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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

S.C. SUPREME COURT

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Appeal from Georgetown County  
The Honorable D. Craig Brown, Circuit Court Judge (*Robertson* Court)  
The Honorable W. Jeffrey Young (PCR Court)  
Appellate Case No. 2017-000211

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STEPHEN C. STANKO,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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

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

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## PETITIONER'S QUESTIONS PRESENTED

### I.

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

### II.

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### IV.

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

## STATEMENT OF THE CASE

Stephen C. Stanko (“Stanko”) seeks certiorari from the denial of his Georgetown County PCR application first by the Honorable W. Jeffrey Young [the original PCR Court] (hereinafter “the 1<sup>st</sup> PCR Court”) and then by the Honorable D. Craig Brown [the Robertson<sup>1</sup> Court] (hereinafter “the 2<sup>nd</sup> PCR Court”).

### *The Georgetown Trial and Sentencing Proceeding*

Stanko was convicted by a jury in Georgetown County on April 11, 2006 of the April 8, 2005 murder, kidnapping and armed robbery of Laura Ling and the kidnapping, rape, and attempted murder [ABWIK] of her 15 year old daughter. Bill Diggs and Gerald Kelly represented Stanko at trial/sentencing.<sup>2</sup> In the penalty phase, the jury found 5 statutory aggravating circumstances: the murder was committed in the commission of kidnapping; CSC; armed robbery; larceny; and torture; and, recommended a sentence of death. The Honorable Deadre L. Jefferson imposed the sentence. Stanko was sentenced to concurrent prison sentences on the remaining indictments. Stanko’s convictions and sentences were affirmed on direct appeal. State v. Stanko. 376 S.C. 571, 658 S.E.2d 94 (2008). The United States Supreme Court denied certiorari.

### *The PCR Action*

On October 17, 2008, Stanko filed his 1st PCR application (2008-CP-22-1446). Stuart Axelrod, Bobby Fredrick, and Tristan Shaffer represented Stanko. After numerous amended applications, in April of 2015, a PCR hearing was held before the 1<sup>st</sup> PCR Court. (Suppl. App. 70-

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<sup>1</sup> Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016).

<sup>2</sup> Bill Diggs was disbarred by this Court and the N.C. Supreme Court in 2016. In the Matter of William Issac Diggs, 418 S.C. 229, 792 S.E.2d 219 (2016). Diggs’ actions leading to his disbarment occurred several years after this trial and had nothing to do with his representation of Stanko in this case. Id.

482). Among other grounds, in his 1<sup>st</sup> PCR, Stanko raised the same IAC grounds he raised at his 2<sup>nd</sup> Robertson PCR hearing *and* now raises to this Court, except an IAC mental health ground was added to at the 2<sup>nd</sup> PCR. (Suppl. App. 1-12; 13-68; 484-575). On June 27, 2016, the 1<sup>st</sup> PCR Court denied relief as to all claims in a filed Order of Dismissal. (Suppl. App. 484-575). The 1<sup>st</sup> PCR Court denied the post-hearing motions. (Suppl. App. 576-88; 685-717).

Stanko appealed to this Court. (Stanko v. State, App. Case No. 2017-000211). While the case was on appeal, this Court issued its Opinion in Robertson, 418 S.C. 505, 795 S.E.2d 29. This Court allowed Stanko to file an amended, successive, PCR application pursuant to Robertson. After remand, the 2<sup>nd</sup>/Robertson PCR Court found initial PCR counsel did not meet the representation requirements of S.C. Code Ann. § 17-27-160 and ordered a prejudice hearing pursuant to Robertson. Stanko was appointed new PCR counsel and raised numerous claims in his new application, many of which had been raised in his original application and at his 1<sup>st</sup> PCR hearing. After conducting a full Robertson PCR hearing on January 28 - 29, 2019, the 2<sup>nd</sup> PCR Court found Stanko was not prejudiced by the fact original PCR counsel were not statutorily qualified and denied the successive PCR application by Order Denying Relief issued March 11<sup>th</sup> and filed March 14, 2021. (App. 4058-4147). Stanko filed a Rule 59 Motion to Alter or Amend and Memorandum in Support. The State filed a Response to the Rule 59 Motion. On June 9, 2021, by Order filed June 11, 2021, the 2<sup>nd</sup> PCR Court denied the Rule 59 motion. (App. 4282).

### ***The Appeal from the Denial of PCR***

Stanko now appeals from the 2<sup>nd</sup> PCR Court's Order Denying Relief, consolidating his appeal with his original appeal from the denial of PCR by the 1<sup>st</sup> PCR Court. (Remand Order, App. 2738-39). Stanko's Petition for Writ of Certiorari filed in this Court raises four (4) grounds [I. – IV]. The first two (2) grounds [I. & II.] allege errors by the 2<sup>nd</sup> PCR Court having nothing to do

with Stanko's actual claims of ineffective assistance of trial counsel (IAC). The remaining two (2) grounds [III. & IV.] contain four (4) claims of IAC raised by 1<sup>st</sup> PCR counsel to the 1<sup>st</sup> PCR Court and again by 2<sup>nd</sup> PCR counsel to the 2<sup>nd</sup> PCR Court, and (1) claim of IAC, which is an extension of a claim raised at the 1<sup>st</sup> PCR, but which contains new facts not presented at the 1<sup>st</sup> PCR. The grounds raised in the Petition for Writ of Certiorari are stated as follows:

- I. Whether the PCR Court erred in adopting the State's post-hearing brief with negligible changes despite the PCR judge's assertion that he would and did draft his own order with his own findings of fact and conclusions of law.
- II. Whether the PCR Court improperly applied Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016), in assessing prejudice on remand by considering the decisions made, and evidence presented, by unqualified initial PCR counsel and the initial PCR court's rulings based on unqualified counsel's presentation.
- III. Whether the PCR Court erred in finding trial counsel were not ineffective where they presented dehumanizing evidence (such as labeling Applicant a psychopath and comparing him to infamous serial killers), pursued a legally impossible defense of not guilty by reason of insanity, and failed to investigate and present mitigating evidence related to Applicant's brain damage,<sup>3</sup> mental illness, and life history.
- IV. Whether the PCR Court erred in finding trial counsel were not ineffective in failing to investigate and present mitigating evidence that Applicant had demonstrated good behavior in prison and the likelihood that he would not be a future danger while incarcerated.

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<sup>3</sup> As stated, Stanko's 2 grounds of IAC raised on appeal [Issues III. & IV] were raised to the 1<sup>st</sup> PCR Court, except a portion of Ground III., raising a claim of a new diagnosis of brain damage, not raised until the 2<sup>nd</sup> PCR, but which is an extension of the original mental health IAC claim raised at the 1<sup>st</sup> PCR. In summary, it appears 2<sup>nd</sup> PCR counsel "piggybacked" on or used 1<sup>st</sup> PCR counsels' final PCR application in the 2<sup>nd</sup> PCR [Robertson] action.

## FACTS

On April 8, 2005, about 1:00 a.m., Petitioner Stephen Stanko bound, beat, stabbed, and then cut his girlfriend Laura Ling's throat. Stanko also bound, beat, and raped Ling's 15 year old daughter. While raping the daughter, Stanko manually strangled Laura to death with his free hand. Stanko tried to smother the daughter but eventually cut her throat 2 times. Stanko then packed his clothes, stole items belonging to Ling and her daughter, and left Ling's home locking the door as he left, believing he had murdered Ling and her daughter. Stanko stole Ling's car and drove to her bank and made a large withdrawal from her account by ATM. He then used her credit card to make a purchase, and drove to a friend's home in Conway. Later that morning, Stanko called Ling's employer and told them she would not be coming to work because she was ill. Stanko did not believe the bodies of Laura and the daughter would be discovered for at least a week. Unknown to Stanko, the daughter had survived the assault and called 911. Police broke the lock on the front door of Ling's home and found the daughter inside covered in blood. When Stanko called Ling's employer the following morning, the operator was already aware of Ling's murder and notified authorities of Stanko's deceptive phone call. (App. 212-28; 365-66; 271; 758; 370-73; 376; 504-05, 538; 764; 850; 196; 206; 209; 329-33; 342; 345; 538-39; 334-40; 851; 197; 229-30).

That same day, Stanko murdered the friend he was staying with, Henry Turner; stole Turner's truck, and fled to Columbia, S.C.<sup>4</sup> Stanko left Ling's distinctive car at Turner's home in

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<sup>4</sup> Based on trial counsel's objections, evidence of the Turner murder was kept out of this trial. The State was only allowed to introduce evidence Stanko left Ling's car at Turner's home in Conway and took Turner's truck to Columbia and had Turner's gun and truck when arrested. Personal property of Ling was found in the truck. Stanko was convicted in Horry County of Turner's murder and armed robbery in 2009 and sentenced to death. His convictions and death sentence were affirmed. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). His PCR action in that case was

Conway. Stanko was seen that evening partying in *the Vista* and spending large amounts of cash and representing himself to be persons he was not. Stanko then drove to Augusta. On April 9th, Stanko visited a bar there and began a new romance. Stanko gave Dana Putnam the bracelet he removed from Laura Ling's wrist after her murder. Putnam eventually recognized Stanko's photo in a newspaper article about the S.C. murders and notified police. Stanko was arrested in possession of Turner's truck. The key fob to Ling's car and a notebook with Ling's name on it were found in the truck. Stanko was extradited back to this state. (App. 850; 428-29; 341-45; 1523-27; 1516; 1532; 1535-38; 1558-59; 1849; 1561-63; 1582-91; 1588 & 1584; 1576-79).

Stanko had previously been convicted of tying up and assaulting another victim, Elizabeth McClendon, in 1996. At that time, Stanko was on the verge of being arrested for several "scams" or "cons" he committed near Charleston and was in danger of being exposed to police by that victim. He served about 8 ½ years for these crimes and numerous counts of breach of trust. The victim of this assault was also bound and gagged like the Lings. Stanko also had prior convictions for larceny and breach of trust. At the time of his Charleston crimes, Stanko had already been diagnosed with anti-social personality disorder (ASPD) also known as "psychopathy" once and diagnosed with the same again while in prison. (App. 1398-99; 1843; 1281; 754-55; 757-60; 763; 774; 1280-81; 1399-1401). At the time of Ling's murder, Stanko was again running several scams, this time in the Myrtle Beach area, representing himself to be a "lawyer," "paralegal," or "investigator" for law firms and was able to secure retainers from "clients." Stanko operated his "practice" out of the library where Ling worked. Once again, Stanko's "cons" and "scams" were on the verge of being exposed. Victims of his latest schemes were demanding their money back

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denied and this Court denied certiorari in the appeal. Judge Richard Gergel just dismissed the federal habeas action related to the Turner murder conviction and sentence.

and threatening to go to the police. Stanko was under community supervision for the Charleston kidnapping at the time he was committing these new scams and the crimes against Ling and her daughter. (App. 1411-47; 762; 818-19; 1394 [Appx. missing ROA pages 1395 & 1396]; 726-27; 1788; 1811-12).

In addition to Ling's daughter's testimony, D.N.A. linked Stanko to both the murder scene and the 15 year old rape victim. Surveillance photos from Ling's bank captured Stanko removing cash from her account after the murder and sexual assault. Stanko's briefcase was also found in Ling's abandoned car at Turner's home in Conway, and items belonging to Stanko and Ling were found in Turner's truck upon Stanko's arrest in Augusta. Dana Putnam and Ling's daughter identified the bracelet Stanko took from Ling's body and later gave to Putnam. (App. 1394, 1397-98; [Appx. missing ROA pp. 1395 & 1396] 331-32; 342-45). *See also* Stanko. 376 S.C. 571, 658 S.E.2d 94.

#### *The Evidence in Mitigation at Trial and Sentencing*

Because the evidence of Stanko's guilt of the Ling and Turner crimes was overwhelming and due to Stanko's prior criminal history, trial counsel sought to defend and mitigate the offenses and Stanko's life of crime through a medical/mental health defense. Counsel retained numerous medical and psychiatric experts and fully investigated Stanko's medical and psychiatric history. The experts advised advanced medical scans, such as MRI and PET scans, which were conducted. During trial and sentencing, Stanko called the numerous medical, psychiatric, and psychological experts, who testified Stanko suffered brain damage during birth and/or adolescence that rendered him insane at the time of the Ling crimes when he was under extreme stress. These experts were: Drs. Bernard Albinak; Joseph Wu, Thomas Sachy; David Thrasher, and Marc Einhorn. Counsel also introduced through Dr. Wu the structural brain study of Stanko's brain conducted by Dr.

Ruben Gur at the University of Pennsylvania. This testimony and evidence presented to the jury included MRI and PET scans of Stanko's brain, which the experts testified showed a malformed and damaged frontal lobe which decreased moral decision making and impulse control, and Stanko's birth records, showing arguable or probable intracranial brain damage at birth, and also testimony of a head injury at age 17. As to Stanko's ASPD diagnosis, Stanko's medical experts testified his medical diagnosis was *involuntarily acquired psychopathy*, i.e. Stanko did not choose to have ASPD [also known as "psychopathy"] but it was thrust upon him by brain damage at birth and/or the later head injury. This, they opined, explained and mitigated not only Stanko's current crimes but his prior criminal offenses in Charleston and before. (App. 400-45; 448-567; 569-83; 586-655; 675-813; 1955-99, 2028-99, 2152-78).

Counsel presented additional sentencing-phase mitigation through Dr. Evelyn Califf, a qualified expert family counselor, who presented Stanko's social history and offered opinions about there being dysfunction in Stanko's childhood home, including a strict, domineering father. (App. 2258-84). Counsel also presented numerous lay witnesses who offered testimony on Stanko's life and social history, including stressors he was under at the time of the Ling murders, and his attempt to obtain help for his mental disorders before the crimes occurred. (App. 1765-1911; 1915-22; 2000-18; 2110-2151; 2179-2219; 2226-56). Counsel also presented evidence of Stanko's ability to adapt to prison in the guilt and penalty phases. (App. 1714-28; 2164-68; 2172-74; 848-49). The jury still returned a sentence of death.

In the guilt and penalty phases, the State presented rebuttal testimony from Drs. Pam Crawford, Tora Brawley, William Brannon, and Kenneth Spicer. Dr. Crawford found no mental disease or defect and diagnosed Stanko with *a personality disorder, not otherwise specified, with narcissistic and antisocial features*, which she categorized as a behavioral problem. Dr. Brawley

testified she reviewed the battery of neuropsychological tests conducted by Dr. Einhorn and opined Stanko showed no signs of cognitive deficit. Dr. Brannon testified he reviewed Stanko's MRI and birth records and opined Stanko had both a normal brain and no indication of a brain defect from birth. Dr. Spicer opined Stanko's PET scan looks normal when compared to a normal hospital database. (App. 825-949). Stanko countered Dr. Spicer's opinion by pointing out Drs. Spicer and Wu utilize different protocols, software, and databases in their PET scan practice. (App. 949-86). The State also introduced Stanko's prior criminal record and the fact he was diagnosed with ASPD after the Charleston incident, and Stanko was on community supervision at the time of the scams in Myrtle Beach and the Ling offenses. The jury rejected the evidence Stanko was NGRI or GBMI at the time of the Ling crimes and found him guilty. The jury also sentenced him to death after finding the 5 statutory aggravating circumstances and hearing his criminal record.

#### ***STANDARD OF REVIEW***

“Our standard of review in PCR cases depends on the specific issue before us.” Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d, 836, 839 (2018). “We defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them.” Id. at 180; 810 S.E.2d at 839. “We review questions of law de novo, with no deference to trial courts.” Id. at 180-81, 810 S.E.2d at 839.

This Court is thoroughly familiar with the standard applicable to claims of ineffective assistance of counsel. The applicant, Stanko, must show (1) counsel’s performance was deficient, and (2) he was prejudiced by counsel’s deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). Stanko must show his counsel’s performance fell below an objective standard of reasonableness, and but for counsel’s deficient performance there is a reasonable probability the result of the proceeding would have been different. Id. And, in a capital case, a defendant must

show deficient performance and resulting prejudice. Bobby v. Van Hook, 558 U.S. 4 (2009). This Court is also thoroughly familiar with the prejudice standard in evaluating a claim of IAC in the capital penalty phase for failure to present mitigating evidence. Stanko must show that considering the aggravating and mitigating evidence introduced at trial/sentencing, along with the new mitigation, and any new aggravation which would have likely come in with the new mitigation, is there a reasonable probability the jury would have returned with a different sentence. Wong v. Belmontes, 558 U.S. 15 (2009); Wiggins v. Smith, 559 U.S. 510 (2003).

### **STANKO'S GROUNDS RAISED ON APPEAL FROM THE DENIAL OF PCR**

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

Stanko's first ground has nothing to do with his IAC claims raised at the 1<sup>st</sup> and 2<sup>nd</sup> PCR hearings. Stanko first argues this Court should remand this case and require the 2<sup>nd</sup> PCR Court [the Robertson Court] to amend or withdraw its Order Denying Relief and enter another Order because the 2<sup>nd</sup> PCR Court allegedly abdicated its judicial authority to the State when it relied on the State's post-hearing memorandum as a template in drafting the Order Denying Relief. However, the record shows the 2<sup>nd</sup> PCR Court did not abdicate its judicial authority and made its own findings of fact and conclusions of law. In fact, the record shows the Court notified both parties early on, in 2020, that the Court was going to deny relief and it would draft its own Order. When the Court first requested a proposed Order, and 2<sup>nd</sup> PCR counsel objected, the Court informed both sides it would draft its own Order. **The State never submitted a proposed Order.**

The Court, months later, indicated to both parties it had been diligently working on the Order and it was in the range of 40 some odd pages but the Court had not included record cites. The Court indicated to both sides it was going to use the State's post-hearing memorandum as a

template for its Order Denying Relief, and there was no objection. When the Court issued its own Order Denying Relief filed March 14, 2015, it contained the Court's own findings of fact and conclusions of law and did not abdicate judicial fact finding to the State. The Court did not rely on a proposed Order by the State, or wholesale adopt a proposed Order, but used the State's post-hearing memorandum as the Court's own template in drafting its own Order Denying Relief, and the Court made changes to the template. Stanko admits those changes were made.

Stanko argues Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004), and also the Sixth, Eighth, and Fourteenth Amendments. The question is whether the 2<sup>nd</sup> PCR Court adhered to his sworn duty as a member of the judiciary in denying relief for the reasons expressed in the Order Denying Relief. Any fair reading of the record shows the Court did adhere to that duty.

In Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), this Court did not ban proposed orders. To the contrary, the Court set out the preferred process: "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." Id., at 256, 423 S.E.2d at 128.<sup>5</sup> The emphasis was on the parties working to ensure that the substance of the proposed order presented adequately reflect the statutorily required findings of facts and conclusions of law on each issue presented in the post-conviction relief action. Id. (citing S.C. Code § 17-27-80 (1991) and Rule 52(a), SCRCP). Pruitt was not a capital case. However, a challenge to the adoption of a proposed order in a capital case was presented in Hall v. Catoe, 360 S.C. at 365, 601 S.E.2d at 341. Again, this Court did not prevent the practice of submitting a proposed order:

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<sup>5</sup> Rather than showing any signs of retreat, the Court has repeatedly directed the parties follow the process. *See, e.g., Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018).

Although we *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.

360 S.C. at 365, 601 S.E.2d at 341 (emphasis added). Not only did this Court not ban the proposed ordered process, it did not even find the Hall order resulting from the process to be deficient. Rather, the Court ultimately concluded the process produced an acceptable order finding “the evidence sufficiently indicates the PCR judge spent an adequate amount of time reviewing the order before adopting it.” Id. Here, **no proposed order was submitted** by either party. That was **because Stanko objected** to the submission of proposed orders. The Court merely used the State’s post-hearing memorandum as a template for its own Order Denying Relief, but made its own changes to that template.

Consequently, Stanko can show no violation of the remand order, and no violation of either Pruitt or Hall. More recent than either Pruitt or Hall, though, is the discussion of proposed orders in Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589-90 (2019). In Fishburne, even while acknowledging once again that the practice of calling for proposed orders from litigants remains routine, this Court instructed that particular care must be taken in the process:

The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (“[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.”). When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as

required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

427 S.C. at 516, 832 S.E.2d at 589–90.

Simply, the process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCPP), and custom, Hall, 360 S.C. at 365, 601 S.E.2d at 341. Further, a long line of precedent, state and federal, allows the acceptance of proposed order language where the court independently reviews and adopts the language as its own. *See, e.g., Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) (acknowledging prior holdings that “verbatim adoption of findings of fact prepared by prevailing parties” should be treated as findings of the court though recognizing it had “also criticized that practice.”) (citing Anderson v. Bessemer City, 470 U.S. 564, 572 (1985))<sup>6</sup>; State v. Holmes, 832 S.E.2d 777, 781 (Ga. 2019) (“It is well established that a trial court may request and then adopt a proposed order from one party. Doing so does not itself demonstrate an absence of cautious discretion.”) (internal citations omitted); McGahee v. State, 885 So.2d 191, 229–30 (Ala.Crim.App.2003) (“even when a trial court adopts verbatim a party’s proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous.”)<sup>7</sup>. The process our Court has directed be followed contains specific

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<sup>6</sup> Though the Supreme Court in Anderson noted the criticism, the Court ultimately resolved “that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.” Anderson, 470 U.S. at 572. Here there was no adoption of a proposed order because none was ever submitted.

<sup>7</sup> Other cases allow adoption of such language. *E.g., United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964) (in reviewing order from district court adoption of entirety of proposed order, “Those findings, though not the product of the workings of the district judge’s mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.”); Tennille v. W. Union Co., 785 F.3d 422, 440 (10th Cir. 2015) (“the fact that the district court adopted the order drafted by the parties, alone, does not establish that the district court failed to exercise its judgment independently”); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1215 (3d Cir. 1993) (“While we cannot dispute that a district court’s verbatim adoption of many of a party’s proposed findings does not always represent a desirable practice, we are

safeguards and cautions to ensure that the process is one where care is taken in review, both by the parties and the judge, and both before and after the order is entered.

With the Court having recently spoken on the safeguards to ensure fairness in the procedure, it is unnecessary to scrap the precedent in favor of less structure – placing all requesting of additional findings or reconsideration in the Rule 59 stage (a later submission with the same presentation). At bottom, a litigant will always be allowed to ask for certain findings of facts and urge certain conclusions of law. In fact, the capital PCR statute allows for the presentation of post-trial briefing, which is, necessarily, presented in a litigant’s preferred phrasing:

Within thirty days from the receipt of the transcript, or if the judge requests post trial briefs, within thirty days from the receipt of the post-trial briefs, the hearing judge in writing shall make specific findings of fact and state expressly the judge’s conclusions of law relating to each issue. ....

S.C. Code Ann. § 17-27-160 (D). That is all that occurred here, the filing by the State of a post-hearing memorandum in compliance with the Rules. If the Court wants to rely on that filing as a template for its final order, then it may do so as long as it is the Court’s Order and findings, which it was here. There is no question about that because the 2<sup>nd</sup> PCR Court made that clear and after careful consideration of both the Rule 59 motion and the State’s response, declined to change its Order Denying Relief. (See Order Denying Motion to Alter or Amend, App. 4282).

Whether taken from a document titled “post-trial brief” or a document submitted as a proposed order, if the PCR judge, after careful consideration, adopts the language offered, that language becomes the Court’s order. Anderson, 470 U.S. at 572. A judge is free to accept or reject a proposed phrasing, finding, or conclusion, as that judge deems appropriate. What is critical

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satisfied that the district court’s findings here satisfy Rule 52(a) and should be upheld unless they are not supported by the evidence in the record.”); Patton v. State, 784 So. 2d 380, 388 (Fla. 2000) (rejecting challenge to verbatim adoption: “[t]he court chose to adopt the State’s arguments as an accurate and well-documented reflection of the facts and law pertaining to the issues.”).

is whether the judge considered the submission(s) in light of the evidence and law; gave his own, independent consideration to those submissions; and, made the proposed language his own. *See Hallford v. State*, 629 So. 2d 6, 8 (Ala. Crim. App. 1992) (where trial judge included sentence that “adoption of this order is based on the Court’s own evaluation of the evidence and law in the case,” the reviewing court found “We do not have a situation here where the trial court merely adopted verbatim the proposed order of the State. It is clear from the trial court’s order denying the petition that the trial court independently evaluated each allegation and denied the petition.”). *Accord Hall v. Catoe*, 360 S.C. at 341, 601 S.E.2d at 365 (noting the PCR judge “told the parties that he would ‘carefully review the proposed order and insure that the facts and conclusions of law are as I find them to be.’”). The record supports that is the case here.

The 2nd PCR Court in this case, much like the PCR judge in Hall, reviewed the Order he signed to make sure the facts and conclusions were as he determined them to be. Also like Hall, there is specific evidence of an adequate time spent in review before issuing the Order. The record and e-mails show the lengthy time spent in review and work.

Stanko’s argument the Court blindly signed the post-hearing memorandum shows he has failed to see the forest for the trees. The great weight of the evidence is the Court heard from each side; considered each side’s arguments; considered language from each side; and heard no objection to the process from PCR counsel on using the post-hearing memorandum as a template. Counsel did object to the proposed order process, but proposed orders were never submitted.

Stanko has shown no factual support for his claim that the procedure used in this case violated this Court’s order and/or his right to due process. Further, Stanko has also failed to show legal support for his assertions decrying the proposed order process, which was not used. The best rebuttal to Stanko’s argument may be found in review of cases where there was truly evidence a

judge failed to review and adopt the findings offered through a proposed order. For instance, in Ex parte Ingram, 51 So.3d 1119 (Ala. 2010), the Court reviewed an order reflecting the signing judge did not exercise sufficient independent review. There was a glaring factual error the judge could not have failed to recognize had an independent review been conducted – the order referenced the judge reviewing the conviction was also the trial judge but he was not:

The obvious problem with the emphasized portions of the above-quoted passages from the June 8 order is that Judge Fielding, not Judge Hollingsworth, presided over Ingram’s capital-murder trial. Although minor factual errors understandably find their way into orders drafted by trial courts in handling busy dockets, an error as to whether the judge in fact sat as the trial judge in a capital-murder trial and is basing his decision on personal observations and personal knowledge acquired by doing so is the most material and obvious of errors.

Ex parte Ingram, 51 So. 3d at 1123. Further still, the judge actually attempted to rescind the erroneous order and recuse himself; however, that later order was found deficient for lack of jurisdiction as Ingram’s post-hearing motion was not timely. 51 So. 3d at 1121. The Court concluded: “In this unusual case, however, we cannot conclude that the above-stated ‘general rule’ is applicable. That is, despite the fact that the trial judge signed the June 8 order, we cannot conclude that the findings and conclusions in that order are in fact those of the court itself.” Id., at 1123. This case shares no similar facts. Stanko has offered none in support of his argument. The record supports the 2<sup>nd</sup> PCR Court was engaged and decided the matter on the substance of the presentation and arguments.<sup>8</sup>

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<sup>8</sup> In Ex parte Scott, 262 So. 3d 1266 (Ala. 2011), the Court found error when a trial court *summarily dismissed* an action and adopted an adversarial pleading, an answer to the complaint, as its order, rather than a proposed order. Id., at 1274. This case shares no such facts. The matter was not summarily dismissed and the judge did not adopt an answer to a complaint without addressing the evidence offered in collateral proceedings. Rather, the Court used a post-hearing memorandum as a template and after careful and independent review of the proposed language in light of the evidence offered during the PCR hearings denied relief. In similar fashion to Scott, the collateral court in a Pennsylvania capital case, while summarily dismissing an action, crafted “a three-page

To the extent Stanko relies on Jefferson v. Upton, 560 U.S. 284 (2010), a capital habeas action arising from the denial of relief in the 11th Circuit Court of Appeals,<sup>9</sup> his reliance is misplaced. In Jefferson, after a concern whether the acceptance of the proposed order in the circumstance of the case was a sound judicial acceptance, the Supreme Court remanded for further findings on whether the order should be given deference. On appeal from remand proceedings, the 11th Circuit summarized:

In laying out its concerns, the Supreme Court noted that, while the verbatim adoption by a court of findings of fact prepared by a prevailing party is often permissible, the use of such a practice might be procedurally problematic “where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them.” Id. at 294, 130 S.Ct. 2217.

Jefferson v. GDCP Warden, 941 F.3d 452, 462 (11th Cir. 2019) (emphasis in original). After a hearing on the process actually used by the state court, the district court found each side had submitted post-hearing briefs; but, the process lost its balance after that: 1) the judge’s clerk *ex parte* contacted the State requesting a proposed order; 2) there was no direction on the substance

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opinion restating the procedural history of the case and” simply incorporated a brief by the district attorney. The state’s supreme court determined it would not “condone the wholesale adoption ... of an advocate’s brief,” especially where there were claims of prosecutorial misconduct asserted. Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999). The court, nonetheless, reviewed the issues on appeal. Id. Again, these facts are distinguishable. Stanko’s action was not summarily dismissed; both sides submitted post-hearing memorandums; the court did not incorporate the initial return in the action, but considered the evidence presented at the Robertson PCR hearing.

<sup>9</sup> To the extent Stanko relies upon a potential review of the practice in Hamm v. Allen; the U.S. Supreme Court denied cert. on October 3, 2016. Id., 137 S.C. 39 (2016). The 11th Circuit had acknowledged the order was adopted without modification, but noted “this procedural shortcut has no bearing on our disposition of Hamm’s federal habeas appeal, *see* Jones v. GDCP Warden, 753 F.3d 1171, 1182–83 (11th Cir. 2014)...” 620 Fed.Appx. 752, 756 n.3 (11th Cir. 2015). It did, “strongly criticize the practice of trial courts’ *uncritical* wholesale adoption of the proposed orders or opinions submitted by a prevailing party.” Id. (emphasis added). The 11<sup>th</sup> Circuit explained the judge in that case failed to even strike the word “proposed” from the caption. Id.

of the order; 3) while the clerk reviewed the transcript and other documents, he did not recall review of the post-hearing briefs, nor communications with the judge on the matter; 4) the clerk did not recall seeing the proposed order, or participating in review of it; 5) upon learning of the *ex parte* request, Jefferson's counsel moved for recusal and asserted he would have requested to send a proposed order, but considered it to be "an exercise in futility," believing the judge had decided the case; 6) the judge denied recusal and did not request a competing order, 7) 21 grammar and spelling errors remained in the order; and, 8) the order referenced an affidavit from an attorney never in the case. 941 F.3d at 463-465. The district court reasoned, based on these facts, under the relevant federal law governing habeas reviews, the state order "invited the reasonable inferences that Judge Newton failed to review the proposed order submitted" by the state, "before executing the final order and failed to review the relevant evidence." *Id.*, at 474. Finding "no clear error in the district court's fact finding," the 11th Circuit resolved the state order would not be afforded "a presumption of correctness." *Id.*

To underscore, the federal court did not vacate the order, but found the statutory deference was not available.<sup>10</sup> Critically, there was no evidence of careful consideration by the judge. The

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<sup>10</sup> Stanko does not suggest such a grave consequence – only the federal court may not afford heightened or any deference to its review of federal issues from state court on federal habeas review. That view is not dominant. *See Green v. Thaler*, 699 F.3d 404, 416 (5th Cir. 2012), *as revised* (Oct. 31, 2012) (recognizing the Court "criticizing the practice" of verbatim adoption, but finding "the Court has never found it to violate due process or to entitle a state court's decision to less deference under AEDPA.") (citing *Brownlee v. Haley*, 306 F.3d 1043, 1067 n. 19 (11th Cir. 2002)(with notation "agreeing with the district court that, although verbatim adoptions by state court of State-submitted proposed orders has been criticized, the practice has been consistently upheld where adequate evidentiary proceedings were held and the court's order was fully supported by the evidence")); *Young v. Catoe*, 205 F.3d 750, 755 n. 2 (4th Cir. 2000) ("It is true that, with regard to opinions and orders rendered by the district courts within this circuit, "[t]he adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions." *Shaw v. Martin*, 733 F.2d 304, 309 n. 7 (4th Cir.1984)(citing examples)(Nonetheless, the disposition of a petitioner's constitutional claims in such a manner is unquestionably an "adjudication" by the state court.")). Federal courts have also

federal court, without key testimony from the judge (as he had passed away), simply looked at what was left – the law clerk did not read or research the proposed order; the proposed order was requested *ex parte*; there was no opportunity to provide opposing views; the same drafting errors remained; and, the order included reference to evidence that was not presented or otherwise part of the case. That is far closer to Ex parte Ingram than the facts of this case as shown in this record. Moreover, the applicability of Jefferson is limited not only to its facts, it is also limited to federal habeas review *prior to the AEDPA*, as the 11th Circuit was careful to note:

Taking all of this together, we agree with the district court that the factual record compels the conclusion that Jefferson did not receive a full and fair hearing in his state court habeas proceeding. We, therefore, hold that the state court’s factual findings were not entitled to a presumption of correctness under pre-AEDPA law.

We neither hold nor imply that if this were a post-AEDPA case the state court’s adoption of the order in these same circumstances would affect the presumption of correctness afforded by 28 U.S.C. § 2254(e)(1) (1996) or the deference provided factual determinations by § 2254(d)(2) (1996). See Jones v. GDCP Warden, 753 F.3d 1171, 1183 (11th Cir. 2014) (explaining that the Supreme Court’s decision in Jefferson “never could have held, nor did it presume to hold, that this kind of adopted order is not entitled to AEDPA deference”); see also Rhode v. Hall, 582 F.3d 1273, 1281–82 (11th Cir. 2009) (Where both sides had opportunity to present the state habeas court with their version of the facts, the court’s verbatim adoption of the State’s proposed order, which petitioner contended selectively used and mischaracterized evidence, did not deprive the findings of AEDPA deference.).

941 F.3d at 476–77.

Even so, the point is – unlike Jefferson – the record here soundly supports this Court carefully reviewed the record and evidence in this case, including that at both PCR hearings, and

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rejected considering a related due process claim when reviewing state convictions in habeas. See Trevino v. Johnson, 168 F.3d 173, 180 (5th Cir. 1999) (finding alleged error on adoption of state’s proposed findings not cognizable in federal habeas for failure to raise a constitutional error that could undermine the inmate’s legal detention); see also Jolly v. Gammon, 28 F.3d 51, 54 (8th Cir. 1994) (“the court’s disapproval of this practice cannot convert Jolly’s challenge to a proceeding collateral to his detention into a constitutional challenge of the detention itself.”).

the post-hearing memorandum, and adopted the language and substance of the order that it did as its' own. The Order became this Court's Order upon adoption of the language used. Jefferson teaches significant errors may reasonably raise a concern with the process as used in a particular case, but it is not dispositive of judicial error. Stanko has been afforded ample opportunity to confirm the order is, in fact, the 2<sup>nd</sup> PCR Court's order, and his challenges have resulted in creating firm record support the Court did not abandon his judicial duty. Stanko's argument does not stand up in light of the remand and additional evidence before the 2<sup>nd</sup> PCR Court and this Court.

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

Stanko's next ground has nothing to do with the IAC claims he raised at his 1<sup>st</sup> PCR hearing and raised again at his 2<sup>nd</sup> PCR hearing. Stanko contends the 2<sup>nd</sup> PCR Court in its Order Denying Relief made legally and factually erroneous findings in describing "The Benchmark Legal Principal" controlling the IAC claims below. Stanko is simply wrong in this regard.

The 2<sup>nd</sup> PCR Court appropriately stated the benchmark legal principle in this case was whether Stanko was prejudiced by the representation of his 1<sup>st</sup> PCR counsel. Robertson, supra. This is exactly what this Court ordered the 2<sup>nd</sup> PCR Court to determine. (Order of Remand of this Court). Because Stanko's grounds which follow this ground are IAC claims against trial counsel, the proper standard of review as to those claims, as the 2<sup>nd</sup> PCR Court found, was Strickland and its progeny. Robertson, supra. And, the 2<sup>nd</sup> PCR Court set forth the proper standard for determining prejudice in an IAC claim against trial counsel in the sentencing phase. (App. 4078-4139, citing Wiggins v. Smith, 539 U.S. 510 (2003); Strickland v. Washington, 466 U.S. 668 (1984); Porter v. McCollum, 558 U.S. 30 (2009); Rompilla v. Beard, 545 U.S. 373 (2005); Cullen v. Pinholster, 563

U.S. 170 (2011); Penry v. Lynaugh, 492 U.S. 302 (1989); Bobby v. Van Hook, 558 U.S. 4 (2009) and Wong v. Belmontes, 130 S.Ct. 383 (2009), among other appropriate progeny of Strickland).

Stanko's main complaint here is he lost before the 2<sup>nd</sup> PCR Court and that Court did not find the way he wished for it to find, i.e. for him. As described under the IAC grounds, Stanko claims the Order in error states his presentation before the 2<sup>nd</sup> PCR Court was cumulative of what was submitted at trial. (*See, e.g.*, Order at 23, citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998)). He claims this case differs because he did not offer "merely 'a more elaborate version' of the mitigation evidence" presented at trial as the Court found. (Order, at 25) (quoting Jones, 332 S.C. at 339, 504 S.E.2d at 826). He implies the 2<sup>nd</sup> PCR Court simply lumped this case in with Jones, because there were similarities and did not conduct a proper deficient performance or prejudice analysis. Stanko is simply wrong. The 2<sup>nd</sup> PCR Court followed Strickland and Wiggins in conducting its analysis. (App. 4078-4139; 4146-47).

As will be discussed in detail under each IAC Ground, the 2<sup>nd</sup> PCR Court did not merely find similarities with Jones, but conducted a proper deficient performance **and** prejudice analysis *as to each claim and all of the claims of IAC against trial counsel*. As the 2<sup>nd</sup> PCR Court found, what Stanko presented as to the IAC grounds below at the Robertson hearing was cumulative, a fancier mitigation case, or the evidence was simply not credible, and as a result, *trial counsel was not deficient nor did Stanko suffer prejudice*. Jones v. State, *supra*. Other cases besides Jones have recognized this principle, as set forth in the 2<sup>nd</sup> PCR Court's Order. Cullen v. Pinholster, 563 U.S. 170, 200-01 (2011) ("The 'new' evidence largely duplicated the mitigation evidence at trial" and left "no reasonable probability that the additional evidence Pinholster presented in the state habeas proceeding would have changed the jury's verdict"); Morva v. Zook, 821 F.3d 517, 530 (4th Cir. 2016) (same); Byram v. Ozmint, 339 F.3d 203, 211 (4th Cir. 2003) ("In light of the wealth of

information presented by trial counsel, additional information about Byram's childhood would have added little. There was no 'reasonable probability' that the outcome would have been different had trial counsel conducted an even more exhaustive investigation into Byram's background. Indeed, the evidence presented before the PCR court was largely cumulative."); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)(no IAC, mitigation was similar).

The United States Supreme Court has rejected the view counsel should have presented additional "humanizing evidence" about a defendant, stating "[a]dditional evidence on these points would have offering an insignificant benefit, if any at all" to the remaining record. Wong v. Belmontes, 558 U.S. at 22-23. The 2<sup>nd</sup> PCR Court also recognized there were cases distinguishing the above cases. (See Order citing Council v. State, 380 S.C. at 177-79, 670 S.E.2d at 365-66; VonDohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). Simply put, the 2<sup>nd</sup> PCR Court did not simply lump this case in with Jones, but made detailed findings of fact and conclusions of law as to each ground as will be discussed below.

Stanko also complains the 2<sup>nd</sup> PCR Court did not give proper authority to the ABA Guidelines for capital defense attorneys. As this Court is aware, the United States Supreme Court has recognized the ABA Guidelines are not commands counsel must follow or he is ineffective, but are guides; and, they are not the standard for ineffective assistance of counsel. Strickland; Bobby v. Van Hook, 558 U.S. 4 (2009). They are not because they can never anticipate the myriad of circumstances counsel could face in a specific capital case. Id. This complaint has no merit.

Stanko's next complaint is the Order contains legally and factually erroneous findings regarding Stanko's claims of IAC in failing to investigate and present available mitigating evidence and instead presenting evidence dehumanizing Stanko. Stanko lumps several claims together under this heading, but breaks down each claim separately. Again, Stanko's chief

complaint is the 2<sup>nd</sup> PCR Court did not find as he wished it would have found, i.e. in his favor. If the 2<sup>nd</sup> PCR Court ruled against Stanko, to Stanko it is error regardless of the facts and law. This is not a valid complaint or reason to grant certiorari. Stanko also complains about credibility findings of the 2<sup>nd</sup> PCR Court, which were adverse to him. Such findings are entirely within the 2<sup>nd</sup> PCR Court's province as it viewed the testimony and is familiar with the entire record in this case. Stanko wishes the 2<sup>nd</sup> PCR Court had found certain of his witnesses credible, but the Court in its' wisdom and discretion did not. Those credibility determinations were correct and are supported by the record. This is simply not a valid reason to overturn the 2<sup>nd</sup> PCR Court's Order.

Finally, as discussed below, and as the 2<sup>nd</sup> PCR Court found, there is no merit to Stanko's IAC claims. Stanko has not shown he was prejudiced by 1<sup>st</sup> PCR counsel's representation because he has failed to show any ground of *ineffective assistance of trial counsel* 1<sup>st</sup> PCR counsel overlooked, which would have entitled him to post-conviction relief. Robertson v. State, *supra*. In fact, 1<sup>st</sup> PCR counsel: Axelrod, Fredrick, and Shaffer, raised almost all of the very same IAC claims 2<sup>nd</sup> PCR counsel raised which are being raised to this Court, and the 1<sup>st</sup> PCR Court after careful consideration of those claims denied relief. (Suppl. App. 484-575). So did the 2<sup>nd</sup> PCR Court. (App. 4058-4147).

Stanko also argues Diggs' later disbarment. As set forth previously, Diggs' disbarment had nothing to do with counsel's representation in this case, and it occurred years after this trial. In the Matter of William Issac Diggs, *supra*. This is not the basis for overturning Stanko's 2006 convictions or sentences Padgett v. United States, 302 F.Supp.2d 593, 603 (D.S.C. 2004) (finding no IAC stemming from counsel's subsequent disbarment for misuse of client funds) (citing United States v. Novak, 903 F.2d 883, 889 (2d Cir. 1990); *see also* Roach v. Martin, 757 F.2d 1463, 1472-73 (4<sup>th</sup> Cir. 1985) (finding no reason in disbarment record to overturn denial of PCR); Soering v.

Deeds, 217 F.3d 840 (4<sup>th</sup> Cir. June 30, 2000) (summarily rejecting contention lead counsel who had been since disbarred, was emotionally and mentally troubled at the time of trial); United States ex rel. Ortiz v. Sielaff, 542 F.2d 377, 380 (7<sup>th</sup> Cir. 1976) (subsequent disbarment having nothing to do with petitioner's case is irrelevant to performance at trial); Hernandez v. Wainwright, 634 F.Supp. 241 (S.D.Fla. 1886) (subsequent disbarment not in itself sufficient absent showing of direct nexus with trial); Collins v. State, 600 N.E.2d 284, 285 (Ohio App. 1991)(similar); White v. State, 481 S.E.2d 804 (1997) (Strickland still applies after unrelated disbarment). Diggs' later misuse of client funds starting in 2009 would in no way relate to his representation of Stanko in 2005-2006. Plus, it was unrelated to this case.<sup>11</sup> This is not sufficient reason to grant certiorari.

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

This IAC ground actually has four (4) claims. Respondent will address each in turn. Three (3) of the four (4) claim of this ground were raised to and addressed by both the 1<sup>st</sup> and 2<sup>nd</sup> PCR Courts in their Orders and denied. (Suppl. App. 484-575; App. 4058-4147). Both the 1<sup>st</sup> and 2<sup>nd</sup> PCR Courts addressed the claims of *alleged* IAC in (1) presenting dehumanizing evidence, (2) pursuing an insanity defense, and (3) not presenting a sufficient life history.<sup>12</sup> The allegation of IAC in (4) allegedly not presenting brain damage and mental illness is an extension of a ground

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<sup>11</sup> Stanko also argues the fact that 1 of his experts was only recently, 2021, convicted of Distribution of Controlled Substances (pain killers) and sentenced to federal prison. However, it would have been physically impossible for either trial counsel to foresee the criminal conduct engaged in by an expert witness over 10 years after trial. The conduct was also completely unrelated to this case.

<sup>12</sup> The 1<sup>st</sup> PCR Court addressed Claim (1) and (2) separately in its Order of Dismissal. The 2<sup>nd</sup> PCR Court combined Claims (1) and (2) and addressed them collectively in its Order of Denying Relief. (Order, Young, Suppl. App. 513-20; Order, Brown, App. 4086-4103).

raised at the 1<sup>st</sup> PCR, but with new facts which was addressed by the 2<sup>nd</sup> PCR Court and denied. (App. 4058-4147).

### 1. Psychopathy/ASPD /Negative references

In this subpart of Ground III., Stanko alleges trial counsel were ineffective for allowing opposing counsel and Stanko's defense experts to refer to Stanko as a psychopath or otherwise portray him in a negative light during trial. This same ground was raised to the 1<sup>st</sup> PCR Court by 1<sup>st</sup> PCR counsel and denied. (Supp. App. 513-20, Order of Dismissal, Young, pp. 30-37).<sup>13</sup> As a result, 1<sup>st</sup> PCR counsel could not have prejudiced Stanko for this reason. Robertson, *supra*.

Regardless, given this record, and the information available to counsel prior to trial, as the 1<sup>st</sup> and 2<sup>nd</sup> PCR Courts found in their Orders, counsel made an objectively reasonable strategic trial decision to pursue the defense of *involuntarily acquired psychopathy* given counsel's experts' diagnoses and findings. (Order, Young, Suppl. App. 513-20; Order, Brown, App. 4086-4103).

Stanko ignores the fact that trial counsel could not choose or dictate the facts of the case or Stanko's criminal past. Counsel were familiar with the facts and evidence through discovery and knew Stanko would be proven guilty of being the perpetrator of the crimes against Laura Ling, the attempted murder of her daughter, and the other crimes against both victims, including raping the

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<sup>13</sup> This Court can take judicial notice of its own records. *See also Stanko v. State*, 2014-CP-26-00035 (Order of Dismissal filed May 18, 2016, pp. 7-8) (Horry County PCR/Turner murder) (finding "references to psychopathy, including testimony from Stanko's expert witness that Stanko is a psychopath, was an attempt to corroborate Stanko's defense of insanity and mitigate his culpability by showing that he could not control his actions" and thus a valid trial strategy articulated by counsel at PCR). This Court denied certiorari in the appeal from the denial of Stanko's PCR from Horry County involving the Henry Turner murder.

daughter.<sup>14</sup> The facts of the Ling crimes were horrible. Counsel knew they could not keep out the horrible facts in the guilt and penalty phase. Counsel also knew Stanko's prior criminal record and he had just been released from prison for the kidnapping of McClendon and multiple convictions for breach of trust and larceny would be introduced in the penalty phase, along with evidence Stanko was defrauding others almost immediately upon release from prison while under community supervision. In summary, counsel knew the State was going to be able to prove at trial and in the sentencing proceeding that Stanko committed the Ling offenses and had engaged in a life of criminal behavior before these crimes, and had not been rehabilitated by 8 ½ years in prison.

Stanko now ignores the fact that trial counsel sought to explain and mitigate Stanko's life of crime and his actions in this case, due to developmental brain damage using birth records, a head injury in adolescence, and current brain scans and medical and psychiatric testimony. If counsel did not mitigate these crimes with some type of medical mental health defense, then the only evidence would be Stanko was a career criminal, who had not been rehabilitated by prison, and had committed even more heinous offenses upon release. However, as brought out on cross-examination of Dr. Sachy in this case, Stanko had been repeatedly diagnosed during his lifetime, long before these present crimes, with ASPD or psychopathy. This could not be avoided.

Trial counsel did not come to this case as novice criminal attorneys. Bill Diggs previously worked as the head of Appellate Defense. (App. 3071). He had argued a capital case before the

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<sup>14</sup> Counsel also knew the State was going to be able to prove Turner's murder, just hours after the Ling crimes. The cases were interrelated. After murdering Turner, Stanko abandoned Ling's distinctive car at Turner's home, and stole Turner's truck and fled the coast. Counsel would have believed the Turner crimes, if not introduced in the guilt phase as "res gestae," would be at sentencing as character evidence. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984) Counsel could not have foreseen they would successfully keep out evidence of Turner's murder in both phases. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1990); State v. Woomer, 276 S.C. 358, 277 S.E.2d 696 (1981).

U.S. Supreme Court and briefed numerous others. (App. 3024). He worked with David Bruck, a nationally-renowned capital defense attorney. (App. 3072). Diggs had tried capital cases as a sole practitioner. (App. 3025). He had garnered an acquittal in 1 case and a hung jury in another resulting in a life sentence. (App. 3070). Gerald Kelly had previously been involved in 9 capital cases. (App. 2984). Diggs and Kelly obtained 2 of only a few capital acquittals in “the modern era of the death penalty” in this state. (App. 3070-71). Prior to Stanko’s trial, Diggs had tried 2 capital cases with “brain issues” as the defense, had won both, one an acquittal and another a life sentence, and he desired to explore this angle in Stanko’s case given the evidence Stanko committed the offenses. (App. 3028-30). But Diggs’ testimony demonstrates this was not a rash or uninformed decision. “It’s just the way that it happened.” (App. 3029). Stanko reported to Diggs “he had blacked out” during an argument with Ling and responded with “the murder or the conduct that followed.” (App. 3031-32). Counsel believed there had to be some reason for Stanko’s actions (App. 3028, 3032, 3076). Counsel wanted to determine what was going on in Stanko’s brain at the time of the offenses. Counsel also assessed with the “crime scene” in this case, he was not going to win this case with Stanko’s social history and he needed a different defense or approach. (App. 3065).

Diggs initiated his investigation, ultimately retaining Drs. Albiniak, Thrasher, Gur, Einhorn, Wu, Sacy, and Califf. (App. 3033-35). Diggs first consulted with 2 local psychiatrists he had a prior relationship with and trusted for advice in legal cases: Drs. Albiniak and Thrasher. (App. 3073-74). Diggs also perceived a strategic benefit from utilizing local doctors versus only bringing in physicians from out-of-state. The jury may know them or be more accepting of their testimony. (App. 3074). For example, Dr. Thrasher was stationed at Guantanamo Bay at the time of Stanko’s birth, so he had a familiarity with the base and the medical facilities there even though

he was a psychiatrist and did not deliver Stanko. (App. 3040). Dr. Thrasher's role did not end there however, he also rendered an opinion Stanko was insane during the time of the crimes. (App. 3040).

Dr. Thrasher referred Diggs to Dr. Sachy, another psychiatrist, who could show brain function, a goal of Diggs'. (App. 3076). Not only could he explain the condition of Stanko's brain, but he could "demonstrate it with visual evidence." (App. 3038). So Diggs consulted with and hired Sachy because he came recommended by a local doctor he trusted and frequently went to for advice and because he could provide a visual representation of insanity. (App. 3037, 3040, 3042, 3052-53). Consultation with Sachy connected Diggs to Drs. Wu and Einhorn, who were brought into the case by Sachy's recommendation to conduct the PET scan which informed their medical opinions. Dr. Wu would create and utilize graphics to assist the experts' explanation of the diagnoses. (App. 3039, 3080-83). Given the possibility, Diggs felt a visual representation "would be an effective way to present the evidence" from these doctors. He discussed that years and years ago when the law on insanity was discussed or examined "there was no technology available to look at how the brain functioned at the time," but there is now, and he saw no reason why he could not "use brain scans in criminal cases." (App. 3076).

Diggs consulted with still more medical experts, Drs. Gur, Brawley, and Crawford. Gur was not available to testify because he was deployed at the time of trial, but he conducted a volumetric brain analysis from Stanko's MRI and made his report available for other experts to address at trial. (App. 3067-68, 3083-86). Diggs recalled that Drs. Crawford and Brawley were not familiar with the technology he thought was beneficial to his jury presentation, or were not "comfortable in going into that area," and so he did not utilize them for testimony. (App. 3077).

Diggs' testimony demonstrates, he was not closeminded about this defense or retaining

these experts, He indicated it “could’ve been changed at any time if it appeared to [him] that it didn’t work out or wasn’t working out.” (App. 3038). His use of Dr. Sachy’s expert opinion “was dependent upon whatever developed after” he hired him. He “was always in a position to change that because there were other experts that we had discussed this case with.” (App. 3041). But his investigation remained consistent at each and every turn, as exemplified by the testimony and diagnoses of his expert witnesses. (App. 3042; 2941-50). Crucial to his continued investigation and preparation for trial, Diggs found that “each step of the way, as the evidence developed, it fell more in line with what the theory was”—Stanko’s brain was not “functioning properly nor in healthy fashion at the time he committed these acts,” and “substantiating physical evidence” existed in the form of brain scans to support it. (App. 3078).

The experts agreed Stanko had ASPD. (App. 3078). Diggs understood this diagnosis “could be considered as a mitigating factor” depending “on the way it’s presented and how it’s pursued.” (App. 3075). His insanity defense “wasn’t solely based on Dr. Sachy’s opinion.” (App. 3047). He felt it was appropriate in Stanko’s case “because he didn’t remember what happened. He blacked out. You have multiple medical doctors’ expert opinions that he was insane, and we could demonstrate it with visual evidence.” (App. 3057). Comparing the earlier crimes for which Stanko was imprisoned, Diggs pointed out Stanko was “not in his right mind even then” based on the evidence of that offense: he drug his live-in girlfriend by the hair down the hallway as he sang. The facts “fit squarely” with the circumstances of the Ling crimes. (App. 3079). Diggs testified, “guilt implies that there was conscious awareness of what he was doing. I don’t think he was.” (App. 3079).

And though he was chiefly responsible for fact-related mitigation rather than medical or mental-health related mitigation, Gerald Kelly likewise recognized Stanko “was clearly mentally

ill.” (App. 2991). He recognized the experts examined Stanko and “determined that he had a brain injury,” which fit with Diggs’ theory. (App. 2989). He recalled Stanko’s diagnosis included a personality disorder, but the testimony at trial provided reasons for the diagnosis, and it overlapped with the medical diagnoses presented in Stanko’s defense at the guilt phase. (App. 3018).

All of the doctors’ opinions dovetailed. (App. 3054, 3082-83). As Diggs put it, his experts testified Stanko had an abnormal brain which led to impaired judgment in the area of impulse control. And they did more in the way to offer a medical reason for Stanko’s ASPD diagnosis. “They explained why. They explained what that abnormal – abnormality was and how it contributed to this particular incident.” (App. 3086-87). Diggs’ experts linked Stanko’s frontal lobe abnormality to his birth records and additionally to Stanko’s being hit in the head with a bottle of beer as a teenager. (App. 3087-88). As a result, Diggs was successful in getting the jury instructed that they may find Stanko NGRI or GBMI. (App. 3086).

Given the favorable diagnoses and the visual representations in support of them, Diggs assessed that, to him, it did not matter “if it’s as high as 99% of the time that the defense [of insanity] is rejected” because the defense was plainly justified by “the facts here, accompanied by the scans and the video evidence that was put together” to explain why the behavior occurred. (App. 3080). To Diggs, neither the wording of the insanity statute nor the success rate of the insanity defense was “outcome determinative” as to “whether or not insanity needs to be used or pursued in a particular case.” (App. 3057). And his theory was consistent from the guilt phase into sentencing because, as Diggs put it, this case did not present “a situation where it was either/or.” (App. 3055). Counsel would present the insanity defense “at the guilt phase. If the jury didn’t feel like he was insane at that time, certainly that was not reason to eject Drs. Wu or Gur, Sachy or Thrasher. It wasn’t a reason to eject them in terms of mitigating evidence.” (App. 3055). Just

because the jury did not find Stanko insane at the guilt phase, it did not make it “inconsistent to accept that evidence as mitigating evidence at the sentencing phase.” (App. 3056).

Diggs understood and wished to show the jury the images put together by the doctors showed Stanko’s fully-engaged brain had a level of activity “well below what it should have been in terms of a normal scale.” (App. 3082; 3050). Diggs understood the affected area “is the same area that would have regulated the limbic system” but because the “brain didn’t operate or didn’t function properly there, that – that impulse drove his conduct.” (App. 3082). “It wasn’t an analysis in his frontal lobes that would have occurred in a normal, healthy brain, and that’s why he committed the offense that that’s why he blacked out and doesn’t remember it.” (App. 3082). Diggs also articulated that to compare the brain to a reptile was to explain an inability to regulate impulse. It was a reference to or explanation of the limbic system where Stanko’s brain defect was located. (App. 3060). Diggs plainly failed to agree this terminology was offensive and inappropriate in the context of Stanko’s case because the limbic system was “where that killer instinct or impulse came from in Stephen.” (App. 3060). Stanko could not regulate his impulses. (App. 3062-63).

Diggs testified some of Sachy’s testimony was not expected. Diggs testified he had read Sachy’s report before trial and interviewed him. During those interviews, Sachy had never made the comparison’s he made during trial comparing Stanko to other famous psychopaths. This testimony was not planned but unexpected. (App. 3044-45; 3047-48; 3062-64; Suppl. App. 402-06; 415-16).

Further, Diggs testified he understood his job as counsel was to select who the experts “were going to be,” *not* “to tell them what to do.” (App. 3044). You assist your witnesses to prepare to testify at trial, but “you don’t tell a doctor how to testify about his area of expertise.” (App.

3044). He felt “it would have been malpractice” and a “mistake not to present” the evidence of a brain defect despite the statistics he understood to be against it, because the evidence he had was “strong”. (App. 3054; 3088-89).

In presenting each of the witnesses, counsel attempted to explain, not excuse, Stanko's undeniable behavior to the jury. The crux of the defense, therefore, became Stanko acted a result of a brain defect both at the time of the Ling crimes, the Turner crimes if admitted, and in past incidences of criminal behavior in his lifetime. However, counsel cannot tell experts what to testify to or diagnose. Taken together, the evidence consistently furthered the affirmative defense of insanity and the related mitigation strategy, brain damage and mental disease or defect. The record shows counsel reasonably bolstered the pursuit of this defense through a network of able expert witnesses who at all times worked to explain the reason why Stanko committed the criminal acts. At all times, counsel exercised professional judgment in presenting this defense and mitigation in an objectively reasonable manner. Each assertion presented was supported by specific evidence, with the overall intention of lessening Stanko's culpability for the crimes in hopes of garnering a life sentence. The PCR Courts reasonably and correctly found no basis to find IAC on this allegation. See Williams v. Taylor, 529 U.S. 362, 413 (2000); Wiggins, 539 U.S. 510.

Stanko argues from *his select* cases and articles, and 2 mitigation investigators' testimony at PCR, that ASPD or psychopathy should not be offered as mitigation. However, case law does not support his argument or the mitigation investigators' testimony. Evidence of his personality disorder may not have made Stanko any more likable, but it might have helped the jury understand him and his horrendous acts. See Sears v. Upton, 561 U.S. 945, 951 (2010). Stanko's “claim that counsel failed to perceive what was mitigating and what was aggravating ignores counsel's testimony, which revealed that counsel was well aware of the complexity and attempted to blunt

the effect of the diagnosis.” Commonwealth v. Robinson, 623 Pa. 345, 379 n.11, 82 A.3d 998, 1018 n.11 (2013). The fact the experts consistently diagnosed Stanko with ASPD did not bear on counsel’s effectiveness in his investigation and preparation of Stanko’s defense. Id. at 377-81, 82 A.3d at 1017-19 (holding no IAC for introducing diagnosis of ASPD in the penalty phase of capital trial given the record in the case, for it humanized the defendant and explained why he was the way he was given his background and life history); Ward v. State, 969 N.E.2d 46, 57-59 (Ind. 2012) (counsel’s decision to pursue diagnosis of psychopathy as mitigating evidence was not deficient performance; while evidence of psychopathy might not have made defendant any more likable, it at least attempted to assist the jury in understanding the defendant and it explained his horrendous acts and his documented lack of emotion on the day of the offenses)(citing State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) (psychopathy is mitigation evidence under South Carolina law and psychopathy diagnosis entitled defendant to instructions on certain mental health statutory mitigating circumstances).\_“The fact that [his experts] also provided some damaging testimony does not mean that the decision to use him as a witness fell below an objective standard of reasonableness. Rather, it presented a strategic decision.” Beardslee v. Woodford, 358 F.3d 560, 583, *supplemented sub nom.* Beardslee v. Brown, 393 F.3d 1032 (9th Cir. 2004) (no IAC for calling expert who presented extensive evidence defendant was a sociopath where that testimony also 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 at \*35-36 (N.D. Ohio 2015) (Slip Opinion) (No IAC in offering mitigation evidence of psychopathy diagnosis as expert related diagnosis to developmental and medical issues in defendant’s life and those factors were beyond defendant’s control).

Still “other courts have specifically recognized evidence of [ASPD] can be considered mitigating evidence” because it serves as a response to the prosecution’s claims of malice and intent.<sup>15</sup> Ford v. Schofield, 488 F. Supp. 2d 1258, 1349 (N.D. Ga. 2007), *aff’d sub nom.* Ford v. Hall, 546 F.3d 1326 (11th Cir. 2008) (collecting cases: Mobley v. Head, 306 F.3d 1096, 1098 n.1 (11th Cir. 2002) (Tjoflat, J., dissenting) (evidence of ASPD introduced as mitigating evidence); Brownlee v. Haley, 306 F.3d 1043, 1072-73 (11<sup>th</sup> Cir. 2002) (“jury could have found a mitigating circumstance based on Brownlee’s borderline intellectual functioning and psychiatric disorders, which, again, included . . . antisocial personality disorder”) (*citing* Clisby v. State, 456 So.2d 99, 102 (Ala.Crim.App. 1983) (evidence of psychiatric disorders such as ASPD *must* be considered as relevant mitigating evidence”)); Smith v. Stewart, 140 F.3d 1263, 1270 (9th Cir. 1998) (recognizing ASPD is a mitigating factor under Arizona death penalty sentencing law)). Foremost, the 2<sup>nd</sup> PCR Court noted ASPD or “psychopathy” is recognized as a diagnosis warranting jury instruction on certain mitigating factors. Caldwell, 300 S.C. at 506, 388 S.E.2d at 823 (decided *in*

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<sup>15</sup> Other courts do acknowledge evidence of an ASPD may be damaging, but they note competent counsel can regularly evaluate the potential impact of psychiatric testimony. Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998)(these are decisions left to counsel); Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir.2003)(same); Atwood v. Ryan, 870 F.3d 1033, 1063 (9th Cir. 2017); *e.g.*, Crittenden v. Ayers, 624 F.3d 943, 968 n.15 (9th Cir. 2010)(counsel made a reasonable decision to keep evidence of defendant’s ASPD away from jury). Ford v. Schofield, *infra* at 1349 (“Testimony such as this is a double-edged sword.”). *See* Satcher v. Pruitt, 126 F.3d 5611, 572 (4<sup>th</sup> Cir. 1997)(no IAC in deciding not to call experts where ASPD traits might indicate possible future dangerousness); Fulks v. United States, 875 F.Supp.2d 535 (D.S.C. 2019)(No IAC for making a strategic decision not to offer ASPD traits on the particular facts of this case). However, each court’s determination must be case-by-case and must afford deference to trial counsel’s articulable decision-making as Strickland demands that hindsight not govern the outcome of deficient performance allegations. 466 U.S. at 689.

*favorem vitae*). Counsel knew and understood this. (App. 3075).<sup>16</sup> As the Fourth Circuit held in Truesdale and Byram, trial counsel is in a “Catch 22” in this situation. If he offers the evidence he is accused of ineffective assistance and if he doesn’t offer the evidence he is accused of ineffective assistance. Id. The Fourth Circuit has found that in this situation the decision to offer this evidence is best left to trial counsel’s strategic decision after a full investigation and in light of the facts of each particular case. Id.

As stated above, in furtherance of this allegation, Stanko incorporated the Horry County PCR testimony of Russell Stetler, a mitigation investigator, and presented an affidavit of the same information prepared for use in this case. Stanko objects to the 2<sup>nd</sup> PCR Court’s assessment of Stetler’s offered testimony. The record shows the 2<sup>nd</sup> PCR Court is correct, and Stanko is wrong. Stetler’s testimony and affidavit are irrelevant, unpersuasive, and inappropriate in this setting. At this PCR, PCR counsel “consistently inquired into how a lawyer practicing in accordance with the prevailing standards in South Carolina would handle certain factual scenarios derived directly from this case.” McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). Stetler’s opinions on this mitigation presentation—and that of Dale Davis to the extent elicited and argued in support of a grant of relief on this claim—“amounted to a case-specific application of the Strickland test that was not designed to assist the PCR Court to understand certain facts, but rather, was a legal argument as to why the PCR Court should rule” for Stanko. Id. at 56-57, 661 S.E.2d at 366.

It is not proper to offer an opinion “as to acceptable legal standards of defense practice.” Id. at 56, 661 S.E.2d at 365-66. Stanko has offered opinion testimony by *non-attorneys* who have

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<sup>16</sup> The mitigators are: (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (6) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (7) the age or mentality of the defendant at the time of the crime. Counsel only requested (2) and (6). Those statutory mitigators were instructed to the jury.

adhered to limited facts and have opined about how a particular lawyer should try his or her case. Such opinions are inappropriate in the present action. Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) (holding opinion testimony from an attorney about standards of defense practice assumed certain facts in arriving at his conclusion and was properly excluded as a mere legal argument on deficient performance). Whether *trial counsel's* performance was in fact deficient was for the 1<sup>st</sup> and 2<sup>nd</sup> PCR Court to decide based upon the remainder of the testimony and record before it. Not for a biased *investigator or investigators* to decide. Stetler and Davis completely ignore the facts and evidence counsel were confronted with at the time, including the incriminating evidence and Stanko's prior criminal record, and the expert medical opinions provided to counsel at the time by counsel's own experts. Stetler and Davis also ignore prior case law cited above.

In any event, Strickland instructs deference to the decisions by trial counsel. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. "[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). The court reviews the strategic decision "an objective standard of reasonableness." Ingle, 348 S.C. at 470, 560 S.E.2d at 402. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Wiggins, 539 U.S. at 521. The court is to "focus on whether the investigation supporting counsel's decision" on the introduction or non-introduction of mitigating evidence "was itself reasonable." Id. at 523. (emph. in original). "In assessing counsel's investigation, we must conduct an objective review of

their performance . . . which includes a context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time.’” Id. (quoting Strickland, at 689).

Stanko’s own experts testified at trial Stanko’s brain was malformed and showed decreased activity in the frontal lobe based on PET and MRI scans. The 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, and/or from a head injury at age 17. Stanko’s own experts diagnosed him as suffering from *involuntarily acquired* psychopathy and their “psychopath” statements during 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. In fact Stanko argues in his Petition itself, that counsel must introduce evidence of brain damage according to United States Supreme Court precedent. (PWC, pp. 19-20, citing Sears, 561 U.S. at 950, Porter, 558 U.S. at 42-43, and Mills v. Maryland, 486 U.S. 367, 370 n. 1 (1988)). It is not IAC to offer such a defense under the facts of this case. Robinson, *supra*, (no IAC for introducing diagnosis of ASPD [psychopathy] as mitigating evidence in penalty phase given the record; it humanized the defendant, and explained why he was the way he was); Ward, *supra*, (no IAC 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 the day of the offenses) (citing Caldwell); and Sears, 561 U.S. at 951 (evidence of personality disorder may not have made defendant any more likable, but it may have helped the jury understand him and his horrendous acts). Further, as the 2<sup>nd</sup> PCR Court found, the references to a “lizard” like brain were references to the limbic system of Stanko’s brain which

was triggered by stress, fear, or threats, because the **frontal lobe of Stanko's brain was damaged** according to Stanko's experts. Again, this was part of Stanko's chosen defense and mitigation of the Ling offenses.

It bears mentioning again, the evidence Stanko committed the acts was overwhelming. Stanko admits this in his Rule 59 Memorandum. Based on counsel's review of the evidence, 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 home, and Stanko's capture with Turner's truck and Ling's personal items, counsel understood the State was going to be able to prove Stanko committed the acts constituting murder, attempted murder, CSC 1st, kidnapping, and armed robbery.

From reviewing the discovery and evidence, counsel also knew the State was going to be able to prove in the penalty phase Stanko had previously committed another kidnapping 10 years before, in which he tied up the victim and attempted to kill her, fled Charleston, and he committed multiple counts of breach of trust and larceny around the same time. And, the State was going to be able to prove Stanko had served 8 ½ years in prison for those crimes and had not been rehabilitated, since upon release, he began engaging in similar cons and fraudulent schemes while on community supervision and committed the present horrible offenses. As a result, counsel made an objectively reasonable trial strategy decision to offer the only defense available, a medical 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 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 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 Stanko was diagnosed as or is “a psychopath” could not be kept from the jury. Stanko had been diagnosed with ASPD after the prior assault and kidnapping 10 years earlier and in prison. The diagnosis was brought out extensively on cross-examination by the State in this case. At least counsel attempted to mitigate the heinous crimes and Stanko’s past criminal behavior. Had counsel acted as Stanko now says he should have, counsel no doubt would be faulted for “failing to present” these expert opinions and diagnoses. Sears; Porter; Mills v. Maryland; Robinson, 82 A.3d at 1019; Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987) (finding impulsivity was the most compelling evidence the defendant could have offered in mitigation and trial counsel was **ineffective** for failing to present expert testimony the defendant was “explosive” and “a time bomb”). *For example also see* Truesdale; Byram, & Fulks, supra (accusing counsel of being ineffective for not offering ASPD diagnosis).

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. This did not come out during counsel’s pre-trial interviews with Sachy. This claim was also addressed by the 1<sup>st</sup> PCR Court. (Suppl. App. 517-18, Order of Dismissal, Young).<sup>17</sup> As a result, 1<sup>st</sup> PCR counsel

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<sup>17</sup> See Stanko v. State, 2014-CP-26-35 (Order May 18, 2016, pp. 7-8)(Horry County PCR) (references to psychopathy, including Stanko’s expert witness testimony Stanko is a psychopath, was an attempt to corroborate Stanko’s defense of insanity and mitigate his culpability by showing he could not control his actions and thus a valid trial strategy articulated by counsel at PCR).

could not have prejudiced Stanko in his 1<sup>st</sup> PCR hearing. Robertson, *supra*. 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. As a result, **counsel was not ineffective** in this regard.

Stanko is **actually complaining about Dr. Sachy**, his chosen expert. “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)). To do so would result in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate, and would undermine the finality of a criminal conviction. Id.; Pruett v. Thompson, 996 F.2d 1560, 1573 n. 12 (4th Cir. 1993); *see also* Poyner v. Murray, 964 F.2d 1404, 1418-19 (4th Cir. 1992) (“the constitutionally deficient performance must be that of counsel, in obtaining the psychiatric examinations or presenting the evidence at trial for example, not that of the psychiatrist or psychologist in failing to identify every possible malady or argument, no matter how tenuous”); Campbell v. Polk, 447 F.3d 270 (4th Cir. 2006)(refusing to read a malpractice standard for the assistance of appointed experts into Supreme Court case law). The Fourth Circuit has observed:

It will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect from the second prospective witness. To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require.

Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989) (*per curiam*). Instead, there exists a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment

in making all significant decisions, Strickland, including its preparing to present Dr. Sachy at trial in furtherance of Stanko's defense. Thus, counsel is also not incompetent for relying on the experts he retained and consulted. "To be reasonably effective, counsel was not required to second-guess the contents of" his expert's report(s). Wilson v. Greene, *supra* at 403; Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (No IAC in arguing for insanity where the defense was supported by 2 experts); Forsyth v. Ault, 537 F.3d 887, 892 (9th Cir. 2008) (counsel not required to expert shop).

Simply put, a capital defendant does not enjoy a right to effective assistance of expert witnesses, which is distinguishable from the right to the effective assistance of counsel. *See* Campbell v. Polk, 447 F.3d 270, 285 (4th Cir. 2006). This means that neither deficient performance nor prejudice should be presumed merely because counsel did not second-guess the evaluation of a qualified expert. Byram, 339 F.3d at 210 (4th Cir. 2003) (alleged "failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance"); McWee v. Weldon, 283 F.3d 179, 188 (4th Cir. 2002) (investigation-based IAC claims "must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation"). Instead, 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. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotations omitted). "When the claim is that counsel

failed to present a sufficient mitigating case during sentencing, the inquiry [at PCR] ‘is not whether counsel should have presented a mitigation case’ but ‘whether the investigation supporting counsel’s decision not to introduce mitigating evidence . . . was itself reasonable.’” Powell v. Kelly, 562 F.3d 656, 670 (4th Cir. 2009) (quoting Wiggins, 539 U.S. at 523); *see* Buckner v. Polk, 453 F.3d 195, 206-07 (4th Cir. 2006) (largely cumulative detail insufficient to show IAC); Moody v. Polk, 408 F.3d 141, 154 (4th Cir. 2005) (no prejudice where counsel did not present more evidence concerning petitioner’s childhood abuse).

### *Lack of Prejudice*

Additionally, Stanko cannot show resulting prejudice. Wiggins; Belmontes, 130 S.Ct. 383. Even taking out the references in the record to his psychopathy or ASPD diagnosis, and 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, the evidence in aggravation was overwhelming such that there is no reasonable probability of a different result. *Id.*; Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011) (prejudice “requires a substantial, not just a conceivable, likelihood 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) (no IAC due to mitigation investigation where aggravating factors were overwhelming, mitigating factors were unremarkable, and no indication 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, most probably due 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 NGRI or GBMI. That however, does not mean counsel was ineffective. Strickland.

Second, the facts of the murder of Ling are horrible. Stanko bound the victim, beat her from head to foot, and stabbed her with a sharp object. The jury found Stanko tortured her before her death. Stanko also manually strangled Laura to death while raping her 15 year old daughter. And, Stanko forced the minor daughter to witness her own mother's murder. Stanko also bound the 15 year old daughter as well. The jury found 5 aggravators. Stanko then fled to another state where he continued partying, met a new girlfriend, and conned her. He also gave her the bracelet he took off Ling's dead body. He was only arrested after U.S. Marshalls located him.

Third, Stanko's bad character and future dangerousness were proven independent of anything Dr. Sachy said. The jury heard Stanko had previously been convicted of numerous fraud and theft crimes over the years. The State proved Stanko had previously been convicted of the kidnapping of McClendon in Charleston 10 years before the present crime. Stanko bound her and attempted to kill her with a cloth soaked in Clorox. Stanko had previously been convicted of multiple counts of breach of trust, larceny, and obtaining goods by fraud, served 8 ½ years in prison for these crimes and was not rehabilitated. After release from prison, Stanko began conning and defrauding multiple victims of their money by pretending to be an attorney, paralegal, or investigator while on community supervision. Stanko then committed the murder of Ling and the attempted murder and rape of her 15 year old daughter when his cons and schemes were about to be exposed. Stanko has failed to prove prejudice in the guilt or penalty phase; trial counsel acted in furtherance of Stanko's chosen defense. Strickland; Belmontes; Wiggins. Ward v. Neal, 835 F.3d 698 (7<sup>th</sup> Cir. 2016)(capital defendant was not prejudiced by counsel's presenting evidence of psychopathy, since counsel's other option was to present minimal mitigation which could not

overcome horrible aggravating circumstances).

## 2. *Insanity defense*

Stanko next alleges PCR Court erred in finding trial counsel were not deficient and he was not prejudiced by offering the insanity defense. Stanko alleges it erred in finding trial counsel made an objectively reasonable strategic decision to present the defense and alleges he was prejudiced by this decision. Stanko is wrong. Strickland v. Washington.

Stanko first alleges the defense failed to meet the standard of insanity provided for under S.C. Code Ann. § 17-24-10, and the only evidence to support the defense of NGRI 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 our law. *See S.C. Code Ann.* § 17-24-10(c). Therefore, Stanko claims, trial counsel was ineffective in presenting the defense of NGRI and he was prejudiced by this defense both in the guilt and sentencing phases. Stanko is wrong.

First, as noted in the 2<sup>nd</sup> PCR Court’s Order Denying Relief (App. 4086-4102), and as set forth above, this same claim was raised to the 1<sup>st</sup> PCR Court by 1<sup>st</sup> PCR counsel and denied by the 1<sup>st</sup> PCR Court. (Suppl. App. 504-13, Order, Young, pp. 21-30). The ground was basically just reworded for the 2<sup>nd</sup> PCR [Robertson] proceeding. Since the purpose of this 2<sup>nd</sup> PCR action was to determine whether 1st PCR counsel’s selection and presentation of PCR allegations prejudiced Stanko, Stanko’s copycat presentation of trial counsels’ and their mitigation investigator’s testimony on this same issue cannot form a basis for relief in this action. *See Robertson, supra* at 521 and nn.14-15, 795 S.E.2d 29, 37 and nn.14-15 (2016). As a result, **1<sup>st</sup> PCR counsel** could not have prejudiced Stanko because **they raised this very issue** at the 1<sup>st</sup> PCR hearing and **it was denied**. Robertson, supra. (See Order, Suppl. App. 504-13).

Further, upon review of the record and testimony presented during Stanko's case in chief and Respondent's case during the 1st and 2<sup>nd</sup> PCR hearings, there is no merit to this ground warranting relief. Strickland. First, as the 1<sup>st</sup> and 2<sup>nd</sup> PCR Court's found, **there was more evidence in this case than just repeated prior criminal behavior** by Stanko. There were **brain scans, medical testimony, and Stanko's birth records**. There was also testimony of a **head injury** suffered by Stanko **at age 17**. Second, both trial counsel testified at the PCR hearings the evidence Stanko committed the charged acts was overwhelming, and the State was going to be able to prove the same. Counsels' testimony on this issue is credible and supported by the record.<sup>18</sup>

As discussed under the previous section, trial counsel retained appropriate mental health and medical experts who informed counsel Stanko had a frontal lobe brain defect and he was legally insane at the crimes. The specific psychiatric diagnosis was **involuntarily acquired psychopathy**. This evidence included 2 psychiatrists, PET and MRI scans, the testimony of a neuro-radiologist, Stanko's birth records of intracranial damage at birth, along with a head injury at age 17. Stanko was made aware of the results of the scans and diagnosis and agreed with the findings and wanted to pursue the defense. He told counsel he had no memory of the crimes. Counsel presented all of this evidence of insanity, that Stanko had a frontal lobe brain defect, that was not his fault, and at the time of the crimes could not differentiate between moral or legal right and moral and legal wrong, and were successful in obtaining jury instructions on the defense of NGRI and GBMI. However, the jury found the State's testimony, both expert and factual, more credible and the State had disproved insanity and GBMI beyond a reasonable doubt. Based upon the record and the information available to counsel, including counsel's investigation and his

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<sup>18</sup> Stanko also conceded in his "Memorandum in Support of the Rule 59 Motions" that there is no question he committed the crimes against Laura Ling and her daughter.

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 (11<sup>th</sup> Cir. 2010) (counsel was not ineffective in arguing for insanity where the defense was supported by 2 witnesses); Bell v. Evatt, 72 F.3d 421 (4<sup>th</sup> 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 (6<sup>th</sup> 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 (5<sup>th</sup> 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 troubled past to curry sympathy in a strong capital case).

The Solicitor made the same argument pretrial that Stanko now makes, and Judge Jefferson rejected that argument and found there was sufficient evidence of insanity to allow the presentation of the same to the jury. (App. 13-109). Further, the trial record demonstrates **Stanko agreed with this defense**, initially informed counsel and his experts he had no 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 for offering this evidence in the guilt phase. Strickland. Contrary to Stanko's assertions, the record shows, and the 1<sup>st</sup> and 2<sup>nd</sup> PCR Courts were correct in finding counsel made an objectively reasonable strategic decision to offer the defense in the guilt phase given the record in this case. 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 (4<sup>th</sup> Cir. 1991) (same).

As the 1<sup>st</sup> and 2<sup>nd</sup> PCR Courts correctly found in their Orders Denying Relief, Stanko cannot show Strickland prejudice on this record. Stanko has not shown 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 given the overwhelming evidence of guilt previously discussed. Strickland.

Further, Stanko has not met his burden of proof to show deficient performance or prejudice in the penalty phase. The evidence from the guilt phase, including all of the expert testimony, the results of the PET and MRI scans, Stanko's birth records, and the testimony regarding his head injury at age 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 re-called several of his expert witnesses to testify to his brain defect and personality disorder, **which was not his choice** but was thrust upon him. As trial counsel testified at PCR, simply because the jury did not find Stanko legally insane at the time of the crimes, did not mean they would not accept the testimony of Stanko's experts in mitigation. As the 1<sup>st</sup> and 2<sup>nd</sup> PCR Court's found, Stanko's diagnosis of involuntarily acquired "psychopathy" and the testimony of mental disease or defect in both the guilt and penalty phases entitled Stanko to and received instructions on the statutory mitigating circumstances requested by counsel. See Caldwell, 300 S.C. 494, 388 S.E.2d 816 (diagnosis of ASPD/psychopathy entitled defendant to statutory mitigating circumstances). 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. Wiggins; Pinholster, 131 S.Ct. at 1403 (citing Harrington v. Richter, 562 U.S. 86, 110 (2011)).

Finally, Stanko cannot overcome with the new evidence at the PCR hearing the overwhelming evidence in aggravation. Belmontes. The State proved **5 statutory aggravating circumstances**: the murder was committed during; (1) the act of torture; (2) kidnapping; (3) CSC; (4) armed robbery; and (5) a larceny with a deadly weapon. Additionally, the non-statutory aggravating circumstances were horrible.<sup>19</sup>

Stanko's bad character and future dangerousness was proven. Stanko had a long criminal history of fraud and thefts. Stanko was previously convicted of kidnapping another woman in a similar manner and attempted to kill her, and was convicted of multiple counts of breach of trust, larceny, and obtaining goods by fraud. He served 8 ½ years in prison, had not been rehabilitated, and after release from prison, while on community supervision, almost immediately began illegally defrauding other victims of their money and committed the present crimes. After this murder Stanko traveled to Columbia, partied with others at bars and eventually fled to another state where he conned another woman into believing he was someone he was not and gave her the bracelet he had taken off Ling's wrist. There is no reasonable probability the jury would have returned with a different sentence had counsel acted as Stanko alleges he should have. Belmontes; Weik (no relief where aggravating factors outweigh likelihood of different outcome at trial even if counsel had performed in the deficient manner complained of); Stitt (defendant not entitled to relief on claim of a deficient mitigation investigation where aggravating factors in the case were

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<sup>19</sup> Ling was bound, beaten from the top of her head to her feet, stabbed with a sharp object, and her throat was cut. Ling was murdered while Stanko raped her 15 year old daughter; and, Ling's murder was witnessed by her own daughter. Stanko then calmly stole Ling's bracelet, her car, and money from her bank account. Further, Stanko attempted to murder the 15 year old child by cutting her throat twice, almost severing her ear from her head, and left her believing she was dead.

overwhelming, mitigating factors were unremarkable, and there was no indication change in psychopathy evidence would have outweighed aggravating factors); Bullock, 53 F.3d 701-02 (even if the defense had virtually no chance of success, petitioner failed to overcome presumption of effective assistance, and the insanity plea permitted introduction of evidence of troubled past to curry sympathy in a strong capital case).

**3. Whether trial counsel were ineffective in failing to investigate and present Mitigating Evidence Related to Stanko's Life History.**

Stanko also alleges under this Ground that the 1<sup>st</sup> and 2<sup>nd</sup> PCR Court erred in finding *trial counsel* was not deficient in failing to investigate and present mitigation evidence and in finding Stanko had not proven Strickland prejudice in this regard. Stanko alleges counsel failed to investigate and present mitigating facts at the penalty phase including information concerning his past, the death of his brother, his social history, the stressors he was under at the time of the offense, etc. Stanko is simply wrong. Trial counsel presented all of these in mitigation.

In the penalty phase, trial counsel **called 26 witnesses in mitigation.**<sup>20</sup> (App. Index pp. ii-iii; & pp. 1714-2321). The record demonstrates counsel conducted a reasonable and thorough mitigation investigation and presented a reasonable and thorough mitigation case. Sears, 561 U.S. 945; Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins, *supra*. Counsel credibly testified during the PCR hearing that Stanko was not forthcoming with his defense team, indicating Stanko likely provided false or misleading information regarding potential mitigation or aggravating information. In any event, as the 1<sup>st</sup> and 2<sup>nd</sup> PCR Court found, and as will be discussed below,

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<sup>20</sup> Those witnesses were: Michael Stanley, Shirlease Maynard, Victoria Jones, Donna Williams, Connie Price, Theresla Dewitt, John Fulmer, Winnie Wenz; Minnie Wenz, Wanda Brooks, Thedus Mayo, Timothy Meachum, Dr. Wu, Sanford Graves, Louis Murden, Dr. James Thrasher, Dale Davis, Karen Hnebrink, Pam Harrelson, Dr. Sacy, Gloria Wilson, Heather Tolar, Irby Walkerl, John Bertang, Gary Owens, and Dr. Evelyn Califf.

*trial counsel* was neither deficient nor was there prejudice from their mitigation presentation because they presented basically the same information presented at the 1<sup>st</sup> and 2<sup>nd</sup> PCR hearings, just in a different fashion through different witnesses. (App. 1714-2321).

Stanko completely failed to prove IAC of trial counsel under this ground. Wiggins; Simpson, 367 S.C. at 605-07, 627 S.E.2d at 711-12 (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, *supra* (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, 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. Belmontes. Even had counsel presented more witnesses, **there is no reasonable probability of a different result.** The evidence of aggravation introduced in this case is horrible and staggering. Stanko cannot show prejudice from not introducing the new mitigation. 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. This ground was properly denied 2 times below. Stanko presented no different testimony on these claims at the 2<sup>nd</sup> PCR stage as he did at trial.

The record shows at all stages, trial counsel bolstered the pursuit of Stanko's defense and mitigation through a network of able experts sought to explain why Stanko committed the criminal acts there was no denying he committed. This defense 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 the same in the penalty phase. Stanko was described by the experts as not choosing to be medically and mentally ill, but rather had the condition thrust upon him. The fact the defense was unsuccessful does not mean IAC, and Stanko has failed to meet Strickland's burden of demonstrating deficient performance and prejudice from the defense presented. Stitt (No IAC based on deficient mitigation investigation where aggravating factors in the case were overwhelming, mitigating factors were unremarkable, and no indication change in psychopathy evidence would have outweighed aggravating factors); Bullock (even if defense had virtually no chance of success, petitioner failed to overcome presumption of effective assistance, and insanity plea permitted introduction of evidence of troubled past to curry sympathy in strong capital case).

Stanko argues the 2<sup>nd</sup> PCR Court erred in finding trial counsel was not deficient and Stanko was not prejudiced by the life history mitigation investigation and presentation at sentencing. Stanko alleges trial counsel provided "the jury with only general testimony that Stanko had a dysfunctional family with a strict father." (BOA at 28). Because he has this time presented the bulk of his life history through a social worker, Stanko reasons he has met his burden of demonstrating deficient performance and prejudice. Stanko is wrong. Stanko has not met his burden by simply re-characterizing the evidence previously presented. Jones v. State, supra.

"Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse." Penry v. Lynaugh, 492 U.S. 302, 319 (1989). "Important sentencing phase considerations include a defendant's 'medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural

influences.” Weik, 409 S.C. at 234, 761 S.E.2d at 767 (emph. in original) (quoting Wiggins, 539 U.S. at 524). In Weik, this Court assigned prejudicial error to counsel’s failure “to present even a skeletal version of Petitioner’s social history even though there was abundant social history evidence available to them.” Id. at 235, 761 S.E.2d at 768. “Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence.” Id. at 234, 761 S.E.2d at 767 (citation omitted). “But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.” Bobby v. Van Hook, 558 U.S. 4, 11 (2009).

Trial counsel struck a balance between these 2 penalty-phase maxims. Before the PCR Court, trial counsel Kelly explained he hired a mitigation investigator and a fact investigator who each reported to him. (App. 2988). Kelly explained separate mitigating factors about Stanko’s life history and how they were relevant to Stanko’s penalty-phase defense. Stanko suffered no reported abuse or other remarkable hardship during his youth, but he had a strict father. (App. 3009). Describing the father as alienating, Kelly testified: “His father was dominating, and his father drove a wedge between the women of the family and Stanko. He didn’t want him around. He wanted him out. He didn’t support him. He didn’t help him when he got out of prison. He didn’t try to help him through.” (App. 3007). Kelly testified Stanko had served a prison sentence for a situation similar to the Georgetown crimes in the sense that he was unable to cope on an economic level. He couldn’t hold a job. He had to rely on others for a place to live, and he relied on the first female victim. He became, in her case, demanding, and that was a quality that he exhibited as the stress mounted on him. And instead of pulling back, it ignited. (App. 3010).

As a result, Kelly developed a purposeful theory of mitigation to show the jury “exactly what happened, the history of it,” i.e. what happened after Stanko’s release from his first prison

sentence that led to his recidivism and the ignition in the Ling home. Kelly wished to attribute this ignition in part to law enforcement's non-responsiveness to citizen complaints. (App. 3011-13). Counsel "felt like it was small, but it was something that might turn a juror because he wasn't receiving any help, and the police, the Sheriff's Department, whoever it happened to be, they weren't reacting to it. If they'd have stepped in, they'd have stopped him." (App. 3013). Diggs echoed Kelly's assessment and preparation, testifying Stanko's intelligence and popularity during high school was "kind of like a double-edged sword"—"if you rely solely on his life history, it creates a problem" because it does not explain what caused the Ling crimes. (App. 3090).

Stanko and his family did not always help with any investigation. And, "Stanko concealed his activities from" counsel and was not forthcoming with them. (App. 3012). Testimony showed Stanko's family also would not attend the trial. The trial team still contacted and met with Stanko's family to prepare. (App. 3007-08). But as Kelly testified, Stanko's family: "would not make themselves available." (App. 3007). Inv. Dale Davis recollected she asked the family to attend the trial, "but only as a formality because [she] knew they wouldn't" attend. (App. 3134). As to Jeff Stanko, Davis testified she met him in Atlanta and assessed "he just didn't want anything to do with it," or "anything more to do with Stephen." (App. 3136). She testified she was responsible for contacting the family and believed he was asked to attend and declined. (App. 3136-37). Kelly assessed Davis' work with high esteem, noting he'd previously worked with her and trusted her to be thorough. (App. 2993, 3014). Davis testified she would have created the following mitigation presentation for the jury as it pertains to her records collection in Stanko's case:

Well, it would be quite in-depth based on the records, but I think I would – you would begin with his childhood and the situation. His father was in the military. We'd talk about that. His father was kind of a stern person and that when he would have qualified for college, his father wouldn't allow tax returns to be used so that he could get financial aid. We'd talk about how successful he was in high school.

Then about you're not sure if the brain injury could have been at birth or the brain injury could have been from licks. You're really not sure where the brain injury came from, but it was certainly there and it affected his behavior, one being that the first incident with the girlfriend and the way she described it even at trial was very similar to the situation that happened in Georgetown County.

To me, it seemed I just couldn't get my head around it. He left and went to Augusta, knowing that his face was all over the news, in a stolen truck, and made no attempt whatever to hide. Instead of taking off for Canada or Mexico or somewhere, he just went to Augusta and was just like he just moved there and was taking up residence.

I mean none of those things signify to me a brain that's functioning properly. And so you can – you can frame things in a way. You're never going to get away from those. I don't think we would've ever used the psychopath, but he certainly had the antisocial personality disorder. I mean you acknowledge those things, but you can – you know, you can frame things different ways and make – make somebody know about him. About his whole life, instead of just all these separate things.

(App. 3129-30).

Trial counsel presented the fruits of the mitigation investigator's research into Stanko's life history at trial. Counsel hired Dr. Evelyn Califf, a licensed family counselor whose practice included family court mediations, teaching, counseling, and evaluations of family dynamics in dysfunctional families, to present the social history since the social worker was unavailable. (App. 2258-63). Dr. Califf had testified several times previously in the 15th Circuit. (App. 2275). As for trial preparation, Dr. Califf made known during cross-examination she "could not get Mr. Jeffrey [Stanko], [Stanko's brother,] on the phone" in the weeks prior to trial. (App. 2276). Nor could she succeed in getting in touch with his parents or sisters. But she did meet with Stanko and Dale Davis, read all of the reports and records provided, as well as emails from Stanko's one sister. (App. 2276-79). Dr. Califf opined before the jury that Stanko's family absolutely showed signs of dysfunction, which she defined as anything, including a rigid (dogmatic) family system, which causes a family "not to be a family or to be able to operate or to live and to do a good job with their children." (App. 2261-63).

To put her opinion into context, Dr. Califf presented Stanko's family genogram. (App. 2263). She identified Stanko's father's "rigidity" as the main issue causing family dysfunction; his "more military" way of being with the family "was the hardest for the children." (App. 2264). "He seemed to in many cases reject some of his children and their ways. If – if the child did not do something that he wanted the child to do, he would withdraw. And it was almost like – we call it abuse when someone gets very silent and does not speak to you." (App. 2264-65). Dr. Califf "found that was one of the overriding issues with" Stanko, as he could never get enough approval or kindness or attention from his father. (App. 2264-65). Dr. Califf testified Stanko had not spoken to his father for 10 years because "he displeased his father even though he was good in school and did really well up until he did not get into the military academy." (App. 2266). She testified Stanko had vision problems, "so when he did not get into the military academy, he became rather depressed," and his father stopped supporting him. (App. 2266-67). At that point, Dr. Califf assessed, Stanko "went downward." (App. 2267). Dr. Califf expounded:

If you begin to not be approved of and you still are trying so hard to get approval from someone and you begin to look at those things, you start building yourself up. And I thought it was really interesting on those who have assessed Mr. Stanko that most all of the time they came in with narcissistic personality disorder, and I can understand that because it's truly . . . it means that you really think you're great and you're always grandioso, and – but actually what that means is not that. What it means is many different things, but most of the time you have low self-esteem, when you do not feel that you have – inside that you have any real good things about you.

. . . And another contributing thing there was when his – when *his brother was killed* because he was very close to him. And I believe that both of those things, but particularly himself, when I interviewed him, it was the only time I saw some real feelings from him is when we talked about that. And that goes into, when you see a person exaggerate, when you see them be a pathological liar because they're holding themselves up, and they are also telling everybody else what they do and they can do this and they can do that, . . . it is understandable. And what we try to do is to get people to see what the truth is, and you then know who you are and your real self, you get in there and you don't have to depend on another person for your

identity, but somebody has to lead you that way when you come up in a very rigid home, and that's all the person you wanted to please.

(App. 2270-74)(emphasis added). Dr. Califf recognized throughout Stanko's young life at home, he was getting good grades, so he was getting support outside of the home in some respects. (App. 2273-74). But she opined Stanko never really got much support from his family because while he was getting some from his mother at home, "she could not intercede between the father who was her charge and the enabler for him." (App. 2273). Dr. Califf testified there "are down to earth things" she sees "every week" that may have a damaging effect on a person's development, such as Stanko's jaundice at birth, or the mental defects presented earlier at trial. (App. 2271-75). She ultimately opined during cross-examination:

[H]e failed to develop because he was in a dysfunction situation, and his particular personality and the location in the family for whatever reason – because I was not there – but the functioning of that family caused him to – to – to do things that he had – lacking of the attention that he needed, and therefore he did not develop on forward.

But when he received it out of other people, he did thrive because you can look at those records and you can find that out. [ ] And you also know that when he thrived, the only time – every record shows that he had any problems was when he failed there or when he was hit in the head with a bottle.

(App. 2281-82 (omitting interjection by counsel)).

With the beer bottle incident, Dr. Califf testified she asked the mitigation specialist for follow-up records because before he got out of high school, "it appeared that when he was hit in the head with a bottle that that had some problems," but there were no records to assist in assessing the damage. (App. 2282-83). In fact, at this stage, trial counsel re-called Dale Davis to testify that she made at least 7 attempts to garner the beer bottle records but they could not be obtained from the Charleston Naval Hospital where he sought emergency treatment. (App. 2285). She had eyewitness sources regarding the incident, which occurred during the end of his junior year or during his senior year of high school. (App. 2286). Davis had earlier been called to give testimony

demonstrating that she collected the totality of Stanko's in-patient birth records from the Guantanamo Bay military base in Cuba. Despite 7 different attempts, Stanko's other outpatient records could not be located due to his family's movements with the military. (App. 2106-07).

As to the rest of the family, Dr. Califf noted they were a middle class family in relatively good health, but that they could each benefit from some counseling. (App. 2268). She assessed Stanko's siblings each dealt with their father's personality differently. One or two rebelled at times, and another was fearful to stand up on her own and risk losing her father's approval. (App. 2265).

Trial counsel complemented Califf's testimony with additional firsthand accounts of Stanko's behavior as a child and adolescent, who grew up with his family in suburban Goose Creek, S.C. (App. 1855-1896). The assistant principal at Stanko's high school testified about his good academic performance and multitude of extracurricular involvements. (App. 1856-66). Stanko's high school physics and AP chemistry teacher testified that he was a leader, involved in activities, excelled academically, had not only potential but excellent manners, and demonstrated respect to teachers and peers. (App. 1871-72, *id.* at 1879-80).

Stanko's neighbor Wanda Brooks testified Stanko lived with his parents, his brother Jeff, and his sister Cindy in a suburban single-family home in a subdivision alongside other military personnel. (App. 1886-87). Stanko was about 12 at this time, and remained as Brooks' neighbor through high school. (App. 1888). Stanko and his brother Jeff would visit Brooks' home to play games and sports with her children and family and to swim in her pool. (App. 1887-89). Stanko was well-behaved, and she felt comfortable having him around her home. (App. 1888-89). Brooks was aware Stanko did not get into the Air Force Academy because he personally talked to her about it. (App. 1893). Stanko expressed he was very upset because it was a major life goal of his and he did not accomplish it. (App. 1893). She testified she was aware the other brother, Billy, had

some troubles and did not live with the rest of the family. (App. 1887). Brooks stated when *Billy* “*died in a fire,*” Stanko and Jeff “showed very little emotion about anything. It was just like everything was suppressed, you know. I mean, it was like they had gone into a depression . . . .” (App. 1892)(emphasis added). Stanko never talked about his parents around her, but she noticed the Stanko home did not get many visitors compared to her own. (App. 1890). Brooks testified Stanko’s father was a disciplinarian, smart, intimidating, and acted unusual “several times.” (App. 1894-95). Brooks recounted he would go “berserk and yelled at the kids” when a firecracker would go off near his house on the 4th of July or New Year’s Eve. (App. 1895). She did not recall seeing Stanko’s father getting involved with any of Stanko’s sports. (App. 1895).

Trial counsel also coupled Califf’s testimony with accounts by individuals who experienced or had received reports of Stanko’s cons and schemes. Others testified about Stanko’s gaining insurance coverage and calling a psychotherapist prior to the Ling incident. (App. 2797-2881, 1897-1922, 2000-18, 2024-27, 2110-49, 2179-2256). This testimony demonstrated Stanko’s functioning and behavior during the critical time period prior to the Ling crimes, as trial counsel testified at PCR that he aimed to do. (App. 3011-14).

Connie Price, one victim of the frauds, testified she began calling authorities because she was concerned with Stanko’s “pretty bizarre” behavior which affected her on a near daily basis, including once when Stanko claimed he had visited a doctor but obviously had just self-applied Band-Aids. (App. 1786-87). Price’s friend Gary Owens echoed this testimony, speaking about Stanko’s erratic behavior a few days prior to the Ling crimes, about Stanko’s lies of a grandiose lifestyle, and about Stanko’s collection of retainers to pursue legal actions that never panned out. The witness recalled meeting with law enforcement the morning before the Ling crimes to ask for

Stanko's activity to be investigated. (App. 2242-53). One former assistant solicitor testified Stanko's name was well known to his office prior to the Ling events. (App. 1919).

Probation agents testified about Stanko's stint in community supervision leading up to the Ling crimes. Stanko failed to report in December and January of 2005 and was in arrears on his supervision fees. (App. 2124-25, 2189-91). Prior to those dates, in October 2004, Stanko reported he wanted to move to North Carolina with his brother. (App. 2213). At least 1 agent warned him of the consequences of the failure to report and of the consequences of the complaints, if true, about his unauthorized practice of law. (App. 2191-2201). One probation agent testified Stanko did not present himself as being in need of mental health counseling, but a January 2005 entry from a meeting with Stanko showed he intended to begin counseling at a specific location, and Probation had in February 2005 given Stanko the names of 3 separate mental health counselors as references to assist with his re-integration. (App. 2206-08). On April 5, 2009, Stanko reported he had begun counseling—the Ling crimes occurred on April 8. (App. 2209). And in March 2005, 1 month before the crimes, Stanko reported to his agent he had voluntarily enrolled in counseling. (App. 2218). Attorney Irby Walker testified to assisting Stanko in his battle to have himself removed from the sex offender registry for his prior kidnapping. The State also stipulated Stanko should not have been required to be on the registry for the prior kidnapping. (App. 2299-36)

Thresla Dewitt testified Ling added Stanko to her health insurance so he was eligible to **receive mental health benefits**. (App. 1850-51). And a psychotherapist in private practice testified Stanko *made a call to her office in April* just prior to the Ling crimes. (App. 2025-27). Elsewhere during the sentencing phase, trial counsel put forth extensive testimony about Stanko's and his mother's health at birth and during his immediate infancy. (App. 2029-75).

Yet Stanko now contends the mitigation presentation was prejudicial and deficient, that it was cursory regarding the father, and it omitted familial accounts from Stanko's brother Jeff and testimony from someone who was there when Stanko got hit in the head with a beer bottle. As the 2<sup>nd</sup> PCR Court found in its Order Denying Relief, an examination of the life history and background presented and argued before the 2<sup>nd</sup> PCR Court, however, provides little, if any, new information. (BOA 18-29; App. 3144-3332). The testimony is not new from trial or the 1<sup>st</sup> PCR.

As outlined above, from the record the jury knew: Stanko excelled in sports and academics during his youth despite having a strict and unsupportive father; his troubled brother Billy died in a fire and Stanko appeared to suppress emotion assigned to the loss; Stanko's birth was accompanied by a number of annotations regarding jaundice and other initial concerns; Stanko was affected by his failure to gain admission to the Air Force Academy, his vision was a contributing factor to his rejection, and this rejection also temporally coincided with getting hit in the head with a full bottle of beer during his senior year of high school; Stanko, a braggart, started engaging in fraudulent activity when he entered the work force after high school graduation and continued after his release from prison; close in time to the Ling crimes; Stanko was behind on his supervision fees and had reported to a probation agent an interest in moving to his brother's in North Carolina; Stanko failed to fully engage in therapy prior to the Ling crimes, was beginning to act erratically, and was in danger of being found out. Otherwise, many, if not all, of the facts presented by Dr. Andrews at the 2<sup>nd</sup> PCR that appear to be outside the scope of Dr. Califf's testimony, derive from facts presented by the State in aggravation. (App. 1245-1450).

Importantly, at trial, the jury learned from Dr. Califf that Stanko grew up with dysfunction in the home which stunted his development, but he thrived when given structure. Her opinion plainly parallels Dr. Andrews's ultimate conclusion that "he just was poorly equipped to deal with

all of these stressors, the barriers he had.” (App. 3317). Dr. Califf just did not harmonize her presentation by calling it a “social history assessment” or by using terminology such as “social ecology” in front of the jury as was done by Dr. Andrews at the 2<sup>nd</sup> PCR. (E.g., App. 3280).

Stanko also complains about the 2<sup>nd</sup> PCR Court’s credibility finding as to Jeff Stanko’s PCR testimony. Although Jeff Stanko claimed before the Court he would have attended trial had the attorneys asked him, (App. 3158-59), this testimony is not credible, as the Court found. Not only is Jeff’s statement not echoed by Stanko’s trial team, but Jeff himself later testified he attended a preliminary hearing in the Georgetown case but did not attend trial “[b]ecause [he] really didn’t want [his] face and [his] family all over the media. . . . It’s a very hostile time because no one cares about you or your family.” (App. 3176-77). He admitted he was contacted by Dale Davis multiple times; he did not recall speaking to anyone other than Davis, and Stanko himself did not request him to be there. (App. 3176-79). The PCR Court’s credibility determination is supported by the record. Also, Jeff Stanko’s testimony could be viewed to undermine part of the mitigation theory. Jeff testified at PCR that he felt they experienced “[r]elatively what [he] would call a normal childhood.” (App. 3146). Jeff did not consider his father to be strict, and did not agree with “that terminology being used.” (App. 3159-61). In fact, Dr. Arlene Andrews testified before this Court she could not get in touch with Stanko’s one sister and she was disappointed to find there were no prior interviews with his parents before their deaths. (App. 3285). Even though Stanko’s family would not cooperate or come to trial, trial counsel still fully investigated and presented Stanko’s social history despite the family’s lack of cooperation or assistance.

Given expansive trial testimony regarding Stanko’s upbringing and the stressors causing him to “ignite” in the commission of the crimes at the Ling home, trial counsel cannot be found to have rendered deficient performance or to have prejudiced Stanko. Stanko’s family life and

upbringing presented no significant problems which required any more detailed testimony than that presented at trial. *Compare Wiggins*, 539 U.S. at 123 (finding IAC to “put on a halfhearted mitigation case” making no mention of defendant’s tumultuous family background); *Council v. State*, 380 S.C. at 172-74, 670 S.E.2d at 363-64 (IAC for not obtaining defendant’s family record, to limit social history investigation, to forego hiring a social worker, and to present only “extremely limited testimony” by defendant’s mother in furtherance of life history mitigation).

But even speaking solely to trial counsel’s performance, the presentation at trial does not warrant a finding of deficient performance because counsel employed an objectively reasonable strategy. *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)(“when 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.’”). Trial counsel presented a case in mitigation which focused on Stanko’s birth records and adult brain scans, on Stanko’s youth and adolescence, and on Stanko’s actions and stressors during the crucial last weeks before the Ling crimes. (App 3011-13, 3090). They hired Dr. Califf a local, credentialed counselor with hands on experience counseling dysfunctional families. Trial counsel and his mitigation investigator both recognized family dysfunction as a mitigating feature of Stanko’s youth, and it was therefore reasonable to hire Dr. Califf to present this family history. They strengthened her testimony with other firsthand accounts of eyewitnesses who knew Stanko. And as to the “stressors” presentation, it countered the aggravation put forward by the State and dovetailed with the medical mitigation that is the topic of the previous issue—these mitigation witnesses’ testimony about Stanko’s increasingly erratic behavior and reported pursuit of mental health treatment helped the jury assign reason to the crimes’ commission.

The trial mitigation investigator's PCR testimony is also telling on the point of deficient performance. Dale Davis has significant experience in capital trial mitigation investigations. Davis testified her role in these capital cases includes interviewing the client and then seeking out an exhaustive list of contacts, interviews, and records, which she then provides to trial counsel for their use and evaluation. (App. 3101-04, 3112-18). Davis testified a social worker would ordinarily be hired to review, verify, and testify about the records she collected and summarized. According to Davis: "They just – they weave – they weave things into a story, which always makes information more interesting and relevant. While it's accurate, it's still cohesive in telling a story." (App. 3114). Dr. Califf's testimony cannot be said to deviate from this role or to differ from that employed by Dr. Andrews at the 2<sup>nd</sup> PCR hearing. Further, Davis testified that the social worker she recommended from Greenville was not available for trial. (App. 3120-22). There was no deficient performance under the totality of these circumstances existing in this specific case.

In sum, it cannot be said trial counsel put on only a skeletal presentation of Stanko's life history. Stanko has not presented anything newly enlightening in 2019 not presented over a decade ago. "This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained." Bobby v. Van Hook, 558 U.S. at 11 (citing Wiggins, supra; Rompilla, 545 U.S. at 389-93). Rather, the presentation before the 2<sup>nd</sup> PCR Court was just a "fancier" supplement to that presented to the Georgetown jury. (App. 3288-3332). The new evidence is either cumulative to the old or was unavailable at the time of trial. Accordingly, the factual basis for relief Stanko presented to the 2<sup>nd</sup> PCR Court was not enough to warrant a finding that 1 juror would have struck a different balance on this record. Pinholster, supra; Morva, supra; Byram, supra; Jones, supra; Simpson, supra. As a result, Stanko can point to no specific indicator

warranting a finding initial PCR counsel was functionally deficient or caused prejudice in representing Stanko at the 1st PCR hearing. Robertson, *supra*.

Finally, Stanko also alleges, under this ground and the following one, that the 2<sup>nd</sup> PCR Court conducted its prejudice analysis erroneously because it considered **each IAC claim individually**. However, Stanko is incorrect. While the 2<sup>nd</sup> PCR Court addressed Strickland prejudice under each IAC ground as is typically done in a PCR case, it also considered all of the mitigation collectively presented at the 2<sup>nd</sup> PCR, against all the aggravating evidence in detail, and still found there was no reasonable probability the jury would have returned with a different sentence, citing Belmontes and Ward v. Neal, 835 F.3d 698 (7<sup>th</sup> Cir. 2016) (state court's determination defendant was not prejudiced by presenting evidence of psychopathy was reasonable, since other option was to present lay mitigation evidence petitioner was well-behaved and thoughtful child, which was not strong enough to outweigh aggravating circumstances, including petitioner tortured and mutilated victim while she was alive). (See App. 4137-39).

Specifically, in its Order Denying Relief, the 2<sup>nd</sup> PCR Court considered all the mitigation evidence, as presented at the 2<sup>nd</sup> PCR hearing, against all the aggravating evidence in this case. Belmontes. (App. 4137-39). The 2<sup>nd</sup> PCR Court stated even had counsel presented "...the mental health assessment, life history, and other prison adaptability evidence in the manner presented before this Court rather than in the manner reflected in the Record on Appeal[,] there exists no reasonable probability" the jury would have returned with a different sentence, citing Belmontes, *supra*. (App. 4139). Stanko's complaint about the 2<sup>nd</sup> PCR Court's prejudice analysis is without merit. (App. 4137-39).

#### 4. The Mental Health Mitigation Claim<sup>21</sup>

Stanko also alleges the 2<sup>nd</sup> PCR Court erred in not finding IAC of trial counsel for failing to further retain Dr. Wu [who was already retained] to conduct an expanded investigation into the evidence otherwise presented through the aforementioned battery of guilt- and sentencing- phase medical and mental health experts. He argues “Dr. Wu could have testified that there was a biological explanation for Stanko’s inability to handle stresses, his failure to anticipate and learn from consequences, and his aggressive reaction to the stresses converging at the time of the offense and that those biological issues were treatable.” Yet Wu testified at trial and sentencing. Wu and the rest of the experts at trial and sentencing testified to the cause of each of these omissions or failures by Stanko, but each attributed them to a different biological explanation. Importantly, **Wu also testified at trial to; (1) the blow to the back of Stanko’s head when Stanko was 17, and (2) to Dr. Ruben Gur’s volumetric analysis in 2006, yet he did not diagnose Stanko with temporal lobe epilepsy nor did any other of the many experts who testified at trial for Stanko or for the State. (App. 639-40; Def.’s Ex. 1 [Gur’s Report]).** Again, Wu’s new diagnosis at the 2<sup>nd</sup> PCR is simply not credible, as the 2<sup>nd</sup> PCR Court found. Therefore, to the extent Stanko argues Wu’s new 2019 testimony materially alters the outcome of that presented in 2006, Stanko has wholly failed to meet his burden of demonstrating deficient performance and prejudice. Strickland; Jones.<sup>22</sup>

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<sup>21</sup> Stanko raised a similar IAC mental health mitigation claim at the 1<sup>st</sup> PCR hearing, but it is not the exact same claim raised to the 2<sup>nd</sup> PCR Court.

<sup>22</sup> Stanko also argues under this portion of this ground that trial counsel failed to introduce evidence of the stressors Stanko was under before the Ling murders and how he could not cope with those. As shown under the previous portion of this ground, trial counsel introduced much evidence about the stressors Stanko was under at the time of the Ling crimes and how he could not cope with them, so this claim, has no merit. Jones v. State; Simpson. Respondent will not rehash that discussion but incorporates its discussion of this issue under the previous ground.

### *Trial Testimony*

At trial, Dr. Wu explained a PET scan and his pre-scan administration of the CPT to ensure engagement of the brain at the time of the scan. (App. 586-626, 1924-27, 1955-62). Wu testified he was retained to review Stanko's PET scan which led him to opine Stanko has a brain abnormality in the frontal lobe, specifically the ventral frontal lobe, which is near the bottom of the frontal lobe. (App. 625-38, 1962-75; App. 3220). There was a decrease in brain activity on both sides of the frontal lobe and was 50% or greater in some areas. (App. 631-32, 638, 1974). **He also examined Dr. Gur's quantitative volumetric brain analysis in preparation for trial, which he then testified showed a statistically significant decrease in volume by a measure of 4 standard deviations from the norm. (App. 639-40, 656).** Wu described the abnormality affects Stanko's **ability to regulate or control his impulses.** (App. 634-35, 1991). Like the famous case of Phineas Gage, Stanko would have difficulty controlling aggressive behavior. (App. 1974-75). He determined Stanko's decrease of activity in the frontal lobe to be clinically significant, and it could "be consistent with someone who had a significant developmental problem" there. (App. 637). **He testified 1 potential contributing factor to the abnormality could be Stanko's having suffered a blow the back of the head with a beer bottle when he was a senior in high school, which Wu categorized as a traumatic brain injury. (App. 1981). Other expert witnesses testified to the same incident and its possible effects on Stanko's brain in the guilt and penalty phases. Dale Davis also testified at trial she confirmed this head injury through 3 witnesses.** Further, Wu testified medical records from Stanko's birth indicated developmental brain abnormalities—there existed poor wiring in Stanko's brain function from the time of birth. (App. 1981-82). And, developmental abnormalities sometimes do not manifest until early adulthood because "the frontal lobe is not fully connected throughout their brain until late adolescence."

(App. 1982-83). Wu **did not** diagnose in 2006 or testify at trial that Stanko suffered from temporal lobe epilepsy even though he and other trial experts were fully aware of the incident where Stanko was struck in the head at age 17 and Wu had Dr. Gur's volumetric brain analysis.

*2<sup>nd</sup> PCR testimony*

At the 2<sup>nd</sup> PCR, Wu simply offered a repetitive explanation and diagnosis. (App. 3201-29, 3251-60). Stanko's frontal lobe damage was likely caused by traumatic brain injury. (App. 3244-45). The area where the brain abnormality resided was responsible for impulse control, and, as in the famous case of Phineas Gage, an abnormality there meant difficulty controlling aggressive behavior. (App. 3224-25, 3234-35, 3241-42). Wu *again testified* Dr. Gur's quantitative volumetric brain analysis showed a decrease in volume by a measure of 4 standard deviations. (App. 3228-29). Wu only minimally expanded his prior diagnosis by testifying that he reviewed additional records not provided to him as part of his trial preparation in this case. (App. 3229-43). According to Wu, the key record he was not provided by trial counsel was *Dr. Gur's volumetric analysis of Stanko's brain*. (App. 3227-28; **3232, ln. 13- 3233, ln. 10**; 3237). According to Wu, if he had been provided that analysis, it would have tipped him off to look at other causes of Stanko's condition and would have led to a diagnosis of temporal lobe epilepsy. (App. 3227-30; **3232, ln. 13 - 3233, ln. 10**; 3237). At PCR, Wu concluded Stanko's records support a "working diagnosis, based on what [he had] learned so far," Stanko had an imaging consistent with a traumatic brain injury and temporal lobe epilepsy." (PCR 320).<sup>23</sup> Yet crucially, Wu's PCR testimony showed there was a great deal of his testimony from trial which Wu did not read, review, or compare to

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<sup>23</sup> Dr. Wu's 2019 PCR testimony opined Stanko had undiagnosed temporal lobe epilepsy, but the only manifestation of that Wu could testify to came in the form of the same criminal or antisocial conduct relied upon by Stanko at trial in 2006 and complained of as deficient by both present and initial PCR counsel. (App. 3243, 3267-68, 3271). Simply put, there is no other manifested evidence of any diagnosis rendered in the past 13 years of capital litigation in Stanko's case.

his new diagnosis. (App. 3258-66). He completely forgot, until shown his trial testimony, **he testified about Dr. Gur's volumetric analysis of Stanko's brain at trial in 2006 and its' findings. (App. 3254-60; App. 639-40; Def.'s Ex. 1)).** Additionally, Dr. Wu in no way retracted his testimony and diagnosis provided in 2006. (App. 3270).

Trial counsel also provided the 2<sup>nd</sup> PCR Court with testimony relevant to this claim. He stated his job as was to select who the experts were going to be. (App. 3044). He hired a number of medical experts who each had a slightly different role in the defense. (*Ibid.* at 8-16). He contradicted Wu and testified not 1 doctor he worked with in this case returned to him and asked for additional information to complete the task they were hired to do. (App. 3087). Importantly, Diggs did not recall hiring Wu to diagnose Stanko upon a review of records extraneous to the PET scan—he hired him “to put together the video” of the PET scan imagery and to testify about it. (App. 3081-83). It was Dr. Sachy who directed Diggs to Wu for purposes of conducting the PET scan and creating and analyzing the PET scan imagery. (App. 3039, 3080-83). “Dr. Wu was in that area of expertise explaining what the scans revealed. Dr. Wu was the one that put together the visual video” used at trial. (App. 3047). Along with Wu’s review of the PET scan and creation of the PET scan graphics came an opinion Stanko had a frontal lobe abnormality. (App. 3081). This planned testimony served to enhance the opinions of the other medical professionals. (App. 3083). Wu’s visual examination and diagnoses fit squarely with that of the other doctors who viewed Stanko’s PET and MRI scans and testified about them at trial. (*Ibid.* at 8-16).

Diggs opinion was Wu’s trial and sentencing testimony enhanced the medical opinions of his other experts because “it demonstrated visually what their opinions were based on.” (App. 3083). Diggs also appraised the defense prepared and presented by counsel and their team of experts and investigators as one which provided a medical explanation for Stanko’s abnormal brain

and explained how that abnormality “contributed to this particular incident.” (App. 3086). Mitigation investigator Dale Davis likewise assessed before the 2<sup>nd</sup> PCR Court that defense counsel “found the answer” to explaining Stanko’s behavior: brain damage. (App. 3130). She disagreed with the ASPD presentation, but that was not her role, as she was not licensed trial counsel. (App. 3130).

***The Lack of Merit of this portion of this Ground***

Stanko challenges trial counsel’s curtailment of Wu’s role at trial, but Stanko cannot prevail on Strickland’s deficient performance prong. Counsel’s investigation and presentation of Wu more than passes muster. “When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry ‘is not whether counsel should have presented a mitigation case’ but ‘whether the investigation supporting counsel’s decision not to introduce mitigating evidence . . . was itself reasonable.’” Powell v. Kelly, 562 F.3d 656, 670 (4th Cir. 2009) (quoting Wiggins, 539 U.S. at 523). “The ‘prevailing norms’ that guide our judgment as to whether counsel’s performance was reasonable do not require counsel to pursue a second expert after a qualified expert has given an adverse opinion”—or a promising one. Stone v. State, 419 S.C. 370, 406-07, 798 S.E.2d 561, 581, *cert. denied*, 138 S. Ct. 392 (2017); Pruett v. Thompson, 996 F.2d 1560, 1574 (4th Cir. 1993) (no IAC for failing to further investigate a theory after counsel had good cause to believe the theory was incredible).

The record reflects trial counsel duly investigated Stanko’s brain function and made a reasonable strategic decision to employ Wu to review and provide testimony regarding the completion and visual presentation of Stanko’s PET scan. (*Ibid.* at pp. 29-46). To this end, Wu admitted at PCR his “primary modality of interpretation is a visual analysis of the scan.” (App. 3216-17). Wu later criticized trial counsel for asking him “more general questions” about PET

scans rather than more specific questions about the functioning of Stanko's brain. (App. 3235). Yet these statements support the fact that trial counsel made an objectively reasonable professional decision to hire Wu to visually examine the scan and prepare testimony on that topic for the jury, knowing Wu's testimony would supplement the remainder of the expert testimony he prepared to present from other expert witnesses who actually examined Stanko and diagnosed him. Counsel acted exactly as recommended by Wu at the PCR hearing when he testified "clinical correlation is recommended."—counsel just did it through another credentialed expert, not Wu. (App. 3272).

This strategic decision, which is based on proper investigation and supported by the testimony of the remainder of the experts who testified at Stanko's trial, should not be subject to second guessing in favor of a new strategy. Gardner v. Ozmint, 511 F.3d 420, 427 (4th Cir. 2007) (acknowledging more detail in evidence submitted may be found, but no Strickland error where counsel investigated the case, relied on experts, presented a sound defense, and evidence of aggravation was overwhelming and compelling). Counsel is not required to independently seek out additional experts when they have already hired experts who they believe are well-qualified. Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) ("counsel did retain medical experts whom he thought well-qualified. The experts he had retained did not state that they required the services of . . . additional experts. There was no need for counsel to seek them out independently."); Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998) (counsel has no duty to pursue additional testimony from alternative neurological experts when the experts with whom he consulted indicated no additional testing was required). The fact Stanko could later secure an alternative expert diagnosis "does not mean that trial counsel's failure to obtain that expert testimony constituted deficient performance." McClain v. Hall, 552 F.3d 1245, 1253 (11th Cir. 2008) ("McClain blames Dr. Maish's failure to diagnose the frontal lobe disorder on his counsel's

failure to inform Dr. Maish of McClain's history of childhood abuse and substance abuse, but that argument fails. As McClain acknowledges, Dr. Maish was aware of both McClain's substance abuse and childhood abuse.”).

This Court has found deficient performance and prejudice where capital trial counsel failed to provide medical records and relevant information to their testifying psychiatrist. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). That case assigned deficiency to counsel's failure because counsel only “exerted some effort,” which was determined insufficient to “adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder.” Id. at 608, 602 S.E.2d at 743. However, Von Dohlen is not analogous to this case for several reasons.

First, because Wu was not hired to examine and diagnose Stanko but to generate the PET scans and examine those scans and provide testimony regarding those scans, which he did. Second, because of the depth of the battery of experts trial counsel strategically employed to present compelling mitigating evidence throughout both phases of trial. Von Dohlen did not present a battery of experts until his PCR hearing. Id. at 604-06, 602 S.E.2d at 741-42. But at Stanko's trial, each expert's testimony built upon that of the previous expert to paint one full picture of the causes and implications of Stanko's brain abnormality. Stanko's experts provided a medical reason—a visually discernable frontal lobe impairment—for Stanko's antisocial diagnosis and criminal behavior. And with the exception of Drs. Einhorn and Wu who were hired to conduct, create, and testify about the findings in the PET scan, Stanko's remaining experts were provided with the gamut of Stanko's relevant records for assistance in diagnosis. Drs. Thrasher and Sachy also personally interviewed Stanko prior to reaching any conclusion and diagnosis. (*Ibid.* at pp. 8-

17 and 29-46). Wu did not. Drs. Thrasher and Sachy did not diagnose Stanko with temporal lobe epilepsy.

Finally, Wu's testimony at PCR is simply not credible. He testified *if* he had been given Gur's report prior to trial it would have led him to eventually diagnose Stanko with temporal lobe epilepsy. (App. 3227-28; **3232, ln. 13- 3233, ln. 10; 3237**). Importantly, and contrary to his 2<sup>nd</sup> PCR testimony, Wu, did have all this information (**App. 3254-60**) and **he did not diagnose Stanko with temporal lobe epilepsy in 2006 or testify to the jury in 2006 Stanko suffered from temporal lobe epilepsy**. He testified at trial he carefully examined Stanko's scans and found brain damage and described what it was, but not temporal lobe epilepsy. **He was aware of the volumetric analysis by Dr. Gur of Stanko's brain as he testified about it at trial (App. 3254-60; App. 639-40; 656; Def.'s Ex. 1)**. Wu eventually admitted on cross-examination at PCR, **he did have Gur's report** before this trial and even testified about its' findings before the jury. (**App. 3254-60; App. 639-40; Def.'s Ex. 1**). Gur also knew about the other experts' findings and his own findings in the PET scans. As to the prior head injury at 17, the record shows counsel attempted **7 times through their mitigation investigator to obtain medical records of this incident** but were unable to do so, through no fault of counsel's, because Stanko's father was in the military and his family had moved so many times. (**App. 2285-87**). Counsel's mitigation investigator **was able to confirm through 3 other sources the head injury at 17 did in fact occur. (App. 2285-87)**. This was not deficient performance. **Dr. Wu also knew about the prior head injury at 17 as he testified about it before the jury at trial in 2006. (App. 1981)**. **Other experts also testified about the head injury at trial. (App. 472)**. But, Wu did not diagnose Stanko with temporal lobe epilepsy in 2006 even though he was aware of all of the evidence, **including the head injury and Gur's volumetric brain analysis of Stanko's brain, both of**

which Wu testified about at trial. (App. 3254-60; App. 639-40; Def.'s Ex. 1). Nor did any of the other medical and psychiatric experts in the case whether for the State *or* for Stanko, and they were aware of Gur's report, the head injury, and what the brain scans contained. Nor is there any evidence Wu ever informed trial counsel Stanko suffered from temporal lobe epilepsy even though he was aware of all of the information described above. Counsel was simply not deficient. Strickland. Wu's assertions at PCR about what he would have diagnosed if he had been given the right information are simply not credible because he had the information and did not diagnose Stanko with temporal lobe epilepsy in 2006. Von Dohlen is simply not applicable to these facts.

Importantly, this concept ties into the maxim there exists no constitutional right to the effective assistance of an expert witness. Wilson v. Greene, supra. It matters whether counsel put forward a reasonable and reasonably thorough investigation into a particular defense, not whether a certain expert he hired missed something fairly duplicative and otherwise discredited from the remainder of the testimony given at trial. Trial counsel has no duty to present all psychiatric evidence and a decision not to present additional psychiatric evidence may be reasonable. Philmore v. McNeil, 575 F.3d 1251, 1263 (11th Cir. 2009). Counsel is also not required to order each expert to conduct an entire battery of neuropsychological tests when counsel does not reasonably believe that necessary to the completion of his defense. Stokley v. Ryan, 659 F.3d 802, 813 (9th Cir. 2011); Byram v. Ozmint, 339 F.3d at 209-10 (4th Cir. 2003) (largely cumulative presentation in collateral action not enough to warrant finding of deficient performance for counsel's failure to expert-shop); *see also* Bobby v. Van Hook, 558 U.S. at 11 ("given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents").

Testimony at both PCR hearings showed 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. Prior to trial, counsel retained 2 psychiatrists, both a local and national psychiatric expert, who examined Stanko, a psychologist, who examined Stanko, 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 **Dr. Gur regarding statistical volumetric differences from a "normal brain."** Gur's report was provided to Wu prior to the 2006 trial. Counsel also thoroughly investigated the prior head injury, seeking to obtain the medical records of the same 7 different times, and confirmed it through 3 witnesses and provided that information to the experts. The findings of these experts and the brain scans were all presented to the jury **including Gur's findings by Wu and the prior head injury.** (App. 639-40; 656; Def.'s Ex. 1; App. 1981; 472). 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 testimony about his sustaining head injury at age 17 from several different witnesses.** Wu knew this. The jury knew this. Counsel presented this evidence of brain damage and insanity. Counsel also re-presented many of these experts in the penalty phase who testified to Stanko's brain defect and personality disorder that were thrust upon him, and these disorders were not a personal choice. Counsel was able to obtain instructions on statutory mental mitigating circumstances requested. If counsel had not presented this evidence of brain damage, Petitioner would be arguing counsel was deficient and he was prejudiced as a result. (PWC, pp. 19-20, citing Sears, Porter, Mills).

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. Counsel certainly was entitled to make an objectively reasonable strategic decision not to pursue a mental health defense [temporal lobe epilepsy] counsel's own experts **did not find Stanko suffered from, even though they were aware of the blow to the back of the head at 17 and even though they had and were aware of Gur's findings in his report.** See generally Savino v. Murray; 82 F.3d 593, 599 (4th Cir. 1996) (if there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial); Bell, 72 F.3d 421 (decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible outcomes); Poyner, 964 F.2d at 1419 (petitioner could not establish IAC because counsel did not "expert shop" until one could be found who would testify favorably).

Wu also claims Dr. Sachy's trial testimony further informed his new diagnoses; but counsel could not have given Sachy's testimony to Wu before trial because it did not exist, further Sachy was aware of all of the information, including Wu's PET scan findings, that Stanko was struck with a bottle at 17, Stanko's birth records, and Gur's findings in 2006, and Dr. Sachy did not diagnose temporal lobe epilepsy. Wu's new claims are not credible and there was no deficient performance. Strickland; Von Dohlen.<sup>24</sup>

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<sup>24</sup> Dr. Wu's PCR testimony is also not credible for several other reasons discussed under the prejudice analysis herein, including his methodology and Dr. Gur's have been repeatedly rejected, questioned, or found not credible. People v. Woodruff, 5 Cal. 5th 697, 717, 421 P.3d 588, 607 (2018)(Wu); Clemons v. State, 55 So.3d 314, 328 n.5 (Ala. Ct. App. 2003)(same) *upheld on habeas*, Clemons v. Thomas, No. 2:10-CV-02218-LSC, 2016 WL 1180113 at \*15 n.5 (N.D. Ala. Mar. 28, 2016); United States v. Walker, 71 M.J. 523, 530 (N-M. Ct. Crim. App. 2012), *aff'd in part, rev'd in part*, (C.A.A.F. July 16, 2012); Smith v. Ryan, No. CV-12-00318-PHX-PGR, 2014 WL 1247828, at \*46 (D. Ariz. Mar. 24, 2014), *aff'd*, 823 F.3d 1270 (9th Cir. 2016)(Unpublished); see also Berryman v. Ayers, No. 1:05 CV 05309 AWI, 2007 WL 1991049, at \*81 (E.D. Cal. July 10, 2007); Smith v. State, 170 So.3d 745 (Fla. 2015)(Gur); State v. Mundt, 2016 W.L. 3573169 (Ct. App. Ohio 2016)(*Slip Copy*)(same); Foster v. State, 132 So.3d 40 (Fla. 2013); State v. Powell,

### *Lack of Prejudice*

Stanko has not demonstrated the mental health history put forward in mitigation caused him prejudice. He has failed to show a reasonable probability of a different sentence with Wu's new non-credible diagnosis. See Wiggins; Belmontes.

The evidence of Stanko's guilt of the crimes was overwhelming and the jury deliberated on the side of guilt. Similarly, the evidence in aggravation of the murder, kidnapping, attempted murder, torture, and rape was overwhelming. And, 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 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 or GBMI at the time of the crime and did not suffer from temporal lobe epilepsy. Stanko has failed to show resulting prejudice in this regard. He has not shown - but for any alleged deficient performance under this ground, there is a reasonable probability the result of the penalty phase would have been different. Strickland; Belmontes. This claim for relief was properly denied.

In fact, Stanko cannot establish prejudice because, in addition to being largely cumulative of his 2006 testimony, (*Ibid.* at 60-62), the content of Wu's 2019 testimony was also cumulative

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2011 W.L. 20411183 (Super. Ct. Del. 2011)(*unpublished*); Steven Bixby v. State, Order of Dismissal, 2011-CP-01-110, filed January 13, 2015, the Honorable Knox McMahon, *cert. denied March 7, 2017, S.C. Supreme Court, Appellate Case No. 2015-00821*); Kamell Delshawn Evans v. State, Order of Dismissal, 2006-CP-23-7719, issued February 24, 2011, the Honorable Garrison Hill; Cone v. Carpenter, 2016 W.L. 1274599, \*134-35 (W.D. Tenn. 2016)(*Slip Copy*); United States v. Duncan, 2013 WL12057465 (D. Idaho 2013)(*Slip Copy*); United States v. Montgomery, 635 F.3d 1074 (8<sup>th</sup> Cir. 2011); Nelson v. United States, 97 F.Supp. 3<sup>rd</sup> 1131, 1146 (W.D. Mo. 2015) See also Commonwealth v. Ballard, 622 Pa. 177, 80 A.3d 380 (2013); United States v. Mezvinsky, 206 F.Supp.2d 661, 674-75 (E.D. Penn. 2002).

to that of the other trial experts. From the outset, Dr. Albiniak opined less than 2% of the population would share a brain structure like Stanko's, which he identified as lacking brain tissue in the area of the brain which regulates emotional behavior. (App. 417-19). Dr. Sachy testified Stanko's behavior was a textbook example of being consistent with brain damage in the frontal lobe, which could be seen in Stanko's PET scans showing up to 50% reduction in function. (App. 2161-64). Dr. Thrasher testified **Stanko was hit on the back of the head as a teenager** which could very well have injured the front of his brain. (App. 472). Dr. Thrasher was also **aware of Dr. Gur's volumetric analysis of Stanko's brain and so was Dr. Sachy**. Drs. Thrasher and Sachy also each testified they reviewed Stanko's prior medical records and the brain abnormality may have resulted from his health at the time he was born. (App. 470-71, 695-96). Neither diagnosed Stanko with temporal lobe epilepsy. Neither did Drs. Wu or Einhorn diagnose Stanko at trial with temporal lobe epilepsy knowing of Gur's analysis and the head injury. Von Dohlen, supra. Neither did any expert witness called by the State such as Dr. Crawford or Dr. Spicer who reviewed Stanko's brain scan. Wu's new diagnosis and testimony would be attacked as not credible if presented today, because he had Gur's report in 2006, testified about it, was aware of the head injury, but did not diagnose temporal lobe epilepsy at that time. Von Dohlen.

On the issue of whether Stanko's condition was treatable, Dr. Sachy testified at trial that aggressive behavior resulting from a diminished ability to control one's impulses can be curtailed with medication. (App. 728, 2168). On the issue of prison adaptability, Dr. Sachy testified Stanko was likely to be well-behaved in a structured prison environment and why, because he has ASPD, **and Stanko would be a benefit to the institution**. (App. 2166-68, 2172-73). As to memory loss, Dr. Thrasher testified at trial Stanko's stated memory loss during the Ling crimes could be caused by a frontal lobe defect. (App. 561-62). Dr. Sachy also addressed Stanko's stated inability to

remember certain things about the crimes. Dr. Sachy offered an opinion Stanko likely chose not to remember some things, but the memory loss also could result from entanglement in an emotionally charged incident which reduces one's ability to store detail. (App. 735-38). At PCR, Dr. Wu expressly stated that he did not disagree with Dr. Sachy on this point. (App. 3265).

Perhaps the most telling indicator relevant to the prejudice analysis is the lack of credible weight Wu's new "working diagnosis" carries. The contention Stanko suffers from "undiagnosed temporal lobe epilepsy," (App. 3229), is contradictory to the testimony of trial experts who actually examined Stanko. Notably, Dr. Thrasher testified at trial that seizures can cause the type of brain dysfunction he diagnosed Stanko with, but his personal examination of Stanko showed he "does not have seizures."<sup>25</sup> (App. 466). Wu's new "working diagnosis" should further be viewed with caution due to Wu's acknowledgement that "you kind of have to ask for" information regarding the manifestation of symptoms. (App. 3271). No other expert, whether from the defense or the State, who carefully reviewed Stanko's records, Gur's report, and Stanko's brain scans, diagnosed Stanko with temporal lobe epilepsy before or since the 2006 trial.

However, Wu's entire testimony, including cross-examination shows, unlike Dr. Thrasher, he has requested no additional information to support his diagnosis. Wu's testimony further shows **Stanko does not present any symptoms of the disorder and is not undergoing treatment or being medicated for it.** (App. 3268, 3271). As to Stanko's purported hypergraphia, Wu's basis for this finding lacks evidentiary support, as it is known Stanko endeavored to write and publish a book while in prison the first time, sought to support himself by writing once released from prison,

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<sup>25</sup> To the extent Stanko elsewhere argues IAC for pursuing an NGRI defense because the evidence showed Stanko's mental defect was manifested only in repeated criminal or antisocial behaviors, Wu's PCR testimony does not establish prejudice. Wu admitted Stanko showed no other symptoms or signs of temporal lobe epilepsy apart from his history of criminal and antisocial acts. (App. 3267-68, 3271).

Stanko has been isolated in a cell by himself much of the time since these crimes so he would have little else to do but write, and as Wu never personally examined Stanko or asked for additional records to enhance or verify his assessment on only limited facts. (App. 3267-68). Mere speculation does not satisfy Stanko's burden of demonstrating prejudice from alleged omissions from trial. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995); *see also* Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).<sup>26</sup>

The weight of Wu's recent testimony is further distinguishable from the trial testimonies of Drs. Thrasher, Sachy, and Einhorn because Wu never personally examined Stanko and was provided with only circumspect materials from the 2006 trial. (App. 3257-67). He was not asked to review, for this proceeding, the testimonies of all of the medical experts who testified at trial. He in fact **could not recognize that the testimony he was hired to prepare for this 2019 hearing was largely cumulative to that of other doctors.** Moreover, at PCR, Wu agreed Stanko has a personality disorder, and he actually lowered the percentage of abnormal functioning he observed within Stanko's PET scan to 25%, which differs from the 50% he testified to at trial. (App. 3226, 3251; *contra* App. 631-32, 638, 1974). And in spite of presenting a "working diagnosis" regarding another abnormality in Stanko's "right temporal insular cortical metabolism," Wu agreed that area of the brain remains in the limbic system and thus remains responsible for impulse control. (App. 3228, 3253-54). Still more, his identification of this portion of the limbic system may contradict a crucial distinction he made at trial. There Wu testified Dr. Einhorn administered neuropsychological tests upon Stanko and obtained normal results. Wu then explained he would

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<sup>26</sup> Moreover, Wu's suggestions Stanko's condition can be treated with hyperbaric oxygen therapy and cognitive rehab, (App. 3246-47), are unavailing to this prejudice analysis given the aggravating evidence, Wu's new testimony is not credible, and the likelihood of Stanko's receipt of that type of boutique treatment in prison, is not available in this country.

expect the results to be normal in Stanko's case because the parts of the frontal lobe Stanko would use to complete those neurological tests were higher up than the impaired portion. (App. 629).

Stanko's revamped presentation of Wu is also suspect given Wu's similar role in other capital collateral actions. *E.g.*, People v. Woodruff, 5 Cal. 5th 697, 717, 421 P.3d 588, 607 (2018) (physician and co-chair Cedars-Sinai imaging department "concluded that Wu's method was appropriate for research but not diagnostics"); Clemons v. State, 55 So.3d 314, 328 n.5 (Ala. Ct. App. 2003) (court correctly refused to admit testimony of PET scan conducted by Wu that defendant suffered a brain injury at or near birth because the test was conducted during adulthood and because **"Wu conceded that none of the scientific journals or studies supported the use of a PET scan as a diagnostic tool to ascertain old brain injuries"**), *conviction upheld in habeas action*, Clemons v. Thomas, 2016 WL 1180113 at \*15 n.5 (N.D. Ala. Mar. 28, 2016); United States v. Walker, 71 M.J. 523, 530 (N.M. Ct. Crim. App. 2012), *aff'd in part, rev'd in part*, (C.A.A.F. July 16, 2012)(lower court did not abuse its discretion by determining the PET scan and Dr. Wu's assistance were unnecessary or cumulative). Wu's non-credible findings do not offer a mitigating explanation of the effects of Stanko's neurological and mental status at the time of the crimes, and there is no reasonable probability placing a different emphasis on the cause of his impulsive behavior would have persuaded the jury to vote for a life. Smith v. Ryan, No. CV-12-00318-PHX-PGR, 2014 WL 1247828, at \*46 (D. Ariz. Mar. 24, 2014), *aff'd*, 823 F.3d 1270 (9th Cir. 2016)(Unpublished) (addressing testimony by Wu); *see also* Berryman v. Ayers, No. 1:05 CV 05309 AWI, 2007 WL 1991049, at \*81 (E.D. Cal. July 10, 2007) (reaching same conclusion and stating: "Dr. Waxman indignantly states that Dr. Wu's method in this regard "is intended to mislead the reader by suggesting that normal *individual* subjects have no asymmetries of the temporal lobe") (unpublished). Stanko takes issue with the PCR Court's credibility finding.

However, the Court's credibility finding as to Wu is, as just discussed above, is fully supported by the record. It is also within that Court's discretion as it viewed and heard Wu's testimony and compared it with the entire record, including his prior testimony at trial and sentencing.

And, the key report on which Wu relies to support his new diagnosis is suspect at best. The methodology is far from uniformly accepted, and is subject to significant challenge. In fact, Dr. Gur's methodology in diagnosing brain damage by volumetric analysis and comparison to other brains or what he terms an "average normal brain" has been rejected by courts throughout the country or found not credible. Smith v. State, 170 So.3d 745 (Fla. 2015)(finding testimony of Dr. R. Helen Mayberg, M.D., more persuasive and convincing MRI and PET scan of defendant showed no brain damage whatsoever, than Gur's claim scans showed frontal lobe brain damage which has major behavioral consequences similar to that asserted in this case, and trial testimony and evidence did not support finding of Gur and another expert); State v. Mundt, 2016 W.L. 3573169 (Ct. App. Ohio 2016)(*Slip Copy*)(noting Gur acknowledged under oath he is not an M.D. and psychologists do not receive formal training in MRI and PET scan results, he reached his conclusions applying an algorithm patented in 1989 and created by him, his doctor-wife, and another; however, after 1990 no articles were published addressing the algorithm's validity; Gur could only name 1 medical professional who used the algorithm in a clinical setting for diagnosis and treatment since 1989, and finding no deficient performance on the part of counsel for failing to have Gur or some other neuropsychologist evaluate him.); Foster v. State, 132 So.3d 40 (Fla. 2013)(noting Gur's claim was directly contradicted by the credible testimony of Dr. Leon Prockup who testified Gur's methodology is not accurate or valid and the algorithm on which it is based was created with insufficient data; there were no publications or articles on this methodology since 1990; and Dr. Michael Gamache testified Gur's methodology is not frequently used by

neurologists and not generally accepted in the field of neuropsychology); State v. Powell, 2011 W.L. 20411183 (Super. Ct. Del. 2011)(*unpublished*)(finding Gur's testimony did not change the sentencing equation as the defendant's actions showed he was not engaged in a fight or flight response but committed a robbery and then murdered a police officer to escape arrest) Steven Bixby v. State, Order of Dismissal, 2011-CP-01-110, filed January 13, 2015, the Honorable Knox McMahon (finding no prejudice from failure to call Gur as mitigation witness as his methodology was questionable based on testimony of doctors presented at PCR hearing), *cert. denied March 7, 2017, S.C. Supreme Court, Appellate Case No. 2015-00821*); Kamell Delshawn Evans v. State, Order of Dismissal, 2006-CP-23-7719, issued February 24, 2011, the Honorable Garrison Hill (finding counsel was not deficient in failing to call Gur for similar reasons); Cone v. Carpenter, 2016 W.L. 1274599, \*134-35 (W.D. Tenn. 2016)(*Slip Copy*)(noting questions about Gur's methodology and applicability to criminal cases from medical professionals and pointing out Gur asserted defendant's alleged brain damage appeared to have resulted from a blow to the back of the head where defendant had reported no history of a head injury and no clinical symptoms giving rise to his evaluation);<sup>27</sup> United States v. Duncan, 2013 WL12057465 (D. Idaho 2013)(*Slip Copy*)(finding Gur's conclusions questionable given his formula or algorithm did not take into account all of the testing of the defendant, including a great number of tests where the defendant

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<sup>27</sup> In Cone, the Court noted, Dr. Meltzer, a neuro-radiologist testified her clinical reading of the defendant's MRI and PET scans were normal and many people who fall in the normal range for brain function would have abnormal or clinically significant findings using Gur's methodology. Meltzer testified brain imaging findings have limited application to the primary question of the court, determining criminal intent and the practice of performing imaging studies to shed light on brain function or state of mind at the time of a prior criminal act was "problematic." Meltzer further testified about how these conclusions were reached at a 2013 Multidisciplinary Consensus Conference attended by Gur and published in the American Journal of Neuroradiology. The Court concluded the technologies employed by Gur and others on brain damage and dysfunction were not conclusive; had no direct clinical correlation to the defendant's behavior; and may not be appropriately used in the criminal context for determining mental state. Id.

scored well); United States v. Montgomery, 635 F.3d 1074 (8<sup>th</sup> Cir. 2011)(upholding exclusion of Gur's testimony regarding MRI findings, and diagnosis, and finding failure to admit PET testimony was harmless); Nelson v. United States, 97 F.Supp. 3<sup>rd</sup> 1131, 1146 (W.D. Mo. 2015)(because there was no baseline comparison value, Gur's imaging provided no useful information; further the failure to introduce Gur's testimony and report was not prejudicial given the overwhelming evidence in aggravation). *See also* Commonwealth v. Ballard, 622 Pa. 177, 80 A.3d 380 (2013)(holding prosecution properly cross-examined Gur on the exclusion of his testimony in Montgomery, his repeated testimony for capital defendants, his failure to deliver a report to the state, and his opposition to the death penalty, because this impeached his testimony and qualifications and showed bias on his part).<sup>28</sup> Gur has admitted in the past, a PET scan [or MRI] is only a "snapshot" of a patient's brain at 1 particular time, and one cannot make a retrospective appraisal of that brain from such snapshots. Mezvinsky, 206 F.Supp.2d at 674-75. Thus, Wu cannot make any inference about Stanko's brain during childhood, as a teenager, or at the time of the crime based on a later PET scan. Id., at 675.

Most fundamentally, Stanko cannot establish prejudice because Wu's testimony is not enough to warrant a finding at least 1 juror would have struck a different balance. Pinholster; Morva; Byram. Wu has simply said more of the same as before. And he has supported it with the same visual presentation original trial counsel hired him to provide. Again, the presentation before the PCR Court was just a "fancier" supplement to that presented to the jury. Jones, *supra*. To focus on any expansion of Wu's testimony would discount the amount of testimony from a number of

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<sup>28</sup> Dr. Gur actually testified to his findings using the same methodology in the guilt phase of State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013)(Turner murder), and Stanko was still convicted and sentenced to death. Gur testified similarly in United States v. Fulks, 875 F.Supp.2<sup>nd</sup> 535 (D.S.C. 2010) and Fulks was still sentenced to death.

other well-qualified experts who testified at trial. In re Yates, 177 Wash.2d 1, 296 P.3d 872, 891 (Wa. 2013)(no IAC in failing present testimony of Gur and other experts called at PCR proceeding as counsel retained appropriate experts in neuro-psychology and psychiatry and those experts did not recommend further evaluations or testing). Further, to the extent Wu's PCR testimony may be viewed to vary from the other expert presentations at trial in any credible manner, trial counsel does not meet the legal standard for deficient performance given the conscious and well-reasoned choice to present a battery of other medical experts. King v. State, 211 So.3d 866, 882 (Fl. Sup. Ct. 2017) (mitigating mental health testimony from Wu at trial not deficient performance where family member testimony corroborated defendant's behavior changed after a sledding accident and at least 1 other expert did not believe the only alternative mitigating theory). As a result, Stanko can point to no specific indicator warranting a finding either trial counsel or initial PCR counsel were deficient or caused Stanko prejudice in their representations. Wiggins; Robertson.

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

Stanko argues the 2<sup>nd</sup> PCR Court erred in not finding trial counsel's performance deficient in the penalty phase in not offering prison guard testimony and that of a prison adaptability expert. Stanko also argues the 2<sup>nd</sup> PCR Court erred in finding he not was prejudiced by counsel's presentation of prison adaptability at sentencing. While he claims trial counsel prejudiced him by choosing to present guards from the county detention center rather than from his time in prison, the record before the 2<sup>nd</sup> PCR Court demonstrated that both the Georgetown County Detention Center and the S.C. D.O.C. employees testified in a critically similar manner. And while Stanko

argues the expert testimony presented at the PCR hearing painted a new picture of Stanko's prison adaptability and future dangerousness, the trial record's expert testimony refutes this contention.<sup>29</sup>

In the penalty phase, a defendant may offer evidence of good behavior while in jail or prison adaptability. Bowman v. State, 422 S.C. 19, 37, 809 S.E.2d 232, 242 (2018). Any prison mitigation evidence must be limited to evidence bearing on the particular "defendant's character, prior record, or the circumstances of his offense." Id. at 36, 809 S.E.2d at 241. Stanko's penalty phase was not deprived of evidence of his ability to adapt to prison life. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland, 466 U.S. at 670. Here, the prejudice inquiry lacks complication.

Before the 2<sup>nd</sup> PCR Court, Stanko presented a retired warden, a retired security sergeant, and a retired correctional facility chaplain. Each witness worked at Turbeville Correctional during Stanko's 1996-2004 prison sentence for kidnapping, ABHAN, breach of trust (9 counts), and obtaining property by false pretenses (2 counts). Each of these witnesses testified Stanko posed no disciplinary problem while incarcerated, was helpful to other inmates and acted in compliance with the structure and authority present within the institution. (App. 2955-81, 248-65). Each recalled Stanko helped other inmates and was a benefit to the prison. (App. 2957, 2961-63, 3183-84, 3193-94). (App. 3182-84; 3193-94; 2957-58, 2961-63). Lay witness testimony also showed Stanko spoke with youthful offenders and at-risk youth brought to Turbeville as part of a deterrent program. (App. 2958-60, 3188-89). Stanko presented a risk assessment and inmate classification expert Dr. James Austin, who testified Stanko "does prison time well." And, Stanko's records from his 1996-2004 incarceration showed Stanko was held in the lowest prison classification possible,

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<sup>29</sup>1<sup>st</sup> PCR counsel raised this claim but offered no evidence in support of it at the PCR hearing. The 1<sup>st</sup> PCR Court denied and dismissed the claim because no evidence was offered in support it, and even if had Stanko could not establish prejudice on this record. (Suppl. App. 546-49).

because of his kidnapping conviction, had no disciplinary record, and behaved like a minimum security prisoner. (App. 2976, 2977). He noted if Stanko were sentenced to life he would indefinitely be held in the highest security classification due to the convictions, but he could contribute to the prison. (App. 2977-81). Dr. Wu and Dr. Andrews also testified Stanko could adapt to prison based on his history or brain injury and would contribute to the prison. (App. 3249, 3291; 3325, 3304-05).

But all of this testimony is similarly reflected in Stanko's 2006 trial where witnesses also testified Stanko does well when incarcerated in jail or prison. There was testimony Stanko was a well-adjusted inmate when he served his prison sentence for the McClendon kidnapping (8 ½ years), and had almost no prison disciplinary violations for assaultive behavior. (App. 848-49). In that stressful prison environment, Stanko could control himself and was not a violent inmate who engaged in fights, but walked away. (App. 848-49). Also, similar testimony was presented Stanko was a well behaved prison inmate with a clean disciplinary record. (App. 2166-68, 2172-73). Counsel also presented the 2nd-in-command at the Georgetown County Detention Center who testified he had daily contact with Stanko and never had any difficulty with him—he was not violent, he followed the rules, he was not bad at being managed, he was respectful rather than threatening, *and Stanko was his cell block's grievance spokesman*. (App. 1714-20). Another county corrections officer testified Stanko followed instructions in the cell block and in the larger unit and he was respectful rather than a threat or harm to others. (App. 1720-24). Another officer testified Stanko was quiet and respectful during booking, and he was respectful and caused no problems during his pre-trial confinement and Stanko was the voice of the cellblock—he brought inmate grievances to the chain of command's attention, and they were not frivolous. (App. 1725-28). Dr. Thomas Sachy testified as follows during the sentencing phase of Stanko's trial:

Q: Let me talk to you about Stephen in the event we were to be sentenced to life imprisonment.

A: Yes.

Q: Would other inmates be in danger around Mr. Stanko?

A: Not typically, no.

Q: Why do you say that?

A: Because in reviewing this – the literature, it had to do with behavioral disorders that he had, the behavioral disorder that he had. In prison they don't act violently or don't tend to act violently. They are manipulative. They use the system to their advantage, but they don't go around shanking other prisoners or attacking other prisoners. They actually seem to be well-behaved. . . . that structure keeps the psychopath at least in control.

Q: Now, we have seen Mr. Stanko. **We know he was in prison for eight and a half years and had a relatively clean record there as an inmate.** And then he gets out and this happens within months. Does that corroborate, do you – would you put that forward as evidence to support your conclusions that you're stating now or opinions?

A: Well, yes. And again, . . . in jail, these people, as long as they have that structure, they – they don't do horrible, terrible predatory acts of violence.

Q: Just like at the Georgetown County Detention Center. I don't think you were here, but we have had corrections – officers come in from the Detention Center who spoke favorably of Mr. Stanko. Would that be something that would be replicated, duplicated in prison, in the prison setting?

A: I – yes. I suspect the guards in prison would end up having a favorable, friendly working relationship with him, but just the same as they did here.

(App. 2166-68). He agreed Stanko had a clean record when he served 8 ½ years for the McClendon incident and he believed Stanko **“could be a contributing individual to the inmate population, to the corrections system, and to science at large . . .”** if he were sentenced to prison. He agreed Stanko “could be housed in that prison – structured prison environment so as not to be an unreasonable risk to any other corrections personnel or inmate.” (App. 2172-73)(emphasis added).

Stanko's trial/sentencing presentation on the topic of prison adaptability was neither sufficiently insubstantial nor so malformed as to warrant a finding in this proceeding 1 juror would

have struck a different balance had the jury heard the 2019 version rather than, or in addition to, the version presented in 2006 at sentencing. See Wiggins, 539 U.S. at 537 (finding a reasonable probability of a different outcome had the jury heard defendant’s entire history of childhood abuse rather than only one significant mitigating factor—that the defendant had no prior convictions). The jury heard the same basic information from the testimony presented at trial and sentencing. Each witness at each presentation discussed Stanko’s (1) low risk of violence while incarcerated; (2) Stanko’s adaptability to the structure of incarceration; and (3) that Stanko had an ability to contribute to the detention center/prison in a productive way. The presentation before the 2<sup>nd</sup> PCR Court was just lengthier and “fancier” than that presented to the Georgetown jury. Therefore, the new evidence is cumulative to the old and is not enough to warrant a finding one juror would have struck a different balance. Pinholster, *supra*; Morva, *supra*; Byram, *supra*; Jones, *supra*.

Moreover, the newly offered evidence relating to Stanko’s prison adaptability is “by no means clearly mitigating, as the jury might have concluded that [Stanko] was simply beyond rehabilitation.” Pinholster, 563 U.S. at 201 (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002) (recognizing mitigating evidence can be a “two-edged sword” that juries might find to show future dangerousness); Belmontes, 558 U.S. at 24 (taking into account certain mitigating evidence would have exposed the petitioner to further aggravating evidence)). Features of Stanko’s character and criminal record actually weigh against Stanko’s contention he was prejudiced from the failure to present *prison* guards to testify in mitigation rather than those from the Detention Center. Not all of the new mitigating evidence was complimentary of Stanko. The retired security sergeant acknowledged Stanko spoke to at-risk youth while at Turbeville, but also reoffended with the Ling incidents a short time after release, demonstrating that **he did the very thing that he encouraged people not to do.** (App. 3189-90). And, he did almost the very same thing that landed him in

prison the first time. And Dr. Wu later testified to a belief Stanko was less stressed in prison than in the outside world not only because it was structured, but because “he was not looked down upon in the prison population. . . . [H]e might not have been under a lot of stress if he was in a population that felt he was you know, kind of helping.” (App. 3268-70).

Further, Stanko was in prison for a callous Berkeley County assault on a live-in girlfriend which mirrored, as an antecedent, the brutal and murderous assaults carried out on Ling and her daughter. As recounted by Dr. Andrews, “he tied her up, attempted to kill her with chemical cloths, and then moved her around the house several times, took the rags out, and was having a conversation with her and then – and then left.” (App. 3321; App. 1264-1362). “[I]t was similar in that he was engaging in the scams. She knew about the scams, and she – he knew that he was going to get in trouble.” (App. 3322). As characterized by trial counsel: “It fits squarely within what happened here.” (App. 3079). “He had her by the head dragging her down the hallway singing, you know, as he was about to strap her into that chair in the kitchen.” (App. 3079). Presenting Stanko’ previous prison time of 8 ½ years would have re-emphasized the McLendon crimes for which Stanko was imprisoned, and demonstrated he could control his behavior when he wanted to, for his own benefit. The prison adaption testimony presented at PCR would also have undercut the mental health defense presented at trial and sentencing, in that Stanko could control his actions under a high stress environment like prison. It is not surprising trial counsel did not wish to dwell on this time period and what Stanko was being punished for during that time. Further, like the McClendon crime, in the Ling crime, Stanko *escaped* from the area of the State where he committed the crimes. The State could have further emphasized Stanko’s escape risk with this testimony, re-emphasizing his flight from the state in the Ling crime. Further, the State could have re-emphasized Stanko learned from the McClendon incident, i.e. he left her alive and he landed in

prison. Instead, this time he murdered Lauran Ling and thought he had murdered her daughter, leaving no witnesses to the Georgetown incident.

Instead, as evidenced by Gerald Kelly's penalty-phase opening statement, trial counsel asked the jury to gauge Stanko's future dangerousness and created a favorable barometer by limiting their consideration to the timeframe between Stanko's arrest in Augusta and trial. (App. 1705-06). And arguably purposefully so. Kelly testified that his mitigation investigator Dale Davis had all the past prison records and he did not consider presenting that as evidence of adaptability. (App. 2994). Diggs testified he did not consider calling a prison adaptability expert and chose to rely "on the witnesses that were presented at the trial who were familiar with what his behavior was in a structured environment." (App. 3058-59). Trial counsel matched this lay testimony with expert testimony from their lead psychiatrist Dr. Sachy. (App. 2166-68).

Even given the double-edge of the additional mitigation testimony, this Court cannot stop "its analysis short without reweighing the totality of all the evidence." Trevino v. Davis, 138 S.Ct. 1793, 1794 (2018). When the new evidence is weighed along with the old evidence to determine whether the omission prejudiced the outcome of Stanko's sentencing phase, it is of "questionable mitigating value" and thus is not worthy of a grant of relief. Pinholster, 563 U.S. at 201. The new, but same mitigating evidence, that Stanko could adapt and arguably thrive as a contributor to the S.C. D.O.C. would be heard along with re-emphasis of testimony of the graphic assault and numerous schemes and cons Stanko committed in Berkeley County. When taken with the old, the new evidence makes Stanko appear more incorrigible because it draws attention to the fact Stanko assaulted his live-in girlfriend because she found out about his conning and scheming, was sent to prison for those crimes, did well and contributed therein for his own benefit, and then reoffended in an eerily similar manner less than 1 year after release. Jurors could infer Stanko received no

benefit from a prison sentence even where he contributed positively to the prison because he was clearly not subject to rehabilitation, and thus decline to find this mitigating. And, Jurors could have determined from the prison guards and prison records, Stanko could control himself in an extremely stressful environment with people his own size [prison], but picked on those weaker than him on the outside, especially women and even a 15 year-old girl.

The sum of these considerations weighs in favor of a refusal to assign error and prejudice to trial counsel's prison adaptability presentation. *Id.*; *Atkins, supra*; *Wiggins*, 539 U.S. at 535 (also noting the double edge of certain mitigation evidence may justify a limited investigation by counsel in some cases) (citing *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986)). The totality of the record evidences Stanko engaged in a long pattern of behavior as a con man who preyed on weaker laypeople he could engage in business and on the women he could engage in romance. Stanko's assault on the Lings and escape thereafter was vicious and violent in its own nature. Therefore, the latest PCR testimony fails to unhinge confidence in the result of the jury's verdict at sentencing. *Belmontes, supra*.

### CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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