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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

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

STEPHEN C. STANKO,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2017-000211

[Volume 2]

PROPOSED SUPPLEMENTAL APPENDIX

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entirety. Applicant Stanko has failed to meet his burden of proof.

This Court makes the following initial conclusions at the outset of this Order, which will be expounded upon in the remainder of this Order:

1. Based upon the overwhelming evidence of guilt delineated throughout this Order, it was understood by defense counsel that the State would be able to prove Stanko's guilt beyond a reasonable doubt at the initial phase of his capital trial. Evidence of guilt is so overwhelming, in fact, that even had counsel performed during the guilt phase in the manners complained of in the present PCR application, there is no reasonable probability that the result of the guilt phase proceeding would have been different.
2. Counsel was not deficient in representing Stanko in presenting the chosen mental health defense. Given the evidence against Stanko, defense counsel put forward the only available defense, and succeeded in providing the jury with a mechanism of understanding Stanko's heinous acts, humanizing him, and scientifically explaining his actions. Counsel's employed defensive strategy was objectively reasonable, especially given its corroboration with Stanko's presenting to his own mental health experts that he did not remember committing the heinous acts against Ms. Ling and her daughter.
3. Stanko wished to pursue the same mental health defense during both the guilt and sentencing phases of his capital trial, and counsel was bound to pursue the same.
4. Counsel put forward full and unmitigated efforts in investigating and pursuing Stanko's mental health defense. Counsel secured a multitude of local and nationally renowned experts to examine Stanko in preparation of this defense, including two (2) psychiatrists, a psychologist, and a neuro-radiologist who conducted a volumetric brain analysis. Through these experts, counsel obtained scientifically advanced PET and MRI scans which were

analyzed and presented in Stanko's defense during both phases of his capital trial. Counsel also demonstrated before the jury a connection between the insanity defense and Stanko's birth records, which counsel obtained and presented, indicating probable or possible intracranial damage at birth, along with his sustaining head injury at approximately seventeen (17) years of age. Counsel presented this evidence of insanity, including documentary evidence and expert witness testimony, and was successful in obtaining a jury instruction on the defense of insanity. An instruction on GBMI was also given.

5. A criminal defendant is not entitled to the effective assistance of expert witnesses. Thus, any untoward nomenclature utilized by defense counsel's experts in relation to Stanko's mental health defense caused no error. Furthermore, counsel did not intentionally elicit Dr. Sachy's testimony of untoward comparisons, only Stanko's diagnosis, and counsel exercised reasonable professional care in handling the expert by not exacerbating his expert's use of such terms in the remainder of the trial.
6. The record contains no evidence which would support a jury instruction on voluntary manslaughter during the guilt phase of Stanko's capital trial, nor does the record contain evidence which would support a jury instruction on the statutory mitigator of provocation. Thus, counsel is not ineffective for failing to request the same.
7. The record demonstrates that the State proved the following statutory aggravating circumstances beyond a reasonable doubt at trial: (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. Given overwhelming evidence against Stanko regarding these crimes and aggravating circumstances, and the testimony put forward regarding his criminal history and potential for future dangerousness, there is no reasonable probability that the jury would have reached an alternative verdict in the penalty phase of Stanko's trial even had counsel not performed in the manner complained of.

8. This Court finds no ineffective assistance of appellate counsel, and additionally finds that appellate counsel had sufficient time to complete briefing on direct appeal, and there was no infringement upon Stanko's due process rights in this regard.
9. This Court finds that Stanko has failed to show by a preponderance of the evidence that trial counsel William Diggs was under the influence of drugs during his representation of Stanko, particularly during the trial. This Court finds that mere speculation by his co-counsel was insufficient to overcome the credible testimony of Mr. Diggs.
10. Respondent is entitled to a directed verdict in regards to claims 1/11(a)(vi), 10/11(a)(viii), and 10/11(a)(x), as no evidence in furtherance of these allegations was put forth during Stanko's case-in-chief. This Court dismisses these allegations upon motion by Respondent and further finds no merit to these claims.
11. This Court also dismisses claims 10/11(b)(i), 10/11(b)(ii), 10/11(d)(i) and 10/11(d)(iii) as they are not cognizable in actions for post-conviction relief, and as Stanko did not put forth any evidence in furtherance of these allegations during his case-in-chief. This Court further finds no merit to these claims.

This Court makes the following additional findings of fact and conclusions of law as

required by S.C. Code Ann. § 17-27-80 and denies Applicant Stanko relief as to each issue raised in his final amended PCR application, and excerpted below:

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

Supporting facts: Pursuant to United States v. Cronin, 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.

Stanko alleges that pursuant to United States v. Cronin, 466 U.S. 648 (1984), he 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

As demonstrated by the record of both the trial and sentencing phases in this case and the testimony and evidence taken at the PCR evidentiary hearing, Stanko was not constructively denied assistance of counsel because Stanko's trial counsel *did not* fail to present a meaningful challenge to the State's case at the guilt and sentencing phases. Id.

The record succinctly demonstrates both first and second chair counsel fully investigated this case from the standpoint of both the guilt and mitigation phases of trial. The evidence was overwhelming Stanko committed the acts charged. Counsel could not prevent the admission of testimony and evidence that was admissible in the guilt phase such as the victim's daughter's eyewitness identification of Stanko as the perpetrator of her mother's murder, her kidnapping and rape, and her own attempted murder. Counsel could not keep out the DNA evidence linking Stanko to the crime scene and the surviving victim, the video surveillance evidence of Stanko withdrawing money from the victim's account shortly after her murder, the evidence of Stanko abandoning Ling's vehicle at Turner's residence in Conway, and the fact Stanko was captured in Augusta, Georgia in Turner's truck, which contained Laura Ling's personal items.

As a result, counsel took necessary steps to further or pursue a mental health defense, including having positron emission tomography (“PET”) and magnetic resonance image (“MRI”) scans of Stanko conducted at the Medical University of South Carolina (“MUSC”) in Charleston, the hiring of multiple experts on the topic of frontal lobe damage and PET and MRI scan imagery, the hiring of psychiatric and psychological experts, investigating Stanko’s past and uncovering a past head injury, and obtaining Stanko’s birth records.¹¹ Trial counsel also employed both a fact and a mitigation investigator to pursue evidentiary support in furtherance of Stanko’s defense and mitigation at both stages of his capital trial.

Counsel’s experts informed counsel Stanko suffered from a brain defect and was insane at the time of the offense. Stanko was informed of the findings and agreed with this defense, as he claimed to have no real memory of the crimes themselves. The record shows counsel presented all of this evidence to the jury in the guilt and sentencing phases of Stanko’s capital trial, both as a complete defense in the guilt phase and as mitigation in the penalty phase. Counsel presented multiple experts including a neuro-radiologist, two (2) psychiatrists, and a psychologist. Counsel presented PET scans, MRI scans, and the results of volumetric analysis of Stanko’s brain. Counsel presented other mitigation evidence including Stanko’s life history and his adaptability to prison. However, in the penalty phase, counsel could not keep out Stanko’s prior convictions and bad acts which demonstrated his bad character and future dangerousness. These acts included prior convictions for kidnapping and multiple counts of breach of trust, and past service of eight and one-half (8 ½) years in prison, after which Stanko had not been rehabilitated, but rather began engaging in criminal cons and schemes almost immediately after release from prison and while on

¹¹ A PET scan measures or reveals brain function. An MRI scan measures or reveals brain structure.

community supervision, including his committing the present horrible crimes. Further, counsel could not keep out the State's psychiatric, psychological, and medical expert testimony that Stanko was not insane or guilty but mentally ill at the time of the crimes.

Stanko has failed to show deficient performance or resulting prejudice under this ground. The record of both the guilt and penalty proceedings shows counsel presented a meaningful challenge to the State's case at both the guilt and sentencing phases as will be expounded upon in Stanko's more succinct grounds for relief below. *Cronic, supra*. Stanko has failed to show deficient performance or prejudice in the guilt or sentencing phase to entitle him to relief under this ground. *Id.*; *Strickland, supra*; *Wiggins, supra* (applicant bears burden of proving balance of aggravators and mitigators did not warrant death sentence rendered at trial). This ground has no merit and must be dismissed.

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.

Stanko next alleges that his trial counsel's defense strategy failed to meet the standard of insanity provided for under S.C. Code Ann. § 17-24-10, and 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." Stanko posits the defense pursued at trial was "not sufficient to establish the defense of insanity" under South Carolina law. See S.C. Code Ann. § 17-24-10(c). Therefore, Stanko claims, trial counsel was

ineffective in presenting the defense of not guilty by reason of insanity and that he was prejudiced by this defense both in the guilt and sentencing phases.

Upon review of the record of the Georgetown capital proceeding and the testimony presented during applicant Stanko's and Respondent's case during the PCR hearing, there is no merit to this ground warranting relief pursuant to Strickland. Both first (1st) and second (2nd) chair trial counsel testified at the PCR hearing the evidence was overwhelming Stanko committed the acts or crimes charged, and the State was going to be able to prove beyond any doubt Stanko committed the crimes or acts. This Court finds counsels' testimony on this issue to be credible and fully supported by the record including that of Stanko's capital trial in this case.

The daughter of the murder victim survived her rape and attempted murder by Stanko. She identified Stanko as the perpetrator of the crimes against her and the kidnapping and murder of her mother, both on the night of the crimes and at trial. She had known Stanko for several months as he lived in the same house with her and her mother. Stanko's DNA was found at the crime scene and in the daughter's vaginal swabs from her rape kit. Her injuries were consistent with being kidnapped and raped, and her throat was cut. Stanko was recorded on surveillance video withdrawing money from Laura Ling's bank account shortly after the crimes.

The Record shows the State proved beyond any question that Stanko bound both victims with neck ties, establishing kidnapping. The State proved Stanko beat severely and cut or stabbed Laura Ling with a sharp object, establishing torture. The State proved Stanko raped and cut the daughter's throat with a knife and left her for dead, and Stanko strangled Laura Ling to death during the rape of the daughter, establishing murder and criminal sexual conduct. The State proved Stanko stole personal items of the victims including Laura Ling's bracelet, her red Mustang automobile, and money from her checking account after murdering Ling and cutting the

daughter's throat, establishing armed robbery and larceny with a deadly weapon.

Stanko left Ling's stolen car at Henry Turner's residence in Conway the morning after these crimes. Stanko's briefcase was found by police in Ling's Mustang at Turner's residence. Stanko fled the coastal area of South Carolina in Turner's truck the morning following the murder of Ling and the attempted murder of her daughter. Prior to leaving the area, Stanko called Ling's employer and falsely informed them Ling would not be coming in for work as she had suffered food poisoning the night before. Stanko was captured in Augusta, Georgia in possession of Turner's truck. Ling's personal items were found in Turner's truck along with personal items of Stanko.

In summary, counsel was correctly and reasonably convinced the State would be able to prove at trial Stanko committed the horrible acts against Laura Ling and her daughter including murder, ABWIK, kidnapping, CSC 1st degree, and armed robbery. Trial counsel was also confronted with the fact, after Stanko was convicted in the guilt phase, he would proceed to a penalty phase, where the State would introduce: his lengthy prior criminal record (including prior convictions for kidnapping and aggravated assault, and numerous counts of breach of trust, grand larceny, and obtaining goods by false pretenses); Stanko had served eight and one-half (8½) years in prison and had not been rehabilitated; and after release and while under community supervision, Stanko was engaged in conning and defrauding several different victims out of their money and committed the present crimes.

Further, counsel was faced with preparing to defend the fact the State would attempt to introduce in evidence in the penalty phase Stanko committed yet another murder the morning following the murder, attempted murder, and rape at the Ling home, i.e. the Turner murder. See State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) (murder committed during trial was

admissible in aggravation as it showed character of the defendant and future dangerousness); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (similar); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (statement of defendant regarding unrelated murder was properly admitted as evidence of the character of the defendant and future dangerousness); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) (prior bad acts admissible in penalty phase to show character of the defendant); State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) (statement regarding prior crimes including one murder admissible to prove character of the defendant in the penalty phase); State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984) (evidence of similar crimes committed by the defendant before *and* after the murder of which he is on trial but of which he had not been convicted are admissible in the penalty phase to show the character of the defendant); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (murders committed earlier in the day and in a different county were properly admitted under common scheme or plan and identity exceptions to Lyle).

As a result, counsel reasonably believed it must pursue some type of mental health defense; otherwise, there was no defense to the crimes, and no real mitigation to the overwhelming evidence in aggravation set forth above. “[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel’s strategy is viewed under an ‘objective standard of reasonableness.’” Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). And counsel did so.

Counsel retained appropriate mental health and medical experts who informed counsel, in their professional expert opinion, Stanko had a frontal lobe brain defect that was not his fault and he was legally insane at the time of the Ling offenses. The specific psychiatric diagnosis was involuntarily acquired psychopathy. This evidence included not only two (2) psychiatrists, but

also PET and MRI scans and the testimony of a neuro-radiologist, Stanko's birth records indicating arguable intracranial damage at birth, along with a head injury at approximately seventeen (17) years of age.

There is no constitutional right to the effective assistance of an expert witness. Fairbank v. Ayers, 650 F.3d 143, 1252 (9th Cir. 2011); Earp v. Cullen, 623 F.3d 1065, 1077 (9th Cir. 2010); see Campbell v. Polk, 447 F.3d 270, 285 (4th Cir. 2006) (refusing to read into Ake a malpractice standard for the assistance of appointed experts). The later expert opinions by the State's experts at trial does not show incompetence of counsel for relying on the experts counsel retained and consulted. See McClain v. Hall, 552 F.3d 1245, 1253 (11th Cir. 2008); Forsyth v. Ault, 537 F.3d 887, 892 (9th Cir. 2008); Marcum v. Luebbers, 509 F.3d 489, 510-11 (8th Cir. 2007); Gonzalez v. Knowles, 515 F.3d 10006, 1015 (9th Cir. 2008). Counsel is entitled to and can rely on the reports of experts who are consulted by counsel. See Stokley v. Ryan, 659 F.3d 802, 814 (9th Cir. 2011); Hammond v. Hall, 586 F.3d 1289, 1326 (11th Cir. 2009); Campbell v. Coyle, 260 F.3d 531, 555 (6th Cir. 2001); Murishaw v. Woodford, 255 F.3d 926, 947 (9th Cir. 2001); Moran v. Godinez, 57 F.3d 690, 699-700 (9th Cir. 1994); Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir. 1990). And, counsel need not continue looking for an expert – shop for experts – just because an unfavorable opinion has been received. Forsyth v. Ault, 537 F.3d 887, 892 (8th Cir. 2008); Smith v. Cockrell, 311 F.3d 661, 7676 (5th Cir. 2003); Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998); Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir. 1995); Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); see e.g. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Counsel is not ineffective in structuring a case on the basis of the opinion received at the time counsel consulted the expert. Forsyth v. Ault, 537 F.3d 887, 892 (8th Cir. 2008).

Stanko was made aware of the results of the various tests and the medical and psychiatric

diagnosis and informed counsel he agreed with the findings and wanted to pursue the insanity defense. At that time, Stanko informed counsel he had no memory of the crimes themselves against Ling and her daughter.

Counsel presented this evidence of insanity, including documentary evidence, medical scans, and expert witness' testimony that Stanko had a frontal lobe brain defect **and was legally insane at the time of these present crimes, i.e. he could not differentiate between moral or legal right and moral and legal wrong.** Contrary to Stanko's assertion in this ground above, the defense was not based solely on "a mental disease or defect that [was] manifested only by repeated criminal or other anti-social conduct." The insanity defense was based on medical scans, medical records, and expert medical and psychiatric testimony of a brain defect that resulted in Stanko being insane at the time of the crimes against Laura Ling and her daughter. Counsel were successful in obtaining a jury instruction on the defense of insanity, and the trial court instructed the jury on guilty but mentally ill (GBMI) as required by law, in the guilt phase. However, the jury found the State's testimony, both expert and factual, more credible and that the State had disproved insanity and GBMI beyond a reasonable doubt. However, simply because the defense was not successful does not make counsel ineffective. Strickland (court must remove from its analysis the distorting effects of hindsight, and must judge counsel's conduct from the circumstances counsel was facing at the time); Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight). As a result, this Court finds Stanko has failed to show counsel was deficient in presenting the insanity defense in this case. Id.

Furthermore, based upon the record and the information available to counsel, including counsel's investigation and their experts' opinions, including medical and psychiatric, counsel

made an objectively reasonable trial strategy decision under the circumstances to present an insanity defense given the record in this case. Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (counsel was not ineffective in arguing for insanity where the defense was supported by two experts); *see also* 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), *and* Walker v Mcquiggan, 656 F.3d 311, 317-22 (6th Cir. 2011) (counsel was ineffective in not pursuing insanity defense with mental impairment evidence known and defense presented contradicted evidence), Bullock v. Whitley, 53 F.3d 697, 701-02 (5th Cir. 1995) (allegation counsel ineffectively pursued insanity defense rejected even though no expert presented and defense had virtually no chance of success where petitioner failed to overcome presumption of effectiveness of counsel and the insanity plea permitted introduction of evidence of troubled past to curry sympathy in a strong capital case). Further, the trial record demonstrates Stanko agreed with this defense, initially informed counsel and his experts that he had no memory or recollection of the crimes, and wished to pursue the defense and directed counsel to pursue the same. As a result, Stanko cannot show deficient performance in the guilt phase. Strickland.

Additionally, Stanko has not shown Strickland prejudice in the guilt phase. Even had counsel not presented the insanity defense, there is no reasonable probability the jury would have returned with a different verdict. Id. Laura Ling's daughter survived Stanko's assault on her and called 911; she identified Stanko as the perpetrator in that call and in excited utterances shortly thereafter, and she testified at trial and identified Stanko as the person who tied her, bound her, raped her, and murdered her mother, and cut her throat. The evidence established Laura Ling was also bound before her murder and severely beaten and strangled to death by Stanko. Stanko's DNA was identified on the vaginal swabs recovered from the daughter's rape kit taken the night of

the murder and rape. Stanko was captured on surveillance video withdrawing money from Ling's account shortly after her murder. Stanko called Ling's employer the following morning and informed them Ling would not be reporting for work because she had food poisoning, when in fact he knew she was already dead. Stanko abandoned Ling's stolen car at his friend Henry Turner's residence in Conway and the car contained items belonging to Stanko. Stanko then fled the coastal area of South Carolina in Turner's truck, and he was later captured in Augusta, Georgia, by U.S. Marshals, in possession of Turner's truck containing items belonging to Ling and Stanko. All of this evidence was admissible and would have been before the jury even had counsel not offered the insanity defense. As a result, Stanko cannot show there is a reasonable probability the result of the guilt phase would have been different had counsel not offered the insanity defense. Strickland. See 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 pursue it cannot be prejudicial).

Furthermore, Stanko has not met his burden of proof to show ineffective assistance in the penalty phase. Strickland; Wiggins; Wong. The evidence from the guilt phase, including all of the expert testimony, the results of the PET and MRI scans, Stanko's birth medical records and his mother's medical records of Stanko's birth, and the testimony regarding his head injury at age seventeen (17), were incorporated by motion into the penalty phase record for the jury's consideration in determining the appropriate sentence. The trial court explained to the jury they could consider all of this evidence in determining the existence of mitigating circumstances and in determining the appropriate sentence. Additionally, trial counsel also presented further expert testimony in the penalty phase regarding Stanko's mental disease or defect. Stanko's diagnosis of "psychopathy" and the testimony of mental disease or defect in both the guilt and penalty phases

entitled him to and he did receive jury instructions on the statutory mitigating circumstances requested by counsel. *See State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1989) (diagnosis of anti-social personality disorder/psychopathy entitled defendant to statutory mitigators). However, after considering all of this evidence, the jury still sentenced Stanko to death. As a result, Stanko cannot show deficient performance or prejudice in the penalty phase either. *Wiggins v. Smith*, *supra*; *Cullen v. Pinholster*, 131 S.Ct. at 1403 (*citing Harrington v. Richter*, 562 U.S. at 110).

Furthermore, the evidence in aggravation was overwhelming. The State proved the existence of five (5) statutory aggravating circumstances beyond a reasonable doubt: (1) the murder was committed during the act of torture; (2) during the commission of a kidnapping; (3) during the commission of criminal sexual conduct; (4) during the commission of an armed robbery; and (5) in the commission of a larceny with a deadly weapon. Ling was bound with neck ties; she was beaten from the top of her head to her feet, and she was stabbed with a sharp object; she was murdered while Stanko raped her fifteen (15) year old daughter; and Stanko stole Ling's bracelet, her car, and money from her bank account. Further, Stanko attempted to murder the fifteen (15) year old daughter by cutting her throat twice, almost severing her ear from her head, and left her believing she was dead.

Additionally, the State established Stanko's bad character and future dangerousness. The State proved Stanko had previously been convicted of kidnapping another woman in a similar manner and attempted to kill her with a Clorox soaked cloth, and Stanko had been previously convicted of multiple counts of breach of trust, grand larceny, and obtaining goods by false pretenses. The State also proved Stanko had previously served approximately eight and one-half (8 ½) years in prison, had not been rehabilitated, and after release from prison almost immediately began illegally defrauding other victims of their money and committed the present crimes. The

State also showed after the murders Stanko traveled to Columbia, where he partied with others at bars and nightclubs. And, the State proved Stanko eventually traveled to Augusta, Georgia where he conned another woman into believing he was someone he was not, and he gave her the bracelet he had taken off Ling's wrist after he murdered her. As a result, this Court finds there is no reasonable probability the jury would have returned with a different sentence had counsel acted as Stanko alleges he should have under this ground. Wiggins, supra; Weik, supra (no relief where aggravating factors outweigh likelihood of different outcome at trial even if counsel had not performed in the deficient manner complained of).

This Court finds based on this record Stanko has failed to show deficient performance or prejudice under this ground in the guilt or penalty phase. Strickland, supra; Belmontes, supra. As a result, this ground is dismissed with prejudice.

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.

Stanko alleges trial counsel was ineffective for allowing opposing counsel and his defense experts to refer to him as a psychopath or otherwise portray him in a negative light during trial. However, given this record, the State's evidence of guilt, and the information available to counsel prior to trial, trial counsel was not deficient and counsel also made an objectively reasonable strategic trial decision to pursue the defense of involuntarily acquired psychopathy given counsel's experts' diagnoses and Stanko's medical records and brain scans. Lounds, supra, 380 S.C. at 462, 670 S.E.2d at 650 (viewing trial counsel's strategy with objective reasonableness); see State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1989) (psychopathy is mitigation evidence under South

Carolina law); Commonwealth v. Robinson, 623 Pa. 345, 82 A.3d 998 (Pa. 2013) (counsel was not ineffective for introducing diagnosis of anti-social personality disorder [psychopathy] as mitigating evidence in the penalty phase of capital trial given the record in the case; it humanized the defendant, and explained why he was the way he was); Ward v. State, 969 N.E.2d 46 (Ind. 2012) (counsel was not deficient in pursuing diagnosis of psychopathy in mitigation phase as it assisted the jury in understanding the defendant and it explained his horrendous acts, and even more so, his documented lack of emotion on the day of the offenses) (*citing* State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1989) (psychopathy diagnosis entitled defendant to mental health statutory mitigating circumstances under *in favorem vitae* review in effect at that time)); Beardslee v. Woodford, 358 F.3d 560, 582-83 (2003) (counsel was not ineffective in calling expert who presented sociopath/anti-social evidence where expert provided useful mitigating evidence including an explanation for defendant's failure to show remorse, testimony of his good behavior in prison, and physical and psychological explanations for his antisocial behavior); Carter v. Bradshaw, 2015 W.L. 5752139 (N.D. Ohio 2015) (*Slip Copy*) (counsel was not ineffective in offering mitigation evidence of psychopathy diagnosis as expert related diagnosis to developmental and medical issues in capital defendant's life and those factors were beyond capital defendant's control); *see also* Sears v. Upton, 561 U.S. 945, 951, 130 S.Ct. 3259, 3264 (2010) (evidence of personality disorder may not have made defendant any more likable, but it might have helped the jury understand him and his horrendous acts).

Stanko's own experts testified at trial that Stanko's brain was malformed and showed decreased activity in the frontal lobe based on PET and MRI scans. Stanko's experts attributed this brain defect to lack of oxygen at birth, which they argued was reflected in his birth records and the medical records of his mother from Stanko's birth, or possibly from a head injury at the age of

seventeen (17). Stanko's birth records and those of his mother from Stanko's birth were introduced in evidence and testified to extensively. The brain scans were introduced in evidence and testified to extensively. Stanko's own experts diagnosed him as suffering from *involuntarily acquired* psychopathy and their "psychopath" statements during the trial merely stated the same. The characterizations of or references to Stanko, whether by Stanko's experts or by the State, were legitimately related to his diagnosed mental illness or personality disorder and insanity defense or mitigating circumstances and were supported by the evidence of his character introduced at trial, including a lifetime of criminal and anti-social behavior.

It is not ineffective assistance of counsel to offer such a defense under the facts of this case. Commonwealth v. Robinson, *supra* (counsel was not ineffective for introducing diagnosis of anti-social personality disorder [psychopathy] as mitigating evidence in the penalty phase of capital trial given the record in that case; it humanized the defendant, and explained why he was the way he was); Ward v. State, *supra* (counsel was not deficient in pursuing diagnosis of psychopathy in mitigation phase as it assisted the jury in understanding the defendant and it explained his horrendous acts, and even more so, his documented lack of emotion on the day of the offenses) (*citing* Caldwell, 300 S.C. 494, 388 S.E.2d 816 (psychopathy diagnosis entitled defendant to mental health statutory mitigating circumstances under *in favorem vitae* review in effect at that time)); Beardslee, 358 F.3d at 582-83 (counsel not ineffective in calling expert who presented sociopath/anti-social evidence where expert provided useful mitigating evidence including an explanation for defendant's failure to show remorse, testimony of good behavior in prison, and physical and psychological explanations for his antisocial behavior); Carter v. Bradshaw, 2015 W.L. 5752139 (N.D. Ohio 2015) (*Slip Copy*) (counsel was not ineffective in offering mitigation evidence of psychopathy diagnosis as expert related diagnosis to

developmental and medical issues in capital defendant's life and those factors were beyond capital defendant's control); *see also* Sears, 561 U.S. at 951, 130 S.Ct. at 3264 (evidence of personality disorder may not have made defendant any more likable, but it might have helped the jury understand him and his horrendous acts).

As previously stated, the evidence Stanko committed the acts themselves was overwhelming. Based on counsel's review of the discovery and evidence in the case, including the surviving daughter's eyewitness identification, Stanko's DNA found in the daughter's rape kit, the video of Stanko withdrawing money from Ling's ATM, Stanko's abandoning Ling's car at Turner's residence in Conway, and Stanko's Augusta, Georgia, capture with Turner's truck and Ling's personal items, counsel understood the State was going to be able to establish beyond any doubt that Stanko committed the acts which constituted, murder, attempted murder, CSC 1st, kidnapping, and armed robbery.

Furthermore, from reviewing the discovery and evidence in the case, counsel also knew the State was going to be able to establish in the penalty phase that Stanko had previously committed another kidnapping approximately ten (10) years before, in which he tied up the victim and attempted to kill her, and he committed multiple counts of breach of trust and obtaining goods by false pretenses around the same time. Additionally, the State was going to be able to prove Stanko had served eight and one-half (8 ½) years in prison for those offenses and had not been rehabilitated, since once he was released from prison, he began engaging in similar cons and fraudulent confidence schemes while on community supervision and committed the present horrible offenses. Further, given the extant case law, counsel had to anticipate the State would seek to introduce in the penalty phase the murder of Henry Turner.

As a result, counsel made an objectively reasonable trial strategy decision to offer the only

defense available, a mental health defense, which would explain why Stanko committed the present horrible crimes, and which was supported by the findings of medical and psychiatric doctors and experts, and included PET scans, MRI scans, and birth records and lay witness' testimony supporting the diagnosis. This defense also explained much of Stanko's past and current behaviors in such a manner as would diffuse some of the aggravating effect the State hoped to gain from such evidence in the penalty phase; i.e., Stanko did not choose to be medically and mentally ill, but rather it was thrust upon him. The fact that the defense was unsuccessful does not mean counsel was ineffective. Strickland. In fact, Stanko agreed with the defense after being fully informed of the findings of his various experts. As a result, the fact that Stanko was diagnosed as or is "a psychopath" could not be kept from the jury.

Stanko further argues counsel should have prevented his expert, Dr. Sachy, from supporting his diagnosis by comparing Stanko to other famous psychopaths or in a negative manner; however, counsel credibly testified at PCR that he reviewed the expert's report prior to trial, which contained no such references, and interviewed Dr. Sachy extensively. Prior to taking the stand at trial, Dr. Sachy never made any such comparisons or negative references to Stanko. It is clear Dr. Sachy made these references during the trial to support his diagnosis of "psychopathy" in light of Stanko's clear history of engaging in lifelong antisocial behavior, and specifically "involuntarily acquired psychopathy." It is also clear counsel did not intentionally elicit these responses or comparisons. "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) (*citing Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990) and Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990)); Fairbank v. Ayers, 650 F.3d 143, 1252 (9th Cir. 2011); Earp v. Cullen, 623 F.3d 1065, 1077 (9th Cir. 2010); *see* Campbell v. Polk, 447 F.3d 270, 285 (4th Cir. 2006) (refusing to

read into Ake a malpractice standard for the assistance of appointed experts). Instead, there exists a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions, Caprood v. State, *supra* at 109, 525 S.E.2d at 517, including its preparing to present Dr. Sachy at trial in furtherance of Stanko's chosen defense. *See, e.g., Wilson v. Greene*, *supra* (to be reasonably effective, counsel is not required to second-guess the contents of an expert's report). As counsel reviewed Dr. Sachy's report prior to trial and interviewed Dr. Sachy, and Dr. Sachy had not made these comments before, counsel was not deficient or ineffective in this regard.

Furthermore, Stanko has failed to prove the second prong of the Strickland test. Even if counsel had a crystal ball and could have somehow prevented Dr. Sachy from making these previously unseen and unheard comparisons to support his diagnosis, Stanko has failed to show there is a reasonable probability the jury would have returned with a different sentence. Even removing these few references from the case, the evidence in aggravation was overwhelming. There is no reasonable probability of a different result. Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014); Stitt v. United States, 369 F.Supp.2d 679, 686 (E.D. Va. 2005) *aff'd*, 441 F.3d 297 (4th Cir. 2006) *opinion recalled*, 459 F.2d 483 (4th Cir. 2006) *and aff'd*, 552 F.2d 345 (4th Cir. 2008) (defendant was not denied effective assistance of counsel due to mitigation investigation where aggravating factors in the case were overwhelming, mitigating factors were unremarkable, and there was no indication that lack of evidence as to defendant's alleged psychopathy or stronger evidence refuting such allegation would have outweighed aggravating factors).

First, the jury was given the choice between overwhelming evidence of guilt or the insanity defense put forward by Dr. Sachy and the other defense experts. The jury chose guilt, due in large part to the State's evidence of Stanko's own actions during and after the crimes' commission. The

jury did not find Dr. Sachy or the other defense expert's credible. They did not find Stanko insane or guilty but mentally ill (GBMI).

Second, the facts of the murder of Laura Ling are horrible to say the least. Stanko bound the victim with neckties, beat her from head to foot, and stabbed her with a sharp object. The jury who sentenced Stanko found the State had proven beyond a reasonable doubt the murder of Laura Ling was committed in the course of torturing her. Additionally, Stanko manually strangled Laura Ling to death while raping her fifteen (15) year old daughter. The jury also found beyond a reasonable doubt the murder of Laura Ling was committed during the act of criminal sexual conduct. Stanko also bound the fifteen (15) year old daughter as well as her mother. The jury found the aggravating circumstance of kidnapping was proven beyond a reasonable doubt. And, after murdering Ling and believing he had murdered the daughter by cutting her throat two (2) times with a knife, almost severing her ear, Stanko robbed Ling of her bracelet, her automobile, and cash from her checking account. The jury also found Stanko committed the murder of Ling in the course of an armed robbery. Stanko methodically showered, packed his clothes and belongings, and left the home locking the door as he left. Stanko did not believe the victims would be found for several days. He then drove almost directly to Ling's bank and withdrew her money from her bank account using an ATM machine. He also used one of Ling's credit cards to make a purchase. The jury also found the murder was committed during a larceny with a deadly weapon.

The following morning, Stanko called Ling's employer, the Socastee Library and falsely informed her employer she would not be in for work because she had suffered food poisoning. He then fled the coastal area of South Carolina to Columbia, after switching vehicles, and partied at several bars in the Congaree Vista area of Columbia. Stanko then fled to Augusta, Georgia where he continued to party, met a new girlfriend, and conned her into believing he was someone he was

not. He also gave his new girlfriend the bracelet he had taken off Ling's dead body. He was only arrested after U.S. Marshals located him at a strip mall.

Third, Stanko's bad character and future dangerousness were proven independent of anything Dr. Sachy said. The State proved Stanko was previously convicted of the kidnapping of Elizabeth McClendon in Charleston approximately ten (10) years before the present crimes. Stanko bound her and attempted to kill her with a cloth soaked in Clorox. The State also proved Stanko was convicted of multiple counts of breach of trust, grand larceny, and obtaining goods by false pretenses. Stanko served eight and one-half (8 ½) years in prison for these crimes and was not rehabilitated. After his release from prison, Stanko began conning and defrauding multiple victims of their money in the Georgetown and Horry County areas by pretending to be an attorney or paralegal. Stanko committed all these fraudulent acts while on community supervision. Stanko then committed the murder of Ling and the attempted murder and rape of her fifteen (15) year old daughter when his cons and schemes were about to be exposed to law enforcement. As a result, this Court finds there is no reasonable probability the jury would have returned with a different sentence had counsel acted as Stanko alleges under this ground. Wong v. Belmontes, *supra*.

As a result, Stanko failed to prove either deficient performance or prejudice in the guilt or penalty phase. Strickland, *supra*; Wong v. Belmontes, *supra*; Wiggins v. Smith, *supra*. This ground must be dismissed with prejudice.

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.

Stanko next alleges trial counsel failed to object to the admission of the facts surrounding

Stanko's previous assault on Elizabeth McLendon, as well as evidence of his prior frauds. Again, Stanko failed to meet his burden given this record and the PCR testimony. Butler v. State; Rule 71.1, SCRCP.

First, the evidence Stanko now complains of was admissible in the context for which it was offered at trial. As a result, its inclusion at trial cannot constitute ineffective assistance even absent counsel's objection. 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, then the claim fails both prongs of the Strickland test as it was neither deficient not to object nor was the defendant prejudiced by the failure to object).

During the guilt phase, Stanko offered the defense of insanity. The expert witnesses who were testifying at the time, Doctors Thrasher and Sachy, two (2) forensic psychiatrists, relied on information regarding the McClendon incident in forming their opinion that Stanko was insane at the time of the Ling murder and other crimes the night of the Ling murder. As a result, the State was properly allowed to cross-examine the experts about information on which the experts relied in forming their opinions, including the McClendon incident. State v. Slocumb, 336 S.C. 619, 521 S.E.2d 507 (Ct. App. 1999) (cross-examination of expert witness may delve into information upon which the expert relied in forming his opinion). Even had counsel voiced an objection to this evidence, it would have been admitted in any event. As a result, Stanko cannot show deficient performance or resulting prejudice. Hough, *supra*.

Second, counsel did not raise an objection to the State's presentation of these or other prior bad acts (the frauds) because they were consistent with and supported Stanko's experts' diagnosis of **involuntarily acquired psychopathy**. This was an objectively reasonable trial strategy decision since the information on which Stanko's experts relied contained this information in any

event and the State could legitimately bring out this information on cross-examination. Slocumb, *supra* (cross-examination of expert witness may delve into information upon which expert relied in forming opinion). Counsel testified their goal was *to keep out any reference to the Henry Turner murder*, which occurred the day following Ling's murder, and had no relevance to the insanity defense, so they objected to that damaging information coming in.

Counsel credibly testified at the evidentiary merits hearing that during the trial he attempted to keep out any reference to the Turner murder. Indeed, **counsel's motion to exclude references to the Turner murder was granted by the trial judge**. Counsel also testified at the evidentiary hearing that he did not want to keep out the facts of the McClendon incident because it was so similar to this incident, except for the fact Stanko completely lost control in the Ling incident, indicating he was insane at the time of this crime. This Court need not second-guess trial counsel's tactics in this regard, especially where his client derived a benefit from the exclusion of the Turner murder as part and parcel of his objection. The testimony regarding the McClendon incident and Stanko's frauds and cons leading up to the Ling murder were admissible, as the experts relied upon that information in forming their opinion. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (courts must be wary of second-guessing trial tactics) (*citing* Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (S.C. 2009) (objectively reasonable trial strategy decisions under the circumstances are not subject to claims of ineffective assistance of counsel); Slocumb, *supra* (expert may be cross-examined about evidence on which he relied). Further, this evidence, the McClendon incident and the frauds and cons supported Stanko's experts' diagnosis and the defense that Stanko chose to pursue and instructed counsel to pursue.

Furthermore, even had counsel objected to this evidence, and it had for some reason been

kept out, this Court finds there is no reasonable probability the result of the guilt *or* sentencing proceeding would have been different. Strickland; Wong v. Belmontes. As discussed in the previous grounds above, the evidence Stanko committed the crimes against Ling and her daughter was overwhelming. Several experts for the State testified that Stanko was not insane and did not have a brain defect at the time of the crimes, and Stanko's actions during and after the crimes demonstrated he was not insane at the time of the crimes against Ling and her daughter. Furthermore, the jury found the State's experts more credible than Stanko's experts. Finally, Stanko's prior bad acts resulting in convictions, and even his involvement in un-convicted crimes would have been admissible and were admissible in the penalty phase as evidence of his character and future dangerousness. Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (*cited in* State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979)); State v. Woomer, 278 S.C. 468, 399 S.E.2d 317 (1981). The horrible facts surrounding the crimes against Ling and her daughter would have still been before the jury, along with Stanko's prior criminal record, his failure to be rehabilitated by a lengthy prior prison sentence, and the fact he committed these horrible crimes and other criminal acts while on community supervision and shortly after release from prison.

As a result, Stanko has failed to prove deficient performance or prejudice under this ground, and this ground is dismissed with prejudice. Strickland, *supra*; Wong, *supra*; Slocumb, *supra*; Hough, *supra*.

10/11(a)(v) Trial counsel was ineffective for failing to request a jury charge on the lesser included offense of Voluntary Manslaughter and 10/11(a)(xiii) and (xiv) Trial Counsel was ineffective in failing to object to the Court's decision not to charge S.C. Code § 16-3-20(C)(b)(8).

Supporting facts: (a)(v) Trial counsel failed to request a jury charge despite the fact that the record contained evidence that would have supported such a charge. (a)(xiii) Trial Counsel did not object to the Trial Court's decision not to charge S.C. Code § 16-3-20(C)(b)(8). (a)(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.

Stanko next *alleges* trial counsel was ineffective in failing to request a jury charge on voluntary manslaughter and, during the sentencing phase, an instruction on the statutory mitigator of provocation. Stanko *alleges* the record contained evidence that would have supported such charges. To the contrary, Stanko was not entitled to an instruction on either voluntary manslaughter or provocation given this record. “The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

At trial in the guilt phase, Stanko offered the defense of insanity. It is undisputed the only evidence which Stanko points to as justifying a charge on voluntary manslaughter *is testimony of Stanko’s retained experts (psychiatrists) or the State’s expert (psychiatrist) about what Stanko told them* allegedly occurred prior to the Ling incident **made to the retained experts (psychiatrists/physicians) for the purpose of making a diagnosis on the issue of criminal responsibility and capacity to conform**. This evidence was solely admissible as “information upon which they [the experts] relied in reaching their professional opinions[,]” and was **not admissible as substantive proof of the facts so stated** by Stanko. Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967); Howle v. PPA/Monarch, 288 S.C. 586 (Ct. App. 1986); *see* State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985) (history as related to the doctor was admissible only as information upon which the doctor relied in reaching his professional opinion. **It is not admissible as substantive proof of the facts stated**); Jones v. Doe, 372 S.C. 53, 640 S.E.2d 514 (Ct. App. 2006) (Rule 703 does not allow for the unqualified admission of hearsay simply because an expert relied upon it in forming an opinion: “[T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. *It is received*

only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception.") (citing 2 Kenneth S. Broun, et al., McCormick on Evidence § 324, at 418 (2006) (emphasis added by the Jones Court); see Notes to Rule 803(4), SCRE.¹² The basis for this distinction is that the statements do not have the same degree of trustworthiness when the patient is seeking to support a matter in court. South Carolina Evidence, 2nd Ed., Danny R. Collins, 2000 S.C. Bar/CLE Division. Any request for a charge on voluntary manslaughter or provocation based on this hearsay testimony only admissible for the limited purpose described above, would have been denied by Judge Jefferson. As a result, counsel was not deficient nor was Stanko prejudiced by the failure to request such instructions. Strickland; See Arnold v. Dormire, 675 F.3d 1082, 1085-86 (8th Cir. 2012) (counsel was not ineffective in failing to request lesser included offense where the evidence did not warrant the lesser offense); Waters v. Zant, 979 F.2d 1473, 1492 (11th Cir. 1992) (counsel not ineffective for not arguing manslaughter where it was not warranted by the evidence); Wilson v. Armontrout, 962 F.2d 817, 820 (8th Cir. 1992) (similar); Marylinsky v. Budge, 577 F.3d 1083, 1092 (9th Cir. 2009) (counsel was not ineffective in making further effort to obtain manslaughter instruction where counsel legitimately believed it would be counter-productive under the egregious facts of the case); Hall v. Head, 310 F.3d 683, 693-94 (11th Cir. 2002) (failure of the evidence to support manslaughter justified counsel's not developing manslaughter charge as a defense).

For the same reason, to the extent counsel did not request an instruction on voluntary

¹² See State v. Reed, 2001 WL 815026 (Ohio App. 2 Dist. 2001) (*Unpublished*) (affirming defendant's conviction where limiting instruction told the jury they could not consider statements defendant made to testifying expert psychologist, who examined defendant prior to trial, about the incident as substantive proof of the crime or any lesser included offense that might be charged but only as to the basis of the expert's findings; see generally State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014) (recognizing "[t]o find otherwise would mean a defendant could automatically obtain the instruction merely by making a self-serving statement as to his intent.")).

manslaughter or provocation, that decision was objectively reasonable under the circumstances, as there existed no evidence on which to base such an instruction under our case law. Gentry, *supra*; Howle, *supra*; *see* Brown, *supra* (history as related to the doctor was admissible only as information upon which the doctor relied in reaching his professional opinion. **It is not admissible as substantive proof of the facts stated**); Jones, *supra* (Rule 703 does not allow for the unqualified admission of hearsay simply because an expert relied upon it in forming an opinion: “[T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. *It is received only for the limited purpose of informing the jury of the basis of the expert’s opinion and therefore does not constitute a true hearsay exception.*”) (citing 2 Kenneth S. Broun, et al., McCormick on Evidence § 324, at 418 (2006) (emphasis added by the Jones Court); *see* Notes to Rule 803(4), SCRE;¹³ South Carolina Evidence, 2nd Ed., Danny R. Collins, 2000 S.C. Bar/CLE Division; Strickland, *supra*; Council, *supra*).

Additionally, Stanko’s chosen defense at trial was insanity, not that he killed Laura Ling and raped and attempted to murder her daughter in the heat of passion upon adequate legal provocation. A decision not to present inconsistent theories is not ineffective assistance. Jackson v. Shanks, 143 F.3d 1313, 1320 (10th Cir. 1998); Wilson v. United States, 414 F.3d 829 (7th Cir. 2005) (while an attorney is entitled to present inconsistent arguments in a criminal case, that entitlement does not imply an obligation to do so); Middleton v. Roper, 455F.3d 838, 848-49 (8th

¹³ *See* Reed, 2001 WL 815026 (*Unpublished*) (affirming defendant’s conviction where limiting instruction told the jury they could not consider statements defendant made to testifying expert psychologist, who examined defendant prior to trial, about the incident as substantive proof of the crime or any lesser included offense that might be charged but only as to the basis of the expert’s findings; *see generally* Sams, 410 S.C. 303, 764 S.E.2d 511 (recognizing “[t]o find otherwise would mean a defendant could automatically obtain the instruction merely by making a self-serving statement as to his intent.”).

Cir. 2006) (similar). Instructions need not be requested that are inconsistent with the trial theory or defense. Butcher v. Marquez, 758 F.2d 373, 376-77 (9th Cir. 1985); Casale v. Fair, 833 F.2d 386, 392 (1st Cir. 1987). Lesser-included offense instructions are not required when to give them would conflict with the theory of the defense. Neal v. Acevedo, 114 F.3d 803, 806 (8th Cir. 1997); Butcher v. Marquez, *supra*; Kubat v. Thieret, 867 F.2d 351, 365 (7th Cir. 1989).

Furthermore, the facts as told at trial also do not support an instruction on voluntary manslaughter. See State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (proper for trial judge to refuse to charge voluntary manslaughter where it very clearly appears there is no evidence whatsoever tending to reduce the crime from murder to manslaughter). Stanko related to his psychiatric experts and the State's psychiatric experts that he and Laura Ling had an argument and Ling threatened to falsely accuse him of being a child molester to stop him from leaving her home. At some point, Ling either slapped Stanko or gesticulated with her arm and struck a cigarette in Stanko's mouth causing the cigarette to go up under Stanko's glasses and burn his skin on the medial portion of his eye. Stanko related to the experts he then blacked out or "saw red" and had no real memory of the incident. He woke up in the shower covered in blood.

The record shows that Stanko bound Laura Ling's hands and feet. He beat her from the top of her head to her feet. He then walked to the fifteen (15) year old daughter's bedroom and started sexually assaulting her. She fled to her mother's bedroom finding her mother alive, but bound and semi-conscious. Stanko followed the daughter to the mother's bedroom. Stanko then began assaulting the daughter again and knocked her unconscious. When she awoke, she was bound with neckties, and Stanko began raping her and talking to her during the rape. At one point, Stanko beat Laura Ling some more as she lay bound on the floor beside the bed. Stanko then continued to rape the daughter and reached over and manually strangled Laura Ling with one hand.

This was the cause of death. Stanko then continued to rape the daughter. The facts simply do not constitute a killing in the sudden heat of passion upon adequate legal provocation as defined by our Supreme Court. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); Cook v. State, Op. No. 27596 (S.C. Sup. Ct. filed December 9, 2015) (Shearouse Adv. Sh. No. 48 at 12-19), 2015 W.L. 8349232 (*not yet released for publication*). And, there was sufficient time a reasonable person would have cooled off, even if there was adequate legal provocation and heat of passion. Id.

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. Strickland. The only evidence of any provocation was Stanko's statements to his or the State's psychiatric or psychological experts knowing he was being evaluated for criminal responsibility shortly before his trial. There was testimony from several experts, including Stanko's own experts, that Stanko habitually lies or makes false statements. The State's expert psychiatrist testified she did not believe Stanko's version of events as he lied to her numerous times. Stanko's own experts testified they either did not believe or were suspicious of Stanko's version of events because of his tendency to make false statements as a result of his diagnosed condition of psychopathy. (App. pp. 1534-37). Numerous lay witnesses also testified during the trial that Stanko habitually lies. There was no substantive evidence of a cigarette burn to Stanko's face or eye presented at trial. The daughter heard no arguing or fighting before the crimes occurred. No cigarette butt from the crime scene was brought into evidence. Dr. Crawford reviewed photographs of Stanko taken shortly after the incident and there was no evidence of a burn to Stanko's face.

Stanko bound Laura Ling's hands and feet. He beat her from the top of her head to her feet. He then walked to the fifteen (15) year old daughter's bedroom and started sexually assaulting her.

She fled to her mother's bedroom finding her mother alive, but bound and semi-conscious. Stanko followed the daughter to the mother's bedroom. Stanko then began assaulting the daughter again and knocked her unconscious. At some point, Stanko stabbed Laura Ling with a sharp object. When the daughter regained consciousness, she was bound with neckties, and Stanko began raping her and talking to her during the rape. At one point, Stanko beat Laura Ling some more as she lay bound on the floor beside the bed. Stanko then continued to rape the daughter and reached over and manually strangled Laura Ling with one hand. This was the cause of death. Stanko then finished raping the daughter and cut her throat twice. Stanko then showered, packed his suitcase, and left locking the door behind him. Before he left, Stanko stole items belonging to the victims. Stanko then stole Ling's car and drove to Ling's bank and withdrew money from her checking account. Stanko also used Ling's credit card to make a purchase. When considering the facts of the case, there is no reasonable probability that even had trial counsel requested an instruction on voluntary manslaughter and one had been given, that the jury would have returned with a different verdict. *See Leach v. Kolb*, 911 F.2d 1249, 1261 (7th Cir. 1990) (no ineffectiveness of trial counsel where the evidence of the greater offense was overwhelming). Stanko's defense at trial was insanity, not manslaughter.

In regards to the alleged failure to request the statutory mitigator, the only evidence of any provocation was Stanko's statements to his and the State's psychiatric or psychological experts, made when Stanko knew he was being evaluated for criminal responsibility shortly before his trial. There was testimony from several experts, including Stanko's own experts, that Stanko habitually lies or makes false statements. All of the experts testified they either did not believe Stanko's version of events or were suspicious of the veracity of his version of events due to his diagnosed psychopathy. Numerous lay witnesses also testified in the guilt and penalty phase that Stanko

habitually lies. Stanko's second chair counsel also testified at PCR that Stanko was not forthcoming with his attorneys concerning the truth. There was no substantive evidence of a cigarette burn to Stanko's face or eye presented at trial. The daughter heard no arguing or fighting before the crimes occurred. No cigarette butt from the crime scene was brought into evidence.

By the time any statutory mitigator was charged, the jury knew Stanko had previously been convicted of multiple counts of breach of trust with fraudulent intent, obtaining goods by false pretenses, and grand larceny, and had received a ten (10) year prison sentence. The jury also knew Stanko had already been to prison previously for eight and a half (8 ½) years for the kidnapping and aggravated assault and battery of Elizabeth McClendon, in which she was tied up in a similar fashion after threatening to go to police for Stanko's fraudulent schemes. The jury was aware, upon his release from prison, and while on community supervision, Stanko had begun engaging in the same or similar fraudulent schemes in the Georgetown and Horry Counties, and he was about to be exposed for those crimes to police and returned to prison.

Further, as recited above, Stanko methodically bound and tortured Laura Ling, attempted to sexually molest the daughter, kidnapped the daughter and raped her, beat the murder victim some more during the rape of the daughter, and finally Stanko manually strangled Laura Ling to death as he raped the daughter, who he had also bound with neck ties. Stanko then cut the daughter's throat twice with a knife, and at some point stabbed Laura Ling in the throat with a sharp object. Stanko stole Lings personal items. Stanko then showered and methodically packed his suitcase and left the residence locking the door as he left. Stanko then stole Lings' car and went to her bank and stole money from her bank account. Stanko was not entitled to such an instruction given this record. Furthermore, based upon these facts, there is no reasonable probability the jury would have returned with a different sentence had the provocation mitigator instruction been

given. Strickland, *supra*; Wong, *supra*. Stanko has failed to prove deficient performance or prejudice under this ground. Strickland; Wong.

Finally, counsel credibly testified at PCR that he did not request this statutory mitigator as a strategic decision. He believed requesting and receiving such an instruction would be viewed by the jury as an attempt to blame the victim for her own murder and the crimes against her daughter. Counsel credibly testified this did not fit with their mitigation strategy that Stanko is a mentally ill individual that does not need to be put to death.

On this record, the undersigned finds counsel's strategic decision not to request this mitigator was objectively reasonable under the circumstances given Stanko's statements to his psychiatric experts were made and admitted solely for the purpose of medical diagnosis, Stanko's history of habitual lying was before the jury, and blaming the victim did not fit with the mitigation strategy that Stanko was mentally ill. Strickland, *supra*; Council, *supra*.

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.

Stanko next *alleges* trial counsel was ineffective in failing to obtain copies of images and data analyzed by State's rebuttal expert Dr. Spicer. Stanko alleges this inhibited trial counsel's ability to impeach this rebuttal witness' testimony at trial. There is no merit to this ground.

No evidence in furtherance or support of this allegation was introduced or testified to at the PCR hearing in applicant Stanko's case. (PCR Tr. pp. 1-282). At the close of applicant's case at PCR, the State moved for a directed verdict on this ground. (PCR Tr. pp. 283-90). Respondent's motion for directed verdict is granted as to this ground, which is hereby dismissed with prejudice.

Stanko waived and abandoned and failed to meet his burden of proof with regard to this ground at the PCR hearing by failing to present any evidence of this ground in his case in chief. Parks v. Morris Homes Corp., 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (it is litigant's duty to bring to the court's attention any perceived error and "the failure to do so amounts to a waiver of the alleged error"); Palacio, *infra*; Butler v. State, *supra*; *see* Rule 71.1, SCRPC.

Additionally, Stanko failed to introduce in his case in chief at PCR, or even on cross-examination of the State's witness, William Diggs, Esquire, copies of images and data analyzed by State's rebuttal expert Dr. Spicer, the scans or films in question. Furthermore, Stanko did not call Dr. Spicer at the PCR hearing and establish what he would have testified to had he been cross-examined or impeached differently. As a result, Stanko failed to meet his burden of proof on this issue. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding that where the contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) (mere speculation what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (State's failure to object to hearsay testimony as to what another witness' testimony might have been does not relieve applicant of the burden of producing admissible testimony in accordance with the rules of evidence); *see also* Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (allegation that expert testimony would

have helped defendant's case merely speculative where he called no expert to testify at PCR).

Federal authority is in agreement with these citations. Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented to show how witness would have testified had the cross-examination been pursued); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991) (prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief); Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense," rather, facts must be presented).

Finally, even considering the Record of this capital proceeding, this Court finds Stanko has failed to prove deficient performance or resulting prejudice. Strickland. Prior to the trial of this case, defense expert Dr. Thomas Sachy requested a PET scan and an MRI scan be performed on Stanko at MUSC in Charleston. Dr. Sachy, at the request of Dr. Wu, another defense expert, had Stanko perform a continuous performance test ("CPT") prior to the PET scan being conducted to comply with the protocol of Dr. Adrian Raine, who had conducted research into the psychopathic mind using such scans. This CPT was administered by another defense expert, Dr. Einhorn, a neuro-psychologist.¹⁴ The PET scan was then conducted on Stanko by the MUSC staff. The PET

¹⁴Dr. Einhorn testified at trial that he was asked to perform this CPT by Dr. Sachy because they were following a protocol of a research scientists in California. Dr. Einhorn testified he would not normally perform a CPT before a PET scan if he was requesting a PET scan for diagnostic purposes. Dr. Einhorn also performed two (2) days of psychological testing of Stanko. The results

scan films and the MRI films were forwarded to Dr. Wu and three dimensional (“3D”) renderings of Stanko’s brain were developed from these and presented at trial through Dr. Wu’s testimony. Prior to trial, Dr. Wu compared Stanko’s PET scan results to those of a database [or control group] of approximately forty-one (41) “normal brains” of his own who had also conducted CPT before their PET scans were administered. According to Dr. Wu and Dr. Sachy, the comparison showed Stanko had low brain function in the lower portion of the frontal lobes of his brain.

The record shows that two (2) reply witnesses called by the State at the guilt phase, Dr. Spicer and Dr. Brannon, both of MUSC in Charleston, reviewed Stanko’s PET scans prior to trial by examining the very same scans which defense expert Dr. Wu received. Both Dr. Spicer and Dr. Brannon testified that they looked at the individual PET scan “slices” of Stanko’s brain using a computer. They testified this review was conducted according to the standard of care of clinical diagnostic practice. Based on their review of the individual PET scan “slices” of Stanko’s brain, both Dr. Brannon and Dr. Spicer opined that Stanko’s brain function was normal, including in the frontal lobes. Both Dr. Brannon’s and Dr. Spicer’s opinion was rendered utilizing the same “slices” imagery rendered from Stanko’s PET scan conducted at MUSC – the PET imagery taken after Stanko engaged in the CPTs administered by Dr. Einhorn. Therefore, the State’s experts’ opinion was based on the same imagery that defense counsel and Stanko’s experts possessed before the trial. (App. p. 1504, ll. 91-12). And, both Dr. Brannon’s and Dr. Spicer’s opinion using Stanko’s PET scan slices alone, which is the standard of care of clinical diagnostic practice, were based on the PET scan slices which counsel and his experts had before the trial. (App. p. 1504, ll. 9-12). As a result, as to this expert opinion testimony, Stanko cannot show deficient performance or resulting prejudice under this ground because counsel had these images or scans prior to trial

of this psychological testing were normal.

and prior to cross-examination of Dr. Spicer. Strickland.

Dr. Spicer conducted further analysis of Stanko's PET scan by using a computer program comparison of Stanko's PET scan [described above] to a control database of thousands of "normal brains" from the Society of Nuclear Medicine. Dr. Spicer had Stanko's PET scan, and the database he relied upon with him at trial on his computer. Stanko's PET scan, and some of the normal database were shown to the jury and viewed by defense counsel during Spicer's testimony. Dr. Spicer testified this computer comparison, also led him to a similar determination that Stanko's brain function was normal, including in the frontal lobes where Dr. Wu and Dr. Sachy claimed Stanko's brain was abnormal. But defense counsel clearly established the difference between Dr. Spicer and Drs. Wu and Sachy's opinion in this regard. The record shows that on direct examination of its own expert Dr. Wu, defense counsel established that Dr. Wu was following a different comparison protocol of Dr. Adriane Raine, which is why Dr. Wu had ordered Dr. Einhorn to administer CPTs to Stanko prior to his PET scan. The CPTs allowed Dr. Wu to utilize his own adopted methodology to compare Stanko's PET scan with a database or control group of PET scans of "normal brains" who had also performed CPTs prior to their PET scans being conducted. Dr. Wu testified in his opinion CPT PET scans are more sensitive or accurate and pick up changes in the brain related to psychiatric illnesses.

In summary, Dr. Wu's opinion differed from Dr. Spicer's because of the administration of the CPTs, and defense counsel had no problem juxtaposing the doctor's methodologies at trial. On cross-examination of Dr. Spicer, counsel impeached Dr. Spicer by eliciting testimony that Dr. Spicer did not know what a CPT was, or who Dr. Adriane Raine was, and by having Dr. Spicer point out that MUSC performs its PET scans with the patient completely at rest, usually in a dark room, without first administering a CPT. Defense counsel established that Dr. Spicer was

unfamiliar with Dr. Wu and Dr. Sachy's methodology. Further, counsel impeached Dr. Spicer with the fact he was using a different database of normal controls, the Society of Nuclear Medicine's database, not the CPT-protocol database used by Dr. Wu. Moreover, counsel obtained a concession from Dr. Spicer that if Stanko's experts did not "fudge" the computer windows or color scale on the PET scan comparisons, then the PET scan of Stanko actually showed that Stanko's brain function in all quadrants, including the frontal lobe, was significantly decreased in comparison to Dr. Wu's control group.

Counsel's cross-examination of Dr. Spicer allowed defense counsel to lay the basis for his guilt phase closing argument that contended Dr. Spicer used an improper methodology in comparing the CPT PET scan of Stanko to a control group that did not follow the same protocol, *i.e.* that Dr. Spicer was comparing apples to oranges. And, that is exactly what counsel did in detail in closing argument. (App. pp. 2108-11 & 2147-57). Both Mr. Kelly and Mr. Diggs argued in their closing argument that Dr. Spicer had admitted on cross-examination that he was comparing a CPT PET scan of Stanko to a control group of PET scans at complete rest. He did not follow proper scientific methodology, as they argued their expert Dr. Wu had done, by comparing Stanko's CPT PET scan to a control group of normal brains who also performed a CPT PET scan. Counsel argued Dr. Spicer's science, or at least as far as his computer program comparison of PET images to the resting database, was invalid and that his testimony actually proved the defense's case: Stanko's brain, performing a CPT PET scan, was normal when compared with a database or control group of brains at rest; *i.e.* Stanko's brain function was not normal but abnormal. (App. pp. 2108-11 & 2147-57). Counsel also re-emphasized in closing argument the concession it obtained from Dr. Spicer that if Stanko's experts did not improperly adjust the PET scan windows, their PET scan comparison showed Stanko's brain functioning, including in the frontal lobes, was

abnormally low. As a result, Stanko has failed to prove deficient performance or resulting prejudice from the alleged failure to have the data Dr. Spicer analyzed prior to impeachment.

Furthermore, in the penalty phase, counsel re-called Dr. Wu who testified that a comparison of Stanko's CPT PET with the resting PET database, which is the methodology employed by Dr. Spicer, would not be appropriate scientifically, *i.e.* Dr. Spicer was comparing apples to oranges. Dr. Wu also testified there was no "fudging" of the computer windows or color scale on the PET scan comparisons he conducted. And, he testified again that his opinion was that Stanko had an abnormally functioning frontal lobe. Defense counsel re-emphasized its impeachment of Dr. Spicer from the guilt phase in the penalty phase as well.

As a result, Stanko has failed to show deficient performance or resulting prejudice from the alleged failure to have the data analyzed by Dr. Spicer prior to his impeachment. The record reflects Dr. Brannon's and Dr. Spicer's analysis of Stanko's PET slices was based on the very PET films in possession of defense counsel and his experts prior to trial. The record reflects that defense counsel proficiently challenged Dr. Spicer on his computer database comparison, and continued to challenge Dr. Spicer into the penalty phase on the same. Stanko has failed to show deficient performance or resulting prejudice for the alleged failure to have the resting database images Dr. Spicer compared to Stanko's CPT PET scan prior to his impeachment. Strickland; Wong. This Court finds counsel effectively cross-examined and impeached Dr. Spicer's testimony in the guilty phase and in the penalty phase. As a result, this ground has no merit and must be dismissed with prejudice.

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.

There is no merit to this ground as this claim was pursued in full on direct appeal. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). Stanko now alleges that trial counsel's abandonment of this issue failed to preserve it for appellate review and also denied his defense counsel's ability to address and question later jurors on the same and/or similar matters. But in its Opinion in this case, the South Carolina Supreme Court specifically ruled that 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. As a result, Stanko cannot show deficient performance or prejudice under Strickland and Wong in this regard.

The record also demonstrates that counsel conducted adequate *voir dire* of the jurors to insure there was no bias and Stanko received a fair and impartial jury and trial. The record in this case additionally shows the evidence of Stanko's guilt was overwhelming; the jury found the evidence of insanity was not credible; and, the overwhelming evidence in aggravation of Stanko's crimes justified and necessitated a death sentence as deliberated upon by the jury. Stanko cannot show deficient performance or prejudice in this regard. 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). As a result, this ground has no merit and

must be dismissed with prejudice.

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.

During the PCR evidentiary hearing, Stanko failed to present any evidence of either deficient performance or prejudice on this claim in his case in chief. (PCR Tr. pp. 1-282). Respondent moved for a directed verdict on this ground. (PCR Tr. pp. 283-90). As a result, Respondent's motion for directed verdict is granted as to this ground, which is hereby dismissed with prejudice. Butler v. State; Rule 71.1, SCRCR.

Even more, Petitioner has failed to meet his burden of showing deficient performance and prejudice under Strickland. While there was certainly publicity surrounding these crimes, as there is in any capital case, the record demonstrates 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 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. Stanko has presented no reason to question the sworn testimony of these jurors. Stanko cannot show deficient performance or prejudice, and failed to present any evidence in furtherance of this allegation.

The lack of change of venue motion does not constitute deficient performance under the

circumstances of the record now before this Court. Our Supreme Court has clearly held 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) (change of venue not warranted in capital murder case with extensive pre-trial publicity even though some of the jurors had read about the defendant's other crimes including another murder). Given the Evins holding, the trial court's instructions in this case, and the jurors' sworn answers under oath they would disregard anything they had read, heard, or seen about the case, and disregard any pre-formed 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. Evins, *supra*; 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); *see* State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 634 (Ct. App. 2008) ("issues involved in a change of venue motion were recently addressed with certitude in State v. Evins").

Nor can Stanko establish prejudice under Strickland. Even had counsel made an additional or further motion to change venue in this case, the trial judge would not have granted it given our case law and given the *voir dire* responses of the jurors under oath. Tucker, *supra*; Manning,

supra; Truesdale, *supra*. 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, *supra*. 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 S.E.2d 132, 138 (1985), *cert. denied*, 471 U.S. 1120 (1985) *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); 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. Stanko was tried by a fair and impartial jury, as has already been determined by our Supreme Court. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008)(finding this Applicant's jury was fair and impartial). Stanko 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 Stanko 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. Stanko has failed to show deficient performance or prejudice from counsel's failure to move for a change of venue as he alleges. Strickland, *supra*; Wong, *supra*. As

a result, even if this Court did not grant Respondent's motion for a directed verdict, this ground must be dismissed with prejudice.

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 has not moved for a directed verdict on this ground as Stanko put forward limited testimony in furtherance of this allegation at PCR; however, this Court finds that even given that testimony, Stanko failed to demonstrate Strickland deficient performance and prejudice which would warrant relief and hereby dismisses the claim.

Stanko alleges counsel should have challenged the State's use of Dr. Pamela Crawford for purposes of a pre-trial competency examination and criminal responsibility examination because prior to being assigned to the case, Dr. Crawford traveled to Columbia, South Carolina and Augusta, Georgia to interview witnesses in the Ling and Turner crimes. Having acted in an investigative process of the case, Stanko posits, Dr. Crawford could not possibly take an unbiased approach to this case.

However, the record shows that everyone involved in this case, including the jury, knew of Dr. Crawford's role in the case prior to being asked by the Court to conduct a competency and criminal responsibility examination. Further, Stanko has failed to prove Dr. Crawford's testimony

was biased, that she was a prosecution tool, or that counsel was deficient in its investigation, research, or challenge to her testimony. In fact, upon reviewing the trial record of her testimony, this Court finds her testimony was not biased; she freely discussed her prior involvement in the case and the fact she disclosed that to everyone including the trial court prior to her appointment; she was not a prosecution tool, and her testimony is supported by the record in this case.

Additionally, based on this Court's review of the trial record, this Court finds counsel adequately and properly cross-examined Dr. Crawford at trial. Where counsel cross-examines the State's witnesses and therein attacks the accuracy of the evidence, a finding of deficient performance will not result. Lorenzen v. State, *supra* at 531, 657 S.E.2d 771 at 777; Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence). "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). Hindsight, however, is not the lens through which the undersigned is bound to examine applicant's PCR allegations. Instead, the reviewing court must eliminate the distorting effects of hindsight and attempt to reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. 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 in its examination of adverse witnesses. 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).

Here, counsel duly challenged Dr. Crawford's testimony at trial by bringing out her possible bias evidenced through the following details: her initial opinion in the case when she was first involved as a consultant for SLED; that a large part of the work she did on the case was for SLED in the behavioral science unit; that she listed her address on her stationary as the SLED behavioral science unit; and that Dr. Sachy related Stanko's insanity to the findings of the PET and MRI scans, not to repeated anti-social behavior. As a result, this Court finds counsel was not deficient in cross-examining or challenging Dr. Crawford's testimony.

Stanko further fails to show that had counsel further challenged her testimony during the State's rebuttal case, that the trial judge would have excluded it from the trial. In fact, by presenting the chosen insanity defense, trial counsel opened the door to the likelihood that the court-ordered criminal responsibility evaluation would be introduced by the State in its rebuttal case. Stanko provided notice to the State that he 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.

Additionally, as second chair trial counsel credibly testified at the PCR hearing, and as Dr. Thrasher, Stanko's psychiatric expert at trial credibly testified at the PCR hearing, there was never an issue regarding Stanko's competency to stand trial. Stanko understood the nature of the charges

against him. Stanko understood the possible penalties. And, Stanko was able to completely and thoroughly communicate with and assist counsel in the preparation of his defense.

Finally, Stanko 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 due to the strength of the State's case and the nature of Stanko's acts during and after the crimes. Strickland, *supra*; Wong, *supra*. As a result, this ground is dismissed with prejudice.

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.

No evidence in furtherance of this allegation was raised or testified to at the PCR hearing. (PCR Tr. pp. 1-282, 293-413). Respondent moved for a directed verdict on this issue at the close of applicant's case. (PCR Tr. pp. 283-90). Respondent renewed its motion for a directed verdict at the close of its case. (PCR Tr. p. 412). No facts in furtherance of this claim appear anywhere in the record. Therefore, this allegation is deemed waived. Parks v. Morris Homes Corp., 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (it is litigant's duty to bring to the court's attention any perceived error and "the failure to do so amounts to a waiver of the alleged error"). Further, Stanko has failed to meet his burden of showing deficient performance and prejudice under Strickland. Butler v. State, *supra*; Rule 71.1, SCRPC. Respondent's motion for directed verdict is granted as to this ground, which is hereby dismissed with prejudice.

10/11(a)(xi) 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.

Stanko alleges trial counsel failed to investigate and present mitigating facts at the sentencing phase including information concerning Stanko's past, the possible murder of his brother, his adaptability to prison life, and other information contained in Department of Probation, Parole & Pardon Services (DPPPS) records. "[A] PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("mere speculation" as to likely witness testimony does not alone satisfy the burden of showing prejudice).

Petitioner failed to put forward any real evidence in furtherance of this claim and has therefore failed to carry his burden of showing Strickland deficient performance or prejudice. Butler v. State, *supra*; see Rule 71.1, SCRPC. Stanko does not even allege what favorable or mitigating evidence he is referring to other than a vague reference to evidence to be introduced at the merits hearing. The record instead demonstrates that 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, 561 U.S. 945, 130 S.Ct. 3259 (2010); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins, 539 U.S. 510 (2003). Further, second-chair trial counsel credibly testified during the evidentiary hearing that Stanko

was not forthcoming with his defense team, indicating that Stanko likely provided false or misleading information regarding potential mitigation or aggravating information.

Furthermore, Stanko completely failed to prove deficient performance or prejudice under this ground because he did not offer any proper evidence in support of this claim. There was a only a brief mention at the hearing by mitigation investigator Dale Davis that the only thing she thought counsel failed to present was an eyewitness to Stanko's head injury at age seventeen (17); however, Stanko did not call that witness at the PCR hearing to establish deficient performance or prejudice. Porter v. State, 368 S.C. at 386, 629 S.E.2d at 358 (mere speculation what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (State's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of the burden of producing admissible testimony in accordance with the rules of evidence); Beaver v. Thompson, 93 F.3d at 1995 (rejecting claim counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief). Stanko did not introduce any Probation and Parole Records, any evidence regarding the alleged murder of his brother, any prison adaptability expert, or call any other mitigation witnesses at the PCR hearing to establish deficient performance or prejudice in the penalty phase. Palacio v. State, 333 S.C. at 513, 511 S.E.2d at 66 (finding where the contents of challenged documents were not presented at the PCR

hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense). As a result, Stanko has completely failed to establish deficient performance or prejudice under this ground. Wiggins; Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (reversing PCR court's conclusion capital defendant suffered prejudice from failure to offer sufficient social history evidence in mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) (no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial); 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).

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. Even had counsel presented more mitigation witnesses, this Court finds there is no reasonable probability of a different result in the sentencing proceeding. The evidence of aggravation introduced in this case is staggering. Stanko cannot show Strickland prejudice from the failure to introduce other alleged evidence of mitigation. Wong, supra. There is no reasonable probability the result of the proceeding would have been different if counsel would have introduced some other known information. The evidence of Stanko's guilt of these crimes was overwhelming; Stanko's evidence of alleged insanity was found not to be credible; and, the evidence in aggravation justifying and necessitating a death sentence was overwhelming.

Accordingly, Respondent's motion for directed verdict on this ground is granted and this claim for relief is denied and dismissed with prejudice. Even if this Court were to deny

Respondent's motion for a directed verdict on this ground, this Court finds Stanko has failed to meet his burden of proof on this ground to prove deficient performance or resulting prejudice on this record. Butler v. State; *see also* Strickland; Wong; Wiggins.

10/11(a)(xii) 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.

Here, Stanko alleges that his defense counsel failed to give investigators the additional time and resources to continue 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 undefined records.

This Court finds that even given testimony taken at the PCR hearing, Stanko failed to demonstrate Strickland deficient performance and prejudice which would warrant relief and thus denies and dismisses the claim. At the PCR merits hearing, Stanko did not introduce any of the records listed above that he claims counsel should have given investigators more time to uncover. He did not introduce the testimony of any witness who witnessed the 1986 incident involving applicant. Nor did Stanko introduce any medical records or documents at the PCR hearing or call any expert to establish had counsel obtained or uncovered such records their diagnosis would have been different. *See* Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004) (concluding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase where defendant suffered from severe, chronic depression at time of murder, given

that counsel failed to provide expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant's mental condition to the jury). Stanko completely failed to meet his burden of proof on this issue at PCR, as this Court cannot speculate what these alleged records or an alleged witness' testimony would have been. Porter v. State, 368 S.C. at 386, 629 S.E.2d at 358 (mere speculation what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (State's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of the burden of producing admissible testimony in accordance with the rules of evidence); Palacio v. State, 333 S.C. at 513, 511 S.E.2d at 66 (finding where the contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense); *see* Lorenzen v. State, *supra* (defendant's testimony expert would have helped his case was merely speculative where he called no expert to testify at PCR); *see also* Beaver v. Thompson, 93 F.3d at 1995 (rejecting claim counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief); Moss v. Hofbauer, 286 F.3d at 864-65 (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had

the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) (applicant cannot show deficiency “based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense,” rather, facts must be presented).

Furthermore, Stanko was determined competent to stand trial and counsel credibly testified there was no issue regarding Stanko’s competence to stand trial. Stanko’s own experts at trial conceded he was competent to stand trial. Stanko introduced no evidence at the PCR hearing that he was not competent to stand trial. Glover.

Testimony at PCR instead showed that counsel completely, thoroughly, 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, tests, and records. Wiggins v. Smith, *supra*. 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. Prior to trial, counsel retained two (2) psychiatrists, both a local and national psychiatric expert, who examined Stanko, a psychologist, who examined Stanko and obtained scientifically advanced PET and MRI scans, and a neuro-radiologist, who analyzed the PET scans. Counsel also had Stanko’s MRI scans analyzed by an expert in Pennsylvania regarding statistical volumetric differences from a “normal brain.” The findings of these experts and the brain scans were all presented to the jury. Counsel also demonstrated before the jury a connection between the insanity defense and Stanko’s birth records, which counsel obtained and presented, indicating probable or possible intracranial damage at birth, along with his sustaining head injury at approximately seventeen (17) years of

age. Counsel presented this evidence of insanity, including documentary evidence and expert witness testimony, and was successful in obtaining a jury instruction on the defense of insanity. An instruction on GBMI was also given.

Trial counsel was entitled to rely on retained psychiatric, medical, and psychological experts' diagnoses 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 at 599 (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 at 421 (decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible outcomes); *Poyner v. Murray*, 964 F.2d at 1419 (petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). At the PCR hearing, Stanko did not present any evidence he suffered from any other brain defect or mental illness. *Bannister, supra*; *Glover, supra*; *Zettlemoyer, supra*.

Stanko has not demonstrated that the lack of mental health history not put forward in his defense caused him prejudice. Stanko has failed to meet his burden of proving there is a reasonable probability of a different result in either the guilt or penalty phase. *See Strickland; Wiggins, supra; Wong, supra*. The evidence of Stanko's guilt of the crimes was overwhelming and the jury deliberated on the side of guilt, finding Stanko guilty and not insane or guilty but mentally ill. Similarly, the evidence in aggravation of the murder, kidnapping, attempted murder, torture, and rape was overwhelming, thus justifying and necessitating the jury's returning a death sentence. The evidence of Stanko's bad character and future dangerousness was proved through prior

convictions and bad acts in the penalty phase. Stanko cannot show prejudice given the cumulative speculative nature of this testimony and the other evidence introduced in his trial and sentencing proceedings. The credible evidence in the record, including Stanko's actions against Ling and her daughter on the night of the crimes, his actions the following day, and the testimony of the State's experts, shows Stanko was not insane at the time of the crime and was not guilty but mentally ill.

Stanko has failed to establish deficient performance or resulting prejudice in this regard. He has not shown that, but for any alleged deficient performance under this ground, there is a reasonable probability the result of the guilt or penalty phase would have been different. Strickland, *supra*; Wong, *supra*. Accordingly, Respondent's motion for directed verdict on this ground is granted and this claim for relief is dismissed with prejudice. Furthermore, even if this Court were to deny Respondent's motion for a directed verdict, this Court finds Stanko has failed to meet his burden of proof on this ground to show either deficient performance or resulting prejudice. Butler v. State; *see also* Strickland; Wiggins; Wong; Rule 71.1, SCRPC.

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

The undersigned dismisses this claim upon the motion of Respondent. This ground is not cognizable on PCR and fails to state a claim upon which relief may be granted by this Court. 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) ("In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised

at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (*citing* S.C. Code Ann. § 17-27-20(b)); 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.

Second, applicant did not put forward any evidence in furtherance of this allegation in his case in chief when given the opportunity. Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809; Glover v. State, 318 S.C. at 499, 458 S.E.2d at 540 (“mere speculation” as to likely witness testimony does not alone satisfy the burden of showing prejudice). Nor was any evidence presented in support of this claim on cross-examination of Respondent’s witness. As a result, Petitioner failed to meet his burden of proof on this claim, and this ground must be dismissed with prejudice. Butler v. State; Rule 71.1, SCRCP. Stanko failed to prove the State knowingly presented false testimony.

Third, there is no merit to this ground. Based on this Court’s review of the trial and penalty phase record, the prosecution **did not** knowingly and willingly initiate, present, and allow any witness including expert witnesses to present false testimony to the jury as alleged. The State’s experts did not, in an attempt to degrade, negate, and or impeach defense experts, knowingly give false testimony as alleged. The State did not knowingly and willingly present witnesses who provided false testimony concerning Stanko 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 Stanko appear as a sane, yet deceptive individual. The prosecution did not present lies, falsehoods, and deceptions by State witnesses or present such and grossly prejudice Stanko’s case. Stanko has not met his burden of proof to show error or prejudice. As a result, this ground must be dismissed with prejudice. There is simply no evidence in the record to support this

allegation.

As to this ground, Respondent's motion for a directed verdict is granted, and this ground is dismissed with prejudice. Even if this Court were to deny Respondent's motion for a directed verdict, this Court finds this claim is not cognizable in post-conviction relief, and Stanko has failed to meet his burden of proof with regard to this claim. Butler v. State; Rule 71.1, SCRPC.

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

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.

This claim is hereby dismissed following Respondent's Motion for a Directed Verdict. First, Stanko did not put forward any evidence in furtherance of this allegation in his case when given the opportunity. (PCR Tr. pp. 1-282). Butler v. State; Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809; Glover v. State, 318 S.C. at 499, 458 S.E.2d at 540 ("mere speculation" as to likely witness testimony does not alone satisfy the burden of showing prejudice); Rule 71.1, SCRPC. 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").

In his case in chief, the only evidence applicant introduced regarding any alleged Brady violation came from second chair counsel Gerald Kelly. Mr. Kelly initially stated he did not

receive all of the discovery material he wanted in the State's first discovery production. The information Mr. Kelly wanted dealt with complaints about Mr. Stanko made by citizens to police and the Solicitor's Office in the days leading up to the murder. However, Mr. Kelly admitted on cross-examination that he eventually received these materials from the State prior to the trial. The capital trial record also shows Mr. Kelly received these materials as Stanko presented this evidence in his capital proceeding. As a result, there is admittedly no Brady or Rule 5, SCRCP violation here.

Second, this Ground must be dismissed pursuant to Respondent's Motion to Dismiss. This claim is not cognizable on PCR and fails to state a claim upon which relief may be granted by this Court because it could have been presented at trial and on direct appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975) (the Uniform Post-conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (same); *see* S.C. Code Ann. § 17-27-20 (post-conviction relief is not a substitute for remedies at trial or direct appeal). This Court recognizes that a PCR applicant may raise a Brady violation or Rule 5 claim in post-conviction relief if he discovers after his trial and conviction, or death sentence and appeal, that the State has withheld or has allegedly withheld Brady or Rule 5 material. However, that is not the case here. Applicant admits the claim mentioned by Mr. Kelly was known to Mr. Kelly prior to trial and remedied prior to trial. Additionally, the claim first mentioned in Respondent's case, and mentioned only through cross-examination of Mr. Diggs, that the State allegedly did not disclose the results of Dr. Spicer's examination of Stanko's PET scans, was fully known by Stanko and his capital counsel during the trial itself, and could have been raised there, in a post-trial motion, and on direct appeal but was not. The record clearly reflects this. As a result, this

claim—even if it had been raised in applicant’s case in chief and could overcome Respondent’s Motion for a Directed Verdict and could be considered—is not cognizable on post-conviction relief because it could have been presented at trial, in a post-trial motion, and on direct appeal. *See Roscoe v. State*, 345 S.C. at 20, 546 S.E.2d at 419 (“In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (*citing* S.C. Code Ann. § 17-27-20(b)); *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), SCRCPP. This ground must be dismissed with prejudice.

Furthermore, there is no merit to the claim raised or mentioned on cross-examination of Respondent’s witness Mr. Diggs. The trial record shows this witness, Dr. Spicer, was a Reply or Rebuttal witness. He did not generate a report in this case. There was no written report to serve on opposing counsel. As a result, there was no Rule 5 violation. Additionally, Dr. Spicer found Stanko’s PET scan was normal. As a result his testimony was not exculpatory; therefore, there could be no Brady violation. *Brady v. Maryland*, 371 U.S. 812 (1962). Further, the record shows the results of MUSC’s review of Stanko’s PET scan, conducted the day of or the day after the PET scan was completed, was normal and those results were immediately forwarded directly to Dr. Sachy, Stanko’s defense psychiatric expert, prior to trial. (R. pp. 1965-1967). As a result, this information was in the possession of the defense, was not exculpatory, and there could be no Brady or Rule 5 violation. For this additional reason, this claim has no merit and must be dismissed.

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

Stanko alleges his right to counsel was violated by appellate counsel not receiving sufficient time to research, write, and prepare the appeal. Stanko alleges this occurred in light of Chief Justice Jean Toal's Order that the appeal should be expedited, 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.

As a threshold matter, the Supreme Court **did not provide for no extensions**. Rather, the Supreme Court stated only that no extensions would be granted except upon showing of extraordinary circumstances. Moreover, counsel did request an extension from the South Carolina Supreme Court on April 19, 2007, and **received a thirty (30) day extension** by Order issued April 23, 2007. Furthermore, the South Carolina Supreme Court did not prevent or prohibit appellate counsel from requesting another extension. Appellate counsel credibly testified at the PCR hearing that he could have requested another extension had he needed one, and he believed the Supreme Court would have granted the extension request. The record shows appellate counsel had sufficient time to review the record completely and brief the arguable issues of merit on direct appeal. The record also shows that two (2) attorneys were assigned to this case on appeal, and that both reviewed the trial record and briefed the issues on appeal. Stanko has not shown deficient performance or prejudice in this regard.

As an additional matter, 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. See Roscoe v. State, 345 S.C. at 20, 546 S.E.2d at 419 (“In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”); Drayton v. Evatt, *supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (citing S.C. Code Ann. § 17-27-20(b)); Hyman v. State, *supra*; Peeler v. State, *supra*. Thus, this entire Ground fails to state a claim upon which relief may be granted by this Court. See SCRCP 12(b)(6).

Third, even if this claim were cognizable in the present action, Stanko has failed to meet his burden. 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). To obtain relief a PCR applicant must show that appellate counsel’s performance was (1) deficient; and (2) prejudice resulted 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).¹⁵ 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

¹⁵ 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”).

overcome.” Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (C.A.7 1986)); *see also* Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (*en banc*).

Appellate counsel is also 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); Jones v. Barnes, *supra*, (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 him Smith v. Robbins, *supra*; Jones v. Barnes, *supra*; Thrift v. State, *supra*. Stanko has failed to show the issues he asserts should have been raised on appeal were clearly more meritorious than the issue or issues raised and argued on appeal based upon the trial record. And, Stanko has failed to show the issues he asserts should have been raised on appeal would have resulted in him prevailing on appeal.

This Court finds that based upon appellate counsel’s PCR testimony and the record in this case, counsel was not deficient, and counsel also made an objectively reasonable strategic decision not to raise the issue regarding the limitation of Dr. Wu’s testimony¹⁶ because it was not meritorious and weaker than the issue or issues raised on appeal. Jones v. Barnes, 463 U.S. 745, 752 (1983) (appellate counsel does not have duty to raise every non-frivolous issue requested by

¹⁶ This is the issue Stanko alleges appellate counsel was ineffective for failing to raise in claim 10/11(c)(ii).

defendant). First, the record shows Dr. Wu was not offered in this regard until the penalty phase, so any limitation in his testimony could not affect the guilty verdicts. Second, the Record shows the trial court did not prohibit Dr. Wu from testifying in rebuttal that in his opinion the proper methodology for comparing a CPT PET scan was to compare it with a database of CPT PET scans, which he did, not a database of PET scans at rest, which Dr. Spicer testified he did. Therefore, Stanko was allowed to elicit exactly what he wished when offering Dr. Wu's rebuttal testimony. As a result, the issue Stanko argues appellate counsel should have raised would not have been meritorious on appeal, and was not stronger than the issues raised in the brief. *See Stanko, infra*. Therefore, this issue cannot be the basis of a claim of ineffective assistance of appellate counsel. Barnes; Strickland. Stanko has failed to show deficient performance in not raising this issue on appeal. This Court also finds that based on the same reasoning, Stanko has failed to show prejudice, *i.e.* there is a reasonable probability had appellate counsel raised this specific issue, he would have prevailed on appeal. Id.

Additionally, this Court finds credible appellate counsel's testimony that the issue regarding failure of the trial court to instruct the jury on the alleged lesser included offense of voluntary manslaughter in the guilt phase, or the statutory mitigating circumstance of provocation in the penalty phase, were not preserved for appellate review. The record reflects there was no request by Stanko for an instruction on voluntary manslaughter, and there was no request by Stanko that the Court charge the statutory mitigating circumstances of provocation by the victim. South Carolina is an issue preservation state. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000). An issue that is not preserved below will not be considered on appeal. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000). The failure to request a jury instruction on an alleged lesser included

offense results in the issue not being preserved for appellate review. State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975); State v. Steadman, 275 S.C. 528, 186 S.E.2d 712 (1972). The failure to request an instruction on a statutory mitigating circumstance results in the issue of the trial court's failure to give an instruction on a specific statutory mitigating circumstance not being preserved for appellate review. State v. Stanko, 376 S.C.571, 658 S.E.2d 94 (2008) (**this very case**); State v. Evans, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006); State v. Bowman, 366 S.C. 485, 623 S.E.2 378 (2005); State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005). As a result, neither of these issues was preserved for appellate review. Appellate counsel cannot be deficient, nor can the applicant show prejudice, from appellate counsel not raising an issue that was not preserved for appellate review. Lee v. Davis, 328 F.3d 896, 901-02 (7th Cir. 2003); Aparicio v. Artuz, 269 F.3d 78, 96 (2d Cir. 2001); Jackson v. Duggar, 931 F.2d 712 (11th Cir. 1991) (appellate counsel not ineffective for failing to appeal issue not preserved for review); Kitt v. Clarke, 931 F.2d 1246 (8th Cir. 1991) (similar); *see* Burton v. Renico, 391 F.3d 764, 777 (6th Cir. 2004) (similar); *see also* Albrecht v. Horn, 485 F.3d 103, 138 (3rd Cir. 2007). The appellate courts of South Carolina would not consider such an issue. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).

Additionally, this Court finds appellate counsel was not deficient in not raising either the voluntary manslaughter or provocation issue on appeal because they were not meritorious appellate issues. As previously stated in the undersigned's discussion on an earlier claim for relief, it is undisputed the only evidence which Stanko points to as justifying a charge on voluntary manslaughter or provocation is testimony of Stanko's retained experts (psychiatrists) of the State's expert (psychiatrist) about what Stanko told them allegedly occurred prior to the Ling incident made to the experts (psychiatrist/physicians) for the purpose of making a diagnosis on the issue of

criminal responsibility and capacity to conform. This evidence was solely admissible as “information upon which they [the experts] relied in reaching their professional opinions[,]” and was **not admissible as substantive proof of the facts so stated** by Stanko. Gentry v. Watkins-Carolina Trucking Co., *supra*; Howle v. PPA/Monarch, *supra*; *see State v. Brown*, *supra* (history as related to the doctor was admissible only as information upon which the doctor relied in reaching his professional opinion. **It is not admissible as substantive proof of the facts stated**); Jones v. Doe, *supra* (Rule 703 does not allow for the unqualified admission of hearsay simply because an expert relied upon it in forming an opinion: “[T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. *It is received only for the limited purpose of informing the jury of the basis of the expert’s opinion and therefore does not constitute a true hearsay exception.*”) (citing 2 Kenneth S. Broun, *et al.*, McCormick on Evidence § 324, at 418 (2006)) (emphasis added by the Jones Court); *see also* Notes to Rule 803(4), SCRE.¹⁷ The basis for this distinction is that the statements do not have the same degree of trustworthiness when the patient is seeking to support a matter in court. South Carolina Evidence, 2nd Ed., Danny R. Collins, 2000 S.C. Bar/CLE Division. As a result, appellate counsel was not deficient in failing to raise either the voluntary manslaughter or provocation issue on appeal.

Further, the facts do not support an instruction on voluntary manslaughter. Stanko bound Laura Ling’s hands and feet. He beat her from the top of her head to her feet. He then walked to

¹⁷ *See State v. Reed*, 2001 WL 815026 (Ohio App. 2 Dist. 2001) (*unpublished*) (affirming defendant’s conviction where limiting instruction told the jury they could not consider statements defendant made to testifying expert psychologist, who examined defendant prior to trial, about the incident as substantive proof of the crime or any lesser included offense that might be charged but only as to the basis of the expert’s findings; *see generally State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014) (recognizing “[t]o find otherwise would mean a defendant could automatically obtain the instruction merely by making a self-serving statement as to his intent.”).

the fifteen (15) year old daughter's bedroom and started sexually assaulting her. She fled to her mother's bedroom finding her mother alive, but bound and semi-conscious. Stanko followed the daughter to the mother's bedroom. Stanko then began assaulting the daughter again and knocked her unconscious. When she awoke, she was bound with neckties, and Stanko began raping her and talking to her during the rape. At one point, Stanko beat Laura Ling some more as she lay bound on the floor beside the bed. Stanko then continued to rape the daughter and reached over and manually strangled Laura Ling with one hand. This was the cause of death. The facts simply do not constitute a killing in the sudden heat of passion upon adequate legal provocation. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); Cook v. State, Op. No. 27596 (S.C. Sup. Ct. filed December 9, 2015) (Shearouse Adv. Sh. No. 48 at 12-19), 2015 W.L. 8349232 (*not yet released for publication*). 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.

The only evidence of any provocation was Stanko's statements to his experts knowing he was being evaluated for criminal responsibility shortly before trial. There was testimony from several experts, including Stanko's own experts, that Stanko habitually lies. There was testimony from numerous lay witnesses that Stanko habitually lies. There was no substantive evidence of a cigarette burn to Stanko's face or eye presented at trial. The daughter heard no arguing or fighting before the crimes occurred. No cigarette butt from the crime scene was brought into evidence. Further, as recited above, Stanko methodically bound and tortured Laura Ling, kidnapped the daughter and raped her, beat the murder victim some more during the rape of the daughter, and finally manually strangled Laura Ling to death also during the daughter's rape. Stanko then cut the daughter's throat twice with a knife, and at some point stabbed Laura Ling in the throat with a

sharp object. Stanko then showered and methodically packed his suitcase and left the residence locking the door as he left. Stanko was not entitled to such an instruction given this record. Further, there is no reasonable probability the jury would have returned with a different sentence had one been given. Strickland, *supra*; Wong, *supra*. Stanko has failed to prove deficient performance or prejudice under this ground. Smith v. Barnes, *supra*.

Finally, during Respondent's case at the PCR hearing, on the cross-examination of Mr. Diggs, applicant Stanko elicited testimony from Mr. Diggs that appellate counsel should have briefed the directed verdict issue on appeal. This Court finds this testimony was not credible. This Court finds credible appellate counsel's testimony that this issue was not meritorious. The evidence of Stanko's guilt was overwhelming. It included eyewitness' identification and DNA evidence. The evidence of Stanko's actions during the murder of Laura Ling and the rape and attempted murder of her daughter and after was sufficient to overcome a motion for directed verdict on insanity. Additionally, the State's psychiatric expert testified Stanko was not legally insane at the time of the crime, and its radiologist and neurologist testified Stanko's PET scan was normal. As a result, there is no merit to this claim of ineffective assistance of appellate counsel. Jones v. Barnes, *infra*; see e.g. Riley v. Berghuis, 481 F.3d 315, 320-24 (6th Cir. 2007) (counsel's failure to move for a directed verdict at the conclusion of the prosecution's case caused no prejudice where a rational juror could have concluded the defendant was guilty); United States v. Moore, 921 F.2d 207, 210 (9th Cir. 1990) (counsel's failure to make a directed verdict motion was not ineffective assistance where sufficient evidence existed to overcome the motion); United States v. Feldman, 853 F.2d 648, 665-66 (9th Cir. 1988) (similar). As a result, this claim is denied and is dismissed with prejudice.

10/11(c)(ii) with 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.

For the reasons stated in the previous ground, Stanko has failed to meet his burden of proof on this issue. Butler v. State; Rule 71.1, SCRCP. 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. 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 appellate counsel's performance was (1) deficient; and (2) prejudice resulted 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. at 285 (citation omitted).¹⁸ 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

¹⁸ See also Smith, 882 F.2d at 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").

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 v. Greer, 800 F.2d 644, 646 (C.A.7 1986)); see also Bell v. Jarvis, 236 F.3d at 164. Given the paucity of applicant’s allegation, he cannot make this difficult showing.

Appellate counsel is also 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); Jones v. Barnes, *supra* (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, a defendant must show not only that counsel’s performance was deficient, but that this deficiency prejudiced defendant. Smith v. Robbins, *supra*; Jones v. Barnes, *supra*; Thrift v. State; *supra*. Stanko has failed to show the issue he asserts should have been raised on appeal was clearly more meritorious than the issue or issues raised and argued on appeal based upon the trial record.

This Court finds that based upon appellate counsel’s PCR testimony and the record in this case, appellate counsel was not deficient, and appellate counsel also made an objectively reasonable strategic decision not to raise the issue regarding the limitation of Dr. Wu’s testimony because it was not meritorious, and was in fact weaker than the issue or issues raised on appeal. Stanko sought to call Dr. Wu in the penalty phase to rebut or reply to Dr. Spicer’s guilt phase testimony. The trial court did not prohibit Dr. Wu from testifying in rebuttal that, in his opinion,

the proper methodology for comparing a CPT PET scan was to compare it with a database of CPT PET scans, which he did, not a database of PET scans at rest, which Dr. Spicer testified as to doing. Therefore, Stanko was allowed to do exactly what he wished to do when offering Dr. Wu's rebuttal testimony, causing the issue Stanko argues appellate counsel should have raised to be without merit on appeal. The resolved issue of Dr. Wu's rebuttal testimony was not stronger than the issues raised in the appellate brief. This issue does not suffice as a winning claim of ineffective assistance of appellate counsel. Stanko has failed to show deficient performance in not raising this issue on appeal. Jones v. Barnes, *supra*; Strickland, *supra*.

This Court also finds Stanko has failed to show prejudice, *i.e.* there is a reasonable probability had appellate counsel raised this specific issue, he would have prevailed on appeal. It cannot be the basis of a claim of ineffective assistance of appellate counsel. Id. Dr. Wu's testimony was not offered until the penalty phase; therefore, it could have no effect on the guilty verdict. Further, the trial court did not prohibit Dr. Wu from testifying in rebuttal in the penalty phase that, in his opinion, the proper methodology for comparing a CPT PET scan was to compare it with a database of CPT PET scans, as opposed to the methodology that Dr. Spicer testified to. Therefore, Stanko was allowed to do exactly what he wished to do when offering Dr. Wu's rebuttal testimony. Dr. Wu's testimony on this point was before the penalty phase jury for its consideration in imposing the appropriate sentence. Given the overwhelming evidence in aggravation and Stanko's actions during and after the crimes, the jury still imposed a sentence of death. Based on this entire record, this Court finds there is no reasonable probability Stanko would have prevailed on appeal, *i.e.* the South Carolina Supreme Court would have vacated his death sentence on this issue. Jones v. Barnes; Wiggins v. Smith. Accordingly, this claim too is denied and dismissed.

10/11(c)(iii) Appellate Counsel was ineffective in failing to argue that the trial court erred in failing to instruct the jury on the statutory mitigating circumstances of provocation

Supporting Facts: 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).

This Court has already ruled regarding the lack of merit within Stanko's claim that the statutory mitigator of provocation should have been requested within the sentencing phase's jury instruction. As that claim is without merit based upon the evidence delineated above in relation to the Strickland standard, appellate counsel is not now deemed ineffective for failing to raise the issue on appeal. Without any substantive evidence in support of the provocation instruction, Stanko derives no prejudice from its exclusion from the trial record and on appeal, and the undersigned hereby dismisses this ground with prejudice

As previously stated, appellate counsel could not have been deficient in failing to raise this issue, nor can Stanko establish prejudice as this issue was not preserved for appellate review. Lee v. Davis, 328 F.3d at 901-02; Aparicio v. Artuz, 269 F.3d at 96; Jackson v. Duggar, 931 F.2d 712 (appellate counsel not ineffective for failing to appeal issue not preserved for review); Kitt v. Clarke, *supra* (similar); *see* Burton v. Renico, 391 F.3d at 777 (similar); Albrecht v. Horn, 485 F.3d at 138. The failure to request an instruction on a specific statutory mitigating circumstance results in the issue of the trial court's failure to give that instruction not being preserved for appellate review. State v. Stanko, 376 S.C.571, 658 S.E.2d 94 (2008) (**this very case**); State v. Evans, 371 S.C. at 32, 637 S.E.2d at 315; State v. Bowman, *supra*; State v. Vazquez, *supra*. The appellate courts of South Carolina would not consider such an issue. *Id.* As a result, there is no merit to this ground and it must be dismissed with prejudice. For the reasons stated under the previous ground addressing this issue with regard to trial counsel, there is no merit to this claim.

10/11(d)(i) with Supporting Facts: Violation of Due Process. 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.

This Court grants Respondent's motion for a directed verdict with regard to this ground. Again, this claim has no merit because it is a direct appeal claim or one that should have been raised to the South Carolina Supreme Court. It is not cognizable on PCR. *See Roscoe v. State*, 345 S.C. at 20, 546 S.E.2d at 419 ("In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); *Drayton v. Evatt*, *supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (citing S.C. Code Ann. § 17-27-20(b)); *Hyman v. State*, *supra*; *Peeler v. State*, *supra*.

Additionally, Stanko asks this Court, a Circuit Court of Common Pleas, to hold that the South Carolina Supreme Court erred in expediting his appeal, which in essence would constitute *reverse vertical stare decisis*. To so rule is outside of this Court's authority. *See Jackson v. Bush*, 2015 WL 574021 (2015) (Report and Recommendation) (unpublished); *see also United States v. Duvall*, 740 F.3d 604 (D.C. Cir. 2013) (discussing vertical stare decisis).

Furthermore, there is absolutely no merit to this ground. The South Carolina Supreme Court only stated an extension would not be granted except upon extraordinary circumstances: the Supreme Court did not institute "no provision" for extensions in this case. Stanko has failed to show the alleged due process violation. In fact, the record before this Court shows that appellate counsel did file a request for an extension on April 19, 2007. And, counsel did receive a thirty (30) day extension by Order dated April 23, 2007. Therefore, the Supreme Court did not prevent appellate counsel from requesting such an extension, and in fact, appellate counsel did request and

receive one.

There also was not anything preventing or prohibiting appellate counsel from filing an additional request had one been necessary. Appellate counsel credibly testified he could have requested another extension had he needed one, and he believed the South Carolina Supreme Court would have granted the request. The record also shows he was not the only attorney representing Stanko on appeal. He testified that another attorney worked with him on the brief. This Court thus finds appellate counsel and co-counsel had adequate time to review the trial record, and did so. Counsel together briefed the arguable issues of merit which they reasonably selected to raise on appeal. Stanko cannot show his due process rights were violated by the South Carolina Supreme Court or that prejudice resulted. Additionally, the provisions regarding an extension in this case were equally applicable to the State as well as applicant Stanko.

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 rebuttal testimony, the failure to charge the statutory mitigator of provocation, and the directed verdict issue. As set forth above, and incorporated fully herein, there is no merit any of these appellate issues. Nor can he establish prejudice in this regard. Strickland, *supra*; Wong, *supra*; Jones v. Barnes, *supra*.

This Court grants Respondent's motions to dismiss and for a directed verdict as to this ground as it is not cognizable in post-conviction relief and beyond the authority of this Court. Even if this Court were to deny Respondent's motion for a directed verdict as to this ground, this Court finds this ground must be dismissed as it is not cognizable in post-conviction relief, beyond the authority of this Court, and Stanko has failed to meet his burden of proof to show his due process rights were violated.

10/11(d)(iii) with Supporting Facts: Applicant was denied Due Process by the failure of the Court to instruct the jury on the statutory mitigating circumstances of provocation

This Court grants Respondent's motion for a directed verdict as to this claim. Again, this claim of trial court error has no merit because it is a direct appeal claim. It is not cognizable on post-conviction relief (PCR). *See Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419 ("In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); *Drayton*, *supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel)(citing S.C. Code Ann. § 17-27-20(b)); *Hyman*, *supra*; *Peeler*, *supra*. It must be dismissed with prejudice. *Irick v. State*, 264 S.C. 632, 216 S.E.2d 545 (1975) (the Uniform Post-conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (same); Rule 12(b)(6), SCRCPP.

Even if this Court did not grant Respondent's motion for a directed verdict, this Court would deny and dismiss this claim because it is not cognizable on post-conviction relief. *Id.* Furthermore, for the reasons stated under previous grounds, the trial court did not err in failing to instruct the jury on this mitigating circumstance.

10/11(d)(ii) and (iv) The cumulative effect of the errors complained of within denied Applicant his right to Due Process

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

A portion of this ground represents claims of trial court error or direct appeal claims that

are not cognizable on post-conviction relief. See Roscoe, 345 S.C. at 20, 546 S.E.2d at 419 (“In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”); Drayton, *supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (citing S.C. Code Ann. § 17-27-20(b)); Hyman, *supra*; Peeler, *supra*. Therefore, this Court cannot grant relief based on those claims.

Additionally, South Carolina has not recognized the cumulative error doctrine on review of direct appeal issues where the issues were not preserved at trial. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011); State v. Beekman, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013). Stanko also has not shown any preserved errors by the trial court, or that if there were any errors, that they violated his right to a fair trial. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (to qualify for reversal on ground of cumulative effect of trial errors, defendant must demonstrate errors adversely affected right to fair trial).

Furthermore, with regard to any claims of trial court error or claims of ineffective assistance of counsel, as this Court has denied relief on every other claim, it similarly denies relief based upon cumulative error. Lorenzen v. State, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant effective legal representation to the extent that prejudice was presumed); Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) (finding that absent the narrow circumstances of presumed prejudice under Cronic, a PCR applicant alleging ineffective assistance of counsel must show actual prejudice); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (“While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we

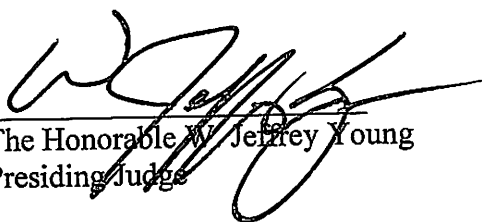
recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors.”); *see e.g., Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). This ground for relief is hereby denied and dismissed with prejudice.¹⁹

CONCLUSION

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that Respondent’s Motion for Directed Verdict is GRANTED upon the grounds enumerated above, and the remainder of Stanko’s grounds in his final PCR application are denied and dismissed with prejudice. Stanko is remanded to the custody of Respondent for the carrying out or completion of his sentences.

AND IT IS SO ORDERED.

¹⁹ This Court also notes that at the PCR hearing, collateral counsel elicited testimony from second (2nd) chair counsel Gerald Kelly that at some point Kelly became suspicious that first (1st) chair counsel William “Bill” Diggs *may* have been using cocaine prior to and during the trial of this case. Kelly admitted this was only a suspicion based on various things including: Diggs driving to Columbia and back prior to the trial without being tired, Diggs wearing his hair in a pony-tail, Diggs going to the bathroom whenever there was a break in the trial, perceived mood swings during trial, and seeing what Kelly believed was particles of white powder on Diggs’ mustache on one (1) occasion when Diggs came out of the bathroom during a break in the trial. (PCR Tr. pp. 117-18, 152-55). Kelly admitted their fact investigator looked in Diggs’ personal [hygiene] bag at counsel during the trial and found no cocaine. (PCR TR. p. 155). Further, Kelly admitted he did not report this *suspicion* to Judge Jefferson, disciplinary counsel, or the Supreme Court. This Court finds there is no credible evidence to support Kelly’s suspicion “because there was no evidence that it would stand up.” (PCR Tr. p. 155). Further, Mr. Diggs testified at the PCR hearing he did not use cocaine prior to or during the trial of this case. He admitted he did go to the restroom during breaks in the trial, and prior to the trial he had a tooth pulled and was using a temporary tooth that had to be re-cemented during the trial. Diggs testified he would re-cement the tooth in the restroom during breaks in the trial. (PCR Tr. pp. 303-04, 306-08). This Court finds there is no credible evidence that Diggs was using cocaine during the trial. Additionally, this Court finds Mr. Diggs’ testimony on this issue to be credible. This Court also notes that this issue was not raised as a ground in applicant’s Final Application and applicant did not move to amend the Application to assert any such ground.



The Honorable W. Jeffrey Young
Presiding Judge

This 27 day of June, 2016
Sumter, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
	)	
Stephen C. Stanko # 6022,	)	C/A No.: 2008-CP-22-1446
	)	
<i>Applicant,</i>	)	MOTION TO ALTER OR AMEND AND
	)	MOTION FOR RECUSAL
	)	
	)	
v.	)	
	)	
The State of South Carolina,	)	
	)	
<i>Respondent.</i>	)	
	)	

On June 27, 2016, this Court signed the Order Granting Respondent's Motion for Directed Verdict in Part and Denying Applicant Post Conviction Relief (hereinafter "the Order"). Applicant received the un-clocked signed Order on July 14, 2016. This Order was clocked on July 15, 2016. Pursuant to Rule 59(e), SCRPC. Applicant makes the following objections to the Order and respectfully request that this Court alter or amend its order:

MOTION TO ALTER OR AMEND

1. On Page 10 of the Order, the Court states the following:

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. 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.

And

FILED
 GEORGETOWN COUNTY, S.C.
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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.

Applicant respectfully asserts that does not accurately describe what occurred.

At the close of the Applicant's case, the State orally moved for directed verdict. The entirety of this argument is contained in Tr. 283-289. Due to the length of the oral motion for directed verdict, the Court allow the State to submit a written motion for directed verdict and Applicant was supposed to reply to the written motion. Tr. 290, l. 5—Tr. 291, l. 16. Both parties were also given the chance to prepare written proposed orders.

The State then called Counsel Diggs. At the close of the State's case it renewed its motion for directed verdict. Upon request the Court clarified that the State was to submit written motion for directed verdict and proposed order and then Applicant was to submit a proposed order and then given a chance to reply to the State's motion for direct verdict. Tr. 412, l. 15 – Tr. 413, l. 4.

The State did not prepare a written motion for directed verdict. Therefore, Applicant never replied to such a motion. However, Applicant did prepare a Memorandum of Support of Application for Post-Conviction Relief to respond to the arguments raised during the State's oral Motion for directed verdict. Applicant also prepared a proposed order which was filed as an attachment to the Memorandum. Applicant's Memorandum and Proposed Order was mailed on the same day as Respondent's Proposed Order. *See Exhibit A* (Respondent's Proposed Order).

By agreement between the parties, the two proposed orders were mailed on the same day. As such, neither party had an opportunity to incorporate the other's arguments into their proposed orders. *See Exhibit B* (affidavit).

It was Applicant's understanding at the hearing that the Court would consider any arguments raised by Applicant in his proposed order as properly raised as part of the record.

Applicant respectfully request the Court alter or amend its order to reflect the Court considered the arguments raised by Applicant during in his Memorandum and Proposed Order.

2. Applicant submits that the "Standard of Review" section improperly limits the scope of post-conviction relief issues to those arising from ineffective assistance of counsel. Such a narrow view is contrary to the plain language of the S.C. Code § 17-27-20 and many PCR cases decided on constitutional issues not related to the ineffective assistance of counsel. To the extent this narrow scope governs the Court's rulings, Applicant respectfully request that the Court alter or amend its order.

3. Applicant respectfully argues that the Order Granting Respondent's Motion for Directed Verdict in Part and Denying Applicant Post Conviction Relief should not have been ruled upon by this Court based on the arguments raised in Applicant's Motion to Recuse the Honorable Jeffrey Young filed in November of 2014. Applicant respectfully asks that the Court reconsider all arguments previously raised in the motion for recusal.

4. The Court makes a finding that the "only" defense available was the mental health defense. Applicant submits this statement is incorrect. Applicant could have raised the lesser included offense of Voluntary Manslaughter.

5. Applicant respectfully request that the Court amend its findings concerning overwhelming evidence of guilt and the likelihood of a different result at the guilt phase. The Court has discounted the possible lesser included offense of voluntary manslaughter which was consistent. Additionally, this conclusory statement is not supported by any specific findings of fact in the record. *See* S.C. Code § 17-27-80.

6. Applicant's respectfully request that the court amend its findings concerning overwhelming evidence of aggravation. This conclusory statement is not supported by any specific

findings of fact in the record. *See* S.C. Code § 17-27-80. Additionally, to the extent this finding suggests that no reasonable juror could have found for life, Applicant does not believe that the record supports this conclusion.

7. On page seventeen, the Court finds, "The record contains no evidence which would support a jury instruction on voluntary manslaughter during the guilt phase of Stanko's capital trial, nor does the record contain evidence which would support a jury instruction on the statutory mitigator of provocation." Applicant submits that this finding is not supported by the record.

8. On page eighteen, the Court finds, "Given overwhelming evidence against Stanko regarding these crimes and aggravating circumstances, and the testimony put forward regarding his criminal history and potential for future dangerousness, there is no reasonable probability that the jury would have reached an alternative verdict in the penalty phase of Stanko's trial even had counsel not performed in the manner complained of." Applicant submits that this finding is not supported by the record. Applicant also asserts that but for the ineffective assistance of counsel there is a reasonable probability that the result would have been different.

9. The Court outlines its "Standard of Review" in part by stating "relief will not be granted on a showing of mere error. Prejudice must also be shown." Applicant respectfully objects to this statement as it applies to the application as a whole. Applicant has raised various claims of Ineffective Assistance of Counsel under *Cronic*. Additionally, Applicant as argued structural error. These claims do not require a prejudice analysis.

10. Applicant respectfully submits that the Court erroneously interpreted S.C. Code 17-24-10(c) in finding that the NGRI defense was supported by the evidence presented at trial. The Court found, "the insanity defense was based on medical scans, medical records, and expert medical and psychiatric testimony of a brain defect that resulted in Stanko being insane at the time of the crimes

against Laura Ling and her daughter.” However, the Court seems to misapply the law. A manifestation is an outward showing. The only evidence of how Applicant’s mental disease was manifested is through criminal or other anti-social behavior.

11. The Order finds the following:

Additionally, Stanko has not shown *Strickland* prejudice in the guilt phase. Even had counsel not presented the insanity defense, there is no reasonable probability the jury would have returned with a different verdict.

Applicant believes that this conclusion overlooks the factual basis for the lesser included of Voluntary Manslaughter that would have been consistent with the findings of Applicant’s experts. Applicant respectfully request that the Court consider this argument and alter its Order.

12. Applicant object to the prejudice analysis in arguments raised not based on *Strickland*. Applicant submits that in all of the claims not based on *Strickland*, the Court has misapplied the law. Applicant respectfully request that the Order be amended to indicate the proper prejudice analysis as outlined in Applicant’s Memorandum and Proposed Order.

13. Applicant submits that the findings of the Court concerning Dr. Sachy’s pretrial statements and comparisons are not supported by the record.

14. The Court found the following:

It is clear Dr. Sachy made these references during the trial to support his diagnosis of "psychopathy" in light of Stanko's clear history of engaging in lifelong antisocial behavior, and specifically "involuntarily acquired psychopathy." It is also clear counsel did not intentionally elicit these responses or comparisons.

Applicant respectfully submits that these findings are not supported by the trial transcript.

15. The Court makes multiple findings that concerning effective assistance of experts. Applicant has never raised this issue. Applicant’s allegation that Trial Counsel should have recognized that the opinions they were presenting are inconsistent with South Carolina concerning NGRI. From the State’s Proposed Order, it appears that the State seeks to conflate Applicant’s

Issue with an issue concerning the effective assistance of experts. Applicant asserts that this finding does not address any issue raised by Applicant.

16. Related to the Court's ruling of the issue in subsection allegation 10(a)(i). The crux of Applicant's argument concerning the guilt phase is that the only outward showing of Applicant's alleged mental disease was his "repeated criminal or other antisocial behavior" and that such behavior is incompatible with NGRI. *See* S.C. Code § 17-24-10. Applicant submits that Trial Counsel's decision of putting forth a mental health evidence that did not rise to the level of NGRI was constructive abandonment under *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

17. The Court found the following:

It is undisputed the only evidence which Stanko points to as justifying a charge on voluntary manslaughter is testimony of Stanko's retained experts (psychiatrists) or the State's expert (psychiatrist) about what Stanko told them allegedly occurred prior to the Ling incident made to the retained experts (psychiatrists/physicians) for the purpose of making a diagnosis on the issue of criminal responsibility and capacity to conform.

This statement is not accurate. Applicant has asserted that the evidence of Applicant's impulse control issues is consistent with him acting in the heat of passion. Therefore, Applicant respectfully request that the Court alter or amend the Order.

18. Applicant asserts that the Court has made an error of law concerning the limited admissibility of the testimony concerning provocation. Applicant respectfully request that the Court has failed to address the arguments concerning this issue raised by Applicant in his Memorandum and Proposed Order. Applicant respectfully request the Court rule on the arguments as raised by Applicant.

19. Applicant asserts that the Court has failed to consider an alternative basis for admissibility of the provocation evidence as it relates to the penalty phase. Upon the State's motion all evidence

of the guilt phase was incorporated into the penalty phase. The provocation statements by Applicant were statements offered into evidence by a party opponent without a request for a limiting instruction. Therefore, for the purposes of the penalty phase, these statements were non-hearsay. *See* Rule 801(d)(2), SCRE. Such non-hearsay are clearly substantive evidence. Therefore, this testimony would have supported the statutory mitigating circumstance of provocation.

20. The Court found that a voluntary manslaughter defense was “inconsistent” with the theory of the defense that was presented. Applicant respectfully submits this finding is without evidentiary support. The facts that would support a charge for voluntary manslaughter are the same that were presented by the Applicant’s case. Therefore, Applicant respectfully submits this finding should be altered.

21. Applicant respectfully submits that there was evidence in the record upon which the jury could have found there was not a “cooling off period.” Therefore, Applicant submits that the Court’s belief that there was “cooling off period” does not defeat Applicant’s claim that he was entitled to a jury instruction on voluntary manslaughter.

22. The Court makes various findings concerning Applicant’s credibility in its analysis of Trial Counsel decision not to request the statutory mitigating circumstance of provocation. Applicant submits the Court is not addressing the correct legal test for this issue.

23. As to the Court’s decision to grant directed verdict on the issue 10(a)(vi), Applicant respectfully request that there was evidence presented to support this issue. During its evaluation of the case, Court considered the record on appeal which included the trial transcript. The trial record sufficiently provides a basis for this allegation. It is clear from the trial transcript that Dr. Wu did not have the data present from Dr. Spicer.

24. As to the Court’s decision to dismiss the issue 10(d)(i), Applicant asserts that this is an

allegation cognizable under the PCR act. *See* S.C. Code § 17-27-20(A)(1); *Cf. Duckson v. State*, 355 S.C. 596, 586 S.E.2d 576 (2003) (noting “a constitutional right to counsel may arise in a parole revocation proceeding by virtue of the Due Process clause.”).

25. As to the Court’s decision to dismiss the issue 10(d)(iii), Applicant asserts that this is an allegation cognizable under the PCR act. *See* S.C. Code § 17-27-20(A)(1); *Cf. Duckson v. State*, 355 S.C. 596, 586 S.E.2d 576 (2003) (noting “a constitutional right to counsel may arise in a parole revocation proceeding by virtue of the Due Process clause.”).

26. Applicant asserts that the Court failed to adequately rule on issue 10(d)(iv) concerning cumulative error.

27. Applicant respectfully submits that the Court’s erred in finding that Appellate Counsel was not ineffective for not briefing the suppression on Dr. Wu’s testimony concerning Dr. Spicer’s Methodology. To the extent that the Court made its finding that the appellate issue lacked merit, Applicant submits that this issue was meritorious. To the extent that the Court’s finding is based on a “strategic decision” by Appellate Counsel, Applicant asserts that there is no objectively reasonable strategy to forego briefing a meritorious issue in this case.

28. Applicant respectfully asserts that the Court’s finding concerning the ability of Dr. Wu to comment on Dr. Spicer’s methodology is not supported by the record.

29. As to the Court’s decision to grant directed verdict on the issue 10(a)(viii), Applicant respectfully request that there was evidence presented to support this issue. During its review of the case, Court considered the record on appeal which included the trial transcript which contains an evidentiary basis for this claim.

30. Concerning allegation 10(d)(i), the Order states, “This Court grants Respondent’s motion for a directed verdict with regard to this ground.” Applicant asserts that the Court dismissed this

claim prior to the hearing. Tr. 21, ll. 6-14. Applicant respectfully request that the order be amended to note the basis for the dismissal of this allegation.

31. Applicant respectfully request the Court reconsider the denial of funding for Applicant's expert Dr. Bursztajn and re-open the record to address this testimony. Applicant sought this expert to discuss the nature of Dr. Crawford involvement. This testimony could have established whether Dr. Crawford was acting ethically during her involvement with the case and whether trial counsel should have objected to her involvement.

This testimony was also crucial to Applicant have a full opportunity to argue that Trial Counsel abandoned Applicant during his sessions with Dr. Crawford. Applicant submits that if Dr. Crawford was acting outside her scope a neutral expert and instead as an agent of the state, Trial Counsel abandoned Applicant during a critical stage. *See Montejo v. Louisiana*, 556 U.S. 778; 129 S.Ct. 2079 (2009) (finding that interrogation is a critical stage).

32. The Court found the following:

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.

Applicant respectfully submits that the Court erred in this analysis concerning this matter. There are no facts in the record that are inconsistent with Applicant's assertion that the killing began after he was provoked. This theory is completely consistent with the theories advanced by all of the experts at trial and is not refuted by physical evidence. Therefore, Applicant submits there is a reasonable probability that, if given the chance, the jury would have returned with a verdict of voluntary manslaughter.

33. The Court's wholesale adoption of the State's Proposed Order violated Applicant's right Due Process by denying Applicant an adequate vehicle to oppose the novel arguments raised by

the State in the proposed order.

34. The Court's wholesale adoption of the State's Proposed Order violates Due Process by denying him the Court to rule on arguments explained by Applicant in his Memorandum and Proposed Order. Applicant submitted this Memorandum and Proposed Order simultaneously with the State's Proposed Order. The State's proposed Order utterly failed to address the arguments raised in Applicant's Memorandum. In many cases, it appears the State's Proposed Order failed to address exactly what Applicant was arguing. Applicant respectfully submits that the Court alter or amend its order to address arguments and authority raised by Applicant in his Memorandum and Proposed Order concerning the following issues: Applicant's argument that *Gentry v. Watkins Carolina Trucking Company*, 249 S.C. 316, 154 S.E.2d 112 (1986) was superseded by the SCRE; In the absence of a limiting instruction, Applicant's argument that Sachy and Crawford's testimony generally admissible for purposes including as substantive evidence; Applicant's argument that the State's failure to request a limiting instruction waived any argument concerning limited admissibility; Applicant's argument that Digg's alleged strategy for failing to request a jury instruction was not objectively reasonable; Applicant's argument that Digg's alleged strategy for failing to request a provocation mitigator was not objectively reasonable; Applicant's argument and authorities concerning Trial Counsel's decision to present an NGRI defense given the evidence in this case; and The applicability of *Nance v. Ozmint*, 367 S.C. 547, 558, 626 S.E.2d 878, 883 (2006) to this case.

35. The Court's wholesale adoption of the State's Proposed Order prevents violates S.C. Code § 17-27-80 and denies Applicant his statutory right to "specific findings of fact" made by the Court.

36. To the extent that the Court grants directed verdict in favor of the State for arguments not raised during the State's oral motion, Applicant objects because he was not given an adequate

chance to be heard on those issues. Applicant asserts that he has a Due Process right to be heard on all the State's arguments concerning directed verdict that were not raised during the PCR hearing. Applicant believes that this right has been violated based on the Court's decision adopt the State's proposed order word for word.

37. The Court asserts that the mental health defense was "objectively reasonable." As stated in Applicant's Memorandum, this the evidence presented did not form the basis of a Not Guilty by Reason of Insanity (NGRI) defense and therefore, this was not an objectively reasonable strategy for the guilty phase.

38. The Court finds, "Stanko wished to pursue the same mental health defense during both the guilt and sentencing phases of his capital trial, and counsel was bound to pursue the same." This statement incorrectly states the attorney client relationship in a criminal case. His counsel was not "bound" to present an invalid defense merely because their client may have requested it. To the extent that the Court based its rulings on Mr. Stanko's alleged request for a particular trial strategy, Applicant asserts that the court has made and error of law.

Additionally, Applicant asserts that the evidence in the record does not sufficiently support this finding.

39. The Court found that trial counsel did not intentionally elicit any "untoward comparisons" from his experts. Applicant asserts that this is not factually supported by the record. Additionally, Applicant asserts that trial counsel was ineffective for calling the witness or failing to request that the court limit the testimony. Therefore, Applicant respectfully request that the court alter or amend its finding concerning this issue.

40. Additionally, Applicant respectfully request that the Court reconsider all allegations an arguments raised by Applicant. *See Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004)

("[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments."). By reference, Applicant seeks to incorporate all arguments raised during the hearing, in the Final PCR Application, in Applicant's Proposed Order, and in Applicant's Memorandum into this request for reconsideration.

MOTION FOR RECUSAL

The South Carolina Code of Judicial Conduct "requires a judge to 'disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .'" *Simpson v. Simpson*, 377 S.C. 519, 523, 660 S.E.2d 274, 277 (Ct. App. 2008); Canon 2 of the Code of Judicial Conduct, Rule 501, SCACR. The "practice of delegating the task of drafting sensitive, dispositive orders to [one party's] counsel, and then uncritically adopting the proposed orders nearly verbatim, would belie the appearance of justice to the average observer." *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373, (11th Cir., 1997). Additionally, a "judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004).

Applicant respectfully asserts that by adopting wholesale the findings of the State, a reasonable observer may question the impartiality of the Court on this motion to alter or amend. Applicant submits that the State's Proposed Order was submitted on the same day as Applicant's Memorandum and Proposed Order. When the State drafted its' Proposed Order, the State had no knowledge of what arguments would be advanced in Applicant's Memorandum and Proposed Order. As a result, the State's proposed order simply did not address many of Applicant's arguments and authorities. By signing the State's Proposed Order without modifying it to address Applicant's arguments, it could give cause a reasonable person to believe the Court is not giving

the arguments of both sides equal consideration.

Therefore, Applicant respectfully submits the Court should recuse itself and another judge should be appointed to consider the motion to alter or amend.

CONCLUSION

Based on the foregoing, Applicant respectfully request that the Court recuse itself and another judge hear the motion to alter or amend. However, in the event that the Court does not recuse itself, Applicant respectfully request that the Court alter or Amend its Order.

Respectfully Submitted,



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ATTORNEYS FOR APPLICANT

July 25, 2016

Exhibit A
(Respondent's Proposed Order)

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

Stephen C. Stanko, #6022,)

Applicant,)

v.)

State of South Carolina,)

Respondents.)

THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

C/A No. 2008-CP-22-1446

**PROPOSED
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

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.

⁴The 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.

⁵Laura 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

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 in 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.

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.

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), SCRCRCP. 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 U.S. 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

entirety. Applicant Stanko has failed to meet his burden of proof.

This Court makes the following initial conclusions at the outset of this Order, which will be expounded upon in the remainder of this Order:

1. Based upon the overwhelming evidence of guilt delineated throughout this Order, it was understood by defense counsel that the State would be able to prove Stanko's guilt beyond a reasonable doubt at the initial phase of his capital trial. Evidence of guilt is so overwhelming, in fact, that even had counsel performed during the guilt phase in the manners complained of in the present PCR application, there is no reasonable probability that the result of the guilt phase proceeding would have been different.
2. Counsel was not deficient in representing Stanko in presenting the chosen mental health defense. Given the evidence against Stanko, defense counsel put forward the only available defense, and succeeded in providing the jury with a mechanism of understanding Stanko's heinous acts, humanizing him, and scientifically explaining his actions. Counsel's employed defensive strategy was objectively reasonable, especially given its corroboration with Stanko's presenting to his own mental health experts that he did not remember committing the heinous acts against Ms. Ling and her daughter.
3. Stanko wished to pursue the same mental health defense during both the guilt and sentencing phases of his capital trial, and counsel was bound to pursue the same.
4. Counsel put forward full and unmitigated efforts in investigating and pursuing Stanko's mental health defense. Counsel secured a multitude of local and nationally renowned experts to examine Stanko in preparation of this defense, including two (2) psychiatrists, a psychologist, and a neuro-radiologist who conducted a volumetric brain analysis. Through these experts, counsel obtained scientifically advanced PET and MRI scans which were

analyzed and presented in Stanko's defense during both phases of his capital trial. Counsel also demonstrated before the jury a connection between the insanity defense and Stanko's birth records, which counsel obtained and presented, indicating probable or possible intracranial damage at birth, along with his sustaining head injury at approximately seventeen (17) years of age. Counsel presented this evidence of insanity, including documentary evidence and expert witness testimony, and was successful in obtaining a jury instruction on the defense of insanity. An instruction on GBMI was also given.

5. A criminal defendant is not entitled to the effective assistance of expert witnesses. Thus, any untoward nomenclature utilized by defense counsel's experts in relation to Stanko's mental health defense caused no error. Furthermore, counsel did not intentionally elicit Dr. Sachy's testimony of untoward comparisons, only Stanko's diagnosis, and counsel exercised reasonable professional care in handling the expert by not exacerbating his expert's use of such terms in the remainder of the trial.
6. The record contains no evidence which would support a jury instruction on voluntary manslaughter during the guilt phase of Stanko's capital trial, nor does the record contain evidence which would support a jury instruction on the statutory mitigator of provocation. Thus, counsel is not ineffective for failing to request the same.
7. The record demonstrates that the State proved the following statutory aggravating circumstances beyond a reasonable doubt at trial: (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. Given overwhelming evidence against Stanko regarding these crimes and aggravating circumstances, and the testimony put forward regarding his criminal history and potential for future dangerousness, there is no reasonable probability that the jury would have reached an alternative verdict in the penalty phase of Stanko's trial even had counsel not performed in the manner complained of.

8. This Court finds no ineffective assistance of appellate counsel, and additionally finds that appellate counsel had sufficient time to complete briefing on direct appeal, and there was no infringement upon Stanko's due process rights in this regard.
9. This Court finds that Stanko has failed to show by a preponderance of the evidence that trial counsel William Diggs was under the influence of drugs during his representation of Stanko, particularly during the trial. This Court finds that mere speculation by his co-counsel was insufficient to overcome the credible testimony of Mr. Diggs.
10. Respondent is entitled to a directed verdict in regards to claims 1/11(a)(vi), 10/11(a)(viii), and 10/11(a)(x), as no evidence in furtherance of these allegations was put forth during Stanko's case-in-chief. This Court dismisses these allegations upon motion by Respondent and further finds no merit to these claims.
11. This Court also dismisses claims 10/11(b)(i), 10/11(b)(ii), 10/11(d)(i) and 10/11(d)(iii) as they are not cognizable in actions for post-conviction relief, and as Stanko did not put forth any evidence in furtherance of these allegations during his case-in-chief. This Court further finds no merit to these claims.

This Court makes the following additional findings of fact and conclusions of law as

required by S.C. Code Ann. § 17-27-80 and denies Applicant Stanko relief as to each issue raised in his final amended PCR application, and excerpted below:

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

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.

Stanko alleges that pursuant to United States v. Cronic, 466 U.S. 648 (1984), he 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

As demonstrated by the record of both the trial and sentencing phases in this case and the testimony and evidence taken at the PCR evidentiary hearing, Stanko was not constructively denied assistance of counsel because Stanko's trial counsel *did not* fail to present a meaningful challenge to the State's case at the guilt and sentencing phases. Id.

The record succinctly demonstrates both first and second chair counsel fully investigated this case from the standpoint of both the guilt and mitigation phases of trial. The evidence was overwhelming Stanko committed the acts charged. Counsel could not prevent the admission of testimony and evidence that was admissible in the guilt phase such as the victim's daughter's eyewitness identification of Stanko as the perpetrator of her mother's murder, her kidnapping and rape, and her own attempted murder. Counsel could not keep out the DNA evidence linking Stanko to the crime scene and the surviving victim, the video surveillance evidence of Stanko withdrawing money from the victim's account shortly after her murder, the evidence of Stanko abandoning Ling's vehicle at Turner's residence in Conway, and the fact Stanko was captured in Augusta, Georgia in Turner's truck, which contained Laura Ling's personal items.

As a result, counsel took necessary steps to further or pursue a mental health defense, including having positron emission tomography ("PET") and magnetic resonance image ("MRI") scans of Stanko conducted at the Medical University of South Carolina ("MUSC") in Charleston, the hiring of multiple experts on the topic of frontal lobe damage and PET and MRI scan imagery, the hiring of psychiatric and psychological experts, investigating Stanko's past and uncovering a past head injury, and obtaining Stanko's birth records.¹¹ Trial counsel also employed both a fact and a mitigation investigator to pursue evidentiary support in furtherance of Stanko's defense and mitigation at both stages of his capital trial.

Counsel's experts informed counsel Stanko suffered from a brain defect and was insane at the time of the offense. Stanko was informed of the findings and agreed with this defense, as he claimed to have no real memory of the crimes themselves. The record shows counsel presented all of this evidence to the jury in the guilt and sentencing phases of Stanko's capital trial, both as a complete defense in the guilt phase and as mitigation in the penalty phase. Counsel presented multiple experts including a neuro-radiologist, two (2) psychiatrists, and a psychologist. Counsel presented PET scans, MRI scans, and the results of volumetric analysis of Stanko's brain. Counsel presented other mitigation evidence including Stanko's life history and his adaptability to prison. However, in the penalty phase, counsel could not keep out Stanko's prior convictions and bad acts which demonstrated his bad character and future dangerousness. These acts included prior convictions for kidnapping and multiple counts of breach of trust, and past service of eight and one-half (8 ½) years in prison, after which Stanko had not been rehabilitated, but rather began engaging in criminal cons and schemes almost immediately after release from prison and while on

¹¹ A PET scan measures or reveals brain function. An MRI scan measures or reveals brain structure.

community supervision, including his committing the present horrible crimes. Further, counsel could not keep out the State's psychiatric, psychological, and medical expert testimony that Stanko was not insane or guilty but mentally ill at the time of the crimes.

Stanko has failed to show deficient performance or resulting prejudice under this ground. The record of both the guilt and penalty proceedings shows counsel presented a meaningful challenge to the State's case at both the guilt and sentencing phases as will be expounded upon in Stanko's more succinct grounds for relief below. *Cronic, supra*. Stanko has failed to show deficient performance or prejudice in the guilt or sentencing phase to entitle him to relief under this ground. *Id.*; *Strickland, supra*; *Wiggins, supra* (applicant bears burden of proving balance of aggravators and mitigators did not warrant death sentence rendered at trial). This ground has no merit and must be dismissed.

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.

Stanko next alleges that his trial counsel's defense strategy failed to meet the standard of insanity provided for under S.C. Code Ann. § 17-24-10, and 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." Stanko posits the defense pursued at trial was "not sufficient to establish the defense of insanity" under South Carolina law. See S.C. Code Ann. § 17-24-10(c). Therefore, Stanko claims, trial counsel was

ineffective in presenting the defense of not guilty by reason of insanity and that he was prejudiced by this defense both in the guilt and sentencing phases.

Upon review of the record of the Georgetown capital proceeding and the testimony presented during applicant Stanko's and Respondent's case during the PCR hearing, there is no merit to this ground warranting relief pursuant to Strickland. Both first (1st) and second (2nd) chair trial counsel testified at the PCR hearing the evidence was overwhelming Stanko committed the acts or crimes charged, and the State was going to be able to prove beyond any doubt Stanko committed the crimes or acts. This Court finds counsels' testimony on this issue to be credible and fully supported by the record including that of Stanko's capital trial in this case.

The daughter of the murder victim survived her rape and attempted murder by Stanko. She identified Stanko as the perpetrator of the crimes against her and the kidnapping and murder of her mother, both on the night of the crimes and at trial. She had known Stanko for several months as he lived in the same house with her and her mother. Stanko's DNA was found at the crime scene and in the daughter's vaginal swabs from her rape kit. Her injuries were consistent with being kidnapped and raped, and her throat was cut. Stanko was recorded on surveillance video withdrawing money from Laura Ling's bank account shortly after the crimes.

The Record shows the State proved beyond any question that Stanko bound both victims with neck ties, establishing kidnapping. The State proved Stanko beat severely and cut or stabbed Laura Ling with a sharp object, establishing torture. The State proved Stanko raped and cut the daughter's throat with a knife and left her for dead, and Stanko strangled Laura Ling to death during the rape of the daughter, establishing murder and criminal sexual conduct. The State proved Stanko stole personal items of the victims including Laura Ling's bracelet, her red Mustang automobile, and money from her checking account after murdering Ling and cutting the

daughter's throat, establishing armed robbery and larceny with a deadly weapon.

Stanko left Ling's stolen car at Henry Turner's residence in Conway the morning after these crimes. Stanko's briefcase was found by police in Ling's Mustang at Turner's residence. Stanko fled the coastal area of South Carolina in Turner's truck the morning following the murder of Ling and the attempted murder of her daughter. Prior to leaving the area, Stanko called Ling's employer and falsely informed them Ling would not be coming in for work as she had suffered food poisoning the night before. Stanko was captured in Augusta, Georgia in possession of Turner's truck. Ling's personal items were found in Turner's truck along with personal items of Stanko.

In summary, counsel was correctly and reasonably convinced the State would be able to prove at trial Stanko committed the horrible acts against Laura Ling and her daughter including murder, ABWIK, kidnapping, CSC 1st degree, and armed robbery. Trial counsel was also confronted with the fact, after Stanko was convicted in the guilt phase, he would proceed to a penalty phase, where the State would introduce: his lengthy prior criminal record (including prior convictions for kidnapping and aggravated assault, and numerous counts of breach of trust, grand larceny, and obtaining goods by false pretenses); Stanko had served eight and one-half (8½) years in prison and had not been rehabilitated; and after release and while under community supervision, Stanko was engaged in conning and defrauding several different victims out of their money and committed the present crimes.

Further, counsel was faced with preparing to defend the fact the State would attempt to introduce in evidence in the penalty phase Stanko committed yet another murder the morning following the murder, attempted murder, and rape at the Ling home, i.e. the Turner murder. *See State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001) (murder committed during trial was

admissible in aggravation as it showed character of the defendant and future dangerousness); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (similar); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (statement of defendant regarding unrelated murder was properly admitted as evidence of the character of the defendant and future dangerousness); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) (prior bad acts admissible in penalty phase to show character of the defendant); State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) (statement regarding prior crimes including one murder admissible to prove character of the defendant in the penalty phase); State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984) (evidence of similar crimes committed by the defendant before *and* after the murder of which he is on trial but of which he had not been convicted are admissible in the penalty phase to show the character of the defendant); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (murders committed earlier in the day and in a different county were properly admitted under common scheme or plan and identity exceptions to Lyle).

As a result, counsel reasonably believed it must pursue some type of mental health defense; otherwise, there was no defense to the crimes, and no real mitigation to the overwhelming evidence in aggravation set forth above. "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). And counsel did so.

Counsel retained appropriate mental health and medical experts who informed counsel, in their professional expert opinion, Stanko had a frontal lobe brain defect that was not his fault and he was legally insane at the time of the Ling offenses. The specific psychiatric diagnosis was involuntarily acquired psychopathy. This evidence included not only two (2) psychiatrists, but

also PET and MRI scans and the testimony of a neuro-radiologist, Stanko's birth records indicating arguable intracranial damage at birth, along with a head injury at approximately seventeen (17) years of age.

There is no constitutional right to the effective assistance of an expert witness. Fairbank v. Ayers, 650 F.3d 143, 1252 (9th Cir. 2011); Earp v. Cullen, 623 F.3d 1065, 1077 (9th Cir. 2010); *see* Campbell v. Polk, 447 F.3d 270, 285 (4th Cir. 2006) (refusing to read into Ake a malpractice standard for the assistance of appointed experts). The later expert opinions by the State's experts at trial does not show incompetence of counsel for relying on the experts counsel retained and consulted. *See* McClain v. Hall, 552 F.3d 1245, 1253 (11th Cir. 2008); Forsyth v. Ault, 537 F.3d 887, 892 (9th Cir. 2008); Marcum v. Luebbers, 509 F.3d 489, 510-11 (8th Cir. 2007); Gonzalez v. Knowles, 515 F.3d 10006, 1015 (9th Cir. 2008). Counsel is entitled to and can rely on the reports of experts who are consulted by counsel. *See* Stokley v. Ryan, 659 F.3d 802, 814 (9th Cir. 2011); Hammond v. Hall, 586 F.3d 1289, 1326 (11th Cir. 2009); Campbell v. Coyle, 260 F.3d 531, 555 (6th Cir. 2001); Murishaw v. Woodford, 255 F.3d 926, 947 (9th Cir. 2001); Moran v. Godinez, 57 F.3d 690, 699-700 (9th Cir. 1994); Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir. 1990). And, counsel need not continue looking for an expert – shop for experts – just because an unfavorable opinion has been received. Forsyth v. Ault, 537 F.3d 887, 892 (8th Cir. 2008); Smith v. Cockrell, 311 F.3d 661, 7676 (5th Cir. 2003); Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998); Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir. 1995); Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); *see e.g.* Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Counsel is not ineffective in structuring a case on the basis of the opinion received at the time counsel consulted the expert. Forsyth v. Ault, 537 F.3d 887, 892 (8th Cir. 2008).

Stanko was made aware of the results of the various tests and the medical and psychiatric

diagnosis and informed counsel he agreed with the findings and wanted to pursue the insanity defense. At that time, Stanko informed counsel he had no memory of the crimes themselves against Ling and her daughter.

Counsel presented this evidence of insanity, including documentary evidence, medical scans, and expert witness' testimony that Stanko had a frontal lobe brain defect **and was legally insane at the time of these present crimes, i.e. he could not differentiate between moral or legal right and moral and legal wrong.** Contrary to Stanko's assertion in this ground above, the defense was not based solely on "a mental disease or defect that [was] manifested only by repeated criminal or other anti-social conduct." The insanity defense was based on medical scans, medical records, and expert medical and psychiatric testimony of a brain defect that resulted in Stanko being insane at the time of the crimes against Laura Ling and her daughter. Counsel were successful in obtaining a jury instruction on the defense of insanity, and the trial court instructed the jury on guilty but mentally ill (GBMI) as required by law, in the guilt phase. However, the jury found the State's testimony, both expert and factual, more credible and that the State had disproved insanity and GBMI beyond a reasonable doubt. However, simply because the defense was not successful does not make counsel ineffective. Strickland (court must remove from its analysis the distorting effects of hindsight, and must judge counsel's conduct from the circumstances counsel was facing at the time); Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight). As a result, this Court finds Stanko has failed to show counsel was deficient in presenting the insanity defense in this case. Id.

Furthermore, based upon the record and the information available to counsel, including counsel's investigation and their experts' opinions, including medical and psychiatric, counsel

made an objectively reasonable trial strategy decision under the circumstances to present an insanity defense given the record in this case. Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (counsel was not ineffective in arguing for insanity where the defense was supported by two experts); *see also* 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), *and* Walker v Mcquiggan, 656 F.3d 311, 317-22 (6th Cir. 2011) (counsel was ineffective in not pursuing insanity defense with mental impairment evidence known and defense presented contradicted evidence), Bullock v. Whitley, 53 F.3d 697, 701-02 (5th Cir. 1995) (allegation counsel ineffectively pursued insanity defense rejected even though no expert presented and defense had virtually no chance of success where petitioner failed to overcome presumption of effectiveness of counsel and the insanity plea permitted introduction of evidence of troubled past to curry sympathy in a strong capital case). Further, the trial record demonstrates Stanko agreed with this defense, initially informed counsel and his experts that he had no memory or recollection of the crimes, and wished to pursue the defense and directed counsel to pursue the same. As a result, Stanko cannot show deficient performance in the guilt phase. Strickland.

Additionally, Stanko has not shown Strickland prejudice in the guilt phase. Even had counsel not presented the insanity defense, there is no reasonable probability the jury would have returned with a different verdict. Id. Laura Ling's daughter survived Stanko's assault on her and called 911; she identified Stanko as the perpetrator in that call and in excited utterances shortly thereafter, and she testified at trial and identified Stanko as the person who tied her, bound her, raped her, and murdered her mother, and cut her throat. The evidence established Laura Ling was also bound before her murder and severely beaten and strangled to death by Stanko. Stanko's DNA was identified on the vaginal swabs recovered from the daughter's rape kit taken the night of

the murder and rape. Stanko was captured on surveillance video withdrawing money from Ling's account shortly after her murder. Stanko called Ling's employer the following morning and informed them Ling would not be reporting for work because she had food poisoning, when in fact he knew she was already dead. Stanko abandoned Ling's stolen car at his friend Henry Turner's residence in Conway and the car contained items belonging to Stanko. Stanko then fled the coastal area of South Carolina in Turner's truck, and he was later captured in Augusta, Georgia, by U.S. Marshals, in possession of Turner's truck containing items belonging to Ling and Stanko. All of this evidence was admissible and would have been before the jury even had counsel not offered the insanity defense. As a result, Stanko cannot show there is a reasonable probability the result of the guilt phase would have been different had counsel not offered the insanity defense. Strickland. See 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 pursue it cannot be prejudicial).

Furthermore, Stanko has not met his burden of proof to show ineffective assistance in the penalty phase. Strickland; Wiggins; Wong. The evidence from the guilt phase, including all of the expert testimony, the results of the PET and MRI scans, Stanko's birth medical records and his mother's medical records of Stanko's birth, and the testimony regarding his head injury at age seventeen (17), were incorporated by motion into the penalty phase record for the jury's consideration in determining the appropriate sentence. The trial court explained to the jury they could consider all of this evidence in determining the existence of mitigating circumstances and in determining the appropriate sentence. Additionally, trial counsel also presented further expert testimony in the penalty phase regarding Stanko's mental disease or defect. Stanko's diagnosis of "psychopathy" and the testimony of mental disease or defect in both the guilt and penalty phases

entitled him to and he did receive jury instructions on the statutory mitigating circumstances requested by counsel. See State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1989) (diagnosis of anti-social personality disorder/psychopathy entitled defendant to statutory mitigators). However, after considering all of this evidence, the jury still sentenced Stanko to death. As a result, Stanko cannot show deficient performance or prejudice in the penalty phase either. Wiggins v. Smith, *supra*; Cullen v. Pinholster, 131 S.Ct. at 1403 (citing Harrington v. Richter, 562 U.S. at 110).

Furthermore, the evidence in aggravation was overwhelming. The State proved the existence of five (5) statutory aggravating circumstances beyond a reasonable doubt: (1) the murder was committed during the act of torture; (2) during the commission of a kidnapping; (3) during the commission of criminal sexual conduct; (4) during the commission of an armed robbery; and (5) in the commission of a larceny with a deadly weapon. Ling was bound with neck ties; she was beaten from the top of her head to her feet, and she was stabbed with a sharp object; she was murdered while Stanko raped her fifteen (15) year old daughter; and Stanko stole Ling's bracelet, her car, and money from her bank account. Further, Stanko attempted to murder the fifteen (15) year old daughter by cutting her throat twice, almost severing her ear from her head, and left her believing she was dead.

Additionally, the State established Stanko's bad character and future dangerousness. The State proved Stanko had previously been convicted of kidnapping another woman in a similar manner and attempted to kill her with a Clorox soaked cloth, and Stanko had been previously convicted of multiple counts of breach of trust, grand larceny, and obtaining goods by false pretenses. The State also proved Stanko had previously served approximately eight and one-half (8 ½) years in prison, had not been rehabilitated, and after release from prison almost immediately began illegally defrauding other victims of their money and committed the present crimes. The

State also showed after the murders Stanko traveled to Columbia, where he partied with others at bars and nightclubs. And, the State proved Stanko eventually traveled to Augusta, Georgia where he conned another woman into believing he was someone he was not, and he gave her the bracelet he had taken off Ling's wrist after he murdered her. As a result, this Court finds there is no reasonable probability the jury would have returned with a different sentence had counsel acted as Stanko alleges he should have under this ground. Wiggins, supra; Weik, supra (no relief where aggravating factors outweigh likelihood of different outcome at trial even if counsel had not performed in the deficient manner complained of).

This Court finds based on this record Stanko has failed to show deficient performance or prejudice under this ground in the guilt or penalty phase. Strickland, supra; Belmontes, supra. As a result, this ground is dismissed with prejudice.

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.

Stanko alleges trial counsel was ineffective for allowing opposing counsel and his defense experts to refer to him as a psychopath or otherwise portray him in a negative light during trial. However, given this record, the State's evidence of guilt, and the information available to counsel prior to trial, trial counsel was not deficient and counsel also made an objectively reasonable strategic trial decision to pursue the defense of involuntarily acquired psychopathy given counsel's experts' diagnoses and Stanko's medical records and brain scans. Lounds, supra, 380 S.C. at 462, 670 S.E.2d at 650 (viewing trial counsel's strategy with objective reasonableness); see State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1989) (psychopathy is mitigation evidence under South

Carolina law); Commonwealth v. Robinson, 623 Pa. 345, 82 A.3d 998 (Pa. 2013) (counsel was not ineffective for introducing diagnosis of anti-social personality disorder [psychopathy] as mitigating evidence in the penalty phase of capital trial given the record in the case; it humanized the defendant, and explained why he was the way he was); Ward v. State, 969 N.E.2d 46 (Ind. 2012) (counsel was not deficient in pursuing diagnosis of psychopathy in mitigation phase as it assisted the jury in understanding the defendant and it explained his horrendous acts, and even more so, his documented lack of emotion on the day of the offenses) (*citing* State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1989) (psychopathy diagnosis entitled defendant to mental health statutory mitigating circumstances under *in favorem vitae* review in effect at that time)); Beardslee v. Woodford, 358 F.3d 560, 582-83 (2003) (counsel was not ineffective in calling expert who presented sociopath/anti-social evidence where expert provided useful mitigating evidence including an explanation for defendant's failure to show remorse, testimony of his good behavior in prison, and physical and psychological explanations for his antisocial behavior); Carter v. Bradshaw, 2015 W.L. 5752139 (N.D. Ohio 2015) (*Slip Copy*) (counsel was not ineffective in offering mitigation evidence of psychopathy diagnosis as expert related diagnosis to developmental and medical issues in capital defendant's life and those factors were beyond capital defendant's control); *see also* Sears v. Upton, 561 U.S. 945, 951, 130 S.Ct. 3259, 3264 (2010) (evidence of personality disorder may not have made defendant any more likable, but it might have helped the jury understand him and his horrendous acts).

Stanko's own experts testified at trial that Stanko's brain was malformed and showed decreased activity in the frontal lobe based on PET and MRI scans. Stanko's experts attributed this brain defect to lack of oxygen at birth, which they argued was reflected in his birth records and the medical records of his mother from Stanko's birth, or possibly from a head injury at the age of

seventeen (17). Stanko's birth records and those of his mother from Stanko's birth were introduced in evidence and testified to extensively. The brain scans were introduced in evidence and testified to extensively. Stanko's own experts diagnosed him as suffering from *involuntarily acquired* psychopathy and their "psychopath" statements during the trial merely stated the same. The characterizations of or references to Stanko, whether by Stanko's experts or by the State, were legitimately related to his diagnosed mental illness or personality disorder and insanity defense or mitigating circumstances and were supported by the evidence of his character introduced at trial, including a lifetime of criminal and anti-social behavior.

It is not ineffective assistance of counsel to offer such a defense under the facts of this case. Commonwealth v. Robinson, *supra* (counsel was not ineffective for introducing diagnosis of anti-social personality disorder [psychopathy] as mitigating evidence in the penalty phase of capital trial given the record in that case; it humanized the defendant, and explained why he was the way he was); Ward v. State, *supra* (counsel was not deficient in pursuing diagnosis of psychopathy in mitigation phase as it assisted the jury in understanding the defendant and it explained his horrendous acts, and even more so, his documented lack of emotion on the day of the offenses) (*citing* Caldwell, 300 S.C. 494, 388 S.E.2d 816 (psychopathy diagnosis entitled defendant to mental health statutory mitigating circumstances under *in favorem vitae* review in effect at that time)); Beardslee, 358 F.3d at 582-83 (counsel not ineffective in calling expert who presented sociopath/anti-social evidence where expert provided useful mitigating evidence including an explanation for defendant's failure to show remorse, testimony of good behavior in prison, and physical and psychological explanations for his antisocial behavior); Carter v. Bradshaw, 2015 W.L. 5752139 (N.D. Ohio 2015) (*Slip Copy*) (counsel was not ineffective in offering mitigation evidence of psychopathy diagnosis as expert related diagnosis to

developmental and medical issues in capital defendant's life and those factors were beyond capital defendant's control); *see also* Sears, 561 U.S. at 951, 130 S.Ct. at 3264 (evidence of personality disorder may not have made defendant any more likable, but it might have helped the jury understand him and his horrendous acts).

As previously stated, the evidence Stanko committed the acts themselves was overwhelming. Based on counsel's review of the discovery and evidence in the case, including the surviving daughter's eyewitness identification, Stanko's DNA found in the daughter's rape kit, the video of Stanko withdrawing money from Ling's ATM, Stanko's abandoning Ling's car at Turner's residence in Conway, and Stanko's Augusta, Georgia, capture with Turner's truck and Ling's personal items, counsel understood the State was going to be able to establish beyond any doubt that Stanko committed the acts which constituted, murder, attempted murder, CSC 1st, kidnapping, and armed robbery.

Furthermore, from reviewing the discovery and evidence in the case, counsel also knew the State was going to be able to establish in the penalty phase that Stanko had previously committed another kidnapping approximately ten (10) years before, in which he tied up the victim and attempted to kill her, and he committed multiple counts of breach of trust and obtaining goods by false pretenses around the same time. Additionally, the State was going to be able to prove Stanko had served eight and one-half (8 ½) years in prison for those offenses and had not been rehabilitated, since once he was released from prison, he began engaging in similar cons and fraudulent confidence schemes while on community supervision and committed the present horrible offenses. Further, given the extant case law, counsel had to anticipate the State would seek to introduce in the penalty phase the murder of Henry Turner.

As a result, counsel made an objectively reasonable trial strategy decision to offer the only

defense available, a mental health defense, which would explain why Stanko committed the present horrible crimes, and which was supported by the findings of medical and psychiatric doctors and experts, and included PET scans, MRI scans, and birth records and lay witness' testimony supporting the diagnosis. This defense also explained much of Stanko's past and current behaviors in such a manner as would diffuse some of the aggravating effect the State hoped to gain from such evidence in the penalty phase; i.e., Stanko did not choose to be medically and mentally ill, but rather it was thrust upon him. The fact that the defense was unsuccessful does not mean counsel was ineffective. Strickland. In fact, Stanko agreed with the defense after being fully informed of the findings of his various experts. As a result, the fact that Stanko was diagnosed as or is "a psychopath" could not be kept from the jury.

Stanko further argues counsel should have prevented his expert, Dr. Sachy, from supporting his diagnosis by comparing Stanko to other famous psychopaths or in a negative manner; however, counsel credibly testified at PCR that he reviewed the expert's report prior to trial, which contained no such references, and interviewed Dr. Sachy extensively. Prior to taking the stand at trial, Dr. Sachy never made any such comparisons or negative references to Stanko. It is clear Dr. Sachy made these references during the trial to support his diagnosis of "psychopathy" in light of Stanko's clear history of engaging in lifelong antisocial behavior, and specifically "involuntarily acquired psychopathy." It is also clear counsel did not intentionally elicit these responses or comparisons. "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) (citing Harris v. Vasquez, 949 F.2d 1497, 1518 (9th Cir. 1990) and Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990)); Fairbank v. Ayers, 650 F.3d 143, 1252 (9th Cir. 2011); Earp v. Cullen, 623 F.3d 1065, 1077 (9th Cir. 2010); see Campbell v. Polk, 447 F.3d 270, 285 (4th Cir. 2006) (refusing to

read into Ake a malpractice standard for the assistance of appointed experts). Instead, there exists a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions, Caprood v. State, *supra* at 109, 525 S.E.2d at 517, including its preparing to present Dr. Sachy at trial in furtherance of Stanko's chosen defense. *See, e.g., Wilson v. Greene, supra* (to be reasonably effective, counsel is not required to second-guess the contents of an expert's report). As counsel reviewed Dr. Sachy's report prior to trial and interviewed Dr. Sachy, and Dr. Sachy had not made these comments before, counsel was not deficient or ineffective in this regard.

Furthermore, Stanko has failed to prove the second prong of the Strickland test. Even if counsel had a crystal ball and could have somehow prevented Dr. Sachy from making these previously unseen and unheard comparisons to support his diagnosis, Stanko has failed to show there is a reasonable probability the jury would have returned with a different sentence. Even removing these few references from the case, the evidence in aggravation was overwhelming. There is no reasonable probability of a different result. Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014); Stitt v. United States, 369 F.Supp.2d 679, 686 (E.D. Va. 2005) *aff'd*, 441 F.3d 297 (4th Cir. 2006) *opinion recalled*, 459 F.2d 483 (4th Cir. 2006) *and aff'd*, 552 F.2d 345 (4th Cir. 2008) (defendant was not denied effective assistance of counsel due to mitigation investigation where aggravating factors in the case were overwhelming, mitigating factors were unremarkable, and there was no indication that lack of evidence as to defendant's alleged psychopathy or stronger evidence refuting such allegation would have outweighed aggravating factors).

First, the jury was given the choice between overwhelming evidence of guilt or the insanity defense put forward by Dr. Sachy and the other defense experts. The jury chose guilt, due in large part to the State's evidence of Stanko's own actions during and after the crimes' commission. The

jury did not find Dr. Sachy or the other defense expert's credible. They did not find Stanko insane or guilty but mentally ill (GBMI).

Second, the facts of the murder of Laura Ling are horrible to say the least. Stanko bound the victim with neckties, beat her from head to foot, and stabbed her with a sharp object. The jury who sentenced Stanko found the State had proven beyond a reasonable doubt the murder of Laura Ling was committed in the course of torturing her. Additionally, Stanko manually strangled Laura Ling to death while raping her fifteen (15) year old daughter. The jury also found beyond a reasonable doubt the murder of Laura Ling was committed during the act of criminal sexual conduct. Stanko also bound the fifteen (15) year old daughter as well as her mother. The jury found the aggravating circumstance of kidnapping was proven beyond a reasonable doubt. And, after murdering Ling and believing he had murdered the daughter by cutting her throat two (2) times with a knife, almost severing her ear, Stanko robbed Ling of her bracelet, her automobile, and cash from her checking account. The jury also found Stanko committed the murder of Ling in the course of an armed robbery. Stanko methodically showered, packed his clothes and belongings, and left the home locking the door as he left. Stanko did not believe the victims would be found for several days. He then drove almost directly to Ling's bank and withdrew her money from her bank account using an ATM machine. He also used one of Ling's credit cards to make a purchase. The jury also found the murder was committed during a larceny with a deadly weapon.

The following morning, Stanko called Ling's employer, the Socastee Library and falsely informed her employer she would not be in for work because she had suffered food poisoning. He then fled the coastal area of South Carolina to Columbia, after switching vehicles, and partied at several bars in the Congaree Vista area of Columbia. Stanko then fled to Augusta, Georgia where he continued to party, met a new girlfriend, and conned her into believing he was someone he was

not. He also gave his new girlfriend the bracelet he had taken off Ling's dead body. He was only arrested after U.S. Marshals located him at a strip mall.

Third, Stanko's bad character and future dangerousness were proven independent of anything Dr. Sachy said. The State proved Stanko was previously convicted of the kidnapping of Elizabeth McClendon in Charleston approximately ten (10) years before the present crimes. Stanko bound her and attempted to kill her with a cloth soaked in Clorox. The State also proved Stanko was convicted of multiple counts of breach of trust, grand larceny, and obtaining goods by false pretenses. Stanko served eight and one-half (8 ½) years in prison for these crimes and was not rehabilitated. After his release from prison, Stanko began conning and defrauding multiple victims of their money in the Georgetown and Horry County areas by pretending to be an attorney or paralegal. Stanko committed all these fraudulent acts while on community supervision. Stanko then committed the murder of Ling and the attempted murder and rape of her fifteen (15) year old daughter when his cons and schemes were about to be exposed to law enforcement. As a result, this Court finds there is no reasonable probability the jury would have returned with a different sentence had counsel acted as Stanko alleges under this ground. Wong v. Belmontes, supra.

As a result, Stanko failed to prove either deficient performance or prejudice in the guilt or penalty phase. Strickland, supra; Wong v. Belmontes, supra; Wiggins v. Smith, supra. This ground must be dismissed with prejudice.

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.

Stanko next alleges trial counsel failed to object to the admission of the facts surrounding

Stanko's previous assault on Elizabeth McLendon, as well as evidence of his prior frauds. Again, Stanko failed to meet his burden given this record and the PCR testimony. Butler v. State; Rule 71.1, SCRPC.

First, the evidence Stanko now complains of was admissible in the context for which it was offered at trial. As a result, its inclusion at trial cannot constitute ineffective assistance even absent counsel's objection. 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, then the claim fails both prongs of the Strickland test as it was neither deficient not to object nor was the defendant prejudiced by the failure to object).

During the guilt phase, Stanko offered the defense of insanity. The expert witnesses who were testifying at the time, Doctors Thrasher and Sachy, two (2) forensic psychiatrists, relied on information regarding the McClendon incident in forming their opinion that Stanko was insane at the time of the Ling murder and other crimes the night of the Ling murder. As a result, the State was properly allowed to cross-examine the experts about information on which the experts relied in forming their opinions, including the McClendon incident. State v. Slocumb, 336 S.C. 619, 521 S.E.2d 507 (Ct. App. 1999) (cross-examination of expert witness may delve into information upon which the expert relied in forming his opinion). Even had counsel voiced an objection to this evidence, it would have been admitted in any event. As a result, Stanko cannot show deficient performance or resulting prejudice. Hough, *supra*.

Second, counsel did not raise an objection to the State's presentation of these or other prior bad acts (the frauds) because they were consistent with and supported Stanko's experts' diagnosis of **involuntarily acquired psychopathy**. This was an objectively reasonable trial strategy decision since the information on which Stanko's experts relied contained this information in any

event and the State could legitimately bring out this information on cross-examination. Slocumb, supra (cross-examination of expert witness may delve into information upon which expert relied in forming opinion). Counsel testified their goal was *to keep out any reference to the Henry Turner murder*, which occurred the day following Ling's murder, and had no relevance to the insanity defense, so they objected to that damaging information coming in.

Counsel credibly testified at the evidentiary merits hearing that during the trial he attempted to keep out any reference to the Turner murder. Indeed, **counsel's motion to exclude references to the Turner murder was granted by the trial judge**. Counsel also testified at the evidentiary hearing that he did not want to keep out the facts of the McClendon incident because it was so similar to this incident, except for the fact Stanko completely lost control in the Ling incident, indicating he was insane at the time of this crime. This Court need not second-guess trial counsel's tactics in this regard, especially where his client derived a benefit from the exclusion of the Turner murder as part and parcel of his objection. The testimony regarding the McClendon incident and Stanko's frauds and cons leading up to the Ling murder were admissible, as the experts relied upon that information in forming their opinion. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (courts must be wary of second-guessing trial tactics) (*citing Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (S.C. 2009) (objectively reasonable trial strategy decisions under the circumstances are not subject to claims of ineffective assistance of counsel); Slocumb, supra (expert may be cross-examined about evidence on which he relied). Further, this evidence, the McClendon incident and the frauds and cons supported Stanko's experts' diagnosis and the defense that Stanko chose to pursue and instructed counsel to pursue.

Furthermore, even had counsel objected to this evidence, and it had for some reason been

kept out, this Court finds there is no reasonable probability the result of the guilt or sentencing proceeding would have been different. Strickland; Wong v. Belmontes. As discussed in the previous grounds above, the evidence Stanko committed the crimes against Ling and her daughter was overwhelming. Several experts for the State testified that Stanko was not insane and did not have a brain defect at the time of the crimes, and Stanko's actions during and after the crimes demonstrated he was not insane at the time of the crimes against Ling and her daughter. Furthermore, the jury found the State's experts more credible than Stanko's experts. Finally, Stanko's prior bad acts resulting in convictions, and even his involvement in un-convicted crimes would have been admissible and were admissible in the penalty phase as evidence of his character and future dangerousness. Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (cited in State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979)); State v. Woomer, 278 S.C. 468, 399 S.E.2d 317 (1981). The horrible facts surrounding the crimes against Ling and her daughter would have still been before the jury, along with Stanko's prior criminal record, his failure to be rehabilitated by a lengthy prior prison sentence, and the fact he committed these horrible crimes and other criminal acts while on community supervision and shortly after release from prison.

As a result, Stanko has failed to prove deficient performance or prejudice under this ground, and this ground is dismissed with prejudice. Strickland, *supra*; Wong, *supra*; Slocumb, *supra*; Hough, *supra*.

10/11(a)(v) Trial counsel was ineffective for failing to request a jury charge on the lesser included offense of Voluntary Manslaughter and 10/11(a)(xiii) and (xiv) Trial Counsel was ineffective in failing to object to the Court's decision not to charge S.C. Code § 16-3-20(C)(b)(8).

Supporting facts: (a)(v) Trial counsel failed to request a jury charge despite the fact that the record contained evidence that would have supported such a charge. (a)(xiii) Trial Counsel did not object to the Trial Court's decision not to charge S.C. Code § 16-3-20(C)(b)(8). (a)(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.

Stanko next *alleges* trial counsel was ineffective in failing to request a jury charge on voluntary manslaughter and, during the sentencing phase, an instruction on the statutory mitigator of provocation. Stanko *alleges* the record contained evidence that would have supported such charges. To the contrary, Stanko was not entitled to an instruction on either voluntary manslaughter or provocation given this record. "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

At trial in the guilt phase, Stanko offered the defense of insanity. It is undisputed the only evidence which Stanko points to as justifying a charge on voluntary manslaughter *is testimony of Stanko's retained experts (psychiatrists) or the State's expert (psychiatrist) about what Stanko told them* allegedly occurred prior to the Ling incident **made to the retained experts (psychiatrists/physicians) for the purpose of making a diagnosis on the issue of criminal responsibility and capacity to conform.** This evidence was solely admissible as "information upon which they [the experts] relied in reaching their professional opinions[.]" and was **not admissible as substantive proof of the facts so stated** by Stanko. Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967); Howle v. PPA/Monarch, 288 S.C. 586 (Ct. App. 1986); *see* State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985) (history as related to the doctor was admissible only as information upon which the doctor relied in reaching his professional opinion. **It is not admissible as substantive proof of the facts stated**); Jones v. Doe, 372 S.C. 53, 640 S.E.2d 514 (Ct. App. 2006) (Rule 703 does not allow for the unqualified admission of hearsay simply because an expert relied upon it in forming an opinion: "[T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. *It is received*

only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception.") (citing 2 Kenneth S. Broun, et al., McCormick on Evidence § 324, at 418 (2006) (emphasis added by the Jones Court); see Notes to Rule 803(4), SCRE.¹² The basis for this distinction is that the statements do not have the same degree of trustworthiness when the patient is seeking to support a matter in court. South Carolina Evidence, 2nd Ed., Danny R. Collins, 2000 S.C. Bar/CLE Division. Any request for a charge on voluntary manslaughter or provocation based on this hearsay testimony only admissible for the limited purpose described above, would have been denied by Judge Jefferson. As a result, counsel was not deficient nor was Stanko prejudiced by the failure to request such instructions. Strickland; See Arnold v. Dormire, 675 F.3d 1082, 1085-86 (8th Cir. 2012) (counsel was not ineffective in failing to request lesser included offense where the evidence did not warrant the lesser offense); Waters v. Zant, 979 F.2d 1473, 1492 (11th Cir. 1992) (counsel not ineffective for not arguing manslaughter where it was not warranted by the evidence); Wilson v. Armontrout, 962 F.2d 817, 820 (8th Cir. 1992) (similar); Marylinsky v. Budge, 577 F.3d 1083, 1092 (9th Cir. 2009) (counsel was not ineffective in making further effort to obtain manslaughter instruction where counsel legitimately believed it would be counter-productive under the egregious facts of the case); Hall v. Head, 310 F.3d 683, 693-94 (11th Cir. 2002) (failure of the evidence to support manslaughter justified counsel's not developing manslaughter charge as a defense).

For the same reason, to the extent counsel did not request an instruction on voluntary

¹² See State v. Reed, 2001 WL 815026 (Ohio App. 2 Dist. 2001) (*Unpublished*) (affirming defendant's conviction where limiting instruction told the jury they could not consider statements defendant made to testifying expert psychologist, who examined defendant prior to trial, about the incident as substantive proof of the crime or any lesser included offense that might be charged but only as to the basis of the expert's findings; see generally State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014) (recognizing "[t]o find otherwise would mean a defendant could automatically obtain the instruction merely by making a self-serving statement as to his intent.")).

manslaughter or provocation, that decision was objectively reasonable under the circumstances, as there existed no evidence on which to base such an instruction under our case law. Gentry, *supra*; Howle, *supra*; *see* Brown, *supra* (history as related to the doctor was admissible only as information upon which the doctor relied in reaching his professional opinion. **It is not admissible as substantive proof of the facts stated**); Jones, *supra* (Rule 703 does not allow for the unqualified admission of hearsay simply because an expert relied upon it in forming an opinion: “[T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. *It is received only for the limited purpose of informing the jury of the basis of the expert’s opinion and therefore does not constitute a true hearsay exception.*”) (citing 2 Kenneth S. Broun, *et al.*, McCormick on Evidence § 324, at 418 (2006) (emphasis added by the Jones Court); *see* Notes to Rule 803(4), SCRE;¹³ South Carolina Evidence, 2nd Ed., Danny R. Collins, 2000 S.C. Bar/CLE Division; Strickland, *supra*; Council, *supra*.

Additionally, Stanko’s chosen defense at trial was insanity, not that he killed Laura Ling and raped and attempted to murder her daughter in the heat of passion upon adequate legal provocation. A decision not to present inconsistent theories is not ineffective assistance. Jackson v. Shanks, 143 F.3d 1313, 1320 (10th Cir. 1998); Wilson v. United States, 414 F.3d 829 (7th Cir. 2005) (while an attorney is entitled to present inconsistent arguments in a criminal case, that entitlement does not imply an obligation to do so); Middleton v. Roper, 455F.3d 838, 848-49 (8th

¹³ *See* Reed, 2001 WL 815026 (*Unpublished*) (affirming defendant’s conviction where limiting instruction told the jury they could not consider statements defendant made to testifying expert psychologist, who examined defendant prior to trial, about the incident as substantive proof of the crime or any lesser included offense that might be charged but only as to the basis of the expert’s findings; *see generally* Sams, 410 S.C. 303, 764 S.E.2d 511 (recognizing “[t]o find otherwise would mean a defendant could automatically obtain the instruction merely by making a self-serving statement as to his intent.”).

Cir. 2006) (similar). Instructions need not be requested that are inconsistent with the trial theory or defense. Butcher v. Marquez, 758 F.2d 373, 376-77 (9th Cir. 1985); Casale v. Fair, 833 F.2d 386, 392 (1st Cir. 1987). Lesser-included offense instructions are not required when to give them would conflict with the theory of the defense. Neal v. Acevedo, 114 F.3d 803, 806 (8th Cir. 1997); Butcher v. Marquez, *supra*; Kubat v. Thieret, 867 F.2d 351, 365 (7th Cir. 1989).

Furthermore, the facts as told at trial also do not support an instruction on voluntary manslaughter. See State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (proper for trial judge to refuse to charge voluntary manslaughter where it very clearly appears there is no evidence whatsoever tending to reduce the crime from murder to manslaughter). Stanko related to his psychiatric experts and the State's psychiatric experts that he and Laura Ling had an argument and Ling threatened to falsely accuse him of being a child molester to stop him from leaving her home. At some point, Ling either slapped Stanko or gesticulated with her arm and struck a cigarette in Stanko's mouth causing the cigarette to go up under Stanko's glasses and burn his skin on the medial portion of his eye. Stanko related to the experts he then blacked out or "saw red" and had no real memory of the incident. He woke up in the shower covered in blood.

The record shows that Stanko bound Laura Ling's hands and feet. He beat her from the top of her head to her feet. He then walked to the fifteen (15) year old daughter's bedroom and started sexually assaulting her. She fled to her mother's bedroom finding her mother alive, but bound and semi-conscious. Stanko followed the daughter to the mother's bedroom. Stanko then began assaulting the daughter again and knocked her unconscious. When she awoke, she was bound with neckties, and Stanko began raping her and talking to her during the rape. At one point, Stanko beat Laura Ling some more as she lay bound on the floor beside the bed. Stanko then continued to rape the daughter and reached over and manually strangled Laura Ling with one hand.

This was the cause of death. Stanko then continued to rape the daughter. The facts simply do not constitute a killing in the sudden heat of passion upon adequate legal provocation as defined by our Supreme Court. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); Cook v. State, Op. No. 27596 (S.C. Sup. Ct. filed December 9, 2015) (Shearouse Adv. Sh. No. 48 at 12-19), 2015 W.L. 8349232 (*not yet released for publication*). And, there was sufficient time a reasonable person would have cooled off, even if there was adequate legal provocation and heat of passion. Id.

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. Strickland. The only evidence of any provocation was Stanko's statements to his or the State's psychiatric or psychological experts knowing he was being evaluated for criminal responsibility shortly before his trial. There was testimony from several experts, including Stanko's own experts, that Stanko habitually lies or makes false statements. The State's expert psychiatrist testified she did not believe Stanko's version of events as he lied to her numerous times. Stanko's own experts testified they either did not believe or were suspicious of Stanko's version of events because of his tendency to make false statements as a result of his diagnosed condition of psychopathy. (App. pp. 1534-37). Numerous lay witnesses also testified during the trial that Stanko habitually lies. There was no substantive evidence of a cigarette burn to Stanko's face or eye presented at trial. The daughter heard no arguing or fighting before the crimes occurred. No cigarette butt from the crime scene was brought into evidence. Dr. Crawford reviewed photographs of Stanko taken shortly after the incident and there was no evidence of a burn to Stanko's face.

Stanko bound Laura Ling's hands and feet. He beat her from the top of her head to her feet. He then walked to the fifteen (15) year old daughter's bedroom and started sexually assaulting her.

She fled to her mother's bedroom finding her mother alive, but bound and semi-conscious. Stanko followed the daughter to the mother's bedroom. Stanko then began assaulting the daughter again and knocked her unconscious. At some point, Stanko stabbed Laura Ling with a sharp object. When the daughter regained consciousness, she was bound with neckties, and Stanko began raping her and talking to her during the rape. At one point, Stanko beat Laura Ling some more as she lay bound on the floor beside the bed. Stanko then continued to rape the daughter and reached over and manually strangled Laura Ling with one hand. This was the cause of death. Stanko then finished raping the daughter and cut her throat twice. Stanko then showered, packed his suitcase, and left locking the door behind him. Before he left, Stanko stole items belonging to the victims. Stanko then stole Ling's car and drove to Ling's bank and withdrew money from her checking account. Stanko also used Ling's credit card to make a purchase. When considering the facts of the case, there is no reasonable probability that even had trial counsel requested an instruction on voluntary manslaughter and one had been given, that the jury would have returned with a different verdict. See Leach v. Kolb, 911 F.2d 1249, 1261 (7th Cir. 1990) (no ineffectiveness of trial counsel where the evidence of the greater offense was overwhelming). Stanko's defense at trial was insanity, not manslaughter.

In regards to the alleged failure to request the statutory mitigator, the only evidence of any provocation was Stanko's statements to his and the State's psychiatric or psychological experts, made when Stanko knew he was being evaluated for criminal responsibility shortly before his trial. There was testimony from several experts, including Stanko's own experts, that Stanko habitually lies or makes false statements. All of the experts testified they either did not believe Stanko's version of events or were suspicious of the veracity of his version of events due to his diagnosed psychopathy. Numerous lay witnesses also testified in the guilt and penalty phase that Stanko

habitually lies. Stanko's second chair counsel also testified at PCR that Stanko was not forthcoming with his attorneys concerning the truth. There was no substantive evidence of a cigarette burn to Stanko's face or eye presented at trial. The daughter heard no arguing or fighting before the crimes occurred. No cigarette butt from the crime scene was brought into evidence.

By the time any statutory mitigator was charged, the jury knew Stanko had previously been convicted of multiple counts of breach of trust with fraudulent intent, obtaining goods by false pretenses, and grand larceny, and had received a ten (10) year prison sentence. The jury also knew Stanko had already been to prison previously for eight and a half (8 ½) years for the kidnapping and aggravated assault and battery of Elizabeth McClendon, in which she was tied up in a similar fashion after threatening to go to police for Stanko's fraudulent schemes. The jury was aware, upon his release from prison, and while on community supervision, Stanko had begun engaging in the same or similar fraudulent schemes in the Georgetown and Horry Counties, and he was about to be exposed for those crimes to police and returned to prison.

Further, as recited above, Stanko methodically bound and tortured Laura Ling, attempted to sexually molest the daughter, kidnapped the daughter and raped her, beat the murder victim some more during the rape of the daughter, and finally Stanko manually strangled Laura Ling to death as he raped the daughter, who he had also bound with neck ties. Stanko then cut the daughter's throat twice with a knife, and at some point stabbed Laura Ling in the throat with a sharp object. Stanko stole Lings personal items. Stanko then showered and methodically packed his suitcase and left the residence locking the door as he left. Stanko then stole Lings' car and went to her bank and stole money from her bank account. Stanko was not entitled to such an instruction given this record. Furthermore, based upon these facts, there is no reasonable probability the jury would have returned with a different sentence had the provocation mitigator instruction been

given. Strickland, supra; Wong, supra. Stanko has failed to prove deficient performance or prejudice under this ground. Strickland; Wong.

Finally, counsel credibly testified at PCR that he did not request this statutory mitigator as a strategic decision. He believed requesting and receiving such an instruction would be viewed by the jury as an attempt to blame the victim for her own murder and the crimes against her daughter. Counsel credibly testified this did not fit with their mitigation strategy that Stanko is a mentally ill individual that does not need to be put to death.

On this record, the undersigned finds counsel's strategic decision not to request this mitigator was objectively reasonable under the circumstances given Stanko's statements to his psychiatric experts were made and admitted solely for the purpose of medical diagnosis, Stanko's history of habitual lying was before the jury, and blaming the victim did not fit with the mitigation strategy that Stanko was mentally ill. Strickland, supra; Council, supra.

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.

Stanko next *alleges* trial counsel was ineffective in failing to obtain copies of images and data analyzed by State's rebuttal expert Dr. Spicer. Stanko alleges this inhibited trial counsel's ability to impeach this rebuttal witness' testimony at trial. There is no merit to this ground.

No evidence in furtherance or support of this allegation was introduced or testified to at the PCR hearing in applicant Stanko's case. (PCR Tr. pp. 1-282). At the close of applicant's case at PCR, the State moved for a directed verdict on this ground. (PCR Tr. pp. 283-90). Respondent's motion for directed verdict is granted as to this ground, which is hereby dismissed with prejudice.

Stanko waived and abandoned and failed to meet his burden of proof with regard to this ground at the PCR hearing by failing to present any evidence of this ground in his case in chief. Parks v. Morris Homes Corp., 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (it is litigant's duty to bring to the court's attention any perceived error and "the failure to do so amounts to a waiver of the alleged error"); Palacio, *infra*; Butler v. State, *supra*; see Rule 71.1, SCRPC.

Additionally, Stanko failed to introduce in his case in chief at PCR, or even on cross-examination of the State's witness, William Diggs, Esquire, copies of images and data analyzed by State's rebuttal expert Dr. Spicer, the scans or films in question. Furthermore, Stanko did not call Dr. Spicer at the PCR hearing and establish what he would have testified to had he been cross-examined or impeached differently. As a result, Stanko failed to meet his burden of proof on this issue. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding that where the contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) (mere speculation what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (State's failure to object to hearsay testimony as to what another witness' testimony might have been does not relieve applicant of the burden of producing admissible testimony in accordance with the rules of evidence); see also Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (allegation that expert testimony would

have helped defendant's case merely speculative where he called no expert to testify at PCR).

Federal authority is in agreement with these citations. Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented to show how witness would have testified had the cross-examination been pursued); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991) (prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief); Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense," rather, facts must be presented).

Finally, even considering the Record of this capital proceeding, this Court finds Stanko has failed to prove deficient performance or resulting prejudice. Strickland. Prior to the trial of this case, defense expert Dr. Thomas Sachy requested a PET scan and an MRI scan be performed on Stanko at MUSC in Charleston. Dr. Sachy, at the request of Dr. Wu, another defense expert, had Stanko perform a continuous performance test ("CPT") prior to the PET scan being conducted to comply with the protocol of Dr. Adrian Raine, who had conducted research into the psychopathic mind using such scans. This CPT was administered by another defense expert, Dr. Einhorn, a neuro-psychologist.¹⁴ The PET scan was then conducted on Stanko by the MUSC staff. The PET

¹⁴ Dr. Einhorn testified at trial that he was asked to perform this CPT by Dr. Sachy because they were following a protocol of a research scientists in California. Dr. Einhorn testified he would not normally perform a CPT before a PET scan if he was requesting a PET scan for diagnostic purposes. Dr. Einhorn also performed two (2) days of psychological testing of Stanko. The results

scan films and the MRI films were forwarded to Dr. Wu and three dimensional ("3D") renderings of Stanko's brain were developed from these and presented at trial through Dr. Wu's testimony. Prior to trial, Dr. Wu compared Stanko's PET scan results to those of a database [or control group] of approximately forty-one (41) "normal brains" of his own who had also conducted CPT before their PET scans were administered. According to Dr. Wu and Dr. Sachy, the comparison showed Stanko had low brain function in the lower portion of the frontal lobes of his brain.

The record shows that two (2) reply witnesses called by the State at the guilt phase, Dr. Spicer and Dr. Brannon, both of MUSC in Charleston, reviewed Stanko's PET scans prior to trial by examining the very same scans which defense expert Dr. Wu received. Both Dr. Spicer and Dr. Brannon testified that they looked at the individual PET scan "slices" of Stanko's brain using a computer. They testified this review was conducted according to the standard of care of clinical diagnostic practice. Based on their review of the individual PET scan "slices" of Stanko's brain, both Dr. Brannon and Dr. Spicer opined that Stanko's brain function was normal, including in the frontal lobes. Both Dr. Brannon's and Dr. Spicer's opinion was rendered utilizing the same "slices" imagery rendered from Stanko's PET scan conducted at MUSC – the PET imagery taken after Stanko engaged in the CPTs administered by Dr. Einhorn. Therefore, the State's experts' opinion was based on the same imagery that defense counsel and Stanko's experts possessed before the trial. (App. p. 1504, ll. 91-12). And, both Dr. Brannon's and Dr. Spicer's opinion using Stanko's PET scan slices alone, which is the standard of care of clinical diagnostic practice, were based on the PET scan slices which counsel and his experts had before the trial. (App. p. 1504, ll. 9-12). As a result, as to this expert opinion testimony, Stanko cannot show deficient performance or resulting prejudice under this ground because counsel had these images or scans prior to trial of this psychological testing were normal.

and prior to cross-examination of Dr. Spicer. Strickland.

Dr. Spicer conducted further analysis of Stanko's PET scan by using a computer program comparison of Stanko's PET scan [described above] to a control database of thousands of "normal brains" from the Society of Nuclear Medicine. Dr. Spicer had Stanko's PET scan, and the database he relied upon with him at trial on his computer. Stanko's PET scan, and some of the normal database were shown to the jury and viewed by defense counsel during Spicer's testimony. Dr. Spicer testified this computer comparison, also led him to a similar determination that Stanko's brain function was normal, including in the frontal lobes where Dr. Wu and Dr. Sachy claimed Stanko's brain was abnormal. But defense counsel clearly established the difference between Dr. Spicer and Drs. Wu and Sachy's opinion in this regard. The record shows that on direct examination of its own expert Dr. Wu, defense counsel established that Dr. Wu was following a different comparison protocol of Dr. Adriane Raine, which is why Dr. Wu had ordered Dr. Einhorn to administer CPTs to Stanko prior to his PET scan. The CPTs allowed Dr. Wu to utilize his own adopted methodology to compare Stanko's PET scan with a database or control group of PET scans of "normal brains" who had also performed CPTs prior to their PET scans being conducted. Dr. Wu testified in his opinion CPT PET scans are more sensitive or accurate and pick up changes in the brain related to psychiatric illnesses.

In summary, Dr. Wu's opinion differed from Dr. Spicer's because of the administration of the CPTs, and defense counsel had no problem juxtaposing the doctor's methodologies at trial. On cross-examination of Dr. Spicer, counsel impeached Dr. Spicer by eliciting testimony that Dr. Spicer did not know what a CPT was, or who Dr. Adriane Raine was, and by having Dr. Spicer point out that MUSC performs its PET scans with the patient completely at rest, usually in a dark room, without first administering a CPT. Defense counsel established that Dr. Spicer was

unfamiliar with Dr. Wu and Dr. Sachy's methodology. Further, counsel impeached Dr. Spicer with the fact he was using a different database of normal controls, the Society of Nuclear Medicine's database, not the CPT-protocol database used by Dr. Wu. Moreover, counsel obtained a concession from Dr. Spicer that if Stanko's experts did not "fudge" the computer windows or color scale on the PET scan comparisons, then the PET scan of Stanko actually showed that Stanko's brain function in all quadrants, including the frontal lobe, was significantly decreased in comparison to Dr. Wu's control group.

Counsel's cross-examination of Dr. Spicer allowed defense counsel to lay the basis for his guilt phase closing argument that contended Dr. Spicer used an improper methodology in comparing the CPT PET scan of Stanko to a control group that did not follow the same protocol, *i.e.* that Dr. Spicer was comparing apples to oranges. And, that is exactly what counsel did in detail in closing argument. (App. pp. 2108-11 & 2147-57). Both Mr. Kelly and Mr. Diggs argued in their closing argument that Dr. Spicer had admitted on cross-examination that he was comparing a CPT PET scan of Stanko to a control group of PET scans at complete rest. He did not follow proper scientific methodology, as they argued their expert Dr. Wu had done, by comparing Stanko's CPT PET scan to a control group of normal brains who also performed a CPT PET scan. Counsel argued Dr. Spicer's science, or at least as far as his computer program comparison of PET images to the resting database, was invalid and that his testimony actually proved the defense's case: Stanko's brain, performing a CPT PET scan, was normal when compared with a database or control group of brains at rest; *i.e.* Stanko's brain function was not normal but abnormal. (App. pp. 2108-11 & 2147-57). Counsel also re-emphasized in closing argument the concession it obtained from Dr. Spicer that if Stanko's experts did not improperly adjust the PET scan windows, their PET scan comparison showed Stanko's brain functioning, including in the frontal lobes, was

abnormally low. As a result, Stanko has failed to prove deficient performance or resulting prejudice from the alleged failure to have the data Dr. Spicer analyzed prior to impeachment.

Furthermore, in the penalty phase, counsel re-called Dr. Wu who testified that a comparison of Stanko's CPT PET with the resting PET database, which is the methodology employed by Dr. Spicer, would not be appropriate scientifically, *i.e.* Dr. Spicer was comparing apples to oranges. Dr. Wu also testified there was no "fudging" of the computer windows or color scale on the PET scan comparisons he conducted. And, he testified again that his opinion was that Stanko had an abnormally functioning frontal lobe. Defense counsel re-emphasized its impeachment of Dr. Spicer from the guilt phase in the penalty phase as well.

As a result, Stanko has failed to show deficient performance or resulting prejudice from the alleged failure to have the data analyzed by Dr. Spicer prior to his impeachment. The record reflects Dr. Brannon's and Dr. Spicer's analysis of Stanko's PET slices was based on the very PET films in possession of defense counsel and his experts prior to trial. The record reflects that defense counsel proficiently challenged Dr. Spicer on his computer database comparison, and continued to challenge Dr. Spicer into the penalty phase on the same. Stanko has failed to show deficient performance or resulting prejudice for the alleged failure to have the resting database images Dr. Spicer compared to Stanko's CPT PET scan prior to his impeachment. Strickland; Wong. This Court finds counsel effectively cross-examined and impeached Dr. Spicer's testimony in the guilty phase and in the penalty phase. As a result, this ground has no merit and must be dismissed with prejudice.

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.

There is no merit to this ground as this claim was pursued in full on direct appeal. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). Stanko now alleges that trial counsel's abandonment of this issue failed to preserve it for appellate review and also denied his defense counsel's ability to address and question later jurors on the same and/or similar matters. But in its Opinion in this case, the South Carolina Supreme Court specifically ruled that 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. As a result, Stanko cannot show deficient performance or prejudice under Strickland and Wong in this regard.

The record also demonstrates that counsel conducted adequate *voir dire* of the jurors to insure there was no bias and Stanko received a fair and impartial jury and trial. The record in this case additionally shows the evidence of Stanko's guilt was overwhelming; the jury found the evidence of insanity was not credible; and, the overwhelming evidence in aggravation of Stanko's crimes justified and necessitated a death sentence as deliberated upon by the jury. Stanko cannot show deficient performance or prejudice in this regard. 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). As a result, this ground has no merit and

must be dismissed with prejudice.

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.

During the PCR evidentiary hearing, Stanko failed to present any evidence of either deficient performance or prejudice on this claim in his case in chief. (PCR Tr, pp. 1-282). Respondent moved for a directed verdict on this ground. (PCR Tr. pp. 283-90). As a result, Respondent's motion for directed verdict is granted as to this ground, which is hereby dismissed with prejudice. Butler v. State; Rule 71.1, SCRCP.

Even more, Petitioner has failed to meet his burden of showing deficient performance and prejudice under Strickland. While there was certainly publicity surrounding these crimes, as there is in any capital case, the record demonstrates 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 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. Stanko has presented no reason to question the sworn testimony of these jurors. Stanko cannot show deficient performance or prejudice, and failed to present any evidence in furtherance of this allegation.

The lack of change of venue motion does not constitute deficient performance under the

circumstances of the record now before this Court. Our Supreme Court has clearly held 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) (change of venue not warranted in capital murder case with extensive pre-trial publicity even though some of the jurors had read about the defendant's other crimes including another murder). Given the Evins holding, the trial court's instructions in this case, and the jurors' sworn answers under oath they would disregard anything they had read, heard, or seen about the case, and disregard any pre-formed 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. Evins, supra; 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); *see* State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 634 (Ct. App. 2008) ("issues involved in a change of venue motion were recently addressed with certitude in State v. Evins").

Nor can Stanko establish prejudice under Strickland. Even had counsel made an additional or further motion to change venue in this case, the trial judge would not have granted it given our case law and given the *voir dire* responses of the jurors under oath. Tucker, supra; Manning,

supra; Truesdale, *supra*. 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, *supra*. 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 S.E.2d 132, 138 (1985), *cert. denied*, 471 U.S. 1120 (1985) *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); 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. Stanko was tried by a fair and impartial jury, as has already been determined by our Supreme Court. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008)(finding this Applicant's jury was fair and impartial). Stanko 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 Stanko 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. Stanko has failed to show deficient performance or prejudice from counsel's failure to move for a change of venue as he alleges. Strickland, *supra*; Wong, *supra*. As

a result, even if this Court did not grant Respondent's motion for a directed verdict, this ground must be dismissed with prejudice.

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 has not moved for a directed verdict on this ground as Stanko put forward limited testimony in furtherance of this allegation at PCR; however, this Court finds that even given that testimony, Stanko failed to demonstrate Strickland deficient performance and prejudice which would warrant relief and hereby dismisses the claim.

Stanko alleges counsel should have challenged the State's use of Dr. Pamela Crawford for purposes of a pre-trial competency examination and criminal responsibility examination because prior to being assigned to the case, Dr. Crawford traveled to Columbia, South Carolina and Augusta, Georgia to interview witnesses in the Ling and Turner crimes. Having acted in an investigative process of the case, Stanko posits, Dr. Crawford could not possibly take an unbiased approach to this case.

However, the record shows that everyone involved in this case, including the jury, knew of Dr. Crawford's role in the case prior to being asked by the Court to conduct a competency and criminal responsibility examination. Further, Stanko has failed to prove Dr. Crawford's testimony

was biased, that she was a prosecution tool, or that counsel was deficient in its investigation, research, or challenge to her testimony. In fact, upon reviewing the trial record of her testimony, this Court finds her testimony was not biased; she freely discussed her prior involvement in the case and the fact she disclosed that to everyone including the trial court prior to her appointment; she was not a prosecution tool, and her testimony is supported by the record in this case.

Additionally, based on this Court's review of the trial record, this Court finds counsel adequately and properly cross-examined Dr. Crawford at trial. Where counsel cross-examines the State's witnesses and therein attacks the accuracy of the evidence, a finding of deficient performance will not result. Lorenzen v. State, *supra* at 531, 657 S.E.2d 771 at 777; Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence). "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). Hindsight, however, is not the lens through which the undersigned is bound to examine applicant's PCR allegations. Instead, the reviewing court must eliminate the distorting effects of hindsight and attempt to reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. 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 in its examination of adverse witnesses. 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).

Here, counsel duly challenged Dr. Crawford's testimony at trial by bringing out her possible bias evidenced through the following details: her initial opinion in the case when she was first involved as a consultant for SLED; that a large part of the work she did on the case was for SLED in the behavioral science unit; that she listed her address on her stationary as the SLED behavioral science unit; and that Dr. Sachy related Stanko's insanity to the findings of the PET and MRI scans, not to repeated anti-social behavior. As a result, this Court finds counsel was not deficient in cross-examining or challenging Dr. Crawford's testimony.

Stanko further fails to show that had counsel further challenged her testimony during the State's rebuttal case, that the trial judge would have excluded it from the trial. In fact, by presenting the chosen insanity defense, trial counsel opened the door to the likelihood that the court-ordered criminal responsibility evaluation would be introduced by the State in its rebuttal case. Stanko provided notice to the State that he 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.

Additionally, as second chair trial counsel credibly testified at the PCR hearing, and as Dr. Thrasher, Stanko's psychiatric expert at trial credibly testified at the PCR hearing, there was never an issue regarding Stanko's competency to stand trial. Stanko understood the nature of the charges

against him. Stanko understood the possible penalties. And, Stanko was able to completely and thoroughly communicate with and assist counsel in the preparation of his defense.

Finally, Stanko 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 due to the strength of the State's case and the nature of Stanko's acts during and after the crimes. Strickland, *supra*; Wong, *supra*. As a result, this ground is dismissed with prejudice.

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.

No evidence in furtherance of this allegation was raised or testified to at the PCR hearing. (PCR Tr. pp. 1-282, 293-413). Respondent moved for a directed verdict on this issue at the close of applicant's case. (PCR Tr. pp. 283-90). Respondent renewed its motion for a directed verdict at the close of its case. (PCR Tr. p. 412). No facts in furtherance of this claim appear anywhere in the record. Therefore, this allegation is deemed waived. Parks v. Morris Homes Corp., 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (it is litigant's duty to bring to the court's attention any perceived error and "the failure to do so amounts to a waiver of the alleged error"). Further, Stanko has failed to meet his burden of showing deficient performance and prejudice under Strickland. Butler v. State, *supra*; Rule 71.1, SCRCP. Respondent's motion for directed verdict is granted as to this ground, which is hereby dismissed with prejudice.

10/11(a)(xi) 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.

Stanko alleges trial counsel failed to investigate and present mitigating facts at the sentencing phase including information concerning Stanko's past, the possible murder of his brother, his adaptability to prison life, and other information contained in Department of Probation, Parole & Pardon Services (DPPPS) records. "[A] PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("mere speculation" as to likely witness testimony does not alone satisfy the burden of showing prejudice).

Petitioner failed to put forward any real evidence in furtherance of this claim and has therefore failed to carry his burden of showing Strickland deficient performance or prejudice. Butler v. State, *supra*; see Rule 71.1, SCRCP. Stanko does not even allege what favorable or mitigating evidence he is referring to other than a vague reference to evidence to be introduced at the merits hearing. The record instead demonstrates that 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, 561 U.S. 945, 130 S.Ct. 3259 (2010); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins, 539 U.S. 510 (2003). Further, second-chair trial counsel credibly testified during the evidentiary hearing that Stanko

was not forthcoming with his defense team, indicating that Stanko likely provided false or misleading information regarding potential mitigation or aggravating information.

Furthermore, Stanko completely failed to prove deficient performance or prejudice under this ground because he did not offer any proper evidence in support of this claim. There was a only a brief mention at the hearing by mitigation investigator Dale Davis that the only thing she thought counsel failed to present was an eyewitness to Stanko's head injury at age seventeen (17); however, Stanko did not call that witness at the PCR hearing to establish deficient performance or prejudice. Porter v. State, 368 S.C. at 386, 629 S.E.2d at 358 (mere speculation what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (State's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of the burden of producing admissible testimony in accordance with the rules of evidence); Beaver v. Thompson, 93 F.3d at 1995 (rejecting claim counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief). Stanko did not introduce any Probation and Parole Records, any evidence regarding the alleged murder of his brother, any prison adaptability expert, or call any other mitigation witnesses at the PCR hearing to establish deficient performance or prejudice in the penalty phase. Palacio v. State, 333 S.C. at 513, 511 S.E.2d at 66 (finding where the contents of challenged documents were not presented at the PCR

hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense). As a result, Stanko has completely failed to establish deficient performance or prejudice under this ground. Wiggins; Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (reversing PCR court's conclusion capital defendant suffered prejudice from failure to offer sufficient social history evidence in mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) (no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial); 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).

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. Even had counsel presented more mitigation witnesses, this Court finds there is no reasonable probability of a different result in the sentencing proceeding. The evidence of aggravation introduced in this case is staggering. Stanko cannot show Strickland prejudice from the failure to introduce other alleged evidence of mitigation. Wong, supra. There is no reasonable probability the result of the proceeding would have been different if counsel would have introduced some other known information. The evidence of Stanko's guilt of these crimes was overwhelming; Stanko's evidence of alleged insanity was found not to be credible; and, the evidence in aggravation justifying and necessitating a death sentence was overwhelming.

Accordingly, Respondent's motion for directed verdict on this ground is granted and this claim for relief is denied and dismissed with prejudice. Even if this Court were to deny

Respondent's motion for a directed verdict on this ground, this Court finds Stanko has failed to meet his burden of proof on this ground to prove deficient performance or resulting prejudice on this record. Butler v. State; *see also* Strickland; Wong; Wiggins.

10/11(a)(xii) 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.

Here, Stanko alleges that his defense counsel failed to give investigators the additional time and resources to continue 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 undefined records.

This Court finds that even given testimony taken at the PCR hearing, Stanko failed to demonstrate Strickland deficient performance and prejudice which would warrant relief and thus denies and dismisses the claim. At the PCR merits hearing, Stanko did not introduce any of the records listed above that he claims counsel should have given investigators more time to uncover. He did not introduce the testimony of any witness who witnessed the 1986 incident involving applicant. Nor did Stanko introduce any medical records or documents at the PCR hearing or call any expert to establish had counsel obtained or uncovered such records their diagnosis would have been different. *See Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004) (concluding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase where defendant suffered from severe, chronic depression at time of murder, given

that counsel failed to provide expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant's mental condition to the jury). Stanko completely failed to meet his burden of proof on this issue at PCR, as this Court cannot speculate what these alleged records or an alleged witness' testimony would have been. Porter v. State, 368 S.C. at 386, 629 S.E.2d at 358 (mere speculation what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (State's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of the burden of producing admissible testimony in accordance with the rules of evidence); Palacio v. State, 333 S.C. at 513, 511 S.E.2d at 66 (finding where the contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense); see Lorenzen v. State, *supra* (defendant's testimony expert would have helped his case was merely speculative where he called no expert to testify at PCR); see also Beaver v. Thompson, 93 F.3d at 1995 (rejecting claim counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief); Moss v. Hofbauer, 286 F.3d at 864-65 (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had

the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense," rather, facts must be presented).

Furthermore, Stanko was determined competent to stand trial and counsel credibly testified there was no issue regarding Stanko's competence to stand trial. Stanko's own experts at trial conceded he was competent to stand trial. Stanko introduced no evidence at the PCR hearing that he was not competent to stand trial. Glover.

Testimony at PCR instead showed that counsel completely, thoroughly, 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, tests, and records. Wiggins v. Smith, *supra*. 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. Prior to trial, counsel retained two (2) psychiatrists, both a local and national psychiatric expert, who examined Stanko, a psychologist, who examined Stanko and obtained scientifically advanced PET and MRI scans, and a neuro-radiologist, who analyzed the PET scans. Counsel also had Stanko's MRI scans analyzed by an expert in Pennsylvania regarding statistical volumetric differences from a "normal brain." The findings of these experts and the brain scans were all presented to the jury. Counsel also demonstrated before the jury a connection between the insanity defense and Stanko's birth records, which counsel obtained and presented, indicating probable or possible intracranial damage at birth, along with his sustaining head injury at approximately seventeen (17) years of

age. Counsel presented this evidence of insanity, including documentary evidence and expert witness testimony, and was successful in obtaining a jury instruction on the defense of insanity. An instruction on GBMI was also given.

Trial counsel was entitled to rely on retained psychiatric, medical, and psychological experts' diagnoses 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 at 599 (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 at 421 (decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible outcomes); *Poyner v. Murray*, 964 F.2d at 1419 (petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). At the PCR hearing, Stanko did not present any evidence he suffered from any other brain defect or mental illness. *Bannister, supra*; *Glover, supra*; *Zettlemoyer, supra*.

Stanko has not demonstrated that the lack of mental health history not put forward in his defense caused him prejudice. Stanko has failed to meet his burden of proving there is a reasonable probability of a different result in either the guilt or penalty phase. *See Strickland; Wiggins, supra; Wong, supra*. The evidence of Stanko's guilt of the crimes was overwhelming and the jury deliberated on the side of guilt, finding Stanko guilty and not insane or guilty but mentally ill. Similarly, the evidence in aggravation of the murder, kidnapping, attempted murder, torture, and rape was overwhelming, thus justifying and necessitating the jury's returning a death sentence. The evidence of Stanko's bad character and future dangerousness was proved through prior

convictions and bad acts in the penalty phase. Stanko cannot show prejudice given the cumulative speculative nature of this testimony and the other evidence introduced in his trial and sentencing proceedings. The credible evidence in the record, including Stanko's actions against Ling and her daughter on the night of the crimes, his actions the following day, and the testimony of the State's experts, shows Stanko was not insane at the time of the crime and was not guilty but mentally ill.

Stanko has failed to establish deficient performance or resulting prejudice in this regard. He has not shown that, but for any alleged deficient performance under this ground, there is a reasonable probability the result of the guilt or penalty phase would have been different. Strickland, *supra*; Wong, *supra*. Accordingly, Respondent's motion for directed verdict on this ground is granted and this claim for relief is dismissed with prejudice. Furthermore, even if this Court were to deny Respondent's motion for a directed verdict, this Court finds Stanko has failed to meet his burden of proof on this ground to show either deficient performance or resulting prejudice. Butler v. State; *see also* Strickland; Wiggins; Wong; Rule 71.1, SCRPC.

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

The undersigned dismisses this claim upon the motion of Respondent. This ground is not cognizable on PCR and fails to state a claim upon which relief may be granted by this Court. 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) ("In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised

at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (*citing* S.C. Code Ann. § 17-27-20(b)); 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.

Second, applicant did not put forward any evidence in furtherance of this allegation in his case in chief when given the opportunity. Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809; Glover v. State, 318 S.C. at 499, 458 S.E.2d at 540 (“mere speculation” as to likely witness testimony does not alone satisfy the burden of showing prejudice). Nor was any evidence presented in support of this claim on cross-examination of Respondent’s witness. As a result, Petitioner failed to meet his burden of proof on this claim, and this ground must be dismissed with prejudice. Butler v. State; Rule 71.1, SCRCP. Stanko failed to prove the State knowingly presented false testimony.

Third, there is no merit to this ground. Based on this Court’s review of the trial and penalty phase record, the prosecution did not knowingly and willingly initiate, present, and allow any witness including expert witnesses to present false testimony to the jury as alleged. The State’s experts did not, in an attempt to degrade, negate, and or impeach defense experts, knowingly give false testimony as alleged. The State did not knowingly and willingly present witnesses who provided false testimony concerning Stanko 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 Stanko appear as a sane, yet deceptive individual. The prosecution did not present lies, falsehoods, and deceptions by State witnesses or present such and grossly prejudice Stanko’s case. Stanko has not met his burden of proof to show error or prejudice. As a result, this ground must be dismissed with prejudice. There is simply no evidence in the record to support this

allegation.

As to this ground, Respondent's motion for a directed verdict is granted, and this ground is dismissed with prejudice. Even if this Court were to deny Respondent's motion for a directed verdict, this Court finds this claim is not cognizable in post-conviction relief, and Stanko has failed to meet his burden of proof with regard to this claim. Butler v. State; Rule 71.1, SCRCP.

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

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.

This claim is hereby dismissed following Respondent's Motion for a Directed Verdict. First, Stanko did not put forward any evidence in furtherance of this allegation in his case when given the opportunity. (PCR Tr. pp. 1-282). Butler v. State; Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809; Glover v. State, 318 S.C. at 499, 458 S.E.2d at 540 ("mere speculation" as to likely witness testimony does not alone satisfy the burden of showing prejudice); Rule 71.1, SCRCP. 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").

In his case in chief, the only evidence applicant introduced regarding any alleged Brady violation came from second chair counsel Gerald Kelly. Mr. Kelly initially stated he did not

receive all of the discovery material he wanted in the State's first discovery production. The information Mr. Kelly wanted dealt with complaints about Mr. Stanko made by citizens to police and the Solicitor's Office in the days leading up to the murder. However, Mr. Kelly admitted on cross-examination that he eventually received these materials from the State prior to the trial. The capital trial record also shows Mr. Kelly received these materials as Stanko presented this evidence in his capital proceeding. As a result, there is admittedly no Brady or Rule 5, SCRPC violation here.

Second, this Ground must be dismissed pursuant to Respondent's Motion to Dismiss. This claim is not cognizable on PCR and fails to state a claim upon which relief may be granted by this Court because it could have been presented at trial and on direct appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975) (the Uniform Post-conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (same); see S.C. Code Ann. § 17-27-20 (post-conviction relief is not a substitute for remedies at trial or direct appeal). This Court recognizes that a PCR applicant may raise a Brady violation or Rule 5 claim in post-conviction relief if he discovers after his trial and conviction, or death sentence and appeal, that the State has withheld or has allegedly withheld Brady or Rule 5 material. However, that is not the case here. Applicant admits the claim mentioned by Mr. Kelly was known to Mr. Kelly prior to trial and remedied prior to trial. Additionally, the claim first mentioned in Respondent's case, and mentioned only through cross-examination of Mr. Diggs, that the State allegedly did not disclose the results of Dr. Spicer's examination of Stanko's PET scans, was fully known by Stanko and his capital counsel during the trial itself, and could have been raised there, in a post-trial motion, and on direct appeal but was not. The record clearly reflects this. As a result, this

claim—even if it had been raised in applicant’s case in chief and could overcome Respondent’s Motion for a Directed Verdict and could be considered—is not cognizable on post-conviction relief because it could have been presented at trial, in a post-trial motion, and on direct appeal. *See Roscoe v. State*, 345 S.C. at 20, 546 S.E.2d at 419 (“In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (citing S.C. Code Ann. § 17-27-20(b)); *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. This ground must be dismissed with prejudice.

Furthermore, there is no merit to the claim raised or mentioned on cross-examination of Respondent’s witness Mr. Diggs. The trial record shows this witness, Dr. Spicer, was a Reply or Rebuttal witness. He did not generate a report in this case. There was no written report to serve on opposing counsel. As a result, there was no Rule 5 violation. Additionally, Dr. Spicer found Stanko’s PET scan was normal. As a result his testimony was not exculpatory; therefore, there could be no Brady violation. *Brady v. Maryland*, 371 U.S. 812 (1962). Further, the record shows the results of MUSC’s review of Stanko’s PET scan, conducted the day of or the day after the PET scan was completed, was normal and those results were immediately forwarded directly to Dr. Sachy, Stanko’s defense psychiatric expert, prior to trial. (R. pp. 1965-1967). As a result, this information was in the possession of the defense, was not exculpatory, and there could be no Brady or Rule 5 violation. For this additional reason, this claim has no merit and must be dismissed.

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

Stanko alleges his right to counsel was violated by appellate counsel not receiving sufficient time to research, write, and prepare the appeal. Stanko alleges this occurred in light of Chief Justice Jean Toal's Order that the appeal should be expedited, 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.

As a threshold matter, the Supreme Court **did not provide for no extensions**. Rather, the Supreme Court stated only that no extensions would be granted except upon showing of extraordinary circumstances. Moreover, counsel did request an extension from the South Carolina Supreme Court on April 19, 2007, and received a thirty (30) day extension by Order issued April 23, 2007. Furthermore, the South Carolina Supreme Court did not prevent or prohibit appellate counsel from requesting another extension. Appellate counsel credibly testified at the PCR hearing that he could have requested another extension had he needed one, and he believed the Supreme Court would have granted the extension request. The record shows appellate counsel had sufficient time to review the record completely and brief the arguable issues of merit on direct appeal. The record also shows that two (2) attorneys were assigned to this case on appeal, and that both reviewed the trial record and briefed the issues on appeal. Stanko has not shown deficient performance or prejudice in this regard.

As an additional matter, 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. *See Roscoe v. State*, 345 S.C. at 20, 546 S.E.2d at 419 (“In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”); *Drayton v. Evatt*, *supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (*citing* S.C. Code Ann. § 17-27-20(b)); *Hyman v. State*, *supra*; *Peeler v. State*, *supra*. Thus, this entire Ground fails to state a claim upon which relief may be granted by this Court. *See* SCRPC 12(b)(6).

Third, even if this claim were cognizable in the present action, Stanko has failed to meet his burden. 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). To obtain relief a PCR applicant must show that appellate counsel’s performance was (1) deficient; and (2) prejudice resulted 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).¹⁵ 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

¹⁵ *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”).

overcome.” *Id.* (quoting Gray v. Greer, 800 F.2d 644, 646 (C.A.7 1986)); *see also* Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (*en banc*).

Appellate counsel is also 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); Jones v. Barnes, *supra*, (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 him Smith v. Robbins, *supra*; Jones v. Barnes, *supra*; Thrift v. State; *supra*. Stanko has failed to show the issues he asserts should have been raised on appeal were clearly more meritorious than the issue or issues raised and argued on appeal based upon the trial record. And, Stanko has failed to show the issues he asserts should have been raised on appeal would have resulted in him prevailing on appeal.

This Court finds that based upon appellate counsel’s PCR testimony and the record in this case, counsel was not deficient, and counsel also made an objectively reasonable strategic decision not to raise the issue regarding the limitation of Dr. Wu’s testimony¹⁶ because it was not meritorious and weaker than the issue or issues raised on appeal. Jones v. Barnes, 463 U.S. 745, 752 (1983) (appellate counsel does not have duty to raise every non-frivolous issue requested by

¹⁶ This is the issue Stanko alleges appellate counsel was ineffective for failing to raise in claim 10/11(c)(ii).

defendant). First, the record shows Dr. Wu was not offered in this regard until the penalty phase, so any limitation in his testimony could not affect the guilty verdicts. Second, the Record shows the trial court did not prohibit Dr. Wu from testifying in rebuttal that in his opinion the proper methodology for comparing a CPT PET scan was to compare it with a database of CPT PET scans, which he did, not a database of PET scans at rest, which Dr. Spicer testified he did. Therefore, Stanko was allowed to elicit exactly what he wished when offering Dr. Wu's rebuttal testimony. As a result, the issue Stanko argues appellate counsel should have raised would not have been meritorious on appeal, and was not stronger than the issues raised in the brief. *See Stanko, infra*. Therefore, this issue cannot be the basis of a claim of ineffective assistance of appellate counsel. Barnes; Strickland. Stanko has failed to show deficient performance in not raising this issue on appeal. This Court also finds that based on the same reasoning, Stanko has failed to show prejudice, *i.e.* there is a reasonable probability had appellate counsel raised this specific issue, he would have prevailed on appeal. Id.

Additionally, this Court finds credible appellate counsel's testimony that the issue regarding failure of the trial court to instruct the jury on the alleged lesser included offense of voluntary manslaughter in the guilt phase, or the statutory mitigating circumstance of provocation in the penalty phase, were not preserved for appellate review. The record reflects there was no request by Stanko for an instruction on voluntary manslaughter, and there was no request by Stanko that the Court charge the statutory mitigating circumstances of provocation by the victim. South Carolina is an issue preservation state. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000). An issue that is not preserved below will not be considered on appeal. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000). The failure to request a jury instruction on an alleged lesser included

offense results in the issue not being preserved for appellate review. State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975); State v. Steadman, 275 S.C. 528, 186 S.E.2d 712 (1972). The failure to request an instruction on a statutory mitigating circumstance results in the issue of the trial court's failure to give an instruction on a specific statutory mitigating circumstance not being preserved for appellate review. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008) (**this very case**); State v. Evans, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006); State v. Bowman, 366 S.C. 485, 623 S.E.2 378 (2005); State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005). As a result, neither of these issues was preserved for appellate review. Appellate counsel cannot be deficient, nor can the applicant show prejudice, from appellate counsel not raising an issue that was not preserved for appellate review. Lee v. Davis, 328 F.3d 896, 901-02 (7th Cir. 2003); Aparicio v. Artuz, 269 F.3d 78, 96 (2d Cir. 2001); Jackson v. Duggar, 931 F.2d 712 (11th Cir. 1991) (appellate counsel not ineffective for failing to appeal issue not preserved for review); Kitt v. Clarke, 931 F.2d 1246 (8th Cir. 1991) (similar); see Burton v. Renico, 391 F.3d 764, 777 (6th Cir. 2004) (similar); see also Albrecht v. Horn, 485 F.3d 103, 138 (3rd Cir. 2007). The appellate courts of South Carolina would not consider such an issue. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).

Additionally, this Court finds appellate counsel was not deficient in not raising either the voluntary manslaughter or provocation issue on appeal because they were not meritorious appellate issues. As previously stated in the undersigned's discussion on an earlier claim for relief, it is undisputed the only evidence which Stanko points to as justifying a charge on voluntary manslaughter or provocation is testimony of Stanko's retained experts (psychiatrists) of the State's expert (psychiatrist) about what Stanko told them allegedly occurred prior to the Ling incident made to the experts (psychiatrist/physicians) for the purpose of making a diagnosis on the issue of

criminal responsibility and capacity to conform. This evidence was solely admissible as “information upon which they [the experts] relied in reaching their professional opinions[,]” and was **not admissible as substantive proof of the facts so stated** by Stanko. Gentry v. Watkins-Carolina Trucking Co., *supra*; Howle v. PPA/Monarch, *supra*; see State v. Brown, *supra* (history as related to the doctor was admissible only as information upon which the doctor relied in reaching his professional opinion. **It is not admissible as substantive proof of the facts stated**); Jones v. Doe, *supra* (Rule 703 does not allow for the unqualified admission of hearsay simply because an expert relied upon it in forming an opinion: “[T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. *It is received only for the limited purpose of informing the jury of the basis of the expert’s opinion and therefore does not constitute a true hearsay exception.*”) (citing 2 Kenneth S. Broun, *et al.*, McCormick on Evidence § 324, at 418 (2006)) (emphasis added by the Jones Court); see also Notes to Rule 803(4), SCRE.¹⁷ The basis for this distinction is that the statements do not have the same degree of trustworthiness when the patient is seeking to support a matter in court. South Carolina Evidence, 2nd Ed., Danny R. Collins, 2000 S.C. Bar/CLE Division. As a result, appellate counsel was not deficient in failing to raise either the voluntary manslaughter or provocation issue on appeal.

Further, the facts do not support an instruction on voluntary manslaughter. Stanko bound Laura Ling’s hands and feet. He beat her from the top of her head to her feet. He then walked to

¹⁷ See State v. Reed, 2001 WL 815026 (Ohio App. 2 Dist. 2001) (*unpublished*) (affirming defendant’s conviction where limiting instruction told the jury they could not consider statements defendant made to testifying expert psychologist, who examined defendant prior to trial, about the incident as substantive proof of the crime or any lesser included offense that might be charged but only as to the basis of the expert’s findings; see generally State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014) (recognizing “[t]o find otherwise would mean a defendant could automatically obtain the instruction merely by making a self-serving statement as to his intent.”).

the fifteen (15) year old daughter's bedroom and started sexually assaulting her. She fled to her mother's bedroom finding her mother alive, but bound and semi-conscious. Stanko followed the daughter to the mother's bedroom. Stanko then began assaulting the daughter again and knocked her unconscious. When she awoke, she was bound with neckties, and Stanko began raping her and talking to her during the rape. At one point, Stanko beat Laura Ling some more as she lay bound on the floor beside the bed. Stanko then continued to rape the daughter and reached over and manually strangled Laura Ling with one hand. This was the cause of death. The facts simply do not constitute a killing in the sudden heat of passion upon adequate legal provocation. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); Cook v. State, Op. No. 27596 (S.C. Sup. Ct. filed December 9, 2015) (Shearouse Adv. Sh. No. 48 at 12-19), 2015 W.L. 8349232 (*not yet released for publication*). 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.

The only evidence of any provocation was Stanko's statements to his experts knowing he was being evaluated for criminal responsibility shortly before trial. There was testimony from several experts, including Stanko's own experts, that Stanko habitually lies. There was testimony from numerous lay witnesses that Stanko habitually lies. There was no substantive evidence of a cigarette burn to Stanko's face or eye presented at trial. The daughter heard no arguing or fighting before the crimes occurred. No cigarette butt from the crime scene was brought into evidence. Further, as recited above, Stanko methodically bound and tortured Laura Ling, kidnapped the daughter and raped her, beat the murder victim some more during the rape of the daughter, and finally manually strangled Laura Ling to death also during the daughter's rape. Stanko then cut the daughter's throat twice with a knife, and at some point stabbed Laura Ling in the throat with a

sharp object. Stanko then showered and methodically packed his suitcase and left the residence locking the door as he left. Stanko was not entitled to such an instruction given this record. Further, there is no reasonable probability the jury would have returned with a different sentence had one been given. Strickland, *supra*; Wong, *supra*. Stanko has failed to prove deficient performance or prejudice under this ground. Smith v. Barnes, *supra*.

Finally, during Respondent's case at the PCR hearing, on the cross-examination of Mr. Diggs, applicant Stanko elicited testimony from Mr. Diggs that appellate counsel should have briefed the directed verdict issue on appeal. This Court finds this testimony was not credible. This Court finds credible appellate counsel's testimony that this issue was not meritorious. The evidence of Stanko's guilt was overwhelming. It included eyewitness' identification and DNA evidence. The evidence of Stanko's actions during the murder of Laura Ling and the rape and attempted murder of her daughter and after was sufficient to overcome a motion for directed verdict on insanity. Additionally, the State's psychiatric expert testified Stanko was not legally insane at the time of the crime, and its radiologist and neurologist testified Stanko's PET scan was normal. As a result, there is no merit to this claim of ineffective assistance of appellate counsel. Jones v. Barnes, *infra*; *see e.g.* Riley v. Berghuis, 481 F.3d 315, 320-24 (6th Cir. 2007) (counsel's failure to move for a directed verdict at the conclusion of the prosecution's case caused no prejudice where a rational juror could have concluded the defendant was guilty); United States v. Moore, 921 F.2d 207, 210 (9th Cir. 1990) (counsel's failure to make a directed verdict motion was not ineffective assistance where sufficient evidence existed to overcome the motion); United States v. Feldman, 853 F.2d 648, 665-66 (9th Cir. 1988) (similar). As a result, this claim is denied and is dismissed with prejudice.

10/11(c)(ii) with 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.

For the reasons stated in the previous ground, Stanko has failed to meet his burden of proof on this issue. Butler v. State; Rule 71.1, SCRCP. 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. 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 appellate counsel's performance was (1) deficient; and (2) prejudice resulted 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. at 285 (citation omitted).¹⁸ 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

¹⁸ See also Smith, 882 F.2d at 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").

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 v. Greer, 800 F.2d 644, 646 (C.A.7 1986)); see also Bell v. Jarvis, 236 F.3d at 164. Given the paucity of applicant’s allegation, he cannot make this difficult showing.

Appellate counsel is also 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); Jones v. Barnes, *supra* (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, a defendant must show not only that counsel’s performance was deficient, but that this deficiency prejudiced defendant. Smith v. Robbins, *supra*; Jones v. Barnes, *supra*; Thrift v. State, *supra*. Stanko has failed to show the issue he asserts should have been raised on appeal was clearly more meritorious than the issue or issues raised and argued on appeal based upon the trial record.

This Court finds that based upon appellate counsel’s PCR testimony and the record in this case, appellate counsel was not deficient, and appellate counsel also made an objectively reasonable strategic decision not to raise the issue regarding the limitation of Dr. Wu’s testimony because it was not meritorious, and was in fact weaker than the issue or issues raised on appeal. Stanko sought to call Dr. Wu in the penalty phase to rebut or reply to Dr. Spicer’s guilt phase testimony. The trial court did not prohibit Dr. Wu from testifying in rebuttal that, in his opinion,

the proper methodology for comparing a CPT PET scan was to compare it with a database of CPT PET scans, which he did, not a database of PET scans at rest, which Dr. Spicer testified as to doing. Therefore, Stanko was allowed to do exactly what he wished to do when offering Dr. Wu's rebuttal testimony, causing the issue Stanko argues appellate counsel should have raised to be without merit on appeal. The resolved issue of Dr. Wu's rebuttal testimony was not stronger than the issues raised in the appellate brief. This issue does not suffice as a winning claim of ineffective assistance of appellate counsel. Stanko has failed to show deficient performance in not raising this issue on appeal. Jones v. Barnes, *supra*; Strickland, *supra*.

This Court also finds Stanko has failed to show prejudice, *i.e.* there is a reasonable probability had appellate counsel raised this specific issue, he would have prevailed on appeal. It cannot be the basis of a claim of ineffective assistance of appellate counsel. Id. Dr. Wu's testimony was not offered until the penalty phase; therefore, it could have no effect on the guilty verdict. Further, the trial court did not prohibit Dr. Wu from testifying in rebuttal in the penalty phase that, in his opinion, the proper methodology for comparing a CPT PET scan was to compare it with a database of CPT PET scans, as opposed to the methodology that Dr. Spicer testified to. Therefore, Stanko was allowed to do exactly what he wished to do when offering Dr. Wu's rebuttal testimony. Dr. Wu's testimony on this point was before the penalty phase jury for its consideration in imposing the appropriate sentence. Given the overwhelming evidence in aggravation and Stanko's actions during and after the crimes, the jury still imposed a sentence of death. Based on this entire record, this Court finds there is no reasonable probability Stanko would have prevailed on appeal, *i.e.* the South Carolina Supreme Court would have vacated his death sentence on this issue. Jones v. Barnes; Wiggins v. Smith. Accordingly, this claim too is denied and dismissed.

10/11(c)(iii) Appellate Counsel was ineffective in failing to argue that the trial court erred in failing to instruct the jury on the statutory mitigating circumstances of provocation

Supporting Facts: 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).

This Court has already ruled regarding the lack of merit within Stanko's claim that the statutory mitigator of provocation should have been requested within the sentencing phase's jury instruction. As that claim is without merit based upon the evidence delineated above in relation to the Strickland standard, appellate counsel is not now deemed ineffective for failing to raise the issue on appeal. Without any substantive evidence in support of the provocation instruction, Stanko derives no prejudice from its exclusion from the trial record and on appeal, and the undersigned hereby dismisses this ground with prejudice.

As previously stated, appellate counsel could not have been deficient in failing to raise this issue, nor can Stanko establish prejudice as this issue was not preserved for appellate review. Lee v. Davis, 328 F.3d at 901-02; Aparicio v. Artuz, 269 F.3d at 96; Jackson v. Duggar, 931 F.2d 712 (appellate counsel not ineffective for failing to appeal issue not preserved for review); Kitt v. Clarke, *supra* (similar); *see* Burton v. Renico, 391 F.3d at 777 (similar); Albrecht v. Horn, 485 F.3d at 138. The failure to request an instruction on a specific statutory mitigating circumstance results in the issue of the trial court's failure to give that instruction not being preserved for appellate review. State v. Stanko, 376 S.C.571, 658 S.E.2d 94 (2008) (this very case); State v. Evans, 371 S.C. at 32, 637 S.E.2d at 315; State v. Bowman, *supra*; State v. Vazquez, *supra*. The appellate courts of South Carolina would not consider such an issue. Id. As a result, there is no merit to this ground and it must be dismissed with prejudice. For the reasons stated under the previous ground addressing this issue with regard to trial counsel, there is no merit to this claim.

10/11(d)(i) with Supporting Facts: Violation of Due Process. 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.

This Court grants Respondent's motion for a directed verdict with regard to this ground. Again, this claim has no merit because it is a direct appeal claim or one that should have been raised to the South Carolina Supreme Court. It is not cognizable on PCR. *See Roscoe v. State*, 345 S.C. at 20, 546 S.E.2d at 419 ("In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); *Drayton v. Evatt, supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (*citing* S.C. Code Ann. § 17-27-20(b)); *Hyman v. State, supra*; *Peeler v. State, supra*.

Additionally, Stanko asks this Court, a Circuit Court of Common Pleas, to hold that the South Carolina Supreme Court erred in expediting his appeal, which in essence would constitute *reverse vertical stare decisis*. To so rule is outside of this Court's authority. *See Jackson v. Bush*, 2015 WL 574021 (2015) (Report and Recommendation) (unpublished); *see also United States v. Duvall*, 740 F.3d 604 (D.C. Cir. 2013) (discussing vertical stare decisis).

Furthermore, there is absolutely no merit to this ground. The South Carolina Supreme Court only stated an extension would not be granted except upon extraordinary circumstances: the Supreme Court did not institute "no provision" for extensions in this case. Stanko has failed to show the alleged due process violation. In fact, the record before this Court shows that appellate counsel did file a request for an extension on April 19, 2007. And, counsel did receive a thirty (30) day extension by Order dated April 23, 2007. Therefore, the Supreme Court did not prevent appellate counsel from requesting such an extension, and in fact, appellate counsel did request and

receive one.

There also was not anything preventing or prohibiting appellate counsel from filing an additional request had one been necessary. Appellate counsel credibly testified he could have requested another extension had he needed one, and he believed the South Carolina Supreme Court would have granted the request. The record also shows he was not the only attorney representing Stanko on appeal. He testified that another attorney worked with him on the brief. This Court thus finds appellate counsel and co-counsel had adequate time to review the trial record, and did so. Counsel together briefed the arguable issues of merit which they reasonably selected to raise on appeal. Stanko cannot show his due process rights were violated by the South Carolina Supreme Court or that prejudice resulted. Additionally, the provisions regarding an extension in this case were equally applicable to the State as well as applicant Stanko.

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 rebuttal testimony, the failure to charge the statutory mitigator of provocation, and the directed verdict issue. As set forth above, and incorporated fully herein, there is no merit any of these appellate issues. Nor can he establish prejudice in this regard. Strickland, supra; Wong, supra; Jones v. Barnes, supra.

This Court grants Respondent's motions to dismiss and for a directed verdict as to this ground as it is not cognizable in post-conviction relief and beyond the authority of this Court. Even if this Court were to deny Respondent's motion for a directed verdict as to this ground, this Court finds this ground must be dismissed as it is not cognizable in post-conviction relief, beyond the authority of this Court, and Stanko has failed to meet his burden of proof to show his due process rights were violated.

10/11(d)(iii) with Supporting Facts: Applicant was denied Due Process by the failure of the Court to instruct the jury on the statutory mitigating circumstances of provocation

This Court grants Respondent's motion for a directed verdict as to this claim. Again, this claim of trial court error has no merit because it is a direct appeal claim. It is not cognizable on post-conviction relief (PCR). *See Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419 ("In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); *Drayton*, *supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel)(citing S.C. Code Ann. § 17-27-20(b)); *Hyman*, *supra*; *Peeler*, *supra*. It must be dismissed with prejudice. *Irick v. State*, 264 S.C. 632, 216 S.E.2d 545 (1975) (the Uniform Post-conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (same); Rule 12(b)(6), SCRPC.

Even if this Court did not grant Respondent's motion for a directed verdict, this Court would deny and dismiss this claim because it is not cognizable on post-conviction relief. *Id.* Furthermore, for the reasons stated under previous grounds, the trial court did not err in failing to instruct the jury on this mitigating circumstance.

10/11(d)(ii) and (iv) The cumulative effect of the errors complained of within denied Applicant his right to Due Process

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

A portion of this ground represents claims of trial court error or direct appeal claims that

are not cognizable on post-conviction relief. See Roscoe, 345 S.C. at 20, 546 S.E.2d at 419 (“In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”); Drayton, *supra* (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel) (citing S.C. Code Ann. § 17-27-20(b)); Hyman, *supra*; Peeler, *supra*. Therefore, this Court cannot grant relief based on those claims.

Additionally, South Carolina has not recognized the cumulative error doctrine on review of direct appeal issues where the issues were not preserved at trial. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011); State v. Beekman, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013). Stanko also has not shown any preserved errors by the trial court, or that if there were any errors, that they violated his right to a fair trial. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (to qualify for reversal on ground of cumulative effect of trial errors, defendant must demonstrate errors adversely affected right to fair trial).

Furthermore, with regard to any claims of trial court error or claims of ineffective assistance of counsel, as this Court has denied relief on every other claim, it similarly denies relief based upon cumulative error. Lorenzen v. State, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant effective legal representation to the extent that prejudice was presumed); Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) (finding that absent the narrow circumstances of presumed prejudice under Cronic, a PCR applicant alleging ineffective assistance of counsel must show actual prejudice); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (“While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we

recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors.”); *see e.g., Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). This ground for relief is hereby denied and dismissed with prejudice.¹⁹

CONCLUSION

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that Respondent’s Motion for Directed Verdict is GRANTED upon the grounds enumerated above, and the remainder of Stanko’s grounds in his final PCR application are denied and dismissed with prejudice. Stanko is remanded to the custody of Respondent for the carrying out or completion of his sentences.

AND IT IS SO ORDERED.

¹⁹ This Court also notes that at the PCR hearing, collateral counsel elicited testimony from second (2nd) chair counsel Gerald Kelly that at some point Kelly became suspicious that first (1st) chair counsel William “Bill” Diggs *may* have been using cocaine prior to and during the trial of this case. Kelly admitted this was only a suspicion based on various things including: Diggs driving to Columbia and back prior to the trial without being tired, Diggs wearing his hair in a pony-tail, Diggs going to the bathroom whenever there was a break in the trial, perceived mood swings during trial, and seeing what Kelly believed was particles of white powder on Diggs’ mustache on one (1) occasion when Diggs came out of the bathroom during a break in the trial. (PCR Tr. pp. 117-18, 152-55). Kelly admitted their fact investigator looked in Diggs’ personal [hygiene] bag at counsel during the trial and found no cocaine. (PCR TR. p. 155). Further, Kelly admitted he did not report this *suspicion* to Judge Jefferson, disciplinary counsel, or the Supreme Court. This Court finds there is no credible evidence to support Kelly’s suspicion “because there was no evidence that it would stand up.” (PCR Tr. p. 155). Further, Mr. Diggs testified at the PCR hearing he did not use cocaine prior to or during the trial of this case. He admitted he did go to the restroom during breaks in the trial, and prior to the trial he had a tooth pulled and was using a temporary tooth that had to be re-cemented during the trial. Diggs testified he would re-cement the tooth in the restroom during breaks in the trial. (PCR Tr. pp. 303-04, 306-08). This Court finds there is no credible evidence that Diggs was using cocaine during the trial. Additionally, this Court finds Mr. Diggs’ testimony on this issue to be credible. This Court also notes that this issue was not raised as a ground in applicant’s Final Application and applicant did not move to amend the Application to assert any such ground.

The Honorable W. Jeffrey Young
Presiding Judge

This ____ day of _____, 2016

_____, South Carolina

Exhibit B
(Affidavit)

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Stephen C. Stanko # 6022,

Applicant,

v.

The State of South Carolina,

Respondent.) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
)
)
)

C/A No.: 2008-CP-22-1446

AFFIDAVIT OF TRISTAN SHAFFER

I, Tristan M. Shaffer, being duly sworn, hereby attest to the following:

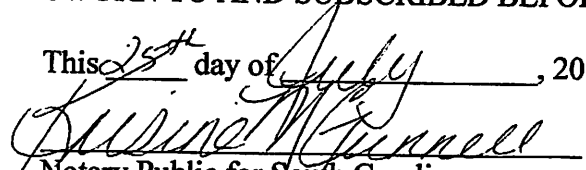
1. I am counsel for Applicant's PCR.
2. Applicant's PCR Counsel mailed Applicant's Memorandum of Support of Application for Post-Conviction Relief and Applicant's Proposed Order Granting Post-Conviction Relief on April 29, 2016.
3. I had been informed by opposing counsel that Respondent's Proposed Order Granting Respondent's Motion for Directed Verdict in Part and Denying Applicant Post Conviction Relief would be mailed to me on April 29, 2016.
4. At no time prior to April 29, 2016, did we ever send Respondent a copy of Applicant's Proposed Order or Memorandum.

By signing below, I hereby affirm that the statements in this affidavit are true.


Tristan M. Shaffer

SWORN TO AND SUBSCRIBED BEFORE ME

This 25th day of July, 2016


Notary Public for South Carolina

My Commission Expires: 05-23-2022

FILED
GEORGETOWN COUNTY, S.C.
2016 JUL 25 PM 3:47
ALMA Y. WHITE
CLERK OF COURT

STATE OF CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
2008-CP-22-1446

Stephen C. Stanko, #6022,)

Applicant)

v.)

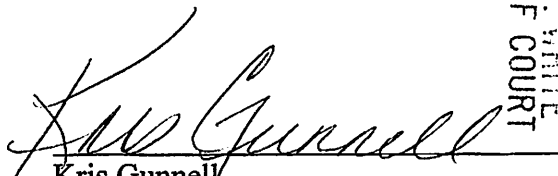
State of South Carolina,)

Respondent)

CERTIFICATE OF SERVICE

I, Kris Gunnell, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the **Motion to Alter or Amend and Motion for Recusal** to the Defendant in the above captioned matter by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

J. Anthony Mabry, Esquire
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211


Kris Gunnell
Paralegal to Tristan M. Shaffer

FILED
2016 JUL 25 PM 3:47
CLERK OF COURT

July 25, 2016
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

Stephen C. Stanko, #6022,)
Applicant,)

v.)

State of South Carolina,)
Respondents.)

IN THE COURT OF COMMON PLEAS
THE FIFTEENTH JUDICIAL CIRCUIT

C/A No. 2008-CP-22-1446

**RESPONSE IN OPPOSITION
TO PETITIONER'S MOTION
TO ALTER OR AMEND
AND TO PETITIONER'S
MOTION FOR RECUSAL**

CLARA Y. WHITE
CLERK OF COURT

2016 OCT 14 PM 4:44

FILED
GEORGETOWN COUNTY, S.C.

Respondent makes the following Response in Opposition to Petitioner's timely Rule 59(e), SCRCP, Motion to Alter or Amend and to Petitioner's concomitant Motion for Recusal filed July 25, 2016 (hereinafter "59(e) Motion"). Applicant's motion was filed in response to this Court's Order "Granting Respondent's Motion for Directed Verdict in Part and Denying Post-Conviction Relief in Full" filed July 15, 2016 (hereinafter "Order of Dismissal"). Within that motion, Applicant seeks this court's reconsideration of all allegations and arguments raised by Applicant from the third amended application on. (59(e) Motion, pp. 11-12, ¶ 40).

In furtherance of its position, Respondent would respectfully show unto this Court:

I. Response in Opposition to Applicant's Rule 59(e) Motion to Alter or Amend

1. Applicant disagrees with Respondent's election to exclusively submit a proposed order in lieu of submitting a proposed order, written motion for directed verdict, and memorandum in support of that motion. Applicant also seeks an amendment of page ten of the Order of Dismissal "to reflect the Court considered the arguments raised by Applicant during in his Memorandum and Proposed Order." (59(e) Motion, pp. 1-3).

Respondent submits that the record remains ambiguous as to whether Respondent was required to separately brief his directed verdict motion, as the Court appeared to leave the briefing of said motion to the parties' discretion. At the close of Respondent's initial oral motion for directed verdict, this Court stated "I have no opposition if y'all want to submit your directed

verdict motions . . .” and ultimately allowed Respondent 30 days to submit a written motion for directed verdict with Applicant receiving 20 days to respond. (PCR Tr. p. 289, line 18 – p. 290, line 25). However, at the close of the hearing, the court appeared to alter its request to one for proposed orders which addressed Respondent’s directed verdict motion:

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 [submit proposed orders] as to the directed verdict motions?

THE COURT: I do and I will look at the transcript up to that point in making those.

(PCR Tr. p. 412, lines 15-22).

As characterized by Applicant, proposed orders were submitted “[b]y agreement between the parties.” (59(e) Motion, p. 2). Respondent’s proposed order enumerates and advocates for receipt of a directed verdict upon every ground so moved at the hearing. Also, as required by this Court of both parties, Applicant prepared and submitted a memorandum in support of his application for post-conviction relief which was filed May 3, 2016. Included as an exhibit to that memorandum was Applicant’s proposed order advocating for a grant of relief. In any event, the court had no objection to each side’s submission of proposed orders in lieu of separately briefing the directed verdict motion. Additionally, Applicant has responded to this Court’s partial granting Respondent’s directed verdict motion within his 59(e) motion.

As to Applicant’s request to amend the Order of Dismissal to reflect consideration of Applicant’s written arguments in support of relief, the Order of Dismissal reads: “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 entirety.” (Order of Dismissal, pp. 15-

16).

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).

(Order of Dismissal, p. 11).

Respondent submits that this language accurately reflects this Court's consideration of the entire record in this case, which includes Applicant's filing of his memorandum and proposed order containing arguments in support of relief.

2. **Applicant seeks this Court's amendment of its standard of review. (59(e) Motion, pp. 3-4, ¶¶ 2, 9). Applicant argues that, as written, the standard of review is contrary to the plain language of S.C. Code Ann. §17-27-20 and therefore does not relate to any constitutional issue raised in the application which does not relate back to a claim of ineffective assistance of counsel. (59(e) Motion, p. 3, ¶ 2). Applicant also objects to the standard of review's statement that "relief will not be granted on a showing of mere error. Prejudice must also be shown," arguing that the statement does not apply to Applicant's claims of structural error and ineffective assistance of counsel pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). (59(e) Motion, p. 4, ¶ 9).**

Respondent opposes amendment of the standard of review, as the standard included in the Order of Dismissal constitutes a correct statement of law. (Order of Dismissal, pp. 11-15). Even pursuant to *Cronic, supra*, Applicant bears the burden of demonstrating error leading to the presumption of prejudice, which Respondent submits this Court has accurately determined Applicant has failed to do. *Florida v. Nixon*, 542 U.S. 175, 190, 125 S.Ct. 551, 562 (2004) (holding *Cronic's* presumed prejudice standard is only used for those cases where counsel fails to "function in any meaningful sense as the Government's adversary"); see *Nance v. Ozmint*, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) ("A finding of per-se prejudice under any of these three prongs is 'an extremely high showing for a criminal defendant to make.'") (quoting *Brown*

v. *French*, 147 F.3d 307, 313 (4th Cir.1998)).

3. Applicant seeks this court's reconsideration of a November 2014 Motion to Recuse.

This Court previously denied this motion, and this motion does not form a basis for the Order of Dismissal. (*See* PCR Tr. p. 10, lines 7-16; Order of Dismissal). Thus, reconsideration of the court's previous collateral ruling is not properly before this Court. *See* Rule 59(e), SCRCP. Where Applicant raises a concomitant motion to recuse within his 59(e) Motion, Respondent addresses that motion at a later point in this response in opposition.

4. Applicant objects to this Court's finding that "[g]iven the evidence against Stanko, defense counsel put forward the only available defense, and succeeded in providing the jury with a mechanism of understanding Stanko's heinous acts, humanizing him, and scientifically explaining his actions" by way of a mental health defense. (Order of Dismissal, p. 16, ¶ 2; *see* 59(e) Motion, p. 3, ¶ 4). Applicant raises a number of related objections to this Court's finding that no evidence appeared in the record which would support a jury instruction on the lesser-included charge of voluntary manslaughter or the statutory mitigator of provocation. (59(e) Motion, pp. 4-5, ¶¶ 7, 11). Applicant's objections together advocate for this Court's reconsideration of the purported factual basis for instructions on the lesser included offense and the statutory mitigator of provocation, and advocate for a finding of ineffective assistance of counsel for the failure to pursue these alternative defenses instead of the chosen mental health defense. (*Id.*; 59(e) Motion, p. 6 ¶¶ 17-19).

Respondent submits that the PCR record supports a finding that the mental health defense put forward by trial counsel in the guilt phase was strategically selected by counsel as a viable defensive strategy. Trial counsel testified extensively at PCR that "it was pretty obvious that . . . 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 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. . . ." (PCR Tr. pp. 294-95). As a result, trial counsel testified, he consulted with a number of medical experts to promulgate demonstrative evidence to explain deficiencies in Applicant's frontal lobes to the jury. (PCR Tr. pp. 296-303). Second-chair

counsel Gerald Kelly also testified at PCR that the evidence surrounding the Ling crimes, specifically Applicant's packing and fleeing the scene, told him that Applicant was not "thinking very clearly," led him to support the defense team's chosen mental health defense. (PCR Tr. pp. 64-65). Kelly went on to testify that his "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 . . . breaking down his resistance to his mental illness" (Tr. pp. 68-72).

As to the trial record, it lacks persuasive support regarding any alternative defensive theory during the guilt phase. Evidence of guilt was indeed overwhelming; the younger Ling victim survived a brutal sexual assault and testified as an eyewitness to her own assault and to the details of her mother's last moments in the hands of Applicant. (Trial Tr. pp. 1240-96).

And, as discussed in the Order of Dismissal, there was no substantive evidence introduced at trial to support Applicant's claim that trial counsel was deficient in failing to advocate for either a jury instruction on lesser-included offense of voluntary manslaughter or the statutory mitigator of provocation. (Order of Dismissal, pp. 43-48). The only evidence Applicant relied upon in support of his PCR allegations concerning voluntary manslaughter is limited to a statement made by Applicant to Dr. James Thrasher, Dr. Thomas Sachy, and/or Dr. Pamela Crawford during the course of psychiatric evaluations conducted in preparation of the presentation of Applicant's mental health defense. (Trial Tr. pp. 1540-42; Trial Tr. 1782-83; Trial Tr. 1917-1918).

That purported evidence concerning provocation arises from a statement allegedly made by Applicant to one or more psychiatrists while seeking diagnosis in preparation for trial, in which he states that the murder victim had flicked him with a cigarette and that he subsequently blacked out and woke up in the shower covered in blood. (*Id.*). The hearsay statement was not

admissible as substantive evidence and cannot constitute evidence of sufficient legal provocation which would warrant any voluntary manslaughter instruction. *Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (Rule 703, SCRE, “does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion”); *Notes to Rule 703*, SCRE (“This rule makes it clear that an expert may rely on facts or data in giving an opinion which are not admitted into evidence.”); *see State v. Burroughs*, 328 S.C. 489, 501–02, 492 S.E.2d 408, 414 (Ct. App. 1997) (requiring statements under Rule 803(4), SCRE to have been necessary for diagnosis or treatment). Additionally, this principle has not been overruled by the South Carolina Rules of Evidence as Applicant argued in his memorandum in support of post-conviction relief. *Notes to Rule 803(4)*, SCRE (citing *Gentry-Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967)); *see State v. Tennant*, 394 S.C. 5, 12, 714 S.E.2d 297, 300 (2011) (“Tennant attempted to use the doctor as a conduit for the introduction of his own statements regarding his belief that the victim consented to their encounter. For example, Dr. Schwartz–Watts testified Tennant reported to her that he believed the sex was consensual. These statements were inadmissible hearsay.”); *see also State v. Terry*, 339 S.C. 352, 355-58, 529 S.E.2d 274, 276-77 (2000), *cert. denied*, 531 U.S. 882, 121 S.Ct. 197 (2000) (holding capital defendant who chose not to testify in accordance with his Fifth Amendment privilege was not “unavailable” pursuant to Rule 804(b)(3), SCRE, and thus could not introduce a confession that tended to reduce crime from murder to manslaughter); *and State v. Cabrera-Pena*, 361 S.C. 372, 380, 605 S.E.2d 522, 526 (2004) (where “the state elects to use a witness to elicit portions of a conversation (and incriminating statements therein) made by a defendant, the rule of completeness requires the defendant be permitted to inquire into the full substance of that conversation”).

“A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues.” *State v. Lee-Grigg*, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007), *aff’d*, 387 S.C. 310, 692 S.E.2d 895 (2010). A jury instruction on voluntary manslaughter would not be a correct statement of law when the only evidence that could be construed to warrant the giving of the lesser-included charge was not evidence admitted for its truth, but rather the admission of hearsay testimony falling within a recognized exception. Rules 703 and 803(4), SCRE. As there exists no legal basis upon which Applicant could garner a jury instruction on voluntary manslaughter during the guilt phase given the evidence presented, that defense theory was not a viable option.

As to the mitigator of provocation, trial counsel testified at PCR that he did not pursue provocation as a mitigating circumstance because, although he knew about the evidence “well before the trial,” “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.” (PCR Tr. pp. 376-77). The record clearly demonstrates that trial counsel’s failure to pursue any evidence in support of provocation was a strategic maneuver to avoid blaming the victim, as placing blame was, in counsel’s view, not likely to persuade the jury to vote for a lesser sentence. (PCR Tr. p. 375-77).

This Court’s finding regarding the lack of substantive evidence which would warrant a voluntary manslaughter charge or a charge on the statutory mitigator of provocation finds support in the record and in the current status of the law on this issue. Furthermore, the court’s finding that counsel made a strategic decision not to pursue either jury instruction is supported by trial counsel’s PCR testimony.

5. Applicant objects to the finding that evidence of Applicant’s guilt was so overwhelming that it precluded any reasonable likelihood that the jury, had it been given

the opportunity, would have returned a verdict of guilt for the lesser-included charge of voluntary manslaughter. Applicant purports that this finding is not supported by any specific findings of fact. (Rule 59(e) Motion, p. 3, ¶ 5; *Id.* at p. 4, ¶ 8; *Id.* at p. 5, ¶ 11; *Id.* at p. 9, ¶ 32). Applicant further submits that no facts in the record “are inconsistent with Applicant’s assertion that the killing began after he was provoked.” (*Id.* at p. 9, ¶ 32). Applicant similarly objects to this Court’s finding that evidence of aggravation is conclusory and suggestive that no reasonable juror could have found for life in light of the record in this case. (Rule 59(e) Motion, pp. 3-4, ¶ 6; *Id.* at p. 4, ¶ 8).

To the contrary, the Order of Dismissal’s introduction carefully delineates—with citations to the Record on Appeal—the State’s presentation evidence lending to Applicant’s convictions and sentence, thus supporting this Court’s finding of overwhelming guilt on each charge, as well as this Court’s finding of overwhelming aggravation. (Order of Dismissal, pp. 4-8). In regards to specific findings of fact on individual claims raised in the application, the Order of Dismissal recites specific facts gleaned from the State’s case at trial in support of its findings relating to trial counsel’s strategy during each separate phase of Applicant’s trial. (Order of Dismissal, pp. 22-23, 29-30, 33, 36-37, 44-47, 80-81).

6. Applicant objects to this Court’s finding that counsel was not ineffective in pursuing and obtaining a jury instruction on not guilty by reason of insanity during the guilt phase of the trial because, according to Applicant, this Court misapplied the law on this point. (59(e) Motion, pp. 4-5, ¶ 10). Applicant also objects to this court’s assertion that defense counsel’s chosen mental health defense was objectively reasonable and therefore did not warrant a finding of ineffective assistance of counsel. (59(e) Motion, p. 11, ¶ 37).

Respondent disagrees. Insanity is an affirmative defense where counsel can demonstrate that “at the time of the commission of the act constituting the offense[s], the defendant, as a result of mental disease or defense, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. S.C. Code Ann. § 17-24-10(a). This instruction is not appropriate where the only evidence of a mental disease or defect is manifested only by repeated criminal or other antisocial conduct. S.C. Code Ann. § 17-24-10(c). Applicant maintains that the “only evidence of how Applicant’s mental

disease was manifested is through criminal or other anti-social behavior” and that this Court was incorrect in finding otherwise given the record in this case. (59(e) Motion, pp. 4-5, ¶ 10).

This Court found that Applicant’s defensive strategy to pursue and obtain the insanity instruction was based upon “medical scans, medical records, and expert medical and psychiatric testimony of a brain defense that resulted in Stanko being insane at the time of the crime;” that is, that the scientific evidence presented by defense counsel at trial supported an instruction reflective of Stanko’s purported inability to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong at the time of the offenses. (Order of Dismissal, pp. 21-27). The record in this case demonstrates that evidence cited by this Court warranted a jury instruction on not guilty by reason of insanity. Defense counsel obtained local and national psychiatric experts, including a neuro-radiologist, to examine Applicant, obtain advanced PET and MRI imagery, analyze the imagery, conduct a volumetric analysis of Applicant’s brain, and connect the makeup of Applicant’s brain to possible intracranial or developmental damage at birth. (Trial Tr. pp. 1442-1850). Furthermore, at the evidentiary hearing in this matter, defense counsel Diggs testified that he decided to pursue a mental health defense based upon prior work with Dr. Thrasher and Dr. Albiniaak, both of whom testified at trial. Diggs testified that he wanted to find out what was going [on] in the brain to explain how it worked, what happened, [and] what had failed in Stephen’s case” for the jury. Consultation with these initial experts led to counsel’s retention of a number of nationally renowned experts who identified a deficiency in Applicant’s frontal lobe. (PCR Tr. pp. 296-302). Co-counsel Kelly supported the presentation of this defense. (PCR Tr. p. 65, lines 20-25; *Id.* at p. 302, lines 15-20). “They [the experts] thought he was legally insane, met the definition of insanity, and [Diggs] felt like [the defense] certainly had an obligation in that situation and it

made sense” to present an insanity defense to explain to the jury why Applicant conducted himself in the manner that he did during the crimes’ commission. (PCR Tr. p. 301, lines 4-13).

The record reflects that defense counsel retained an able batch of experts whose medical analysis of Applicant furthered counsel’s strategic decision to present an affirmative defense at trial demonstrative of the possibility that Applicant could not distinguish moral right from moral wrong at the time of the Georgetown County offenses.

7. Applicant objects to this Court’s conducting a prejudice analysis on any claim not raised pursuant to *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065 (1984). (59(e) Motion, p. 5, ¶ 12). The third amended application for post-conviction relief raised the following claims citing to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), not *Strickland v. Washington*, *supra*:

10/11(a) “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 phase.”

(See Order of Dismissal, pp. 19-21).

10/11(c)(i) “[A]pplicant 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[.]”

(See Order of Dismissal, pp. 75-82).

Respondent submits that his Court accurately determined that Applicant was not denied the effective assistance of trial or appellate counsel pursuant to *Cronic*, a case holding that prejudice may be presumed from a limited enumeration of circumstances. 466 U.S. at 659, 104 S.Ct. at 2047. In *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), our state supreme court outlined the extraordinary and limited exceptions present in *Cronic*, wherein

the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel “at a critical stage of his trial.” *Cronic*, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” thus making “the adversary process itself

presumptively unreliable.” *Id.* Third, the Court identified certain instances “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is “an extremely high showing for a criminal defendant to make.” *Brown v. French*, 147 F.3d 307, 313 (4th Cir.1998).

Nance v. Ozmint, 367 S.C. at 552, 626 S.E.2d at 880.

Nance pointed out that these situations of presumed prejudice are rare, and concluded with this instruction: “Absent these narrow circumstances of presumed prejudice under *Cronic*, defendants must show actual prejudice under *Strickland*.” *Nance v. Ozmint*, 367 S.C. at 552, 626 S.E.2d at 880 (citing *Strickland v. Washington*, *supra*). *Nance* determined that appointed trial counsel in that case failed to mount any adversarial challenge to the State’s case because of statements made during his opening and closing arguments, including stating that the defendant was “a sick man” who had done “sick things” during his penalty phase closing argument, and because counsel called defense witnesses to testify about the defendant’s prior misbehavior in jail and his propensity for killing animals as a child. *Id.* at 553, 626 S.E.2d. at 881; *contra Bell v. Cone*, 535 U.S. 685, 696–97, 122 S.Ct. 1843, 1851 (2002) (noting that, under *Cronic*, defense counsel’s failure to test the prosecution’s case must be “complete” before prejudice is presumed); *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067 (“constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice”); *Hooper v. Mullin*, 314 F.3d 1162, 1175 (10th Cir. 2002) (holding that *Cronic* did not apply because “[d]efense counsel cross-examined the State’s guilt-stage witnesses, made objections to the State’s evidence, presented some evidence in Petitioner’s defense, and made opening and closing arguments”); *Cooks v. Ward*, 165 F.3d 1283, 1296 (10th Cir. 1998) (holding that *Cronic* did not apply because counsel

“conducted limited cross-examination, made evidentiary objections, and gave a closing argument”).

Petitioner cannot show that there was “an actual breakdown of the adversarial process during the trial of this case.” *Cronic*, 466 U.S. at 657-58, 104 S.Ct. at 2046. While Applicant’s complaints about counsel’s conduct concern a litany of alleged errors, omissions, and strategic blunders, the record does not support a finding that the *Cronic* presumption should be applied because there was no collapse in the adversarial process. None of *Cronic*’s exceptions to the traditional error-and-prejudice analysis apply to either claim 10/11(a) or claim 10/11(c)(i), and the holding in *Nance* is inapposite to counsel’s representation in the case *sub judice*.

As reflected in the Order of Dismissal, both claims raised by Applicant pursuant to *Cronic*, *supra*, were denied upon a basis found in the record. (Order of Dismissal, pp. 19-21, 75-82). At trial, the State’s case was not void of meaningful adversarial testing at the hands of trial counsel. During the guilt phase, defense counsel mounted a valid mental health defense upon the results of analyses done by a number of experts. (Trial Tr. pp. 1442-1850). The validity of the defense is additionally marked by the State’s a contestation of Applicant’s experts. The State put forth a thorough rebuttal case by presenting its own band of experts to testify, collectively, that Applicant may have personality disorder but could distinguish between moral right and moral wrong, and to challenge the sufficiency of the evidence of a frontal lobe deficiency put forward by the defense. (Trial Tr. pp. 1862-2019). Defense counsel challenged the State’s rebuttal testimony with a thorough cross-examination during which defense counsel distinguished each State’s expert’s level of expertise from that of the defense’s own testifying experts. (Trial Tr. pp. 1862-2019).

Similarly, during the sentencing phase, defense counsel continued to present a consistent

mental health defense in support of their plea for a lesser sentence. (Trial Tr. pp. 2951-3019, 3048-3119, 3172-3198). At PCR, counsel Diggs testified that he continued the mental health defense into the penalty phase because “[i]f 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.” (PCR Tr. p. 303, lines 1-6). At PCR, trial counsel Kelly’s recollected the presentation of roughly a dozen mitigation witnesses to demonstrate what Kelly characterized at PCR as “stressors” lending to Applicant’s commission of criminal acts in a period of insanity. (PCR Tr. pp. 70-71, 75). Trial counsel also presented extensive information obtained through a thorough mitigation investigation, conducted with the assistance and expertise of two mitigation investigators, Dale Davis, who had served as a mitigation specialist in over two dozen cases prior to Applicant’s, and mitigation investigator Vicki Childs. (PCR Tr. pp. 66, 157, 180-90; *see* Trial Tr. pp. 3122-29).

On appeal, Applicant’s defense was not subject to the third enumeration of presumed prejudice under *Cronic* as the Rule 59(e) Motion contends. Under *Cronic*’s third enumeration, prejudice may be presumed when counsel is available to assist the accused, “but the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small” due to circumstances surrounding the representation. *Nance v. Ozmint, supra*. The record demonstrates that appellate counsel was available to mount a thorough challenge to a number of trial issues in its appellate brief, despite an order issued by our state supreme court denoting a limit on the number of extensions appellate counsel may obtain prior to completing his brief. (PCR Tr. p. 46). A Supreme Court Order reflected that the appeal in this case was to be expedited, with no extensions granting absent extraordinary circumstances. (PCR Resp. Exhibit

3). However, the record additionally reflects that appellate counsel did seek an extension, and was in fact granted a 30-day extension by the Supreme Court. (PCR Resp. Exhibits 4-5). That court followed with another letter indicating that any further extension requests must be made to the Chief Justice or to the full court, but did not preclude any additional request by counsel for time to complete the appeal. (PCR Tr. pp. 47-48; PCR Resp. Exhibit 6). Appellate counsel Joseph Savitz also testified at PCR that he worked with co-appellate counsel Katherine Hudgins in completing the appeal, that they jointly decided on the issues to raise after conducting independent readings of the trial transcript, and that counsel Savitz also consulted with trial counsel Diggs, with whom he was professionally familiar, prior to completing his appellate brief. (PCR Tr. pp. 25-27). Thus, the record indeed reflects that appellate counsel's representation was not constrained in a manner lending to the presumption of prejudice defined by *United States v. Cronin*, *supra*.

8. Applicant disagrees with this Court's findings concerning trial counsel's performance in handling Dr. Sachy's statements regarding Applicant, and purports that these findings are not supported by the record. (59(e) Motion, p. 5, ¶¶ 13-14; *Id.* at p. 11, ¶ 39).

Respondent disagrees. Applicant claims that counsel rendered ineffective assistance by failing to object to his own expert's testimony which, according to Applicant, characterized him as an evil person. (Order of Dismissal, pp. 30-37 (claim 10/11(a)(iii))). The record demonstrates that, as reflected in the Order of Dismissal, defense counsel did not intentionally cause Dr. Sachy to compare Applicant to Ted Bundy or John Wayne Gacy. Rather, Dr. Sachy provided those comparisons as part of his opining that Applicant met the definition of antisocial personality disorder—also medically and scientifically termed psychopathy—and that Applicant's criminal acts were conducted in a moment of insanity experienced as a result of reactions within Applicant's limbic system. (Trial Tr. pp. 1779-85).

Furthermore, at PCR, counsel Diggs testified that it “was not [his] choice” for his experts to refer to Applicant as a psychopath—the comparison occurred as a result of the defensive strategy. (PCR Tr. p. 330). Diggs testified that Dr. Sachy thought that psychopath was the appropriate way to describe the condition of Applicant’s brain. (PCR Tr. pp. 330-31). Diggs’ PCR testimony also indicated that merely referring to Applicant as having antisocial personality disorder was not “sufficient in the defense of this case.” (PCR Tr. p. 332). In the same vein, counsel Kelly testified that whatever the experts called Applicant at trial, “it couldn’t be anything but a benefit to him because it would define him,” thus furthering defense counsel’s strategy of rationalizing Applicant’s behavior as the result of a scientifically-backed deficiency in his mental health. (PCR Tr. pp. 78-83). Most succinctly on this point, Diggs expounded:

I wouldn’t have used it intentionally but in term of him – in terms of the experts, how a psychiatrist is going [to] 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 [might be]. 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.

(PCR Tr. pp. 336-37).

Furthermore, the trial transcript demonstrates that Dr. Sachy testified differently pre-trial than during trial. Dr. Sachy did not make any direct comparison between Applicant and Ted Bundy or a great white shark until the State cross-examined him *in limine*. (Trial Tr. pp. 75-91). Before the jury, the record shows that defense counsel did not ask Dr. Sachy to compare Applicant to any one individual, but that Dr. Sachy offered comparisons to Ted Bundy and John Wayne Gacy as part of his explanation of the ebbs and flows in Applicant’s demeanor, and trial

counsel did not act to exacerbate those comparisons. (*See* Trial Tr. pp. 1727-34, 1746-54, 1766-99).

9. Applicant disagrees with this Court's finding that Applicant is not entitled to the effective assistance of expert witnesses. (59(e) Motion, p. 5, ¶ 15; Order of Dismissal, pp. 25, 35-36). Applicant's claim 10/11(a)(ii) purports that counsel rendered ineffective assistance by pursuing the defense of not guilty by reason of insanity. Applicant's claim 10/11(a)(iii) purports that counsel rendered ineffective assistance by not objecting to his experts' characterization of Applicant as an evil person.

This Court found that counsel made a reasonable, strategic decision in selecting to pursue its chosen mental health defense, that the defense was supported by the evidence presented at trial, and that counsel did not purposefully elicit testimony which characterized Applicant as an evil person in a deficient manner. (Order of Dismissal, pp. 21-37).

In reaching these findings, this Court cited to a number of cases which support the proposition that Applicant is entitled to the effective assistance counsel, not that every expert's testimony on his behalf will lend to the desired result; i.e., that counsel's performance cannot be deemed deficient simply because the expert opinions forming the basis for his defense do not persuade the jury to acquit or issue lesser sentence for his client. (Order of Dismissal, p. 25).

Respondent submits that this finding constitutes a correct statement of law.

10. Applicant submits that this Court's denial of allegation 10/11(a)(i), a claim raised pursuant to *United States v. Cronin*, *supra*, was in error because trial counsel's presentation of the chosen mental health defense constituted constructive abandonment. (59(e) Motion, p. 6, ¶ 16).

For the reasons discussed by Respondent in ¶¶ 6-7 above, Respondent submits that the record supports this Court's denial of the ineffective assistance of trial counsel allegation regarding the decision to pursue the insanity defense.

11. Applicant objects to this Court's finding that that counsel was not ineffective for failing to request jury instructions on voluntary manslaughter and the statutory mitigator of provocation, and argues that the theories cannot be inconsistent because the underlying facts are the same. (59(e) Motion, p. 7, ¶ 20).

In making its finding this Court reasoned that “Stanko’s chosen defense at trial was insanity, not that he killed Laura Ling and raped and attempted to murder her daughter in the head of passion upon adequate legal provocation. A decision not to present inconsistent theories is not ineffective assistance of counsel.” (Order of Dismissal, p. 43; *see* Order of Dismissal, pp. 40-48).

Respondent submits that the underlying facts are not dispositive of this particular claim. This Court’s finding is that counsel was not ineffective for selecting to pursue the chosen defensive theory. Implicit in the court’s reasoning is the premise that had counsel elected to pursue a jury instruction on voluntary manslaughter *in addition to* not guilty by reason of insanity, counsel would be instructing the jury on multiple defensive theories. Had counsel sought both instructions, counsel would have been purporting that his client was not guilty by reason of insanity, meaning that he could not distinguish between moral right and moral wrong, *and* that perhaps his client was not in fact insane as he had presented, but rather merely committed a reactive killing in the sudden heat of passion upon sufficient legal provocation. *See* S.C. Code Ann. §§ 16-3-50 and 17-24-10. To pursue both theories at trial would require counsel to argue two separate things. Evidence counsel selected to put forth in support of one defensive theory would not comport with evidence which would support the other.

Respondent submits that the presentation of alternate and inconsistent defensive theories is not demonstrative of effective advocacy. Not requesting a lesser-included offense instruction is objectively reasonable where that instruction is inconsistent with defendant’s theory of defense. *Compare Lopez v. Thurmer*, 594 F.3d 584, 588 (7th Cir. 2010) (not requesting lesser-included felony-murder instruction in first-degree murder case was reasonable where such instruction was inconsistent with defendant’s testimony that he was “innocent of any

crime”), and *Wilson v. Cockrell*, 70 F. App’x 219, 228 (5th Cir. 2003) (not requesting lesser-included murder instruction in capital-murder case was “legitimate strategic choice” where such instruction was inconsistent with defense theory that defendant did not murder the victim), and *Neal v. Acevedo*, 114 F.3d 803, 806 (8th Cir. 1997) (not requesting lesser-included offense instruction in first-degree kidnapping case was reasonable where such instruction was inconsistent with alibi defense), with *Breakiron v. Horn*, 642 F.3d 126, 138 (3d Cir. 2011) (not requesting lesser-included theft instruction in robbery case was unreasonable where such instruction was consistent with defense theory that defendant only committed theft, not robbery), and *Richards v. Quarterman*, 566 F.3d 553, 569–70 (5th Cir. 2009) (not requesting lesser-included aggravated assault instruction in murder case was unreasonable where such instruction was consistent with theory of self-defense).

12. Applicant objects to this Court’s finding that there was not a cooling off period which would have allowed for a jury instruction on voluntary manslaughter. (59(e) Motion, p. 7, ¶ 21).

Respondent disagrees. In order to garner a jury instruction for voluntary manslaughter, proof of two elements must be present: a sudden heat of passion and sufficient legal provocation. *State v. Hernandez*, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010). But even when a person’s passion is “sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter.” *State v. Knoten*, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). “Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved.” *State v. Hernandez, supra*. The cooling period need not be any specific amount of time. “[I]f at the time of the killing those passions had

cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter.” *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007).

In this case, the record evidences time during which the passions of an ordinary man could have cooled. The record demonstrates that Applicant paused at least once between the sexual assault of Christina Ling and the strangling of Laura Ling. Christina Ling testified that Applicant violently raped her, removed himself from her body, *likely partially redressed, then walked over to her mother*, struck her a few more times, *paused to turn to strike daughter Christina Ling again*, held Christina Ling down, *and then* reached down and choked mother Laura Ling to death. (Trial Tr. pp. 1261-64). Moreover, prior to forcing Christina Ling into her mother’s bedroom and raping her, Applicant initiated his violent physical assault of Laura Ling, pausing the assault to walk down the bedroom to initiate his acts against daughter Christina Ling. (Trial Tr. pp. 1253-59).

13. Without specificity, Applicant objects to “various findings concerning Applicant’s credibility in its analysis of Trial Counsel decision not to request the statutory mitigating circumstance of provocation,” as those findings are not an application of the correct legal test. (59(e) Motion, p. 7, ¶ 22).

Respondent submits that Applicant’s claims related to trial counsel’s performance were examined by this Court under the standard promulgated by *Strickland v. Washington, supra*.

14. Applicant objects to this Court’s granting a directed verdict in favor of Respondent on claim 10(a)(vi), a claim alleging trial counsel’s ineffectiveness for failing to request copies of images and data analyzed by State’s expert Dr. Spicer. (59(e) Motion, p. 7, ¶ 23). Applicant alleges that it presented evidence in furtherance of this issue by way of the trial transcript. (*Id.*).

The trial record was made part of this case at the evidentiary hearing upon motion by Respondent. (PCR Tr. p. 10; PCR Resp. Exhibit 1). Respondent maintains that Applicant did not pursue this ground at any point during the evidentiary hearing. (PCR Tr. pp. 1-412; *see Id.* at p.

355-58 (ruling testimony offered by Applicant through cross-examination not relevant to claim 10(a)(vi))).

15. Applicant objects to this Court's granting a directed verdict in favor of Respondent on claim 10(d)(i), a claim alleging that the South Carolina Supreme Court violated Applicant's due process rights by ordering his appellate briefing schedule be expedited. (59(e) Motion, p. 8, ¶ 24). Applicant disagrees with this's Court finding this claim not cognizable in a post-conviction relief action. (*Id.*; see Order of Dismissal, p. 87).

Respondent submits that this Court's finding is an accurate reflection of law on this issue. S.C. Code Ann. § 17-27-20. "In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel." *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993)).

Moreover, this Court's dismissal of claim 10(d)(i) was not limited to a finding that the claim was not limited to a finding that the claim was not cognizable under the Post-Conviction Relief Act. This Court also found that the claim was not cognizable because it asked a South Carolina Circuit Court to find that a higher court, the South Carolina Supreme Court, erred. Respondent submits that this Court's dismissal of this claim upon this basis is also an accurate statement of law. (*See* Order of Dismissal, p. 87).

Additionally, this Court dismissed claim 10(d)(i) as being without merit, and Respondent submits that this Court's findings on this point are supported by the record, as discussed in Respondent's ¶ 7 above. (*See* Order of Dismissal, pp. 87-88).

16. Applicant similarly objects to this Court's dismissal of claim 10(d)(iii), a claim that Applicant was denied due process by the trial court's failure to instruct the jury on the statutory mitigating circumstance of provocation. (59(e) Motion, p. 8, ¶ 25). Applicant disagrees with this's Court finding this claim not cognizable in a post-conviction relief action. (*Id.*; see Order of Dismissal, p. 89).

Respondent submits that the dismissal constitutes an accurate application of law as

discussed in Respondent's ¶ 15 above. The claim was appropriate for direct appeal, not post-conviction relief. *See Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing *Todd v. State*, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003)) (post-conviction relief case claiming that defense counsel's failure to object to a particular jury instruction violated applicant's due process rights).

17. Applicant submits that this Court failed to adequately rule in its dismissal of claim 10(d)(v), Applicant's cumulative error allegation claiming that the sum of counsel's errors is violative of Applicant's due process rights. (59(e) Motion, p. 8, ¶ 26; see Order of Dismissal, pp. 89-91).

"Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina." *Simpson v. Moore*, 367 S.C. 587, 604 S.E.2d 701, 710 (2006). However, because this Court found no error by counsel on any claim raised, and found that counsel's representation caused Applicant no prejudice on any claim raised, there can be no sum of either errors or prejudice upon which this Court may grant relief. *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant effective legal representation to the extent that prejudice was presumed). Applicant's objection does not form a meritorious basis for amendment of the Order of Dismissal.

18. Applicant disagrees with this Court's finding regarding appellate counsel's decision not to brief any issue regarding the trial court's limitation of Dr. Wu's testimony. (59(e) Motion, p. 8, ¶ 27). This Court dismissed Applicant's claim 10/11(c)(ii), finding that appellate counsel did not brief that issue because it was weaker than other preserved issues and was in fact not meritorious. (Order of Dismissal, pp. 76-78).

Respondent submits this Court's findings constitute an accurate application of law to fact and are supported by the record. The testimony at issue arose during the penalty phase of Applicant's trial, wherein Dr. Wu was called by the defense to testify at length regarding the

validity of his own scientific methodology as compared to the methodology testified to by State's witness Dr. Spicer. (Trial Tr. pp. 2951-3019). At the onset of this testimony, a pitting objection was raised by the State. (Trial Tr. pp. 2954-55). The trial court sustained the objection, but made it clear that defense counsel could elicit the testimony it desired by rephrasing its questioning. The trial court noted that the testimony sought was by its very nature pitting, but that Dr. Wu was entitled to testify regarding his interpretation of Applicant's brain function without including commentary on the truthfulness or testimony of an adverse witness such as Dr. Spicer. (Trial Tr. pp. 2955-59). Dr. Wu went on to testify at length that it was, in his opinion, not scientifically valid to conduct a PET scan analysis without the use of a particular database, and without first administering a continuous performance test (that is, that the methodology employed by Dr. Spicer was not as valid as his own). (Trial Tr. pp. 2968-2998). He testified that the difference in the two ways of administering the PET scan was akin to comparing apples to oranges. (Trial Tr. p. 2997, line 22 – p. 2998, line 20). The trial record therefore reflects that defense counsel succeeded in eliciting detailed testimony to contravene the State's own expert presentation.

At PCR, appellate counsel Savitz testified that his interpretation of the trial transcript was that defense got to ask its witness to compare his methodology to the State's witness. (PCR Tr. p. 34). He testified that witness pitting was having one witness call the other a liar, but that one witness' "commenting on the methodology that another expert uses" would not be pitting. (PCR Tr. p. 35). He later added "I don't think it was witness pitting, what they wanted to do . . . it seemed to me they got to do what they wanted to do, you know, with the questions they asked." (PCR Tr. p. 52). Appellate counsel made it clear that he did not see any merit to this potential appellate issue because it appeared that Dr. Wu was able to testify on behalf of the defense without any apparent limitation. The record thus supports appellate counsel's strategic decision

to forego raising this issue on appeal.

19. Applicant further objects to this Court’s findings regarding Dr. Wu’s testimony, asserting that the record does not demonstrate that Dr. Wu was able to comment on Dr. Spicer’s methodology. (*Id.* at ¶ 27).

This Court noted that defense counsel re-called Dr. Wu during the penalty phase to testify regarding the differences in PET scans taken after a period of rest versus PET scans taken after completion of a continuous performance test (CPT), and that Dr. Wu’s penalty phase testimony rebutted the earlier testimony of State’s expert Dr. Spicer regarding the appropriateness of the scientific methodology employed by Dr. Wu in his PET scan analysis. (Order of Dismissal, p. 54). The record indeed supports this finding, as Dr. Wu was called to testify in the penalty phase to testify regarding the differences in his own technology and that employed by State’s expert Dr. Spicer—to which he testified at length. (Trial Tr. pp. 2951-3019).

20. Applicant objects to this Court’s granting a directed verdict in favor of Respondent as to claim 10(a)(viii), a claim that trial counsel was ineffective for wholly failing to move for a change of venue in this case. (59(e) Motion, p. 8, ¶ 29). Applicant alleges that it presented evidence in furtherance of this issue by way of the trial transcript. (*Id.*).

The trial record was made part of this case at the evidentiary hearing upon motion by Respondent. (PCR Tr. p. 10; PCR Resp. Exhibit 1). Respondent maintains that Applicant did not pursue this ground at any point during the evidentiary hearing. (PCR Tr. pp. 1-412). Respondent further submits that this Court’s findings on this issue reflect an accurate application of law to fact in regards to this issue. (Order of Dismissal, pp. 56-59).

21. Applicant objects to this Court’s granting a directed verdict in favor of Respondent as to claim 10(d)(i), upon the basis that this claim was dismissed prior to the taking of testimony during the evidentiary hearing. (59(e) Motion, p. 8, ¶ 30; PCR Tr. p. 21, lines 6-14).

Respondent notes that prior to the hearing, this Court did appear to dismiss a generalized category of claims upon motion by Respondent:

MR. MABRY: 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.

(PCR Tr. p. 17, lines 1-21).

Then, upon further argument, the court altered its ruling:

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 . . . I'd rather do – take longer to do it right then try to cut corners and do it wrong. . . . There's no sense in arguing and making decisions on stuff that really is not yet before the Court.

(PCR Tr. p. 19, line 16 – p. 20, line 6; *see* PCR Tr. pp. 17-21).

Respondent submits that the Order of Dismissal more clearly delineates this Court's basis for the dismissal of each specific claim as raised in the application, in lieu of the wholesale dismissal of all non-ineffective assistance of counsel claims conducted prior to the taking of testimony at the evidentiary hearing. (*See* Order of Dismissal).

22. At the outset of the evidentiary hearing, Applicant renewed its request for funding in this case for Dr. Bursztajn, and the court restated its denial of that motion. (PCR Tr. p. 9, line 13 – p. 10, line 2). Applicant seeks reconsideration of that denial and a reopening of the record to consider the expert's testimony. (Rule 59(e) Motion, p. 9, ¶ 31). Applicant purports that Dr. Bursztajn's testimony was necessary at the evidentiary hearing to further

his 10/11(a)(x) allegation that trial counsel abandoned Applicant during Dr. Crawford's interview, and that the alleged abandonment "later allowed Pamela Crawford to make numerous false and highly prejudicial statements during her court testimony that could not be rebutted." (Order of Dismissal, p. 62 (quoting PCR application)). This Court granted Respondent's motion for directed verdict as to this claim. (*Id.*).

Respondent submits that the denial of funding does not warrant reconsideration by this Court. Dr. Crawford conducted a court-appointed, independent mental health evaluation, and testified during the State's rebuttal case at trial. (Trial Tr. pp. 1862-1920). This Court found trial counsel effective in investigating, researching, and challenging Dr. Crawford—and her neutrality—during her testimony at Applicant's trial. (Order of Dismissal, pp. 58-62). As to the abandonment allegation, Respondent submits Applicant's request for expert testimony on this issue is misplaced. As a matter of law, counsel had no automatic right to be present at Applicant's interview with Dr. Crawford. "Where insanity is interposed as a defense in a criminal prosecution, compulsory examination of the accused by experts for the purpose of determining his mental condition does not violate either the constitutional protection against self-incrimination or the constitutional guaranty of due process of law." *State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000). "Further, where a trial court is under the impression that a criminal defendant's mental condition will be an issue at trial, it has the inherent authority to order an independent mental evaluation of that defendant." *State v. Bixby*, 388 S.C. 528, 558, 698 S.E.2d 572, 588 (2010) (citing *Locklair*, *supra* at 364, 535 S.E.2d at 427). "Under such circumstances, ordering a criminal defendant to submit to a mental evaluation does not violate his right against self-incrimination." *Id.* Thus, counsel had no right to be present.

To the extent this Court may reopen the record to consider Dr. Bursztajn's testimony on the Dr. Crawford issue, Respondent opposes any *ex parte* consideration of the related funding request. Statutory provisions providing for the *ex parte* request of expert services in a criminal

trial are inapplicable to post-conviction relief proceedings. *Thames v. State*, 325 S.C. 9, 11, n.1, 478 S.E.2d 682, 682, n.1 (1996) (finding S.C. Code Ann. § 16-3-26(C), which is limited to capital cases, applies to “the representation of the defendant whether in connection with issues relating to guilt or sentence,” not to collateral post-conviction relief proceedings, and stating: “While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word “defendant” throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions.”).

23. Applicant raises a number of objections to this Court’s adoption of the State’s proposed order. (59(e), pp. 9-11, ¶¶ 33-36). Applicant posits that the adoption of the State’s proposed order indicates that this Court did not consider the arguments made by Applicant in its own memorandum of law and accompanying proposed order, thus violating Applicant’s due process rights and contravening S.C. Code Ann. § 17-27-80. (*Id.*).

An order dismissing a PCR case indeed must include specific findings of fact and express conclusions of law as to each issue presented, a requirement with which Respondent purports the order in this case complies. S.C. Code Ann. § 17-27-80. “A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.” Rule 501, Canon 3B(7)(e), SCACR. In regards to proposed orders, our state supreme court has cautioned:

Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP.

Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992).

However, there exists no prohibition against the court’s blanket adoption of either party’s

proposed order. “Although [our appellate courts] strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004); *Hamm v. Comm’r, Ala. Dept. of Corr.*, 620 Fed. Appx. 752, n.3 (11th Cir. 2015), *cert. denied* – U.S. –, – S.Ct. – (No. 15-8753) (Oct. 3, 2016) (finding the PCR court’s verbatim adoption of the state’s proposed order “has no bearing on our disposition,” but taking “this opportunity to once again strongly criticize the practice of trial courts’ uncritical wholesale adoption of the proposed orders or opinions submitted by a prevailing party”).

As to Applicant’s delineation of specific disagreements with the Order’s findings, (59(e) Motion, p. 10, ¶ 34), Respondent submits that it had addressed these objections elsewhere within the instant response in opposition, as they overlap with specific objections made in Applicant’s 59(e) Motion.

Given the Rule 59(e), SCRE, motion in this case and the time which has elapsed between receipt of the proposed orders and the adoption of the State’s proposal, Respondent submits there exists no basis upon which this Court could find a violation of Applicant’s due process rights as a result the adoption of the order in this case.

24. Applicant finally objects to the summary finding that Applicant “wished to pursue the same mental health defense during both the guilty and sentencing phases of his capital trial, and counsel was bound to pursue the same.” (See Order of Dismissal, p. 16). Applicant purports that this finding is a misstatement of the attorney-client privilege and that the finding is not supported by the record. (59(e) Motion, p. 11, ¶ 38).

Trial counsel Diggs testified at PCR that Applicant agreed with the defense prepared by counsel.

[H]e 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.

(PCR Tr. p. 302, lines 8-14). Furthermore, as argued in Respondent's ¶¶ 4, 6, and 7 above, the record demonstrates trial counsel made an objectively reasonable strategic decision to pursue a mental health defense supported by the testimony of multiple local and national experts. It follows that counsel's advising his client to pursue that defense is also objectively reasonable. This finding should not be overruled.

II. Response in Opposition to Applicant's Motion for Recusal

Applicant moves for judicial recusal due to this Court's adoption of the State's proposed order. (59(e) Motion, pp. 12-13). This reasoning does not form a valid basis for recusal.

Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" Canon 3(E)(1), Rule 501, SCACR. The judicial canons provide direction as to when disqualification may be necessary, including but not limited to, instances where: (1) the judge holds personal bias or prejudice towards a litigant or counsel or has personal knowledge of evidentiary facts in dispute in the proceeding; (2) the judge either worked on the case as a lawyer, a lawyer with whom the judge previously practiced law worked on the case while the judge was associated with the lawyer's firm, or the judge has been a material witness concerning the case; (3) the judge "knows" that he or a member of his family (spouse, parent, or child) has more than a *de minimus* economic interest in the litigation and the litigation will "substantially affect[]" that interest; or (4) the judge or his spouse or a person within the third degree of relationship to them (or the spouse of such a person) is either a party or the officer, director, or trustee of a party, is a lawyer in the case, known to have more than a *de minimus* interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding. Canon 3(E)(1)(a)-(d).

Davis v. Parkview Apartments, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014), *reh'g denied* (Sept. 11, 2014); *see id.* at n.21 ("Appellants further argue the circuit court erred in failing to ensure that Appellants received a fair and impartial forum in which to litigate their claims [because the circuit court adopted Respondent's proposed order], thereby depriving them of their

right to due process of law under the United States and South Carolina constitutions. Because this issue is tied to whether or not the court erred in refusing to recuse himself and we find that he did not, we need not reach this issue.”).

Respondent submits that this Court’s impartiality is not in question. A circuit court’s adoption of either party’s proposed order is not precluded, despite language encouraging the “PCR judges to draft their own findings of fact and conclusions of law in death penalty cases.” *Hall v. Catoe*, 360 S.C. at 365, 601 S.E.2d at 341; *Hamm v. Comm’r, Ala. Dept. of Corr.*, 620 Fed. Appx. 752, n.3 (11th Cir. 2015), *cert. denied* – U.S. –, – S.Ct. – (No. 15-8753) (Oct. 3, 2016) (finding the PCR court’s verbatim adoption of the state’s proposed order “has no bearing on our disposition,” but taking “this opportunity to once again strongly criticize the practice of trial courts’ uncritical wholesale adoption of the proposed orders or opinions submitted by a prevailing party.”). Respondent further submits that this Court had ample time to consider proposed orders submitted by both Applicant and Respondent, which were submitted on April 29, 2016. The Order of Dismissal was signed June 27, 2016.

The selection of one order over another is merely an exercise of judicial discretion and does not purport any bias warranting this Court’s recusal. As demonstrated in this response in opposition, and as is true of the entire Order of Dismissal, this Court’s findings have support in the record.

III. September 28, 2016, Disbarment of Applicant’s Trial Counsel

Respondent respectfully requests this Court take judicial notice of the September 28, 2016, disbarment of Applicant’s trial counsel Diggs. *In the matter of William Isaac Diggs*, Op. No. 27669 (S.C. Sup. Ct. filed Sept. 28, 2016) (Shearouse Adv. Sh. No. 38 at 17-30).

Respondent further states that the disbarment further has no cause to reopen the record or to alter

or amend judgment in this case. Where a subsequent disbarment has no bearing on trial counsel's representation of Petitioner, the disbarment does not require any *per se* finding of ineffective assistance of counsel which would warrant the grant of post-conviction relief. The "'technical versus substantive' standard" utilized in licensure also applies in disbarment situations; that is, a disbarment for violation of technical bar requirements will not generally suffice, whereas being found to be incompetent by the state bar to represent clients qualifies as ineffective assistance." *Padgett v. United States*, 302 F. Supp. 2d 593, 603 (D.S.C. 2004) (finding no ineffective assistance stemming from counsel's subsequent disbarment for misuse of client funds) (citing *United States v. Novak*, 903 F.2d 883, 889 (2d Cir. 1990) (counsel disbarred six years after representation for fraudulently representing facts in his bar application)).

There is also a significant distinction between an attorney disbarred *at the time* of the representation and one disbarred *subsequent to* the representation. A variety of state and federal cases clearly hold that, unless it is somehow causally related to the representation at issue, disbarment *after* the representation is not automatically suspect. *E.g.*, *United States ex rel. Ortiz v. Sielaff*, 542 F.2d 377, 380 (7th Cir. 1976) (affirming holding that subsequent disbarment "for reasons having nothing to do with petitioner's case" is "irrelevant" to performance at trial); *Hernandez v. Wainwright*, 634 F.Supp. 241, 246 (S.D.Fla. 1986) (subsequent disbarment not in itself sufficient absent showing of "direct nexus" with trial); *Collins v. State*, 74 Ohio App.3d 660, 600 N.E.2d 284, 285 (1991) (disbarment after trial did not render conviction "null and void"); *White v. State*, 267 Ga. 523, 481 S.E.2d 804, 806 (1997) ("objective standard of reasonableness" in *Strickland v. Washington* still applies after unrelated disbarment).

Id. at 603–04; *see also* *Roach v. Martin*, 757 F.2d 1463, 1472–73 (4th Cir. 1985) (finding no reason in disbarment record to overturn court's denial of post-conviction relief); *Soering v. Deeds*, 217 F.3d 840, 2000 WL 870490, at *5 (4th Cir. Jun.30, 2000) (court summarily rejected the contention that lead trial counsel, "who has since been disbarred, was emotionally and mentally troubled at the time of the trial").

Diggs' case, akin to *Padgett*, *supra*, includes a subsequent disbarment for misuse of client funds. *In the matter of William Isaac Diggs*, Op. No. 27669 (S.C. Sup. Ct. filed Sept. 28, 2016)

(Shearouse Adv. Sh. No. 38 at 17-30). Misuse of client funds does not relate to any subject which would suggest that Diggs' appointment to represent Applicant at his capital trial was impeded in any way.

WHEREFORE, for all of the foregoing reasons, Respondent submits that the findings in this Court's Order of Dismissal filed July 15, 2016, find accurate support in law and fact. Respondent therefore requests this Court overrule Applicant's objections to the Order of Dismissal, as well as deny its Motion for Recusal for the reasons stated herein. Finally, in light of the foregoing regarding the September 29, 2016, disbarment of trial counsel Diggs, Respondent submits that the disbarment does not provide a legal basis for reopening the record in this case should such action be sought by opposing counsel.

Respectfully submitted,

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October 10, 2016
Columbia, South Carolina

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

Stephen C. Stanko, #6022,)

Applicant,)

v.)

State of South Carolina,)

Respondents.)

IN THE COURT OF COMMON PLEAS
THE FIFTEENTH JUDICIAL CIRCUIT

C/A No. 2008-CP-22-1446

CERTIFICATE FOR SERVICE

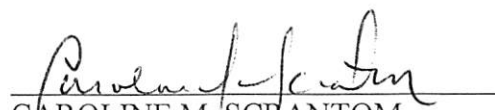
I, **Caroline M. Scrantom**, hereby certify that I have served the *Respondent's Response in Opposition to Petitioner's Motion to Alter or Amend and to Petitioner's Motion for Recusal* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Stuart Axelrod, Esquire
Axelrod & Associates, P.A.
4701 Oleander Drive
Myrtle Beach, SC 29577

Tristan M. Shaffer, Esquire
Shaffer Law Firm
225 Columbia Avenue
Chapin, SC 29026

This 10th day of October, 2016

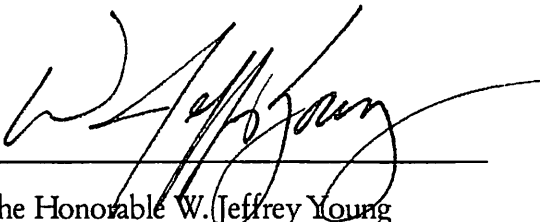
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GEORGETOWN COUNTY, S.C.
2016 OCT 14 PM 4:49
ALMA Y. WHITE
CLERK OF COURT


CAROLINE M. SCRANTOM
Assistant Attorney General

STATE OF SOUTH CAROLINA	)	
COUNTY OF GEORGETOWN	:	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
STEPHEN C. STANKO, # 6022	:	
Plaintiff,	)	
Vs.	:	<u>COURT ORDER</u>
STATE OF SOUTH CAROLINA	)	
Defendant.	:	

Per the order of the Honorable W. Jeffrey Young, the Motion to Alter and Motion for Recusal by Plaintiff is hereby DENIED.

Dated this 19th day of January, 2017.


 The Honorable W. Jeffrey Young
 Circuit Court Judge, Third Judicial Circuit