim for her murder?

A: Well, I mean any time ---

MR. SHAFFER: Objection, Your Honor. Speculation.

THE COURT: Overruled.

A: Yeah, but I can't speculate on it. It's -- anytime you blame the victim for provoking their own death, you're in a sense blaming the victim. When you ask for voluntary manslaughter, you're blaming the victim. I mean, it just depends on what we're talking about here. You know, that's classic evidence of provocation, I mean, slapping somebody and burning them with the cigarette, you don't -- but the mitigator is designed for situations where the jury obviously would not find voluntary manslaughter. It's something less than voluntary manslaughter, it's just provocation. There is no cooling-off period required for the mitigator, I don't think. I mean, if they had ask for the mitigator, should they have gotten it? Yes. Strategically, was that a sound playing for a trial lawyer do? You'll have to ask trial counsel. I would've raised it if it had been, you know, brought to my attention.

Q: The problem is if you request it and get it and the jury is instructed, it looks like you were blaming the victim for her

own murder. I mean, that's what the mitigator is, the victim provoked her own death.

A: Yes.

Q: That's what the jury would've been asked to ---

A: Yeah, this wouldn't have happened but for something that the victim did.

Q: And he raped her daughter, bound her and raped her?

A: But, I mean, he got the death sentence for murder not rape.

Q: But he is already convicted of murder. We're talking about the mitigating factor in the penalty phase, correct?

A: That's right. I'm talking about a death sentence.

Q: In any event, this mitigator, the provocation, you didn't decide to raise it and neither did Ms. Hudgins. She didn't bring it up?

A: No.

Q: Neither one of you?

A: No.

Q: And in fact, that mitigator was not preserved?

A: I don't believe it was preserved.

Q: In fact, in this case, the other mitigator you raised -- this Respondent's Exhibit Two, which is *State v. Stanko*, 2008 opinion ---

MR. SHAFFER: May I ---

MR. MABRY: Oh, I'm sorry. It's just the opinion.

MR. SHAFFER: Okay.

RESPONDENT'S EXHIBIT NUMBER TWO

MARKED FOR IDENTIFICATION

BY MR. MABRY:

Q: In this very case, the other mitigator you raised, it wasn't preserved either, was it?

A: That's right.

Q: And in fact, the Court found that it wasn't preserved because counsel did not request the mitigator and then did not object when the Judge didn't charge it?

A: That's right.

Q: All right. You think Appellate Counsel was ineffective for failing to raise an issue that's not preserved?

A: I mean, you know, if it's, you know, I mean, there's certain issues you don't need an objection, this would be one of them.

Q: I'm sorry.

A: There's certain issues that you don't need an objection, like race, gender, things like that, you can raise on your own, but this would not fall within that category. It used to be. It used to be you could raise it. The Judge was supposed to go through them and select which ones were gonna be given but under current jurisprudence, no, you've got to have an objection. You either have to have a request for it or you have to have an objection to them when it's not given. And we

don't have either one of those here.
Q: Okay. So, the issue was not preserved?
A: The issue was not preserved, definitely.
Q: This is -- our jurisdiction is an issue preservation?
A: That's correct.
Q: Then it goes to back to -- in fact, the mitigator goes back the Kamell Delshawn Evans case that says you have to request it or object and that includes *State v. Humphries*, *State versus Vazquez*, *State v. Bowman*, and *State v. Sapp*, all of those cases say that, correct?
A: That's correct.
Q: Do you think maybe that's why you didn't raise this issue?
A: No. I mean, I raised an unpreserved issue which, you know, I knew was unpreserved. This one, I actually like better than the one that I raised though. No, I don't think that I voluntarily didn't raise this.
Q: There was a lot of -- the issues, the mitigator you did raise had to do with an age or mentality of the Defendant?
A: That's right. And you've got two, six and seven, it was -- that was -- at the time you raised it, you've got two, six and seven, it's one of those ---
Q: He got two and six but he didn't get seven?
A: Yeah.
Q: All right. But in this case, there was testimony from numerous experts about Mr. Stanko's mental illness or a brain

defect?
A: Right.
Q: But he didn't get seven?
A: That's right.
Q: The only issue of provocation in this case is the hearsay testimony of what Mr. Stanko told his doctors for the purpose of a medical diagnosis?
A: That's right.
Q: And there's all kind of testimony throughout this trial that Mr. Stanko was a pathological liar; isn't that true?
A: That's -- that is certainly a good argument to make to the jury but, I mean, evidence is evidence. You know, that's not objected to hearsay, I mean, it's evidence, it's evidence.
Q: I understand that. Do you think that could've been part of your consideration in not raising this issue that the only evidence of provocation came from Mr. Stanko talking to his psychiatrist?
A: I don't think that I gave it any consideration because I didn't have adequate time to do this appeal if you want to know the truth.
Q: All right. Well, I'll ask you about that. I'm gonna show you Respondent's Exhibit Number ---
MR. AXELROD: Your Honor, May I see that, please?
MR. MABRY: Oh, I'm sorry. It's the Supreme Court's Order.

THE COURT: Any objection?

MR. SHAFFER: No objection.

THE COURT: Without objection, Respondent's Exhibit Number what?

MR. MABRY: It will be Three, Four and Five, Your Honor.

THE COURT: Three, Four and Five are admitted without objection.

RESPONDENT'S EXHIBIT NUMBERS THREE, FOUR AND FIVE ADMITTED INTO EVIDENCE

BY MR. MABRY:

Q: First, I want to show you Respondent's Exhibit Number Three.

A: Okay.

Q: Is that the original order of the Court which stated the Court was expediting the appeal?

A: Yes.

Q: Okay. Let me show you Respondent's Exhibit Four. Now, that order said there will be no extensions; is that correct?

A: That's right.

Q: All right. And Respondent's Exhibit Four, is this a Motion for an Extension of Time that you filed with the Court?

A: Yes, sir.

Q: All right. Now, actually, Respondent's Exhibit Three, the original order, says no extensions of time will be granted except -- absent extraordinary circumstances?

A: Right.
Q: And you filed a motion and on -- for an extension of time and I'm going to show you Respondent's Exhibit Five. Is this an order from the Supreme Court signed by Justice Pleicones granting you a thirty-day extension?
A: Yes. I guess that's his signature. Yeah, that's it.
Q: So, he grated -- you got a thirty-day extension, no question about it.
A: Right.
MR. MABRY: Any objection?
MR. SHAFFER: No objection.
THE COURT: This will be Number Six?
MR. MABRY: I believe so, Your Honor.
THE COURT: Respondent's Exhibit Number Six is admitted without objection.

RESPONDENT'S EXHIBIT NUMBER SIX
ADMITTED INTO EVIDENCE

BY MR. MABRY:
Q: Then you received a letter, I believe on May 24th, 2007 saying that you had already got an extension and stating that any further extensions had to be made to the Chief Justice or to the full court?
A: Right.
Q: Respondent's Exhibit Six, is that correct?
A: That's correct.

Q: All right. Now, the Court did not say you could not make another request for an extension, did it?
A: No.
Q: And you could have filed a motion for another extension, could you?
A: Yes, I could have. I did file a letter asking them why they were expediting the appeal and I don't know where that occurs in this timeline. I just said, wait a minute, this is not like something I came up with after the appeal. This is something that was a concern during the appeal. I wrote the Court a letter and told them that that was gonna be an issue at the PCR because they hadn't given us enough time, you know, what's going on.
Q: Right.
A: I don't know if they responded to that or not but that happened somewhere in here, but yeah, I could've asked them for another extension. I could've filed a motion with the whole court.
Q: And if you had filed another motion for an extension, do you believe you would've gotten an extension?
A: I don't think they would've dismissed the appeal unless they wanted to file some kind of grievance against me.
Q: Right.
A: So, I've got to think that they would've given me some time to finish this appeal. But that's not really the way you

want to have people handling capital appeals is with the threat of an ethical violation hanging over their head.
Q: Okay.
A: And that's what -- that was my concern.
Q: Did you and Ms. Hudgins discuss whether you wanted to file another extension request?
A: I don't remember if we did or not.
Q: Okay. But the two of you decided, obviously decided not to?
A: I mean, we filed what we filed.
Q: Okay. At that time, you believed you had adequately briefed the issues that were in the record.
A: I don't believe I had an adequate amount of time to do the appeal, no.
Q: Well, did you ---
A: I mean, I filed a brief, okay. I filed a brief with these orders hanging over my head and, I mean, that's not like, oh, I've done excellent job here, no; that's not what happened.
Q: But you could've filed for another extension and you didn't ask one but you believe they would've granted you one?
A: Yeah, yeah, I wish it were that simple. I wish the -- I wish the circumstances were that simple at the time. As I say, I don't believe, regardless of what these orders say that I had enough time to do this appeal. I felt like that if we requested additional -- I certainly wouldn't have filed one

with the Chief Justice alone to request an extension. And the whole Court, we probably would've been called in and had to argue the thing. My concern, you know, my concern is I don't -- you don't want lawyers doing capital appeals with like a metaphorical, you know, ethical gun at their heads and that was my concern. My concern in the letter was why is this appeal being expedited, what's -- you know, why? I mean, what's the point of that. I mean, it's a capital case. Surely you want somebody to spend longer than two months on a capital appeal, I would think.

Q: Well, do you know whether the State got any extensions at all to file their reply brief?

A: I don't believe the State got cut any slack either.

Q: Okay.

A: But the only reason to expedite an appeal is that -- it's not to help the Defendant, certainly. It's not -- the reason you expedite the appeal is to expedite the execution.

Q: Well, that's -- you don't know, that's your personal opinion, isn't it?

A: Based upon my experience.

Q: And was there -- there was another murder case pending against this Defendant?

A: That's correct.

Q: And the State had not announced whether they were going to seek the death penalty or not on that case; isn't that

correct?
A: Okay. So, it was to help the prosecution in the other death penalty case; I'll agree with that.
Q: I didn't -- I'm asking you a question. My question was, Was there another pending murder case?
A: Yes.
Q: All right. And the State had not sought the death penalty in that case?
A: Now, that I don't know. I did not handle that appeal.
Q: And you know for a fact death penalties costs hundreds of thousands of dollars, do they not?
A: Yes.
Q: You don't know why the Court ordered the appeal expedited, do you?
A: Are you saying it's to help the State decide whether or not to seek a death penalty ---
Q: I'm asking you. The question was, Do you know ---
A: No, I don't know because I wrote them a letter asking why they did it and they didn't respond. So, we were doing it because death penalties cost a whole bunch of money and we're trying to save money here by expediting this one, no, I don't know that.
Q: The issue about Dr. Wu's testimony ---
A: Right.
Q: Do you see any merit to that testimony -- that issue?

A: You know, I don't think -- I don't think it was witness pitting, what they wanted to do but, you know, given the -- I skimmed through the record that you gave me, part of the record, and it seemed to me they got to do what they wanted to do, you know, with the questions they asked. I mean, I could be wrong about that. Diggs could get up here and say something, no, that's not what we wanted to do.
Q: Correct.
A: But, I didn't -- you know, I don't see that as an issue.
Q: All right. Thank you.
THE COURT: Redirect?
REDIRECT EXAMINATION OF JOSEPH L. SAVITZ, III BY MR. SHAFFER:
Q: Now, since this came up, what evidence in the record did you see of a cooling-off period?
A: Mr. Mabry and I talked about this case, I think it was last Thursday ---
Q: I'm asking you ---
A: What evidence I saw?
Q: I want your specific answer, I don't want what Mr. Mabry told you in this case ---
A: I haven't looked at the record again, so I don't know. I was -- he just -- I said, hey, that sounds like voluntary manslaughter to me. Well, wait a minute. What about this? And I said, okay, maybe not.
Q: So, part of that you were just saying what Mr. Mabry told

you?
A: Based upon hearsay that I'm relating here today, that's ---
Q: Okay. Were you familiar with a voluntary manslaughter case called McNaught (spelled phonetically)?
A: Probably. I mean, it's not -- the name is familiar but as far as me telling you what it's about today, no.
Q: What's the standard for whether or not to charge a jury charge or whether or not the Judge has to give any instruction.
A: If there's any evidence of it and it's requested.
Q: Okay. So, the standard is not would the jury believe it?
A: No.
Q: The standard is not would Mr. Mabry think the jury would believe it?
A: No. I hope not.
Q: So, the standard is any evidence?
A: Yes.
Q: Okay. If Mr. Mabry or you personally didn't think that the jury would buy it, is that any reason not to brief an issue?
A: No. I mean, it's, you know, like I say, evidence is evidence. If there's evidence of voluntary manslaughter or a mitigator and it's requested, then the Judge is supposed to charge it to the jury. They're the ones that find the facts.

Q: Okay. Take a look at State's ---
MR. MABRY: Mr. Savitz had some of them up there with him.
Q: I'm showing you Respondent's Four. This is your ---
A: Yes.
Q: --- motion. And I'm also -- that's your extension request -- and I'm also showing you Respondent's Five, which is the order for an extension.
A: Right.
Q: Is there any particular reason that Chief Justice Toal didn't sign that order?
A: I believe she was out of the office when I made the request for an extension to Justice Pleicones.
Q: Okay. Was that by design?
A: Yes.
Q: Okay. So, you specifically made it whenever she was out of the office?
A: I was gonna make it and she happened to be out of the office.
Q: Okay. I'm showing you Respondent's Exhibit Six. This is a letter regarding your motion, correct?
A: That's right.
Q: And whether or not you can get another extension?
A: That's right.
Q: And in that letter it says that it must be made either to

the Chief Justice or the full Court?
A: That's correct.
Q: Have you ever had a letter to come back saying that the extension request had to be made to the Chief Justice or the full Court?
A: No, I've never written the Court a letter saying why are you expediting this death penalty case, either. I mean, this was -- this has never happened. I've been doing death penalty cases since 1985 and it never happened before then and it never happened after that. I don't think it's happened since then; I don't know since I've left. But, no, this was -- this was rare.
Q: Did you feel free and make a second extension request?
A: I mean, if had come down to it, yeah, I would've made one but it was not like -- I mean, they had strongly discouraged making another extension request. I would not have filed a brief that -- I would not -- I would not allow them to let -- to make me file the brief that I didn't think covered what I saw in the case, which is not to say that I think we had enough time to do an adequate job on the appeal. I mean, it's something different. You -- you know, you don't want the Chief Justice of the Supreme Court, basically, you know, writing a letter saying -- I mean, this had never happened before and it was an unpleasant experience, let me put it that way. But, if I had spotted an issue on the last day that we

had missed, I would have filed an extension to be allowed to brief it. But I didn't see anything. I saw -- you know, we saw what we saw, we wrote the brief and we filed it and instead of -- I didn't file another extension just hoping to find something else.

Q: And you said that having seen the statutory mitigation -- mitigating factor of provocation that you would've raised that?

MR. MABRY: Objection, leading.

THE COURT: Overruled.

A: Yeah, I mean, I didn't -- you know, I don't remember seeing it at the time. If I had seen it at the time, you know, it's at least as good as the one that we raised if not better and it also has the advantage of having a ruling from the Trial Judge saying that she wasn't gonna give it. So, you know, there's an argument that the, you know, the reason you have objections is to get a ruling from the Judge so there's an argument that can be made that it is preserved and, so, yeah.

MR. SHAFFER: Court's indulgence.

BY MR. SHAFFER:

Q: And I'm asking in your opinion then, just for clarification, because obviously some of what you have said is related to Mr. Mabry's opinion.

A: That's right.

Q: Do you see a specific reason for why Mr. Stanko would not have been entitled to a voluntary manslaughter charge?

MR. MABRY: I'm gonna objection. That has nothing to do with ---

THE COURT: Sustained.

MR. SHAFFER: Your Honor, if I may, I certainly not trying to argue with the Court's ruling. The -- I didn't get into it obviously but the reason I mentioned it is that he opened the door into by specifically asked him about cooling off periods and things like that and that came out in his testimony. Your Honor, if I can explore it ---

THE COURT: My ruling stands. Thank you. Proceed.

MR. MABRY: Thank you, Your Honor.

MR. SHAFFER: No further questions.

THE COURT: Any recross?

RECROSS EXAMINATION OF JOSEPH L. SAVITZ, III BY MR. MABRY:

Q: You do not believe the issue of provocator is preserved on this record, do you?

A: No. I can see an argument that it is but I don't believe that it is and that's based on the case law that we discussed; that's correct. In fact, Judge Jefferson -- it was basically a charge conference. She started off by mentioning she didn't see that ---

Q: Right.

A: --- provocation but they never asked for it and they never

objected.

Q: They didn't, no, neither one.

A: No.

Q: All right. Thank you.

THE COURT: All right. You may step down.

A: Thank you.

THE COURT: Any objection to this witness being excused?

MR. SHAFFER: No objection, Your Honor.

MR. MABRY: No, sir.

THE COURT: All right. Thank you, sir.

A: Thank you.

THE COURT: Let me see the attorneys for just a second.

(REPORTER'S NOTE: A bench conference was held off the record.)

BY THE COURT:

THE COURT: All right. Based upon my conference with the attorneys, we're gonna go ahead and recess now until 2 o'clock. I'll remind everyone the witnesses are sequestered at this time. Thank you.

(RECESS - 11:45 A.M.)

*******OFF THE RECORD*******

**(On the Record - 2:07 P.M.)**

THE COURT: Good afternoon, sir.

GERALD ALAN KELLY, HAVING BEEN DULY SWORN, TESTIFIES AS FOLLOWS:

THE COURT: Please have a seat. Once you're comfortably seated, would you state your full name for the record.

MR. KELLY: Gerald Alan Kelly.

THE COURT: Mr. Axelrod, you may proceed.

MR. AXELROD: Thank you, Your Honor.

DIRECT EXAMINATION OF GERALD ALAN KELLY BY MR. AXELROD:

Q: Good afternoon, Mr. Kelly.

A: Good afternoon, sir.

Q: How are you, sir?

A: I'm fine, sir; how are you?

Q: I'm fine. I'm gonna pull that microphone a little bit for you to make sure we get it close to you.

Were you second chair in this trial?

A: I was.

Q: Were you originally asked to be first chair?

A: No.

Q: What did Judge Jefferson ask of you?

A: She called me in my office one afternoon and said that she was having difficulty finding experienced attorneys to be assigned to this case and she said that she had an attorney in the area who she believed that she could assign to it but he wanted to be first chair and did I mind being second chair. I told her if it would be of service to her, I would be happy to take that seat.

Q: So, would it be fair to say that you were co-chairs?

A: No. Judge Jefferson had told Mr. Diggs that we should consider ourselves co-chairs but by the rules, there can only be one first chair.
Q: So, Mr. Diggs was first chair?
A: He certainly was.
Q: He was the captain of the ship?
A: The first chair is captain and he was the captain, yes.
Q: And he was pilot of the airplane?
MR. MABRY: I object to the leading questions.
THE COURT: Overruled.
A: As first chair, he directed the defense.
BY MR. AXELROD:
Q: Okay. Now, where would -- if you remember, when was the first time you talked to Mr. Diggs about the case?
A: The first time that I talked to him about the case was after I was appointed and I met with him and his secretary with the client at his prison holding cell.
Q: Would it be fair to say approximately September 22nd?
A: It could well be; it was within a matter of days.
Q: And I believe your appointment was on August the 30th, 2005?
A: That sounds right.
Q: And every time you met with Mr. Diggs, was his secretary Johanna with him?
A: I believe she was.

Q: Okay. When you went to that first meeting in September, I believe, to Georgetown, what did you talk to Mr. Stanko about?
A: We talked to him about the procedure. We asked him, really, whether he preferred to live or die in this particular matter.
Q: And his answer to that was?
A: He said that he preferred to live through it. I told him that it was my opinion that he would have to ask for a jury trial, that he needed to put his fate in the hands of the jury.
Q: And at that first meeting, that initial meeting, did you go over the facts of the case with Stephen?
A: Not in depth. I went over the facts with him the first time I met with him by myself.
Q: And what did you go over with him when you met him the first time?
A: I just went over everything. At the first interview, I try to get the whole story out.
Q: Now, I think it was interesting, we understand -- and for clarification, there were -- Stephen's been convicted of two death penalties, correct?
A: That's my understanding.
Q: And you were involved in the first trial?
A: That's correct.
Q: And sometimes I might refer to that to you as Stanko I,

would that be okay?
A: Yes, it is.
Q: And the second trial we had on the death penalty was the killing allegedly of Henry Turner?
A: That's correct.
Q: And would it be fair that we call that Stanko II?
A: That's acceptable to me.
Q: Now, when you got the discovery packages, and I've looked at them, it appears that they gave you all the discovery including Stanko I that you're appointed on and Stanko II?
A: Well, they gave me all of the Stanko II that I ever received but they didn't give me all the Stanko I.
Q: Which Stanko I did they not give you?
A: Well, we didn't get some of the information that had to do with complaints about Stanko's behavior previous to the time of his arrest and telephone records that had to do with calls to the Solicitor's office.
Q: Whose attention did you bring that to?
A: I brought it to the Solicitor's attention.
Q: And what was their response to you?
A: We got some of it, some it they said it was too late to give it.
Q: That -- did that affect your representation at that time?
A: I think that it did to some degree.
Q: Now, you got all of Stanko II discovery?

A: I got -- all that I got I got immediately. I felt like they were trying to swamp me with the evidence of Stanko II.
Q: Did you read Stanko II?
A: Yes, I did.
Q: Why?
A: Well, because I felt that it was necessary to determine what took place. It was immediately after the first -- after Stanko I, he'd left that scene and gone to the second scene. And it had to do with the objects of evidence that were found in his possession when he was arrested, which some were taken from the original Stanko I scene. And you never know what's gonna be in there. So, when I dig through it and find out, they might leave something in there that they don't know is in there.
Q: Did you -- did you have time to talk to Stephen about Stanko II?
A: Yes.
Q: When you prepared for Stanko I, did the second murder influence any of your thinking or decision-making?
A: Well, it influenced some of my thinking.
Q: In what way?
A: Well, it told me more about him.
Q: And what did you learn?
A: I learned some of the ways in which he was thinking on that particular day.

Q: And how was that?
A: Well, he was thinking of his getaway. He was planning to flee the scene. One of the odd things was how he packed the car.
Q: What was odd about packing the car?
A: Well, he packed everything he owned.
Q: Did he pack his electric guitar?
A: I don't know but he packed every tie, every belt, every shirt, every jacket, every piece of clothing that he owned into the car.
Q: What did that say to you, sir?
A: It told me he wasn't thinking very clearly.
Q: The State argued, I believe in summation, that he was thinking clearly.
A: Well, they were -- in my estimation, they were incorrect.
Q: Because by packing a bag and taking your stuff that's incoherent thinking?
A: Well, by loading down everything that you own into your getaway vehicle, when you're never gonna use them and they're only a burden to you, it's ---
Q: What do you mean -- I'm sorry.
A: He's only partially -- that's just one aspect of his lack of clear thinking at that time.
Q: Let's go back to that. He wasn't gonna use them again. Can you explain that?

A: Well, the -- maybe if he'd gotten away. You know, if he had -- let's say for instance that he had followed the path that he did follow which is to go to the -- to Stanko II and take that man's vehicle and that he begins to flee into Georgia. And let's say that he -- instead of miring up in Augusta, he continues, let's say into Texas.

Q: Mexico?

A: Maybe so. And if he gets to a place where he can unpack the car and put those clothes and belts and such things in there, maybe he will use them but they're really a burden to him.

Q: When you said he would never use them again is that meaning that you felt that eventually he would be convicted of his crimes?

A: No. I would think that he would have to discard them as he raced to escape. Maybe I exaggerate when I say he'd never need them again. I don't see how a man in his circumstances would want to carry hundreds of pieces of clothing with him. It seems to me to be illogical.

Q: But you did raise the defense of not guilty by reason of insanity?

A: Well, we did, the team did.

Q: You did.

A: Well, that was no my position but I supported it. I didn't think he was insane.

Q: Okay. Let's back up. January 27th, who was the mitigation expert appointed? Was it Dale Davis?
A: It was Dale Davis.
Q: And a fact investigator Vicky Childs?
A: That's correct.
Q: And were they hired or were they suggested from your side, from you?
A: From me? Yes. And I told Judge Jefferson that I would request that I have both a mitigation investigator and a fact investigator and that I had those two people in mind. She agreed that that was acceptable.
Q: And you got funding for her and stuff like that?
A: Absolutely.
Q: Now, Mr. Diggs wasn't in favor of the two investigators, was he?
A: No, he didn't see any use to have them.
Q: Well, let's start off with each one. Why didn't he want Vicky Childs?
A: I don't know specifically why he didn't want her or specifically why he didn't want Dale Davis. But I think the reason was that he just thought that his side of the case was gonna carry the day and the facts of the case was of no interest or use to him. That was the impression that I got.
Q: How many death penalties were you on again?
A: I've done nine death penalties.

Q: Was that thinking -- was that strange thinking?
A: It was to me.
Q: And what -- what did you say to him?
A: I told him I thought that it would be very helpful because they would develop information that he could give to his experts.
Q: But he didn't want to know that, did he?
MR. MABRY: Objection, leading.
THE COURT: Sustained.
BY MR. AXELROD:
Q: Did he want to know what the experts said?
A: He wanted to know what the experts said because he's the one who hired them but he was not particularly interested in what the investigators had to offer, either one.
Q: Did he tell you his concerns with Dale Davis, the mitigation expert?
A: I don't think that he particularly cared for her physical image, if you really want to get right down to it.
Q: I do want to get down to. What'd you mean he didn't get care for her because of her ---
A: I didn't think he -- she was pretty enough for him. He was -- I think that he looked at her in a physical sense rather than a sense of a whole person. I don't think he really understand how valuable she really was. She was supreme as an investigator.

Q: That would be superficial on his part to judge an investigator by her appearance.
A: I thought it was.
MR. MABRY: Objection, leading.
THE COURT: Sustained.
BY MR. AXELROD:
Q: Do you think the appearance of somebody matters when you look at their qualifications?
A: I do not.
Q: Well, when that occurred, how did you proceed with Mr. Diggs?
A: It didn't make any difference to me what he thought. They were working for me. I was the one running -- he didn't have anything -- he couldn't do anything about it.
Q: So, you were preparing all the fact witnesses?
A: Absolutely.
Q: Okay. Okay. And he was preparing the medical stuff?
A: That's correct.
Q: Okay. Now, in the beginning, what was the first theory of the case that you came up with?
A: My theory of the case?
Q: Yes.
A: My theory of the case was that Stanko was mentally ill and that he was involved in a set of circumstances that was creating a building stress on him, on his activities and what

was going on the inside of his head. And that that stress was breaking down his resistance to his mental illness breaking out into violence.

Q: Can you give an example?

A: Well, he gets out of prison. He's got nowhere to go. That's stressful. He's got really nowhere to live, he's got no means of support. He begins to lie to people. He wants to get from them money that he can use and he cannot deliver on the promises he makes and they're beginning to demand that he deliver. That's stressful. He's taken up with a librarian and he's moved into her house. She has a teenage daughter. All of this is gonna come down -- it's gonna be revealed. He's in a fishbowl and he can't get out and he's gonna be discovered and all that is building on him, stressful. For example, he's told one woman that he works for a law firm and she's got a problem and he's got a lawyer and it happens to be Mr. Edwards who ran for the presidency in North Carolina. He tells her that he can take her to see Mr. Edwards. They actually get in the car to go there. His phone rings and he tells her it's Edwards cancelling the meeting. I call that stress. And I think that stress was eating at him as it eats on all of us and it was occupying his mind and I don't think he could deal with it.

Q: And was it making it hard for him to control his actions?

MR. MABRY: Objection, leading.

THE COURT: Sustained.

BY MR. AXELROD:

Q: Do you think that stressors had an effect on Mr. Stanko?

A: Absolutely.

Q: In what way?

A: The fact that it drove him to try to protect himself from the effects of his agreements that he had made that were developing to stress.

Q: Do you think at that time he understood what he was doing?

A: No.

Q: Why?

A: Because he didn't just simply pick up and go. There's only one way out, that's to pull up stakes and move on. You can't get away from the stress by staying in the middle of it.

Q: Does stress create anxiety?

MR. MABRY: I'll object to that. I don't think this witness is qualified ---

THE COURT: Sustained.

BY MR. AXELROD:

Q: Let me ask you this, Connie Price, you know her?

A: Yes.

Q: You put up maybe a dozen mitigation witnesses dealing with Connie Price.

A: Particularly with Connie, yes.

Q: Half of the mitigation witnesses dealt with Connie Price

in one way shape or another?
A: That could well be true.
Q: And it didn't come out in the trial, in the mitigation phase that she had told Stephen the day before that she was gonna call the police, he was gonna go to jail.
A: That's correct. And she did call.
Q: The stress.
A: That was stress, yeah.
Q: Caving in on him?
A: Everything was coming apart. In Stanko II, he had promised the victim there that he was going to deliver to him from the lawyers that he represented hundreds of papers to be served, each of which would have a fee. There was no lawyer, there were no papers and there were never gonna be any fees.
Q: So, killing Laura Ling was just a stroke of insanity at that moment?
A: I don't know but they were in the bed together and he was -- they were drinking and his -- my theory that his inhibitions that he needed to hold himself in check were dissolving in the alcohol and it ignited. He said that they were arguing in the bed, they were smoking, she had reached out in gesture, she struck his cigarette, it had burnt him and that started the violence. I don't know what happened or how it happened but I do know that the dam, as I would call it, burst into an ignition of violence and ending in her death and

the rape of her daughter.
Q: Exactly.
A: Exactly, that's what I think.
Q: But it wasn't your theory, insanity?
A: No, I didn't think he was insane. I thought he was seriously mentally ill.
Q: Would it be fair to say that you think he was guilty but mentally ill?
A: That's for the jury. I think it -- there's no question that he was guilty, that he did the act.
Q: And you consider that he was mentally ill in your opinion, as ---
A: The experts said he was insane. I'm not qualified -- in my opinion, I don't believe that he was legally insane but I know he was seriously mentally ill.
Q: Now, when we came up with a theory, when you came up with guilty but mentally ill, to a degree, and Mr. Diggs said no, he's not guilty by reason of insanity.
MR. MABRY: I'm gonna object. There's no testimony to that effect and it's a long leading question.
THE COURT: Sustained.
BY MR. AXELROD:
Q: Did Mr. Diggs ever tell you that his theory was not guilty by reason of insanity?
A: He said that his theory was that Stanko had damaged -- a

damaged brain, specifically damaged frontal lobes and that a scientific examination would show this damage and that damage such as that was damage such that neither Stanko nor anyone else would be able to control their emotions and they would be more prone to violence through no fault of their own.

Q: Now, that -- that opinion given to you was before you even had a single expert?

A: He told me that the first time I met with him.

Q: Is Mr. Diggs a psychiatrist?

A: Mr. Diggs -- Mr. Diggs said he was making arrangements to have him examined.

Q: Is Mr. Diggs a psychiatrist?

A: No, he is not.

Q: Is he a neuropsychiatrist?

A: No, he is not, that I know of.

Q: Is he a neuropsychologist?

A: I don't know that he has any training in that area. He told me that he had studied this and it had come to his attention and he believed that Stanko would prove out to be such a subject.

Q: And therefore, he's not guilty by reason of insanity.

MR. MABRY: Objection ---

A: I don't know what he was thinking.

THE COURT: Sustained.

MR. MABRY: Strike -- move the strike the answer.

THE COURT: Answer is stricken.

BY MR. AXELROD:

Q: Do you think that the not guilty by reason of insanity defense was boot-strapped through a guilty but mentally ill?

A: What you mean by that? What do you mean boot-strapped? What does that mean? I don't think you can be insane without being seriously mentally ill.

Q: Okay.

A: I think the two go hand-in-hand but I think you can be seriously mentally ill and not insane.

Q: So, at the time -- well, did you buy into Diggs' theory?

A: I kept an open mind throughout.

Q: Did anybody else in your team, if you know, buy into that theory?

A: They weren't interested in it. My team were investigators, they investigated. They're like a pack of hounds. They find the spore and they track it till they run it to the ground. They don't care about theories.

Q: They day after the murders are committed in Stanko I, Stephen calls the library and tells them that Ms. Ling, who is now dead, Ms. Ling has food poisoning and she won't be in to work; do you remember that?

A: Yes.

Q: Would that be a statement of an insane man, in your opinion, or somebody trying to cover something up?

A: Insanity would attach for purposes of guilt at the moment of her death and could be identified by the time leading up to that moment and going away from it but it would have to be at that moment. So, he could call the next morning after he begins to regain some of his rationale world allusion and call the library but still be totally insane at the time that he kills her.

MR. AXELROD: May I approach, Your Honor?

THE COURT: You may.

BY MR. AXELROD:

Q: Let me just use the microphone for a second. So, what you're saying is all the stressors leading up to all the stuff -- and we're gonna make the microphone the death of Laura Ling, okay?

A: Suits me.

Q: And then everything in the future after that. So, all the stressors, he has his mind together, and we've reached the murder and you say that moment, that thin slice, as you said, that's where the insanity hit?

A: It would have to present there. And it could be present on each side of that moment depending on when it was there. You can only find it by its shadow which are the actions that take place. If you're insane at any moment, there's a moment that you move into it and you may never come out, but he obviously came out.

Q: So, if, if for instance, when he got to that moment, let's say he did not kill her but he just slapped her like she slapped him and he left. Would he have been insane then?
A: Of course.
Q: So, you're testimony today is that whatever he did at that moment was insanity?
A: If he was insane at that moment. If he was insane at that moment, there would be no legal consequences for his acts.
Q: Dr. Sachy ---
A: Well, I mean, he would be -- there would be legal consequences but not the same as if -- or if he were a normal rationale actor.
Q: Dr. Sachy justified -- Dr. Sachy was an expert, correct?
A: Correct.
Q: And what did he testify in the trial to?
A: I think that he testified mainly to the brain scan.
Q: And did he testify that it was his medical theory that Stephen was insane at the time of the commission of the crime?
A: Yes.
Q: And didn't he justify that decision by saying look at what he did, he did this horrific crime?
A: Well, I don't know if he was the one who said that or if it was a local psychiatrist who said that. I remember the local psychiatrist said that. I do know that the medical experts did not deal with the surrounding facts of Stanko's

life, including the outbreaks of violence. They didn't specifically deal with them and they didn't put them together with their theory. I think that was a failing on their part.

Q: In what way?

A: Well, juries know what stress is. You've got a jury you're dealing with and the jury has to understand what was going on, they have to understand it and they have to believe, yeah, that's -- I can see that, that's the way it is, that's what they have to say.

Q: So, would it be fair to say, with your testimony, that anytime someone has stress, they could probably be insane?

A: No. I would say that anybody who has stress deals with what they're stressed out about and it limits their thinking. It limits their choices by the focus of their mind. They can become obsessed with it.

Q: But aren't you subjectively saying to the Court today that because he murdered somebody, therefore he had to be insane. Aren't you looking at yourself when you say, Oh, my God, someone commits a murder, they got to be crazy?

A: No.

Q: What happens if -- what happens if Stephen was -- say he was Jewish and that day he went and ate pork, could he be insane? I mean, with the stress -- I mean, where were -- where do we separate that?

MR. MABRY: I object to the relevance.

THE COURT: I'm gonna give him a little leeway.

MR. AXELROD: Thank you.

A: Could I have some water?

THE COURT: Certainly.

MR. AXELROD: Yeah. I got it.

A: Thank you.

BY MR. AXELROD:

Q: Now, was it your theory of the case to make your client look as bad as you could make him look to the jury?

A: No.

Q: Did you accomplish that?

A: Did I accomplish making him look as bad as I could make him look?

Q: Did Mr. Diggs?

A: I don't really know what Mr. Diggs did in the final analysis. All I wanted to do was to show whatever he did. I didn't think anything that he did could hurt him. I don't think how bad -- the worse it is, the more it shows how sick he was.

Q: Say that again, please.

A: The more violent you are or anybody else, the more it shows how sick you are.

Q: So, by call -- by having your experts call him a psychopath, that would be a benefit to Stephen in this trial?

A: Well, I think that whatever they called him, if that's

what he was, it couldn't be anything but a benefit to him because it would define him. As it happens, if you're a psychopath, at least the violence that he did and the wrongdoings that he did, wouldn't upset him so much. That wouldn't have anything to do with how stressed out he would be.

Q: I'll refer to 1750. They're gonna put some stuff on the screen for you. It's hard to see; I apologize. I don't know why the screen is angled -- you're gonna have to maybe look at that. It's kind of low, too. Go figure, right. Can you read that?

A: No, I cannot.

Q: I can't either. It's fuzzy.

THE COURT: It's fuzzy on that one.

MR. SHAFFER: What line?

THE COURT: Well, mine's clear. His is still fuzzy.

Q: It's fuzzy.

A: I can read this.

Q: How about -- Your Honor, I'm gonna let him make -- can you see now?

MR. MABRY: If he can, that's fine.

THE COURT: That's it. He can see it.

BY MR. AXELROD:

Q: Mr. Kelly, I'm gonna let you look at this. I kind of highlighted from Line 21 to 25. I'll let you look at that and

refresh your memory there. It's on the screen.
A: Okay. I've read it.
Q: Okay. And in this -- this is Dr. Sachy's testimony on Page 1750 and Dr. Sachy says that Dr. Einhorn diagnosed him with antisocial personality disorder.
A: That's what it says.
Q: And Dr. Sachy says up until 1980, they called that psychopathy.
A: That's what it said.
Q: And then after 1980, for some reason, they call it antisocial personality disorder?
A: He says that, yes.
Q: And then he says, we -- I guess meaning psychiatrists -- we still call them psychopaths because that's actually a better description of what they are.
A: All right. That's what he said.
Q: Now, ---
THE COURT: Change the page. He's rolled over to the next page. I'm trying to read it, too. Okay. Go back. I think we've -- okay.
Q: I'm gonna go to 1767. Your Honor, I'm just gonna show him the page because that's -- you can't read that.
MR. MABRY: That's fine.
Q: Kind of the highlighted section.
A: All right. I've read it.

Q: Okay. And, and what was the diagnosis that Dr. Sachy gave Mr. Stanko?
A: According to that, that he was a psychopath.
Q: And how many percent certain of that was he?
A: He was a hundred percent according to that.
Q: And his brain was the brain of what?
A: I didn't see that marked.
Q: Line 14 and 15.
A: It says his brain was the brain of a psychopath.
Q: That's a way to endear Stephen to the jury, wouldn't you agree?
A: I don't think you need to endear Stephen Stanko to the jury in order to get them to understand him.
Q: Don't you think some words -- well, let me ask you this, why didn't the Solicitor object to him being called a psychopath?
A: Because the ---
MR. MABRY: Objection, he doesn't know why the Solicitor didn't object.
THE COURT: Sustained.
BY MR. AXELROD:
Q: Were there any objections by the State of Mr. Diggs' experts and your experts calling Stephen a psychopath?
A: Certainly not.
Q: And if they didn't like it, one would assume they would've

objected?
A: Well, if they had -- if they found it objectionable, they would have the choice to object.
Q: Do you think there's some words in the English language that bring about hostile environments?
A: Yes.
Q: And what you're saying is we were trying to show Stephen to be an animal and not a human?
A: Who did that?
Q: Your team and you.
A: I never did that.
Q: You didn't want him to be an animal?
A: No, he's a man. He's a sick man, not an animal.
Q: He's a sick, ill man.
A: He's a sick, ill human being. Just as fragile as anybody else.
Q: Now, we live in a world of -- I don't know how I want to say it -- politically correct -- we live in a politically correct world and sometimes we say things that aren't politically correct anymore or socially acceptable. Would you agree?
A: Some of us do.
Q: Some of us don't?
A: Some of us don't.
Q: Do you?

A: Oh, I say politically incorrect things all the time.
Q: Like if I was to stand in this courtroom and use the N-word, that would be politically and socially unacceptable today?
A: Yes, probably would.
Q: But you don't think it's politically and unacceptable to say psychopath instead of antisocial personality disorder?
A: I don't see that that's politically incorrect if we are attempting to explain somebody's behavior in a scientific way.
Q: I refer you to 1769 and I'll let you just read in the highlighted section.
A: I've read that.
Q: Can you read it into the record for me?
A: It says, the question is, But there are times when Mr. Stanko looks perfectly normal and he may act perfectly normal. How do you explain that? And the answer is, Well, again, that's typical of a psychopath.
Q: MR. AXELROD: Court's indulgence, Your Honor.
THE COURT: Yes, sir.
BY MR. AXELROD:
Q: I'm going to refer to Page 1774 for the record and for Mr. Kelly's understanding, this is Dr. Sachy on direct exam by Mr. Diggs. If you can just read into the record the highlighted section.
THE COURT: What line is that for the record?

MR. AXELROD: Your Honor, we are looking at Line 14 ---
A: 14 through 17, Your Honor. The answer is, Mr. Stanko says that he can't remember certain things; I believe him. There are certain things he may choose not to remember; I believe that, too. Mr. Stanko is a psychopath.
Q: Now, I'm referring to Page 1780 and I'll have you read into the record -- I'll go back to 17 -- I need 1779 to see the question, please. The question from Mr. Diggs to Dr. Sachy, So, are you aware of any other efforts that could be undertaken to produce evidence on the issue of sanity or insanity at that moment? And I think ---
THE COURT: What lines are you reading from? Read it for the record.
MR. AXELROD: On 1779, Your Honor, Lines 22 through 24.
THE COURT: Okay.
BY MR. AXELROD:
Q: That was the question that was asked and I'm going to ask you to read the response starting on Line 3.
A: The absolute aberrant and horrible things that took place, our gut instinct is to say that person is a psycho. I mean, that's why that movie was made, the Alfred Hitchcock movie *Psycho*. What our gut instinct is to label these people as crazy. That guy had to be crazy, he was evil, he was psycho.
Q: And he is referring to Stephen?
A: I think he must be.

Q: And then, Mr. Diggs says on Line 10, He was insane? Read the answer to that question starting on, I think, 13.
A: Those of us in the field in brain science understand what they mean. They are psycho when actually they are psychopathic.
Q: Go to Page 1782. Mr. Kelly, I have my own notes on this page, so I'm gonna have to ask you to be able to refer to the screen or -- can you print me out the page?
MR. MABRY: Just have him not to read your notes.
MR. AXELROD: Okay. Your Honor, Court's indulgence one second?
THE COURT: Yes. You want to take a break? Are you okay Mr. Kelly? Do you want to take a break?
A: Whatever suits the Court, Your Honor.
THE COURT: Okay. How long will it take to print?
MR. AXELROD: Forty seconds. I'm just printing out a page, Judge. We came prepared today. That's how were going to do this.
BY MR. AXELROD:
Q: Now, on Line 5, Dr. Sachy says that psychopaths are a subset of people with antisocial personality disorder. I'll let you come to that.
A: You want me to do what?
Q: Now, what I'm saying to you is in the first -- up until Line 6, Line 3 to 6, Dr. Sachy testifies that psychopaths are

a subset of antisocial personality disorder -- people that have that disorder.

A: And ---

Q: Do you agree with that, what he says?

MR. MABRY: Objection, he's not qualified to ---

THE COURT: Sustained.

BY MR. AXELROD:

Q: Can you read Line 3 to Line 6 into the record, please?

A: And statistically speaking, we found a lot of people with antisocial personality got in trouble with the law before age fifteen, but we know that psychopaths or a small subset of that. They may not have ever got into trouble with the law.

Q: Okay. Now, there is an expression -- I guess there is an expression, it's actually in the autobiography of George Harrison, he was a Beetle. He wrote it in the very beginning of his own biography, if you want to be tall, you have to walk with giants. Would that make sense in a metaphorical analogy?

MR. MABRY: Object to the relevancy.

THE COURT: I want to hear the answer; I'm curious.

MR. MABRY: Yes, sir.

A: If George Harrison said that, I'm willing to believe it.

BY MR. AXELROD:

Q: So, if we really want to make him look tall as a psychopath, let's just in enamor him with some really good ones. They talk about Ted Bundy being a psychopath.

A: And?
Q: Do they not?
A: Yes, they do.
Q: And isn't it fair to say that Ted Bundy was only convicted of thirty-six murders; are you aware of that?
A: I knew it was a number of murders.
Q: And they thought there was a hundred but they could only do thirty-six.
A: Well, they didn't catch him and all of them, did they?
Q: No. And he's a psychopath just like Stephen?
A: Is he?
Q: That's what your expert said.
A: How can they tell?
Q: Well, they said Stephen is a psychopath and to Mr. Bundy was psychopath; so, A equals B, B equals C, A equals C. So then Stephen would be in line with Ted Bundy.
A: So they say.
Q: That probably -- do you think that was a good thing to tell the jury?
A: I think it was probably too bare-bones to really be meaningful to the jury.
Q: Okay. And how about John Wayne Gacy, because they compared him to John Wayne, too.
A: Yes, I believe they did.
Q: And we're all aware that John Wayne Gacy killed thirty-

three boys, who he first sexually molested, and then he ate parts of them.

A: I'll take your word for it.

Q: Now, do you think that's something good that your expert tells the jury to compare Stephen to?

A: Without further explanation, I think it might not be as meaningful to them as you would like it to be.

Q: But there was no further explanation, was there?

A: I don't believe there was.

Q: Thank you.

MR. AXELROD: Your Honor, I'm going to refer to Page 1790 and I'm going to be in the area of Line 11 to Line 20, but I'm gonna have the witness read what's been highlighted.

BY MR. AXELROD:

Q: Just read the highlighted sections and if there's confusion, we'll go back.

A: You mean, read the sections in which they are things highlighted?

Q: Only read the highlighted words.

MR. MABRY: Whoa, whoa, whoa, whoa. Is this a paragraph and he's only reading highlighted words, read the whole thing, I mean, the context is ---

THE COURT: I mean, he can ask him to read what he wants to and then you can cross examine him.

MR. AXELROD: Yeah, Your Honor, I thought that first we

go there because it might not be objectionable.

MR. MABRY: Okay.

A: What would you have me do?

BY MR. AXELROD:

Q: Read the highlighted words.

A: Psychopaths; he's probably a psychopath because he used his charm; I think of Ted Bundy again; I think of John Wayne Gacy; I think of all the people they manipulated without difficulty; they have no difficulty in manipulating people.

Q: He sure is walking tall today, isn't he?

A: I beg your pardon?

MR. MABRY: Object to the form of the question.

MR. AXELROD: I'll withdraw the question.

BY MR. AXELROD:

Q: Still under Dr. Sachy, Page 1791, please read Lines 12 to 16.

A: So, right as a young man he starts his confidence scheme behavior. And if we look at the Hare Psychopathic Checklist, cunning and manipulative behavior, pathological lying, right from a young man he's showing these hallmarks of being a psychopath.

Q: So, did you have the opportunity to look at Pam Crawford's evaluation of Stephen?

A: I don't know that I did.

Q: For a little background for the Court, can you tell the

Court how Pam Crawford originally got involved in this case?
A: I'm not really certain. I didn't handle the medical side.
Q: Do you remember that -- Your Honor, may I just -- I'm just trying to get somewhere if I could do a little leading maybe I can get there.
THE COURT: I'll give you a little bit.
Q: Do you remember that Pam Crawford was hired by SLED to go to Georgia?
A: I do.
Q: And at that time, she was working for SLED?
A: That's correct.
Q: And what was her job at that point?
A: To investigate what SLED wanted to investigate and give a report of it.
Q: She was a fact investigator?
A: I think she was.
Q: And a psychiatrist?
A: Perhaps.
Q: Who ultimately evaluated Stephen to decide whether he was competent to stand trial and she ultimately gave a decision that he was legally sane, correct?
A: Yes.
Q: And that evaluation was conducted on behalf of Mr. Diggs?
A: That's correct.
Q: Now, tell the Court, were you in agreement with that?

A: No.

MR. MABRY: I'm going to -- I've got to object, her evaluation was ordered by the Court. She was the State's evaluator in response to the defense of insanity.

MR. AXELROD: Okay. I'll back up for a second.

THE COURT: All right.

BY MR. AXELROD:

Q: Mr. Diggs acquiesced to Pam Crawford being the State's evaluator at the end?

A: I think so, yes.

Q: And were you in favor of that?

A: I didn't have any input in the decision but, no, I was not in favor of it.

Q: Tell the Court why you were not in favor.

A: Because it seemed to me that she would be difficult to cross examine.

Q: Why?

A: Well, because you're -- she's your witness, you've got her on direct. Why would you want her -- if you could have her on cross examine, why would you allow her to examine your client as though her opinion were something that you valued when you disagreed with her opinion previously.

Q: So, why did he pick her?

A: Who knows?

Q: It's an important point, so do you have ---

A: Well, I don't have any idea why he did it; you'll have to ask him.
Q: Okay. I will. Do you know the nickname that Dr. Crawford has?
A: Who?
Q: Dr. Crawford, the lady we're talking about. Do you know the nickname she has?
A: No, I don't.
Q: Okay. Now, how did you find out that Dr. Crawford was going to be the psychiatrist -- let me back up. Strike that question. When did you find out that you forgot to have him evaluated?
A: I didn't know that he had -- it had been forgotten. I was not in -- I had no input. I didn't know that she was doing that.
MR. MABRY: I'm gonna object to the vagueness of the question. We're talking about evaluating him for competency or mental responsibility? What are we talking about?
THE COURT: I don't know that he knows but I'll let Mr. Axelrod rephrase his question.
A: Can I have more water?
THE COURT: Certainly.
MR. AXELROD: I'll get you -- I got you.
THE COURT: You've been up there for about an hour. Do you want to take break?

A: I'd like to take a break.

THE COURT: Let's take a ten-minute recess. He's been at for an hour. We'll resume at 3:15 by that clock.

MR. MABRY: Thank you.

A: May I come down, Your Honor?

THE COURT: You certainly may. Of course, you know, you're still on the stand.

(RECESS - 3:02 P.M.)

*******OFF THE RECORD*******

**(On the Record - 3:18 P.M.)**

THE COURT: All right. Mr. Axelrod, you may continue.

MR. AXELROD: Thank you, Your Honor.

Your Honor, I'd like to make this as One.

THE COURT: All right.

APPLICANT'S EXHIBIT NUMBER ONE

MARKED FOR IDENTIFICATION

BY MR. AXELROD:

Q: Question, I believe where we finished off, I think somewhere around there, I asked you when did you find out that you forgot to evaluate him; do you remember?

A: Yes, I remember.

Q: When was it?

A: I didn't forget to evaluate him. And I didn't understand that he was being evaluated because it would've been forgotten but he was being evaluated. I wasn't privy to those decisions

only knew that some of them were taking place.
Q: Now, at the time of this trial, *48 Hours* was covering the trial?
A: Yes.
Q: And they had little boxes in the courtroom with a little camera in them?
A: Correct.
Q: And why didn't you just -- why didn't you just get a continuance at that point and have him evaluated?
A: That wasn't up to me to make that motion.
Q: Who made that motion or lack of?
A: It would be the lead counsel, Mr. Diggs.
Q: Okay.
MR. MABRY: I'm gonna object at this point. My objection is to the form of the question. When he says evaluated, he's being evaluated for competency. That's what ---
THE COURT: By the State.
MR. AXELROD: By the State, yes.
THE COURT: Excuse me, by the Court.
MR. AXELROD: By the Court. And my whole line of questioning right now, Your Honor, is by the Court.
THE COURT: Okay.
MR. MABRY: Okay.
MR. AXELROD: Yeah, I'm not trying to mislead anyone.
MR. MABRY: No, no. I just want to make sure the Judge

understood, we're not talking about criminal responsibility; we're talking about competency to stand trial.

MR. AXELROD: Right, yes, yes, yes.

BY MR. AXELROD:

Q: I'm gonna let you just refresh your memory. This is an email that was sent from Dale Davis to Mr. Diggs and you're copied and I'll just let you read it for a minute.

A: I've read it.

Q: Okay. When the Judge ordered DMH to do the competency exam on Stephen, did Dr. Frierson call the Court and say he was unable to do it?

A: According to that document, yes.

Q: And his explanation was there was too little time?

A: That's correct.

Q: Does it take time to get an evaluation?

A: It does.

Q: On July the 14th, two weeks before the trial, it's determined that there has not been an evaluation?

A: That's correct.

Q: What would you normally do in this situation? Let's just say you had a murder trial as an example and you were the only counsel. If you reached a point two weeks prior to trial and you forgot an evaluation, what would you do?

A: What would I do?

Q: Yeah.

A: I would contact the Solicitor in charge of the case. I would tell him what I had discovered. I would suggest that we go before the Judge and determine what should be done.
Q: And if you had done it in this case, if you would've been asked to participate in this, would you have told the Judge that you would rather have someone other than Pam Crawford do the evaluation?
A: I would've had to confer with Dale on this and from reading what she put there, I think we'd have to say no.
Q: You would not have ---
A: I would say, no, we don't want her.
Q: I got you. But you were never allowed that ability or that opinion?
A: I didn't have that choice. It wasn't up to me.
Q: But ultimately, is it your choice to save his life?
A: Is it my choice to attempt to do that?
Q: Yes, your job.
A: Yes, that's my job.
Q: So, why didn't you raise it?
A: It was raised by Dale Davis.
Q: Why didn't you make a motion in court and ask for a continuance?
A: It's not up to me to make that motion. It's up the lead counsel to make that motion.
Q: But he chose not to and you thought it was important,

could you have?
A: Could I have done it? Well, I would have to sit down with him and tell him I'm gonna do this.
Q: On hindsight, do you think you should have?
A: No.
Q: Now, you were against Pam Crawford doing the evaluation. Are you aware that Dr. Sachy was -- I'll strike that first part of that question. Dr. Sachy was your expert in saying Stephen was insane.
A: He was the expert from defense. If you mean when you say my expert in that sense, yes, he was.
Q: And that's all I mean by it. I'm not trying to ---
A: As long as it's understood that you're taking it in that sense.
Q: Yes, sir.
A: I had nothing to do with the experts.
Q: You had nothing to do with any part of the experts?
A: Not medical experts. I never talked to them, questioned them or had any direct contact with them.
Q: At -- okay -- when -- originally, didn't you plan on doing a guilty but mentally ill defense, your team?
A: I think we had to.
Q: Okay. And when did that change?
A: I don't know when it changed. I didn't change it.
MR. MABRY: No objection.

MR. AXELROD: Your Honor, I would ask that One get admitted into evidence.

MR. MABRY: What was that?

MR. AXELROD: That was the first one we did.

MR. MABRY: Okay.

THE COURT: All right. Petitioner's Number One is admitted into evidence. Is this Number Two?

MR. AXELROD: I'd ask that be admitted as well.

THE COURT: Two is admitted as well without objection.

APPLICANT'S EXHIBITS NUMBER ONE AND TWO

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

A: I've read it.

Q: Were you aware that, if Mr. Diggs had asked for a continuance in the trial, *48 Hours* would've pulled their case; are you aware of that at all?

A: No, I'm not.

Q: Do you know why Mr. Diggs would rush the trial when he had such an impediment of not having somebody evaluated per court order?

A: No, I do not.

Q: Now, what's been marked as Number Two into evidence, what's the date of that email?

A: The date of this email is Friday, June the 16th, 2006 at 4:19 P.M.

Q: So, a month and a half before the trial, Mr. Diggs' defense is what? What's he say that his experts are gonna testify to?
A: He's gonna testify, he thinks, to his damage to the frontal lobe and that might have consequences to his acting, his volition to act.
Q: That's what it says?
A: That's what I thought it said.
Q: Well, let me read to you and you tell me if it says this: Dr. Sachy will likely testify as to the issue of guilty but mentally ill under South Carolina law based on Dr. Wu's analysis along with Dr. Thrasher's testimony on guilty but mentally ill and related forensic issues. Does it say that?
A: It does say that.
Q: So, that on June the 16th, Mr. Diggs' theory in this email is guilty but mentally ill?
A: I think that -- it certainly appears to be part of his theory.
Q: And did he -- would it surprise you that Dr. Crawford tried to have people change their opinion of Stephen, specifically Sachy?
A: No.
Q: Why would that not surprise you?
A: Well, frankly, my investigators didn't trust her and neither did I.

Q: But you were silent because that wasn't your section.
A: Well, I -- I didn't raise the issue directly with Diggs. You have to give the -- you have to give him the benefit of the doubt that he knows more about it than I do since he's dealing with it.
Q: Now, there was a woman about ten years earlier, Ms. McLendon, that was assaulted, tied up by Stephen and he ultimately went to jail for about eight and a half years, I think.
A: That's correct.
Q: And there was a -- there was a proffer of Dr. Thrasher during that trial where they -- the State agreed to -- the State agreed to not go into the conviction that Mr. Stanko received.
A: I don't recall that but that is very likely.
MR. AXELROD: Court's indulgence.
BY MR. AXELROD:
Q: I refer you to Page 1561, sir. You're gonna have to look at that screen. (To the Court) And, Your Honor, for the Court's knowledge, Dr. Thrasher was a psychiatrist and he was testifying.
THE COURT: Okay.
MR. AXELROD: In the middle of the testimony, they wanted to go somewhere and a proffer was submitted.
THE COURT: All right.

MR. AXELROD: And I am dealing now with the ruling of the Court on that proffer.

THE COURT: All right.

MR. AXELROD: And it's concerning Ms. McLendon.

BY MR. AXELROD:

Q: And do you see where it says that ---

MR. MABRY: Let me interrupt a second. I need to clarify one more, Judge. The State was cross examining Dr. Thrasher and they wanted to go into -- his opinion was Mr. Stanko was insane and they wanted to go into prior acts of Mr. Stanko and decedents acts after this murder and the Judge was ruling on how far they could go with Dr. Thrasher on cross because he had testified to insanity.

THE COURT: All right, sir.

BY MR. AXELROD:

Q: And you see where it says that they weren't gonna go into the convictions?

A: What line?

Q: 15 and 16. The Solicitor states that he was not going to go into the convictions.

A: Yes, I see that.

Q: Isn't it true that Dr. Sachy just blurted it out in the trial, He did eight-and-a-half years for this crime; he's got to be insane?

A: I don't recall whether he did but that wouldn't surprise

me.
Q: I'm gonna find it but why wouldn't it surprise you?
A: It's gonna be difficult.
Q: To surprise you?
A: About Dr. Sachy blurting things out.
Q: Well, my question is, I understand it was done as a proffer, but do you think -- I mean, you're second chair, did you go up to Dr. Sachy and say, hey, we got to keep out -- thank God, we got to keep out the convictions of this lady, let's not talk about it.
A: No.
Q: Should you have?
A: No.
Q: Cause it wasn't your job?
A: It's not my portion of the defense.
Q: So, really, would it be fair to say then that you did nothing but the mitigation?
A: Well, we did all of the investigation of the facts and we presented those facts in mitigation. We did more than just mitigation. We found out things that didn't mitigate.
Q: Well, if Mr. Diggs is deficit maybe in part of his job, why didn't you raise it?
MR. MABRY: Object to the form of the question.
THE COURT: Overruled.
A: What part of his job do you say he was deficit?

BY MR. AXELROD:

Q: Well, it looks like he didn't tell Dr. Sachy, hey, don't talk about the convictions. I mean, we're not in a vacuum. I mean, you're sitting there alongside chair one and did -- did Mr. Diggs talk to anybody or his experts about what was going on in the trial to be able to say to him, hey, don't talk about the convictions?

A: I would suppose he did.

Q: Okay. Because -- you see, here's the interesting thing I want to ask you. Dr. Thrasher used the incident with Mr. McLendon -- tell the Court what happened with that incident with Ms. McLendon. Do you remember?

A: Tell them what?

Q: Tell the Court that incident about Ms. McLendon what happened ten years ago or whenever it was.

A: The facts were similar to what had taken place in this county.

Q: He tied up his girlfriend?

A: Correct.

Q: Stuck a rag down her mouth?

A: Yes.

Q: Soaked with 409 and Clorox?

A: Yes, his actions were ineffectual in some ways and as often they were.

Q: And let me ask you this, Don't you think like under a 403

analysis to even bring those facts out it would be bad?
A: I don't think that it really hurts him.
Q: Let me ask you a question, a hypothetical. You have a client that's on trial for trafficking marijuana and he has a prior record for trafficking marijuana. Do you think that somehow it would be beneficial -- would that prejudicial to let that come in?
A: Is the death penalty on the table?
Q: My question was, If somebody is charged with trafficking marijuana ---
A: Correct.
Q: --- and they have a prior record or trafficking marijuana, would you want that to come into the trial?
A: If the death penalty is on the record and the proceeding is bifurcated, it doesn't bother me at all.
Q: Well, I'm gonna ask you my question again. I'd like you to answer my question and then you can answer it.
A: It's not a hypothetical that applies to these facts.
Q: I'm asking you a hypothetical.
A: I know you are but the hypothetical under our law has to apply directly to the facts ---
Q: I'm gonna just ask you this hypothetical ---
A: I understand but it's not ---
Q: And please answer my question. Your Honor, I'm just asking ---

A: It's a trafficking in the previous ---

THE COURT: I think you're confusing him. You're confusing me as well. Rephrase your question.

Q: If you had a client on the stand ---

THE COURT: What he's saying is he's saying that your hypothetical doesn't have the death penalty on the table, so it's not effectual.

MR. AXELROD: But it's the argument of the prejudicial nature. I'll bring it in a little closer.

THE COURT: Rephrase your question.

BY MR. AXELROD:

Q: Let me bring it closer.

A: Would you like me to speak to the prejudicial nature?

Q: No, I'm gonna ask you a different question because it seems like we're -- let me just ask you another question. I'm okay, listen. Ms. McLendon was bound with ties behind her back, correct?

A: Correct.

Q: Ms. Laura Ling was bound with ties behind her back.

A: That's correct.

Q: And theoretically, I guess he tried to kill Ms. McLendon?

A: I don't -- I'm not sure exactly what he was trying to do. He was ineffectual at it.

Q: But, by sticking a Clorox rag down the mouth, soaked with Clorox and 409 cleaner, you would think he's not doing it to

clear her throat for her.
A: I think he's probably doing it because he's mentally ill and that mental illness is the same one he has later in this county and that's what you want the jury to understand.
Q: And but you don't think he was insane with Ms. McLendon?
A: I don't know whether he was insane at that moment or not.
Q: But you -- I think you make a report somewhere that you didn't think he was because she hadn't been killed.
A: I'm not sure if I said that under any circumstances but if I wanted to say that it would have to come in through the experts.
Q: But why did you volunteer for those facts to come in?
A: Because they don't hurt him.
MR. MABRY: I'm gonna object, Judge, they did not volunteer for those facts to come in. The State brought those out on cross because of an insanity opinion of the doctor.
BY MR. AXELROD:
Q: I refer to Page 1557. I'm gonna read, The Court -- this is in that ruling section, Your Honor. I'm gonna read from Line 10. The Courts says, Because I hear you saying there's some things you would not find objectionable and that you might feel would be a less intrusive way of him examining the voracity and underlying opinion of Dr. Thrasher. Mr. Kelly goes on to say on Line 15, Your Honor, we don't object to the going into Elizabeth McLendon facts as known by the doctor.

Now, you don't think that was damaging?
A: No, I don't. It's all coming out ---
Q: How do you weigh that on ---
MR. MABRY: He didn't ---
A: I'm sorry.
THE COURT: Let him answer the question.
Q: I'm sorry.
A: It's all coming out. There's no way to keep it in. Bring it out and deal with it. Show how it's part of the sickness and establish that the sickness was there years ago even in the isolation of the prison. Establish the sickness, it doesn't hurt him. We're not talking about are they gonna find him guilty or not guilty and put him in prison; we're finding -- are they gonna find him guilty and then are they gonna put him to death or not. Nothing hurts you in a death penalty case no matter how bad it is; it only shows how sick they really are.
Q: Why not do a guilty but mentally ill defense?
A: I thought we did. I thought it was put to the jury. I didn't have anything to do with it.
Q: You only did the mitigation?
A: I did the fact investigation with the mitigation investigator and the fact investigator and put together that side of the case which should go hand-in-hand with the other side of the case. It's all the same thing, the same man,

isn't it?

MR. AXELROD: Judge, Court's indulgence, sir?

THE COURT: Yes, sir.

A: I think it has to do with how you handle it.

MR. AXELROD: Judge, just bear with me if I may.

THE COURT: Yes, sir.

(REPORTER'S NOTE: Mr. Axelrod confers with co-counsel.)

BY MR. AXELROD:

Q: Do you remember that Mr. Diggs did not want a guilty but mentally ill charge, correct?

A: I don't really remember that. It may be, it may not be. I just really -- once you get into trial, you handle your stuff and they handle their stuff. I haven't got time to straighten his problems out unless he comes to me and asks me to do it. I'm not gonna chase him down and tell him how he ought to run his business.

Q: And on Page 2162, bring that up. Page 2162, is it up? Closing argument, Mr. Diggs. The Judge -- Line 16, Your Honor. The Judge, by law, is going to give you an option to vote guilty but mentally ill. Nobody, we don't say that, that he was guilty but mentally ill and they don't say he was guilty but mentally ill because guilty but mentally ill means he knew, because he had the capacity at that time to make a distinction between right and wrong. Now, isn't it true that the Judge told him -- I'm trying to find the case law -- told

him that she had to charge guilty but mentally ill?
A: She told who?
Q: You, the team, the courtroom. She said by law, by statute, she has to do guilty but mentally ill as ---
A: I don't recall but I think she did charge it and I was fine with that. I thought she should.
Q: Isn't she required by statute to charge it, that's what I'm looking for.
A: I can't tell you that. I'd have to go back and check my notes to see whether I checked it or not. I believe that she had to do it. It would've delighted me if she had not done it; we could overturn the case and we wouldn't be here now.
MR. AXELROD: All right. Mark it as Three. Your Honor for the Court's understanding, I'm actually dyslexic and sometimes I get a little befuddled.
MR. MABRY: Judge, I might can save us some time, we'll stipulate when there's evidence of insanity the Judge must charge guilty but mentally ill. That's the law.

APPLICANT'S EXHIBIT NUMBER THREE
MARKED FOR IDENTIFICATION

BY MR. AXELROD:
Q: Just read footnote (4), let's read that into the record about what you have charge.
A: In the prosecution for a crime when the affirmative defense is insanity, is raised sufficiently by the defendant

or when there's sufficient evidence of a mental disease or defect of the defendant is admitted into evidence, the trier of fact shall find under the applicable law and the verdict must so state whether the defendant is, one, guilty; two, not guilty; three, not guilty by reason of insanity; or four, guilty but mentally ill.

Q: So, he by law, had to charge that, the Judge had to charge that?

A: According to this, that's true.

Q: But your co-counsel didn't know that, did he?

A: I don't have an idea what he knew, to tell the truth.

Q: Okay. Hang on.

A: Your Honor, could I have some more water, please?

THE COURT: Certainly. Mr. Axelrod, do you need a break to get organized? Do you need a break to get organized?

MR. AXELROD: No. Let me fill you up and I'll leave it up there.

A: I have one.

THE COURT: He's got one. I gave him mine.

BY MR. AXELROD:

Q: Okay. Did you ever read the statute on insanity, subsection (C)?

A: I don't recall that I ever have. I may have. I don't think I read it for this case, however.

Q: Excuse me?

A: I don't think I read it for this case.
Q: The one that says in subsection (C) that you cannot, you cannot raise insanity by antisocial behavior or continuance acts of violence. It's -- it's a small section, Section 17-24-10, just let's read that into the record, (A),(B) and (C).
A: Defendant is guilty but mentally ill -- you're talking about 17-24-20 or are you talking about ---
Q: The whole first section, yeah.
A: 17-24-10.

APPLICANT'S EXHIBIT NUMBER FOUR

MARKED FOR IDENTIFICATION

Q: Just 10, that's the insanity section.
A: All right.
Q: As the affirmative defense.
A: It's 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 charted as morally or legally wrong; or (B) the defendant has the burden of proving the defense of insanity by a preponderance of the evidence; and (C) evidence of mental disease or defect is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

Q: Correct. So, now, I think Section (C) was added after 1984, if you want to look and see if that's correct.
A: You mean was it added in 1984?
Q: Well, what is the year of that statute that you're reading?
A: The history of this particular section is Act No. 396, Section 2 and also 1988 Act No. 323, Section 2, and 1989, Act No. 93, Section 2. That's the history of that paragraph.
Q: Correct. Okay, now, would you tell the Court what Section (C) is? Is it a -- is it a filter, let's use that word for a word, is it a filter?

MR. MABRY: I'm gonna object to the relevance of the question because that's a matter for the Court to determine always.

THE COURT: Yeah, that's for the Court to determine.

MR. AXELROD: Well, it goes to the defense. I'm going to -- they're using an insanity defense, I'm gonna ask this learned lawyer ---

THE COURT: I'll give him a little leeway.

MR. AXELROD: --- about that.

BY MR. AXELROD:

A: It's not that you -- if they don't want it used to establish insanity, that still doesn't restrain you from showing that it's present as insanity is developed.
Q: It's ---

A: Ask yourself this question, Does the state of insanity take place in time and, if it does, it has to have a beginning at least, and if it does, is it prehistory. And if it has a prehistory, any prehistory under our law can be established by any fact no matter what its nature might be.

Q: Who makes the laws of our state?

A: I think the people do.

Q: Would it be fair to say that laws are enacted by the legislature?

A: I'm gonna say yeah.

Q: And was this law enacted by the legislature?

A: I think so.

Q: Okay. And did they say that evidence of mental disease that is manifested by repeated criminal activity ---

MR. MABRY: I'm gonna object. It says manifested only by ---

THE COURT: Yeah ---

MR. MABRY: Let's get all the words out.

MR. AXELROD:

Q: Evidence of mental disease or defect that is manifested only by repeated criminal or antisocial conduct is not sufficient to establish the defense of insanity. Now, Ms. McLendon, would that be repeated criminal conduct?

A: Yes, I think it would be.

Q: And antisocial conduct, that's the psychopath, correct?

A: According to the experts, it is.
Q: Okay. Now, I'm gonna refer you to Page 2047 and I'm going to read to you from Line 6 to 10 -- and Your Honor, I believe this is the charge conference that the Judge had in the ---
MR. MABRY: In the penalty phase?
MR. AXELROD: In the guilt phase.
MR. MABRY: Guilt phase, okay.
MR. AXELROD: In the guilt phase.
BY MR. AXELROD:
Q: The Judge is reading, Judge Deadre Jefferson, she's reading. And the charge would say the defendant has advanced the theory of guilty but mentally ill, I am not going to charge that because I do not believe he has advanced that theory nor that it would be appropriate for me to charge that. And that was Mr. Diggs' wish not to have that charged. Do you remember that?
A: I suppose it was. It surely wasn't mine.
Q: And then the Judge did a little research. On the next page, 2048, Line 4 to Line 6, I read to the Court, Judge Jefferson, The Court's research reflects that that cannot be waived that that is mandatory, that I have no option in charging that.
A: Yeah, she caught herself.
Q: Which was the right thing to do.
A: Correct.

Q: Now, Mr. Diggs was unaware of that, wasn't he?
A: According to the record, he doesn't seem to be aware of it.
Q: Thank you. Now, I'm gonna read to you once again from 1797 to 1798, I'm gonna read Dr. Sachy an answer from Mr. Diggs.
THE COURT: You have 1979, you said 1798.
MR. AXELROD: I'm dyslexic. 1797, I might've said it backwards, Judge.
THE COURT: No, you said it right but they put it up wrong. Unless that's what you want.
BY MR. AXELROD:
Q: Now, this is -- this is again, Dr. Sachy describing Stephen. And I want you to tell me if this is beneficial. I think they thought the word psychopath was too dramatic, psychopaths are a specific subset of antisocials. They are the kind of people we're terrified of and yet we read books about them and we're fascinated and we watch court TV and A&E and Learning Channel -- next page, please. 1 through 4. Dr. Sachy says -- and he's speaking about psychopaths who he says Stephen is. They're the Hannibal Lecters from *Silence of the Lambs*, they're the murderous psychopath, they seem almost, they are terrifying, they are like evil, they are the devil. Was that beneficial for Stephen in your opinion?
A: Limited to only that, I think it's less beneficial than if he also added there are also other psychopaths.

Q: But they didn't.
A: Well, it would've been better. It might've brought it home.
Q: Now, originally, you had -- I believe tried to enlist Dr. Schwartz-Watts onto the case?
A: I didn't, I don't believe, but I think that she -- there was some talk about it. I'd had Schwartz-Watts on a case earlier.
Q: Well, so, do you think -- do you think that bringing up the facts of Ms. McLendon was mitigation when you agreed to let the State go into the facts of it, do you consider that a mitigation strategy?
A: Absolutely.
Q: Then why didn't you argue for that to come out in the mitigation phase versus the guilt phase?
A: Well, it was gonna come out and it could come out in the mitigation but I've got her sitting right there in front of me so I can examine her and I can find out all about her emotions and find out about his emotions at that time. I can get all the development of his illness and sickness out on her right in front of the jury.
Q: You had a lot of concerns about Mr. Diggs, did you not?
A: I had some.
Q: You -- what were the concerns you had? Let's go into them.

A: Such as what?
Q: You thought there was drug use?
A: I thought there could be.
Q: How early did you think there might be drug use?
A: Before time of trial.
Q: Before the trial?
A: Yes, I suspected it.
Q: And is Mr. Diggs practicing law now?
A: I don't think he is.
Q: Okay. And how did you suspect it before trial?
A: There were certain signs that led me to believe that my suspicions might not be unfounded.
Q: All right. Tell the Court what they were.
A: Well, he had mood swings and he was -- his focus sometimes appeared to be unreasonable. It's something that you sense more than you can actually nail down. I also knew that he had periods where he was awake on long periods of time.
Q: Do you remember taking notes back in March about Mr. Diggs unwilling to use his trust fund for funds?
A: I might have, yes.
Q: Tell the Court about that.
A: What I remembered is that he was reluctant to run billings through his trust fund. So, I offered to run all the payments for the investigators through my account. It's been my experience that if an attorney doesn't want to run billings

through his trust account, there's something wrong with his trust account. That's been my experience so I was concerned about that when it appeared to me that that was the circumstance.

Q: I'm not sure if you're aware but are you aware that, I believe in North Carolina, Mr. Diggs was suspended for trust account violations?

A: No, I'm not aware of that.

Q: Okay. Now, during the trial, did you have the opportunity to confront Mr. Diggs concerning some type of drug use?

A: No, I never confronted him.

Q: Did you say to him at some point, Mr. Diggs, you have white powder on your mustache?

A: During trial, in the -- at the courthouse, we had a room that was for the use of the defense and with that room and in the area of that room was a lavatory with a toilet and a mirror. And when we'd take a break, it was Mr. Diggs' habit to go there first and use that toilet and he'd go in and close the door and then he'd come out. And I was standing there by the bathroom door and he came out and he had on his mustache he had grainy-white powder on his mustache and I said to him, you've got some powder on your mustache and he wiped it off. That alarmed me.

Q: Back in October, October 21st, you made a note.

THE COURT: What year?

MR. AXELROD: 2005. Your Honor, it's gonna be marked and I would ask that it be admitted. I think there's no objection.

THE COURT: Any objection?

MR. MABRY: No objection.

THE COURT: This would be Number Six, Seven.

COURT REPORTER: Five.

THE COURT: Five. Okay.

APPLICANT'S EXHIBIT NUMBER FIVE

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: I'm just -- just -- on October 21st, I just highlighted one sentence. If you would just read that into the record before we move on.

A: Diggs says that he does not want the client evaluated for competency and intimates that insanity is not a defense.

Q: So, that would dovetail, really with that email that we had, I believe back in June saying that Dr. Sachy and Dr. Wu have testified to guilty but mentally ill, that we've had the whole preparation for this trial, up until ten weeks before, was guilty but mentally ill defense.

A: Well, this is an entry from my log and it's on October 25th, 2005 at 9:27 A.M. And it follows a conference call between the attorneys and the Judge. I'll read the whole thing if you ---

Q: No, it was just that one sentence. I'm just establishing back in October Mr. Diggs had told you that he did not want to use an insanity defense.
A: The -- this was said to me by him after he and I talked once the conference call was over.
Q: Okay.
A: That's why it's in that place.
Q: Now, we're pulling the record about the charge conference where you have to give a guilty but mentally ill charge, correct?
A: Correct.
Q: Okay. Now, let me ask you this, you got to do a closing argument in the guilt phase.
A: Correct.
Q: Why didn't you argue to the jury guilty but mentally ill?
A: Why didn't I argue guilty but mentally ill?
Q: Uh-huh (affirmative response).
A: Well, because Diggs was doing all the arguments that had to do with the mental side of it. That was his portion of the case. I was showing that he was mentally ill. He was doing the law and such things and the expert testimony and things that had to do legally with experts himself. Those two should dovetail. That's why.
Q: Do you think that guilty but mentally ill should've been argued to the jury as a viable defense?

A: I think that it, it is -- it should've been argued to the jury, absolutely, no question. He was guilty -- well, he was mentally ill, no question about that in my mind.

MR. AXELROD: Judge, Court's indulgence for one moment.

THE COURT: Yes, sir.

BY MR. AXELROD:

Q: Have you ever heard the model rules -- the ABA Guidelines for Death Penalty Cases?

A: Yes.

Q: Have you ever read it?

A: Yes.

Q: If you were first chair, would you have argued a guilty but mentally ill to the jury?

A: If I had been first chair and the theory of the case was the same, then I would've argued all of the law having to do with guilty and mentally ill and insanity from top to bottom in detail and I would've prepared all my experts exactingly for their testimony to fit the facts of his life as well as his physiological being.

Q: And as well as the charge that the Judge was gonna charge?

A: Absolutely.

Q: Because that's why we have a charge conference prior to the close so we know what we should argue?

A: Well, you asked me how I would do it, that's how I would do it.

Q: But it wasn't done in this case with Mr. Diggs, was it?
A: I wasn't running this case.
MR. MABRY: Objection, leading.
THE COURT: Sustained.
BY MR. AXELROD:
Q: Was it done in this case with Mr. Diggs?
A: The way that I described that I would do it was not.
Q: Okay. Now, do you remember the testimony that came out -- do you remember the provocation issues in this case?
A: Provocation?
Q: Yes.
A: Meaning what?
Q: Well, let me start with 3348, Lines 19 and 20. Tell me when you're ready. It says 19 and 20. The Judge is speaking. I know in the guilt phase that there was some indication potentially about provocation. Do you remember that?
A: Yes.
Q: And do you remember what provocation she was talking about?
A: The only thing that I can think of is that when Ling and the Defendant were in bed together, it was said that she had struck his cigarette and that it sparked, that had provoked the outburst.
Q: Correct. And I'll read to you on Page 1783, Line 14 through 17, I'm gonna read to you. Dr. Sachy testifies, And

she slapped him and the cigarette burnt the medial portion on his eye but that's when I guess essentially he saw red and he has no memory or great memory of what happened. And he comes to -- he comes to later in the shower, correct?

A: That was his story.

Q: I got you. And after she slapped him and burnt him -- I think even prior to that, she threatened with reporting him for touching her daughter. Do you remember that?

A: There was that said.

Q: And with this provocation, ultimately he murdered her?

A: He was found guilty of murder; that's true.

Q: Okay. Now, back to the ABA Guidelines -- Your Honor, can I use the copier.

THE COURT: I have no objection.

MR. AXELROD: Thank you, sir.

(REPORTER'S NOTE: Break in the record while copies being made.

THE COURT: Are you okay or you need another break? It's been about an hour.

MR. KELLY: I'd like to push on through if I could, Judge.

THE COURT: Okay.

MR. AXELROD: This is the ABA Guidelines on death penalty.

MR. MABRY: We do object to this, Judge, he's citing the

ABA Guidelines and the U.S. Supreme Court said those are not the standard grounds for effective assistance of counsel, *Bobby v. Van Hook*.

THE COURT: Sustained.

MR. AXELROD: Your Honor, what I'm seeking to admit this not for the ineffective assistance of counsel but to go to a lesser included offense.

MR. MABRY: A lesser included offense would be a trial court error which would not be ---

THE COURT: That's correct. You would've had to do that on appeal.

MR. MABRY: --- here in PCR.

BY MR. AXELROD:

Q: Would you agree with the basis that you should always look for a lesser included defense if possible?

A: Absolutely, yes.

Q: And that trial counsel must coordinate together and integrate those legal theories?

A: They should.

Q: Did they do it in this case?

A: I don't think they ever do it in any case when it comes right down to it but, in this case, no.

Q: Okay. Now, clearly, Mr. Diggs could've asked for a voluntary charge in this case?

MR. MABRY: Objection, form misleading and it's also --

he's testifying.
Q: Did Mr. ---
THE COURT: Rephrase your question.
MR. AXELROD: I'll rephrase it.
BY MR. AXELROD:
Q: Did Mr. Diggs request a voluntary charge?
A: No, he did not.
Q: Were there facts in the case that would've supported requesting a voluntary charge?
A: I don't think so, no. You could ask for it, though, put it on the record.
Q: The Judge said that there was provocation.
A: Well, I think that the law it ---
MR. MABRY: Objection, testifying. He didn't even ask a question.
MR. AXELROD: We covered that already. I'm sorry; I apologize ---
THE COURT: That was in the last witness, I think.
BY MR. AXELROD:
Q: Going back to Page 3348, Line 19 and 20, I know in the guilt phase that there was some indication potentially about provocation. That's the Judge telling you that.
A: Well, at least she says some provocation. Provocation has to -- in our law, provocation has to rise to a certain level before it can be directed to the jury as an instruction.

Q: Now, I'm going to ask you a hypothetical, it has nothing to do about the death penalty but I think it's fair to ask. If I came up to you and I slapped you and I burnt you with the cigarette and you pulled out a gun and shot me, wouldn't you ask for a charge of voluntary?
A: I would ask -- if you did that to me, I would ask that they instruct the jury to find that you had committed suicide.
Q: I'm going to ask you the question again because it's actually a really serious question.
MR. MABRY: I object to the question, Your Honor.
MR. AXELROD: It's a valid question.
THE COURT: I'm going to let him -- I'm going to that he -- I'm taking it all in and see where ---
MR. MABRY: Yes, sir.
BY MR. AXELROD:
Q: Answer the question, sir.
A: Okay.
Q: If I came up to you and I slapped you, burnt your eye and threatened to report you to be a child molester in you pulled out a gun and shot me in that moment of passion, would you ask for a voluntary?
A: Well, you know, if I had pulled out a gun and shot you ---
Q: No, you are defending the person that does that, I don't mean you, I take that back.
MR. MABRY: Let him at least answer the question.

THE COURT: Wait a minute. Let him answer the question. You're asking a clear question and I'm going to let him answer it.

A: You're assuming that I would be a person who would lose total control. I don't think I would do that. I would probably shoot you two or three places is probably what I would do but somebody like Stanko, with his sickness, his disability, he might -- that might be enough to push him completely over-the-top.

Q: Okay. Here's my question. If you were defending somebody that was charged with murder and the facts of the case lent themselves to be that they slapped -- the wife slapped him, burnt his eye and he pulls out a gun and shoots, would you, as the attorney for the defendant, ask for a voluntary charge?

A: Well, I would ask for it, yes.

Q: Thank you. I think at one point you testified in a deposition that we had that Mr. Diggs did not care about the facts of the case, only his theory.

A: Basically, that's true; I did say that. It's the way it appeared to me. It might be a little harsh.

Q: Now, on June 22nd, there was a hearing -- there was a hearing on June 22nd in front of Judge Jefferson and it was on -- he was trying to declare the death penalty statute unconstitutional.

Court's indulgence, Your Honor. (Confers with co-

counsel.)

He was trying to declare not guilty by reason of insanity and the guilty but mentally ill, he was trying to declare all those statutes unconstitutional. Do you remember that?

A: I think he probably did do that but I don't think it worked.

Q: And do you remember what the Judge said to all that?

A: Not specifically, no.

Q: Did she agree with Mr. Diggs?

A: No, she did not.

Q: And what did she actually do? How did she rule on it?

A: I think she ruled against his motion.

Q: So, what she said was -- so, at that point did Mr. Diggs argue to the jury -- was he asking for a nullification of a statute to the jury?

A: I don't remember that he did ask for a nullification.

Q: Well, the testimony was such that, although he considered the statute unconstitutional, she said it was constitutional, correct?

A: I think he made that argument and motion before her, yes.

MR. AXELROD: Judge, Court's indulgence for a moment, sir.

THE COURT: Yes, sir.

MR. AXELROD: Your Honor, could I take a five-minute break? I'm almost at the end.

THE COURT: Let's go ahead and take a ten-minute break and then we'll go right into cross examination. We'll take a ten-minute recess.

(RECESS - 4:20 P.M.)

*******OFF THE RECORD*******

**(On the Record - 4:33 P.M.)**

THE COURT: All right. Mr. Axelrod, are you ready?

MR. AXELROD: Briefly, Your Honor.

THE COURT: Yes, sir.

BY MR. AXELROD:

Q: I'm going to refer to the record on Page 3348. Your Honor, I'm going to read from Line 15 to 23.

THE COURT: All right.

Q: You may also consider the following mitigating circumstances, and I included the last one because I did this early and I was not certain how the facts would shake out. I know in the guilt phase, that there is some indication potentially about provocation but, after having listened to the penalty phase, I don't think it is supported by the facts and I would not charge it. My question to you is, Why did you not object to this?

A: I don't think I was handling that portion, I think, Mr. Diggs ---

Q: Okay. Thank you. And on Page 2430, I'm going to ask you are you aware that they incorporated the evidence from the

guilt phase into the penalty phase?
A: Yes.
MR. AXELROD: Court's indulgence one second.
BY MR. AXELROD:
Q: Mr. Kelly, answer any questions that the Attorney General has for you.
THE COURT: Mr. Mabry.
MR. MABRY: Yes, sir, Your Honor.
CROSS EXAMINATION OF GERALD ALAN KELLY BY MR. MABRY:
Q: Mr. Kelly, I want to kind of first go over what y'all were confronted with when you got the case. Okay?
A: All right.
Q: Am I speaking loud enough?
A: Yes, sir, you are.
Q: You have a deep, loud voice and sometimes I don't speak loud enough.
A: I can hear you.
Q: Appreciate it. One of the facts y'all were confronted with was you had a defendant who had just been released from prison after serving eight and a half years?
A: Correct.
Q: And I believe in September before this murder occurred?
A: I think that is correct.
Q: And he was actually on community supervision at the time of Laura Ling's murder and the attempted rape -- excuse me --

the attempted murder of her daughter and rape of her daughter.
A: That is correct.
Q: And while he was out on supervised -- community supervision, he was running cons and schemes on pretty much everybody he met; isn't that correct?
A: That is correct.
Q: He was running cons and schemes on people at the library that he met, also on Mr. Turner, the second murder victim. Connie Price, do you remember her?
A: My discovery showed that's everyone he met, he attempted to con.
MR. FREDERICK: Judge, can we get him to turn the microphone?
MR. MABRY: Yes ---
THE COURT: Oh, yes. I can hear fine if y'all can hear him okay.
BY MR. MABRY:
Q: And, of course, you found that out from not only reviewing the State's case but reviewing the materials or your investigation?
A: Correct.
Q: And, but Mr. Stanko, one of the problems y'all had in this case was he did not tell y'all the complete truth when you were preparing for trial, did he?
A: No, he concealed information.

Q: And Ms. Price was the lady that you told the judge about going to see Mr. Edwards, John Edwards.
A: I think it is.
Q: And she had a friend or a boyfriend or a husband named Gary?
A: It's a boyfriend.
Q: Boyfriend, all right. And she had told Mr. Stanko -- she began to suspect that Mr. Stanko was not being upfront with her. She had given him money to work on the case for her and she told Mr. Stanko she was going to the police and did go to the police?
A: That's correct.
Q: And, in fact, Mr. Stanko showed up at her house and said -- for an appointment to take her and Gary to Charlotte North Carolina to meet Mr. Evans; do you remember that?
A: I remember that she got in the car with him.
Q: Right. But Gary couldn't get in the car. Do you remember the fact that Gary was sick that day and couldn't get in the car?
A: I think he was or did say that he was ill that day.
Q: And Ms. Price told you, and she also told the jury, that Mr. Stanko got upset that Gary would not get in the car and go with her and him to see Mr. Edwards in North Carolina?
A: That may be so.
Q: In fact, she got in the car with Mr. Stanko and there was

a knife in the car?
A: I believe that's correct.
Q: Now he had already told -- she had already told Mr. Stanko that she had gone to the law and she was going to turn him in?
A: And Gary knew about that as well, didn't he?
Q: And Gary wouldn't get in the car because he was sick?
A: I think that's what he said.
Q: And halfway to Charlotte, Mr. Stanko made a phone call or pretended to make a phone call and told her the meeting with Mr. Edwards was canceled.
Q: I think she said that the phone rang and he answered the phone and said that it was a call from Edwards' office.
Q: Okay. And they canceled the meeting?
A: And that it had been canceled and they would have to go back.
Q: Mr. Edwards never represented Ms. Price and Mr. Stanko never worked for John Edwards, did he?
A: That's correct.
Q: That was just con he was running?
A: That was a con.
Q: All right. And you and Mr. Diggs knew that these cons and schemes were probably going to come out in the guilt phase or at least in the penalty phase of the trial?
A: I was certain they would.
Q: Because, in the penalty phase, it's pretty much wide-open,

his bad character, anything that he's done in the past could come in?

A: That is correct.

Q: Now, you also knew about the second murder of Mr. Turner the morning after Lara Ling was killed?

A: That's correct.

Q: And I believe you sent an email to Mr. Diggs saying that the Turner murder may come up in the penalty phase?

A: Yes.

Q: All right. You were concerned about that.

A: I was.

Q: Because that was a pretty methodical killing, wasn't it?

A: It was.

Q: Mr. Turner was shaving in front of his bathroom mirror and was shot in the back and then turned around and was punched or hit and then shot in the chest.

A: He was shot from behind, I remember that.

Q: And then he was robbed of his truck.

A: Correct.

Q: And Ms. Ling's car was left at the scene of Mr. Turner's residence.

A: That is correct.

Q: And then they caught Mr. Stanko in Augusta in Mr. Turner's truck.

A: They did.

Q: With the gun that was used to shoot, Mr. Turner.
A: That's correct.
Q: And also with the keys to Ms. Ling's red Ford Mustang.
A: That's correct.
Q: And also a notebook with Ms. Ling's name on it?
A: That's correct.
Q: Now, you also had to deal with these other cons and schemes where -- isn't it true that Mr. Stanko had actually forged Judge Rawl's signature on an order with one of his clients or that may've been Ms. Price.
A: I think there was evidence to that effect.
Q: And he was also representing himself to be an attorney to some people, a paralegal to other people and then just an investigator to other people.
A: That's correct.
Q: So, you had a -- not only was he a con artist, he was a very intelligent individual?
A: He was somewhat intelligent.
Q: Had a high IQ, I guess.
A: He claimed to have a high IQ.
Q: 143; is that correct?
A: I think that's probably about twenty-five to thirty points an exaggeration.
Q: Okay. Well, he had a tend to exaggerate -- tendency to exaggerate as well, correct?

A: Yes, he did.
Q: All right. And Mr. Stanko had actually been convicted of the incident where Ms. McLendon was tied up. That's the offense he spent eight and half years in prison on?
A: It is.
Q: I think it was kidnapping and assault and battery with intent to kill or high and aggravated; I can't remember.
A: It was serious.
Q: Yeah. And he also was convicted of numerous counts or breach of trust for stealing -- like taking cars off of a car lot where he worked and selling them at a used car lot?
A: Yes. His past was littered with similar incidents.
Q: And he had also stolen a, I believe a computer from somebody and maybe even stole a computer from his parents in the past.
A: It's possible.
Q: Do you remember the fact that his family was not cooperative in the mitigation investigation?
A: I do.
Q: In fact, none of his family came to the trial, did they?
A: That's correct.
Q: His father and mother had actually disowned him years ago, even before Ms. McLendon was tied up and he went to prison.
A: The investigation revealed that his father was the prime mover there.

Q: Okay. But you still had Ms. Davis and Ms. Childs still did their investigation into Mr. Stanko's background?
A: Top to bottom.
Q: So, they talked to Mr. Stanko's family and got the background information to present at the trial but the family just simply wouldn't come and testify.
A: That's correct.
Q: His brother wouldn't come either, right?
A: That's correct.
Q: And he lived just over in North Carolina, somewhere.
A: That is correct.
Q: Now, the other thing that you had to deal with, Ms. Ling was not shot, that's not how she was killed; isn't that correct?
A: I don't think she was shot. I'm not sure if she was strangled or stabbed; I'm not sure.
Q: Okay.
A: Or both.
Q: Well, do you remember the fact that her hands were tied and her feet were tied?
A: I do think I remember that. It was gruesome.
Q: It was gruesome.
A: Yes.
Q: And so you were facing a kidnapping, just from your review of the discovery you had kidnapping involved.

A: Well, the -- there were a number of things that could've arisen off of the facts.
Q: And she was also beaten from the top of her head all the way down to her feet?
A: She was severely beaten.
Q: She was tortured; isn't that correct?
A: We could've made out that case.
Q: She was also punctured in her throat several times?
A: I think she was.
Q: And then according to the facts in the case, Mr. Stanko, before he even killed Ms. Ling, went down the hall into the daughter's bedroom and grabbed her and brought her back to the mother's bedroom?
A: I think the mother was dead by then.
Q: Well, didn't the daughter testify the mother was still breathing and groaning during the trial?
A: She might have. The mother was -- I believe the testimony was the mother was lying on the floor between the bed and the wall.
Q: And the daughter testified she was moaning and making some kind of noises?
A: It was hideously brutal.
Q: Correct. And as Mr. Stanko -- he then beats the fifteen-year-old girl, ties her up and then rapes her?
A: That's correct.

Q: And while he's raping her, he reaches over and grabs the mother with his right hand and strangles the life out of her.
A: I don't recall that but it could've happened.
Q: And the pathologist said that was actually the cause of death was manual strangulation.
A: I believe that may've been the stated cause.
Q: And he also -- when he got done raping Laura Ling -- well, he talked to her during the rape; isn't that correct?
A: Yes.
Q: And he took a knife after he got done raping her and he cut her twice across the throat, almost severed one of her ears off?
A: That's correct.
Q: And then he went into his bedroom or while he was in that bedroom starting packing his clothes up in the suitcase.
A: That may have happened, yes.
Q: Or he took a shower first and then he packed up.
A: I think that's the account.
Q: Okay. At least according to Christina, who -- she sat up at one point and saw him packing his suitcase.
A: I think she said that, yes.
Q: He then left the house and locked the door up because EMS had to break in the front door to get in the house; do you remember that?
A: Yes, I do.

Q: All right. And the daughter actually -- he had killed Ms. Ling already but he cut the daughter's throat and left her for dead?
A: That is partially correct.
Q: Okay.
A: He didn't finish killing her and he may've thought that she was gonna die.
Q: But he -- didn't he tell some of the doctors that he checked both of them, checked their pulse and he couldn't find a pulse on either one?
A: He might have.
Q: Okay. So, he at least -- he at least thought the daughter was dead?
A: It's a delicate point unworthy of differentiation.
Q: All right. And he didn't believe they were gonna be found for several days, maybe even a week, when he left and locked the door, did he?
A: I don't think he had any knowledge. He might've had some thoughts.
Q: Well, he immediately then goes -- and this is from the discovery you got, he goes to her bank and withdraws about $700 from her ATM account.
A: He may have done so.
Q: And they had him on camera withdrawing the money from her bank account.

A: I think that is correct.
Q: And then he drives to Mr. Turner's residence but on the way he makes a phone call to Mr. Turner.
A: Yes.
Q: Tells Mr. Turner, his father has died.
A: Yes.
Q: That Stephen's father has died.
A: That's correct.
Q: But Stephen's father had not died?
A: No, he had not.
Q: So, he uses that story to get inside Mr. Turner's residence.
A: Indeed he did.
Q: Now, the other thing you had to deal with was Ms. Ling actually survived the assault and called 911.
A: That's correct.
Q: And they had the 911 tape of her identifying Stephen as the person who raped her and killed her mother.
A: That's correct.
Q: And she also identified him at the hospital?
A: I believe she did.
Q: And then you had a rape kit that was done on her at the hospital and you had Stephen's DNA from her vaginal area.
A: That's correct.
Q: She also had a torn vaginal area.

A: That is correct.
Q: And she was beaten as well.
A: She was indeed.
Q: Severely.
A: Yes.
Q: Now, Mr. Stanko also -- another problem you had to deal with was before he even left the house, he took items out of Laura's and Christina's purse, dumped them on the bed and took the items that he wanted and removed the bracelet from Laura's wrist.
A: Yes.
Q: He also took her Rolex watch.
A: Correct.
Q: And he also took his personal items as we've talked about.
A: I have no ---
Q: Okay. Stole her Mustang.
A: Yes.
Q: So, he took her car keys. Now, when the police searched Laura Ling's Mustang, they found it at Mr. Turner's residence the next day.
A: They did.
Q: Mr. Turner's son, Saturday evening -- Laura's murder occurred Friday night into the Saturday morning. The next day would've been Saturday and that Saturday evening, Mr. Turner's son started getting worried about his dad.

A: That's correct.
Q: And the police went to Mr. Turner's residence and that's where they found Laura's Mustang.
A: They did. It was under a shed adjacent to ---
Q: And in that Mustang -- I'm sorry. Go ahead.
A: It was under a shed adjacent to the building.
Q: Adjacent to Mr. Turner's residence?
A: That's correct.
Q: And they also found in Laura Ling's Mustang Mr. Stanko's briefcase.
A: They did.
Q: And as we've already talked about, at some point while he was at Mr. Turner's residence, Stephen, or maybe after he left there, he called the library and told them Laura Ling's got food poisoning and she won't be in today.
A: That did take place.
Q: Of course, he didn't know the police had already found their bodies.
A: No, he did not.
Q: So, the librarian alerted the police to that phone call.
A: Yes.
Q: So, you had to deal with that in this case as well.
A: It was thousands of shards of evidence.
Q: And then he fled to Columbia, South Carolina.
A: He did.

Q: And he went to the Congaree Vista area of Columbia and he was basically partying that Saturday night.
A: Yes, he was.
Q: After killing Ms. Ling, raping her daughter and killing Mr. Turner.
A: Yes, that's correct.
Q: And he had all kind of money he was throwing around.
A: He did.
Q: And he was also bragging about or making up stories about himself, he was a business man or stockbroker, all kind of stories.
A: Yeah, the sickness was in full flight.
Q: And he was buying drinks for everybody.
A: He did that.
Q: He lied about -- he had an injury to his hand and he lied about how that happened, didn't he?
A: Yes, he did.
Q: Then he goes to Augusta and meets a woman at a bar and ends up going home with her.
A: Yes, he does.
Q: He somehow convinced her he was okay and ended up staying a couple of days with her, didn't he?
A: Yes, he drew her into his illusion.
Q: And then he's finally captured when she sees his picture in the paper and she calls the U.S. Marshall's office.

A: Her mother.
Q: Her mother did, okay. And they catch him in Mr. Turner's truck.
A: They certainly did.
Q: So, was there any question about his -- when you got the case, you and Mr. Diggs that the State could prove him guilty of committing the crimes themselves.
A: There was no doubt in my mind.
Q: So, you had a case where the -- you knew the State was gonna prove him guilty.
A: I believed that, yes.
Q: And there was no question in your mind, was there?
A: Not any question in my mind.
Q: And you knew in the penalty phase, they were gonna introduce all his prior convictions, his prior -- he'd gone to prison, he hadn't been rehabilitated.
A: Anything they wanted that happened, comes in.
Q: Right, right. So, you had to present some kind of defense, correct?
A: That is correct.
Q: And isn't it true the only realistic defense you could present was some kind of mental health defense?
A: No, that's not correct. The only defense that I really could present was the only one that was present; that was the sickness.

Q: Okay.
A: It wasn't that I chose it; it's that because I believed it was there and I believe there was ample evidence for it just as there was ample evidence for everything else.
Q: All right. And did you present that defense? Was that defense presented at trial to the jury?
A: I thought it was, yeah. And not through the experts but we tried to present it as best we could on the discovery side of the case.
Q: All right, because I want to ask you a little bit about that. This was not just a case where you had a psychiatrist and a psychologist come in and testify. It's correct you actually introduced his birth records. You had his birth records and his mother's records from his birth from Guantanamo Bay; isn't that correct?
A: My mitigation investigator discovered those records and we made them available.
Q: And they were used during and admitted during the trial.
A: Yes, they were.
Q: And the experts testified there was some indication in those records that Mr. Stanko had some type -- some type of intracranial or intracranial damage when he was born.
A: That's correct.
Q: And you also had evidence you introduced of a head injury when -- he received when he was approximately sixteen,

seventeen, eighteen years old ---
A: That's correct.
Q: --- knocked unconscious.
A: That is right.
Q: And in addition to that, you had PET scans or a PET scan, you also had MRIs done on him.
A: That is correct.
Q: And his MRI scan was sent off to Pennsylvania where Dr. Gur looked at it and did what's called a volumetric analysis and he submitted a report ---
A: That is correct.
Q: --- back to you.
A: Well, to the defense.
Q: Well, to the defense.
A: Correct.
Q: To Mr. Diggs.
A: To Mr. Diggs.
Q: And it found some abnormalities in Mr. Stanko's brain.
A: I believe it did.
Q: And Dr. Wu is a neuroradiologist.
A: That is correct.
Q: And the PET scans were actually done at MUSC and sent to him at the University of California Irvine.
A: That is right.
Q: And his opinion was there as some type of brain defect to

Mr. Stanko's brain.
A: That was his testimony.
Q: He came in and testified before the jury and actually showed them the PET scan and where the damage was to his brain.
A: He did do that.
Q: And Dr. Sachy and Dr. -- I'm trying to remember, Thrasher both testified that the defect to Mr. Stanko's brain caused the sickness that he had and caused him to be insane at the time of the Ling murder.
A: I think that they -- as I remember it, said it in such an emphatic way as there was a solid connection between the two.
Q: Okay. And that was presented in the guilt phase and then in the penalty phase, you recalled several of the doctors to talk about the fact that even if he wasn't insane, he still had this mental illness and was suffering under an emotional disturbance at the time of the crime.
A: That is correct.
Q: And you also called a social worker to testify to the history -- basically, Mr. Stanko's family history.
A: Yes.
Q: And she got her information from Dale Davis and also from ---
A: Vicky Childs.
Q: Vicky Childs.

A: That's correct. We unearthed all of that.
Q: Now, on direct examination, you were talking about some discovery you didn't get to begin with. Am I understanding you correctly, the Solicitor sent you their traditional packet of discovery. It was like everything on Laura Ling's murder and everything on the Henry Turner's murder as far as the police investigation.
A: Right.
Q: But y'all wanted the phone records where people had called in complaining about Stephen's cons and schemes going on.
A: I believe Connie told us that she'd made phone calls and that she had complained directly to the Solicitor's office and spoken to certain people and she'd also gone to a police office and spoken to a policeman about it and we wanted those records.
Q: Okay. So, you called the Solicitor and told him that you wanted -- you didn't get those records in the initial discovery that was turned over, the two murders, but that's what you wanted?
A: Well, I didn't call him. We had a phone conference with the Judge and I told her I didn't have them.
Q: Okay.
A: And I wanted them and she ordered that they be produced.
Q: Okay. And did they produce everything that they could produce at that time?

A: That's what they said they did.
Q: All right. Was there a -- tell me, is there anything that you know of that they did not turn over?
A: No, I don't know of anything.
Q: Okay. You are asked about the competency evaluation that Dr. Crawford did shortly before trial.
A: Right.
Q: She was the State's expert as far as criminal responsibility whether he was insane or guilty but mentally ill but she didn't -- she also did a competency evaluation, which was separate shortly before the trial. Do you remember that?
A: Yes, I do.
Q: Okay. Was there any question about Mr. Stanko's competence to stand trial at any time in your representation of him?
A: You mean in my opinion?
Q: Right.
A: No.
Q: Was he able to fully communicate with you and Mr. Diggs and your investigators?
A: He was -- you know, Stanko was mentally ill. That mental illness in my estimation limited his ability to communicate.
Q: You talking about because he would tell you lies and ---
A: Right. I think that the lies were not just something that

he intellectual developed. I think that was part and parcel of the illness itself.

Q: Okay.

A: I think it was a mixture of both. So, there were things that he didn't tell us and that he hid and I think that hiding them was a symptom of his mental illness. I think that everything that Stanko did was part and parcel of the man he was. And the man that he was was deficit in judgment.

Q: Did he understand what the proceedings were?

A: Oh, yes, he understood but he didn't understand his own best interest. He has trust -- let me say this ---

Q: Yes, sir.

A: He had trust issues. It was difficult for him to trust.

Q: Okay. Did he understand what he was charged with?

A: He did.

Q: And did he understand he was facing -- even life in prison or the death penalty?

A: Very well, he did.

Q: Did he agree with the defense that you presented, you and Mr. Diggs?

A: Yes, he did.

Q: Did he ever tell you he didn't want you to present that defense?

A: No, he did not.

MR. MABRY: One moment, Your Honor.

THE COURT: Yes, sir.

BY MR. MABRY:

Q: Oh, I wanted to ask you about -- you had mentioned that at some point in time you became suspicious that Mr. Diggs might be using drugs.

A: That's correct.

Q: You still don't know to this day that he was using any kind of drugs or any illegal drugs?

A: No, I do not.

Q: And you said that one of the things was he did not want to run the Indigent Defense funds through his trust account and then write another check to Vicky or Dale Davis.

A: I didn't mean by that that I thought that it had anything to do with drug use.

Q: Okay.

A: I thought that was just suspicious.

Q: Okay. You just thought that was suspicious.

A: Any limitation that an attorney puts on the use of his trust account has got to raise suspicion.

Q: Well, it could've been you just didn't want to have to deal with Indigent Defense checks. He would rather they pay them directly; isn't that correct?

A: Well, they can't do that.

Q: But you agreed to run it through your account?

A: Yes, I did.

Q: And you were handling the mitigation anyway?
A: Yes, I was.
Q: You were handling those investigators?
A: Well, I handled the fact side of the mitigation.
Q: Right.
A: Well, they had to be paid.
Q: Okay.
A: So, I stepped in and did it and I was happy to do it.
Q: And the other thing you said was Mr. Diggs was staying up late but I believe you actually wrote a memo about that in your file?
A: I think I did give a heads up the investigators.
Q: You said that he drove to Columbia and then back late at night and he enjoyed it.
A: Well, that he was wide awake and, you know, he was -- it was as though he was using cocaine as his crutch to stay awake.
Q: Well, he never told you he was using cocaine?
A: He certainly did not.
Q: I'm gonna -- I'm looking at your memo that you wrote to the file. I suspect the cocaine use because AWID, that's Attorney William I. Diggs, right?
A: I guess.
Q: You were the -- I'm going by your abbreviation. Told me he had a federal case in Columbia and had jury selection for

two weeks in a row for Monday and Tuesday and that he drove back to the beach and then back to Columbia the next morning and did not mind at all.

A: His secretary complained that she was worn out and she couldn't understand why he would be wide awake and she'd be worn out.

Q: So, Bill told you he didn't mind driving from Columbia to Myrtle Beach and back but Johanna said, his secretary said she was wore out.

A: She's the one who told me about the incident.

Q: Okay. And you also said, and I'm gonna read your words, He wears his hair in a ponytail. He seems to announce to me, I'm a maverick, I am different or will -- willing to be different appearing. And you said, To me, the hairstyle says drug culture.

A: Yes. That's correct.

Q: So, one of the things that you thought indicated drug use by Mr. Diggs was he wore his hair in a ponytail at that time?

A: Yes, I thought that his appearance and his acts both raised that suspicion in my mind.

Q: Now, he -- you said -- you told us about the incident, as you recalled it, him coming out of the bathroom and you saw what looked like some white powder on his mustache and you told him to wipe it off.

A: Well, it was white powder. It was grainy white powder.

Q: Grainy white powder. And eventually, during the trial, because Mr. Diggs had a little personal bag, he had a little black bag ---

A: Correct.

Q: You remember that?

A: Yes, I do.

Q: And one of the investigators looked in that bag and they didn't find any cocaine in that bag, did they?

A: That's correct. They did look and there was none there.

Q: And, in fact, you never reported any drug use to Judge Jefferson to the Supreme Court or to Disciplinary Counsel?

A: No, I did not. There was no evidence that would stand it up.

Q: All right. (To the Court) One moment, please.

THE COURT: Yes, sir.

MR. MABRY: That's all I have, Judge. Thank you.

THE COURT: Redirect?

MR. AXELROD: Yes, sir.

REDIRECT EXAMINATION OF GERALD ALAN KELLY BY MR. AXELROD:

Q: At any time with your meeting with Stephen and Mr. Diggs at the jail, did you and Mr. Diggs ever discuss a voluntary defense?

MR. MABRY: Object, Your Honor. It's not part of my cross examination.

THE COURT: There was nothing during his cross

examination, he didn't ask about that. Sustained.

BY MR. AXELROD:

Q: You were asked about the mitigation. Was the mitigation -- do you believe that your mitigation was damaged by the way that Mr. Diggs presented his case?

A: My mitigation? No. I think that there could've been better coordination between the two sides of the case and that would enhance both.

MR. AXELROD: That'd be all, Judge.

THE COURT: Any recross ---

MR. MABRY: No, sir.

THE COURT: Thank you. You may step down. Any object to this witness being excused?

MR. AXELROD: He has a long way to go home.

THE COURT: Have a nice safe trip back home.

MR. KELLY: Thank you, Judge.

(REPORTER'S NOTE: A bench conference was held off the record.)

THE COURT: We'll take a ten-minute break and then we'll come back for this -- the final witness for the day, the final long witness for the day.

(RECESS - 5:10 P.M.)

*******OFF THE RECORD******

**(On the Record - 5:21 P.M.)**

THE COURT: All right. Petitioner may call his next

witness.

MR. AXELROD: Call Dale Davis.

DALE DAVIS, HAVING BEEN DULY SWORN, TESTIFIES AS FOLLOWS:

THE COURT: When you're comfortably seated, please state your name for the record.

MS. DAVIS: My name is Dale Davis.

MR. AXELROD: I have poured you some water, ma'am, in case you need it.

MS. DAVIS: Thank you.

MR. AXELROD: I've had water duties, today.

DIRECT EXAMINATION OF DALE DAVIS BY MR. AXELROD:

Q: Ms. Davis, can you tell the Court why you were hired for this case?

A: I was a mitigation specialist and working in death penalty cases.

Q: I'm gonna -- I'm gonna pull that microphone just a little closer to you so everyone can hear you.

A: And I was hired to do the investigation of -- on Stephen's background in order to present mitigation in the penalty phase.

Q: And do you remember when you were hired?

A: I don't. I think it was sometime in 2006 but maybe 2005.

MR. AXELROD: I'd like to mark and I think the State is not gonna object to it as evidence, mark it in as Applicant's

Six.

THE COURT: Any objection for the record?

MR. MABRY: No, sir. I'm sorry.

THE COURT: Without objection, Applicant's Six is admitted.

APPLICANT'S EXHIBIT NUMBER SIX

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: What this is, this is your timeline. So, I'm gonna let you look at it in the beginning here and then maybe I'll take it back but it'll refresh your memory.

A: September of 2005, I got the second call from the attorney about this sometime earlier he must've contacted me.

Q: And when did you start working on the case? Can you tell when you had your first meeting with -- let me strike that question. Before you work on the case or try to get mitigation evidence, do you have to come up with a theory in the case?

A: No, you shouldn't come up with a theory until you've done some of that.

Q: Some of the mitigation ---

A: The -- and then you have seen what's there before you could come up with a theory. Are you talking about a mitigation theory or a theory of the whole case?

Q: A theory of the whole case.

A: You generally don't come up with a theory of the whole case until there's been some investigation and some meetings and figure out what you have before you decide on a theory.
Q: Okay. When did you all first start to meet and talk about the case if you can tell by your timeline?
A: Looks like -- it said, met attorney in Beaufort, so that was probably Gerald Kelly to pick up some discovery materials.
Q: And when was that?
A: That was in January of 2006.
Q: Okay.
A: And then I believe I see a meeting here in Myrtle Beach on January 27th.
Q: Okay. And let me ask you this, how long have you been doing mitigation work on death penalty cases?
A: I started in 1998 or '99.
Q: So, about eight or nine years? 1998?
A: 1998 or '99.
Q: And this trial took place in 2006.
A: '6. I had done about thirty-some-odd cases at the time I did this trial.
Q: You were a mitigation expert on thirty death penalty cases?
A: I was a mitigation specialist on thirty and, I mean, because they don't all go to trial, most end up with plea agreements before we get to trial.

Q: Okay. And did you know who came up the theory of this case?
A: Bill Diggs.
Q: And I'm gonna ask you the theory, would that be the not guilty by reason of insanity defense?
A: It was a theory that involved the brain damage and Dr. Sachy and all of that and then, yes, it ended up being -- that was the theory that it was not guilty by reason of insanity.
Q: Now, originally, Mr. Diggs had spoken with the Dr. Schwartz-Watts, psychiatrist and she was never hired. Do you know why by chance?
A: I don't. I worked on a number of cases with her. I don't know that I knew he had contacted her. Maybe I did; it's hard to remember that far back.
Q: Now, Mr. Diggs had the theory that Stephen's brain was damaged prior to hiring his experts.
MR. MABRY: I'm gonna object.
A: I'm not sure ---
MR. MABRY: That's not even a question.
MR. AXELROD: I'll rephrase it.
THE COURT: Yeah, you don't get to testify yet. Rephrase your question.
BY MR. AXELROD:
Q: Do you know if Mr. Diggs reached his decision to do a not guilty by reason of insanity prior to having the PET scan done

and the MRI and stuff like that?
A: I'm not completely sure when he arrived at that. I don't know -- I just -- generally, I have a lot of contact with the experts and stuff but I just didn't in this. He was the one that had the contact with them. I'm not sure what testing had been done when he decided that but the first time we met that was -- that was his theory at that point that he believed that was going to be so.
Q: And do you remember when that meeting was?
A: Based on this, it's January of 2006.
Q: And he was evaluated by the doctors, I believe, in May?
A: That -- that's probably right, without looking at something; I'm not sure.
Q: Okay.
A: And I don't know if that would be the date of the report but it was actually around in May.
Q: Did the team support Mr. Diggs' theory?
A: No.
Q: Did Vicky Childs, the fact investigator support it?
A: No.
Q: Did Dale Davis, the mitigation investigator support it?
A: No.
Q: Did Gerald Kelly, co-counsel, chair number two, support it?
A: No, I don't think he did.

MR. AXELROD: I'd like to mark this Appellant's Seven and introduce it into evidence.

THE COURT: Any objection?

MR. MABRY: Oh, no. No, Your Honor.

THE COURT: Without objection.

APPLICANT'S EXHIBIT NUMBER SEVEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: I'm gonna let you refresh your memory on this email. It's an email dated Sunday, March the 26th, 2006 from you to the team.

A: Okay.

Q: And in this email you sent -- you sent a -- you sent some stuff that you had done some research on.

A: Yes.

Q: And it was an article that you received concerning PET scans. I'm gonna let you look at ---

A: Okay.

Q: Just look at everything I gave you, ma'am, and then I'll ask you. Take your time. No one is rushing you.

A: I think I originally did the search of the stuff from Myrtle Beach because there had been such an extraordinary amount of publicity that I thought that we probably should try to change where the trial was held.

Q: Yes, ma'am. And they originally made that motion, I

believe, at trial, did they not?
A: It was my understanding that they said until a jury was -- until they had jury people there, they couldn't do it before the trial, they had to wait until the trial began.
Q: But after they picked a jury, Mr. Diggs never renewed that motion, did he?
A: I can't -- I don't remember; I can't say that for sure. This is talking about specific areas of the brain and I think in this case, the frontal lobe, that you would have diminished capacity, it affects certain things.
Q: Okay. Hang on one second.
A: There's just specific things that you can list that are affected by frontal lobe damage.
Q: But in March, you gave an article that showed that it might not be valid to compare scans from two different machines with patients.
MR. MABRY: Objection.
THE COURT: What's your objection?
MR. MABRY: Well, the exhibit speaks for itself. I think it's -- they're not correctly characterizing what the articles are about. It's about the whole trial ---
THE COURT: Yeah, you can't editorialize on the articles. You can ask her specific questions.
BY MR. AXELROD:
Q: Did this article raise the issue that if two people were

being tested on different machines, it might hurt the results?
A: If you did the same person on two different machines, I think that would -- because if you did two different people, you're not gonna have the same brain.
Q: If you did ---
A: May I look at that again, please?
Q: Yes, you may.
A: That's -- it's that you can't validly compare two different machines with patients. It's just saying with patients because they're -- if they're performing under different circumstances. So, unless you had identical situations with identical machines and the same patient, you wouldn't be able to compare them. At least that's my understanding of it.
Q: And that's what happens in this case that they compare him with two different machines, don't they?
A: I don't know.
Q: Didn't they send the material to California to be looked at?
A: Yes.
Q: And wasn't the PET scan done here?
A: Yes, at MUSC.
Q: So, it's different machines?
A: That's reading the material or doing the scan?
Q: That, that's ---

A: That's reading the material?
Q: Yes.
A: I -- yes, that's what happened but I'm not qualified really to say, to answer the question.
Q: Now, there was a time -- there was a time that Dr. Sachy started to call Stephen psychopath.
A: Yes.
Q: Was it the -- if you know this, was it the defense's position that they wanted to make Stephen look as bad as they could make him look?
A: No, that -- I guess they were going for the insanity but in the worst possible way.
Q: What do you mean by the worst possible way?
MR. MABRY: I'm gonna object to this. She's a mitigation investigator who is testifying about ---
THE COURT: Yeah. She's outside of her expertise on this.
BY MR. AXELROD:
Q: Did their presentation of the insanity defense affect the mitigation of this case?
A: Yes.
MR. MABRY: Same objection. I think she testified that she's a mitigation investigator.
THE COURT: Yeah. Sustained.
MR. AXELROD:

Q: Was the mitigation you brought forth to the trial, was it hampered the way the case had been presented?

MR. MABRY: Same objection.

THE COURT: I think I'm gonna allow that.

MR. MABRY: Yes, sir.

A: Yes, it absolutely was.

BY MR. AXELROD:

Q: How?

A: Because you're -- in mitigation you are trying to present information about the person's background that sums up their life, not a single day or a single time and saying that somebody is a psychopath, I meant, just on the face of it is so detrimental to a jury's or anybody's impression of them that it would be very difficult to overcome with anything else that you had to overcome a label psychopath.

MR. MABRY: I'm gonna objection, Your Honor, and move to strike. She can't testify as to what a jury would ---

THE COURT: Sustained. Sustained.

MR. AXELROD: But she can -- on that last ---

THE COURT: She can say what she did as a result. She can't speculate as to what they jury would do.

BY MR. AXELROD:

Q: So, you feel that a calling Stephen a psychopath was detrimental to the mitigation of this case?

A: Yes, because that's typically something that the

prosecution would present.
Q: And when Dr. Sachy testified that Mr. Stanko is a psychopath, I'm a hundred percent certain of that, I believe we proved it, was that damaging to Stephen?
A: In my opinion it was very damaging and in comparing this with any other mitigation case that I've ever worked on, no one would even consider having a psychologist in the case say something like that.
Q: This was actually a psychiatrist?
A: Psychiatrist or psychologist, technically, both are involved.
Q: And then he likened Stephen to -- I think of Ted Bundy again, I think of John Wayne Gacy, I think of all the people that manipulated without difficulty, they have no difficulty manipulating people. Do you think the comparison of Stephen to psychopaths would be inappropriate in mitigation?
A: Yes, absolutely.
Q: And when Dr. Sachy testifies, so right as a young man he starts his confidence scheme behavior. And if we look at the Hare Psychopathy Checklist, coning and manipulative behavior, pathological lying, right from a young man, he has shown these hallmarks of being a psychopath. Do you think that was damning to Stephen in mitigation?
A: Yes. Again, that's the prosecution's case not a defense case.

Q: And when -- when his own expert said that psychopaths, the Hannibal Lecter from *Silence of the Lambs*, these are murderous psychopaths, they seem almost -- they seem, they are terrifying, that are like evil, they are the devil.

A: These are things that completely demonize the person that you're using that to describe and that's what you definitely don't want to do in mitigation.

Q: All right. You're aware -- (To the Court) I'd like this marked.

THE COURT: Number Eight.

MR. AXELROD: I'll find out in a second, Judge. Yes, sir.

THE COURT: Any objection?

MR. MABRY: No, sir.

THE COURT: Without objection, Applicant's Exhibit Number Eight is admitted.

APPLICANT'S EXHIBIT NUMBER EIGHT

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: On June the 28th, you told -- you sent a letter to Mr. Diggs and Gerald, hey, we need a social worker.

A: Yes.

Q: So, would it be fair to say that up until that day, there's wasn't a social worker?

A: There was no real social workers.

Q: And what's the purpose of a social worker in a death penalty case?
A: That's what I'm saying here that that's the person who would take all the information that I gather and as a team we would put it together and that person would be able to testify about his background, his accomplishments, that sort of thing.
Q: Did it surprise that you there was not a social worker?
A: There should've been a social worker, but I guess I had become so disillusioned with the insistence on that defense that it didn't surprise me because that's not the first time I had brought it up.
Q: In your opinion, did the facts matter to Mr. Diggs, or did his theory matter?
MR. MABRY: Object to the form of the question.
THE COURT: Sustained.
BY MR. AXELROD:
Q: What drove Mr. Diggs?
MR. MABRY: Objection
THE COURT: Sustained.
BY MR. AXELROD:
Q: Did you ever ask Mr. Diggs if the facts mattered in this case?
A: I don't remember specifically asking him that but I did many times bring up the difficulties with getting a jury to spare his life using this particular defense. But he just

seemed determined that that was what he was going to do and talked about how it was gonna be groundbreaking and he was starting a whole new path that people would accept later that just seemed delusional to me.

Q: I'm gonna hand you -- (To the Court) Your Honor, I'm going to mark this as Nine.

THE COURT: Any objection, Mr. Mabry?

MR. MABRY: No, sir.

THE COURT: Without objection. It is entered into evidence.

APPLICANT'S EXHIBIT NUMBER NINE

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: That's an email that you sent to Gerald, I believe, stating that, stating that you heard -- you got wind that Pam Crawford was going to be doing an evaluation.

A: Yes. I sent it to Gerald and Bill and Vicky and his paralegal, whose name I've forgotten, but I was in Columbia with attorneys meeting with Dr. Schwartz-Watts on another case and in the course of that meeting Dawn mentioned that Pam Crawford was evaluating Stephen then or that she was either going to do it or it was in the process at that point.

Q: Why did that concern you?

A: It concerned me because me for a couple of reasons. I knew that Pam Crawford had been involved with SLED on the

front end of the case because when I went to his high school and I don't remember whether it was a principal or -- it probably was the principal -- mentioned that she had been there with one of the SLED investigators. Secondly, I think the reason that came about was because of the hearing, once it was the -- the not guilty by reason of insanity, it was stated that that was gonna be used, the State wanted their own evaluation, which is normal but that was getting pretty close to trial. That was in July and the trial was scheduled for August. They were never gonna get into Hall that quickly.

Q: So, why didn't Mr. Diggs, if you know, ask for a continuance?

A: I don't know. I mean it just seems like if you needed a continuance, certainly for something that important, he would've asked for a continuance and I decided after that that it had to do with the *48 Hours* segment which was being ---

MR. MABRY: Objection, speculation.

THE COURT: Sustained.

MR. MABRY: Move to strike.

THE COURT: Stricken.

A: But at any rate, I didn't -- there was nobody there when it was being done. She was meeting with him without anybody talking to him about it beforehand and it was just a much more invasive and intensive kind of thing that would happen if you were sent to Hall and they were just really looking at whether

or not you were really mentally competent to stand trial.
Q: Did Mr. Diggs discuss this with the team or with you at least?
A: He didn't. To my knowledge, nobody knew about it until I sent that email.
Q: *48 Hours* was doing this trial?
A: They were filming it. They were going to film it, yes.
Q: Do you know if they were on a strict time schedule?
A: I don't.
Q: Do you know if they were gonna get a continuance, it would be -- it would be filmed or not?
A: I don't know that.
Q: Dr. Crawford has a nickname, do you know it?
A: I don't. I know that she had been in trouble over another case up in Greeneville/Spartanburg over representing herself as there to help the person when in fact she'd been sent there by the police.
Q: And that's the behavior she exhibited in this case?
MR. MABRY: Objection.
THE COURT: Sustained.
BY MR. AXELROD:
Q: Are you aware that Dr. Crawford called Dr. Sachy and asked him to change his testimony?
A: I wasn't aware of that.
Q: Mr. Diggs never shared that with you?

A: No.
Q: Did you have a chance to talk to Mr. Kelly about your concerns with the mitigation?
A: Yes, we discussed it both -- I actually spent more time with the investigator than with either of the attorneys but I was much more able to talk to Gerald Kelly about the concerns about it and because I had worked on other cases with him before and he was receptive to what you were saying and I always just felt like Bill Diggs was putting up with me because he had to because I just wouldn't get onboard with his theory which was why I didn't work in the second trial.
Q: As far as you're aware, were there any expert evaluations prior to Mr. Diggs arriving at his theory of not guilty by reason of insanity?
A: I can't say ---
MR. MABRY: I'm sorry. I couldn't hear the question. Repeat that.
Q: I said, As far as you're aware, were there any expert evaluations prior to Mr. Diggs arriving at his theory of not guilty by reason of insanity?
A: No, to my knowledge there was nothing to support that theory when the decision -- when he made that decision to use that theory.
MR. MABRY: Object.
THE COURT: Sustained.

MR. MABRY: And move to strike.

THE COURT: Strike, she's not qualified.

MR. AXELROD: I'll get back to it a different way, Your Honor.

THE COURT: All right.

BY MR. AXELROD:

Q: Did you believe that Mr. Diggs was trying to change the law concerning not guilty by reason of insanity?

A: That's what he said.

Q: He told you that?

A: He didn't tell me he just said it in a meeting but it wasn't specifically directed at me but he said that at a meeting, yes.

Q: That he was gonna change the law?

A: Well, that he expected the law to change in the future to take this theory into account.

Q: Would his -- now, would his trial strategy not be the law at this point?

MR. MABRY: Object to her testifying what the law is.

THE COURT: Sustained.

MR. AXELROD: Well, she testified that ---

THE COURT: She can't testify what the law is. Sustained. Move forward.

BY MR. AXELROD:

Q: You sent articles to Mr. Diggs concerning the *Rivera* case

in Georgia?
A: I don't know if I sent them to him or not but I had seen them before I ever met with him about this case I had seen that in the paper and at the time remember thinking that that just seemed the most foolish thing I'd ever seen when I read the article. I don't know whether I sent him that or not.
Q: And in that case, Dr. Sachy was the expert in Georgia?
A: Yes.
Q: And if you remember, did they seek a not guilty by reason of insanity or guilty but mentally ill, if you remember?
A: I don't remember.
Q: Stephen, in trial he was shown to be a con man, we've had testimony of him working schemes?
A: Yes.
Q: Do you know him to be not a con man? Did he ever work for lawyers?
A: Did Stephen ever work for lawyers? I think he did briefly for a lawyer in Myrtle Beach or was getting clients for him. They had some kind of relationship but I'm not sure exactly what it was.
Q: The mitigation evidence that you've collected, if it had only been used in the mitigation phase to support a guilty but mentally ill defense, in your mind would it have been more persuasive?
A: I'm not sure I understand the question.

Q: If Mr. Diggs had gone after a guilty but mentally ill defense on the frontend, would the mitigation that you collected been able to be used to assist the jury in coming back with a life sentence versus the death sentence?
A: I believe if the ---
MR. MABRY: I'm gonna objection. She can't speculate what a jury ---
THE COURT: Yeah, that would be speculative as to what a jury would do. Sustained.
BY MR. AXELROD:
Q: As an expert -- as an expert, did they use your mitigation evidence in the mitigation phase of this trial?
MR. MABRY: I'm gonna object to that. She hadn't been qualified as an expert.
THE COURT: Yeah, she's not an expert in this trial.
MR. MABRY: She's testifying as a mitigation specialist.
THE COURT: You can ask if they used her information, that's a yes or a no question.
BY MR. AXELROD:
Q: Did they use your information that you collected in the mitigation phase?
A: It was used in the mitigation phase but in my opinion nothing could overcome the psychopath, Dr. Sachy's comparisons and his testimony and his diagnosis, I guess it would've been.
Q: Did you tell that to Mr. Diggs?

A: Yeah, yes. I told him that a number of times but we didn't have an awful lot of meetings so I didn't have a whole lot of contact with him. You know, I was sending emails and things like that but that -- it was discussed at meetings, but again that was just gonna be it.

Q: Now, Dr. Califf is eventually hired about two weeks before the trial?

A: Not too long before the trial. When she was hired, we'd gone up there to have a meeting and meet her or for her to meet me and she showed up so late that we were breaking up the meeting when she got there. And then, I know she used my material but she met with Stephen about ten minutes in lock-up while he was at the place and that's the only time she met with him which was not an acceptable thing for a social worker ---

MR. MABRY: Objection, she's not a social worker.

THE COURT: Sustained.

MR. MABRY: Move to strike.

THE COURT: Stricken.

BY MR. AXELROD:

Q: Wasn't she ---

A: She said she was being -- that's the capacity that he was using her for. She is not a social ---

Q: Was the case rushed at the end, the preparation? He hired a social worker two or three weeks before the trial; is that

normal?
A: No.
Q: Could he have asked for a continuance based on the lack of a mental health evaluation that the Court had ordered?
A: Yes. I think you -- you don't know if you're gonna get it or not but you can always ask for an evaluation especially when the State is making that request and need it.
Q: And if -- if it could not have been done then, then the trial would've been continued?
A: If the Judge had given a continuance, it would've been continued until that evaluation was done by the gentleman down at Hall.
Q: And if the Judge had ordered it, the Court ordered it and William S. Hall could not do it then there would've been a continuance?
A: If he had not gotten -- if a different psychologist had not been obtained to do it.
Q: But for Mr. Diggs getting Dr. Crawford?
A: I don't know who got Dr. Crawford. I don't know who suggested, what if it was the State or him? I think it may've been the State and he agreed to it. But again, I'm not sure about that.
MR. AXELROD: Your Honor, I'm just gonna let her refresh -- does the Court want it for ID or ---
THE COURT: That's fine.

A: I see right here, I don't know how it came about but Pam Crawford is going to do the exam, so ---

BY MR. AXELROD:

Q: Okay. I'm just gonna let you refresh your memory -- just the top paragraph here, that's all. The email that you sent and that -- was this -- as you put it, the attorney is hell-bent on pursuing his path in this case without any forensic medical evidence.

A: Yes.

Q: Was there a disconnect in this trial between the attorneys?

A: I can't say that for sure because I wasn't there but there seemed to be because there was a disconnect about what the theory of the case should be.

Q: And did Mr. Kelly have a different theory of the case than Mr. Diggs?

A: I don't know. He did not have that theory. I don't know if he had a separate theory or not.

Q: But it was your understanding that Mr. Kelly did not have a theory of not guilty by reason of insanity?

A: That was not what he would have picked.

Q: That's all the question I have.

THE COURT: Mr. Mabry?

CROSS EXAMINATION OF DALE DAVIS BY MR. MABRY:

Q: Ms. Davis ---

A: Yes, sir.
Q: You testified about a lot of different things here or tried to. I want to know exactly what your job in this case was.
A: It was to do -- investigate his background, provide all of that information, interview all the people I could locate, all the records that I could, compile that information, supply it to the attorney. We had meetings to come up with a theory of mitigation and pursue that with exhibits or testimony from witnesses or how it needed to be done.
Q: All right. So, your job as a mitigation investigator is to go out and talk -- find everything about Stephen's life, anything that might be possibly mitigation, go back and get his medical records?
A: Yes.
Q: Birth records?
A: And I wasn't looking for just things that might be mitigation, you're looking for everything because some it is not gonna be mitigating.
Q: Right. You kind of want to know what the prosecution is gonna use, right?
A: Yeah, because it's out there.
Q: Right. But you didn't -- did you get his birth records?
A: I did get his birth records.
Q: And did you give those to counsel?

A: Yes, sir. I scanned and emailed them to Mr. Diggs.
Q: And did you get his mother's records from the birth?
A: Yes.
Q: And were those given to Mr. Diggs?
A: Yes.
Q: Were those given to the experts?
A: Yes. That's the only time he was happy with me.
Q: Okay. Well, generally, he wasn't happy with your -- you in this case; is that correct?
A: He wasn't happy with me because I wasn't going along with his theory.
Q: All right. Well, did -- did he give those records -- did the medical records on Stephen's birth and his mother from his birth to the experts?
A: As far as I know they did.
Q: Well, were you here during the first trial in Georgetown?
A: The first trial, yes.
Q: Were those records admitted in the trial?
A: They probably were.
Q: Did the doctors testify about brain damage to Stephen when he was born, intracranial damage?
A: I'm sure they did.
Q: Okay. Is that ---
A: I can't -- I can't -- that was a long time ago. I can't remember exactly but that's one of the things I'm sure

somebody testified about.
Q: Well, you haven't had any problem remembering anything else on direct examination so I'm trying to understand why you're having problems remembering on cross examination.
A: I think I said I don't remember when I didn't. I mean, I'm not trying to pull the wool over anybody's eyes if I don't remember something.
Q: Several of Stephen's doctors testified that he suffered intracranial brain damage when he was born; is that correct?
A: I'm sure that is correct.
Q: All right. And also testimony was introduced that he suffered a head injury when he was about sixteen or seventeen. He got hit in the back of the head with a bottle and knocked unconscious?
A: Yes.
Q: All right. And did you -- were you the one that found that out?
A: Yes.
Q: And you shared that with Mr. Diggs?
A: Yes.
Q: And that was given to his experts because they testified about it during the trial, didn't they?
A: They did but the one thing I had ---
Q: Go ahead.
A: I had wanted the person that was with him when that

happened to be subpoenaed but he didn't and then I ended up having to testify about it.

Q: Okay. Well, you don't even -- you don't even testify normally, do you?

A: No, I do not.

Q: Okay. And you're not a social worker, are you?

A: I'm not.

Q: And you're certainly not a psychiatrist or a psychologist?

A: Absolutely not.

Q: I guess I need to ask you this question, too. Have you been to law school?

A: No.

Q: You're not a licensed attorney, are you?

A: I am not.

Q: Did you do everything that you were supposed to do as the mitigation investigator in this case?

A: I felt that I did everything I could do except ---

Q: Try the case?

A: --- convince Mr. Diggs.

Q: Except try the case?

A: I don't know why -- I didn't want to try the case, I just wanted to try to use mitigation that was beneficial. I didn't want to present something that was not gonna be beneficial in mitigation.

Q: And you testified here today you do not think the insanity

defense should've been presented; is that correct?
A: I thought that mentally ill would've been better but either one I wouldn't have gone along with -- I'll just say I thought it should've been mentally ill.
Q: Mentally ill, not insanity. Okay. I want to show you this email. This says March 25th of 2006, I think the day before you sent the other email.
MR. AXELROD: Without objection, Your Honor.
MR. MABRY: Without objection.
THE COURT: Which exhibit would this be?
MR. MABRY: Respondent's Seven, Your Honor.
THE COURT: Seven?
MR. MABRY: Yes.
THE COURT: Without objection.

RESPONDENT'S EXHIBIT NUMBER SEVEN

ADMITTED INTO EVIDENCE

BY MR. MABRY:
Q: I'm gonna show you -- I'm sorry. I'm gonna show you, this is an email that you received from K. Dawn White. I'd ask you to read that into the record for me, the entire email.
A: This is the email that he had given me before that she was responding to.
Q: She sent it to you, didn't she?
A: Yes, but he handed me one that had this at the bottom where there was -- and then the response at the top. Below is

a post I received when inquiring about information on serial rape/murder. And then I've got in quotes, the *Ramirez* case in Augusta, Georgia, 2004 was a serial rape case. Dr. Thomas Sachy was the forensic psychiatrist at trial, the defendant diagnosed as psychopath was given same constitutional equal protection comparable to a person with schizophrenia on the basis of psychopathy immutable brain characteristics as demonstrated with PET scans. The jury inclined toward not guilty by reason of insanity until defendant testified that if ever released, he would reoffend. This might be an approach to include in mitigation if not not guilty by reason of insanity. Below are links to two articles I found regarding the case mentioned above in Dr. Sachy's testimony.

Q: Okay. Was that information provided to Mr. Diggs by you for Mr. -- you've got that from Mr. White, that email, did you provide that to Diggs?

A: I can't say unless you've got a -- unless there's an email stating it but I -- we talked about the *Ramirez* case because Dr. Sachy ---

Q: Was involved.

A: --- had been on both of them.

Q: And the *Ramirez* case, it was a fellow that had killed four different women. And according to this email to you, the jury was leaning towards not guilty by reason of insanity or maybe a life sentence until he took the stand and said I'll reoffend

if I ever get out.
A: Well, I'm quoting somebody saying that, I don't -- I don't know if that's true or not.
Q: No, you don't. But you don't know what's true in the newspaper articles that you gave Mr. Diggs, either, do you?
A: I don't remember what articles -- I'm sorry. I just don't remember which articles, but it ---
Q: The ones involving the *Rivera* case in Georgia. You talked about it a while ago, you said there was an email you sent to Mr. Diggs with articles about Dr. Sachy and what he -- the defense experts were saying and what the State's expert's saying and I'm -- that's clearly an email you received from someone about that case, correct?
A: Yes.
Q: Okay.
A: But I ---
Q: I'm asking did you forward that information to Mr. Diggs?
A: I don't know that I forwarded it to him. I believe that I sent links to the other case to him because I sent a number of emails that had a lot of links to a lot of cases but, again, without something specific to look at, I can't tell you that absolutely.
Q: All right. Well, the fact of the matter is you did not disagree with Dr. Sachy being involved in the case until his opinion came back regarding psychopathy, isn't that correct?

A: I didn't -- I didn't agree with the defense, not necessarily Dr. Sachy. And, again, I mean, I didn't -- I didn't really know anything ---
Q: You're not a lawyer, are you?
A: I've never claimed to be a lawyer.
Q: And, in fact, Mr. Diggs, in his notes in the file that have been referred to throughout this hearing said on March 24th, Dale -- DD, that's Dale Davis -- is strong on your neuropsychologist Robert DiSachy (spelled phonetically).
A: Disach (spelled phonetically) must be what he means. Robert Disach.
Q: That's a different one?
A: Yes. That's a difference psychologist that I have ---
Q: Did you ever tell Mr. Diggs or Mr. Kelly that you didn't want Dr. Sachy involved?
A: I didn't mind if Dr. Sachy was involved. I had made -- he had said something about having neuropsych stuff done and Dr. Disach had worked on a number of cases that I had done and I had called him to see because unlike a lot of people, Dr. Disach would go the jail to do the evaluations rather than the person having to be brought to him. And so I had talked to Dr. Disach about going up and seeing him and he said that he would but then when I told Bill Diggs about that, he said he already had a psychologist.
Q: Okay. There were multiple doctors and psychologists and

psychiatrists in this case who actually testified, isn't that correct?

A: Yes.

Q: You had Dr. Sachy, you had Dr. Thrasher, Dr. Einhorn, Dr. Wu, Dr. Gur. Did you ever tell Mr. Diggs that you didn't want any of those people involved?

MR. AXELROD: Your Honor, I ---

A: I wouldn't have told them that.

MR. AXELROD: Your Honor, I'm gonna object.

THE COURT: Hold on. What's your -- don't say anything else.

A: Sorry.

THE COURT: Okay, go ahead.

MR. AXELROD: She's a -- she's not a mitigation expert only that she's a mitigation fact finder and I think she has to be -- he's asking about medical doctors now. I think it's outside of her ---

THE COURT: I think he just asked her if they testified, he's not asking her for an opinion.

MR. MABRY: No, I'm asking ---

THE COURT: Overruled.

BY MR. MABRY:

Q: Did you ever tell him you didn't want him to use any of the doctors?

A: It's not my position to tell him no. I don't know that I

-- I wouldn't have told him that. I wouldn't say that to any lawyer.

Q: Exactly. You wouldn't tell them how to try their case; isn't that correct?

A: Well, in meetings you discuss it usually and it's not that I'm telling them or they're telling me, it's a discussion between team members where you figure out what you've got and the best way to do it. Hopefully, it's not anybody telling anybody else. That's the reason you have a team to do those things.

Q: Do you think Mr. Diggs' dissatisfaction with you had anything to do with the fact that you were trying to tell him how to try the case instead of being out investigating the facts in the mitigation?

A: I was out investigating the facts in mitigation. I wasn't telling him how to try the case. I was giving my opinion which I think is what I'm supposed to do about the theory that he was using in the case.

Q: Well, that theory was as to a defense in the guilt phase.

A: Right.

Q: You're a mitigation investigator to present mitigation in the penalty phase. So, why are you telling him whether to use an insanity defense or not?

A: I didn't tell him whether to use an insanity defense or not. I just -- you generally introduce -- you introduce some

of the mitigation in the guilt phase of the trial.
Q: You frontload it?
A: Yes. And if you're frontloading with the kind of information that this defense put forth, I don't think you can overcome that in the sentencing phase no matter what your mitigation is. But I think that actually that was presented in both phases. I think doctors testified in both phases about the same thing.
Q: And Dr. Califf also presented the social history in the penalty phase, did she not?
A: She used my notes as if she were -- had done the interviews, yes.
Q: Okay.
A: She didn't talk to the people herself which typically the social worker would look at my things and then re-interview the person themselves.
Q: Was that my question? What was my question?
A: You told me she presented ---
Q: I asked you did she ---
MR. FREDERICK: Judge, maybe he can ask questions instead of constantly badgering her.
THE COURT: All right. Just ask her the straight questions.
BY MR. MABRY:
Q: Did she testify in the penalty phase to the social history

without going into actually what she did in the case. I'm asking you, Did she testify in the sentencing phase?
A: She testified, yes.
Q: And was it based on the information you had gathered?
A: Yes.
Q: And you testified that you gathered all the information that should've been gathered, isn't that correct?
A: Yes.
Q: In fact, the family would not cooperate, they wouldn't come to the trial and testify in mitigation, would they?
A: No.
Q: How much money did you not get paid in this case?
A: Something over $4,000.
Q: So, it's $4,000 that you didn't get paid and that was because Mr. Diggs did not turn in all your time timely; is that correct?
A: A lot of that was where I had paid for the hotel and the expenses that were incurred during the trial itself.
Q: That wasn't my question. My question was, The reason you didn't get paid was because Mr. Diggs did not submit your time in a timely fashion to the Court?
A: I don't know that.
Q: Do you still hold that against him that you didn't get paid $4500 in this case?
A: No. It was my fault. I waited too long to send it. If I

had sent it originally because Gerald Kelly was really the one handling the money part of it and if I had -- we were -- the day the trial started, we were moving to a new house and in the course of moving and getting settled and all of that, I just waited too long to send that final bill so it was really my fault, not theirs.

Q: Before you were a mitigation investigator, where did you work?

A: At the Public Defender's office.

Q: And how many years did you work there?

A: I worked there about four and a half years and then I worked for the Sheriff's Department about five and half years as the liaison between the two.

Q: Between the Public Defender's office and the Sheriff's office?

A: Uh-huh (affirmative response). Between the jail and the Public Defender's office.

Q: Okay. So, you worked as liaison between the jail and the Public Defender's office. Basically, you were associated with the Public Defender's office for about eight years?

A: Yes, sir.

Q: And you ---

A: Maybe more than that.

Q: And you learned during that time when somebody is convicted, if their direct appeal is denied, then it -- the

next place it goes is post-conviction relief?
A: I honestly don't understand appeal very much but I thought it went straight -- I thought it went straight to a PCR. I didn't know.
Q: Okay. And then you became a mitigation investigator and you did that for about six years, seven years before this trial?
A: Yes.
Q: And you know those cases, if the -- the death penalty cases almost always end up in the post-conviction relief.
A: Yeah, and if there's a death sentence, I knew there was a direct appeal, so -- but I'm not sure of the order.
Q: Okay. If the direct appeal is denied, it ends up in post-conviction relief.
A: You're -- I'm agreeing with you but I don't know that for sure. I mean, that's what I said.
Q: Well, let me ask you this, Have you ever testified in a post-conviction relief hearing before?
A: Yes.
Q: In fact, you testified in more than one, haven't you?
A: Yes, sir.
Q: You testified in Kamell Evans?
A: Was that the one Greenville?
Q: That's the one in Greenville, yes, ma'am, where you testified that the attorney did not get a continuance and had

something to do with, I believe, trying to change the law. You basically came in and testified that the attorney was not effective, he didn't move for a continuance when he should have.

A: Well ---

Q: Would you like for me to show you your testimony?

A: I sent him information because he -- I think -- okay, let me look at what you're saying.

Q: This is a transcript of *Kamell Delshawn Evans vs. South Carolina*, it's a capital PCR. You testified in that case?

A: I know what you're talking about but I don't know that this -- the attorney called me to come up there and he actually called Winfred Sheely (spelled phonetically) and she put him in touch with me in July for a death penalty trial that was starting in September but he had just gotten appointed to it, I think. And what I had said to him was I could -- no litigation had been done that I could provide, come up there and do a few days of investigation and provide information that would allow him to make that motion because the investigation for mitigation had not been done but I already was working on a trial in Georgia that I knew was going to trial in September and so that was what I did. And then when he went ahead with it, I had sent an email about the different things that had not been done and the one in particular I remember was left -- he'd had lead poisoning as a

child and I sent an email about that and ---
Q: Do you remember testifying in Marian Bowman's PCR?
A: Yes.
Q: And in that case, you claimed counsel was ineffective in their mitigation presentation because they didn't consult you on how to present the mitigation.
A: I can't -- that's been a while ago but if you say it's there, then it is.
Q: So, this is not ---
A: Although I'm sure that's not exactly all of it that's there but they didn't, that's true.
Q: So, the fact the lawyers didn't consult with you and go along with the way you wanted to present the mitigation, you came and testified at the PCR against them; isn't that correct?
A: I testified as to what I thought. I mean, that's all I can do. When I'm called to testify is say what I think.
Q: So, it's not the first time you've come in and testified after the case is over in post-conviction relief?
A: It's not the first time I've dealt with bad lawyers either, I'm sorry to say.
Q: Okay.
A: And that -- you know, sometimes I guess the thing is that I -- I don't really know why they would hire me if, if we're not gonna be part of a team together because that's the

purpose.
Q: Have you corresponded with Mr. Stanko since this trial and his death sentence?
A: It's been a good while but I did have a number of letters between us early on.
Q: Okay. And you've also corresponded with his sister since this trial and his death sentence, haven't you?
A: I think I got an email from his sister once after that but -- I'm pretty sure I did but, again, I can't swear to that, sorry.
Q: And Ms. Davis, you know when you're working on this case, preparing it for trial that any memo or anything you write in the file is gonna be there for the PCR lawyers to use if they need it in post-conviction relief; isn't that correct?
A: Well, that's not on my mind necessarily when I'm doing it except for one case that I remember but if it's all there, I mean, you find that out later.
Q: So, you have done that before?
A: I did in one case make notes about it after talking to a different lawyer.
Q: Thank you, ma'am. Nothing further.
THE COURT: Any redirect, Mr. Axelrod?
REDIRECT EXAMINATION OF DALE DAVIS BY MR. AXELROD:
Q: Mr. Kelly is insinuating that you purposefully put emails into the record to substantiate the things he just discussed

with you. Did you purposefully do that or did you just put what you knew or what you saw?
A: I was -- I just put what I knew or what I saw or what I thought ---
Q: Was there an ulterior ---
A: --- into the emails. There's no agenda to it. You're just -- I mean, I've worked the same way on every case.
Q: Was there an ulterior motive at all?
A: No.
Q: Thank you.
THE COURT: Any recross?
MR. AXELROD: Your Honor, Court's indulgence -- can I have the Court's indulgence for just one minute?
THE COURT: Yeah, sure.
MR. AXELROD: Your Honor, just two more questions.
BY MR. AXELROD:
Q: When you connected with Stephen's family, is that because Mr. Diggs did not? The Attorney General asked if you had communication with Stephen's family after the trial; is that true?
A: I got an email from his sister and I responded to it.
Q: And was that more communication than Mr. Diggs had had with the family?
A: I don't think he had had any with them.
Q: Okay. And the communication that you had with Stephen,

was that his requesting you to be on a second trial, if you remember?

A: He did ask me to do that and I wrote back and told him why I couldn't.

Q: Why did you tell you couldn't?

A: For the reasons that ---

Q: Tell me right now why you told Stephen you would not be on the second trial?

A: Because as a team, there's certain things that you do together as a team and you work together and that that just had not worked out that way. I don't remember exactly how I put it but basically that I didn't -- I just couldn't work with Mr. Diggs. I don't even think I said I couldn't work with Mr. Diggs but I -- we just did not work as a team in order to get to mitigation so that we could try to get a life sentence.

Q: Does it take a whole team to -- does it take a village to avoid a death sentence?

A: It takes a team, it takes definitely -- the ABA has set out ---

MR. MABRY: Objection. I don't think she can speculate.

THE COURT: Sustained.

A: The ABA has set out guidelines ---

THE COURT: Sustained. Do not speak when ---

A: Oh, I'm sorry. I thought I was to answer his question.

THE COURT: No, ma'am. I sustained the objection.

BY MR. AXELROD:

Q: How many death penalty trials were you on?

A: I had worked on about thirty at this point, I believe.

Q: If you know, was this the most dysfunctional team you were ever with or was there worse?

MR. MABRY: I'm not sure that's proper redirect.

THE COURT: Sustained.

MR. AXELROD: I have no further questions, Judge.

MR. MABRY: I have just a couple briefly.

RECROSS EXAMINATION OF DALE DAVIS BY MR. MABRY:

Q: You said you told Stephen the reason why you weren't working on the second case, that's not what you told Mr. Diggs, is it?

A: No, it isn't. I was trying to be nice.

Q: You sent him an email saying that you couldn't work on the second case because you were retiring and you weren't taking any more cases.

A: That's right.

Q: So, are you telling us that you lied to Mr. Diggs in the email?

A: I did because I thought it spared his feelings.

Q: And also you and Ms. Davis were the ones that tried to get Mr. Diggs relieved before the trial even started, didn't you?

A: Me and who?

Q: You -- I'm sorry, you and Vicky Childs were the ones pushing Mr. Stanko to relieve ---

A: That's not true.

Q: This is Page 3565 ---

MR. AXELROD: Your Honor, I don't this is proper recross now.

THE COURT: Overruled. It's going to her bias.

BY MR. MABRY:

Q: Page 3565 of the transcript in this case and this is Mr. Stanko talking. I had to tell Dale and Vicky they're the ones that actually pushed that whole issue that got the letter written that shouldn't be done.

A: That what shouldn't be done?

Q: I believe he was asking to relieve Mr. Diggs.

A: I don't know why all of a sudden we're gonna believe Stephen when nobody has up till now but I did not push Stephen to get rid of Mr. Diggs. I don't know whether Vicky did or not but I did not.

Q: No further questions.

THE COURT: All right. Thank you. You may step down.

Any objection to this witness being released?

MR. AXELROD: No, sir.

MR. MABRY: No, Your Honor.

THE COURT: Thank you, ma'am.

MS. DAVIS: Thank you.

BY THE COURT:

THE COURT: I assume that's all your witnesses for today?

MR. AXELROD: Yes, sir, Your Honor.

THE COURT: What witnesses do you intend to call tomorrow?

MR. AXELROD: We have Dr. Thrasher lined up. We have Dr. Knight -- Dr. Thrasher, Dr. Knight and ---

THE COURT: Is Dr. -- Dr. Knight, I still need to make a ruling on?

MR. MABRY: Yes, sir. I'm sorry. Yes, sir. If you want to consider that overnight, Your Honor, that's fine.

THE COURT: Yeah, I'm gonna consider that overnight.

MR. SHAFFER: Your Honor, something came up at lunch regarding that ruling. If -- and I know Mr. Mabry handed up a bunch of cases. I have no idea what the cases are.

THE COURT: Okay. You can get them from my Clerk. If y'all need to make an additional argument based on the cases, I'll give you some time to do that.

MR. SHAFFER: Thank you, Your Honor. What I would also like to do, because I think the characterization was a little bit off of what she's actually going to testify to. Would the Court like a copy of her report as well just so -- because ---

THE COURT: Well, I'm not so -- the timing of her report, I mean, she -- again, she hasn't talked to anybody involved this case. It's kind of like bringing in another lawyer, you

know, an expert to say that these lawyers didn't do the case right. I mean, I think that's all she -- and I'm leaning against not allowing that, so ---

MR. SHAFFER: Your Honor, I would just like -- you know, because of the fact of the way Mr. Mabry characterized it, she's not actually making an opinion as to whether or not ---

THE COURT: Then why is she here?

MR. SHAFFER: Your Honor, what she is saying is essentially that their conclusions are not supported with any evidence that they put in their report or on the record.

THE COURT: I'm not gonna listen to that. You just made my mind up for me.

MR. SHAFFER: And, Your Honor ---

THE COURT: She will not be allowed to testify.

MR. SHAFFER: May I proffer it tomorrow?

THE COURT: Yes, sir.

MR. SHAFFER: Thank you, Your Honor.

THE COURT: You can make a copy of her report and put it in the record.

MR. SHAFFER: Thank you.

THE COURT: Thank you. So, you can let her go because she's not gonna testify tomorrow.

MR. SHAFFER: And, Your Honor, we can't have her -- in the proffer, we can't have her testify for the proffer; is that correct?

THE COURT: Well, I mean, I thought you just wanted to get her report in.

MR. FREDERICK: Judge, I think we're entitled to put her on the stand and proffer her testimony on the record.

THE COURT: Okay. You can do that.

MR. SHAFFER: Thank you, Your Honor.

THE COURT: I thought you just wanted her report in so I was saying you could just do that as a proffer. Okay. All right. And what other witnesses does the State intend to call?

MR. MABRY: Right now, the State doesn't intend to call anybody. I may call Mr. Diggs and we'll consider it overnight. They haven't indicated they're gonna call Mr. Diggs at all. I had the State's witnesses but there's no *Brady* claim, no false evidence claim. So, I'm probably not gonna call them. It'll be Mr. Diggs if anybody.

THE COURT: So, about how long do you think your doctor is gonna take to proffer her testimony?

MR. SHAFFER: Your Honor, I would suspect forty-five minutes.

THE COURT: Okay. All right. And then Dr. Thrasher about how long? I'm just trying to get an idea.

MR. AXELROD: Ninety minutes.

THE COURT: Okay. All right. Very well. Y'all have a nice evening. See you tomorrow morning at 10 o'clock.

MR. AXELROD: Thank you, sir.

MR. MABRY: Yes, sir.

(RECESS -- 6:36 P.M.)

*******OFF THE RECORD*******

**(APRIL 28, 2015)**

**(On the Record - 10:11 A.M.)**

THE COURT: All right. Are we ready to proceed?

MR. AXELROD: Yes. Mr. Frederick has stepped out but he said it was okay if we proceed.

THE COURT: All right. We will proceed. You may call your next witness.

MR. SHAFFER: Your Honor, this is the one that we're going to proffer.

THE COURT: Right. This is a proffer, so I'm the finder of fact so I won't listen to the testimony.

MR. MABRY: I understand.

MR. SHAFFER: Applicant would call Susan Knight.

THE COURT: All right. Ms. Knight, come forward and be sworn.

SUSAN C. KNIGHT, HAVING BEEN DULY SWORN, TESTIFIES AS FOLLOWS:

THE COURT: All right. Please have a seat and when you're comfortably seated, if you would state your full name for the record.

MS. KNIGHT: Susan Knight, K-N-I-G-H-T.

THE COURT: All right. You may proffer your testimony.

PROFFER DIRECT EXAMINATION OF SUSAN KNIGHT BY MR. SHAFFER:

Q: Dr. Knight, can you describe your educational background?

A: I have a Bachelor's degree in psychology from Trinity

University in San Antonio, Texas. I have a Master's degree in clinical psychology from the University of Louisville, Louisville, Kentucky; and I have PhD or a Doctorate degree in clinical psychology from the University of Louisville.

Q: Okay. And what do you currently do for employment?

A: I am a forensic psychologist employed in private practice. I also hold an adjunct faculty position at the Charleston School of Law where I teach law students in an adjunct faculty position at Cornell University.

Q: Okay. How long have you been a forensic psychologist or specifically how long have you been conducting forensic evaluations in South Carolina?

A: In South Carolina, since 2008, January of 2008.

Q: Can you approximate how many you've done?

A: Well, I -- I started doing forensic psychological evaluations prior to moving to South Carolina. So, I completely a predoctoral internship with the federal government where I trained in their federal evaluation center conducting criminal responsibility evaluations and other types of forensic psychological evaluations. Then I completed a postdoctoral training -- postdoctoral fellowship at the Keck School of Medicine in Los Angeles where I also received training on criminal responsibility evaluations and other types of forensic psychological evaluations and then began work in 2008 at the Medical University of South Carolina in

their division of forensic psychiatry where I started conducting criminal responsibility evaluations and other types for -- under South Carolina law.

Q: Okay. And is there any way for you to approximate how many -- would you say hundreds?

A: Sure. Well, over 200 criminal responsibility evaluations, approximately maybe 150 of those in South Carolina and that's in addition to providing training and supervision on residents and fellows when they do their own criminal responsibility evaluations.

Q: Okay. So, you actually supervise residents who are doing criminal responsibility evaluations?

A: Correct, when I was a faculty member at MUSC.

THE COURT: Can you just have them put her CV in rather than going through all this?

MR. SHAFFER: Yes, Your Honor. We could do that. The State said that they would not object to her qualifications.

MR. MABRY: We stipulate to her qualifications.

THE COURT: All right. Again, this is just a proffer, so ---

MR. SHAFFER: And, Your Honor, part of what I wanted her to qualified in is actually, in addition to being an expert in forensic psychology, I would also like her qualified as an expert in ---

THE COURT: I'm not qualifying her in anything. She's

not testifying; I've already ruled in inadmissible. You're just proffering. You can put anything in you want to right now.

MR. SHAFFER: Okay. And Your Honor -- well, if she was to testify, what I would've said is that she was also an expert in criminal responsibility evaluations in ---

THE COURT: Fine. Good.

MR. SHAFFER: --- South Carolina. Would you like this to be a Court's exhibit, Your Honor?

THE COURT: Yes.

COURT'S EXHIBIT NUMBER ONE

MARKED FOR IDENTIFICATION

BY MR. SHAFFER:

Q: Dr. Knight, you were retained by us, correct, or by the Defense or the Applicant's attorneys, correct?

A: Correct.

Q: Okay. What were you retained to do?

A: I was retained to review the reports and trial testimony of experts that testified in Mr. Stanko's trial and opined on his criminal responsibility.

Q: And were you -- did you ever speak with Mr. Stanko?

A: I did not.

Q: And specifically you weren't retained to give an evaluation as to whether or not he's insane, correct?

A: Correct. I was not asked to conduct my own criminal

responsibility evaluation nor render a clinical diagnosis of any kind, so I did not meet with him.

Q: Briefly, I'm just gonna go ahead to your opinion. You prepared an opinion letter in this case, correct?

A: Correct.

Q: And in that opinion letter, you gave three sort of overarching opinions, correct?

A: Yes.

Q: Let's go into the first one. What was your first opinion?

A: Do you have a copy of it?

Q: Oh, yes, I do.

MR. MABRY: No objection to him marking it as a Court's exhibit.

THE COURT: All right.

COURT'S EXHIBIT NUMBER TWO

MARKED FOR IDENTIFICATION

Q: I'm handing you Court's Exhibit Two. Is that your opinion?

A: This is my report, yes.

Q: Okay. If you could, tell us a little bit about the first opinion you reached.

A: The first opinion dealt with the diagnosis rendered by both experts at the time of trial, Dr. Thrasher and Dr. Sachy. The diagnoses they used to establish the mental disease and defect were diagnoses that manifest in criminal and antisocial

conduct. And this contradicts Subsection (C) of the insanity statute.

Q: How -- and going to that, tell us what Subsection (C) of the insanity statute is.

A: This section states, Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish a defense of insanity.

Q: Okay. And the basis of opinions by Dr. Thrasher -- we'll go into Dr. Thrasher first. Okay? What was the basis of his finding that Mr. Stanko was insane?

A: Well, the mental disease and defect that he rendered was antisocial personality disorder, psychopathic type.

Q: Okay. And that actual diagnosis will be contrary to Subsection (C), correct?

A: Correct. If you look at the diagnostic criteria for that diagnosis in the DSM, the Diagnostic and Statistical Manual, the criteria for that disorder laid out is clearly comprised of criteria that manifest in criminal and antisocial conduct.

Q: What are the criteria for antisocial personality disorder under the DSM-IV?

A: So, the essential criteria is that the individual has a pervasive disregard for social norms and violates social norms, they repeatedly perform acts that are grounds for arrest. And in addition to that, deceitfulness, use of

aliases, conning others, aggression often resulting in fighting or threatening behaviors, impulsivity, recklessness, particularly putting other people's lives at risk with their recklessness, irresponsibility, failing to hold a job, failing to meet financial obligations, failing to pay child support, those sorts of things, and a lack of remorse, being indifferent to others feelings and even if they've done something wrong to that person. In addition to that, the -- you must meet the criteria for conduct disorder prior to age fifteen. And conduct disorder means that as a youth, the individual was aggressive to people, to animals, committing acts of vandalism, fire setting, all of those sorts of antisocial behaviors.

Q: And the -- any of those factors or any of those criteria for antisocial personality disorder would basically be established through antisocial behavior, correct?

A: Correct. It's -- all of those things manifest in antisocial and criminal conduct.

Q: Okay. So, Dr. Thrasher diagnosed Mr. Stanko with a disorder that only manifested in antisocial or criminal behavior?

A: Correct.

Q: Now, moving to Dr. Sachy's opinion, what did Dr. Sachy diagnose Mr. Stanko with?

A: So, Dr. Sachy used the diagnosis of psychopathy.

Q: And what is the diagnosis of psychopathy?
A: Psychopathy is not a recognized diagnosis per se. It's not in the DSM, the book that we use to diagnose. It's a clinical construct, it's very closely related to antisocial personality disorder. It has all of the characteristics of antisocial personality disorder in addition to personality traits of strong traits of manipulation, use of deceit, superficial charm, a glib nature, all of these things in combination with the antisocial behaviors manifest in criminal or antisocial conduct.
Q: And with the clinical construct of psychopathy, would there be anything that would manifest in a non-antisocial or criminal way?
A: You could have a trait here or there but you wouldn't meet the criteria for psychopathy.
Q: Okay.
A: So, you have to have the antisocial and criminal conduct in order to meet the full criteria.
Q: Okay. How do you or how would a forensic psychologist or psychiatrist create the clinical construct of psychopathy? I mean, what goes into that?
A: Well, the gold standard assessment in the field is something called a PCLR, Psychopathy Checklist Revised. This is a measure that has been heavily researched and validated and the examiner would administer this measure, it's comprised

of a very detailed interview and record review. And then all of that data is scored on the PCLR and a number is derived. Anything thirty or over is considered to be in the psychopathic range.

Q: Now, did it appear that Dr. Sachy actually went through that checklist?

A: It does not, no.

Q: Did it appear that he went through any checklist?

A: In his notes, his handwritten notes, there's a reference to the PCLR and he has written out some of the criteria but there's no indication that he scored that criteria that he derived at a score of psychopathy in Mr. Stanko.

Q: What evidence did he use to support his finding that Mr. Stanko was a psychopath?

A: Well, if we look at his testimony, he describes the concept of psychopathy in criminal and antisocial -- in a criminal and antisocial light. I mean, he -- I can go through some of his quotes if you like.

Q: Yeah, if you wouldn't mind.

A: So, first of all, in his testimony he states that Mr. Stanko's behavior absolutely consistent with the diagnosis of psychopathy so that we know he's using that diagnostic construct. His behaviors are very typical of the psychopath. Mr. Stanko is a psychopath, I'm a hundred percent certain of that. And then he uses descriptors throughout his testimony

to define psychopathy that there's a seventy to eighty percent chance of committing a violent act, increased chance, lack of significant remorse or guilt, conning, pathological lying, manipulative behavior without remorse or guilt. The ability to keep hurting people and abusing people without, let's say, batting an eye ---

THE COURT: I don't mean to cut you short. But if she's just gonna read the report, why don't you just put the report in since it's gonna be proffered?

MR. SHAFFER: Your Honor, there's a couple of follow-up questions related to ---

THE COURT: Okay.

BY MR. SHAFFER:

Q: At one point, he even defines psychopathy or describes psychopathy as they are the Hannibal Lecters from *Silence of the Lambs*, they are the murderous psychopaths, they seem almost terrifying, they are evil or they are like evil, they are the devil. Is that -- would that be a clinical description of a psychopath or would that be ---

A: No.

Q: Would that be proper to rely on that definition of a psychopath for a forensic psychologist ---

A: No.

Q: --- or anyone conducting forensic exams?

A: No, that's extreme, using figures from movies and using --

comparing them to the devil is not a clinical definition.
Q: Okay. Now, do you find any -- you said that he didn't -- it did not appear that he actually used the psychopathy checklist, correct ---
A: Correct.
Q: --- or that he scored it?
A: Correct.
Q: Do you find any basis for his -- well, I withdraw that question. Did he cite any manifestation of a mental -- of a mental disease or defect from Mr. Stanko that would be anything other than antisocial or criminal behavior?
A: No.
MR. SHAFFER: Court's indulgence. I'm trying to check off and make sure everything I was going to ask is in the report.
BY MR. SHAFFER:
Q: Moving on to your second opinion, what was your second opinion?
A: My second opinion pertained to Dr. Thrasher and it was my opinion that he misapplied and misinterpreted the South Carolina insanity statute when he issued his opinion on insanity.
Q: And to do this -- before we actually get into his opinion, I would like you to explain what the process is for evaluating someone for criminal responsibility.

A: Well, there's essentially three prongs. The first is evaluating the individual to see if they have a mental disorder and that involves a detailed clinical interview, it involves looking at medical records, psychiatric records, talking to people that know the individual to see if there's any basis for a mental disorder. If there's not, the inquiry would stop there. If there is a mental disorder, then the second prong is, did that mental disorder have any connection to the actions related to the allegations? So, somebody can have schizophrenia and they commit a crime and the schizophrenia doesn't have any relationship to the crime. So, the second prong is evaluated through again a very detailed comprehensive interview of the individual regarding their acts, their behaviors, their emotions, their motivations around the time of the allegations looking at the discovery documents, talking to witnesses, talking to people that knew the individual at that time and considering their mental disorder with what that information shows. If there is a connection between the mental disorder and the allegations, the third prong is, do those findings adhere to the statute in which the examiner is practicing, whatever jurisdiction they practice in; is it statutorily acceptable?

Q: So, in every evaluation to some degree it requires the forensic psychologist or forensic psychiatrist to look at the applicable law in that state?

A: Yes.
Q: Okay. And essentially, what your job is to testify to the Court about the facts in the light of that underlying law, correct?
A: Yes. The findings from that three-prong inquiry.
Q: In South Carolina, what law do you have to adhere to for one of these evaluations?
A: That's the South Carolina insanity statute.
Q: Okay. And at first, you evaluate him under the insanity statute, correct?
A: Correct.
Q: Do you move forward from that point and evaluate him under GBMI, do you ever consider GBMI?
A: So, if you work under a court order, the Court orders a criminal responsibility evaluation, their called Criminal Responsibility and Capacity to Conform evaluations, but only if the examiner believes that the defendant is sane or is criminally responsible, then they go on to conduct the Capacity to Conform Evaluation for guilty but mentally ill.
Q: Okay. And going back to Opinion 2, could you restate Opinion 2?
A: So, Opinion 2 deals with Dr. Thrasher and his opinion on insanity. It appears that he misapplied and misinterpreted the insanity statute because he provided an opinion on insanity where he believed Mr. Stanko to meet the insanity

statute and then he also opined on the -- Mr. Stanko's lack of capacity to conform which goes to the guilty but mentally ill statute. And those directly contradict one another, you wouldn't apply them both if the first opinion is insane.

Q: Okay. So, to some degree, Dr. Thrasher appears to be evaluating him under both, not guilty by reason of insanity and guilty but mentally ill?

A: Right. He -- he issued an opinion on insanity, he believed Mr. Stanko to be insane, then he issued an opinion on capacity to conform and the language in the capacity to conform statute states that the defendant had the capacity to distinguish right from wrong.

Q: Okay.

A: And if you've already said somebody is insane, that means you believe they don't have the capacity to distinguish right from wrong.

Q: So, these two are mutually exclusive, correct?

A: Yes.

Q: Okay. So, GBMI, the findings you would make from GBMI are mutually exclusive from the findings you'd make for not guilty by reason of insanity?

A: Right. You would only opine on guilty but mentally ill or capacity to conform if your opinion is that the defendant is sane or criminally responsible.

Q: Okay. And the capacity to conform, to your knowledge does

that have anything to do or should that be taken into account when evaluating somebody for insanity?
A: If -- if the person is criminally responsible in my opinion, then I would evaluate their lack of capacity to conform their conduct.
Q: Okay. But you wouldn't actually use that for support to say that they were insane or not?
A: No, they are different standards.
Q: Okay. Now, looking at Dr. Thrasher's testimony, did it appear that he was conflating those two standards?
A: Correct. So, during his testimony, he provided -- when he gave his opinion on sanity or insanity, he provided the insanity statute and within the same sentence he also stated as a result of those defects, he was not able to conform his behavior to the requirements of the law using that ability or lack of ability to conform to support the finding on insanity.
Q: All right. So, he used the lack of ability to conform to support his finding for insanity?
A: Correct.
Q: And that's not -- that would not be appropriate in your field, correct?
A: Right. That standard goes towards a guilty but mentally ill finding.
Q: Okay. Now, moving to Opinion 3. Tell us about Opinion 3, if you don't mind.

A: Opinion 3 deals with both experts, Dr. Sachy and Dr. Thrasher that in their reports and in their testimony they appear to be using a volitional impairment standard to support their opinion on insanity versus the cognitive standard that's in place in South Carolina.
Q: Tell us what volitional impairment standard means in layman's terms.
A: So, that just means that somebody is having difficulty controlling their behavior due to a mental disease or defect.
Q: Okay. And this lack of control, is that evidence of insanity or would it be considered by you to be evidence of insanity?
A: No, that may be evidence that the person lacked capacity to conform ---
Q: Which would be GBMI?
A: Which would be GBMI but it doesn't go into the opinion on insanity.
Q: But they used it to support their opinion?
A: It appears so from their reasoning they provided in their report and their testimony.
Q: Okay. And could you go through that reasoning and as it relates to Dr. Thrasher's testimony?
A: In Dr. Thrasher's testimony, he -- so, he continually cited difficulty controlling behavior. He stated that when asked to opine on insanity, he cited that Mr. Stanko had an

area of brain dysfunction that's involved in the controls that human beings have over how they behave. He -- in consideration of a prior offense, he responded that Mr. Stanko was able to restrain himself and therefore did not cross the boundary into insanity in that prior offense. This implicates the lack of behavioral restraint and control as defining insanity. He also stated that Mr. Stanko didn't have -- didn't do anything to restrain himself, he was insane and he said that, a couple of times, I believe, in a different place Dr. Thrasher said he had no control over what he was doing, he was insane, he had no control over it. So, he's confusing the standard for capacity to conform to support his opinion on insanity. In addition to that, in his testimony or his report, he didn't provide an analysis of how he believed Mr. Stanko's behavior was right or wrong or how he believe Mr. Stanko lacked capacity to determine right or wrong at the time of the offense. He relied on what he perceived as Mr. Stanko's lack of control of his behavior.

Q: So, he was relying on factual findings or findings by him related to lack of control to support his theory for insanity?

A: Yes.

Q: Or to support his conclusion which was the cognitive tests, the inability to understand right from wrong?

A: Yes.

Q: Did you find the same thing with Dr. Sachy?

A: Yes.
Q: Regarding Dr. Sachy's testimony, could you specifically tell us why you made that finding or why you have that opinion concerning Dr. Sachy's testimony?
A: So, in Dr. Sachy's testimony, you find the same kind of language in explaining insanity. He speaks in terms of the behavioral discontrol that Mr. Stanko is impulsive, prone to outbursts of anger and violence. He stated from a legal perspective insanity is an inappropriate dysfunctional behavior. In another place, he states that under the right circumstances you lost it and you can't control it and you become insane, again implicating this lack of control as equaling insanity. He talks in different places about impulses again, controlling behavior, violent impulses. He has a -- he makes a point to say what you call insanity, I call extreme behavioral discontrol. He -- Mr. Stanko crosses the line into insanity when his violent aggressive impulses gain complete dominance of his brain.
Q: So, Sachy actually says, what I'm referring to his insanity is complete lack of control.
A: He does.
Q: Okay. So, the factual findings made by Dr. Sachy support that he might have a volitional impairment, a control impairment?
A: Yes.

Q: And to your understanding, that would not be -- that would not be evidence of insanity under South Carolina law?
A: Not per statute.
MR. SHAFFER: Court's indulgence?
THE COURT: Yes, sir.
MR. SHAFFER: No further questions.
THE COURT: Mr. Mabry?
MR. MABRY: Briefly.
PROFFER CROSS EXAMINATION OF SUSAN C. KNIGHT BY MR. MABRY:
Q: Dr. Knight, let's make something clear first, where did you go to medical school?
A: I did not go to medical school.
Q: Okay. And you are not a psychiatrist, are you?
A: I am not.
Q: But you're here today to criticize the two psychiatrists that testified for Mr. Stanko in his trial; isn't that correct?
A: I wasn't asked to criticize them.
Q: But that's what you've done here today, isn't it?
A: I'm reviewing their findings.
Q: Would you -- are you telling this Court or this -- into this record, you are not here criticizing the two psychiatrists that testified in this case?
A: I was not asked to criticize them.
Q: But that's what you're doing, isn't it?

A: I don't -- I'm reviewing their findings per statute.
Q: Are you criticizing their testimony or not? This is the third time I've asked you that question.
A: I am reviewing their findings.
Q: Have you criticized their testimony in this trial today?
MR. SHAFFER: Objection, Your Honor. Asked and answered.
MR. MABRY: She's not answered the question.
THE COURT: She hasn't answered the question.
A: No, I'm not criticizing their findings.
Q: Can you prescribe medication ---
A: No.
Q: --- to a psychiatric patient?
A: No.
Q: That's because you're not a medical doctor?
A: That's correct.
Q: You have a PhD in psychology?
A: Yes.
Q: And you said you worked at Cornell, where exactly do you work at Cornell University?
A: I am adjunct faculty at the law school. I teach in the Capital Case Clinic.
Q: Okay. Well, you didn't mention that on direct, you said you taught at Cornell University. You actually teach at Cornell Law School, don't you?
A: Correct.

Q: In the Capital Litigation Death Penalty Resource Project Section; is that correct?
A: It's the Capital Case Clinic.
Q: Okay. And that's run by John Bloom?
A: Yes.
Q: Professor Bloom who has also a capital PCR attorney in numerous cases here in South Carolina; isn't that correct?
A: He is, yes.
Q: Did he get you that job at Cornell Law School or have anything to do with getting you that job?
A: I believe he approached me about teaching psychology to the law students.
Q: Now, in this case, you were contacted by another capital PCR attorney. Which one of these gentlemen contacted you?
A: Tristan Shaffer.
Q: Okay. And the materials that you reviewed for your opinion or report that you issued in this case, were they provided to you by him?
A: Yes. Yes, his office.
Q: Exactly what did he provide to you and what did you review?
A: He provided me the record on appeal, record of appeal, the evaluation reports from Dr. Sachy, Dr. Thrasher and Dr. Crawford. He provided reports from additional experts, Dr. Gur, Dr. Wu, Dr. Einhorn. And then additional documents from

their various files, Dr. Sachy's handwritten notes, his CV, and within that file was various articles, literature clippings and case documents.

Q: Did he send you the entire record on appeal or was it just selected testimony of certain witnesses?

A: The entire record.

Q: And tell me which part of the record, all of it, what did you exactly review in rendering your opinion?

A: I reviewed the entire record of the guilt phase, did not review the penalty phase.

Q: So, you did not even review any of the testimony that occurred in the penalty phase from fact witnesses or experts?

A: Not in the penalty phase.

Q: All right. Did you review the PET scans that were done on Mr. Stanko?

A: No.

Q: Did you review the MRI scans that were done on Mr. Stanko?

A: No.

Q: Was there not testimony in this trial from Dr. -- did you review Dr. Wu's testimony?

A: I did.

Q: And was there not testimony in this trial that Dr. Wu found a malformed frontal lobe, certain section of Mr. Stanko's brain?

A: He testified to that effect, yes.

Q: All right. And isn't it true the statute that you referred to says evidence 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? Section (C) of the statute.
A: Correct.
Q: Okay. And in this case, that wasn't the only testimony in this case. You actually had a neuroradiologist that said there was some malformed function of Mr. Stanko's brain?
A: Correct.
Q: And also there was testimony regarding Dr. Gur's findings reviewing the MRIs, finding that there was some malformation or damage to Mr. Stanko's brain?
A: Yes, there was that testimony as well.
Q: All right. Is it your testimony, you agree with Dr. Crawford's assessment in this case?
A: What do you mean?
Q: Well, you read her testimony, do you agree with her assessment in this case, the State's doctor?
A: Do I agree with her opinion on insanity, is that ---
Q: Correct.
A: I didn't do my own criminal responsibility evaluation, so I can't arrive at an opinion on insanity or not.
Q: All right. And isn't it true that Judge Jefferson actually instructed the jury on the defense of insanity at the

end of the guilt phase?
A: I believe so.
Q: She also instructed the jury on guilty but mentally ill?
A: Yes.
Q: Now, did you see any evidence in the reviewing the transcript that Mr. Stanko was not competent to stand trial?
A: I did not.
Q: And if someone can't tell the difference between right and wrong, it would be impossible for them to conform their conduct to the requirements of the law, wouldn't it?
A: If you're talking about -- I suppose with a criminal act.
Q: Correct. If you -- if I -- if you cannot differentiate right from wrong or legal right from wrong, how can you conform your conduct to the requirements of the law? If you're insane, you cannot conform your conduct to the requirements of the law, can you?
A: Well, if you're insane, it means you didn't know the difference between right and wrong.
Q: Right, moral or legal right from moral or legal wrong.
A: Correct.
Q: So, you cannot conform your conduct to the requirements of the law, can you?
A: I suppose it -- it depends on if you act on that, that you don't know right from wrong.
Q: At the time of an act, you don't know the difference

between right and wrong, you could not conform your conduct to the requirements of the law, could you, cause you don't know what's right and what's wrong or what's legally right or legally wrong?

A: Well, capacity to conform is based in volition. You may not have a volitional impairment even though you have the cognitive impairment of not knowing right from wrong.

Q: So, it's your testimony here today that a person who is insane can conform their conduct to the requirements of the law?

A: It depends on the circumstances of the case.

Q: That's your testimony?

A: Yes.

MR. MABRY: No further questions.

THE COURT: Any redirect?

MR. SHAFFER: Your Honor, just ---

THE COURT: Based upon his cross.

PROFFER REDIRECT TESTIMONY OF SUSAN C. KNIGHT BY MR. SHAFFER:

Q: Despite the fact that you might not be a licensed -- licensed as a medical doctor, do you help train medical doctors in forensic psychology or forensic -- do you help train forensic psychiatrists in doing competency evaluations for criminal responsibility evaluations?

A: Yes. So, at the Medical University, I worked in the division of forensic psychiatry. Forensic psychiatrists were

trained in that division and I routinely supervised them and trained them in criminal responsibility evaluations, provided their lectures on criminal responsibility because the evaluation components are the same regardless of if you're a forensic psychologist or forensic psychiatrist, they are conducted in the same manner.

Q: Okay. So, despite not being a medical doctor, do you feel that you are capable of giving an opinion on how a forensic psychiatrist would conduct a criminal responsibility examination in South Carolina?

A: Correct. The South Carolina Department of Mental Health uses them, psychologists and psychiatrists, interchangeably.

Q: Okay. Now, the term manifests, does that mean outward showing?

A: Yes.

Q: Tend to mean an outward showing?

A: Yes.

Q: So, if I have a hidden brain defect that would be detected on a complex PET scan, by running the data through a statistical model, would that necessarily be a manifestation or would you view that as a manifestation of a mental illness?

A: No.

Q: Okay. Now, Mr. Mabry asked you about if you didn't know the difference between right and wrong and whether you could conform your actions to the standard of the law, I guess I'm

going to ask you sort of the inverse of that question. Just because I can't control myself, does that mean that I don't know the difference between right and wrong?

A: No.

MR. SHAFFER: No further questions.

THE COURT: Any cross?

MR. MABRY: Just briefly.

PROFFER RECROSS EXAMINATION OF SUSAN C. WHITE BY MR. MABRY:

Q: Tell me how a person who cannot tell the difference between moral or legal right and moral and legal wrong can control -- can conform their conducts to the requirement -- conduct to the requirements of the law?

A: One is a cognitive standard and one is a volitional standard. Cognitive impairment versus a volitional impairment.

Q: I understand the difference but I'm asking you, how can an insane person conform their conduct to the requirements of the law? A person who is actually insane, how can they conform their conduct to the requirements of the law?

A: If because they don't know right from wrong, they have a volitional impairment and they act on that, then what you're saying may be true but not everybody that doesn't know right from wrong has a volitional impairment.

Q: In 2006, you were not even performing competency evaluations, were you?

A: Yes.
Q: I thought you said in 2008 is when you began ---
A: I began performing forensic evaluations in 2003. I began in South Carolina in 2008.
Q: Okay. 2008 in South Carolina?
A: Correct.
Q: Were you consulted by trial counsel in this case?
A: No.
Q: In 2006.
A: No.

MR. MABRY: That's all I have.

THE COURT: All right. Thank you. You may step down.

Y'all want to take a break before we call -- before y'all call Dr. Thrasher?

MR. AXELROD: May I do one little housekeeping measure?

THE COURT: Yes, sir.

MR. AXELROD: We had to go to great lengths to get Mr. Stanko's file here in case we needed it for some reason.

THE COURT: Y'all need it in here?

MR. AXELROD: No. No, if the Court would please for a second. I tried to get it and I got yelled at that I wasn't allowed to touch the file and I'm not gonna touch the file. So, we had to go -- Mr. Skidmore had to go down to Liber and get Mr. Stanko to sign a release and Mr. Skidmore had to go up to the Supreme Court and had to have the people that have Mr.

Diggs files under lock and key, they gave it to Mr. Skidmore. Now, Mr. Skidmore brought it down here. The file is actually Stephen's. Stephen owns the file; it's his file. If he wasn't in jail, if he an auto accident, Mr. Diggs can go up to Columbia sign it and get his file. Mr. Stanko wants his file. I'm not allowed to touch the file. The Supreme Court doesn't want the file back, Mr. Skidmore doesn't want the file. I would just ask the Court, the Clerk took control of the file yesterday. Can we leave the file in the control of the Court? The file has become a red-headed stepchild now. Mr. Stanko won't be allowed to take it into his cell because it has staples and pins and all that kind of stuff. And it's just a housekeeping ---

THE COURT: It's become a white elephant, hasn't it?

MR. AXELROD: Yeah, yeah, about eight boxes of it. But he told me this morning he wants his file and I'm just thinking, can it stay here and then -- because I'm not allowed to touch it.

THE COURT: Well, maybe I just need to contact the -- I mean, the Clerk of Court may not want to have responsibility once this trial is over with. Where were they before the trial ---

MR. AXELROD: I'm explain to the Court, they were in the shred bin. We got them pulled out of the shred bin. The Supreme Court was gonna shred them. So, they don't want them.

Nobody wants them except Mr. Stanko and he's entitled to them.

THE COURT: Well, I mean, there's a limit to that. I mean, because he can't have them in his cell, then there's a problem. I'll contact Court Administration and see what they would say we need to do with them. I understand why you would want to keep them while this is ongoing and ---

MR. AXELROD: Correct.

THE COURT: And I mean, it's a ---

MR. MABRY: I don't have -- I mean, as long as it -- I don't have a problem with returning the file to Mr. Stanko when this proceeding and everything is over with.

THE COURT: I mean, this is also effective -- is this somewhat effective of the other PCR if there's anything in that ---

MR. MABRY: Yes.

THE COURT: I mean, that's -- and I'll talk with Judge Culbertson and talk with Court Administration as to what we need to do with the file.

MR. AXELROD: And because if for some reason we send it back to the Supreme Court, I think the Court needs to -- this Court needs to put something to the Supreme Court saying do not shred.

THE COURT: Right.

MR. MABRY: We agree with that.

THE COURT: I -- that's easy, yeah.

MR. AXELROD: Because if that's to occur, then Mr. Skidmore would have to come back again and do that.

THE COURT: I'll contact Court Administration and I'll have an answer in a little while.

MR. AXELROD: Okay. And also, my funding that the Court signed for me today will carry me through now.

THE COURT: Okay.

MR. AXELROD: When we go to the point of having -- if I have to start to prepare for the order, they'll be another funding order to the Court.

THE COURT: Certainly.

MR. AXELROD: Okay. Thank you.

MR. FREDERICK: Judge, I said I would bring the motion for funding ---

THE COURT: Oh, yeah.

MR. FREDERICK: Just to put in the record. This is actually the motion to reconsider funding. It's -- if that's okay with the Court? It's for the expert from Harvard that would have ---

THE COURT: Right, that I denied the $25,000 for?

MR. FREDERICK: Yes, sir, that would've given an opinion on Pamela Crawford's ethics of her doing the evaluation ---

THE COURT: Okay. Do you need for me to sign that order?

MR. FREDERICK: No, it's just a motion to put on the record if that's okay?

THE COURT: All right. Certainly.

MR. FREDERICK: You can make it a Defense Exhibit or Applicant's Exhibit, however we say that.

THE COURT: That would be Number Nine?

COURT REPORTER: Ten.

THE COURT: Ten. I'm always off one.

MR. FREDERICK: Without -- Mr. Mabry?

THE COURT: Mr. Mabry, any objection to their motion ---

MR. FREDERICK: Without objection just to put in the record?

MR. MABRY: No, I didn't -- I didn't look at it carefully.

THE COURT: Denied the funding for the Harvard expert.

MR. MABRY: Yeah, I don't have a problem with that.

THE COURT: Okay. That's Number Ten.

MR. FREDERICK: Okay. Thank you, Judge.

THE COURT: All right.

APPLICANT'S EXHIBIT NUMBER TEN

ADMITTED INTO EVIDENCE

MR. MABRY: We could take a break, Judge.

THE COURT: Why don't we take a ten-minute break before Dr. Thrasher.

(RECESS - 11:01 A.M.)

*******OFF THE RECORD*******

**(On the Record - 11:12 A.M.)**

THE COURT: All right. You may call your next witness.

MR. AXELROD: We'd call Dr. Thrasher.

JAMES W. THRASHER, HAVING BEEN DULY SWORN, TESTIFIES AS FOLLOWS:

THE COURT: All right. Please have a seat. Once you're comfortably seated, please state your full name for the record.

DR. TRASHER: My name is James Winfield Thrasher, Jr.

MR. AXELROD: Thank you, Your Honor.

THE COURT: That's the first witness who has done it right. Spoke right into the microphone.

MR. AXELROD: Yes, sir.

DIRECT EXAMINATION OF JAMES W. THRASHER, JR. BY MR. AXELROD:

Q: Dr. Thrasher, I took the liberty, I just poured you some nice cold water.

A: Thank you.

Q: They gave me water duties yesterday. Doctor, it's good to see you, sir. When was the last time we saw each other?

A: Several years ago, I think.

Q: Was my hair black?

A: I don't recall. I didn't have any back then, though.

Q: How about mine?

A: I don't remember what your color was.

Q: Okay. You testified in -- there was two death penalty trials. The first trial, the Georgetown trial and then there

was the second trial, the Horry County trial, correct?
A: Correct.
Q: For my own dealing in this process or this PCR hearing, we're at a post-conviction relief hearing, I have referred to the first death penalty as Stanko I and I referred to the second one as Stanko II. Would that be acceptable for you if I use it that way?
A: Stanko I was the Ling?
Q: Yes, sir.
A: And Stanko II would be the Turner homicide?
Q: Yes, sir. Yes, sir, Doctor. Is that okay?
A: Yeah, sure.
Q: Because it just -- my mind, I've been on the PCR, which is the post-conviction relief, for only Stanko I. Did you testify in Stanko II PCR?
A: No, I did not.
Q: Did you testify in the Stanko II trial? Did you testify in the trial of Henry Turner in Horry County, if you remember?
A: I don't recall doing that, no.
Q: All right. I'd like -- (Confers with Mr. Mabry.)
MR. MABRY: No objection.
MR. AXELROD: I'd like to admit this as Applicant's Number Eleven.
THE COURT: Number Eleven. It's without objection.

APPLICANT'S EXHIBIT NUMBER ELEVEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: I know it's been a long time ago, how old are you, sir?

A: I'll be seventy-nine in June.

Q: God bless you. You're Gemini. I'm a Gemini. I'm going to let you look at -- I'm gonna let you look -- this is what is your Defense Indigents voucher. I'm gonna let you look at it. And I'll let you look at it all but I'm referring to the last page. So, take your time because there's absolutely no rush today. May I look at it with you? It's the only one I have. On the fourth page, on the fourth page, we have a -- we have a bill dated December 29, 2009 sent to Attorney Mr. William Isaac Diggs.

A: Uh-huh (affirmative response).

Q: Concerning Stephen Stanko.

A: Uh-huh (affirmative response).

Q: And it has -- let me ask you question. Do you remember when Stanko I's trial was?

A: I don't remember the date. It was eight or nine years ago.

Q: Would it be fair to say that the trial occurred in 2006?

A: I ---

Q: Would that make sense, do you remember? Do you remember when you were hired?

A: No, I really don't.

Q: Let's go back to -- and I understand and I can't remember what I had for breakfast yesterday. Let me let you look at the first page because the first page kind of gives us -- kind of gives us -- I'll let you look at it, what you did and when you were hired. You can look at the timeframe and then we'll establish the year of the trial.

A: All right.

Q: Would it be fair to say that the Stanko I trial was approximately the end of July 2006?

A: Yes, it would appear so.

Q: Okay. And it continued for maybe two weeks in August?

A: It may have.

Q: Okay. Let me go back to Page 4. Now, on Page 4, can you read into -- tell me what this bill -- what's it's comprised of? Let's read into the record what -- is this a bill for services?

A: Professional expert testimony.

Q: Okay. And what's the date of the bill?

A: December 20th, 2009.

Q: And tell us the entry dates, starting with the first one, or let's read, Dear Bill -- let's read the whole letter.

A: Dear Bill, I'm submitting my bill for professional and expert testimony in Stephen C. Stanko case, capital murder case, November 7th, 2009. Meeting at defense attorney's office to discuss testimony.

Q: Okay. Let me interrupt for one second.
A: Uh-huh (affirmative response).
Q: Would that be fair to say that this would not be Stanko I at this point?
A: Correct.
Q: Okay. This would be Stanko II?
A: Correct. Next line, November 14th ---
MR. MABRY: Excuse me. I'm gonna object at this point. This bill is about the second trial that occurred ---
THE COURT: What's your purpose?
MR. MABRY: --- two or three years later. I don't understand ---
MR. AXELROD: I have reason for the question.
THE COURT: That's what I asked. What's your reason?
MR. AXELROD: Because I'm gonna ask him why he didn't testify in the guilt phase of this trial.
MR. MABRY: Of the second trial?
MR. AXELROD: Yes.
THE COURT: That's not this case.
MR. AXELROD: But I'm gonna ask him why he didn't testify in the second in the guilt phase and then I'm gonna -- in the first PCR they brought in tremendous amount of stuff about Stanko I to Stanko II. I'm asking why he was hired by Mr. Diggs and why he did not testify in the guilt phase and I think it's pertinent to where I'm going with Stanko I. I'm

starting there and I'm coming back.

THE COURT: I'll give you a little leeway.

MR. MABRY: Yes, sir.

BY MR. AXELROD:

A: I'd started on the second one November 14th, 2009, testimony for the first phase of trial and waiting and travel time. November 18th, 2009, travel time and waiting time. November 19th, that's November 19th, testimony, second phase of trial, waiting time and travel time. And next line is reviewing the documents and testimony from the first trial and research on this case.

Q: Okay. You state in your bill that you testified in the second phase of Stanko II, the penalty phase of the second trial.

A: Yeah.

Q: But on your bill, you didn't testify in the guilt phase?

A: No, I didn't bill for the time, no.

Q: Did Mr. Diggs ask you to testify in the guilt phase?

A: I don't recall. I don't remember.

MR. AXELROD: Court's indulgence one second, Your Honor.

THE COURT: Yes, sir.

BY MR. AXELROD:

Q: Do you know if you opined to Mr. Diggs that Stephen was insane for the second trial?

A: I did not.

Q: Did you opine that he was not insane?
A: That's true.
Q: Why did you feel he was not insane at the second trial?
A: Mr. Diggs had Mr. Stanko go over the details, his side of the story for the Turner case. And he told me a story where he got into a fight with -- he'd gone there to tell Turner what he had done to Ling and her daughter and they got into a fight, a gun was proffered by somebody, I don't remember who it was, and they struggled over the gun and they fell on the floor and the gun went off. Well, as it turns out, the gun went off through a pillow and -- in Turner's autopsy. And from Turner's autopsy, they found pillow stuffing and ticking in the body of the decedent. And it didn't match what he had told me at all.
Q: So, Stephen lied to you?
A: It appeared that way.
Q: Do people with antisocial personality disorder lie?
A: Yes.
Q: Now, based on his ---
A: Well, they can and they do, yes. In general, do every single one of them do that, I don't know.
Q: But you diagnosed Stephen with antisocial personality disorder?
A: I don't think I presented that diagnosis on any of the reports here.

Q: One second.

MR. MABRY: No objection.

MR. AXELROD: Twelve, Your Honor.

THE COURT: All right. Applicant's Exhibit Number Twelve is admitted without objection.

APPLICANT'S EXHIBIT NUMBER TWELVE

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: Doctor, I'm gonna hand you your report that you wrote in 2006 for Stanko I. Take your time and review it, there's no rush. I know it's been almost a decade, sir, since we've done this.

A: Yes.

Q: Take your time.

A: Yes.

MR. AXELROD: Now, I'm not sure the State would have an objection, but at this time, I'd like to have Dr. Thrasher qualified as an expert in forensic psychiatry. I just want to make sure ---

MR. MABRY: No objection.

THE COURT: Without objection.

MR. AXELROD: So, that way I won't have to go through everything ---

MR. MABRY: He's already qualified.

THE COURT: He's already been qualified in the other

trials.

MR. MABRY: In the trial.

A: I haven't been called as an expert witness.

BY MR. AXELROD:

Q: When?

A: Here today.

Q: No, you're just called as a witness but sometimes when -- why I said that, Doctor, was that we're gonna go to the report so I just wanted to make sure that you are that expert because you're gonna be talking about a medical report that happens to be your own.

My last question to you was, Did you diagnose Stephen with antisocial personality disorder?

A: Yes, I did.

Q: Okay. Do people with antisocial personality disorder, is one of the traits lying?

A: Could be.

Q: Okay. Would it be fair to say that after you found out the truth of the matter, you decided that there might have been premeditation in Stanko II?

A: Well, let's -- yeah, that's on the list, yeah. That's one thing to be considered.

Q: What were the other things? Tell the Court today.

A: Well, it's -- the specifics of it, I don't recall exactly. That's the major thing that comes to my mind about that

incident.

Q: And if you don't remember anything else ---

A: I didn't match the story that he told, you know. Pure happenstance that a pillow was in the way when the gun went off, you know.

MR. AXELROD: Thirteen, Your Honor.

THE COURT: Without objection.

MR. MABRY: Without objection.

APPLICANT'S EXHIBIT NUMBER THIRTEEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: Dr. Thrasher, I'm gonna let you look at something for a minute and then I'm gonna ask you question about it. I'm just gonna let you look at it. It's titled the AAPL Practice Guideline for Forensic Psychiatric Evaluation of the Defendant's Raising the Insanity Defense?

A: Yes.

Q: You're well aware of this?

A: That report specifically, no.

Q: Do you belong to the AAPL, is that the American Association of Psychiatric Lawyers? Let's see what it's called. Court's indulgence.

THE COURT: Yes, sir.

A: It's the American Academy of Psychiatry in the Law.

Q: Bingo. You're not a ---

A: No.
Q: Were you ever ---
A: Yes, I was a member of that for how many years? Don't know. About forty? I don't know when I dropped that.
Q: I know you got some age. Here's my question. How long have you been a psychiatrist?
A: I've been in practice about fifty years.
Q: Okay. Now, before that, you were a lawyer before that or did you become a lawyer after a psychiatrist?
A: After.
Q: And you've let the license go from Temple?
A: It's inactive.
Q: It's inactive?
A: Yes.
Q: So, you still have a Pennsylvania license, just inactive?
A: Yes.
Q: Have you ever transferred to South Carolina at all?
A: No.
Q: But you've been a psychiatrist fifty years?
A: Yes.
Q: Did you join this like the first year?
A: Yes.
Q: And paid dues every year?
A: For a while, yes.
Q: Have you retired?

A: Not completely.
Q: In 2006, were you retired?
A: No.
Q: During Stanko I?
A: No.
Q: Were you retired in 2009 for Stanko II?
A: I sold my practice in 2008. So, I was in-between?
Q: Okay. Okay. When you were in practice, did you -- in 2006, were you a member of AAPL?
A: I do not believe I was.
Q: Okay. But you're aware of the organization?
A: Oh, yeah.
Q: And they present practice guidelines for forensic psychiatrists?
A: Yes.
Q: Is it kind of like a manual where you can like read stuff, what's going on, cutting edge, just stuff to look at?
A: It's a guideline, yeah.
Q: And the update them on some type of basis?
A: Usually.
Q: And I'm showing you -- this is 2002 supplement. And I'm not sure how often they do them but that's a 2002. I believe it was good reading material in 2006. Do you know how often they update the supplements?
A: I do not.

Q: Okay. I'll let you look at that for second. Do you recognize that as a guiding organization for your profession, the AAPL?
A: I recognize it as a useful, a useful piece of information for doing these sorts of evaluations.
Q: If the Council of the American Academy of Psychiatry in the Law adopted a practice guideline for forensic evaluation of defendants raising the insanity defense, would you disagree with that?
A: I'd be hard put to disagree with that.
Q: Would it fair -- let me ask you this, would a manual of that type, would it reflect the consensus among its members and experts that the principals and practices applicable to the conduct of insanity defense evaluations?
A: What?
Q: That was a long question. I'm gonna say it again. I'll break it up. Would a guideline such as that reflect a consensus among the members and experts about the principles and practices of that defense?
A: Yes.
Q: All right. Let me ask you this ---
MR. MABRY: Without objection.
THE COURT: It's gonna be Applicant's Exhibit Number Fourteen.

APPLICANT'S EXHIBIT NUMBER FOURTEEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: Doctor, I'm gonna let you review this. This is South Carolina Code Annotated 17-24-20, guilty but mentally ill. I'm gonna let you look at that and let you kind of read over it where you can refresh yourself.

MR. MABRY: No objection.

THE COURT: Fifteen without objection?

MR. MABRY: Yes, sir, I'm sorry. Without objection.

APPLICANT'S EXHBIIT NUMBER FIFTEEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: I'm gonna hand you what's been marked as Fifteen, this is the affirmative defense of -- I'll let you read that to refresh your memory.

Okay. When you first evaluated Stephen, did you determine that he was not guilty by reason of insanity in your mind or did you determine that it -- the facts likened themselves more to a guilty but mentally ill defense?

MR. MABRY: Say that again. What was the question?

Q: Did you -- when you first -- I think it was a good question.

THE COURT: Repeat it.

Q: When you met Stephen, was your -- did you ever entertain the thought when you met Stephen that he was guilty but

mentally ill?

A: Yes.

Q: Okay. And at some point, did that opinion change?

A: No.

MR. AXELROD: Court's indulgence. (REPORTER'S NOTE: Mr. Axelrod confers with co-counsel.)

Q: Is that pursuant to 17-20, the guilty but mentally ill statute?

A: I'm sorry?

Q: Is that -- is your opinion today pursuant to that 17-24-20, guilty but mentally ill, just put them side-by-side.

A: Well, back then it was, yeah.

Q: Okay. Court's indulgence once again.

THE COURT: Yes, sir.

Q: Did Mr. Diggs know that was your opinion?

A: Did he know? I assume he did.

Q: That's the questions I have at this time.

THE COURT: All right. Mr. Mabry?

CROSS EXAMINATION OF JAMES W. THRASHER, JR. BY MR. MABRY:

Q: Dr. Thrasher, good morning.

A: Good morning.

Q: My name is Anthony Mabry and I work for the Attorney General's office and I just have a few questions for you to kind of clear up some confusion. You testified -- we've been talking about two different trials, Stanko I and Stanko II.

A: Yes, sir.
Q: All right. And Stanko I, do you remember testifying in that case, the Ling case, here in Georgetown?
A: Yes, I do.
Q: And do you remember your testimony in that case was that Mr. Stanko was insane?
A: Well, I didn't testify to that terminology. I testified that he did not have the -- you know, the capacity in either sense, either aspect of that insanity plea.
Q: Okay. So, he didn't ---
A: That was not saying that he's insane.
Q: Okay. Your testimony -- okay, well, whatever the transcript shows your testimony is, that would be correct?
A: Yes.
Q: All right. And your testimony was in the Georgetown trial that he could not distinguish moral or legal right from moral or legal wrong?
A: At the time of the incident.
Q: The time of the Ling murder?
A: Yes.
Q: And you also said he couldn't conform his conduct to the requirements of the law?
A: Yes.
Q: All right. And the Turner murder was a completely different factual scenario from the Ling murder?

A: Yes, yes.
Q: It occurred the next day?
A: I think it did, yes.
Q: All right. And in that case, first, let's talk about the Ling murder, what Mr. Stanko told you about it. You met with him for the purpose of ---
A: He told me nothing about it.
Q: Okay. Well, I'm gonna ask you that. You met with him because you were retained as a forensic psychiatrist to render an opinion?
A: Yes.
Q: And what he told you about what happened that night in the residence with Laura Ling was for the purpose of you making a medical diagnosis?
A: Yes.
Q: All right. And he told you that they were sitting on the bed, and I'm going by your report, and she was being expressive with her arms and arm went up and hit a cigarette, knocked the cigarette next to his nose and burned him there.
A: Yes.
Q: And he did not remember anything after that?
A: No, sir.
Q: He woke up in the shower?
A: Yes.
Q: So, he blacked out?

A: Apparently.
Q: Apparently, okay. And after he came to, then he found this carnage that had occurred with Mrs. Ling and her daughter?
A: True.
Q: All right. That's what he told you?
A: Yes.
Q: And then he packed up his things and left and ended up going to Mr. Turner's residence?
A: He packed up his belonging and ---
Q: Drove to Horry County?
A: Drove Ms. Ling's car, I think ---
Q: Right, the Mustang.
A: --- to -- I don't know what kind of car it was, but he drove it to Turner's place in Horry County.
Q: All right. Now, when you talked to him about the Turner murder, he had a clear memory or what occurred, at least his version of what occurred in the Turner murder?
A: Indeed he did.
Q: All right. And his basic -- what he told you was there was a struggle over the gun and the gun hit the floor and went off?
A: Something to that effect.
Q: I may not be getting all the details right but had a clear memory of what happened?

A: Yes.
Q: And taking that, also what he told you and also looking at the forensic evidence in the case, Mr. Turner was actually shaving in front of a bathroom mirror.
A: Yes.
Q: And he was shot in the back through a pillow and he turned around and he was punched and fell to his knees and was shot again in the chest?
A: The punch and the second shot, I don't recall.
Q: Okay. And then Mr. Turner's keys were stolen from him and his truck was stolen by Mr. Stanko.
A: He drove off with Turner's truck, yes.
Q: And left Ms. Ling's Mustang at the Turner residence?
A: I ---
Q: Or Ms. Ling's car?
A: I suspect that's true, yes.
Q: All right. And in your -- you provided a report to Mr. Diggs in this case?
A: Yes.
Q: And your report is consistent with what you testified to in the Ling trial?
A: Yes.
Q: And your diagnosis was antisocial personality disorder:psychopathic type.
A: Yes.

Q: Okay. What -- tell me the difference, what does that mean, antipersonality disorder:psychopathic type?
A: Well, there are some that that they're classifiable into groups, you know, currently they classify them as violent of nonviolent. And psychopathic type would mean that he had the elements of psychopathy in a personality structure in his behavioral pattern.
Q: All right. And does your report also indicate that Mr. Stanko started life on the margin, the medical records indicate that he had evidence of central nervous system dysfunction that caused providers to believe he might not survive?
A: I don't know if I -- are you reading from my report there?
Q: Yeah, I'm reading from the summary section after your diagnosis.
A: Okay. Yeah, yeah.
Q: And that was based on his medical records -- his birth records and his mother's birth records?
A: Yes.
Q: They actually called the family in and told them the baby may not live.
A: Yeah.
Q: And they -- he had a poor Moro reflex and they thought there was some type of intracranial damage to Mr. Stanko?
A: Yes.

Q: And you relied on that as well in your -- rendering your opinion?
A: Yes.
Q: And then he had, according to your summary, he had a head injury where he was knocked unconscious in high school with a -- struck in the back of the head with a bottle and suffered a concussion?
A: Yes.
Q: And then you said he almost also may have had a contrecoup injury to the frontal lobe or maybe that's referring to the bodily injury, leading to further injury to that area of his brain?
A: Yes.
Q: Okay. And the part of his brain we're talking about is the frontal lobe of his brain?
A: Yes.
Q: All right. And there were PET scans and MRI scans done in this case that also -- at least according to those experts, Dr. Wu and Dr. Gur that there was a problem with Mr. Stanko's brain?
A: Yes.
Q: In fact, Dr. Wu testified Mr. Stanko had a malformed frontal lobe of the brain?
A: I don't -- I don't remember ---
Q: You don't remember exactly ---

A: I don't know if I heard his testimony per se but I don't remember that.
Q: Okay. And Axis III of your diagnosis, you said abnormal low function of the frontal lobes, particularly of the orbitofrontal areas?
A: Yes, sir.
Q: Right. And those are areas where people make moral distinctions between right and wrong; isn't that correct?
A: When they're properly functioning, that's their purpose, yes.
Q: Right. And he had abnormal -- at least according to your findings, abnormal low function of the frontal lobes?
A: Yes.
Q: Particularly the orbitofrontal areas?
A: Yes.
Q: And he also told you about other instance where he had supposedly blacked out?
A: I don't recall.
Q: Somebody, somebody -- a gay person touched him at a bar.
A: Yes, yes.
Q: And he blacked out and assaulted them?
A: Yes, true.
Q: And there was maybe another incident at the jail where something happened with another inmate?
A: Could be.

Q: Okay. And according to your report, you said at the time of the alleged offenses, Mr. Stanko was suffering from a mental disease, disorder or defect and he did not have the capacity to distinguish moral or legal right from wrong and to recognize the particular acts as morally or legally wrong?
A: True.
Q: And that's what you testified to before the jury?
A: Yes.
Q: In the Ling case?
A: Yes, sir.
Q: And you also put in -- found in your report, at the time of the alleged offenses, Mr. Stanko did not -- Mr. Stanko did have a mental disease -- excuse me -- a mental disorder, disease or defect and did not have sufficient capacity to conform his behavior to the requirements of the law.
A: Yes.
Q: And you also said, At the present time, Mr. Stanko does have a mental disorder, disease or defect but he is competent to stand trial?
A: True.
Q: There was no question about his competency?
A: For trial.
Q: Right.
A: Then those other two instances -- well, those other two descriptions you read all pertain to at the time of the

commission of the alleged crime.
Q: Against Ms. Ling and her daughter?
A: Yes.
Q: And Mr. Turner's murder, you did not have the opinion that he was insane at the time of that offense?
A: No.
Q: Right. And that's based on what he told you and the facts that you looked at?
A: Yes.
Q: And that's why you didn't testify in the guilt phase, in the Turner murder?
A: Well, I don't recall if I was -- I don't think I was asked to do that.
Q: Okay.
A: It wasn't that I refused to do it; I was not asked.
Q: Sure, I understand.
A: I wasn't asked to.
Q: Right. But you could not say he met the statutory definition of insanity in the Turner murder?
A: Not in my mind, he couldn't.
Q: Okay. Thank you, sir.
A: Yes, sir. Thank you.
THE COURT: Redirect.
REDIRECT EXAMINATION OF JAMES W. THRASHER, JR. BY AXELROD:
Q: Okay. Doctor, earlier I asked you in Stanko I, the Ling

murder, I said to you Stephen -- at the time of the Ling murder, was Stephen insane and your testimony earlier to me was that he was not insane?

MR. MABRY: Objection. That was not his testimony.

THE COURT: He didn't say he was not insane. He said ---

MR. AXELROD: Can we strike that?

THE COURT: You may.

BY MR. AXELROD:

Q: Your first testimony to me earlier was today that at the time of the Ling murder, Stephen was guilty but mentally ill.

MR. MABRY: I'm gonna object to that. I'm not sure that's what he said.

THE COURT: That's what he said.

MR. MABRY: Okay. Well, I thought he just said -- we were talking about the Turner murder and the Ling murder and I'm not sure which one -- the doctor knew which one he was talking about.

MR. AXELROD: I was -- can we read back.

THE COURT: Can we read that back?

COURT REPORTER: Give me just a second.

(REPORTER'S NOTE: At this time a portion of the record was played back for the Court.)

MR. MABRY: You said back then when you met him, it doesn't say which crime he's talking about. You just said back then when you first met Stephen, did you think he was

guilty but mentally ill and did that change. So, I think you need to clarify what ---

THE COURT: Yeah, I mean, well, you can cross him.

MR. MABRY: Yes, sir.

MR. AXELROD: I want to let the Clerk get caught up. Give her some ---

MR. MABRY: Sure. I'm sorry.

BY MR. AXELROD:

Q: All right. Doctor, and I'm sure not trying to confuse you, sir.

A: You're doing a good job of it.

Q: When you first met Stephen, when you first evaluated him back in 2006, did you think that he was guilty but mentally ill?

A: Well, that was certainly an option when I first met him. It was certainly one of the options that were available.

Q: Now, did the diagnosis change at some point and you decided that he was not guilty by reason of insanity?

A: No, I didn't change my diagnosis.

Q: So, he was guilty but mentally ill?

MR. MABRY: Objection, leading.

THE COURT: Sustained.

BY MR. AXELROD:

Q: Was he guilty but mentally ill in your mind?

A: He had a mental illness and he didn't have the proper

frame of mind to be able to control his behavior, yeah.
Q: So, on the volitional side, he was unable to control his actions?
A: True.
Q: That was true?
A: True, when he was committing the crime, yes.
Q: He couldn't control his action. Now, you testified on cross that he had abnormal low function of the frontal lobe?
A: Cross here today?
Q: Yes, sir.
A: Yes.
Q: That -- you told Mr. Mabry in testimony that during the trial, you determined that he had abnormal low function of the frontal lobe was your testimony.
A: Yeah.
Q: And how did you -- how did you base that -- what information did you use to base that opinion?
A: I met with the other experts on this case at the time we were doing the brain studies ---
Q: The PET scans?
A: Yes. I don't -- I don't perform those, I never did perform them. I knew about them and I had seen some of them, the results of some of them and it took some convincing and I spoke with those gentleman in great detail and they showed me evidence enough for me to, to understand that his supra

orbital prefrontal cortex was dysfunctional.
Q: Did you rely on that as part of your basis for your insanity?
A: Yes.
MR. AXELROD: Court's indulgence. I'm gonna refer Dr. Thrasher to what's been marked as Appellant's Thirteen and -- if I may, Your Honor, I'm gonna bracket a paragraph I would like him to read.
MR. MABRY: What is this?
THE COURT: It's already in evidence. This is the American ABA ---
MR. AXELROD: I'm gonna show him -- read a paragraph on this.
MR. MABRY: This is -- I have cross examined him and I didn't cross examine him about this, so it's not proper.
MR. AXELROD: He raised the issue of the PET scan ---
THE COURT: I'm gonna give him a little leeway on that, I mean, it's in evidence.
BY MR. AXELROD:
Q: I would like you read this one -- it's a small paragraph, just read this one paragraph into the record, please.
A: You want me to read it aloud?
Q: Yes, yes, please.
A: Brain imaging is one of the most rapidly developing areas of scientific research. Results from MRI, PET and SPECT scans

are attractive to attorneys as they seem to show concrete evidence of brain abnormalities. These can be quite persuasive to a jury. Currently imaging procedures may help confirm or establish a diagnosis of certain brain disorders but they do not provide any evidence that a defendant met either the cognitive or volitional prong of the insanity defense.

Q: So, basically the AAPL is telling you that you should consider that?

A: In their opinion, yes.

Q: Okay. And you value their opinion? You testified earlier that you did.

MR. MABRY: Objection, leading.

THE COURT: Sustained. You're back on direct.

MR. AXELROD: Okay.

BY MR. AXELROD:

Q: You testified earlier that you valued their opinion. Is that still your opinion?

A: The -- it's a guideline and it's useful information and it's worthy of consideration, that's for sure.

Q: Okay. Now, you diagnosed him with antisocial personality disorder.

A: True.

Q: Now, is that a basis for your decision to have insanity be Stephen's ---

A: Yes, it's part of the picture, yeah.
Q: Okay. Now, what was your understanding at the time of the trial, what was your understanding of the insanity defense, tell us. Did you read the statute?
A: Yes.
Q: Was it provided to you by Mr. Diggs?
A: I don't recall that.
Q: Okay.
A: I don't ---
Q: Did you have an offhand knowledge of the statute or should we find it again?
A: Well, I have an offhand knowledge of it, yeah, but there's a copy of it right there.
Q: What is your -- what do you believe the statute says to determine somebody not guilty by reason of insanity, what do you have to establish?
A: You have to establish whether they had the capacity to understand the difference between right and wrong and morally and legally.
Q: Okay. And is there anything else that you need to know about that statute?
A: Yeah, there's a ---
Q: The defendant has the burden of proving the defense of insanity by a preponderance of the evidence?
A: Preponderance of the evidence, yeah.

Q: Now, what I want to talk to you about is the third prong, the C prong, do you know that one?
A: You mean guilty but mentally ill?
Q: No. Read 17-24-10(C), can you just read that to the Court, the last one Subsection (C)?
A: Evidence of mental disease or defect that is manifested only by repeated criminal or other antisocial conduct that's not sufficient to establish the defense of insanity.
Q: And what does that mean to you?
A: Well, a person who is a habitual criminal or does habitual criminal acts does not prove that they're insane and that other antisocial conduct, which is common in antisocial personalities, is not sufficient to establish a defense of insanity.
Q: But in your, in your report under his mental disease, you listed antisocial personality disorder ---
A: And other things, yes.
Q: Just psychopathic type, no other things.
MR. MABRY: Let me ---
THE COURT: Sustained.
Q: What other things? Let's go back to your report.
A: Axis I diagnosis was deferred; Axis II was antisocial personality diagnosis; and Axis III, abnormal low function of the frontal lobes, particularly of the frontal -- orbital frontal area.

Q: Okay. Now, ---
A: Serious legal entanglements.
Q: Is that a mental disease, serious legal entanglements?
A: Well, at the time we were using a five Axis diagnostic display, yes, it is part of the Diagnostic Manual. So, they're all included.
Q: All right. Earlier, you testified to me, you testified to the Court, you testified -- you said that you used antisocial personality disorder as one of your factors in determining Stephen to be insane.
A: One of the factors, yeah.
Q: And I just read -- you just read the statute into the record that you're not allowed to use that.
A: Evidence of mental disease or defect that is manifested only by these things. The only means there could be other things.
Q: For the record, tell me the mental diseases and defects that Stephen had at the time of your psychological -- your psychiatric evaluation.
A: Antisocial personality disorder:psychopathic type, abnormal low function of the frontal lobe, particularly the orbital frontal areas, serious legal entanglements.
Q: And these are diseases? We'll do them one-by-one. Let's go one-by-one because I'm not here to -- let's do it -- antisocial personality disorder, you ---

A: That's a disease yes.
Q: But we've read you're not allowed to use it? Only if it's that one.
MR. MABRY: Objection, leading.
THE COURT: Sustained. If you want to testify, you can testify but I think he'd be better ---
MR. AXELROD: Okay.
BY MR. AXELROD:
Q: Is antisocial personality disorder a disease?
A: Yes.
Q: Is psychopath type a disease?
A: It's -- the first section of that, yes.
Q: It's a medical disease or antisocial personality disorder?
A: Yes.
Q: Is abnormal lobe -- function of the frontal lobes a mental disease?
A: In itself, no, it's not -- it's not a mental disease, it's a physical diagnosis.
Q: Okay. Serious legal entanglements, is that a mental disease?
A: No, it's -- in that five axis of distribution, they call for things like that to be added to it.
Q: How is the antisocial personality disorder manifested?
A: Oh, there are many -- there are many criteria in it to establish that diagnosis -- I can't list them off the top.

Q: Would failure to conform to social -- I'm sorry, strike that -- failure to conform to social norms with respect to lawful behaviors by repeatedly performing acts that are grounds for arrest. Would that be a form of ---
A: Sure, yes.
Q: Deceitfulness?
A: Yes.
Q: As indicated by lying, coning others for personal profit or pleasure?
A: Certainly.
Q: Impulsivity?
A: Yes.
Q: Failure to plan ahead?
A: Yes.
Q: Aggressiveness?
A: Could be, yes.
Q: Reckless disregard for safety of self or others?
A: True.
Q: Consistent irresponsibility as indicated by repeated failure to sustain consistent work behavior or honor financial obligations?
A: True.
Q: Lack of remorse?
A: Yes.
Q: As indicated by indifferent to or rationalizing having

hurt, mistreated or stolen from others?

A: Yes.

Q: Would it be fair to say that the criteria used for the diagnosis of antisocial personality disorder involves a manifestation of antisocial and/or criminal conduct?

MR. MABRY: Objection, leading.

THE COURT: Overruled.

A: Again.

BY MR. AXELROD:

Q: Does the criteria used for the diagnosis of antisocial personality disorder involve the manifestation of antisocial and/or criminal conduct?

A: Yes.

Q: Okay. What I'm gonna do is I'm gonna go through some of your testimony that was elicited in Stanko I in the guilt phase.

MR. MABRY: Objection. It's not proper reply. This is reply, he direct, I cross and now he's just wanting to go back through his testimony.

THE COURT: Sustained.

MR. AXELROD: Well, Your Honor, I would ask for a little latitude because when I stopped initially, I stopped initially -- I would ask the Court's indulgence here because I stopped -- Dr. Thrasher testified that we met Stephen -- and I said in the beginning when you met him, did you think that Stephen was

guilty but mentally ill when you evaluated him and he said, yes, and I stopped. I would ask the Court a little more latitude because I ---

THE COURT: I'm gonna give him a little more latitude as I will give you more latitude on cross examination.

MR. MABRY: Yes, sir. Thank you.

MR. AXELROD: Thank you, Your Honor, and I'm not gonna be long from here.

BY MR. AXELROD:

Q: What I'm gonna do is we're gonna call out the page, they're gonna stick it up on that little screen but I provided you a page, Doctor, to let you read from out loud because I know you had eye surgery and it's very hard -- nobody has been able to read that screen all week. Okay. I'd like to bring up Page 1498. And what I'm gonna do is -- let's close this up. What I'm gonna do is I'm gonna ask you -- Mr. Diggs asked you a question on Line 20, he asked you, Dr. Thrasher -- Mr. Diggs asked you, Dr. Thrasher, do you know Stephen Stanko? And your answer was -- if you could read ---

A: I've met the man, yes, I have, twice.

Q: And the question was, Do you have an opinion with respect to the issue of sanity at the time of the incident that we're here about in this particular case?

A: The answer was, Yes, I have.

Q: I'm gonna refer the Court to Page 1499. And on 1499, Mr.

Diggs asked you on the top line, What is that opinion?
A: Yes.
Q: And can you read into the record your opinion?
A: That Mr. Stanko did have a mental disease, defect or disorder at the time of the commitment of these incidents and that he was not able to, to, to -- appreciate the difference between moral or legal right or wrong and that he was not able -- as a result of those defects, he was not able to conform his behavior to the requirements of the law.
Q: Now, in a guilty but mentally ill, can you -- in Subsection (A), can you read that out loud?
A: Sure. A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A) but because of mental disease or defect, he lacked sufficient capacity to conform his conduct to the requirements of the law.
Q: So, in actuality, in your -- in your opinion, you're referring to a guilty but mentally ill opinion there?
MR. MABRY: Objection, that's not his testimony.
THE COURT: Sustained.
Q: Did you incorporate -- why did you feel the necessity to go to the volitional prong of guilty but mentally ill in your diagnosis of insanity?

A: Well, both aspects are involved, cognitive and volitional aspect are involved in an insanity defense.
Q: But in the insanity defense under 17-24-10, does it ever mention that he's not able to conform his behavior to the requirement of the law?
A: No.
Q: Okay. I'm gonna refer you to 1504 and on Line 6, well, let me go back to Line 4. On Line 4, Mr. Diggs is asking you what it was specifically you reviewed and when you reviewed it and why you reviewed it. And your answer was -- if I may, Your Honor, may I just read that to him?
THE COURT: Yes.
Q: Well, I asked for the available records and the reports concerning the case and you provided them for me here. Mr. Diggs said, Did we provide you everything that you asked for? And on Line 10, you said, Yes, and that list of things included reports and the actual CT discs that were of some imaging that had been done of Mr. Stanko. Is that correct?
A: True.
Q: And you used them in your diagnosis?
A: Uh-huh (affirmative response). I used them in formulating it, yes.
Q: And in Line 22, Mr. Diggs asked you in Line 19, As a result of review of those materials including those discs, those PET scans and MRIs, what impact did that have on your

ultimate opinion in this case? And on Line 22, can you read that into the record?

A: Yes, sir. Well, rather significant because it, it turns out that Mr. Stanko has abnormal dysfunction of a critical area of his brain and that area is involved in the controls that human beings have over how they behave.

Q: Now, I refer you to Page 1600. I'm kind of jumping through pages, Doctor.

A: Yeah.

Q: On Page 1600, the first -- did you have the chance -- let me ask you this, did you have a chance to converse with Dr. Sachy concerning the opinions that you both rendered?

A: I don't believe I did. I had a chance to talk with him about what he was using and how he -- how he -- how he combined the examinations and of the physical findings. Whether he said -- whether he told me what his ultimate decision would be about his condition, I don't know.

Q: Did you ever discuss the facts of the case with Dr. Sachy?

A: The facts of the case, yes.

Q: Okay. I'm going to refer to -- on 1600, Mr. Diggs on Line 1 goes -- the McLendon incident where you opined that Mr. Stanko was not insane during that incident, the McLendon, Elizabeth McLendon incident where she was tied -- and you said, yes, and then gagged. Do you remember that incident?

A: I don't remember the incident, I remember hearing about

it, yes.
Q: May I refresh your memory or would it help -- Your Honor, may I refresh his memory on this?
THE COURT: Yes.
Q: About ten years prior, Mr. Stanko was arrested and eventually put in jail for ---
A: Eight years.
Q: Yes, sir. Yes, sir.
A: He tied up this woman and eventually let her go.
Q: Tied her up with ties?
A: With a necktie.
Q: With neckties and then put a Clorox rag with 401 down her mouth?
A: That -- I don't recall that specifically but it's possible.
Q: Okay. And that was your answer -- I'm just gonna go back -- I'm gonna go to 1601 -- well, let's -- you stated -- you testified in that case that Stephen was not insane at -- for that event, do you remember?
A: No, I do not think I testified to insanity in that incident, I didn't ---
Q: I'll give you the next page. Let me give you ---
A: I didn't examine him for that incident.
MR. AXELROD: What I'm gonna do right now is I'm gonna give Dr. Thrasher Page 1600 to 1604 and let him review this

section. I'll let him read that for a minute.

BY MR. AXELROD:

Q: Did you decide that on that first, the McLendon case, that Stephen was not insane on that act?

A: I never examined him for that crime. The description of it showed that he had gone -- that he had stepped over the line and committed a crime with that woman and had somehow made a decision to let her go. I don't know why he did that. I don't know -- I don't know that from him.

Q: Would it be fair to say that you used that as a basis to determine whether he was insane in Stanko I?

A: Well, there was a difference in his -- it was described to me that there was quite a difference in those two things and the outcome was significantly different. The McLendon person was let go and I think we all know what happened to Ling and her daughter.

Q: So, you used that as a basis for your formulation?

A: I used what as a basis, the McLendon thing?

Q: Yes.

A: No, no, I didn't use it as a basis, I used it ---

Q: You used it as a -- I'm sorry.

A: I mean, the information was consistent with psychopathic behavior, sure.

Q: I agree, not the basis, you used it was one of the factors.

A: Yeah, it was another one to consider, yes.
Q: I just misspoke there. Okay.
(To the Court) I just have a few more questions, Your Honor.
Is an antisocial personality disorder, is a antisocial personality disorder an enduring pattern of interpersonal -- I'm sorry -- strike that. Is a personality disorder an enduring pattern of inner experience and behavior that deviates markedly from the expectations of culture?
A: Are you talking about all personality disorders, all of them?
Q: Yes.
A: Yes.
Q: Is it described as an illness or a pattern of -- enduring pattern of inner experience and behavior that's persuasive and flexible and onset in early childhood?
A: It's usually onset in early childhood. You can't always determine that but ---
Q: But it's not an illness?
A: When a -- yes, it is; it's a diagnosis ---
MR. MABRY: Objection, leading.
THE COURT: Sustained. You've got him on redirect, Mr. Axelrod.
BY MR. AXELROD:
Q: My question, Based on the DSM-IV, on antisocial

personality disorder, are these behavioral problems or mental illnesses?

A: They are mental illnesses that are expressed by apparent behavioral problems of a chronic nature.

Q: So, it's your testimony today that based on the DSM-IV these are mental illnesses; the antisocial personality disorder is a mental illness?

A: Yes. They are listed in the DSM-IV. The compilations of the diagnosis in psychiatry, yes.

Q: But doesn't the DSM-IV consider them behavioral problems?

A: They're ---

MR. MABRY: Asked and answered.

THE COURT: Sustained.

Q: Does the DSM-IV call antisocial personality disorder an enduring pattern of inner experience behavior that deviates from the norm?

A: I believe it does.

Q: And isn't that a behavioral pattern?

A: Yes.

Q: That's all I have.

THE COURT: Yes, sir. On redirect?

MR. MABRY: Just two questions.

REDIRECT EXAMINATION OF JAMES W. THRASHER BY MR. MABRY:

Q: On Page 1499 of the transcript, the question was followed-up by Mr. Diggs in front of the jury, You state in your report

that at the time of the alleged offenses, Mr. Stephen Stanko was suffering from a mental disease ---

A: Where are you reading?

Q: I'm sorry. Page 1499.

A: Yeah.

Q: Starting at Line 9.

A: Okay.

Q: You state in your report that at the time of the alleged offenses, Mr. Stephen Stanko was suffering from a mental disease disorder or defect and he did not have the capacity to distinguish moral or legal right from wrong and to recognize a particular act charged as morally or legally wrong. Are those your words and what was your answer?

A: Correct.

Q: And on Page 1603, I'll show you, you were asked the question, on Line 11, Just because it was, it was worse -- do you have that?

A: Yes, sir.

Q: Okay. And your answer was?

A: He had no control over it, he didn't have the awareness of the moral or legal right or wrong, he was insane.

Q: All right. Thank you, sir. That's all I have.

THE COURT: All right. Thank you.

MR. MABRY: Thank you, Doctor.

THE COURT: Why don't we take a recess?

MR. MABRY: I need one, yes, sir.

THE COURT: All right. Let's take a fifteen-minute recess and then we'll figure what to do from there.

MR. MABRY: Yes, sir, Your Honor.

THE COURT: Thank you.

MR. AXELROD: Your Honor, could Dr. Thrasher be released?

THE COURT: Yes, sir. Thank you, Doctor.

DR. THRASHER: You're welcome.

MR. AXELROD: Your Honor, before you leave, my investigator is asking me if we've made a decision about the boxes.

THE COURT: I've sent an email to Court Administration, I have not heard back.

MR. AXELROD: I'm gonna have him wait here to see.

THE COURT: Okay. They're still in the control of the Clerk of Court right now.

MR. AXELROD: The reason I say that is because OID gets mad because he's still here but we want him here right now.

THE COURT: He stays here.

MR. AXELROD: Thank you, sir.

(RECESS - 12:29 P.M.)

*******OFF THE RECORD*******

**(On the Record - 12:49 P.M.)**

THE COURT: All right. Here's what we're gonna do at this point. We're gonna take a recess until 1:30, we're

taking an abbreviated lunch and then we'll start back. I'm gonna give his attorney, Mr. Stanko's attorney, permission to meet with him over this lunch so y'all need to make that work somehow. And then as to the evidence or the file of Mr. Diggs, an order will be signed wherein they will be ordered not to destroy them and then your investigator can take them back to where he got them from.

MR. AXELROD: And I'll incorporate that into the order.

THE COURT: Okay.

MR. AXELROD: Now, Your Honor, can we ask the -- if the Sheriffs of Georgetown if they can follow that order of the Court that we can stay here for lunch?

THE COURT: I mean, my verbal order saying you can stay here through lunch. Are y'all sufficient -- is that sufficient for you? Okay. Very well. Court's in recess until 1:30.

(RECESS - 12:50 P.M.)

*******OFF THE RECORD*******

**(On the Record - 1:33 P.M.)**

THE COURT: All right. The Applicant may call his next witness.

MR. AXELROD: Your Honor, at this time, we would rest.

THE COURT: Okay.

MR. MABRY: I have motions, Your Honor.

THE COURT: All right.

MOTIONS:

MR. MABRY: The State moves for a directed verdict on all grounds in the Application. The burden of proof is on the Applicant to prove its case by a preponderance of the evidence. He chose to call only Mr. Kelly in his case and not call Mr. Diggs. Specifically, I would point out to the Court Ground 10, I'll start with 10(b) which is the prosecutorial misconduct claim. They've shown no false or inaccurate testimony was offered by the State. And in the *Brady* claim they've shown no *Brady* material or discovery was held -- withheld under Rule 5 as to that ground.

On the ineffective assistance of counsel claim, Mr. Savitz testified that the issue regarding Dr. Wu had no merit because basically he was allowed to testify to his methodology on reply testimony in the penalty phase. And then the provocation mitigator was not even preserved in the -- so it cannot be ineffective assistance of appellant counsel failing to raise an unpreserved issue which would've been heard by the Supreme Court.

The Court has already ruled on the ground (b) which is the Supreme Court and the Chief Justice violated his due process rights.

I'll go back now to the claims of ineffective assistance of trial counsel. He's failed to meet his burden of proof on the first ground (a)(i) which is that trial counsel failed to

present a meaningful challenge to the State's case at the guilt and sentencing phases. The record reflects the opposite. Counsel was ineffective for presenting a defense of not guilty by reason of insanity. He's failed to prove ineffective assistance on that ground. Trial counsel was ineffective for failing to object to the characterization of Applicant as an evil person. We submit that's part and parcel of the diagnosis that was offered that Dr. -- actually, it was their witness that testified to that. Counsel presented that testimony as a strategic reason. Trial counsel was ineffective for allowing the introduction of prior bad acts in the guilt phase. The record will reflect that had to do with cross examination of a defense witness on the question of insanity. So, the Defendant's acts prior to and after the crime were relevant material to cross examine the doctor on how he came up with his diagnosis. Further, there was basically an agreement reached that would not go into the Turner murder but they would be allowed to go into the prior kidnapping of Elizabeth McLendon.

Then (v) is trial counsel was ineffective for failing to request a jury charge on a lesser included offense of voluntary manslaughter. What I would cite to the Court, I have a copy of a case, I'll hand it up to the Court. This *Howell vs. Monarch*, 288 S.C. 586, 344 S.E.2d 157, if I can approach.

THE COURT: Yes, sir.

MR. MABRY: This is also in the court rules, Your Honor, when a defendant calls an expert to testify in trial and he gives a statement to that expert and basically for the purposes of medical diagnosis, that's what that statement is admissible for. If you'll turn over to Page 5 of that opinion, it's a 1986 opinion by the Court of Appeals but it also cites *Gentry vs. Watkins, Carolina Trucking Company*, 249 S.C. 316, 154 S.E.2d 112, the Court notes that in *Gentry* the Supreme Court held, where a physician is consulted solely as a perspective witness, the physician's testimony as to the patient's statements about his present condition on past symptoms is not admissible as substantive proof of the facts so stated but is admissible as information upon which he has relied in reaching his professional opinion. Now, the only testimony in this case that they have that they argue could approach voluntary manslaughter are statements that Mr. Stanko made to his experts where he said we had some type of argument or we were discussing him moving out and the victim either slapped him or gesticulated and reached up and struck a cigarette and then he blacked out and he doesn't remember anything else. So, the State submits that's not -- first of all, it's not sufficient proof anyway because of the facts reflected in the record of how he tied the victim up, beat her and tortured her, went to the next room, grabbed her daughter,

brings the daughter back, ties her up and rapes her and the during the rape of the daughter, he reaches over and strangles the victim, that's doesn't constitute voluntary manslaughter anyway but the -- that's why there's no discussion on voluntary manslaughter at the end of the guilt phase. I believe -- I submit Judge Jefferson knew they couldn't use that testimony of those doctors to -- about what Mr. Stanko said as proof of facts that this was a voluntary manslaughter. It's solely for the purpose of medical diagnosis. That's why it wasn't requested, that's why it wasn't charged, that's why there was no discussion about it. That also goes to the provocation issue because again ---

THE COURT: Yes, sir.

MR. SHAFFER: Your Honor, I can wait until he finishes ---

THE COURT: Yes, please be seated while he's arguing.

MR. SHAFFER: I apologize.

THE COURT: Thank you.

MR. MABRY: On the provocation issue, it's the same thing. The only evidence of any provocation is Mr. Stanko's statements to his doctors. He never testified in the case, never took the stand in the guilt or penalty phase. We Shepherdized this case, it's still good law as far as we know. I don't know if there's been any superseding -- been superseded by any rule of evidence but it is in the courts --

South Carolina Rules of Court, 2015. Actually cites *Gentry vs. Watkins* for that proposition that that -- those statements to the doctor are not admissible as proof of facts in the case. That would also go the provocation mitigator, why it was not requested. There has been no testimony about that trial counsel was ineffective for failing to request images that Dr. Spicer used. There's absolutely no testimony in the record. They chose not to call Mr. Diggs in their case in chief and they've got the burden of proof on that ground and we're entitled to a directed verdict on that ground at this time. Counsel was ineffective for abandoning the argument about jurors being questioned about the insanity defense, that issue was decided by the Supreme Court. In their opinion in this case, they said that wasn't proper questioning anyway. But Judge Jefferson allowed them to question jurors generally about would you follow the law, could you listen to any defense recognized by law and that's sufficient of questioning during voir dire.

The next ground is trial counsel failed to properly motion for a change of venue. There'd been no testimony on this issue in their case in chief and this is a civil case. In fact, the record reflects a change of venue motion was made and denied and appropriately denied.

Defense counsel failed to investigate research and challenge the State's expert Pamela Crawford. There has been

some limited testimony on that issue, so I won't make a directed verdict on that ground at this time.

Trial counsel abandoned the Applicant during Pamela Crawford's multiple interviews. I can't exactly remember what Ms. Davis testified to, if she testified on that issue or not but there was no testimony from Mr. Diggs because he wasn't called and no testimony from Mr. Kelly and no testimony from Mr. Savitz.

Trial counsel was ineffective for failing to investigate and present mitigating evidence in the sentencing phase. There's really been no testimony on that in this case. The only thing Ms. Davis said is they should've called a witness who actually witnessed the bottle-throwing incident, which she said she actually testified to, the expert also testified to it, that it did occur and that he was knocked unconscious. That's in the record.

Trial counsel was ineffective for failing to investigate matters concerning his past mental health history. There's been absolutely no proof, no evidence that they failed to uncover anything about his mental health history; in fact, it's the opposite. They called multiple experts, went into his whole history and psychiatric history.

Ineffective for failing to object to the Court's decision not to charge the mitigator (C)(b)(8). I don't recall any testimony on that issue. And failing to argue the evidence in

the record supported the charge of provocation, I've already covered. But there was no testimony as far as mitigation about the Defendant's brother's death. There's been no testimony on that. That's an allegation in the application. So, we would move for directed verdict on each and every ground that I've enunciated to the Court. And the direct appeal grounds are claims against the prosecution would not be something that could be decided here. They haven't offered any proof on any *Brady* claim.

THE COURT: All right. Thank you.

Yes, sir, Mr. Shaffer.

MR. SHAFFER: Your Honor, given the fact that we went down every single allegation, I guess I'm not exactly sure how you would like me to structure my arguments in rebuttal. If you'd like me to take them line-by-line, I guess I would -- I would also say that I need him to refresh me because it -- we went through it rather fast, I just can't keep ---

THE COURT: I understand. And here's the -- I've got a -- because there are so many of them and they require so much, I have no opposition if y'all want to submit your directed verdict motions within ten days.

MR. MABRY: Yes, sir. That'll be fine.

THE COURT: And then you can -- and then I'll give you fifteen days to respond.

MR. SHAFFER: That would be fantastic. Thank you, Your

Honor.

THE COURT: Does that work for y'all?

MR. MABRY: Yes, sir.

THE COURT: I mean, that way you don't have to remember every one and go through and tick it off. That way, it gives you time to present it the way you want to present it and you to respond the way you want.

MR. SHAFFER: Thank you, Your Honor.

MR. MABRY: Yes, sir.

THE COURT: All right. Thank you. Anything further?

MR. MABRY: We won't have the transcript, so we'll have to go by our notes and ---

MR. SHAFFER: And, Your Honor ---

THE COURT: Or do y'all want to ---

MR. MABRY: We can wait for ---

THE COURT: Well, what you can do is you can just make it and then brief it and then you can respond -- how soon do you think we can get a transcript.

COURT REPORTER: I should be able to get right on it but I don't know what my schedule will be for the next couple of weeks.

THE COURT: How about if I give you thirty days.

MR. MABRY: That's fine, Judge.

THE COURT: And that will then give you twenty days to respond.

MR. AXELROD: Your Honor, will we have the transcript by then.

MR. MABRY: That's what we're talking about.

MR. AXELROD: Oh, I'm just -- I didn't hear what the Court Reporter ---

THE COURT: That's what we're talking about. She thinks she can get in a couple of weeks.

MR. AXELROD: Okay. So we'll just -- we'll wait until we get the transcript and then we'll have some kind of scheduling order.

THE COURT: And then if I need to set a time limit, I can do that. And you've got it in front to you and then you can cite page and line and you cite page and line where you think you have ---

MR. SHAFFER: Thank you, Your Honor.

MR. AXELROD: Thank you, Your Honor.

MR. MABRY: Judge, I do want to make you aware of one thing, I spoke to Mr. Diggs before leaving for lunch. He mentioned that he did see an article in the paper yesterday on this case.

THE COURT: Right.

MR. MABRY: He was sequestered, so I wanted the Court to be aware of that.

THE COURT: Well, he wasn't called, so ---

MR. MABRY: I'm fixing to call him -- I'm fixing to call

him.

THE COURT: Okay. Okay.

MR. MABRY: So, I just wanted to make you aware of that. He saw ---

THE COURT: I saw the article as well. I don't think it spoke of anything -- I mean, he was sequestered, he wasn't -- it wasn't like he -- nobody could talk to him at all, he couldn't see anything, he was just kept out in the hall.

MR. MABRY: Right.

THE COURT: All right.

MR. MABRY: Since we've made our motions and the Court is gonna rule on them, we'll move into our case.

THE COURT: All right.

MR. AXELROD: Your Honor, we're almost finished the order for the Court to sign.

THE COURT: Okay.

MR. AXELROD: I'm gonna need to get the order signed, clocked. Mr. Skidmore is asking -- they're locked up in there, he would like to get and get Dr. Thrasher out of here before we continue.

THE COURT: All right.

MR. MABRY: Mr. Diggs might need something.

THE COURT: Yeah, that's possible. It's his ---

MR. AXELROD: Oh, I forgot. I'm sorry.

THE COURT: He is going to testify.

MR. AXELROD: I'm sorry.

WILLIAM ISAAC DIGGS, HAVING BEEN DULY SWORN, TESTIFIES AS FOLLOWS:

THE COURT: After you're seated comfortably, please state your full name and address for the Court -- or just your full name.

MR. DIGGS: My name is -- I go by Bill Diggs. My name, complete name is William Isaac Diggs.

DIRECT EXAMINATION OF WILLIAM ISAAC DIGGS BY MR. MABRY:

Q: Mr. Diggs, were you appointed as first chair counsel in this case, State vs. Stanko, the Georgetown, Ling murder case?

A: Yes.

Q: And who appointed you to be first chair?

A: Judge Deadre Jefferson.

Q: Do you remember approximately when you were first appointed on the case, would it have been September of 2005?

A: It was before September. Well, it would've been before September, maybe sometime in the summer.

Q: Okay. Do you remember when the first time you met with Mr. Stanko?

A: I don't recall the date.

Q: How many meetings would you say you had with Mr. Stanko?

A: Numerous meetings. I don't really feel comfortable giving you an exact number but a lot -- we had a lot of meetings.

Q: Okay. If -- I guess early on in the case, you received

the discovery from the State regarding the Ling murder and also the Turner murder?

A: Yes.

Q: Okay. If you would, kind of tell the Judge what problems you were facing as far as defending him on these charges?

A: Well, it was pretty obvious that, excuse me, that Stephen had committed the murder and the assault on the daughter of Ms. Ling and also the murder of Mr. Turner in Conway. And what -- what I -- I knew it was gonna be difficult to defend and the one thing that I was told and I don't remember who told me this but when Judge Jefferson was assigned the case, she was looking for an attorney that would defend Mr. Stanko under the circumstances of the case as she understood them to be. And I don't know who did it but my name was passed along to Judge Jefferson and she ended up appointing me as the lead counsel. I looked at the case and realized there was no defense in terms of explaining why he did this and justification for why he did it. And so, what interested me about the case was what was going on in Stephen's mind at that time, what happened in his brain that was different from what would've occurred in the normal brain. What allowed him to go through with these acts admittedly against people who loved him and who he cared for. As far as I could tell, Laura Ling was one of the few people in the world who cared about Stephen. But for her, Stephen would've been on the street and

yet he ended up killing her after a few weeks living in her home and assaulting the child and -- or the young girl and then leaving there and committing another murder after that. So, immediately it occurred to me we need to find out why he did this because when you meet him in person, he comes across as quite normal, likeable person and so I knew I needed some medical expert testimony to help me figure out what could happen in someone's mind in their brain that would allow them to do this.

Q: Okay.

A: And that's the way I approached the defense of the case.

Q: And had Stephen been to prison before?

A: He had been. He had been convicted of charges related to his girlfriend in either Charleston -- I think it was Charleston -- and he had done time in prison for that. He had tied her up and I think they had accused him of kidnapping and some other type of offenses at that time and he had been to prison for eight years. I think he was given a ten-year sentence for that.

Q: Was he out on parole or community supervision when these crimes occurred, Laura Ling's murder?

A: I don't know. I can't answer that. I don't recall.

Q: All right. And was Stephen engaged in any kind of criminal conduct while he on -- after he got out of prison and before the Ling murder?

A: Not -- not that I'm aware of. I mean there was some people who said, well, he was defrauding me here, he was lying to me there but to my knowledge he had not been involved in criminal activity up until this time.
Q: All right. Did -- was there -- basically, there's no defense to the fact he committed the crime ---
A: Correct.
Q: So, you had -- you decided to pursue a mental health defense of sorts?
A: Yes.
Q: Yes. How did you go about doing that?
A: I had worked with Dr. Thrasher and Dr. Albiniak out at the University on a number of cases prior to that and I went to both of those experts, Dr. Thrasher, and I explained to him basically what the case was about and explained to him I wanted to find out what was going in the brain to explain how it worked, what happened, what had failed in Stephen's case and I remember specifically sitting in his office saying, gee, I wish I could have some demonstrative evidence and pictures of something like that that would demonstrate for the jury and he said, I -- I can -- I know somebody who can get you pictures and that would be Dr. Sachy over in Georgia. And he referred me -- I wanted to retain Dr. Thrasher because he was a local expert and I thought would carry, you know, that would carry weight with the jury and -- as opposed to an outside

expert who came into town, who could be perceived as giving testimony simply for payment.

Q: All right. And what occurred after that, did you contact Dr. Sachy?

A: I contacted Dr. Sachy and he came here to meet with Stephen, I believe it was on the weekend, Sunday afternoon down in Georgetown or here in Georgetown at the new detention center, it was new at that time. He met and he is the one -- he said, you know, based on his initial evaluation and observation, so forth, and said I believe, you know, I see indications that there's gonna be a defect here in the frontal lobes of Stephen and I know how we can have a test done, performed to corroborate that or confirm that, if it really is true. And of course, that's how he turned me on to Dr. Wu out at the University of California Irvine.

Q: Did he indicate to you at that time why he believed there was some problem with his frontal lobe?

A: It was the way that Stephen carried his hand and had something to do with his balance but I don't recall specifically beyond that. But I remembered him specifically referring that to a hand gesture a lot of times you would see in a gang person who would be carrying a pistol and he demonstrated it like that and he showed me, if I'm not mistaken, he showed me Stephen did that and explained Stephen did that during a balancing test that we did.

Q: Okay.
A: And then sure enough afterwards, we were able to get Dr. Wu involved and he had Dr. Einhorn go down to MUSC and do what's called a continuance performance test on Stephen to make sure his brain was fully engaged at the time of the scan.
Q: Okay.
A: And it turned out that there was a deficient activity -- deficit of activity in the frontal lobes during that exam.
Q: Okay. So, that was a PET scan that was done?
A: Yes.
Q: And they also did an MRI test?
A: Yes. High resonance, high definition MRI.
Q: And where was that sent to?
A: That as evaluated up in Pennsylvania by Dr. Gur, Ruben Gur. Now, in that it showed also an anomaly to the three times standard deviation. I mean, it was very different from what the standard brain looked like in terms of its shape and size. Dr. Gur couldn't come and testify directly at the trial because this was when Israel had engaged in the war with Hezbollah or someone, I can't remember the specific people involved in that war but Dr. Gur had gone to Israel and was out of the country at the time of the trial. But we were able to get -- lay a sufficient foundation for that chart that Dr. Gur prepared to have it admitted into evidence and it was part of the evidence that was used at the trial.

Q: And Dr. Wu, from University of California Irvine, did he actually review the PET scans on that test?
A: Yes. He operates a clinic or a program out there in California and does studies with individuals who have had brain trauma or deficiencies in some way and he has developed a process whereby he can show deficiencies in the brain. He has a standard model that consists of what he did, his common standard normal brain activity with the bulk of the brain activity as occurring in most humans. And he has a sample that's large enough that when there's a deviation from that standard, he can readily identify that and show in Stephen and he did do that with Stephen and it showed in the executive functioning of the brain, frontal lobes of the brain, Stephen just didn't have the activity there that normal people have which I believe accounts for the failures in his life that led up to him initially being incarcerated.
Q: Okay. Did -- and Dr. Wu testified at the trial?
A: Yes.
Q: Okay. In fact, he had to come twice because Dr. Spicer got on the stand. He was an expert from MUSC and said, you know, this is so -- such a deviation that Dr. Wu had to be not being truthful, had to be lying. And so we had to fly Dr. Wu all the way back after that testimony just to tell the jury this is real, this is what it is and I'm certainly not lying. Now, Dr. Wu was consulting the national -- you know, he has

credentials that make him a credible witness. Dr. Spicer, even said, well, if all that is true, he does have a brain defect.

Q: Did he also have medical records from ---

A: We have medical records, ironically, Dr. Thrasher had been stationed -- I think he was in the Navy but he had been stationed at Guantanamo Bay where Stephen was born and had access to his birth records.

Q: And the mother's birth record ---

A: Yes.

Q: Mother's records from the birth?

A: Right. Stephen's birth.

Q: And did those records -- at least your experts determined they showed ---

A: It showed that he had been for a period of time deprived of oxygen at birth, which could've resulted in the defect in the brain.

Q: And did he also -- Mr. Stanko have a head injury?

A: Yeah, that happened when he was a teenager. I can't remember specifically, seventeen maybe, that age range, fifteen to seventeen. Someone threw a bottle of beer or liquid, could've been a soft drink, I don't know, but it apparently was full and it hit him in the back of the head which could've caused an injury to the front of the brain, hitting in the back and forcing the brain to go forward into

the skull.
Q: All right. And what was Dr. Sachy and Dr. Thrasher's opinion after the investigation and materials ---
A: They thought he was legally insane, met the definition of insanity, and I felt like we certainly had an obligation in that situation and it made sense. No one could look at the facts of this case and not come out saying this is sick, you know, this man is sick. Now, that might be just like kind of like rhetorical kind of statement but we know that's true. We know -- I think everyone knows there's a problem there and from there the decision has to be made or had to be made at that time. So, what effect does that have on the case and what are we gonna do with that.
Q: So, they -- Dr. Thrasher and Dr. Sachy both told you they believed he was insane?
A: Yes. They both testified to that.
Q: Okay.
A: And then we got an insanity instruction.
Q: Did the State try to keep the insanity instruction out?
A: Yeah, they did. We had a pretrial one-day hearing where Dr. Sachy had to come in and testify before Judge Jefferson as to what his trial testimony would be and he did that. And at the end of that testimony, the Judge, I think, heard arguments about the issue and decided, made a ruling that he would be permitted to testify and we would be permitted to proceed on

the issue of insanity.
Q: All right. And at the end of the guilt phase, did she charge the jury on insanity, guilty but mentally ill?
A: Yes, I believe so.
Q: Okay. Did ---
A: It's been a long time since I saw the file but if I recall correctly that's true.
Q: Did Mr. Stanko agree -- did he know what the defense was?
A: Yes. And he agreed with it. Stephen is very smart, has a very high IQ. He fully understood what the offense was about and he liked it at that time because he was concerned, of course, about how he could do this -- do these things. And he -- I think he was somewhat at peace with it because he understood how it could happen, you know, why it happened.
Q: Did -- Mr. Kelly, did he voice any objections to you offering the insanity defense or did he agree with it?
A: He agreed with it and it's curious because no one who worked with the defense offered any kind of objection to it.
Q: What about Ms. Childs and Dale Davis?
A: Neither one offered any objection to it.
Q: Okay. Did -- in the penalty phase, did you also present experts regarding whether he was suffering from some mental illness at the time?
A: Yes, because the way I saw it, you know, a lot of times attorneys would say, well, this is a life case or a death

case. Let's save that for the sentencing phase, but I felt like you could get two for the same. If the jury didn't completely -- if they weren't convinced about the insanity defense, then it would certainly be a mitigating factor in the sentencing and that's why we made a decision. I didn't see a downside in presenting it at the guilt phase.

Q: All right. Did -- now, Mr. Kelly, has given some testimony in this case and I have to kind of tell you so I can ask you the question that he had some suspicion at some point in time that you might have been using some kind of illegal drugs or cocaine or something to that effect?

A: Well, I practiced law in Horry County since 19 ---

MR. AXELROD: Your Honor, I would object to the question because the witnesses were sequestered. Now, the Attorney General is telling Mr. Diggs what came out prior and I think it's an improper question.

THE COURT: I'm gonna overrule it.

A: I practiced in Horry County since 1989 and I was in Columbia ten years prior to that or nine years prior to that. I think I was pretty well known in the legal community here. I would venture to say you could ask any attorney, even Mr. Axelrod, whether I used drugs and they would say, no, they had no knowledge of that and so -- Mr. Kelly never raised that as a concern with me during the trial and he certainly never went to the Judge or anyone else that I'm aware of.

Q: And did you ever use drugs ---
A: No, sir.
Q: --- during this trial or preparation?
A: Absolutely not.
Q: All right. Did Stephen agree with the presentation of the defense that you were presenting in this case?
A: Yes, he did at that time.
Q: And did he ever indicate he wanted to testify in the guilt or the penalty phase of this trial?
A: I don't -- you know, we have discussions about it. He may've expressed that as a desire from time to time but he made the decision in this, I mean, ultimately not to testify and he made that decision and I was in agreement with it and Mr. Kelly was in agreement with it.
Q: Did you present other mitigation in the penalty phase from Dr. Califf?
A: Yes.
Q: And what was her purpose in testifying?
A: She went to interview members of Stephen's family and school teachers and people of that -- such people from Stephen's past life, his activities in school and things like that. Stephen was a model student, he was -- he was great and he made excellent grades, well-liked, he was -- if I'm not mistaken King of the prom or something similar to that when he was in high school. And so we were -- Ms. Califf, Dr. Califf

was able to put together a presentation of that type of evidence from Stephen's past. Now, there were problems she felt in Stephen's home where he had a very strict father, who was military, a military -- had actually a military background as evidenced by Stephen's birth at Guantanamo Bay -- but very strict on family and she felt like that might've had some bearing on the way Stephen grew up and turned out, whatever. But she was given pretty free rein. I had used her a lot to -- in my practice. I'd been an attorney twenty-five years at the time I was appointed to represent Stephen in this case and had been in Horry County since 1989 and I had used Evelyn Califf a number of times in cases in similar situations.

Q: So, she testified in the penalty phase to the social background ---

A: Yes.

Q: --- and information? And did you use her again in the Horry County death penalty case?

A: Yeah, yeah, we did.

Q: All right. How long have you actually been a practicing attorney now, Mr. Diggs?

A: Since 1980.

Q: And did you work at Appellate Defense?

A: I was at Appellate Defense from 1981 till March of 1989 and was the Chief -- the Deputy Chief Attorney and Chief Attorney there.

Q: And you actually hired Mr. Savitz?
A: Yeah, I did; 1983, if I'm not mistaken.
Q: And you worked on any capital cases before this one?
A: At the trial level, I think about six.
Q: Had you ever won an acquittal in a capital case?
A: Yes. *State vs. Marion Smith* here in Georgetown in 1998, I think.
Q: Had Mr. Kelly ever won an acquittal in a capital case?
A: I don't know. I heard he did but I'm not -- that's all I know about it.
Q: You also consulted Dr. Tora Brawley and Dr. Schwartz-Watts before ---
A: Yes.
Q: Was there something about them that you didn't want to use? Did they tell you something ---
A: You know, there was. At this point I can't remember specifically what it was but for some reason, I ended up not using them.
Q: Okay.
A: And went in the direction -- and that might've been before I got the information about Dr. Sachy but I just don't recall.
Q: Okay. And during the trial, if there were breaks during this trial, would you use the restroom?
A: Yeah.
Q: And what -- was there any other reason you would go to the

bathroom during the trial?
A: It was strange because during that trial I had lost a tooth and temporarily I had a false tooth that I was using and it was just one little tooth and if you've ever seen one of those, you have to like cement it in and -- to keep it in your mouth and especially when you're talking. And so, every opportunity I'd have to go to the restroom and I would recement that tooth and put it in. I've since had it fixed with a permanent situation but that's what -- one thing I remember specifically about that case.
Q: All right. That's all I have, Judge.
THE COURT: Mr. Axelrod?
MR. AXELROD: Your Honor, can we have a five-minute recess.
THE COURT: Sure. You're still on the stand, so you, of course, know -- but if you need to go to restroom, you can.
All right. We'll take a five-minute recess.
MR. MABRY: Judge, so you know, Mr. Diggs has asked to be reimbursed for having to travel here for two days, I believe.
THE COURT: And he will be.
MR. DIGGS: Thank you, Judge.
(RECESS - 2:11 P.M.)
*******OFF THE RECORD*******
**(On the Record - 2:16 P.M.)**
THE COURT: Yes, sir.

MR. AXELROD: Thank you, Your Honor.

CROSS EXAMINATION OF WILLIAM ISAAC DIGGS BY MR. AXELROD:

Q: Good afternoon.

A: Good afternoon.

Q: When you glued your tooth back in your mouth, what kind of glue did you use?

A: I don't remember. It's a little pasty thing that looks like a tube of toothpaste. It was pink in color because it matched the gum color of the tooth.

Q: So, if Mr. Kelly told you you had white powder on your mustache, what was that?

A: I don't believe he ever told me that.

Q: If Mr. Kelly testified to that, would he be lying?

A: You're pitting me against him.

Q: I'm asking you a question.

MR. MABRY: He is, Judge, I object to the pitting.

THE COURT: Yeah, sustained.

BY MR. AXELROD:

Q: Did you have white powder on your mustache that day?

A: No, I didn't.

Q: Tell the Court why you're not ---

A: You know what ---

THE COURT: Hold on. Hold on. Ask the question and then ---

Q: Are you practicing law today?

A: No.
Q: You told us how long you've been practicing law, why aren't you practicing law today?
A: I was suspended in September.
Q: Why?
A: I'm not gonna answer that but let me say it has nothing to do with drug use or this case.
MR. AXELROD: Your Honor, I think I can ask him why he was suspended.
A: I take the Fifth.
Q: Was there a published opinion in North Carolina for why you were suspended?
A: I don't know.
Q: If it said -- if North Carolina had a published opinion that said that you stole $150,000 from your trust account, would that be true?
A: It's not true.
Q: Isn't it true that you came up with this insanity defense before you even had an expert?
A: No, I wouldn't say that. I think I came up with the question about what a brain does in this kind of situation and I went to a couple of experts that I knew in the community and the defense came from that.
Q: When did you come up with the not guilty by reason of insanity defense?

A: I don't know that I ever did. I don't even think I asked for that.
Q: Excuse me?
A: I think that Mr. Kelly was the one that wanted to approach that. It's not -- it's not the defense that I wanted to present.
Q: What defense did you want to present?
A: Insanity.
Q: All right. Question, Did you want to present the not guilty by reason of insanity defense?
A: It certainly wasn't a priority. I didn't object to it being charged but it was not the -- it was not the defense that I wanted to present to the jury or that I wanted them to find.
Q: Okay. So, I'm confused so I'm gonna back up. You wanted the jury -- you wanted to present a defense of insanity.
A: Correct.
Q: And you wanted to present to the jury that Stephen would be not guilty by reason of insanity.
A: Correct.
Q: And that was your defense that you wanted.
A: It was the defense that I wanted to present on Stephen's behalf.
Q: And you didn't want to present a guilty but mentally ill defense, did you?

A: It was not a priority. It wasn't my first choice.
Q: Were you surprised that the Judge was gonna charge it?
A: No, I wasn't surprised. It makes -- it's somewhat logical.
Q: Well, you asked her for it not to be presented.
A: I don't recall because I haven't looked at the file in a long time, I can't remember specifically whether I objected to it or not.
Q: Okay. I refer to Page 2047.
MR. MABRY: He doesn't know what you're referring to.
Q: It's gonna come up on that little screen for you.
MR. MABRY: He doesn't know what you're referring to. Show him what you're referring to.
MR. AXELROD: We're bringing it up. I was just letting him know that that little screen is coming ---
MR. MABRY: I don't think he knew the screen was ---
MR. AXELROD: That's what I was telling him. There's a little screen there. Why it's so low, I have no idea. 2047.
MR. SHAFFER: I'm having technical difficulties.
BY MR. AXELROD:
Q: Mr. Diggs, can you see that?
A: I can see it but ---
Q: I'll read it to you.
A: I'm having difficulty reading it.
Q: I'm gonna read from Page 2047, Line 1. And this is the --

Judge Jefferson speaking to you during the charge conference, sir. And originally, the Defense had indicated to me that they were not pursuing a defense of guilty but mentally ill. Now, did you tell the Court that you were not pursuing a defense of guilty but mentally ill?

A: I don't remember but it is certainly not consistent with what I wanted as a defense because it still would've left him vulnerable to the death sentence, so why would I pursue it.

Q: All right. But you would agree then the Judge is saying that you had indicated that you were not pursuing it?

A: Well, that's what it says.

Q: And we could draw an inference from that that that was -- you were not seeking it?

A: Yeah, I wouldn't seek it now if I were doing it.

Q: I understand. But you had to by law, didn't you?

A: I don't think so.

Q: Did you research this case when you researched the insanity defense?

A: Of course.

Q: Did you?

A: What do you mean researched this ---

Q: Well, did you research whether or not you would be able to withstand not having a guilty but mentally ill charge?

A: I don't recall.

Q: But you didn't want the charge?

A: I did not.
Q: But you learned later that you had to have the charge.
A: If you say so, I don't recall.
Q: I'm not gonna say so, I'd like to submit to you something. I'd like you just to look at this and we'll discuss it. This is Applicant's Three. Take your time.
A: Okay.
Q: What year was your trial?
A: 2007, I believe.
Q: Would it be fair to say it was 2006?
A: I don't know, if you say so. It was -- I know I got appointed, I think, in 2005.
Q: Okay. Now, the case you read -- that I asked you to read was *State v. Rimert* and what year was that case decided?
A: It was '94.
Q: And I'm gonna read something to you, it says, In a prosecution for a crime ---
A: I just read it.
Q: I'm gonna read to you, if I may. In a prosecution for a crime when the affirmative defense of insanity is raised sufficiently by the defendant -- we raised that in this case, correct?
A: Correct.
Q: Or when sufficient evidence of a mental disease or defect of the defendant is admitted into evidence, correct?

A: If you say so.
Q: I'm asking you. The trier of facts shall find under the applicable law and the verdict must state so whether the defendant is guilty, not guilty, not guilty by reason of insanity or, four -- what's number four?
A: Guilty but mentally ill.
Q: So, you didn't know that going into this trial?
A: I probably did because I remember seeing, you know, you handed me the decision now, I remember seeing that at the time. So, I probably would've known that in 2005, 2006.
Q: Then why did you argue against it if the law said ---
A: Because it's a death penalty case and you make arguments based on the way you see it at that time and if it's against precedent you argue against it.
Q: Why do you have a jury -- why do you have a -- why do you have a charge conference with a judge before closing arguments, what's the purpose?
A: To go through the perspective charge.
Q: To know what they're gonna charge.
A: To know what's gonna be charged and to get input from counsel about it.
Q: Sort of like say we do a reasonable doubt charge and the Judge is gonna charge *Victor v. Nebraska* where you had to firmly convinced. Sometimes you want to know whether the Judge is gonna use that reasonable doubt charge or maybe a

different one.

A: Right.

Q: Because maybe you want to incorporate into your closing argument the words firmly convinced.

A: Could be.

Q: Have you done that before, incorporated the wording of *Victor v. Nebraska* in a closing argument for reasonable doubt.

MR. MABRY: Objection, that's not relevant in this hearing.

THE COURT: Sustained.

MR. MABRY: We are not here to ---

MR. AXELROD: Well, I ---

MR. MABRY: It's not a ground in this case.

THE COURT: Sustained.

BY MR. AXELROD:

Q: Isn't it true -- 2048 -- that the Judge said to you mirroring the language in both the cases presented the guilty but mentally ill verdict must be submitted because the statute mandates it and it cannot be waived by defendant, correct? She told you that?

A: I guess. If that's in the transcript, she did.

Q: And then she goes on further on Line 17, so even if it's the defense's position that they are not seeking it and they wish to waive it, State law indicates it cannot be waived and it must be submitted to the jury.

A: State law sometimes is unconstitutional and you approach those things and I don't know if I made that argument at the time but certainly you're not gonna be confined in a capital case to strictures of what's included in your state statutes. If you feel like it's an unconstitutional restriction or application in your case, you make that argument.
Q: So, you made that argument there and she shot you down?
A: I don't recall. But it's certainly not -- you know, you're not gonna waive an insanity defense because of this when you've got the ultimate guilty verdict out there as an alternative.
Q: So, when she says citing *Campen*, 17-24-30, are mandatory and may not be waived. So, she basically said to you she was forced to do it by statute?
A: Yeah, that's what she was citing.
Q: So, you made a constitutional argument and there you wanted to waive it because you thought it was unconstitutional.
A: I know that I didn't want to have the charge.
Q: Why?
A: Because I didn't want it as alternative to the insanity verdict.
Q: But you were forced to law by have it?
A: Well, apparently so, that seems to be what the transcript indicates.

Q: And this was your first knowledge of this?
A: No, I'm sure I knew it at the time, Stuart.
Q: All right. You had a -- you had a hearing June the 22nd, I believe.
A: Was that the one about you?
Q: No. That was in March.
A: Okay.
Q: June the 22nd, you had a hearing ---
THE COURT: What year?
Q: 2006. It was a hearing -- it was a motion hearing to declare the statute unconstitutional, the statute unconstitutional not guilty by reason of insanity statute. You had hearings to declare it unconstitutional, do you remember that?
A: I remember arguing the statute, the death penalty statute was unconstitutional.
Q: And you argued that ---
A: It might've included the insanity part of it, I don't recall.
Q: But that the death penalty statute is unconstitutional.
A: Yes.
Q: And you made a motion to declare 17-24-10 of the insanity statute, I believe, unconstitutional as a conclusive presumption and it ---
A: Yeah. Counsel, I haven't seen it in a number of years.

Q: How about if I come up ---
A: That's good. But, you know, you have it there and if you say so ---
Q: No, I will ---
A: I depend more on what's shown in the record than what I recall off the top of my head.
MR. AXELROD: Okay. I'd like to mark this as Sixteen.
MR. MABRY: Is it the transcript?
MR. AXELROD: No.
THE COURT: Any objection?
MR. AXELROD: I have to show him first.
THE COURT: Okay.
(REPORTER'S NOTE: Mr. Axelrod confers with Mr. Mabry.)
MR. MABRY: That's fine. No objection.

APPLICANT'S EXHIBIT NUMBER SIXTEEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:
Q: You had several motions heard on the 22nd of June, do you remember that date?
A: Yes, sir.
Q: Okay. And I don't know how many -- do you want me to go through them with you -- I'm gonna go through them with you with the Court's order. It might be simpler to refresh you by what she said.
A: Okay.

Q: And she said that -- you made a motion to declare 17-24 unconstitutional (conclusive presumption), Number One, the Court denies the motion and finds that the statute does not require a conclusive presumption of guilt of the defendant. Do you understand that?

A: Yes.

Q: What were you arguing to the Court at that time?

A: I would need to look at it.

Q: Okay.

A: I mean, if it's on the record, I would rather ---

MR. MABRY: Your Honor, maybe a few minutes to let him review this document.

THE COURT: Sure.

A: Do you have a copy of the motion that goes with this?

BY MR. AXELROD:

Q: I believe I do and here's the transcript.

A: I would need that because she kind of -- the Judge kind of ---

MR. MABRY: I've got a copy of the transcript. The hearing starts 3606.

MR. AXELROD: Are the motions in there?

MR. MABRY: Now, that I don't know.

MR. AXELROD: I have the motions. Can I show him or would you want them marked right now.

MR. MABRY: Well, just let me see it.

(REPORTER'S NOTE: Mr. Axelrod confers with Mr. Mabry.)
A: There were about nine or ten of those motions.
MR. MABRY: Show him that and see if it will refresh his memory.
BY MR. AXELROD:
Q: These were motions you filed in Stanko II.
A: '09?
Q: This is the second trial.
A: I don't know if they were the same. Let me look at this, Stuart, maybe it'll refresh my memory. I'm trying to remember why we were arguing ---
Q: Well, weren't you trying -- weren't you trying to argue that -- you were trying to argue that the statutes were unconstitutional, you were trying -- the insanity -- you were trying to negate malice through insanity?
A: Yeah, that malice comes from a certain area of the brain ---
Q: And if the brain is not working ---
A: Where Stephen at that time didn't have any activity in the brain and therefore he wasn't capable of forming malice.
Q: And therefore, he wouldn't be capable of murder?
A: Basically, I would want to look at the precise language that I used in that motion but what I was reading at the time was it was conclusive if they found, you know, Item 1, then they necessarily would find Item 2 because the statute doesn't

recognize the physical way in which the brain processes that signal from the base limbic system.

MR. AXELROD: Your Honor, I'm just gonna staple some stuff together if I may.

A: In other words, the malice could've been based on what was coming out of the limbic system at the time but that's not where malice forms. It wouldn't form in the limbic system, it forms in the frontal lobe.

Q: And if the frontal lobe is not working, you can't have malice and you can't be convicted of murder?

A: Right.

Q: And you can't get the death sentence?

A: Well, the statute doesn't allow for that and that's why we were arguing unconstitutional.

Q: Right. And that's what I want to get to. Let me staple this for you, first, and then I'm gonna show them to the Attorney General.

(REPORTER'S NOTE: Mr. Axelrod confers with Mr. Mabry.)

MR. AXELROD: Your Honor, I don't believe the State has objected to admitting this as one motion ---

THE COURT: I think -- is that correct?

MR. MABRY: As one exhibit ---

MR. AXELROD: I'm sorry. One exhibit and ---

THE COURT: A, B, C, D ---

MR. AXELROD: And if -- there's nine of them, so A, B, C,

D, E, F, G, H, I.

THE COURT: Okay.

APPLICANT'S EXHBIITS 17 A THROUGH I

ADMITTED INTO EVIDENCE

A: I notice we did challenge the guilty but mentally ill constitutionality, Motion Number 6. Okay.

BY MR. AXELROD:

Q: Explain why you challenged 17-24 on your first motion, conclusive presumption.

A: Okay. I argued that it was conclusive presumption because it said if one can distinguish between moral right from moral or legal wrong in one area of the brain, then one maintains free will to act accordingly and it's kind of a presumption that, okay, you knew that here and so it doesn't take into account that there are other functions of the brain that have to kick in to make that analysis. And that's why we were arguing it was unconstitutional.

Q: And what did the Judge tell you?

A: That -- she overruled it.

Q: And she gave reasons.

A: Well, she did but, you know, I would've appealed it, I don't agree with it, but of course, the Judge issued an order.

Q: I'll get to the appeal in a second. The second one was a conclusive presumption to declare it unconstitutional. I'll let you look at that.

A: Okay. Okay. It says if one can distinguish between moral or legal right from moral or legal wrong in any area of the brain under any circumstances, one is guilty of criminal conduct under the circumstances presented in this case notwithstanding the presence of a defect in the brain which would lack the ability to further analyze the situation and make a correct decision under the circumstances.

Q: And the Court denied that motion stating the statute does not require conclusive presumption of the guilt of the defendant and relies on additional findings set forth in the -- from the denial on the first motion. Do you remember that?

A: Kind of.

Q: I'll show you the third one.

A: Here we were arguing that it was arbitrary because it allowed -- the statute was arbitrary because it allowed the prosecution to establish malice aforethought based solely on the conduct of the accused. While it denies the statute, the same statute denies the accused of the right to establish insanity based solely on conduct. The prosecution is getting a break here and allow, you know, it's like you can conclude this based on the conduct but the defendant can't conclude this based on the conduct.

Q: And the defendant's motion to declare that arbitrary factor number one, the Court denied that motion and found the statute does not contain an unconstitutionally arbitrary

factor.
A: Well, I -- go ahead.
Q: That was what she said?
A: Yeah. What I'm arguing here is what we alluded to earlier. Anyone who looks at the facts of this case under the circumstances says this is sick, you know, a sane person doesn't do this. The law doesn't permit one to look at the circumstances like that and conclude insanity. In other words it has to be proven by expert testimony and corroborated and, you know, all these hoops you have to jump through in an affirmative fashion.
Q: And she stated on the record that counsel for the defendant argued the statute allows the State to establish malice aforethought based solely on the conduct of the accused.
A: Right.
Q: And her ruling was, The law of this state regarding proof of malice aforethought is well-settled and is fully consistent with South Carolina Supreme Court and the U.S. Supreme Court precedent. She went on to say, Additionally, the State ultimately bears the burden to establish each and every element of the offense of murder beyond a reasonable doubt, no arbitrary factor is contained within the statute.
A: It was well-settled way -- you know, a hundred years before the development of technology and medical science that

indicated that -- it was beginning to discover how the brain operated and how it functioned. And what we were getting at there is maybe the definition of malice aforethought needs to be revisited given an increase in our knowledge about how the brain functions.

Q: So, actually, you were trying to get the Judge to change law.

A: To look at law and maybe modify it to fit better with what we know in terms of what we know from science.

Q: And if she had -- if she had granted it, what -- some of these motions, she might've modified that that law.

A: Right.

Q: And those rules.

A: Right.

Q: And that's what you were attempting here.

A: Well, we thought if that could happen, it would help the defense. It's not necessary to prevail in the case but it would've helped us.

Q: And then on ---

A: And also, you want to preserve issues for down the road in a capital case. You don't want to waive what might be a good case. Now, this happened almost ten years ago, and I would eventually say there's a lot of more acceptance now of the science than there as, you know, that was happening in 2005 and 2006.

Q: Cause your theory was that, well, we'll call it post Hinckley.
A: Well, when Hinckley happened, we were making, in my opinion as a criminal defense attorney, an insanity and that issue. We were making progress with insanity until Hinckley came along and that just set us back a long time.
Q: And you were trying to move forward again?
A: Yeah.
Q: I'm gonna hand you what's a pretrial motion Number 5.
A: And this is -- the way self-defense used to be treated in the law and what we're arguing here simply is insanity should be disproven by the prosecution as opposed to the defense having to prove it.
Q: And she ruled against you and said insanity, much like self-defense, is an affirmative defense that had to be raised by the ---
A: If I'm not mistaken, self-defense isn't any longer, correct?
Q: I'm just saying, at that time, she ruled that insanity, much like self-defense is an affirmative defense.
A: Okay.
Q: Was she correct in that at that point?
A: Well, certainly, she's correcting stating what the law was at the time.
Q: And that's what we're dealing with here.

A: Yes.
Q: This one was the guilty but mentally ill, I'll let you look at this one, 17(F), arbitrary factor.
A: Well, here, we argued it as kind of -- it was -- I said it was a -- because it's really -- it kind of muddies the water and give the jury an out and they might be thinking -- it gives them an opportunity to say, well, let's throw him bone, we'll -- we're gonna find him guilty but we'll throw this in too to help him, but in effect, it doesn't help. So, it undermines -- it gives the jury a false choice that increases the likelihood that the defendant is gonna be put to death.
Q: Well, let's talk about that. If she charges, if the Judge charged the jury as to a not guilty by reason of insanity and she was forced to charge guilty but mentally ill, don't you think that sometimes the jury will say, well, I'm not gonna charge -- I'm not gonna find him guilty of murder, maybe we'll find guilty of voluntary manslaughter and your fear was ---
A: Exactly.
Q: --- even that along could still bring a death penalty?
A: Right. I mean, if that were a proper or an appropriate sentence under manslaughter, you know, yes, you understand what I'm saying?
Q: But, you know, you frontloaded your mitigation in this trial, would that be fair?
A: Well, you know ---

Q: Some of it.
A: --- it's not unreasonable like that. I don't think we did because we had the traditional mitigating stuff, you know, evidence in the sentencing phase but we frontloaded it with the insanity defense but that was not the only mitigating evidence that we had in the case.
Q: Now, that didn't work too well, did it?
A: Well, in terms of the guilt phase?
Q: In terms of the verdict.
A: The jury didn't agree with it.
Q: Okay.
A: But you had two state experts that, quite frankly, probably, you know -- what's the lady's -- the lady's name, Pam ---
Q: Crawford.
A: Crawford, testified in her testimony in the trial that she wasn't familiar with this technology and couldn't really comment on it. And Dr. Spicer acknowledged in his testimony, yes, if Dr. Wu is telling the truth, then there's a problem here with this young man's brain. So, really, you know, if I had done the appeal, I would've argued a directed verdict motion and that, you know, admittedly, that's rare at the appellate level but all the evidence ---
Q: You preserved the appeal right there, did you not?
A: I ---

Q: You preserved ---
A: I think all of these issues were preserved.
Q: And I agree with you. Why -- when you realized that you weren't gonna be allowed to go the way you wanted to, because basically you were raising a defense of insanity -- I misspoke I think when I said you -- not guilty by reason of insanity because you were really raising a defense of insanity ---
A: Yes.
Q: --- and the insanity negated the malice for the murder.
A: Right.
Q: And nobody could understand you.
A: Well, I'm not saying they didn't understand, they didn't agree.
Q: Okay. Okay. So, now at that point, you knew that you weren't gonna be able to go the way you wanted to go.
A: Not completely.
Q: Did you ever consider maybe pursuing a guilty but mentally ill defense and back loading the insanity for the mitigation?
A: Yeah, I'm sure I thought about it but it's not something I wanted to do in the case and I don't think Stephen did. I feel like we had a legitimate defense in the case with two experts, two expert psychiatrists, one local and one from out of state who both said he was insane at the time of this incident.
Q: Was it your goal to make Stephen look bad to the jury?

A: No, I -- you know what, that was not my choice. I think, unfortunately, there as reference from one of the experts, not Dr. Thrasher, but someone referred to him as psychopathic or psychopath, that's not the way you want to characterize him because, you know, and if that's where you're going with the question, that's certainly not something I wanted to do.
Q: But it kept coming out by your own experts, did it not?
A: Well, I -- they're not gonna say what I ask them to say, I mean, they're -- that's -- Dr. Sachy thought that. You know, he felt that was an appropriate way to describe it. There's no -- my objection to it was -- I mean, it has horrible connotation that denotes things that really are not true. And I don't think anyone chooses to be psychopath. You know, they don't choose to make decisions -- it's kind of like, if you have a defective limb, if you have a defective arm, it's not really you're fault if you're not a great baseball pitcher, you know, you can't do those things. And Stephen's brain can't do certain things. And if we -- psychologically put him in a certain category, you know, it's not -- he's not there by choice. It's not something he makes a decision on, a conscious decision to do and that's why I would object to any kind of an arbitrary, negative, you know, description with respect to who he is and what he is.
Q: So, when your expert Dr. Sachy testified on direct with you that my diagnosis of Mr. Stanko is a psychopath and I'm

100 percent certain of that and I believe we proved that, that was ---
A: Yeah, and I mean that's not -- I never specifically -- I didn't -- I remember that, you know -- I have trouble with my memory sometimes but I can recall that clearly now and it was not ---
Q: That wasn't good, was it?
A: No, it was more like, gee, I wish she hadn't said that.
Q: And a little for the recess to you, the absolute abhorrent and horrible things that took place, our gut instinct is to say that that person is a psycho. I mean, that's why that movie was made, the Alfred Hitchcock movie, *Psycho*. Our gut instinct is to label these people as crazy. That guy had to be crazy, he was evil, he was psycho.
A: Yeah, and I think what he's saying there, I would've put it differently but it's basically what is said at the beginning of my testimony, when we see something like this, we say that's sick but then you turn right around and hold them criminally liable ---
Q: And then he said ---
A: --- and you forget, you know you forget your first impression that this is a sick individual who did this. And literally, I think, people -- you know, they forget literally that is the case, you know, that this person is not normal, their brain doesn't function the way that a typical brain

should function and they do things that are out of the ordinary and cross the line into, you know, criminal conduct and worst criminal conduct such as that in this case.

Q: And Dr. Sachy told you that Mr. Stanko meets the definition I have to say of something called antisocial personality disorder.

A: Yeah, and I know -- I think everybody concluded that's the case but I don't think that was sufficient in the defense of this case. I don't think that carries enough weight as an attorney, a defense attorney, I don't think that accurately describes to the jury, you know, what's wrong with this person's mental thought process.

Q: But, at least at that point, he stopped calling him a psychopath and he says he has antisocial -- antisocial personality disorder.

A: And still though that leaves -- in the typical mind, you're going to leave the door open there like, well he chooses to do that, he shouldn't do that, he knows better. He should make a decision not to do that stuff.

Q: But your earlier testimony was, whew, I wish he hadn't said that.

A: Right.

Q: So, did you feel a little bit relieved that at least he didn't say psycho?

A: probably did, I don't remember, but you're probably right.

Q: But then he went on to follow up with you, up until 1980, what Mr. Stanko had was called psychopathy and I still use that word and in the medical research it's called psychopath but in 1980 they changed it to antisocial personality disorder because they wanted statistics.
A: Yeah, I think -- well, I'm not qualified to give an opinion about it but ---
Q: Did it make you feel bad again because we're back on psychopath?
A: Yeah.
Q: And then ---
A: I hope you don't get to a point in the argument where I called him a psychopath; did I do that?
Q: We might get to that.
A: I hope not.
Q: But then Dr. Sachy -- Dr. Sachy is trying to make your client look good in the eyes of the jury, he compares him to Ted Bundy. Do you remember that?
A: Yeah, I think so.
Q: And are you aware that Ted Bundy was convicted of thirty-six murders?
A: Am I aware of it? I know it was a lot.
Q: And they had said they thought there was a hundred but, literally, convictions of thirty-six. Is that a good thing to compare Stephen to?

A: I think reasonable minds can disagree on that. You don't want to -- you certainly don't want initially to say he's like Ted Bundy but I think most people understood Ted Bundy was sick as well.
Q: The question was, Was at a good person to compare ---
A: I don't know. It depends, you know, probably with most people it's not a good comparison but it might for some who understood what was going on.
Q: In your mind, was it a good comparison?
A: I wouldn't have chosen that. I wouldn't have compared him to Ted Bundy.
Q: Did you go over your -- his trial testimony prior to trial? Did he tell you he was going to call -- he was going to refer to him as an associate of Ted Bundy?
A: If you -- I think in the record you have the report from Dr. Sachy and I don't think it says stuff like that. I thought basically it was gonna come, you know, his testimony was coming from ---
MR. AXELROD: Court's indulgence.
A: --- in the way that it was described in his report.
Q: It might've been nice if we compared him somewhat to Mother Teresa, would that be a good comparison?
A: It would've been a good comparison.
Q: So ---
A: But you know what, he was highly thought of in school.

You go back and look at his early, you know, his school years, he was very much admired, respected, loved. But, you know, this is the type -- if the experts in my case, in Stephen's case, are right about this, you know, the frontal lobe doesn't fully mature until you're in your mid-twenties and so it's not really a defect that's gonna manifest and show itself until you get older and, you know, you continue to do these stupid teenage, you know, what you are doing at fifteen. I know my son fell off the top of the car one to because he was surfing, you know, on top of the car. He was about fifteen years of age. He wouldn't have done that at twenty-five.

Q: Bad behavior.

A: Yeah, it was stupid and you take risks and ---

Q: Volition ---

A: Those things continued with Stephen even after the age where they shouldn't have.

Q: And the risk refers to behavior.

A: Yeah, stupid things.

Q: And for Stephen it manifested all the way to antisocial behavior.

A: It's -- according to the experts, he did.

Q: But that's not -- you can't use that in determining someone to be insane by our statute.

A: Right.

Q: Okay. Now, Dr. Sachy, he wasn't done with Ted Bundy, he

thought he should compare Stephen to the jury to John Wayne Gacy.

A: Gacy.

Q: Yeah. Now, what did he do, do you know?

A: Killed a bunch of people and bury them under his house.

Q: Well, he actually killed thirty-three young boys, had sex with them and ate them. Was that beneficial to your client?

A: It wasn't that -- in terms of the mental defect, you know, proclivities might have been different but in terms of brain function -- and I don't know, I'm not familiar with the Gacy case in terms of what the mental experts said about him. Dr. Sachy would've been a lot more familiar with and understand what the mental situation was in both the Bundy case and the Gacy case. I am not -- and I think that if there's an error there it was the understanding that the jury probably didn't know any better either. I wouldn't have ---

Q: Question ---

A: I wouldn't have used that example.

Q: Question, if your mitigation person, Ms. Davis, had said that she felt that this type of testimony was damning to Stephen ---

A: Well, it's not -- I see where you're going with that, I wouldn't have used it intentionally but in terms of him -- in terms of the experts, how a psychiatrist is going view that, you know, they're going to view things differently from a

layperson. It might be somewhat, you know, they are more accustomed to those things, they're not going to be as taken aback by those things as a layperson, you know, as a jury Monday. So, and it's just an unfortunate situation. I wish it hadn't of happened but I don't think it distracted from the merits of the defense we were presenting. I think that we were correct to present the insanity defense and I think for the most part Dr. Sachy's testimony was very much beneficial, even if those kind of, you know, allusion to this person or that person -- it would've been better for it not to be there. I don't think it negates the merits of the insanity defense.

Q: During Dr. Thrasher's testimony, during Dr. Thrasher's testimony, on direct exam, on direct exam it came up that they were gonna start to talk about the McLendon case, if you remember that lady down ---

A: Yes.

Q: She got -- Stephen went to jail for eight and a half years, got a ten-year sentence ---

A: Right.

Q: Okay. And did you try to keep that information out?

A: I don't recall.

Q: Would you have liked to have kept it out?

A: I would -- I would be speculating at this point to go back and ---

Q: I don't want you to speculate. I don't want you to

speculate.
A: You know, the facts of that case show, though, that Stephen was not healthy. Ms. McLendon described him as walking down the hallway humming and singing and totally detached from what was going on at that time. He was dragging her down the hallway by her hair, she thought -- she did think he was gonna kill her and that he was humming and singing and just totally -- seem to be totally detached from the reality of what was happening.
Q: And you had a hearing, and you had the hearing -- when Dr. Thrasher was on the witness stand, you had a hearing, and there was some proffer of testimony. Do you remember that?
A: I don't remember that at this point.
Q: Okay. Let me find it. (To the Court) Court's indulgence, Your Honor.
THE COURT: Yes.
BY MR. AXELROD:
Q: I'll try to set it up for you and then I'll ask you a question. There was a proffer, they wanted -- on cross, Mr. Hembree wanted to go into the facts of that case and there was a discussion -- they proffered Dr. Thrasher and then there was a discussion whether or not we would allow the convictions to come in and whether or not we would allow the facts to come in. Now ---
A: I think at that point, I would have objected to the

convictions coming in. You always, of course, want to keep that kind of testimony out of evidence if possible.

Q: Let me ask you this.

A: Yes.

Q: In -- I know you're an experienced trial lawyer by my heart. Should you not've attempted to keep out the facts of the case as well?

A: Well, if they came in, I'm thinking -- what my thought process was at the time, it corroborating what we were saying now. Stephen said he blacked out during the Laura Ling incident and did not have any recollection of it. The experts say when you have this reduced or the lack of activity in the frontal lobes, in order to put the brakes on what's coming out of the limbic system, at the same time, you don't lay down memory tracks either. So, it's common for someone who is in a blacked out state like that not to remember what happened until the brain is able to begin the function after -- I don't know what -- what happens in the brain that causes it to start working sufficiently to stop that, maybe, you know, that danger, the perceived danger has passed and so that signal from the limbic system stops and at that point he goes back to its regular function. What we thought was that -- was corroborated by the events down in Charleston or Monks Corner, wherever that was, that particular case.

Q: So, basically -- well, let me back up a second. But there

was no argument to try to keep the facts out because Mr. Kelly voluntarily said we're not opposed to the facts coming out.
A: Okay.
Q: I refer you to Page 1557.
A: Sometimes when you have the two attorneys, you know, what your first inclination might be if it's -- if the other attorney has a different perspective on it or a different opinion, unless you feel strongly about it one way or the other, you just kind of let that go. So, it might've been one of those situations. I don't recall us -- I'm sure we would've discussed it but I can't recall at this time having specific discussions about it and what position we were gonna take about that -- the admissibility of that incident.
Q: Mr. Kelly testified that you were in charge of the facts -- I'm sorry. Mr. Kelly testified that you were in charge or the insanity ---
A: Right.
Q: --- the doctors and ---
A: I dealt with the doctors, the experts and ---
Q: And he testified that he was in charge of the mitigation section.
A: Well, that's basically true.
MR. MABRY: I would object to that because he also said he was in charge of the facts, facts and mitigation. That's what he testified to.

THE COURT: Yeah, that is what he testified to.

MR. AXELROD: Okay. I'm not arguing that.

BY MR. AXELROD:

Q: But on Page 1557, Mr. Kelly volunteers, Your Honor, we don't object by going into the Elizabeth McLendon facts as known by the doctor. So, Dr. Thrasher was going to be allowed to testify that down in Charleston, ten years ago, that Stephen tied up some lady with neckties, similar as in Laura's case.

A: Right.

Q: And he stuck a rag down her mouth infused with a blend of Clorox ---

A: Yeah.

Q: --- and 409 ---

A: Right.

Q: --- in an attempt to kill her.

A: Right or make her pass out, one or the other.

Q: Now, it's similar to this case.

A: But her testimony is pertinent because it fit the pattern that we saw in this particular case, in the Laura Ling case. She did not think Steve was in his right mind. I mean, I -- that's -- I don't know if she said that expressly but I think you can glean from the totality of her testimony. She -- this was certainly not the man that she loved and it was not -- he did not appear to be in his right mind at the time that was

going on.
Q: But he was -- he wasn't found insane for that, was he?
A: I don't think they presented -- I think that was -- it must've been a guilty plea; I'm not sure.
Q: Now, so, what you're basically doing, the end result, you're asking the jury to find Stephen not guilty by reason of insanity even though ten or fifteen years ago he took a lady, tied her up and stuck a rag down her throat and try to kill her possibly and then, hey, goes to jail now.
A: I think he was insane when he did that affect, the first act.
Q: Now, you were able to keep out the sentence in the guilt phase, you were able to keep out the conviction, the amount of years he did. Do you remember that?
A: Yeah, it makes sense.
Q: Okay. Let me go to it. On Page 1561, I'm gonna read it to you but it might go -- what happened is, Mr. Diggs, people are seeing these besides just ---
A: My -- these glasses ---
Q: I'm gonna read to you, I'm gonna read to you Line 14.
A: Go ahead.
Q: Mr. Hembree says, No question, Your Honor, Elizabeth McLendon -- we can talk about that, we can talk about -- I never intended to talk about convictions, so we're in agreement. So, you won a moral victory there. Your co-

counsel let's in something that maybe he shouldn't have but you at least got to keep the convictions out in the guilt phase until Dr. Sachy testifies; isn't that true? Do you remember?

A: Well, I --

Q: Do you remember?

A: I don't remember.

Q: Now, Dr. Thrasher testified that he would consider Stephen to be not insane in the McLendon incident because he didn't follow through. Do you remember that?

A: I kind of do.

Q: I'll let you just read this page here.

A: Okay.

Q: He decided that he thought he was not insane at that time, correct?

A: Yeah, that's correct.

Q: But didn't, did Dr. Sachy say in his testimony that he was insane based on that event?

A: He could have, I don't recall specifically. For some reason, I mean, I'm thinking -- I thought he was insane. Dr. Sachy might've thought that, too, and I could see where Dr. Thrasher felt differently because of the way that event ended.

Q: Do you think it was strange that your two experts opined to different levels of insanity on the same event?

A: I'm sorry but could you repeat that?

Q: Well, the jury heard one expert say that on McLendon he wasn't insane and your other expert Sachy said he was insane. Do you think that could confuse the jury?
A: No, I don't think so because it was a collateral case.
Q: Because it was a collateral case, you think it didn't bother them?
A: I don't -- I really don't think that would've been an issue.
Q: All right. I'll refer you to Page 1796. This is the direct by you, sir. And I'm gonna read -- this is -- I'm going to start on Line 3 of 1796.
A: Okay.
Q: And this is what Dr. Sachy is saying to you. However, it's my contention that gagging and binding and threatening someone is an act of insanity itself because a normal person can't do that. So, he ---
A: Right.
Q: Now, Dr. Thrasher said it wasn't insanity because he was able to control himself.
A: Okay.
Q: Now, so would it be fair to say the layperson, the juror, is getting confused on the volitional prong of insanity defense?
A: I think that's a possibility if that were Stephen's case that was on trial at that time but, again, it's a collateral

case. They are in agreement up to a point and then there is a diversion, a divergence of opinion based on the outcome of the case. It could be, you know, I would be curious to ask Dr. Thrasher if he felt there could've been some measure of insanity during the course of that event of -- leading up to, you know, the conclusion, when it stopped.

Q: But isn't it true that he used that level of not having insanity to base his decision of insanity in this case?

A: Yeah, but that wasn't an issue in Stephen's trial that we had before us and so it didn't -- I'm pretty sure it didn't cause any concern at that time.

Q: Well, it didn't cause you concern but the end result, Stephen got the death sentence.

A: Yeah, I don't think it's because of that.

Q: Now, you interrupted Dr. Sachy and you said, okay, and then you say you're -- basically, you're sorry, I interrupted you. And so he goes on and continues still talking.

A: I might've been trying to stop him.

Q: And he goes on to say anyhow, went to jail for eight years for that. And now, you just argued to a judge who ruled that he could not -- the State would be precluded -- I guess you're not because Mr. Hembree did not object to you saying that, so I guess he liked it. What did you think when that happened?

A: I thought -- I don't have any specific recollection of what my reaction was but I'm sure it was a shock.

Q: Why didn't you tell Dr. Sachy -- you could've told him to ---

A: Well ---

MR. MABRY: Let him answer the question, please.

A: I interrupted.

THE COURT: Answer the question.

Q: I thought I was -- do you want to go or do you want me to go?

A: Why didn't I better prepare him?

Q: No, I haven't asked the question yet.

A: Okay.

Q: May I ask the question?

THE COURT: You may ask the question.

Q: Why didn't you better prepare him? And I'll -- because you had a limiting -- you had a proffer for a purpose, you didn't want it in, you wanted excluded because you didn't want it and you got it. Wasn't that damaging?

A: It was not as -- I can't say that it was damaging. I can tell you ---

Q: Stephen got a death sentence

A: I can -- I think I ---

THE COURT: Let him answer.

A: I think it was based on the facts of the case, you know, in terms of how that -- how Ms. Ling was killed.

Q: But don't you think the presentation of your case could

affect the facts of that case to bring back the death penalty?
A: I think it could've been better prepared, you know, I could've had sessions with Dr. Sachy where we went over every conceivable possibility. You know, he's a very articulate guy, he talks a lot. It's impossible, you know, to make sure that everyone puts a spin on their testimony that's, you know, a positive, that throws your particular case into a positive light. You just can't do that -- I mean, I feel like everything within reason we did with Dr. Sachy we did, within reason, that could be done, I feel like we did.
Q: Would it be fair to say that you had a scheduling order from Judge Jefferson?
A: I'm sure we did.
Q: Would it be fair to say that you were being pushed by time constraints on this case?
A: Not the extent -- not to the extent that the Appellate counsel was but, I mean, you know, you schedule these cases, there's a lot of preparation that has to go in it. The Clerk's office has to send that all these notices and once you set a date, you know, it's pretty hard to just change it.
Q: What's at stake -- ultimately, what's at stake? What's at stake?
A: Well, as a defense attorney, we're going to say it's life-and-death.
Q: What's at stake in this case, though?

A: The stake is the fairness of the preceding, to make sure that it's done in the most fair manner that is reasonably possible.
Q: What's at stake? Is Stephen's life at stake?
A: Yes, of course.
Q: So, if you were -- if you were being pushed time wise, why didn't you asked for a continuance?
MR. MABRY: Objection, to the form of the question. He didn't say he was being pushed time wise.
THE COURT: Sustained.
BY MR. AXELROD:
Q: Were you being pushed time wise?
A: I don't recall that. I do recall I wished Dr. Gur had been available but, I mean, that was a war, you know, it was an act of war that took him out of the country.
Q: Did you make a motion for continuance with Dr. Gur?
A: I don't think so.
Q: Why not?
A: I guess -- I assume, I think it would be because we had his testimony, you know, we had his exhibit that other experts could explain. And, so, it wasn't essential that we have him there in person to testify.
Q: How much -- and I'm not sure, I can find it, how much money did the State give you for experts, if you remember?
A: I don't recall.

Q: Was it in excess of $100,000?
A: Huh-uh (negative response). It wouldn't have been that much.
Q: But you did get a lot of money from the judges?
A: We got money for each of the experts that we asked for.
Q: I think Dr. Sachy was 40,000?
A: You know, I don't know.
Q: Okay.
A: I know that the experts put a lot of time in the case and, you know, just having to come and testify at trial, they were all from out of town, if not out of state.
Q: In May -- and I'm looking at your time, your timeline for your billing stuff. It has in, I think, right around May 17th or May 18th, Stephen was actually tested at MUSC, do you remember that?
A: I remember he was tested there.
Q: I'm gonna -- just -- this might refresh you a little bit. I'll come back in a second
A: Okay, that is -- counsel, you're looking at the discussions, the actual testimony, I think, occurred earlier in May, April, you see what I'm saying?
Q: Well, did Dr. Einhorn perform the continuance performance test?
A: Right.
Q: And that was done right prior to the exam, the MRI.

A: It was done during, if not -- the MRI, I think, was done at the same time, I'm not sure.
Q: Do you think that while -- do you think that while the MRI was being performed, he was doing a continuous ---
A: No, because the MRI was merely measuring structure, it wasn't measuring performance.
Q: Would it be fair to say that the CPT -- you weren't aware that the CPT was done separately until after it was done; is that fair to say?
A: No, I knew Dr. Einhorn was going there to perform the test during the scan.
Q: When you say during the scan, what did you mean by that?
A: While the scan was being taken -- you see, normally when Dr. Spicer, who was the state expert in the PET scan, when he does it, he puts the subject in a dark room and goods -- gets them as close to a sleep state as he can so that he can take the scan at maximum rest. Okay? Now, and that's the base -- that's what it looks that when he looks at a PET scan, he looks at a brain to the best of his ability that he has gotten it at rest. He looks at it when the brain is at rest. When Dr. Einhorn, when they did the scan on Stephen, what Dr. Wu wanted was the brain at its maximum activity level and that's why the test has to be done while the scan is in place if not simultaneously, immediately following so that the brain is engaged, is active and he's measuring the maximum activity

that can take place in the frontal lobe. And that's why Dr. Spicer felt like Dr. Wu was not being truthful because it looked like a normal scan to Dr. Spicer that he didn't understand that it was a scam of Stephen's brain when it was fully engaged as opposed to it being at rest.

Q: I'm confused on something, let me ask.

A: Okay.

Q: Is it your testimony that the CPT was done simultaneously ---

A: Yes.

Q: --- or after or ---

A: It's the -- the test is designed to put the brain at its maximum performance level at the time the scan is done so it may be there's a lag time. I don't know if it's done just seconds prior to the stand or at the time of the scan.

Q: Your experts never informed you of how it actually transpired?

A: I'm sure they did but I don't recall because of the passage of time I don't remember specifically that detail.

Q: Okay. So, back to where I was. If the -- if on May 18th it states -- this one here ---

A: We're having discussions with Dr. Einhorn regarding his testing for the day -- when he was at MUSC and that's the day that I spoke to Dr. Einhorn, that's not the day that Dr. Einhorn was in Charleston. Do you follow me?

Q: Okay. Let's find out when they did that.
A: I think it was 8th or the 9th.
Q: Of June?
A: May.
Q: Maybe it was the 8th, on the 8th, travel directions and scheduling for testing. And then you had a conversation with him after that.
A: Yes.
Q: Probably concerning what happened.
A: And it could be, counsel, that it took place, you know, at some time between those two dates.
Q: All right. Now ---
THE COURT: Hold on one second. Let me ask, where are we -- just for purposes -- how much longer. We've been going about two hours now.
MR. AXELROD: I understand what the Court is saying. I have a ways to go now. I was under the impression from Mr. Mabry that he wasn't going to call Mr. Diggs at that point. If the Court wants to break, we can break and we can come back.
THE COURT: What only take a ten-minute recess. We've been in here a long time, is two hours. We take a ten-minute recess.
MR. MABRY: Thank you.
(RECESS - 3:33 P.M.)

*******OFF THE RECORD*******

**(On the Record - 3:45 P.M.)**

THE COURT: All right. Mr. Axelrod, you may continue.

MR. AXELROD: Thank you.

BY MR. AXELROD:

Q: The PET scan was done down at MUSC, correct?

A: Yes.

Q: And it was done by Dr. Spicer. I'm sorry. I'll strike that question. It was done at MUSC?

A: Yes. I don't know specifically who was there from MUSC.

Q: I gotcha, I gotcha. Let me ask you this, Were there HIPAA forms signed for stuff like that or -- you know, how -- what was the parameters of you allowing Stephen to go to a hospital ---

A: Yeah, I don't know the -- when MUSC -- when I found out later that MUSC had to look at that scan and evaluated it and made decisions were brought for testimony about it, I was very upset about it.

Q: Can you tell me what -- when you made a motion to exclude that evidence?

A: I don't recall.

Q: Because you never did, did you?

A: Yeah, I would do that now if I had it to do over again.

Q: That was a mistake?

A: It's probably -- it's something I would do differently.

MR. MABRY: Judge, I would object to the relevance of this. It's is not included in any ground in the Application. There's nothing about it.

THE COURT: Yes, sir.

MR. AXELROD: It is relevant because it was -- the State used Dr. Spicer to negate Dr. Wu causing Bill ---

THE COURT: I'm going to give them a little leeway.

BY MR. AXELROD:

Q: It was really bad that Dr. Spicer looked at it, wasn't it?

A: I thought it was -- not only that, but to use that and testify about it, I thought it was terrible. I was very mad about it.

Q: It was a mistake. We should've attempted to stop it.

A: If I had it to do over, I would've made that motion.

Q: Fair enough. And then ---

A: Because, see, he didn't even understand the circumstances under which that test was -- that scan was conducted. He not only wrongfully, in my opinion, took the evidence but he unknowingly mischaracterized what he was testifying about.

Q: Now, on the application -- (Confers with co-counsel.) Court's indulgence one moment, Your Honor.

THE COURT: Yes, sir.

MR. MABRY: I have the same objection, Judge. This is not -- they've had this case for five years.

THE COURT: What is this?

MR. MABRY: There is no ground about ineffective assistance ---

THE COURT: I'll let you -- there's nothing about his not raising that objection.

MR. MABRY: In the application. It's not in there.

THE COURT: You were very detailed and it's not in there. I'm not going to allow you -- objection sustained.

(REPORTER'S NOTE: Mr. Axelrod confers with co-counsel.)

MR. FREDERICK: Judge, if I may, it says -- the relevance, on 10(a)(vi), Trial Counsel was ineffective in failing to request copies of the images and data analyzed by Dr. Spicer. And I think it clearly relates to that.

THE COURT: I don't think it does, I agree, sustained. He got them and he looked over them and he was upset about it. Sustained.

MR. AXELROD: Your Honor, I would like to proffer this right now.

THE COURT: Yes, sir.

MR. AXELROD: Your Honor, I'm just going to mark this, I'll let him read from the yes and it will save some time. And we will mark this as something.

THE COURT: It'll be Proffer Number Two, I guess.

COURT REPORTER: It's actually Court's Number ---

THE COURT: Court's Number Two.

COURT REPORTER: Three.

THE COURT: Okay.

COURT'S EXHIBIT NUMBER THREE

MARKED FOR IDENTIFICATION

PROFFER BY MR. AXELROD:

Q: This is -- I believe this is Dr. Spicer talking to Mr. Hembree. I'll just let you look at this stuff and I'll ask you a question.

A: Okay.

Q: Isn't it true that Dr. Spicer said that Dr. Leonie Gordon, a colleague of mine, a full-time nuclear medicine physician ---

A: Right.

Q: --- Department of Radiology ---

A: Read it.

Q: Read it.

A: Yes.

Q: And isn't it ---

A: It was normal, perfectly normal, no aberrations. They didn't even know the performance test was being done at the time. It looked like somebody at rest in a sleep.

Q: And this was even a hearsay, wasn't it?

A: Right.

Q: And did you object to that?

A: I don't see an objection.

Q: Should you have objected and asked that that be stricken?

A: I would do it differently at this time and I would object to that.

THE COURT: All right. The proffer has been made.

MR. FREDERICK: Judge, if -- I beg your patience, if I could interrupt just to make a record.

MR. MABRY: Wait, then the witness needs to step out because I don't know exactly what he's gonna say but the witness is sequestered and ---

THE COURT: All right. Well, I mean, it's his witness, he needs to be doing the objecting.

MR. AXELROD: Well, Your Honor, in the split that we've had in this case, being dyslexic, Mr. Frederick and Mr. Shaffer have assisted me all on this side ---

MR. MABRY: Let's let the witness step out.

THE COURT: Take another break.

MR. MABRY: Don't say anything else.

(REPORTER'S NOTE: Mr. Diggs exits courtroom.)

MR. AXELROD: Your Honor, if Mr. Frederick can assist on -- he was co-counsel and ---

THE COURT: All right. Go ahead.

MR. FREDERICK: Judge, I was just gonna say the ground for PCR that's in the petition that the question is relevant here. In addition to what I said earlier regarding failing to get the information from Dr. Spicer, the very first ground, which is that the Applicant was constructively denied

assistance of counsel when Trial Counsel, Mr. Diggs, failed to present a meaningful challenge to the State's case in both the guilt and the sentencing phases when they brought in evidence that they should not have had in the first place, Mr. Diggs failed to challenge that and that's the very first ground raised for PCR.

THE COURT: Well, that's an all-inclusive ground. That covers everything that happened in the entire case. I'm looking at the one that you're talking about that y'all specified and said, in failing to request copies of the images, not to object to their -- so, I'm, I'm -- my ruling stands. Thank you.

You may proceed. Bring the witness back in.

MR. FREDERICK: Thank you, Judge.

THE COURT: Yes, sir.

(REPORTER'S NOTE: Mr. Diggs enters courtroom.)

THE COURT: You may proceed.

BY MR. AXELROD:

Q: There was testimony in the Court in the trial that Dr. Spicer sent to your team the results of that evidence, his opinion.

A: I don't -- I don't -- he might've, I don't remember. Now, I remember, of course, the images in terms of whether there was a written -- you know, if you'll get a -- like if you go and have that type of scan done or an MRI, you've got the

picture but then you've got a follow-up report from the doctor saying what the results were and I don't recall seeing anything like that. I do recall seeing the images of the scan.

MR. AXELROD: Court's indulgence.

(REPORTER'S NOTE: Mr. Axelrod confers with Mr. Mabry.)

MR. AXELROD: I'll ask another question while we're doing that. I'll go back to that in a second.

Your Honor, I believe the Attorney General maybe is not opposed to Eighteen being admitted.

THE COURT: Okay. Applicant's Number Eighteen is admitted.

APPLICANT'S EXHIBIT NUMBER EIGHTEEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: Okay. Mr. Diggs, I'm gonna kind of go away from where I was while they're trying to find a piece of paper. This is actually Dr. Sachy's final report.

A: Okay.

Q: And all the way at the end, maybe -- let me get this out of your way. I highlighted the sentence. And what was the diagnosis that Dr. Sachy gave him?

A: Hypofrontality with a diagnosis of involuntarily acquired Psychopathy.

Q: And Psychopathy, I've learned means you're a psychopath.

A: I take it as a mental disease.
Q: But Dr. Sachy in his testimony equated Psychopathy with a psychopath, correct?
A: Okay. I didn't -- I don't recall. If you say he did, he probably did.
Q: I'd refer everybody to Page 1967 on the record. And I'm gonna read to you -- there was a question from Mr. Hembree to Spicer, According to the records and research, were those results provided to Dr. Sachy? And he says, Certainly, yes. So, the next question was, Basically, Dr. Sachy was aware on May 18th of May the 19th or sometime thereafter that Stephen Stanko's PET scan was perfectly normal? And he answered, Yes. Do you have an opinion in that?
A: It may've looked normal but again I don't think they understood the continuous performance test was being done and it should've been exactly opposite. He looked like -- when he was fully engaged mentally in the mental process, he looked he was at rest and asleep.
Q: My question -- I'm not trying to confuse you. I didn't say it properly. You weren't aware -- I don't believe there's anything in the record, of your record, of your file or anything, that Dr. Sachy was ever notified by Dr. Spicer?
A: Not that the PET scan was normal.
Q: Did that -- was that a bombshell to you?
A: Yeah, yes.

Q: And did you object?
A: Apparently not. I just remember being very angry about it.
Q: It should've been something you -- should've been something at that point that you should've objected to?
A: I think it would've been a proper -- there was a proper basis for the objection but I did follow-up on cross examination.
MR. MABRY: I'm gonna object to ---
THE COURT: Yeah, isn't this the same thing we've just gone over?
MR. MABRY: You've already ruled on it. That's not a ground.
THE COURT: I mean, we're going right -- these are the same questions you asked him five minutes ago.
MR. AXELROD: But this is going to whether they were ever given the results of the reports. I believe that's one of our bases that we raised under 10(b). And I believe it's Mr. Diggs' testimony that he wasn't given this opinion by Dr. Spicer.
MR. MABRY: Judge, they raised that ground -- they raised a *Brady* claim in the ground 10(d) and they produced absolutely no evidence of that claim in their case in chief and I'm entitled to a directed verdict on that ---
THE COURT: My ruling is the same.

MR. MABRY: All right.

THE COURT: Move away from this subject.

MR. AXELROD: Moving on, Judge.

BY MR. AXELROD:

Q: Now, in actuality, your defense was insanity?

A: Yes.

Q: And ---

A: It was not guilty by reason of insanity.

Q: But your defense was insanity, that it was unconstitutional?

A: Well, if -- that's different. We were trying to get a leg up, so to speak, not having the statutes declared unconstitutional but short of that, then we wanted to present the meritorious defense of insanity.

Q: So, you preserved your appeal issue that could've been appealed?

A: Yes.

Q: And the defense of insanity that you presented to the Court on June the 22nd was your defense of insanity.

A: I think, yes, I think that's correct.

Q: Okay.

A: I would contend that that would've been an appropriate argument for directed verdict at the appellate level.

Q: Was that argued ---

A: I think Mr. Savitz should've raised that. I'm not saying

he was ineffective because he didn't but I would've done it if I had been appellate counsel.
Q: How long were you appellate counsel?
A: I worked there nine years. I was chief attorney five years.
Q: Did you hire Mr. Savitz?
A: Yes.
Q: And I believe it's your understanding Mr. Savitz never raised this issue?
A: Yeah, he raised the one issue that wasn't preserved at trial.
Q: But this one you totally preserved?
A: Yeah, and in fact, I called him on the phone and said please do this, Joe, because I think it's a good case and it's a good issue but I think the way that worked out he just didn't have time and so he didn't do it.
Q: Cause you heard about the expedited appeal?
A: Yeah, yes, I did. And I don't remember how I learned of that. I'm sure it was through communications with him, Mr. Savitz during the pendency of the appeal, he was frustrated about it, I could tell, but it didn't get raised. I mean, from my standpoint as an appellate defense attorney and as chief attorney of that office, this was a complex appeal in my opinion and they're should've been a lot of issues raised in the appeal.

Q: What other issues do you think should've been raised on the appeal?
A: I would've raised all of those pretrial written motions that we filed, plus a directed verdict, you know, really look at the testimony that Pam Crawford -- that Dr. Crawford gave and Dr. Spicer gave because they really don't challenge the merits of what we're saying, not sufficiently -- support, you know, a rational basis for a verdict.
Q: I'm gonna hand you what's been marked as Appellant's Eight. It's an email from Dale Davis to you.
A: Yeah, I ---
Q: I'll let you look at that.
A: I saw this and this is the one about the seminar or something.
Q: No.
A: Okay.
Q: I'll just let you read it a little bit.
A: Okay.
Q: In June, right around June the 28th, she suggested to you that you get a social worker? Four weeks before the trial?
A: Uh-huh (affirmative response).
Q: Now, was it something that you thought you needed?
A: I think that when she raised the issue with me, I thought it was a good point and that's when we got in touch with Dr. Califf and asked her to get involved.

Q: Because don't you normally in a capital case have to some type of social worker testify?
A: You know, that's the standard procedure when you don't really have any other defense and I think that's a very weak defense and so it wasn't something that was high on our priority list, obviously, but it, you know, when Dale raised that issue with me, I thought, you know, that should be done and so we did it.
Q: And do you think that Dr. Califf might have had adequate time to prepare?
A: I'm sure she had enough time.
Q: In your PCR on the other Stanko case, you testified that, that she did the best she could with her time constraint, do you remember that?
A: If that's what I said, I mean, I'll go with that but I think she had adequate time to prepare. And she did, she did a good job.
Q: I'm gonna let you -- when did you decide to abandon the guilty but mentally ill defense, if you remember?
A: It would've been before the trial.
Q: Right before?
A: I don't know, whenever we raised -- filed that written motion.
Q: Well, that written motion was on June the 22nd.
A: Okay.

Q: So, were you still guilty but mentally ill at that point or you had already abandoned it?
A: I don't like that, I never liked it.
Q: Were you pursuing a guilty but mentally ill?
A: I never pursued that to my knowledge.
Q: Okay. I'm gonna hand you what's been marked as Appellant's Number Two. This is from you, Mr. Diggs, and it's to Gerald Kelly and then it's cc'd to Dale Davis, Vicky Childs and -- I'm not sure who that is on the email.
A: That's Dr. Sachy.
Q: Dr. Sachy? Well, I'd like you refresh your memory here and then I want you to read this into the record, this is Appellant's Number Two.
A: Okay. Dr. Wu confirmed for me this afternoon that the PET scan data from MUSC shows hypofrontality in Stephen's lower frontal area. He states that this can be associated with a inability or reduced ability to control impulse behavior in a situation such as that is present in this case. Dr. Sachy hopefully will soon be in a position to speak to the data on the Volumetric MRI. He will be meeting with Stephen next week. Dr. Sachy will likely testify as to the issue of GBMI under South Carolina law based on Dr. Wu's analysis along with Dr. Thrasher's testimony on GBMI and related forensic issues. However, I believe this data can be used to challenge the malice aforethought element of murder in the guilt phase. We

will see. Bill.
Q: That's a wonderful email, isn't it, because we've discussed the issue of this. Let me ask you this, basically on June the 16th, you had guilty but mentally ill defense.
A: I know that I was thinking in that memorandum ---
Q: You ---
MR. MABRY: Let him answer the question.
A: Go ahead.
Q: In this email, did you state that Dr. Sachy would likely testify to GBMI under South Carolina law?
A: Dr. Sachy, I remember, had used that terminology because it was something that he was familiar with in Georgia. It's not anything that I ever intended to present as a defense in Stephen's case. That's why we -- I'm trying to like ease into that insanity concept by saying that this something that can negate malice.
Q: Because Dr. Sachy is from Georgia?
A: Right.
Q: Where is Dr. Thrasher from? What state?
A: He lived in Pennsylvania, I believe.
Q: Dr. Thrasher, where did he practice psychiatry at?
A: Here.
Q: And where did he do opinions?
A: While he was practicing here, he practiced here.
Q: Okay. And you also wrote ---

A: You can see like three days after that, I was filing a motion to declare that unconstitutional.
Q: I'm gonna get to that. I'm just trying to hammer this in right now. You also said that Dr. Thrasher would testify on guilty but mentally ill and related forensic issues. So, on June 16th, you had two experts gonna testify to guilty but mentally ill.
A: I don't think you can -- I'm not saying -- I think that's an inference that you can glean from that memorandum but that's not what I was thinking about, that's not what my intentions were at the trial of the case.
Q: I'll go back to -- and then I'll go back.
A: Okay.
Q: I understand that at the end of the email you said you believe this data can be used to challenge the malice aforethought element of murder in the guilt phase, correct? Correct?
A: Right.
Q: And I'm not arguing that point with you. You were hoping in a week to ten days that your constitutional arguments would prevail?
A: Right.
Q: But at that point, both of them were going to testify to GBMI.
A: I think we were still building -- I don't know where that

is in relation to the trial of the case but I was building up to try to get the experts in the case on board with the insanity defense and it just -- I don't know if we had talked about it. I know Dr. Thrasher was fairly late, I remember this, in getting on board with the insanity testimony. It's not something -- I mean, he certainly, out of the gate, he didn't jump at that and say this is something I'm willing to do. I can't remember specifically what the timing was but it was not -- it didn't -- and, of course, had he not testified about insanity, I wouldn't have gone there with him but it was timely, you know, he came to me in sufficient time to put that in as part of the testimony in the defense of the case and I'm glad he did. But, you know, that indicates where we were in terms of the insanity question in getting the experts on board with the testimony we needed in the case for the defense of the guilt phase.

Q: But forty days prior to trial you were still in a guilty but mentally ill defense?

A: Yeah, it's not a good -- it's not a good way to characterize that because it certainly would have fit him with any other kind of mental illness, you know, as a mitigating circumstance, a mitigating factor in the guilt -- in the sentencing phase but it was -- I guess it was the best choice of words at that time for everybody that was receiving the email, you know, in terms of where we were going. The purpose

of that is to show -- is to tell them the evidence shows what we thought it was gonna show.

Q: But you didn't put NGRI, you put GBMI.

A: Because some work still had to be done and they hadn't looked at the evidence at that point, they hadn't seen the PET scan results, they hadn't seen -- it's extremely -- what Dr. Wu does is extremely complex. It all boils down to this -- and I don't know if it's part of the record in this hearing that there was a video that shows Stephen's brain. It's several minutes long and it shows the activity taking place in his brain and, I mean, it's just remarkable. And put all that together, that had not been done at that point in time. Dr. Wu had to produce that video and so it was just -- and, you know, it's unusual to talk about a brain defect and insanity in a situation where the person normally in those circumstances looks pretty normal. And, so, that's the way we were characterizing it at that time and I -- the purpose of that memo was not to lay out what the defense specifically was going to be but it was to transmit the information that the mental defect there had been documented and was gonna be available for the trial.

Q: If Judge Jefferson denied you the insanity defense, not guilty by reason of insanity ---

A: Right, right.

Q: That's a possibility. What would you have done me then?

A: Used it as a mitigating factor.
Q: And sought a guilty but mentally ill?
A: Probably.
Q: Not guilty, guilty but mentally ill?
A: Right.
Q: And then used your medical evidence as the mitigation in the penalty phase?
A: Yes, right.
Q: That was viable theory?
A: It was a second -- it was a second choice but it was viable; it was better than death; it was better than not having a social worker defense.
Q: Now, your theory, your defense of insanity was your defense but it flew in the face of statute.
A: No, I don't think so at all.
Q: But the Judge said that you were wrong and she wouldn't, she wouldn't bend or change the law will change any rules for you.
A: Yeah, I didn't -- you know, if we had won those motions then we wouldn't have had to worry about the trial. You know, it would've been -- it would've ruled -- it would've made him non-death eligible in that circumstance. You follow me?
Q: Yes.
A: It would've simply been a murder, guilty or not and a life sentence.

Q: I understand. And that was still -- that's still your argument with the -- that -- it sounds, hey, guilty but mentally ill but I'm gonna still kill you.
A: Yeah, it's ---
Q: But, on one hand you are asking the jury to basically release Stephen, find him not guilty of insanity because of all the heinous crimes he committed?
MR. MABRY: Object.
Q: The crime with McLendon and Laura Ling.
MR. MABRY: I object to that question.
A: Notwithstanding ---
THE COURT: Overruled.
A: Notwithstanding those acts, let him go because he is insane.
Q: Because Dr. Sachy basically testified the more horrific the act, the more insane he was.
A: Yes.
Q: So, if he had killed four more people, Dr. Sachy would've said absolutely insane.
A: You might've.
Q: Based on his theory ---
A: Number of murders alone, I don't think -- I think it's the brutality of the killing, you know as opposed to an assassination type shot in the back of the head. You know, but then making someone really suffer and torment, you know,

before their life, before they expire, different kinds of murders.

Q: Now, Dr. Sachy it equated him with Hannibal Lecter in the *Silence of the Lambs*. That wasn't a good analogy, was it?

A: No.

Q: Now ---

A: Well, I think, you know, anyone who watches that film can understand this is not a well person. I think the difficulty might come when you look at someone and they appear to be normal and can sounds normal, then why aren't they doing normal things, how is it that they can do such extreme acts of cruelty. It's hard to understand that sometimes those acts are not a result of freewill, you know, direct intent to cause harm.

Q: So, you knew at some point, you knew at some point in the charge conference that you were gonna be forced to have a guilty but mentally ill charge?

MR. MABRY: Asked and answered repeatedly.

THE COURT: Yeah, we've already gone over that already.

MR. AXELROD: Well, I was just prefacing because I was gonna go elsewhere. I apologize to the Court. I'll move on. If you're confused, I'll go back.

BY MR. AXELROD:

Q: In the closing argument, in the closing argument -- I'm referring to 2158. Tell me, Mr. Shaffer, when you're ready

for me to read. 2158, you're -- we're doing a closing argument at the guilt phase, Mr. Diggs, right? I'm gonna read to you ---

A: Is this me?

Q: Excuse me?

A: Is this me?

Q: Yes. I'm gonna read to you. On Line 17, Stephen, I don't know if Laura met to slap him or hit him or whatever. She hit the cigarette and it's lodged up here beneath his glasses and stuck in eye and that was the last time he remember it until he came to in the shower. Now, you made mention of that to the jury. Why?

A: Well, in the context of insanity, it was the act that set off the limbic system signal fight or flight and that normally goes to the front of the brain and its analyzed and being reasonable -- you formulate at that point a reasonable reaction to that event. It is dangerous? Is it something -- you know, how much -- what do I need to do here? I need to either get out of here or I need to respond in some way because this is clearly dangerous. And, I think at that point he goes into this rage and he is not analyzing and it fits within the theory of the defense -- this argument fits within the theory of the defense that we presented in the case.

Q: In a normal murder trial, in a murder trial -- how many have you done? Three dozen, four dozen?

A: Maybe three -- three dozen.
Q: And when you have a fact like that and your client was charged with murder, would you suggest something to the Court -- would you suggest maybe that you are entitled to a voluntary charge?
A: I think ordinarily, you know, you get into the area of mutual combat, you get into the area of what this victim has done to justify reaction, you simply have a, you know, a reaction where somebody overreacts and they don't control themselves the way they should and they commit a murder in the heat of passion, commit a homicide in the heat of passion.
Q: And ---
A: In this case, I didn't want to put -- I mean, if you had seen the photographs of Laura Ling following this incident, you can't reasonably blame her, you know, for -- I think it would take a lot more. If it was an unintentional act, she -- I can't remember now why she slapped him or what happened that led up to that. I remember that conversation.
Q: Haven't you had many, many trials where the heat of passion provokes an horrific act?
A: Well, it gets to the point -- if you mean by horrific to act of killing ---
Q: Just real bad stuff, whether killing ---
A: I, you know, I think it's more a heat of passion like shooting somebody. I don't know if we've had -- I don't know

that I have seen that many beatings like this and then the assault that followed, you know, and then returned to the beating during the assault -- I'm talking about the second victim in the home -- in the house that night.

Q: Which was the second crime in itself, correct?

A: Right.

Q: But for the murder, could you not have asked for a voluntary?

A: It didn't occur to me that -- and I can tell you that I didn't want to blame Laura Ling for this and that's why -- I mean that's why I didn't pursue that. I mean, I knew at that point that the concept was there ---

Q: But it didn't occur to you?

A: I can't say that.

Q: You just did? You said it didn't occur to you to ask for a voluntary?

A: Because, it didn't occur to me, you know, in a serious way to present that as a factor because I didn't want us to be seen as blaming the victim.

Q: The heat of passion, don't we always sometimes blame the victim?

A: Yeah, is different. The facts of this case were such, I felt like it was cleaner not to muddy it up with blaming her. I felt like that might evoke -- as I sit here now I'd say it might evoke resentment from the jury to blame Laura Ling for

what happened to her.
Q: And you never really considered that a defense up until and in the trial, correct?
A: I never considered presenting it as a defense.
Q: But when the facts arose and came to light ---
A: Well, they came to light, we knew about that well before the trial.
Q: I understand that you didn't expect that to come into the trial.
A: That particular testimony?
Q: Yeah.
A: Well ---
Q: You knew ---
A: No, no. It never -- I didn't present. If you're saying I didn't present it, I don't recall how it came into the trial but, obviously, if I'm arguing that it's been presented into evidence. I'm sitting here trying to think what would've been going on in my mind. In my mind, I'm not -- it never -- I've never took seriously the idea that I could use that as a defense ---
Q: But you didn't see it coming, did you?
A: Why would that justify the attack on the daughter?
Q: The daughter is a separate -- let's take the daughter out of this ---
A: It happens during the same act, the sequence of events.

Q: But he -- but ---
A: He would attack her and then he would be Laura and then he would continue to go back to this one.
Q: But you can't get the death penalty for Christina.
MR. MABRY: I'm gonna object to the relevance.
MR. AXELROD: It's relevant, Your Honor.
MR. MABRY: I don't think it is. In case law handed up to the Court, the only testimony that came in about this was Stanko ---
MR. SHAFFER: Speaking objection.
MR. MABRY: Stanko ---
MR. AXELROD: Speaking objection. I guess are going to have to have ---
MR. SHAFFER: If he wanted -- I apologize, Your Honor.
MR. MABRY: Well, they know what the record is, they know what the record is.
MR. SHAFFER: It's the exact same motion he made for wanting ---
MR. MABRY: That's fine. The Court knows my objection is to irrelevance here because of the way the evidence came in.
THE COURT: I'm going to give him a little bit of leeway but not much.
MR. MABRY: Yes, sir.
THE COURT: You've asked that -- you have been on this issue for ten minutes now and I think the Court, as the finder

of fact, I understand where we're going.

MR. AXELROD: It came in as hearsay through, I think Mr. Humphries, it got elicited through somebody, I'm not sure who.

A: I didn't even know it happened because I learned of that in a confidential communication that I had with Stephen.

Q: And I'm sorry, it might have come in through Sachy on cross by Humphries. I think that's how it came in.

A: Okay.

Q: And it was hearsay but it was not objected to or limited for any purpose.

A: Okay.

Q: It was evidence. Now, you are driving the Titanic, you're on the Titanic, you're going 3000 miles insanity defense all the way and at the very last minute you have a voluntary charge that can be asked for by you.

A: Well, based on that, but remember we would -- I don't recall that. You know, I don't have any recollection -- if I've read the transcript it will probably come back. I'm not asking to read it. But, I knew about that incident well before the trial.

Q: Well, you talked about in your closing argument.

A: Well, if I did, it was because it had been mentioned in the trial of the case, you're right. And so, what I am doing here is trying to explain what that -- I mean, I've seized on an opportunity, it seems to me, to explain why he went into a

rage.
Q: If the jury bought ---
A: But I didn't, you know, it might be useful for that purpose but I think it would be going too far to say, so therefore, Laura, you know, she caused this to happen, it was a legally sufficient provocation to make his do these things, I didn't feel like that was a legitimate argument to make.
Q: Have you ever done that in a murder trial before?
A: Try to get an involuntary?
Q: A voluntary.
A: Of course, yeah.
Q: Voluntary. And you've read the ABA Guidelines on death penalty defense?
A: I'm sure I have at some point.
Q: Does a voluntary get a death penalty?
A: Voluntary manslaughter? No.
Q: Okay. And your argument with guilty but mentally ill, you could still get a death penalty. So, isn't it ---
A: You could at that time.
Q: Isn't it fair to say that on ABA Guidelines that all defenses should be investigated that might bar a death sentence, for example, guilty of a lesser included offense?
A: I think under normal circumstances and within reason, that's true, of course.
Q: Now, also, would it be fair to say that trial counsel must

coordinate, integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase?

A: Yeah, I agree.

Q: Now, in closing argument, I'm bringing up Page 2162. The Judge -- just a second -- your closing argument on Line 16 ---

A: Yeah.

Q: One more thing I want to say.

A: All right.

Q: The Judge by law is going to give you an option to vote guilty but mentally ill. Nobody -- we don't say that that he was guilty but mentally ill and they don't say he was guilty but mentally ill because guilty but mentally ill means he knew something -- he knew because he had the capacity at that time to make a distinction between right and wrong. Why not say to the jury, if you don't find him not guilty by reason of insanity, let's take that premise first, if you choose not to find him guilty by reason of insanity, let's look at guilty but mentally ill because you the jury have now found he basically might've understood what he doing.

A: I think you undermine, you know, your credibility by doing that. I think you're saying I don't like defenses that say, you know, one thing, but if you don't believe that, how about this. You know ---

Q: Why not?

A: I don't think you're sincere about it. I don't think it comes across as being sincere and it undermines your own -- you know, your own belief in the merits of the defense that you're presenting. You know, we believe and I believe now he's -- at this moment, he was insane. He did not have the ability to conform his conduct as required by law under the circumstances.
Q: So you're ---
A: I think ---
Q: I'm sorry.
A: --- it would've -- it wasn't in my -- in wasn't in my nature at that time to say but, you know, forget that -- let's say he's not insane, he's mentally ill. I don't think that enhances the credibility of, you know, it hurts your credibility and it shows -- it opens the door for them to believe as a juror that I don't believe that defense myself.
Q: You wanted it your way no matter what the facts said.
A: There were no -- in my opinion there were no facts that said that. I don't -- as we sit here today, I don't believe the cigarette, that's was totally accidental, she didn't mean to do that.
Q: Doesn't, doesn't ---
A: She slapped him but it was the cigarette that burned, that got stuck in his eye.
Q: Well, she slapped him, that's a volitional act and then,

then the cigarette burned him and then we have heat of passion, and Dr. Sachy said he saw red. Now, when Dr. Sachy testifies he sees red, is that what -- is that what, is that heat of passion when you see read?

A: I think Dr. Sachy was saying he went unconscious at that point and he was being driving strictly out of the limbic system.

Q: He didn't say that. He said he saw red.

MR. MABRY: He's arguing with the witness now.

THE COURT: Sustained.

MR. MABRY: And we've gone over this ground.

THE COURT: We have.

MR. AXELROD: I'll move on.

BY MR. AXELROD:

Q: Now, on July the 14th, you realized you had a problem with this case, do you remember?

A: No.

Q: Stephen had been -- everyone had forgotten to interview Stephen. I'll rephrase that. That was not a good question. I'm getting tired, Judge. The Court had ordered Stephen to be evaluated.

A: By the State.

Q: By the State.

A: Yes.

Q: And we all forgot to do it.

A: Right.
Q: Now, *48 Hours* was filming this, correct?
A: Yes.
Q: Okay. Now, at that point, on July the 14th, why didn't you ask for a continuance?
A: I don't -- I mean, the only thing I can think of was -- can I ask you the date of the trial?
Q: The trial started, I believe around the 30th, 28th of July?
MR. MABRY: July 31st. The 31st of July.
Q: The 31st of July.
A: The only thing I can think of is that we had set our schedules for the experts and everyone and it didn't occur to me we needed to continue the case. I think I probably made a decision -- in fact, I think I can say that I did make a decision, I didn't want to delay it.
Q: Even if it hurt Stephen?
A: It did not occur to me that it was gonna hurt Stephen. I didn't view it in that vein.
Q: Well, you had the opportunity to get a continuance, you probably could've been granted one by Judge Jefferson because that's -- if it's true ---
A: I think, I think that my attitude at that time was that we wanted to go ahead and get the -- go with the schedule that we had and that's one reason I didn't object to Dr. Crawford

doing the evaluation.
Q: Whose idea was it for Dr. Crawford?
A: Mr. Humphries, I believe.
Q: So, you acquiesced to the State for Pam Crawford?
A: Right.
Q: Tell the Court her original position in this trial originally. Who did she work for?
A: I don't -- she was in some way associated with SLED but I would prefer -- I mean, that's all I can do and maybe if you know what it was ---
Q: Well, didn't she go down to Georgia and do some investigation for SLED concerning Stephen?
A: I'm not sure. I'm not sure.
MR. AXELROD: Court's indulgence.
BY MR. AXELROD:
Q: Now, she worked for SLED.
A: I don't know if she worked for them, she -- she might've been associated with them in some fashion. I don't know if she was a SLED agent -- it might've been one of those situations ---
Q: I want to read to you an email that was sent from Dale Davis to you, Appellant's Number Nine. While was I was in Columbia today meeting on another case, I came across some information that you all may or not be -- all may or may not know so I thought I would pass it along. When the Judge

ordered DMH to do the competency on Stephen, Dr. Frierson called the Judge and said he could not do it, there was too little time. She was not happy but there was little she could do, I guess. I don't understand how it came about but Pam Crawford is going to do the exam. It is my understanding that she has some kind of relationship with SLED.

Now, you're aware that Pam Crawford's nickname is Dr. Death, are you not?

A: I don't -- I don't know that I'm aware of that. I don't remember it.

Q: Let me ask you this way. While they're looking for it. If it's the testimony in this trial that Pam Crawford worked for SLED as an arm of SLED to do forensic psychiatric investigation on Stephen's case on the very front end when he -- after he got arrested in Georgia, would it have been improper for you to acquiesce to her being the one ---

A: I think it would've been grounds to object to her but I knew Dr. Crawford. I didn't feel uncomfortable with her doing the assessment and I felt like anyone would find him -- I wouldn't be surprised, you know, finding that he's competent and so forth. So, I can just tell you at this point, I did not have any objection to Dr. Crawford being the examiner.

Q: You had no problem with Dr. Crawford?

A: With her being the examining doctor in this case.

Q: Did she so anything that bothered you about this case? I

mean, here you got Mr. Humphries, the Deputy Solicitor, saying, hey, let's use Dr. Crawford, the lady that used to work for SLED to be the one to do the evaluation?
A: I didn't -- I felt like she was professional and would do -- I did not believe that she would be anything other than professional in her assessment of the situation.
Q: Would it be fair to say that your job as a defense attorney in the capital case is to prolong Stephen's life?
A: Well, you -- if you're talking about just delaying ---
Q: I'm just saying to delay, did you not have the perfect opportunity to delay this trial?
A: We wanted to go forward with the trial because I felt like -- if you go back and look at the date, when did I acquiesce on that, what's the date of that memo, because I'm sure I had a conversation with Fran Humphries prior to that day.
Q: This is July 14th. And I don't think ---
A: Fran and I discussed that. I remember we were in the courtroom in Georgetown at the time we discussed that. I told him I didn't have any objection, that was based on my knowledge -- I've known Dr. Crawford and felt like she would be professional in her assessment.
Q: Now, on July 18th, you had a conversation with Dr. Sachy, do you remember that?
A: No.
Q: On July 18th, Dr. Sachy told you that Pam Crawford, a/k/a

Dr. Death, called him and said, hey, Dr. Sachy ---

MR. MABRY: I'm gonna object to that characterization.

THE COURT: Strike.

BY MR. AXELROD:

Q: On July 18th, you had a conversation with Dr. Sachy informed you that Pam Crawford called him and told him to change his opinion; do you remember that?

A: No. I -- if I put that in my notes -- I kind of do recall it, I kind of recall it.

Q: Unbelievable.

MR. MABRY: Object to testifying.

THE COURT: Sustained.

Q: Was that unbelievable? That was unbelievable, wasn't it?

A: I think that it was inappropriate although I don't know that Dr. Sachy characterized the conversation accurately because I know both of the people involved in the conversation ---

Q: Excuse me?

A: I know both of the -- I know Dr. Crawford and I know Dr. Sachy. I don't know, I don't -- I'm not willing to take Dr. Sachy's version of the characterization of the conversation as literally as you are at this point.

Q: Well, just read -- on July the 18th, just read that one blurb. Just read it.

A: And I know -- I wrote that.

Q: Read it into the record.
A: July 18th, 2006, discussions with Dr. Sachy, re: Dr. Crawford's efforts to change his opinion. Review case law applicable to insanity and diminished capacity.
Q: Now, diminished capacity, would that be guilty but mentally ill?
A: No.
Q: Isn't that a volitional prong of GBMI?
A: A what?
Q: Isn't that the volitional prong of GBMI, diminished capacity?
A: I -- could be, yes.
Q: Okay. Now, Your Honor, I'm almost finished. I'm running out of paper up here.
A: On that, counsel, remember, Dr. Crawford admitted in her testimony she's not familiar with the technology that was used in the case with the scans and everything that was depicted in the images used down at MUSC. And I felt like she was looking at the case strictly from the book, you know, that sets out the mental -- the different mental illnesses and so forth.
Q: You testified that ---
A: And I think she -- I took her conversation with Dr. Sachy in terms of, you know, strictly looking at the DSM and the antisocial personality diagnosis instead of looking at scientific testimony produced by the scans. You know, she

wanted -- she didn't understand Dr. Sachy was looking at different types of evidence to reach his conclusion.

Q: If you had to continue the trial, would *48 Hours* have pulled out?

A: You know, I don't know because I never thought about that and that's not an issue that concerned me.

Q: But Dr. Califf came into the case four weeks before the trial, you didn't find out the results of some of your experts until four weeks till the trial.

A: I can -- I can say I thought we were ready to go to trial. I felt like we had a defense that gave us a shot of winning the case and I didn't want to delay it.

Q: Well, I'm going back to Dr. Crawford now. All right. I'm gonna read to you the direct by Mr. Hembree. Dr. Crawford says Line 12 on Page 1870, I initially got involved in this case when I was -- part of what I do is consultation for SLED. So, prior to getting this court order, I was asked by SLED to assist them in helping them understand what happened in this case. So, I initially got involved in this case in 2005 in terms of interviewing people. This is something that I had disclosed to both the prosecution and the defense before they agreed to have me do this evaluation. But I wanted you to understand that even prior to this, I had had some connection with the case.

Why didn't you ask for a continuance?

A: I didn't see a need to do it. At that time, remember, again, I thought she was professional, I thought she could do -- her evaluation of Stephen really didn't depend on things that might've been learned in any kind of investigation. It was just, you know, my willingness to trust her and, again, I didn't -- I'm pretty sure I didn't want to delay the case. I wanted it go ahead and start.

Q: But didn't she have facts that nobody else would've had in theory? I mean, she interviewed ---

A: I don't know ---

Q: She interviewed all kinds of people down in Georgia and then she had that what no one else would've had and then you acquiesced to her doing the evaluation.

A: Well, I just see it as something different from, you know, an investigation in Georgia.

Q: Let me ask you this, wasn't there a hearing on or about 2006 to have you removed as counsel for Mr. Stanko?

A: Yeah.

Q: Isn't it true -- on the family issue, isn't it true that you only spoke to Mr. Stanko, to his sister one time?

A: I don't think I ever spoke to her.

Q: Okay.

A: I mean, I might've; I don't recall. I know we had people on the defense team that did speak to her.

Q: Did you instruct Ms. Dale Davis not to contact the family?

You argued in your close the family is not ---

MR. MABRY: Wait a minute ---

A: No, I didn't.

THE COURT: Let him answer the question.

A: No, let me say this, we wanted -- we tried to get the family to come to the trial. I didn't ask anybody not to contact them. I asked them to get the family there and the fact of the matter is, they refused to come and we used that as an example of Stephen's conduct. He had alienated -- he had done some ridiculous things, out of the ordinary to the extent he alienated every single person in his family, not one person would come to the trial to support him.

Q: Well, you even told the jury, heck, he's so crazy his family didn't even come in closing ---

A: Yeah, I didn't -- I don't know if I said that but I pointed out to the jury that not even his family would come to support him in this situation.

Q: Prior to Stephen moving in with Laura, isn't it true that he was living on his own at that time?

A: Yeah, on the street, I think.

Q: Excuse me?

A: He was living on the street.

Q: Didn't he have an apartment?

A: I don't recall. I know that he would've been homeless if Laura hadn't brought him in.

Q: It's your testimony today that -- do you not remember or are you saying that he was homeless?
A: I think he was -- I think he would've been homeless. Now, he might've had an apartment, but I think that was not a permanent thing for him. I think if Laura hadn't have come along, I think Stephen would've been homeless.
Q: Did he ever want to move in with his brother? Do you remember?
A: I don't remember. I don't recall.
Q: Did Peggy have a plane ticket -- did you buy Peggy a plane ticket to come here?
A: I think ---
MR. MABRY: Object. Somebody is over here talking instead of Mr. Axelrod.
THE COURT: Yes.
MR. MABRY: I believe it's Mr. Stanko.
BY MR. AXELROD:
Q: Did you buy her a plane ticket to come here?
A: You know, I don't recall. I think we had discussions about it but I do not remember -- I know we certainly thought she was gonna come here and I remember at the last minute she decided against it because her husband didn't want her to come. She lived in California and so it was -- it was gonna take some arranging to do to get her here but eventually she said, no, I'm not gonna come. And so whether we bought the

ticket or not, I don't know.
Q: All right. Did you ever -- did you ever tell them to cancel that stuff?
A: To cancel ---
Q: The ticket and the hotel?
A: I don't know.
Q: Okay. Now, I'm gonna refer you to Page 3348.
A: Listen, I'm gonna go back to that one thing about Dale Davis, did I tell her not to contact the family; that is absolutely not the case.
Q: Well, did you tell ---
A: We, we -- I know for sure that we did contact the family and so it's totally inaccurate to say that I instructed her not to contact them.
Q: Let me ask you this -- I'm gonna go to Page 3348. On 3348, I'm gonna read to you, the Judge, she says, You may consider the following mitigating circumstances and I included the last one because I did this early and I was not certain how the facts would shake out. She goes on to say, I know in the guilt phase, there was some indication potentially about provocation but I, after having listened to the penalty phase, I don't think it's supported by the facts and I would not charge it. Now, isn't true that under the -- under *Stone* case in 2002, the Supreme Court has said the Trial Court is required to charge all statutory mitigating circumstances

regardless of whether it was asked for? Would you agree with that?

MR. MABRY: Object to that, Judge. That's not a fair characterization. There's cases after *Stone* that's different -- it has to be asked for or objected to.

MR. AXELROD: Your Honor, it's our opinion that at the time it was good law, I want to print the case.

THE COURT: Why don't we just do at the time of the trial, 2006.

MR. AXELROD: Yes, sir. So, let's get it ---

MR. MABRY: I understand. If the Court's gonna allow it, I've submitted the cases already, so ---

THE COURT: Okay. All right.

MR. AXELROD: I'd like to address the Court for a second if I may. It's my understanding that at the time of this case, at the time of this charge, it was statutorily required by the Judge to instruct all mitigators. A few months later, I believe it changed and I'm not sure of the case -- they'll probably tell me -- but it changed and it became the province of the attorney. But for this case, at this time, Your Honor, I submit to you that it was good law. The State -- the Judge had to charge it. That's what -- we'll put the case it, we'll let it speak for itself.

THE COURT: Mr. Mabry?

MR. MABRY: Yes, sir, Your Honor. This very case, *Stanko*

on appeal to the Supreme Court said a mitigator was not preserved below because it was not requested or -- and there was no objection. So, when this case went up on appeal, this very case, they said, that's not the law, it's got to be preserved below, not -- it's not judicial ---

THE COURT: I'll take that into consideration when I rule on this.

A: Your Honor, for that mitigating circumstance, I specifically -- when Joe Savitz appealed that, we specifically did not want that in the charge and it was a companion one that was charged that I felt was appropriate under the statute. So, you know, we didn't -- it's not an oversight that we made; it's a decision we made that we didn't want ---

THE COURT: I'll consider what the Court said in this case.

BY MR. AXELROD:

Q: You don't think the Judge erred in not charging the provocation mitigator?

A: I think the -- you get to a point where you charge statutory mitigating factors to the -- you overcharge until the point it gets to be ridiculous and it undermines the credibility of the ones that do apply.

Q: There weren't that many, were there?

A: There were -- I had -- I think he had a tremendous amount of evidence showing a mental defect. And when you say wait a

minute now, let's throw that over and let's don't consider the mental defect, let's go with the fact that she caused this whole thing by slapping him, you know, I think it undermines the credibility of your case.

(REPORTER'S NOTE: Mr. Axelrod confers with co-counsel.)

MR. AXELROD: Court's indulgence, Your Honor.

THE COURT: Yes, sir.

MR. AXELROD: Because I'm almost done, Your Honor.

BY MR. AXELROD:

Q: So, you don't think the Judge erred in not charging the provocation mitigator?

A: I'm glad she didn't because, again, I think it undercuts, undermines the merits of the insanity defense that we put up.

Q: Even if she was required at that time?

A: Yeah.

Q: So, her not following the law was a good thing at that point?

A: I think it is. It's like I said before, simply because it's written in a statute doesn't make it right.

Q: But it makes it law.

A: But it makes it unfair. And if it's arbitrary, it makes the proceeding unfair. It undermines -- okay, if we're out there, we present a defense, we present evidence that supports the defense that we're asserting. And then we go out there and just throw darts at the dartboard, oh, yeah, and by the

way, if you don't buy that, then you've got all this stuff over here that the statute says might be applicable. You know, if the facts don't fit it properly, it undermines the credibility of your case, that does have an error. And I think counsel would have a right to make those decisions in the presentation of the defense.

Q: And if the law -- if you don't like the law, you just think it's unconstitutional.

A: Right. That's what you have an obligation to do if it's the case.

Q: And then basically, what you're basically telling the jury in your closing argument is you're basically saying, hey, you need to nulli -- you're looking for jury nullification ---

A: No, no, no.

Q: Aren't you?

A: No, not -- that's a different degree, it's a different ballpark.

Q: Well, you're basically telling the jury not to follow the law because it's not -- it's not right.

A: Well, I don't ---

Q: Isn't that nullification?

MR. MABRY: Judge, I object to that ---

THE COURT: Let him talk. You ask him a question and then you cut him off. Don't do that anymore.

MR. AXELROD: I'm sorry.

THE COURT: Let him answer.
A: It depends on what your definition of nullification is. It could be -- I think it's -- I don't agree with you about it but I don't think it's totally wrong to characterize it like that.
Q: Well, let's just -- let's just say -- let's say there's a speed trap in Turbeville, I think they have one there where you go like from fifty down to thirty-five and then it goes back to fifty.
A: Yeah, I know exactly where it is.
Q: Okay. I think we all do. Now, that's not fair so should we just tell the jury in a speeding trial ticket just ignore what that says because it's not fair and you should let him go?
A: One is a procedural question and one is a substantive issue and I think the procedure, in terms of identifying what mitigators are gonna be there, the legislature is looking at trying to be fair, I think when we do something, it's all kind of situation, you know, they're doing the best they can and sometimes, you know, we don't -- it doesn't fit and you're happy that it doesn't fit. It's -- you take that and you go with it.
Q: But you gave up -- you gave up a lesser -- a possible lesser included charge for an affirmative defense that wasn't viable at the time.

A: A lot of times ---

MR. MABRY: Objection, asked and answered.

THE COURT: We've already been over this. Sustained.

(REPORTER'S NOTE: Ms. Axelrod confers with Mr. Mabry.)

MR. MABRY: Subject to my previous objection.

THE COURT: What is he trying to put in?

MR. MABRY: It's *State v. Stone*, but my objection is ---

THE COURT: Well, that doesn't need to come in, the Court will consider that.

MR. AXELROD: Can I put it in, Your Honor?

THE COURT: Sure.

MR. AXELROD: Thank you, sir. This will be ---

COURT REPORTER: Nineteen.

APPELLATE'S EXHIBIT NUMBER NINETEEN

ADMITTED INTO EVIDENCE

BY MR. AXELROD:

Q: On Page 6 and Page 7, maybe just read this one sentence. It's constitutional stuff, the Eighth Amendment.

A: Eighth Amendment prohibits the State from limiting -- consideration of any relevant mitigating evidence which could cause the jury to decline to impose the death penalty.

Q: Thank you.

A: Okay. They're citing *Payne v. Tennessee*, there, right? That's the case that overruled the *Gathers* opinion.

Q: And *Eddington v. Oklahoma*.

A: I argued the *Gathers* opinion.

MR. AXELROD: Your Honor, I just have one or two more questions. Your Honor, this just -- it has Tristan Shaffer's name on the bottom of it. For some reason, his printer likes to put his name on stuff.

THE COURT: It's a nice printer to have that puts your name on the bottom of everything.

MR. MABRY: It's just the Code section with the mitigating circumstances.

MR. AXELROD: Have we got to twenty yet?

THE COURT: This is Twenty.

APPELLATE'S EXHIBIT NUMBER TWENTY

ADMITTED INTO EVIDENCE

MR. AXELROD: Judge, I think I'm gonna stop at Twenty because it's a nice round number.

THE COURT: Okay. You do that.

BY MR. AXELROD:

Q: I'm gonna show you -- it's the like a mitigator statute. And on Page Two, it goes into the mitigating circumstances and it's kind of long. I'm gonna let you read it and then we'll go into which ones we've got and which ones -- and maybe -- why don't we -- I'll give you my pen. Why don't you just circle the ones that you believe got in the -- I'll let you look at them, there's no rush. We've been here a long time.

A: Well, I mean, I don't remember ---

Q: The ones you do remember.
A: Specifically what the Judge charged or what my thinking was at the time was at the trial. You want me to mark the ones that I think are applicable?
Q: Yes, sir.
MR. MABRY: Judge, we object to this. The record reflects ---
THE COURT: Yeah, the record had got what it is, he doesn't have to say what it is. Sustained. You don't have to do it.
BY MR. AXELROD:
Q: Let me ask you this question.
A: Yes, sir.
Q: Did they charge the Defendant acted under duress?
A: I don't think so.
Q: Did they charge the Defendant was provoked by the victim committing the murder?
A: I don't think so.
Q: Now, you said, you said that Dr. Crawford acted very professional?
A: No, I said I trusted her to be professional in the performance of that evaluation.
Q: And she wasn't, was she?
A: I don't know. I'm not -- I'm not ---
Q: Did you think it was right for her to call another one of

your experts that -- the doctor that worked for SLED and say, hey, Dr. Sachy ---

MR. MABRY: Objection, asked and answered.

THE COURT: Sustained. Don't answer the question; I sustain the objection.

BY MR. AXELROD:

Q: You made note of that situation. If you look at it today, was that professional?

MR. MABRY: Same objection. Asked and answered.

THE COURT: Sustained.

MR. AXELROD: Your Honor, I don't believe that's ever been asked. It's my last question and I don't think it's been answered.

THE COURT: Okay. I'm the finder of facts and I'll take it for what it's worth. Go ahead.

BY MR. AXELROD:

Q: When you look back ---

A: No. I think, I think, you know, knowing her and knowing Dr. Sachy, I don't know that I put the best characterization in that note as to what actually was said. I don't believe she said, oh, come on now, change your opinion. I want you to -- I want you to go with us, with the State here and say he was sane. I don't think it happened like that. I think she might have discussed with him what his opinion was, how he reached that, was he real comfortable with it, you know, I

just don't know. I think there's too much possible variance there to make an assessment of whether she was professional or not. I don't think there's anything unprofessional about calling somebody up and discussing their opinion.

Q: So, his ---

A: I think that's basically what happened in that situation.

Q: His opinion was that Dr. Sachy was -- that Stephen was not guilty by reason of insanity?

A: Right.

Q: Dr. Crawford's opinion was that he legally sane at the time of the murder?

A: Right, just add some kind of antisocial behavior diagnosis.

Q: So, conversation about changing something would only be one issue, then?

A: Yeah, I don't know -- you know, I'm not sure that -- I didn't put that word in there. You know, I just don't know, I'm not -- I know who I tend to be myself at times. I'm not sure what that conversation entailed.

Q: And it would be your testimony today that you don't remember the conversation that Dr. Sachy had in response to that ---

A: I don't recall that. Do you have notes about it? I don't recall.

Q: I'm not sure but -- what I'd like to do, Your Honor, is

ask my table if there's anything else that'd like me to ask.

THE COURT: Yes, sir.

(REPORTER'S NOTE: Mr. Axelrod confers with co-counsel.)

MR. AXELROD: Your Honor, we rest.

THE COURT: Okay. Any brief ---

MR. MABRY: Very briefly. Thank you, Your Honor.

REDIRECT EXAMINATION OF WILLIAM ISAAC DIGGS BY MR. MABRY:

Q: Mr. Diggs, there came -- this was talked about by Mr. Axelrod. There was a competency evaluation that had failed to have been done shortly before the trial. Do you remember that?

A: Yes.

Q: Okay. And that -- was there ever any question in your mind about Stephen Stanko's ---

MR. AXELROD: Your Honor, I object, he's leading here. This is a -- I believe I had the cross and he had the direct here.

THE COURT: Overruled. I let you go a little ways, too.

BY MR. MABRY:

Q: Was there ever any question in your mind about Mr. Stanko's competency to stand trial?

A: No.

Q: And did you have any problem with Pam Crawford conducting the competency evaluation?

A: No.

Q: All right.
A: No, I didn't.
Q: All right. In fact, do you remember an email where you emailed Dale Davis and said ---
MR. AXELROD: Your Honor, I would object again that it's actually leading.
THE COURT: I don't know what he's asking.
MR. MABRY: I'm gonna ask him if he remembers an email. If he doesn't remember it, then I'll ---
THE COURT: Okay.
BY MR. MABRY:
Q: Do you remember an email to Dale Davis where you said, I've been meeting with Pam and Stephen, Pam Crawford and Stephen over the last two days. I prefer this to Dr. Frierson. Thanks, Bill.
A: Yeah, I kinda do.
Q: Okay. Did you prefer her to Dr. Frierson, talking to your client?
A: Yeah. And I mean it goes back -- I just for some reason trusted her to do the right thing and, you know, I knew her and I felt more comfortable with her.
Q: All right. Did -- well, let me ask you a question as a lawyer, can -- if you call an expert or the State calls an expert and they cross examine that expert about any information he relied on in forming his opinion ---

A: Uh-huh (affirmative response).

MR. AXELROD: Objection, Your Honor. Now we're going into the leading here.

THE COURT: He hasn't finished his question yet.

MR. MABRY: I don't think it was a leading question. This -- it's not suggesting an answer.

THE COURT: Overruled. Go ahead.

BY MR. MABRY:

Q: Can an attorney with ---

MR. AXELROD: Objection to what the law is, Your Honor, I object.

THE COURT: Sit down, Mr. Axelrod. Proceed.

BY MR. MABRY:

Q: Can an attorney ask an expert about any information he relied on in forming his opinion?

A: Yeah, yes.

Q: All right. Is that basically standard law?

A: Yes.

Q: And did -- did Dr. Sachy and Dr. Thrasher rely on information about the prior kidnapping of the ---

A: I think they would've -- I'm pretty sure that they would've done that.

Q: Okay. So, that was some of the information that ---

A: That they already had.

Q: They already had?

A: Yeah.
Q: Okay. And that's what the State was questioning them about during the trial, what they relied on?
A: Right.
Q: Okay. And do you recall -- yes or no, I'm not suggesting an answer -- do you recall during that proffer or issue before Judge Jefferson that the State actually wanted to go into the Turner murder in cross examining Dr. Thrasher or Dr. Sachy?
A: I kind of do. I hadn't thought about that but I think I remember that.
Q: Do you recall if you were able to stop the State from doing that?
A: Okay. Yeah.
Q: And Dr. Gur did not come to this trial but he did testify in the Horry County case?
A: Yes, that's right.
Q: And Mr. Stanko was also sentenced to death there?
A: Yeah, that's correct.
Q: Did -- and you tell me if it's true or not, I'm not suggesting an answer to you -- well, let me ask you this, Did Stephen testify in the guilt phase of the trial?
A: No.
Q: Did he testify in the penalty phase?
A: No.
Q: And the statement that was made about Ms. Ling striking

the cigarette ---

A: Uh-huh (affirmative response).

Q: --- were the only references in the trial to that, Stephen's statements to his doctors for the purpose of medical diagnosis?

A: I believe that's true.

Q: Thank you, sir. That's all the questions I have.

RECROSS EXAMINATION OF WILLIAMS ISAAC DIGGS BY MR. AXELROD:

Q: What medical diagnosis was the doctors getting at that point? She told it -- Pam Crawford, she was a psychiatrist, so what medical diagnosis were they doing? Was he sick? Did he need his eye examined?

A: Who?

Q: Stephen.

A: I don't understand the question.

Q: Well, you just heard a question saying that the diagnosis of the burn of the eye was for medical purposes, what medical purposes were they looking at, what of eye?

A: They were looking at that scenario to make a diagnosis on the issue of insanity.

Q: And I ---

A: I don't know that they were looking to derive any kind of medical service.

Q: No medical service?

A: Right.

Q: Okay. Thank you.

MR. MABRY: Nothing further.

THE COURT: Thank you. You may step down.

MR. MABRY: The State rests, Your Honor.

THE COURT: All right.

BY THE COURT:

MR. AXELROD: Your Honor, I believe I might have an order -- I have an order for you to sign about the destruction now.

THE COURT: All right.

MR. AXELROD: I'm not sure, Your Honor, but I haven't had this ---

THE COURT: Any objection to this witness being excused?

MR. MABRY: No objection.

MR. AXELROD: Your Honor, this has not been clocked yet, this has not been clocked and I don't think -- I don't think -- I don't know if they -- what I'd like to do ---

THE COURT: If I sign it, it's an order, whether it's clocked or not.

MR. AXELROD: Very good. Now, who do you want to hold on to the order prior to clocking tomorrow?

THE COURT: A representative of the Clerk of Court's office.

MR. AXELROD: Okay. Now, what I would ask is ---

THE COURT: Make a copy of it and then -- that'll go along with the boxes.

MR. AXELROD: Okay.

THE COURT: And they're not gonna rush to go grind it up tonight, I don't think.

MR. AXELROD: Well, here's my question, we have some bailiffs here, if there's somebody in the Clerk of Court's office, we can clock it all right now. If they can check for us.

DEPUTY: There's no one in the Clerk's office.

THE COURT: If there's no one -- first of all, make another copy, I'll sign the original, let me sign the original, make a copy and he can take it with him when he goes back to leave and I doubt if they're gonna grind this up tonight.

MR. AXELROD: I'm just trying to do everything the right way, Judge.

THE COURT: You're gonna be fine.

MR. MABRY: The boxes are -- we're gonna let him take those back to ---

MR. SKIDMORE: Summerville, South Carolina tonight.

MR. MABRY: And you'll just keep them until tomorrow?

MR. SKIDMORE: And then tomorrow -- that's right.

MR. MABRY: That's fine with us if that's fine with Mr. Stanko?

MR. AXELROD: Mr. Stanko, is that okay?

MR. STANKO: That's fine.

MR. AXELROD: Judge, one second, I don't know why they haven't printed it, after all the hours, but ---

MR. AXELROD: Your Honor, after they -- I believe Mr. Frederick has some issues that he wants to raise ---

THE COURT: Yes, sir, Mr. Frederick.

MR. FREDERICK: Just a question, Judge, but I was -- gonna give them just a minute.

MR. MABRY: Your Honor, I'm gonna -- you ready?

THE COURT: Yes, sir.

MR. MABRY: I'd renew my directed verdict motions as to the same basis ---

THE COURT: All right. And I will stick by the same guidelines.

MR. MABRY: Yes, sir.

MR. FREDERICK: Judge, my question was earlier when the State made a directed verdict motion and the Court directed each side to prepare a proposed order?

THE COURT: Yes, that will be fine.

MR. FREDERICK: And you still would like each side to do that as to the directed verdict motions?

THE COURT: I do and I will look at the transcript up to that point in making those. All right?

MR. FREDERICK: Yes, sir.

THE COURT: Thank you, gentlemen?

MR. MABRY: Yes, sir.

THE COURT: And lady.

MR. MABRY: Thank you for staying, Judge.

THE COURT: Nice to see y'all and it's been a pleasure trying this case with you.

(ADJOURNED - 3:45 P.M.)

END OF TRANSCRIPT.

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Stephen C. Stanko versus State of South Carolina, held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on April 27-28, 2015.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

June 1, 2015.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN | ) | THE FIFTEENTH JUDICIAL CIRCUIT<br>IN THE COURT OF COMMON PLEAS |
| Stephen C. Stanko, #6022,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondents. | ) | **C/A No. 2008-CP-22-1446**<br><br>**ORDER GRANTING RESPONDENT'S MOTION FOR DIRECTED VERDICT IN PART AND DENYING APPLICANT POST-CONVICTION RELIEF IN FULL** |

This is a capital post-conviction relief (PCR) case brought by death row inmate/applicant Stephen C. Stanko (hereinafter "Stanko").[1] Stanko filed his original PCR application on October 17, 2008, and numerous subsequent amendments. Respondent timely filed a Return and Motion to Dismiss the application and each amendment. An evidentiary merits hearing took place on April 27-28, 2015, at the Georgetown County Courthouse.[2]

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GEORGETOWN COUNTY S.C.
CLERK OF COURT

## I. PROCEDURAL HISTORY

Stanko was indicted by the Georgetown County Grand Jury on August 24, 2005, in a multi-count indictment (Ind. # *2005-GS-22-0918*), for murder, two (2) counts of kidnapping, assault and battery with intent to kill (ABWIK), criminal sexual conduct in the first degree (CSC 1st), and armed robbery. The charges arose from the April 8, 2005, death of Laura Ling and the rape and attempted murder (ABWIK) of her fifteen (15) year old daughter ("the daughter") on the

[1] This proceeding was brought pursuant to S.C. Code Ann. § 17-27-160 and the November 7, 2008, Order of the S.C. Supreme Court staying the Order of Execution of Stanko to allow him to pursue potential PCR.

[2] There were multiple procedural delays in this matter due to the untimely illness of Stanko's first PCR counsel William P. Godfrey and his removal from this case for that reason and the removal of Stanko's original second chair PCR counsel, Andrew Ritner, because of the potential for a conflict of interest. Judge Baxley, the original circuit judge assigned to this case also retired in 2014, and this Court was assigned this case by the Supreme Court with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary.

same date. The State served a notice of intent to seek the death penalty.

Stanko was appointed William "Bill" Diggs, Esquire, and Gerald Kelly, Esquire, to represent him on the charges. The State was represented by then Solicitor Greg Hembree, Deputy Solicitor Fran Humphries, and current Solicitor Jimmy Richardson.

**The Guilt Phase**

Stanko was tried by a jury of his peers from August 7 through 11, 2006. The Honorable Deadra L. Jefferson, Circuit Court Judge, presided. At the conclusion of the guilt phase, the jury found Stanko guilty as charged of all counts in the indictment.

**The Penalty Phase**

After the required statutory twenty-four (24) hour waiting period, the sentencing phase began on August 14, 2006, and ended on August 18, 2006. At its conclusion, the jury found the State had proven beyond a reasonable doubt all of the statutory aggravating circumstances it alleged: (1) the murder was committed while in the commission of criminal sexual conduct in any degree; (2) the murder was committed while in the commission of kidnapping; (3) the murder was committed in the commission of robbery while armed with a deadly weapon; (4) the murder was committed while in the commission of larceny with the use of a deadly weapon; and (5) the murder was committed while in the commission of physical torture. On the murder charge, the jury recommended a sentence of death. Judge Jefferson, following the jury's recommendation, sentenced Stanko to death for the murder of Laura Ling. Judge Jefferson also sentenced Stanko to twenty (20) years confinement for ABWIK, thirty (30) years for CSC 1st degree, thirty (30) years for the kidnapping of the daughter, and thirty (30) years for armed robbery. Judge Jefferson did not sentence Stanko for the kidnapping charge of Laura Ling pursuant to South Carolina law.

**The Direct Appeal**

Stanko appealed his convictions and sentences to the South Carolina Supreme Court. He was represented in his appeal by Joseph L. Savitz, Chief Appellate Defender, and Katherine Hudgins, Esquires, with the Appellate Division of the South Carolina Commission of Indigent Defense. On direct appeal, Stanko raised two (2) issues:

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

2. Did the trial judge commit reversible error at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by S.C. Code Section 16-3-20(C)(b)(7): "The age or mentality of the defendant at the time of the crime?"

The State filed a brief in opposition. On February 25, 2008, the Supreme Court affirmed Stanko's convictions and death sentence. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). Stanko filed a Petition for Rehearing which was denied on March 19, 2008.[3]

Stanko then filed a Petition for Writ of Certiorari in the United States Supreme Court raising one (1) issue. Stanko was represented in this appeal by the same appellate counsel. Respondent filed a Brief in Opposition. On October 6, 2008, the United States Supreme Court denied certiorari.

The South Carolina Supreme Court subsequently issued an Order of Execution to carry out Stanko's death sentence. Stanko's appellate counsel filed a Petition for Stay of Execution dated October 9, 2008, based on Stanko's desire to pursue post-conviction relief (PCR). On November

[3] Upon motion by the Applicant and over Respondent's objection, the Supreme Court entered an Order on April 16, 2008, which stayed Stanko's execution for ninety (90) days so that he could either seek certiorari to the U.S. Supreme Court or file an application for post-conviction relief (PCR) in the state Circuit Court of Common Pleas.

7, 2008, the Court granted the request for a Stay of Execution.[4] This PCR action followed.

**FACTS SURROUNDING THE CRIMES**

On the evening of April 7, 2005, the fifteen (15) year old daughter of Laura Ling was working on a term paper at her home in Murrells Inlet, S.C. The daughter went to bed around 11:00 p.m. At approximately 1:15 a.m., she was awakened by Stanko, her mother's boyfriend, trying to sexually assault her. The daughter fled to her mother's bedroom. (R. 1252- 57).

There she found her mother semi-conscious between the bed and the bedroom wall with her hands tied behind her back. Stanko followed the daughter into her mother's bedroom and knocked the daughter unconscious. When the daughter regained consciousness, her arms were tied, she was gagged, and Stanko was sexually assaulting her.[5] (R. 1257-59, 1407-08).

Stanko beat the daughter until she yielded to the sexual assault. While Stanko raped her, the daughter could hear her mother moaning on the floor beside the bed. Stanko then turned the daughter over and tried to smother her while he choked the life out of her mother with his free hand. Stanko then slit the daughter's throat twice with a knife. The emergency room doctor who later treated the daughter testified that her ear was almost completely severed from her head. (R.

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[4] The State filed a Return opposing the Stay pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), because the sole ground alleged in Stanko's Petition for Stay of Execution was one the South Carolina Supreme Court found to be completely without merit in the direct appeal. Stanko's appellate counsel filed a letter in reply stating Stanko intended to offer other grounds of ineffective assistance of counsel later, after appointment of and investigation by counsel. While four (4) members of the Court agreed with the State's position that Stanko had asserted no claim of ineffective assistance of counsel except one (1) the Court found on direct appeal to be without merit, those members of the Court granted the Stay stating Stanko could file additional grounds of ineffective assistance of counsel later. Chief Justice Toal disagreed with the Court's decision and would have denied the Stay request pursuant to In re Stays, because the only claim asserted in the Petition for Stay was patently without merit.

[5] Laura Ling was also gagged. Her autopsy revealed she had been savagely beaten before her death. She died as a result of asphyxia due to strangulation. Her throat was also cut. (R. 1795, 1412-15, 1418).

1259-64, 1311).

During the assault and after, Stanko spoke to the daughter. Stanko held a sharp object to her throat and whispered to her, ". . . scream and I'll kill you both." After killing her mother, Stanko told the daughter that what had happened to her mother was her, the daughter's, fault. Stanko also taunted the minor victim during the sexual assault. When the daughter told him she was going to be sick, Stanko told her ". . . well, you will just be sick on yourself." When she told him her fear of getting pregnant, Stanko told her "[w]ell then, you're going to be raising a baby by yourself . . .". During the sexual assault, Stanko also accused the fifteen (15) year old victim of being promiscuous. After cutting the daughter's throat, Stanko told her to lie down on the floor next to her mother. (R. 1254, 1264, 1291-92, 1261, 1264, ll. 16-18).

After murdering Laura and raping the daughter and cutting her throat, Stanko showered, dressed, packed a suitcase, and went through the daughter's and Laura's purses removing belongings.[6] Stanko also removed a bracelet from Laura's dead body. Stanko locked the door as he left the house and then left the crime scene driving Laura Ling's car. (R 1265-66, 1268, 1541-42, 1575, 1801, 1887,1236, 1246, 1249).

Stanko drove Ling's car to a local bank, Ling's bank. He then made a large withdrawal from Laura's bank account using an ATM machine, used her credit card to make a purchase, and drove to a friend's residence in Conway in Laura's car. (R. 1369-73, 1382, 1385, 1575-76).

Later that morning, Stanko called Laura's employer, the Socastee Library, and informed them Laura would not be coming in to work because she had suffered food poisoning and was

[6] After her throat was cut, the daughter used all her strength to sit up. When she did, she saw Stanko packing the suitcase. While packing the suitcase, Stanko told the daughter ". . . no, no, no, lie back down." (R. 1265). The daughter then passed out.

hospitalized. At the time, Stanko did not believe the bodies of Laura and the daughter would be discovered for at least a week. (R. 1374-80, 1888).

Unbeknownst to Stanko, the daughter had survived the assault and alerted authorities to her mother's murder by calling 911. Sheriff's deputies broke the lock on the front door and found the daughter inside her home covered in blood. As a result, when Stanko called the library the following morning, the operator at the Socastee Library was already aware of Laura's murder and notified authorities of Stanko's deceptive phone call. (R. 1269-70, 1237, 1376-80).

That same day, Stanko shot and killed the friend he was staying with, Henry Turner, and fled to Columbia in Turner's truck.[7] Stanko abandoned Laura Ling's car at Turner's home in Conway. (R. 1887, 1470-71, 1381-85).

After he drove to Columbia, Stanko was seen that evening, April 8th, partying at a bar in the Congaree Vista area of Columbia. While there, Stanko represented himself variously to be a real estate magnate who had just closed a big deal, a graduate of The Citadel, and an employee of a company traded on the New York Stock Exchange. Stanko was witnessed spending large amounts of money at this establishment and another. (R. 2550, 2552-53, 2554, 2543-44, 2559, 2545).

Shortly thereafter, Stanko drove from Columbia to Augusta, Georgia, where *the Master's* golf tournament was occurring. On April 9th, Stanko was seen once again visiting a nightclub and

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[7] The State did not seek to introduce evidence of this murder in its case during the guilt phase. Based on counsel's objection, the trial judge refused to allow the State to cross-examine Stanko's psychiatric expert's about the Turner murder in the guilt phase. Evidence that Stanko committed this murder was not allowed in the penalty phase of the Ling murder trial either. The trial court only allowed the State to introduce evidence that Stanko left Ling's vehicle at Turner's residence in Conway and took Turner's truck to Columbia, S.C. and had Turner's gun and truck when arrested. Personal property of Laura Ling was found in Turner's truck. (R. 2611, 2615). Stanko was subsequently tried and convicted in Horry County of the Turner murder in 2009 and sentenced to death. His convictions and death sentence for that murder were affirmed by the S.C. Supreme Court. That case is presently pending on PCR.

began a new romance representing to others, including his new girlfriend, Dana Putnam, that he was the owner of several "Hooter's" restaurants in South Carolina. Stanko gave Putnam the bracelet he had removed from Ling's wrist after her murder. (R. 2562, 2564- 65, 2585-86, 2876).

After the passage of a few days, Stanko's new girlfriend recognized Stanko's photo in a newspaper article regarding the coastal South Carolina murders, and she immediately notified police. U.S. Marshals placed a trace on her phone, and Stanko was subsequently arrested at a shopping mall in possession of Turner's truck. The key fob to Laura Ling's car and a notebook with Ling's name on it were found in the truck. Stanko was extradited to South Carolina for both murders and the crimes against the fifteen (15) year old daughter. (R. 2588-90, 2609-18, 2615, 2611, 2603-06).

Stanko had previously been convicted of tying up and assaulting another female victim in February of 1996. This victim was also gagged. At the time that assault occurred, Stanko was on the verge of being arrested for several "scams" or "cons" he was committing in the Charleston area of South Carolina, and Stanko was in danger of being exposed to police by that female victim. (R. 2430-31, 2870, 2313, 1795, 2312-13, 2431-33).

At the time of Laura Ling's murder, Stanko was once again running several scams, this time in the Myrtle Beach area of South Carolina. Stanko was representing himself to be a "lawyer," "paralegal," or "investigator" for law firms and as a result was able to secure retainers from various clients around Murrells Inlet. Reportedly, Stanko operated his "practice" out of the library where Laura Ling worked. In the days leading up to the Ling murder, once again Stanko's "cons" and "scams" were on the verge of being exposed. Victims of Stanko's latest schemes were demanding of him the return of their money and threatening to go to the police. Stanko was under community supervision for the Charleston kidnapping at the time he was committing the Myrtle

Beach area scams, as well as at the time he committed the brutal crimes against Laura Ling and her daughter. (R. 2443-79, 1799,1855-56,1394-95, 1763-64, 2815, 2838- 39).

In addition to the testimony of the daughter, who survived her rape and attempted murder, D.N.A. evidence linked Stanko to both the murder scene and the fifteen (15) year old rape victim. Surveillance photos from Laura's bank captured Stanko removing cash from Laura's account after the murder and sexual assault. Stanko's briefcase was also found in Laura's abandoned car at Turner's residence in Conway. (R. 1395-98, 1371- 72, 1382, 1384-85).

## II. THE PRESENT PCR ACTION

On October 17, 2008, Stanko, through appellate counsel, filed an application for PCR alleging only one (1) ground. The State filed a Return and Motion to Dismiss denying the allegation and moved to dismiss because the underlying issue was found to be completely without merit by the Supreme Court in its published opinion in this case, Stanko, *supra,* and in the Court's Order subsequently staying any Order of Execution. Judge Baxley, with the State's consent, reserved ruling on the Motion to Dismiss pending the appointment of collateral counsel and the filing of a Final PCR Application.

### The 1st Final Amended Application

On October 17, 2009, Stanko, through appointed collateral counsel, E. P. "Bill" Godfrey and Andrew Ritner, filed a Final Amended Application pursuant to the Court's Scheduling Order. In the Final Amended Application, Stanko alleged several grounds. The State filed a Return and Motion to Dismiss denying the allegations of this application.

### The 2nd Final Amended Application

Shortly before this case was to be tried at the originally scheduled merits hearing, Mr. Godfrey was removed from the case because of personal illness. Mr. Ritner was removed from the

case by his own motion because he is now employed with the Attorney General's Office, though not with the capital litigation section which is handling Stanko's PCR case on behalf of the State.[8] Judge Baxley appointed Stuart Axelrod and Bobby Fredrick, Esquires, to represent Stanko is this PCR action. Tristan Shaffer, Esquire, was also appointed as third chair PCR counsel.

Following a delay so new PCR counsel could thoroughly investigate the matter on Stanko's behalf, Stanko filed a Final Amended Application for PCR (which was actually Stanko's 2nd Final Amended Application) on December 17, 2013, alleging numerous grounds. Respondent filed a Return and Motion to Dismiss denying the allegations of this application. On October 27, 2014, Mr. Axelrod and Mr. Fredrick filed another Final Amended Application for PCR (actually Stanko's 3rd Final Amended Application, but the 2nd filed by Mr. Axelrod on behalf of Stanko) which alleged numerous grounds for relief. Respondent filed a Return and Motion to Dismiss and denied each of the above allegations and required strict proof thereof.

Further, Respondent moved to dismiss several of the allegations because they are not cognizable on post-conviction relief (PCR) and fail to state a claim upon which this Court can grant relief. *See* Rule 12(b)(6), SCRCP. Stanko then filed another Final Amended Application for PCR which raised additional grounds of ineffective assistance of trial and appellate counsel.[9] Also within that application, Stanko dropped the claim previously labeled 10/11(a)(xi) regarding the impeachment of witness Irby Walker.

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[8] Pursuant to Judge Baxley's Order relieving Mr. Ritner from the case, Mr. Ritner has not discussed this case or his prior representation of Mr. Stanko with any of the members of the Attorney General's Office handling this PCR action.

[9] Each ground raised in the "final application" at the time of the merits hearing is excerpted in full immediately prior to the undersigned's ruling on that ground.

**The PCR Evidentiary Merits Hearing**

The PCR merits hearing took place on April 27 and 28, 2015 at the Georgetown County Courthouse. Stanko was present and represented by his PCR counsel. Counsel Axelrod, Frederick and Shaffer called the following witnesses on Stanko's behalf: Joseph Savitz, Esquire (appellate counsel), Gerald Kelly, Esquire (2nd chair trial counsel), Dale Davis (a mitigation investigator at the trial and penalty proceeding), and Dr. Thrasher (a forensic psychiatrist who testified at trial and in the penalty phase). Stanko also proffered the testimony of Dr. Susan Knight (a forensic psychologist). Assistant Attorneys General Anthony Mabry and Caroline Scrantom appeared on behalf of Respondent, the State.

At the close of the applicant's presentation of his case, Respondent moved for a directed verdict on all grounds alleging trial court error, prosecutorial misconduct, direct appeal grounds, the allegation applicant's due process rights were violated by the South Carolina Supreme Court on direct appeal, and all but one (1) of applicant's claims of ineffective assistance of counsel.[10] The basis of Respondent's Motion for a Directed Verdict was applicant Stanko failed to introduce any evidence in support of the claims of ineffective assistance of counsel, and Stanko failed to introduce any evidence in support of the claims of trial court error, prosecutorial misconduct, or due process violations *and* those grounds were barred in post-conviction relief as a matter of law.

After moving for a directed verdict and preserving its motion, Respondent called in its case-in-chief, first chair capital trial counsel, William "Bill" Issac Diggs, Esquire, to offer testimony on those allegations on which Stanko presented evidence in his case in chief. Respondent renewed its motions for a directed verdict at the close of its case.

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[10] This Court reserved ruling on Respondent's motion due to the lateness of the day. This Court made clear it would rule on these motions based solely on the evidence introduced by applicant Stanko in his case in chief.

Prior to ruling on this application, this Court had before it and carefully reviewed the Record of Stanko's capital trial and penalty proceeding from Georgetown County, the testimony of the witnesses at the PCR hearing, and the exhibits submitted at the hearing. This Court had the opportunity to view the testimony and evidence presented at the evidentiary hearing and made a credibility assessment regarding each witness' testimony as well as the evidence presented and weighed the testimony and evidence accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

This Court now grants Respondent's motion for a directed verdict as to the grounds enumerated within. As to the remaining grounds raised in the application, this Court hereby denies relief for the following reasons:

## III. STANDARD OF REVIEW

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C. Code Ann. Section 17-27-20(a), which provides:

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise held unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any

> ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(emphasis in original). Section (b) further limits the jurisdiction of the PCR court as follows: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also* Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. Drayton, 312 S.C. at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel."); *see also* Cummings v. State, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) ("At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel."). Ineffective assistance of counsel claims are of "the general

nature of issues appropriate for post-conviction relief" actions. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996); *see, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984).

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000); Rule 71.1(e), SCRCP. In order to prove counsel was ineffective, the applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability, but for counsel's errors, the result of the trial would have been different. Id. (*citing* Strickland v. Washington, 466 US. 668 (1984)). An applicant must show his attorney's representation fell below an objective standard of reasonableness, and the applicant must show prejudice. Id.; Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). In the context of a capital *sentencing* proceeding, the applicant also must show deficient performance. Cullen v. Pinholster, 131 S.Ct. 1388 (2011); Bobby v. Van Hook, 558 U.S. 4, 130 S.Ct. 13 (2009).

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 1690. "There are countless ways to provide effective assistance in any given case," and the simple fact that counsel's strategy was ultimately unsuccessful does not render counsel's assistance ineffective. Strickland, 466 U.S. 689; Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688; Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993).

To effect a fair review of counsel's performance, a reviewing court must eliminate the distorting effects of hindsight and attempt to reconstruct the circumstances of counsel's challenged

conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; Butler v. State, 286 S.C. 444-45, 334 S.E.2d 815 (1985). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," Strickland, 466 U.S. at 690; Butler v. State, 286 S.C. at 455, 334 S.E.2d at 815-16, and an applicant claiming error bears the burden of showing counsel's conduct did not constitute reasonable assistance. Strickland, 466 U.S. at 689; Butler v. State, 286 S.C. at 443, 334 S.E.2d at 814.

As set out above, counsel must be given latitude in the art of advocacy, which necessarily allows for strategic decisions. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (*citing* Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). This is true as long as counsel's strategic decision was objectively reasonable under the circumstances. Strickland, 466 U.S. at 689 (objectively reasonable trial strategy decisions cannot be the basis of a claim of ineffective assistance of counsel). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (*quoting* Ingle v. State, 384 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)).

Lastly, as noted, relief will not be granted on a showing of mere error. Prejudice must also be shown. Strickland, 466 U.S. at 687. The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In the context of a capital sentencing proceeding, applicant must prove that "there is a

reasonable probability that . . . the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695; *see also* Wiggins v. Smith, 539 U.S. 510, 537, 123 S.Ct. 2527, 2543 (2003); Jones v. State, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). Again, [a] reasonable probability is a probability sufficient to undermine confidence in the outcome. Jones, 504 S.E.2d at 823-24. The United States Supreme Court in Wong v. Belmontes, 558 U.S. 15 (2009), made clear the burden is not on the State to prove the lack of prejudice, but rather, ***the burden of proving prejudice is on the applicant.*** Id. To establish prejudice, the applicant "must show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. (*quoting* Strickland, 466 U.S. at 694). That showing requires the applicant to establish that had counsel acted competently, there is a reasonable probability the jury would have returned with a different sentence. Id. (*quoting* Wiggins v. Smith, 539 U.S. at 535-36).

Moreover, the applicant can meet this burden only if he shows there is a reasonable probability that at least one juror would have struck a different balance. Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014) (*quoting* Wiggins, 539 U.S. at 537, 123 S.Ct. 2527). Such a showing requires a substantial, not just a conceivable, likelihood of a different result. Cullen v. Pinholster, 131 S.Ct. at 1403 (*citing* Harrington v. Richter, 562 U.S. 86, 110 (2011)).

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon its review of the record and the evidence presented, this Court is constrained pursuant to S.C. Code Ann. § 17-27-80 to make the following findings of fact and conclusions of law and deny the application for post-conviction relief, as amended, in its