No. _____
(Capital Case)

IN THE
Supreme Court of the United States

STEPHEN C. STANKO, Applicant/Petitioner

v.

BRYAN STIRLING, Director, South Carolina Department of Corrections, and Lydell Chestnut, Deputy Warden Broad River Correctional Institution, Respondents

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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injury to the officer that would justify his conduct of firing one shot through the car's windshield and additional shots through the car's passenger window.[7] *See Waterman*, 393 F.3d at 482. We therefore reverse the district court's ruling on the excessive force claim. And because the court applied the same reasoning to dismiss the plaintiff's state law claims against Officer Sletten without addressing those claims individually, we reverse the court's dismissal of those claims and remand them for the court's consideration in view of our holding.[8]

* * *

[20] In reaching these conclusions in this case, we recognize that law enforcement officers regularly are placed in threatening situations and are not as a matter of course required to "ponder the[ ] many conflicting factors" or "risk[ ] losing their last chance to defend themselves" by "paus[ing] for even for an instant." *Id.* at 478. Nonetheless, courts must be mindful not to short-circuit at the motion to dismiss stage a plaintiff's plausible claim of excessive force based on a video that does not blatantly contradict those allegations.

III.

For these reasons, we affirm the district court's judgment in favor of the City. We reverse the district court's judgment granting Officer Sletten's motion to dismiss the § 1983 claim, and we also reverse the court's judgment dismissing the state law claims. We remand all the claims against Officer Sletten to the district court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Stephen C. STANKO, Petitioner - Appellant,

v.

Bryan P. STIRLING, Director, South Carolina Department of Corrections; Lydell Chestnut, Deputy Warden of Broad River Correctional Secure Facility, Respondents - Appellees.

Stephen C. Stanko, Petitioner - Appellant,

v.

Bryan P. Stirling, Director, South Carolina Department of Corrections; Lydell Chestnut, Deputy Warden of Broad River Correctional Secure Facility, Respondents - Appellees.

No. 22-2, No. 22-3

United States Court of Appeals, Fourth Circuit.

Argued: March 19, 2024

Decided: July 29, 2024

Background: Following affirmance of his capital convictions and death sentence, 402

7. Officer Sletten argues that this Court could affirm the dismissal of the excessive force claim on an alternative basis, namely, the second prong of the qualified immunity inquiry, because there "was no clearly established right" preventing an officer from firing "a one-second-long three-round burst in self-defense when a suspect accelerates a car directly at that officer." *See Lewis*, 98 F.4th at 534 (describing the clearly established right prong). Because this argument rests on an improper construction of the facts at this point in the proceedings, we decline to consider this alternative argument.

8. We decline to address Officer Sletten's separate request that we affirm the dismissal of the plaintiff's state law claims based on the doctrine of public official immunity. Because the district court did not consider the merits of this argument, we leave for the district court to address in the first instance Officer Sletten's request for application of this doctrine.

S.C. 252, 741 S.E.2d 708, state inmate filed petition for writ of habeas corpus. The United States District Court for the District of South Carolina, Richard M. Gergel, J., denied petition, 2022 WL 22859294, and denied petitioner's motion to alter or amend judgment, 2022 WL 22859295. Petitioner appealed.

Holdings: The Court of Appeals, Harris, Circuit Judge, held that:

(1) petitioner's ineffective assistance of counsel claims were subject to Antiterrorism and Effective Death Penalty Act's (AEDPA) deferential standard;

(2) state trial court did not abuse its substantial discretion when it accepted petitioner's waiver of conflict-free counsel;

(3) determination that petitioner's waiver of conflict-free counsel was valid was not unreasonable;

(4) petitioner's claim that he was denied effective assistance during sentencing phase was procedurally defaulted;

(5) petitioner's appeal from district court's order unsealing his ex parte filings requesting funds for specialist services was not moot;

(6) district court did not abuse its discretion when it unsealed petitioner's ex parte filings; and

(7) petitioner was required to obtain certificate of appealability (COA) as prerequisite to appealing district court order denying his motion to alter or amend judgment.

Affirmed in part and dismissed in part.

1. Habeas Corpus ⚿842

Court of Appeals reviews de novo district court's denial of habeas petition. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⚿766

Claim is not adjudicated on merits, and thus is not subject to Antiterrorism and Effective Death Penalty Act's (AEDPA) deferential standard on federal habeas review, if it is decided on materially incomplete record because state post-conviction review (PCR) court has unreasonably refused to permit necessary factual development—either by refusing to consider, without explanation, critical evidence, or by unreasonably refusing to hold hearing to resolve critical factual dispute. 28 U.S.C.A. § 2254(d).

3. Habeas Corpus ⚿773

State post-conviction review (PCR) court adjudicated on merits petitioner's ineffective assistance of counsel claims, and thus those claims were subject to Antiterrorism and Effective Death Penalty Act's (AEDPA) deferential standard on federal habeas review, despite PCR court's denial of some of petitioner's additional funding requests; state PCR court held two-day hearing with multiple witnesses, including counsel, it granted substantial funding to aid petitioner's investigation, it provided reasoned explanation going to specificity or relevance of each funding request, and petitioner made no showing that PCR court's denial of requests deprived him of material evidence. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

4. Criminal Law ⚿1780, 1791

Criminal defendant has both Sixth Amendment right to conflict-free counsel and ability to waive that right. U.S. Const. Amend. 6.

5. Criminal Law ⚿1790

Nothing limits defendant's right to waive his right to conflict-free counsel; it is buttressed by his right to counsel of his choice. U.S. Const. Amend. 6.

6. Criminal Law ⚿1791

Courts have their own independent interest in ensuring that criminal trials are conducted within ethical standards of profession and that legal proceedings appear fair to all who observe them, and that interest can justify, in rare circumstances, insisting on conflict-free counsel even when defendant would prefer to proceed with conflicted counsel.

7. Criminal Law ⚿1791

Trial courts have very substantial latitude in accepting and refusing criminal defendants' waivers of conflicts of interest.

8. Criminal Law ⚿1791

State trial court did not abuse its substantial discretion in defendant's murder trial when it accepted defendant's waiver of conflict-free counsel and allowed him to proceed with attorney who represented him in previous prosecution, even though defendant argued in post-conviction proceeding that attorney had provided ineffective assistance in prior trial; there was no reason to think that ineffective assistance claim so tarnished attorney's reputation that he would be moved to undermine defendant's defense at second trial, ineffective assistance allegations were sufficiently routine that attorney was unlikely to be overly concerned about defendant's claim, and it was far from obvious that adjustments at second trial would be seen as evidence of ineffective assistance in first trial. U.S. Const. Amend. 6.

9. Habeas Corpus ⚿487

State court's determination that petitioner's waiver of conflict-free counsel was valid was not unreasonable application of clearly established federal law in *Brady v. United States*, 90 S.Ct. 1463, and thus did not warrant federal habeas relief; trial court undertook careful inquiry into potential conflict arising from petitioner's assertion of ineffective assistance claim in postconviction proceeding in earlier prosecution, extensively questioning petitioner to confirm that his request to keep attorney as counsel was well informed, and trial court hearing transcripts showed that petitioner understood source of potential conflict and its possible implications, but nevertheless desired to continue with attorney, given his expertise, understanding of defense, and personal devotion to case. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

10. Constitutional Law ⚿947

Waivers of constitutional rights must be not only voluntary but also intelligent acts done with sufficient awareness of relevant circumstances and likely consequences.

11. Criminal Law ⚿1791

Defendant must voluntarily, knowingly, and intelligently waive his right to conflict-free counsel. U.S. Const. Amend. 6.

12. Habeas Corpus ⚿366

Habeas petitioner's claim that he was denied effective assistance of counsel during sentencing phase of his capital murder prosecution was procedurally defaulted as result of postconviction counsel's failure to present claim to state supreme court in his petition for certiorari. U.S. Const. Amend. 6.

13. Federal Courts ⚿3581(1)

Court of Appeals reviews district court's dismissal based on mootness de novo.

14. Federal Courts ⚿2202

Party claiming mootness bears heavy burden to show that it is impossible for court to grant any effectual relief whatever to prevailing party.

15. Habeas Corpus ⚭826(3.1)

Habeas petitioner's appeal from district court's order unsealing his ex parte filings requesting funds for specialist services was not moot, even though state had obtained filings; state's ongoing access to and ability to rely on petitioner's funding requests was continuing injury, in that it might give state strategic advantage in any further litigation in case, and even if Court of Appeals could not fully rectify improper disclosure, it could provide partial but meaningful relief by ordering funding requests resealed and state's copies destroyed – and perhaps by ordering state to refrain from relying on them in subsequent litigation against petitioner.

16. Records ⚭656

District court did not abuse its discretion in habeas proceeding when it unsealed petitioner's ex parte filings requesting funds for specialist services and made them available to state; petitioner had put contents of those filings at issue in his motion to alter or amend judgment denying his petition, arguing that issue of whether he knowingly waived his right to conflict-free counsel should not have been decided without results of funded brain imaging and tests, state could not determine purpose of testing in question or its relevance to any of petitioner's arguments without access to funding requests, making it impossible for state to meaningfully respond, and court found that unsealing requests would not have deprived petitioner of any tactical or strategic advantage.

17. Habeas Corpus ⚭818

Where it applies, federal habeas statute's certificate of appealability (COA) requirement is jurisdictional. 28 U.S.C.A. § 2253(c)(1)(A).

18. Habeas Corpus ⚭818

Habeas petitioner was required to obtain certificate of appealability (COA) as prerequisite to appealing district court order denying his motion to alter or amend judgment denying habeas petition on ground that district court prematurely denied petition without waiting for results of brain imaging it had authorized; district court considered merits of premature adjudication claim in denying motion, concluding that there was no need to wait for testing because results would have been inadmissible. 28 U.S.C.A. § 2253(c)(1)(A); Fed. R. Civ. P. 59(e).

Appeals from the United States District Court for the District of South Carolina, at Aiken. Richard Mark Gergel, District Judge. (1:19-cv-03257-RMG)

ARGUED: Joseph Perkovich, PHILLIPS BLACK, INC., New York, New York, for Appellant. James Anthony Mabry, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. ON BRIEF: E. Charles Grose, Jr., THE GROSE LAW FIRM, LLC, Greenwood, South Carolina; Joseph C. Welling, PHILLIPS BLACK, INC., St. Louis, Missouri, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees.

Before DIAZ, Chief Judge, and HARRIS and HEYTENS, Circuit Judges.

Affirmed in part and dismissed in part by published opinion. Judge Harris wrote the opinion, in which Chief Judge Diaz and Judge Heytens joined.

PAMELA HARRIS, Circuit Judge:

Stephen Stanko appeals the district court's denial of a 28 U.S.C. § 2254 petition

challenging one of his two South Carolina capital convictions and sentences. We conclude that none of Stanko's claims can survive review under the Antiterrorism and Effective Death Penalty Act ("AEDPA"): Those claims properly before us on appeal are either procedurally barred under AEDPA or meritless under AEDPA's deferential standard of review. Stanko also seeks review of two docket management decisions made in the district court. We see no merit to one of these complaints and lack jurisdiction to address the other. Accordingly, we affirm the judgment of the district court and dismiss the portion of the appeal over which we have no jurisdiction.

I.

This capital case winds its way to us after a complex path through the South Carolina and federal courts. Of the voluminous procedural and factual background, we recount only what is important to this appeal.

A.

1.

Stephen Stanko has twice been convicted of murder and sentenced to death in South Carolina courts. The first death sentence, not directly at issue here, was imposed in Georgetown County for the murder of Stanko's girlfriend, Laura Ling, and the rape and attempted murder of her daughter. *See generally State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The second – and the one challenged here – comes out of Horry County, for the armed robbery and murder of Stanko's friend Henry Turner. *See generally State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). The Horry County murder occurred shortly after the murder in Georgetown County, as part of a crime spree spanning county lines.

Stanko never seriously contested that he committed the acts charged. Instead, he defended both cases at trial by arguing that an organic brain disorder rendered him not guilty by reason of insanity, *see* S.C. Code Ann. § 17-24-10, or, if guilty, not deserving of a death sentence.

The Georgetown County jury was unconvinced; it convicted Stanko and recommended a death sentence, which the court imposed. Stanko then filed a state action for post-conviction review (a "PCR" action) arguing that his appointed attorney, William Diggs, had provided ineffective assistance of counsel in the Georgetown proceedings, depriving him of his Sixth Amendment right to counsel.

But despite the pending ineffective assistance claim, Stanko insisted that Diggs continue to represent him in Horry County, where trial had yet to begin. Recognizing that questions might be raised by this arrangement, the Horry County trial court and the Georgetown County PCR court held several hearings to ensure that Stanko was aware of and validly waived any potential conflict of interest. Repeatedly – at three separate hearings in Horry County and one in the Georgetown County PCR court – Stanko insisted that he did not "want to lose" Diggs as an attorney because he continued to "believe in" Diggs and because Diggs was "the one who had the test ordered" to discover the brain disorder that anchored Stanko's defense. *Stanko*, 741 S.E.2d at 715.

Satisfied that Stanko's waiver of the right to conflict-free assistance of counsel was voluntary, knowing, and intelligent, the Horry County trial court acquiesced and permitted Stanko to move forward with Diggs. At trial, Diggs put on significant evidence – from seven medical experts and two mitigation experts – of Stan-

ko's purported brain disorder and how it affected his conduct and mental health, both in support of his insanity defense and to mitigate his culpability. Like the Georgetown County jury, the Horry County jury was unconvinced: It, too, convicted Stanko and recommended the death penalty, which the trial court imposed.

2.

On direct appeal, the Supreme Court of South Carolina affirmed Stanko's Horry County conviction and sentence. *Stanko*, 741 S.E.2d at 727. As relevant here, the court rejected the argument that the trial court erred in accepting Stanko's waiver of any conflict of interest. Stanko, the court determined, "was fully informed" of the potential conflict and executed "a valid waiver." *Id.* at 717 (citing *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).[1]

B.

We turn now to Stanko's pursuit of post-conviction relief in state court. In his PCR petition, Stanko raised two groups of claims relevant here, both alleging the denial of his Sixth Amendment right to counsel.

The first we alluded to above: Stanko argued that Diggs labored under a conflict of interest, given Stanko's pending ineffective assistance claim, and that his purported waiver of this conflict was not sufficiently informed. This time, instead of arguing that the Horry County trial court erred in accepting his waiver, Stanko argued that Diggs's failure to better advise him on his waiver and to raise the conflict at trial constituted ineffective assistance of counsel. The PCR court disagreed. Even assuming there was a conflict of interest, it held, "that conflict was knowingly, voluntarily, and effectively waived by Stanko" at the many pre-trial hearings during which Stanko was questioned and advised about Diggs's continued representation. J.A. 5321.

Second, Stanko argued that he was denied the effective assistance of counsel at the sentencing phase of his trial. According to Stanko, his lawyers unreasonably told the jury that his family disliked him and did not attend his trial, and further dehumanized him with expert testimony referring to him as a "psychopath." In addition, Stanko argued, Diggs failed to adequately investigate and present mitigating evidence related to his background and mental health.

In two lengthy opinions, the PCR court rejected these claims, as well. The court pointed to Diggs's testimony that he made a "conscious decision" to call attention to Stanko's estrangement from his family, both as evidence that Stanko was unable to function normally – mitigating his culpability – and to generate sympathy for Stanko. J.A. 5325; *see also* J.A. 5464-65. That strategic judgment, the court concluded, was not constitutionally unreasonable. Likewise, expert references to "psychopathy" were used "in a reasonably strategic man-

1. The court also concluded that Stanko had failed to preserve the claim because he "did not object to the appointment of Diggs as counsel." *Id.* But the court went on to consider the claim's merits, as noted above – as did the subsequent state PCR court, and the federal district court after that. J.A. 7596. Like the district court, we note the circularity of requiring a defendant who is by hypothesis represented by counsel with an unwaivable conflict to object to that representation through said counsel. *Id.* Regardless, we agree with the district court that the prudent course is to follow the lead of the state courts and address the issue on the merits. *See Lawrence v. Branker*, 517 F.3d 700, 714-15 (4th Cir. 2008) (considering the merits of a habeas claim where the state court held the claim both procedurally defaulted and meritless).

ner," to corroborate Stanko's insanity defense and to mitigate his culpability by showing his inability to control his actions. J.A. 5465. The court painstakingly reviewed the testimony of the "network of able expert witnesses" engaged by the defense to explain Stanko's neurological deficits and thus rationalize Stanko's conduct for the jury. J.A. 5470; *see* J.A. 5465-70. In that context, the court determined, expert references to psychopathy were part of an "affirmative defense of insanity and [a] related mitigation strategy," within the bounds of professional norms. J.A. 5470.

Nor, the court concluded, had Diggs shirked his responsibility to pursue and present mitigation evidence. To the contrary, Diggs hired a mitigation investigator and a fact investigator, who conducted interviews of Stanko's family and other possible witnesses and obtained school, medical and prison records. And from that investigation came extensive testimony in mitigation: from a social worker who testified to Stanko's sometimes troubled and dysfunctional family history; from teachers, neighbors, and friends who testified that Stanko nevertheless was a well-liked, polite, and academically successful boy through middle school and until an accident in high school that may have caused his brain disorder; from correctional officers who testified that Stanko was a model inmate; and from an expert who testified to Stanko's antisocial personality disorder, a mitigating factor under South Carolina law. J.A. 5472-75. Stanko's primary complaint, the court explained, was that this extensive mitigation defense relied mostly on the investigation previously done for the Georgetown County trial, instead of "a brand new investigation" for Horry County alone. J.A. 5470. But the court deemed that allocation of resources constitutionally reasonable, given that the two murders were committed in quick succession, with "the same social and psychological history" relevant to both. J.A. 5472.

Accordingly, the PCR court denied relief on these claims, as well as others not relevant to this appeal. Stanko then petitioned the Supreme Court of South Carolina for certiorari review of the PCR court's decision. That court denied certiorari review, ending Stanko's state court proceedings in this case.

C.

1.

That brings us finally to the federal habeas proceedings that give rise to this appeal. Stanko petitioned the South Carolina district court for habeas relief under 28 U.S.C. § 2254, presenting over a dozen claims. As before, we will discuss here only those relevant on appeal.

First, Stanko again raised a series of Sixth Amendment claims stemming from Diggs's alleged conflict of interest. Diggs, Stanko argued, had rendered ineffective assistance by inadequately advising him of the implications of his purported waiver. And the trial court also had deprived him of his right to conflict-free counsel by failing to assure that his waiver was knowing and informed. Finally, and for the first time, Stanko contended that Diggs's conflict was so severe that it was non-waivable – that the trial court, that is, had no discretion to accept his waiver, no matter how well informed.

Second, Stanko again argued he was deprived of the effective assistance of counsel at the penalty phase of his trial. Here, Stanko mostly repeated the claims he had raised before the PCR court, focusing on Diggs's presentation of evidence that portrayed him as an unlikeable "psychopath" and on Diggs's failure to conduct a new mitigation investigation for the Horry County trial.

Stanko urged the district court to review these claims de novo, without the AEDPA deference due a state court adjudication on the merits. *See* 28 U.S.C. § 2254(d). The state PCR court had denied some (but far from all) of Stanko's many requests for funding for various investigative purposes. According to Stanko, that made the record before the PCR court materially incomplete – which meant, under our case law, that the PCR court had not truly "adjudicated" his claims "on the merits" and thus lost its entitlement to deference under § 2254(d). *See Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015).

The district court rejected Stanko's claims and denied him relief. *See Stanko v. Stirling*, No. 1:19-03257-RMG, 2022 WL 22859294 (D.S.C. Mar. 24, 2022), *reproduced at* J.A. 7582-7614.[2] First, the district court established that its review of Stanko's claims would proceed under the "highly deferential" § 2254(d) standard, applied to "the record developed by the state court." J.A. 7594. Contrary to Stanko's argument, the court held, the record before the PCR court was not materially incomplete. Unlike the cases to which Stanko pointed, the PCR court here had not unreasonably refused to develop the necessary factual record. Instead, it had conducted an extensive two-day hearing, with direct and cross examination of Stanko's lawyers, two mitigation experts, and a fact investigator. It did so after approving multiple requests for funding for investigations, and Stanko had made no showing that the PCR court's denial of other requests – each accompanied by a reasoned explanation – deprived him of material evidence. Because the PCR court's decision rested on a full and fair hearing and a materially complete record, the court concluded, Stanko was entitled to relief only if that decision could be deemed "unreasonable" under AEDPA's exacting standards. *See* 28 U.S.C. § 2254(d)(1), (2).

Under that deferential standard, the court held, Stanko could not succeed on his Sixth Amendment conflict claims. The court agreed that the "unusual circumstances" of Stanko's representation by Diggs – against whom Stanko had filed a claim of ineffective assistance in his Georgetown County trial – "certainly merited a careful inquiry by the Horry County trial court." J.A. 7596. But there had been just such an inquiry, the court concluded, reviewing the extensive hearings and colloquies confirming Stanko's waiver. Under those circumstances, the court concluded, it could not be said that the state court rulings on the validity of the waiver were "unreasonable" – or even that they "remotely approach[ed]" that standard. J.A. 7599. Instead, those determinations were "reasonable and in accord with [Stanko's] repeated, even urgent, requests that he be allowed to continue with Diggs' representation." *Id.*

The district court also became the first court to address – and reject – Stanko's claim that his conflict with Diggs could not be waived. The court recognized that there are cases in which prejudice stemming from a conflict may be so severe that the conflict is non-waivable. *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 159-60, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). But the purported conflict here, the court held – stemming from "alleged damage to Diggs['s] reputation from having [Stanko] file a claim of ineffective assistance of counsel against him" – did not fall close to that line. J.A. 7598. Such ineffective assistance motions are "made routinely by criminal defendants," the court reasoned, and there is no reason to think they are so

2. Because the district court's unpublished decision is not available via a publicly accessible legal database, we cite to the version contained in the joint appendix on appeal.

"professionally devastating" to the attorney's reputation that the attorney will be driven to "act against a client's best interests." *Id.* And on the other side of the coin, the district court cautioned, was Stanko's interest in continuing with Diggs as his counsel of choice, as he repeatedly requested. Under all the circumstances, the court concluded, the Horry County trial court acted well within its discretion when it accepted Stanko's waiver and allowed Diggs to represent him.

The district court dealt more briefly with Stanko's second set of Sixth Amendment claims, which alleged that he had been denied effective assistance of counsel at the penalty phase of his trial. Those claims, the district court held, were procedurally barred. *See* 28 U.S.C. § 2254(b)(1)(A). They had been submitted to and adjudicated by the state PCR court, to be sure. But AEDPA exhaustion also required Stanko to "fairly present" his claims to the Supreme Court of South Carolina in his petition for certiorari, and this, the district court held, Stanko had failed to do. J.A. 7611 (quoting *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004)).

Finding Stanko's claims either meritless under AEDPA's deferential standard or defaulted, the district court granted the state's motion for summary judgment, denied Stanko's partial motion for summary judgment, and denied Stanko a certificate of appealability.

2.

Ordinarily we could stop there in our description of the federal court proceedings, but this case has a few more steps to go. After the district court ruled on his habeas petition, Stanko moved under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. At issue again, broadly speaking, was funding for specialist services – but this time, funding Stanko had sought from the federal district court, not the state PCR court. The district court had approved funding for services as "reasonably necessary" under 18 U.S.C. § 3599(f) – specifically, for high-resolution brain images and further analysis of Stanko's brain anomalies. The problem, Stanko argued in his motion, was that the district court had then granted summary judgment against him prematurely, without waiting for the results. In response, the state moved to unseal Stanko's *ex parte* funding requests: Without information about the purported relevance of the brain imaging, the state contended, it could not address the merits of Stanko's motion.

The district court granted the state's motion to unseal, agreeing that Stanko's motion had put at issue the contents of the *ex parte* funding requests. And after receiving the state's response, it denied Stanko's Rule 59(e) motion. First, it noted Stanko's unexplained delay in obtaining the brain scans, the results of which were still outstanding. And in any event, it concluded, the imaging results could have no bearing on Stanko's claim that his waiver was invalid, as Stanko hypothesized. Because that claim was adjudicated in state court, AEDPA barred the district court from considering new evidence beyond the state court record – even if, as the Supreme Court had just held, Stanko raised a so-called *Martinez* claim and argued that his state post-conviction counsel provided constitutionally ineffective assistance. J.A. 7847 (citing *Shinn v. Ramirez*, 596 U.S. 366, 382, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022)).

Before he noted his timely appeal from the district court's final judgment, Stanko made several unsuccessful attempts to keep his *ex parte* funding requests private. First, he moved the district court for a stay of the unsealing order, which the dis-

trict court denied. He then took an interlocutory appeal to this court and asked us to stay the unsealing order. We denied the stay and consolidated Stanko's interlocutory appeal with his appeal from the final judgment, which by then had been filed.

After Stanko filed an opening brief raising over a dozen issues, we granted a certificate of appealability limited to four, tracking the Sixth Amendment issues discussed above. First are the conflict questions: whether Stanko was deprived of his right to conflict-free counsel when he was permitted to waive Diggs's potential conflict, either because the conflict was not waivable or because Stanko was not adequately informed. Second are the questions related to Diggs's performance at the penalty phase of trial: whether Diggs pursued an unreasonable strategy of depicting Stanko as a psychologically disordered person disavowed by his family or failed to adequately investigate and present other mitigating evidence.

II.

[1] We begin with the appeal from the district court's denial of Stanko's § 2254 petition. We review de novo the district court's judgment. *Sigmon v. Stirling*, 956 F.3d 183, 191 (4th Cir. 2020). And like the district court, we are constrained by AEDPA's highly deferential standard for review of the underlying state court decisions in Stanko's case. Stanko may prevail on a claim "adjudicated on the merits" in state court proceedings only if a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

[2] Stanko argues on appeal, as before the district court, that § 2254(d)'s deferential standard should not apply to the decision of the state PCR court because that court did not "adjudicate" his claims "on the merits." Like the district court, we disagree. It is indeed well established in our circuit, as Stanko contends, that a claim is not adjudicated on the merits for purposes of § 2254(d) if it is decided on a "materially incomplete record" because a state PCR court has "unreasonably refused to permit" necessary factual development, *Valentino v. Clarke*, 972 F.3d 560, 577 (4th Cir. 2020) (cleaned up) – either by refusing to consider, without explanation, critical evidence, *see id.*, or by unreasonably refusing to hold a hearing to resolve a critical factual dispute, *see Gordon*, 780 F.3d at 203. But that is a "rare scenario," and Stanko cannot show that his case falls within it. *See Valentino*, 972 F.3d at 576 (explaining that petitioner bears the burden of overcoming a "strong but rebuttable presumption" that claim presented to and decided by state court was "adjudicated on the merits" for purposes of § 2254(d)).

[3] As the district court explained, Stanko's case looks nothing like the handful in which we have evaluated claims de novo because "a state court shun[ned]" its responsibility to consider a materially complete record. *Id.* Here, the state PCR court held a two-day hearing with multiple witnesses, including Diggs. It granted substantial funding to aid Stanko's investigation. The only purported shortcoming Stanko can identify is the PCR court's denial of some of his additional funding requests – each time, as the district court observed, with a reasoned explanation going to the specificity or relevance of the request. That is not enough to render the extensive factual record before this PCR court "unreasonably truncated," *Gordon*,

780 F.3d at 202, or "materially incomplete" within the meaning of our case law, *Valentino*, 972 F.3d at 577-79. Indeed, if it were otherwise, every funding dispute in a state PCR court could turn into an exception to § 2254(d), leaving that critical provision with little to do. We therefore give § 2254(d) its ordinary application in this case.

A.

We begin with Stanko's conflict claims. We granted a certificate of appealability to consider whether Stanko was deprived of his Sixth Amendment right to counsel when the court accepted his waiver of Diggs's potential conflict, either because the conflict was non-waivable or because it was not properly waived. We conclude that the purported conflict in this case was waivable, and that the state courts did not unreasonably apply clearly established federal law as determined by the Supreme Court in finding that Stanko's waiver was valid and adequately informed. Accordingly, we affirm the district court's denial of relief on these claims.[3]

1.

[4] A criminal defendant has both the Sixth Amendment right to conflict-free counsel, *see Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), and the ability to waive that right, *see Wilson v. Moore*, 178 F.3d 266, 279 (4th Cir. 1999). Stanko argues that this is the exceptional case where the prejudice arising from a conflict is so great that the conflict cannot be waived, eclipsing what normally would be his ability to waive the conflict and proceed with Diggs. We disagree.[4]

[5, 6] An initial clarification is in order. We, like Stanko and some of our case law, use the term "unwaivable" or "non-waivable" to describe this narrow class of conflicts. *See, e.g., United States v. Urutyan*, 564 F.3d 679, 687 (4th Cir. 2009). But that is really a kind of shorthand. Nothing limits a defendant's right to waive *his* right to conflict-free counsel; indeed, it is but-

3. Stanko has raised his Sixth Amendment conflict claim through two different lenses, arguing both that the *trial court* violated his Sixth Amendment right to counsel by accepting an invalid waiver and that *Diggs* provided ineffective assistance in failing to adequately advise him on his waiver. However it is formulated, this claim is foreclosed by our holding, explained above, as to the propriety of Stanko's waiver. Accordingly, we treat the two variations on Stanko's conflict claim together, and do not further consider whether Stanko's claim that Diggs provided ineffective assistance of counsel in connection with his waiver could otherwise satisfy the *Strickland* standard. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

4. A question arises at the outset as to whether § 2254(d) restricts our review of this claim – not because (as Stanko argues) the state courts adjudicated it on an incomplete record, but because they may not have adjudicated it at all. Both the Supreme Court of South Carolina and the state PCR court decided that Stanko validly – voluntarily, knowingly, and intelligently – waived any potential conflict. Neither considered expressly whether the conflict was waivable in the first place, likely because Stanko did not expressly put that question before them. That could mean the issue is defaulted – except that the state has forfeited any procedural default defense by failing to raise it. *See Plymail v. Mirandy*, 8 F.4th 308, 316 (4th Cir. 2021). If the question was never put to or decided by the state courts, then, we would consider it de novo. *Id.* On the other hand, it may be that whether the putative conflict here was waivable was logically subsumed within the waiver-in-fact question Stanko presented and the state courts decided – in which case we would apply § 2254(d)'s deferential standard. We need not resolve that question: Stanko cannot prevail whether we undertake de novo or deferential review.

tressed by his right to counsel of his choice. *See, e.g., Wheat*, 486 U.S. at 164, 108 S.Ct. 1692. The defendant, however, is not the only stakeholder here. Courts have their own "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them," and *that* interest can justify, in rare circumstances, insisting on conflict-free counsel even when a defendant would prefer to proceed with conflicted counsel. *United States v. Caldwell*, 7 F.4th 191, 203 (4th Cir. 2021) (quoting *Wheat*, 486 U.S. at 160, 108 S.Ct. 1692). When we talk about a non-waivable conflict, in other words, what we really are asking is whether a conflict is so severe and obviously prejudicial that a court's interest in fairness (and its appearance) outweighs the defendant's interest in choosing his lawyer – giving the court discretion to reject a waiver, *e.g. United States v. Fowler*, 491 F. App'x 453, 457 (4th Cir. 2012) (citing *United States v. Basham*, 561 F.3d 302, 323 (4th Cir. 2009)), or, in the most extreme cases, leaving the court without discretion to accept one, *e.g. Hoffman v. Leeke*, 903 F.2d 280, 288 (4th Cir. 1990). Stanko argues, as he must to prevail, that his conflict is of the most extreme type, so that the Horry County trial court lacked discretion to accept even a fully informed waiver of his right to conflict-free counsel.

[7] In our view, like that of the district court, the purported conflict in Stanko's case plainly does not belong in this exceptional category. We have not had occasion to specify the precise "circumstances in which a [trial] court must override a defendant's otherwise valid conflict of interest waiver," *United States v. Edelen*, 561 F. App'x 226, 232 (4th Cir. 2014), and we need not do so here. It is enough to observe, first, that the bar for such a non-waivable conflict is set extremely high, with other courts describing a conflict "so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation," *United States v. Lussier*, 71 F.3d 456, 461 (2d Cir. 1995), or "so severe as to render a trial inherently unfair," *United States v. Vaquero*, 997 F.2d 78, 90 (5th Cir. 1993). And second, the scope of a trial court's discretion in this area is correspondingly broad. As the district court recognized, a court faced with a defendant who wishes to proceed with conflicted counsel is "whip-sawed by assertions of error no matter which way [it] rule[s]": an accusation of impermissible conflict on the one hand and of the deprivation of the right to counsel of choice on the other. *Wheat*, 486 U.S. at 161, 108 S.Ct. 1692; *see also United States v. Williams*, 81 F.3d 1321, 1324 (4th Cir. 1996).[5] Recognizing these competing interests, we accord trial courts very "substantial latitude" in accepting and refusing waivers of conflicts of interest. *Edelen*, 561 F. App'x at 232 (quoting *Wheat*, 486 U.S. at 163, 108 S.Ct. 1692); *see also Hoffman*, 903 F.2d at 288.

[8] Under this standard, and assuming (for now) that Stanko's waiver of conflict-free counsel was otherwise valid, the state trial court did not abuse its substantial

5. The district court explained it like this: "[T]here is little doubt that had the state trial court required the removal of Diggs as counsel over the vigorous objections of [Stanko], the motion before the Court would be that [Stanko] had been denied his Sixth Amendment right to effective counsel because he had exercised his right to seek post-conviction relief in the Georgetown County case" – that is, deprived of his counsel of choice because he filed an ineffective assistance claim against Diggs in Georgetown County. J.A. 7599. "Surely, the law cannot be that whatever decision the state trial court made, [Stanko] would have been denied his constitutional right to effective counsel." *Id.*

discretion when it accepted Stanko's waiver and allowed him to proceed with Diggs. As the district court aptly explained, *see* J.A. 7598, there is no reason to think that Stanko's ineffective assistance claim in Georgetown County so tarnished Diggs's reputation that Diggs would be moved to undermine Stanko's defense at the Horry County trial. Any potential conflict here was not so "egregious," *Lussier*, 71 F.3d at 461, that a court would be bound to reject a fully informed waiver to protect its "independent interest" in assuring the appearance of fairness. *See Wheat*, 486 U.S. at 160, 108 S.Ct. 1692.[6]

Nor are we persuaded by Stanko's alternative formulation of the conflict: that Diggs would be reluctant to adjust his trial strategy for the Horry County trial because any change from his (unsuccessful) Georgetown County approach would be taken as an indication that his Georgetown County performance was indeed constitutionally deficient. To be clear, we do not doubt that a lawyer's self-interest – as opposed to the interest of a second client, as in most of these cases – can generate a cognizable conflict. The lawyer himself, that is, can be one of the "two masters" that the Sixth Amendment forbids him from serving simultaneously. *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (internal quotation marks omitted); *see, e.g., United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (finding actual conflict where lawyer "chose a course of action which furthered his interest and diminished" his client's). But here, the second master was not all that demanding; as the district court pointed out, ineffective assistance allegations are sufficiently routine that Diggs was unlikely to be overly concerned about Stanko's claim against him. And even if he were, it is far from obvious that strategic adjustments at the second trial would be seen as evidence of ineffective assistance at the first – and not just a sign of a thoughtful lawyer willing to adapt. On this theory, too, the potential conflict presented no risk of prejudice so "severe," *Vaquero*, 997 F.2d at 90, as to take it outside the mainstream of conflict cases.

Moreover, we have here a compelling example of a trial court forced to reconcile competing interests. Stanko was set on keeping Diggs as counsel – so set that he suggested to the trial court that he would rather drop his ineffective assistance claim in Georgetown County than lose Diggs's services in Horry County. Stanko, that is, cared deeply enough about retaining his lawyer that he threatened to eliminate the potential conflict himself, by forfeiting claims in ongoing post-conviction litigation in a capital case. Under all the circumstances here, the trial court acted well within its considerable discretion in respecting Stanko's waiver.

2.

[9] Even if the putative conflict in this case was waivable, Stanko insists, he did not in fact waive it. The Supreme Court of South Carolina held otherwise, finding that Stanko was "fully informed" of any potential conflict and executed "a valid waiver." *Stanko*, 741 S.E.2d at 717 (holding that trial court did not err in accepting waiv-

6. We discuss separately, in connection with the validity of Stanko's waiver, the extensive steps taken by the trial court to confirm the waiver and Stanko's repeated assurances, on the record, that he indeed wished to continue with Diggs as counsel. But there is some overlap here, because those on-the-record proceedings also would have lessened any perception of unfairness that might otherwise have implicated the court's independent duty to reject a waiver. *Cf. Hoffman*, 903 F.2d at 288 (finding conflict non-waivable where "a member of the public would be shocked to observe" the trial proceedings).

er).[7] We have no occasion to consider whether we would reach the same conclusion as a matter of first principle. Under AEDPA, Stanko can prevail on this ground only if the state supreme court's decision was an "unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (explaining that § 2254(d)(1) permits relief only where state court errs "beyond any possibility for fairminded disagreement"). We agree with the district court that it was not.

[10, 11] As the state court recognized, the Supreme Court of the United States has established a standard for the waiver of constitutional rights, requiring that such waivers be not only voluntary but also "intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748, 90 S.Ct. 1463; *see* 741 S.E.2d at 717 (citing *Brady*). In short, the defendant must "voluntarily, knowingly and intelligently" waive his right to conflict-free counsel. *Hoffman*, 903 F.2d at 288. That much, we have explained, is "well-settled." *Id.* But beyond that, the Supreme Court has not gone; there is no Supreme Court precedent "embroider[ing]" *Brady*'s general rule or spelling out the requirements for a conflict-waiver colloquy. *See McCamey v. Epps*, 658 F.3d 491, 500 (5th Cir. 2011); *cf. Horner v. Nines*, 995 F.3d 185, 202 (4th Cir. 2021) (making similar observation in the context of waiving the right to trial by jury). So for purposes of this AEDPA case, the only question is whether the Supreme Court of South Carolina unreasonably applied the clearly established rule of *Brady* – that a waiver be voluntary, knowing and intelligent – to the facts before it, leaving no room for reasoned disagreement. *See* 28 U.S.C. § 2254(d)(1); *Renico v. Lett*, 559 U.S. 766, 776, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010).

We alluded above to the inquiries made at four separate hearings into the potential conflict and Stanko's waiver. The details were spelled out by the Supreme Court of South Carolina across three pages of its published decision, *see* 741 S.E.2d at 715-17, and we offer here only some illustrative examples of Stanko's assurances that he understood the dimensions of the potential conflict and insistence that he nevertheless wished to proceed with Diggs as counsel.

At the first Horry County hearing, called to determine Stanko's representation, Stanko "express[ed] his satisfaction with Diggs's efforts in the prior trial and request[ed] Diggs represent him a second time." *Id.* at 715. Stanko reassured the court that he was "familiar with the law" and "would not raise any kind of argument concerning" Diggs's continued representation, and he emphasized that he "would greatly appreciate" Diggs's appointment. *Id.* The issue then arose in the Georgetown County PCR court reviewing Stanko's ineffective assistance claim against Diggs. There, Stanko "explained his desire to proceed with a PCR application against Diggs, but at the same time retain his representation" in Horry County. *Id.* It is worth quoting part of Stanko's statement in court, describing the "conundrum" he faced and why he nevertheless wished to go forward with Diggs:

7. The state PCR court reached the same conclusion in addressing Stanko's related claim that Diggs provided ineffective assistance by failing to properly advise him as to his waiver. J.A. 5451-52. As we have noted, whether the issue is couched in terms of trial court error or ineffective assistance by Diggs, the bottom-line question – whether Stanko executed a valid and adequately informed waiver – is the same.

> [J]ust because I feel [Diggs] may have been ineffective in the first case does not mean that he'll make those same ineffective mistakes in the second; because he's learned from them, or may see them differently. So my conundrum is I don't want to lose him; because I believe in him. He knows my case. He's the one who had the test ordered and found out everything that was wrong with my medial front lobe. I don't want to lose him.

Id.

The next two hearings, back before the Horry County trial court, were called specifically to address Diggs's potential conflict. At the first of these, the trial court explained to Stanko that the conflict could be "downright" disqualifying. *Id.* But Stanko held his ground, reiterating that he continued to "trust and believe in [Diggs] and his efforts" and expressing his confidence that his PCR claim against Diggs would have "no effect on [the Horry County] case." *Id.* at 715-16. It was at this hearing that Stanko suggested, as noted above, that he would be willing to "waive" his IAC claim against Diggs in Georgetown County to keep his representation in Horry County – an offer the trial court was quick to decline. *Id.* at 716 ("No sir. I'm not asking you to do that."). Diggs also spoke, assuring the court that he saw no conflict in his continued representation of Stanko. *Id.*

Finally, after the state moved to disqualify Diggs on conflict grounds, the Horry County court held yet another hearing. Stanko explained that he had conferred with his PCR attorneys in Georgetown County and continued to want Diggs to represent him. *Id.* The substance of the Georgetown County ineffective assistance claim, Stanko went on, had "nothing to do" with issues that would arise in Horry County; instead, his PCR claim against Diggs focused on "trial situations" that "should have been objected to." *Id.* Diggs also spoke again, reiterating that "he did not feel the PCR application had impacted his relationship with [Stanko], his ability to communicate with him, or his ability to effectively represent him in any way." *Id.* And Stanko agreed: In a colloquy with the trial court, he affirmed that he continued to desire Diggs's representation, that he had "free and open communication" with Diggs "despite" the pending PCR application, and that he saw no issues that "would create a conflict or any argument or [ ] cause any communicative problems." *Id.*

On this record, we cannot say that the state supreme court unreasonably applied the *Brady* standard in finding that Stanko executed "a knowing and intelligent waiver of any possible conflict." *Id.* at 717. Again, the United States Supreme Court has not established a specific colloquy required before a defendant may validly waive his right to conflict-free counsel and proceed with counsel of choice. But here, as the district court observed, the trial court undertook a "careful inquiry" into the potential conflict, J.A. 7596, extensively questioning Stanko to confirm that his request to keep Diggs as counsel was "conscious and well informed," J.A. 7600. The trial court hearing transcripts are reasonably read as showing that Stanko well understood the source of the potential conflict and its possible implications for his relationship with Diggs and for Diggs's efforts in the Horry County trial – but nevertheless fervently desired to continue with Diggs as counsel, given Diggs's "expertise, understanding of the defense, and personal devotion to the case." J.A. 7598. Like the district court, we think this is enough to put the decision of the state supreme court well within the broad range of AEDPA deference.

Stanko's arguments to the contrary are unavailing. He first contends that his waiver was insufficiently informed because he was unaware of a "relevant circumstance": Evidence later emerged, Stanko says, that Diggs was struggling financially at the time of the Horry County trial and was ultimately sanctioned for mishandling client funds, all of which could have given him a self-interested reason to stay on as Stanko's lawyer. But neither that evidence nor that argument was properly presented to the state courts, which means, as the state argues, that it is procedurally defaulted. Our review under AEDPA is limited to the "record that was before the state court," *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), and Stanko has made no effort to overcome this bar.[8]

Stanko also attempts to cast doubt on his waiver's validity by pointing out that the trial court did not appoint him separate "conflict" counsel to advise him on the wisdom of proceeding with Diggs. We do not doubt that the appointment of conflict counsel can be helpful in assuring that a defendant's waiver is voluntary and fully informed. But the Supreme Court of the United States has never established a rule requiring conflict counsel, as would be necessary for relief on this ground under § 2254(d)(1), and indeed, our own court has approved waivers of conflict-free counsel in the absence of independent counsel, *see Gilbert v. Moore*, 134 F.3d 642, 653 (4th Cir. 1998) (en banc). Moreover, the Supreme Court has stated in analogous contexts that the "decision to waive [the right to counsel] need not itself be counseled." *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (citing *Michigan v. Harvey*, 494 U.S. 344, 352-53, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990)). And in any event, the record before the Supreme Court of South Carolina showed that Stanko *did* consult with independent counsel, in the form of his PCR lawyers from Georgetown County – lawyers with no personal stake in whether Diggs remained on the case in Horry County. *See* 741 S.E.2d at 716 (describing Stanko's statement before the trial court that "he had the opportunity to confer with his PCR attorneys, but [ ] nothing had changed regarding his desire to retain Diggs").

In sum, we agree with the district court as to the validity of Stanko's waiver of conflict-free counsel. The state court's determination that Stanko "was fully informed of [any] conflict," and executed a "knowing and intelligent waiver," 741 S.E.2d at 717, was not an unreasonable application of the waiver standard established by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). For that reason, it cannot be the basis for relief under AEDPA.

B.

Like the district court, we may deal more briefly with the second group of Sixth Amendment claims on which we granted a certificate of appealability. Those claims involve more traditional ineffective assistance arguments under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): that Diggs performed deficiently at Stanko's capital sentencing, both by failing to adequately investigate and present mitigating evidence and by unreasonably eliciting tes-

8. Though this is dispositive, we do not want to leave the impression that Stanko's argument otherwise would be successful. On that we offer no opinion. But we do note that the district court, in rejecting a closely related ineffective assistance claim against Diggs, found no record support for any alleged connection between Diggs's representation of Stanko in Horry County and his subsequent misuse of client funds. J.A. 7600.

timony that Stanko was a "psychopath" abandoned by his family; and that his objectively unreasonable representation prejudiced Stanko's effort to avoid a death sentence. By way of reminder, these are the claims discussed at length and rejected on the merits by the state PCR court, as earlier described.

The district court, on the other hand, did not review the merits of Stanko's *Strickland* claims. Instead, it agreed with the state that the claims were procedurally barred. To exhaust his state remedies under AEDPA, the district court explained, it was not enough that Stanko presented his *Strickland* claims to the state PCR court; he also was required to "fairly present" those claims – both the "operative facts" and the "controlling legal principles" – to the Supreme Court of South Carolina in his petition for certiorari. J.A. 7611 (quoting *Longworth*, 377 F.3d at 448). The district court made a "comparison" of Stanko's federal habeas claims and those in his certiorari petition and concluded that the *Strickland* claims were not "fairly present[ed]" to the state's highest court. *Id.*

[12] We have no occasion to review that assessment, because Stanko does not challenge it on appeal. Instead, Stanko argues that he may be able to overcome the procedural default via the equitable exception recognized in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). But Stanko never explains exactly how this would work, and we see no path. As our court has explained, *Martinez* contemplates a "narrow exception" to the procedural-default bar when counsel's failure to raise an issue in "state initial-review collateral proceeding[s]" means that "no state court will hear the prisoner's claims." *Vandross v. Stirling*, 986 F.3d 442, 450 (4th Cir. 2021) (internal quotation marks omitted). But here, post-conviction counsel *did* raise the *Strickland* claims at issue in "initial-review collateral proceedings," and those claims *were* addressed – and thoroughly so – "by the state habeas trial court." *See Martinez*, 566 U.S. at 10, 132 S.Ct. 1309. What Stanko is gesturing at is deficient performance by his post-conviction counsel on *appeal* from the state PCR court to the state supreme court, and *Martinez* simply has nothing to say about such circumstances. *Mahdi v. Stirling*, 20 F.4th 846, 893 (4th Cir. 2021) (explaining that *Martinez* "does *not* apply to claims of [ineffective assistance] by PCR appellate counsel"). In short, and contrary to the only argument Stanko makes in this appeal, *Martinez* offers no defense to the procedural default identified by the district court.[9] For that reason, we affirm the district court's denial of habeas relief on Stanko's *Strickland* claims.

III.

Finally, we turn to two issues arising from Stanko's Rule 59(e) motion for reconsideration. First, Stanko argues that the district court abused its discretion when it unsealed his *ex parte* filings requesting funds for specialist services. Second, Stanko argues that the district court should have granted his Rule 59(e) motion, revisiting its decision to adjudicate his petition without waiting for the results of brain imaging it had authorized. As we explain below, we see no merit in the first argument and lack jurisdiction to address the second.

9. There is no need to belabor the point, but we note briefly a second reason why Stanko could not prevail under *Martinez*: As Stanko concedes, he could make out a claim of ineffective assistance of post-conviction counsel only with the aid of evidence outside the state-court record – and the Supreme Court held in *Shinn*, 596 U.S. at 389, 142 S.Ct. 1718, that this is not permitted. *See Stokes v. Stirling*, 64 F.4th 131, 136 (4th Cir. 2023).

A.

The unsealing issue, recall, arose when the state, in order to respond to Stanko's Rule 59(e) motion, sought and obtained access to Stanko's *ex parte* requests for funding for brain imaging and related specialist services. Stanko pursued an interlocutory appeal in this court. Because Stanko's two appeals – from the unsealing order and then from the final judgment denying habeas relief – came to us in quick succession, we consolidated them. Meanwhile, we denied Stanko's motion to stay the unsealing order pending appeal.

From this procedural morass arise three points of contention: appealability, mootness, and the merits. We take them in turn.

1.

Because of the posture from which Stanko first took his appeal, much of the parties' briefing is devoted to the permissibility of an interlocutory appeal of an unsealing order. As Stanko argues, an order unsealing district court documents generally is treated as an appealable collateral order. *See United States v. Doe*, 962 F.3d 139, 143 (4th Cir. 2020). But we need not bear down on that issue here. We have already declined to consider the unsealing question on an interlocutory basis, opting instead to consolidate Stanko's appeal of the unsealing order with his appeal from the district court's final judgment. Whatever its original status, in other words, the appeal from the unsealing order is no longer interlocutory. *See Kelly v. Town of Abingdon*, 90 F.4th 158, 165 n.3 (4th Cir. 2024). And because limitations on interlocutory appeals "go[ ] to the timing, not the availability, of review," *W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 222 (4th Cir. 2019), review is now available regardless of whether it could have been had earlier.

2.

Nor, contrary to the state's second argument, is Stanko's appeal now moot. The state argues, in essence, that the horse is already out of the barn: Once we denied an emergency stay, Stanko's funding requests were unsealed, so Stanko has already lost any privacy interest and there is nothing we can do to remedy that loss now. Put together with the state's argument on appealability, the state's position goes something like this: When the issue was live, Stanko's appeal was interlocutory and therefore unappealable; and now that it is appealable, it is moot.

[13, 14] The district court agreed with the state as to mootness, J.A. 7725, a determination we review de novo, *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017). In our view, Stanko has the better of this argument. A party claiming mootness bears the heavy burden to show that "it is impossible for a court to grant any effectual relief whatever to the prevailing party," *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 295, 143 S.Ct. 927, 215 L.Ed.2d 262 (2023) (internal quotation marks omitted), and the state cannot carry that burden here.

It is not the case, as the state suggests, that the disclosure of documents necessarily moots a dispute over whether those documents should be disclosed. The Supreme Court held as much in *Church of Scientology of California v. United States*, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992), finding that a party's "continued possession" of information wrongfully disclosed constituted an ongoing injury, and that a court could effectuate at least a "partial" remedy by ordering documents – or, in that case, tapes – returned or destroyed. And we have followed *Church of Scientology* in cases just like this one,

finding that disputes remained live on appeal even after the allegedly wrongful disclosure of employees' private information, *Reich v. Nat'l Eng'g & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993); or potentially privileged investment decisions, *Solis v. Food Emps' Labor Relations Ass'n*, 644 F.3d 221, 225 n.3 (4th Cir. 2011); or statements made "with an expectation of confidentiality," *United States v. Under Seal*, 853 F.3d 706, 723 (4th Cir. 2017). In each, we recognized that our inability to order "the recipients of . . . disclosed documents to forget the information contained therein" did not mean we could order no effectual relief at all, *Under Seal*, 853 F.3d at 723, because we could still order documents "return[ed] or destroy[ed]," *Reich*, 13 F.3d at 98.

[15] Just so here. As Stanko argues, the state's ongoing access to and ability to rely on his funding requests is a continuing injury, in that it may give the state a strategic advantage in any further litigation in this case. And even if we could not fully rectify an improper disclosure, we could provide partial but meaningful relief by ordering the funding requests resealed and the state's copies destroyed – and perhaps by ordering the state to refrain from relying on them in subsequent litigation against Stanko, *see In re Grand Jury Investigation*, 445 F.3d 266, 273 (3d Cir. 2006). Accordingly, Stanko's appeal from the district court's unsealing order is not moot.

3.

[16] On the merits, however, we conclude that no relief is warranted because the district court did not abuse its discretion when it unsealed Stanko's funding requests and made them available to the state. *See Under Seal v. Under Seal*, 326 F.3d 479, 485 (4th Cir. 2003) (articulating abuse of discretion standard). As the court reasonably determined, Stanko put the contents of those filings at issue in his Rule 59(e) motion, arguing that the waiver issue should not have been decided without the results of the funded brain imaging and tests. Without access to the funding requests, the district court found, the state could not determine the purpose of the testing in question or its relevance to any of Stanko's arguments, making it "impossible" for the state to meaningfully respond. J.A. 7688. And the court further found that unsealing the requests would deprive Stanko of no "tactical or strategic" advantage. *Id.*

Stanko makes much the same argument on appeal as he did before the district court, simply submitting that the content of his funding motions cannot be relevant because he is not challenging the actual disposition of those motions – which were, after all, granted. But that does not follow, for precisely the reason given by the district court: Stanko himself made the reasons for his funding requests relevant to his Rule 59(e) motion by tying the two together. Under the circumstances, we see no abuse of discretion here.

B.

That leaves the district court's denial of Stanko's Rule 59(e) motion. That motion, again, arose from the district court's earlier grant of Stanko's request for funding for brain imaging and expert analysis under § 3599(f), which permits such funding on a finding that it is "reasonably necessary" for a defendant's representation. 18 U.S.C. § 3599(f). In his Rule 59(e) motion, Stanko argued that the district court erred when it granted summary judgment against him without waiting for the results of those "necessary" tests, and he repeats that argument on appeal. We denied a certificate of appealability ("COA") on this

issue, but Stanko insists he does not need one to go forward. We disagree.

[17] Habeas petitioners must obtain a COA to appeal "final orders that dispose of the merits of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180, 183, 129 S.Ct. 1481, 173 L.Ed.2d 347 (2009); *see* 28 U.S.C. § 2253(c)(1)(A). Where it applies, the COA requirement is jurisdictional. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

It is true, as Stanko argues, that the COA requirement does not apply to all final orders; some orders, even if final, lack "a sufficient nexus" to the underlying merits of a habeas petition to "trigger the COA requirement." *United States v. McRae*, 793 F.3d 392, 399 (4th Cir. 2015). We have drawn a line between a *dismissal* of a motion for reconsideration as an unauthorized successive petition, which may be appealed without a COA, *id.* at 399-400, and a *denial* of a motion for reconsideration on its merits, which may not, *see Reid v. Angelone*, 369 F.3d 363, 370 (4th Cir. 2004). Whereas a dismissal by definition does not pass on a habeas petition's merits, the same is not true of a denial: When a district court denies a reconsideration motion "on the merits, it necessarily considers the merits of the underlying habeas petition" because such a motion "alleges illegality in the conduct of" the habeas proceedings. *McRae*, 793 F.3d at 399.

[18] Stanko's Rule 59(e) motion was denied by the district court, not dismissed. As in *Reid*, Stanko's motion alleged illegality in the conduct of the federal habeas proceedings – specifically, an error in granting summary judgment prematurely. And, as in *Reid*, the district court considered the merits of that claim in denying Stanko's motion: There was no need to wait for the testing at issue, it concluded, because the results would be inadmissible under the Supreme Court's then-recent decision in *Shinn*, barring a federal habeas court from considering new evidence, beyond the state court record, based on ineffective assistance of post-conviction counsel. J.A. 7847 (citing *Shinn*, 596 U.S. at 382, 142 S.Ct. 1718). *Reid* therefore governs, and given the absence of a COA, we lack jurisdiction to review this argument and must dismiss the portion of the appeal raising it. *See Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029; *Rowsey v. Lee*, 327 F.3d 335, 345 (4th Cir. 2003).[10]

IV.

For the foregoing reasons, the judgment of the district court is affirmed and the appeal from the district court's denial of the Rule 59(e) motion is dismissed.[11]

AFFIRMED IN PART AND DISMISSED IN PART

10. Even if we could consider this argument, it would not get Stanko far. In light of *Shinn*, 596 U.S. 366, 142 S.Ct. 1718, 212 L.Ed.2d 713, which confirmed that any evidence from the sought-after testing would have been inadmissible, and *Shoop v. Twyford*, 596 U.S. 811, 820, 142 S.Ct. 2037, 213 L.Ed.2d 318 (2022), which held that a court lacked authority to arrange for medical testing if *Shinn* would exclude the resulting evidence, the district court's decision to go forward with summary judgment in the absence of test results looks like a course correction, not an error.

11. We note an outstanding motion from the state to strike a letter Stanko filed pursuant to Federal Rule of Appellate Procedure 28(j). We have not relied on any of the materials cited in the Rule 28(j) letter and accordingly dismiss the motion to strike as moot.

FILED: July 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2 (L), Stephen Stanko v. Bryan Stirling
1:19-cv-03257-RMG

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: July 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2 (L)
(1:19-cv-03257-RMG)

STEPHEN C. STANKO

Petitioner - Appellant

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Secure Facility

Respondents - Appellees

No. 22-3
(1:19-cv-03257-RMG)

STEPHEN C. STANKO

Petitioner - Appellant

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Secure

Facility

Respondents - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part. The appeal is dismissed in part.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

Case Nos. 22-2 (L) & 22-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEPHEN C. STANKO, Appellant/Petitioner

v.

BRYAN STIRLING, Director, South Carolina Department of Corrections, and LYDELL CHESTNUT, Warden Broad River Correctional Institution, Appellees/Respondents

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

PETITION FOR PANEL REHEARING AND REQUEST FOR REHEARING *EN BANC* BY APPELLANT-PETITIONER

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PETITIONER'S STATEMENT OF PURPOSE

Petitioner-Appellant Stephen C. Stanko, through counsel, respectfully seeks rehearing or reconsideration *en banc* of the Court's opinion denying habeas corpus and, pursuant to Fed. R. App. P. 40(a)(2), states the following points of law and fact the Court overlooked or misapprehended.

I. THE OPINION OVERLOOKED PETITIONER'S CENTRAL ARGUMENTS AND MISSTATED PROCEDURAL FACTS IN RULING IT LACKS JURISDICTION IN THE APPEAL OF RIGHT CHALLENGING THE DISTRICT COURT'S TERMINATION OF AUTHORIZED SPECIALIST SERVICES.

A. The Opinion Relies on Inapposite Circuit Cases and Ignores Supreme Court Authority Establishing that Appeal from the Denial of Counsel Resources is Taken as of Right.

The Opinion misapplies *Reid v. Angelone*, 369 F.3d 363, 370 (4th Cir. 2004), and *United States v. McRae*, 793 F.3d 392, 299 (4th Cir. 2015), cases concerning Federal Rule of Appellate Procedure ("FRAP") 60(b)—a kind of motion not at all involved here—to whether a non-merits issue from a district court's denial of habeas corpus relief is appealable without a certificate of appealability ("COA"), pursuant to 28 U.S.C. § 2253(c). These are cases that sought to reopen an already denied petition. In 2009, the Supreme Court unanimously held that an order denying a request for counsel resources under 18 U.S.C. § 3599 does *not* require a COA. *Harbison v. Bell*, 556 U.S. 180, 183, 196

(2009).[1] In 2018, the Supreme Court reviewed the affirmance of the Southern District of Texas's denial of an expert funding request, recognizing that the Fifth Circuit "held that a COA was not required insofar as petitioner challenged the District Court's denial of funding under § 3599." *Ayestas v. Davis*, 584 U.S. 28, 38 n.1 (2018).[2] It is clear that a COA is not required for issues that are not "the final order in a habeas corpus proceeding." *Harbison*, 556 U.S. at 182 (citing *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000); *Wilkinson v. Dotson*, 544 U.S. 74, 78-83 (2005)).

Instead of applying *Harbison* and *Ayestas* with respect to this pivotal, albeit non-merits, issue, the Opinion hinges on whether the District Court's disposal of the *Rule 59(e) motion*—not the § 2254 action itself— was designated a "dismissal" or a "denial":

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[1] Justice Stevens, writing for the majority, held that denial of a motion to authorize federal counsel to proceed in state clemency "was clearly an appealable order under 28 U.S.C. § 2291." *Id.* at 183. Justice Scalia, writing in dissent and joined by Justice Alito, "agree[d] with the Court that Harbison was not required to obtain a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A) before appealing the District Court's denial of his motion to expand counsel's appointment." *Id.* at 200.

[2] Justice Alito, writing for the majority, explained that the parties had not briefed "whether an appeal from a denial of a § 3599 request for funding would fit within the COA framework, and we find it unnecessary to resolve the issue." *Id.* The Court concluded that at the very least review of denial of a COA on constitutional claims did not require a COA, and thus, the Court of Appeals can reach the funding issue without a COA.

> When a district court denies a reconsideration motion[3] "on the merits, it necessarily considers the merits of the underlying habeas petition" because such a motion "alleges illegality in the conduct of" the habeas proceedings. *McRae*, 793 F.3d at 399.

Opinion at 33.

This rationale improperly frames the motion to alter the judgment, a motion filed in the typical course of litigation and granted only in extraordinary circumstances, as the main event of the habeas corpus action. The Rule 59(e) motion merely gave the District Court the opportunity to reconsider whether it improperly truncated specialist services previously authorized under § 3599. The Opinion's approach conflates Rule 60(b) with Rule 59(e), but no authority, nor principle, justifies that contravention of the foregoing Supreme Court authoirities. The Opinion thus repurposes *Reid* and *McRae* to swallow all § 2254 denials in the initial, routine course, discarding *Harbison* along the way.

Reid held that a COA was required because denial of a Rule 60(b) was a final judgment in a habeas proceeding. *Reid*, 369 F.3d at 367-69. *McRae* also addressed whether a COA is needed to appeal disposition of a Rule 60(b) motion, but in this case the disposition was styled a "dismissal" rather than a denial, though the district court specified the "dismissal" was because the purported Rule 60(b)

[3] But *McRae* did *not* involve a "reconsideration" motion. *McRae*, 793 F.3d at 399. ("When a district court *denies* a Rule 60(b) motion on the merits, it necessarily considers the merits of the underlying habeas petition.").

motion was actually an impermissible successive habeas petition. *McCrae*, 793 F.3d at 394. Based largely on guidance from post-*Reid* Supreme Court decisions, this Court found that a COA was not necessary in every disposition of a purported Rule 60(b) motion. *Id*. at 398 ("Based on the Court's reasoning in *Gonzalez* [*v. Crosby*, 545 U.S. 524 (2005)], and *Harbison v. Bell*, 556 U.S. 180[] (2009), we hold that the COA requirement in § 2253(c) allows us to review, without first issuing a COA, an order dismissing a Rule 60(b) motion as an improper successive habeas petition.").

This Court subsequently recognized that *Gonzales* and *Harbison* further abrogated *Reid*'s broad holding by noting that "*Gonzalez* reveals the importance of distinguishing between Rule 60(b) motions and successive petitions, and *Harbison* opens the door for us to ensure that the district court does so properly." *Bixby v. Stirling*, 90 F.4th 140, 157 (4th Cir. 2024). In *Bixby,* this Court concluded that the purported 60(b) motion was an impermissible successive petition and remanded for dismissal rather than denial. *Id*. at 157. While *Bixby* did not focus on the question of COA requirement, it took the appeal after the district court denied a COA and without itself issuing a COA. *Id.* at 165 ("For several reasons, we conclude that we need not issue a COA to consider Bixby's appeal.").

Clearly, these cases do not announce a blanket rule that in an original habeas corpus action what determines whether § 2253 requires a COA is whether the district court disposed of the issue by "dismissal" or "denial."

Further, to the extent these cases articulate requirements for a COA to review dispositions of a Rule 60(b) motion, that guidance is rooted in the likelihood that the motion is a successive petition. Therefore, these cases cannot extend to Rule 59(e) motions. *Banister v. Davis*, 590 U.S. 504, 508-509 (2020) (holding that a Rule 59(e) motion cannot be a successive petition, in part because a Rule 59(e) motion "suspends finality of the original judgment"). *Banister* observed that "Rule 60(b) differs from Rule 59(e) in just about every way that matters to the inquiry here." *Id*. at 518. The issue here is that the District Court's granting of summary judgment simultaneously, and erroneously, denied certain specialist services earlier authorized for Stanko with the concurrence of the Chief Judge in 2020 under § 3599(f)'s "reasonably necessary" standard—neither a Rule 60(b) motion nor a successive petition.

B. The Opinion's Reliance on *Shinn* and *Twyford* is Misplaced, Factually Misleading, and Ignores Petitioner's Arguments.

The District Court's error in this issue accrued prior to its disposition of Stanko's Rule 59(e) motion, although the motion provided the District Court an opportunity to "correct [its] own errors [and thereby] prevent unnecessary burdens being placed on the courts of appeals." *Banister*, 590 U.S. at 516 (quotation and

citation omitted). The Opinion's recitation of the disposition of the Rule 59(e) motion skews the timeline:

> And, as in *Reid*, the district court considered the merits of that claim in denying Stanko's motion: There was no need to wait for the testing at issue, it concluded, because the results would be inadmissible under the Supreme Court's then-recent decision in *Shinn* [*v. Ramirez*, 596 U.S. 366 (2022)], barring a federal habeas court from considering new evidence, beyond the state court record, based on ineffective assistance of post-conviction counsel.

Opinion at 33. But the error, issuing summary judgment without permitting specialist services authorized pursuant to § 3599(f), accrued months before *Shinn* was decided. JA7615.

More important, nothing in *Shinn* invalidates or otherwise calls into question § 3599(f). Further, neither the briefing nor opinion mentions § 3599 at all. *See generally*, *Shinn*, 596 U.S. at 366-91; Brief for the Petitioners, *Shinn*, No. 20-1009, 2021 WL 3056470 (July 15, 2021); Brief for Respondents, *Shinn*, No. 20-1009, 2021 WL 4197216 (Sept. 13, 2021); Reply Brief for the Petitioners, *Shinn*, No. 20-1009, 2021 WL 4845766 (Oct. 13, 2021). *Shinn* only addressed whether the equitable exception in *Martinez v. Ryan*, 566 U.S. 1 (2012), implies an exception to § 2254(e)(2). *Shinn*, 596 U.S. at 371. It did not address the range of admissibility of new evidence that might be reasonably necessary to the § 3599 representation. *See, e.g., Harbison*, 556 U.S. at 183-87 (holding that § 3599 provides for representation of indigent prisoners in proceedings beyond federal

habeas, including state executive clemency and other available post-conviction proceedings). The Opinion fails to respond at all to these arguments in this appeal.

Similarly, the Opinion improperly relies on *Shoop v. Twyford*, 596 U.S. 811 (2022), without responding to arguments showing it is inapposite. *Twyford* addresses the ramifications of *Shinn* as to a request for a transport order under the All Writs Act (28 U.S.C. § 1651(a))—not effective denial of specialist services authorized under § 3599(f). *Twyford*, 596 U.S. at 814. Section 1651 requires that the writ generate evidence admissible in the federal jurisdiction. *Id.* at 816. Just as *Harbison* found it could not infer a limitation to "federal" proceedings in § 3599(e), *Harbison* 556 U.S. at 186-87, this Court should not infer a similar unwritten limitation in § 3599(f). Here, by contrast, the District Court issued a transport order in furtherance of authorized services —not the All Writs Act. As repeatedly pleaded, on February 15, 2022, the District Court issued its transport order for Stanko's brain imaging on March 3, 2024. JA7581. Just three weeks later, before the hospital could even transmit the scans to Stanko's authorized specialists, the District Court granted summary judgment.[4]

[4] Further, the District Court abruptly ended the case before *Shinn* was decided, and Stanko could move to stay the federal proceedings under *Rhines v. Weber*, 544 U.S. 269 (2005).

C. The Opinion Incorrectly States Stanko Sought a COA and Was Denied.

The Opinion incorrectly recites, "We denied a certificate of appealability ("COA") on this issue. . . ." Opinion at 32. In fact, relying on the foregoing Supreme Court authorities permitting his appeal as of right on the issue, Stanko in no way requested a COA on the issue. Doc. 89 at 16-17. Further underscoring the Opinion's blanket application of this circuit's Rule 60(b) habeas corpus cases (*supra*), while the State challenged jurisdiction as to Stanko's interlocutory appeal concerning the unsealing of certain docket items, the State did not question Stanko's unambiguous appeal as of right of the § 3599 issue. Doc. 118 at 11-12.

FRAP 22(b)(2) and Local Rule 22(a)(1)(B) provide that if the appellant does not file an express request for a COA, the notice of appeal is to be treated as a request for a COA. The Opinion's statement that it denied a COA on this issue could only be based on the unconvincing and hypertechnical idea that its grant of COA as to four issues and denial as to the others was a denial of COA as to this issue.

But FRAP 22(b)(2) clearly contemplates the absence of any request for a COA. Here, there *was a request* for a COA on various merits issues in the 59(e) motion and in the opening brief. These requests were to issues on appeal other than the two "global" issues: *viz*. the interlocutory matter and the §3599(f) issue. Further, the opening brief explicitly argued that these two issues did not require a

COA, yet the order granting a COA did not explicitly refute that. Doc. 89 at 16; Doc. 91.[5] Under these circumstances, FRAP 22(b)(2) has no application.

II. DISPOSITION OF THE CONFLICT-RELATED CLAIMS IGNORES THE EGREGIOUS FACTS AND CENTRAL ARGUMENTS IN THIS APPEAL.

While cases involving an actual conflict from simultaneous representation in a trial and claims of trial-ineffectiveness ("IAC") in post-conviction proceedings in another case are vanishingly rare,[6] the facts here are even more egregious. The Opinion overlooks these unique facts.

Prior to the Georgetown County trial, Stanko's appointed counsel, William Diggs, settled on an untenable strategy that falls far outside the prevailing norms[7]

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[5] All citations to Case No. 22-2(L) enumeration.

[6] Undersigned counsel's diligent search turned up just three cases involving successive capital prosecutions in two different counties: 1. Ronald Woomer (Horry, Colleton, and Georgetown Counties); 2. James Neil Tucker (Calhoun and Sumpter Counties); 3. Larry Gene Bell (Saluda (transferred to Berkeley) and Lexington Counties). *State v. Woomer*, 277 S.E.2d 696 (S.C. 1981); *State v. Woomer*, 284 S.E.2d 357 (S.C. 1981); *State v. Tucker*, 512 S.E.2d 99 (S.C. 1999); *State v. Tucker*, 478 S.E.2d 260 (S.C. 1996); *State v. Bell*, 360 S.E.2d 706, 708 (S.C. 1987); *State v. Bell*, 393 S.E.2d 364, 367 (S.C. 1990). Only in Bell's case did the same attorney represent him at both trials. Counsel's research found no indication that counsel was subject to trial-ineffectiveness claims at the time of the second trial nor anything like the egregious circumstances in Stanko's cases.

[7] *E.g.*, John Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1049 (2008) ("Nothing sounds more dangerous than a psychopath, and jurors may be swayed by the apparently objective nature of the scoring process. But the psychopathy checklist is junk science, and its purveyors are demonstrably mercenary, so it behooves every defense attorney to prepare to exclude this 'expert' testimony, or to debunk it should exclusion fail.").

in capital representation: pursuing a Not Guilty by Reason of Insanity ("NGRI") defense based on a "diagnosis" of psychopathy or anti-social personality disorder ("ASPD"). Doc. 158 at 1 (citing Georgetown County ROA.3585-3589.[8] Diggs settled on this approach before any defense expert had conducted any evaluation of Stanko. *Id*. On June 20, 2006, well before any evaluation was conducted, Diggs filed ten interlacing pretrial motions challenging the constitutionality of the statutes effectively rendering NGRI in Stanko's case unlawful. Doc. 158 at 3-23. The trial court heard these motions on June 22, 2009, denying them at the hearing. ROA.3606-3701. Nonetheless, Diggs persisted with this untenable strategy outside capital representation norms. The result, predictably, was a death sentence.

While the Georgetown case proceeded into post-conviction, where Stanko raised numerous claims of trial-ineffectiveness, Diggs persisted with the same failed strategy in Horry County. He assured the judge he would save the court's resources by needing no additional funding for investigation or experts, because he

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[8] The Georgetown ROA is available at https://ctrack.sccourts.org/public/caseView.do?csIID=40270.

Stanko brought the inadvertent omission of these materials and their subsequent admission in the District Court to correct a material mischaracterization of the record at oral argument was brought to this Court's attention. Docs. 158, 165. By declining to consider these materials, the Panel effectively granted the State's motion to strike Stanko's Rule 28(j) letter, while purporting to deny it as moot. Opinion at 34 n.11.

The State's argument in its motion to strike was based primarily on its unsupported theory that the rule only permits "legal authorities." Docs. 160 & 161.

would recycle the evidence. Doc. 89 at 70; JA7542-7544. He filed substantively identical pre-trial motions challenging the NGRI statutes. JA3938-3955 These motions were again denied, and Diggs again presented his client to the jury as a monster, his experts comparing Stanko to Ted Bundy and John Wayne Gacey. Tr. 1497-98.

The Opinion appropriately rejects the State's circular argument that these conflict issues are not preserved because Diggs failed to object to his own representation. Opinion at 5 n.1. The Opinion also correctly recognizes that a "narrow class of conflicts" are "unwaivable" or "non-waivable." Opinion at 16 (citing *e.g., United States v. Urutyan*, 564 F.3d 679, 687 (4th Cir. 2009)). But the Opinion roots waivability in a different "stakeholder"—the judiciary and its interest in maintaining the appearance of fair proceedings. *Id*. at 17. It notes that other jurisdictions have tied the waivability standard to conflicts affecting the defendant's interest in fairness. Opinion at 17-18. But those cases involved only "potential" conflicts based on the simultaneous or successive representation of co-defendants. *United States v. Lussier*, 71 F.3d 456, 462 (2d Cir. 1995) ("Thus, we find that the conflicts were at worst potential, i.e., creating merely the possibility of some unforeseen problem arising at trial . . . . Accordingly, the district court did not abuse its discretion in determining that a valid waiver could be effected."); *United States v. Vaquero*, 997 F.2d 78, 91-92 (5th Cir. 1993)) ("[W]hen a

defendant who is an attorney with twenty years of experience unequivocally waives his right to conflict free counsel, following a full *Garcia* hearing, and when the potential conflict arises from counsel's dual representation of co-conspirators and counsel's tangential link to the conspiracy himself, the integrity of the judicial system is not undermined and the accused has not been deprived of his right to effective assistance of counsel.")[9].

The proper legal analysis for an actual conflict of interest is whether the conflict adversely affected the representation. *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980); *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

While the Opinion recognizes that an attorney's financial and reputational interests can give rise to a conflict, it again ignores the unique circumstances of Diggs's undisputed conflict and observes that IAC "allegations are sufficiently routine [and] Diggs was unlikely to be overly concerned about Stanko's claim against him." Opinion at 20. Again, the Opinion ignores the extreme circumstances distinguishing this case from other IAC cases. The Opinion concludes that "the potential conflict presented no risk of prejudice so severe as to take it outside the mainstream of conflict cases." *Id*. (quotation and citation omitted). Again, this is

[9] At a *Garcia* hearing, the judge is required to serve as conflict counsel and "personally and forthrightly advise [the defendant] of the potential dangers of representation by counsel with a conflict of interest." *Id*. at 89. Stanko was never properly advised on the consequences of waiver.

not a merely "potential conflict," but an undisputedly actual conflict, originally characterized by the State as "unwaivable." JA3960-3961.

In any case, Diggs's untenable NGRI defense was beyond severely prejudicial, as it entailed presenting Stanko to the jury as a psychopathic monster.

Finally, assuming the actual conflict was waivable, and not subject to the clearly established test for actual conflicts, the Opinion concludes the state court finding that the waiver was adequate was reasonable under 28 U.S.C. § 2243(d)(1). This finding ignores the fact that Stanko was never advised on the consequences of waiver (especially that Diggs's NGRI strategy was outside professional norms, could not possibly secure an acquittal, and would result in a death sentence).

CONCLUSION

For the foregoing reasons, Stanko respectfully requests this Court grant his motion for rehearing or for *en banc* reconsideration.

Respectfully submitted,

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Counsel for Petitioner Stephen C. Stanko

August 12, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2023, the foregoing was served upon all counsel of record in this case via the ECF filing system, pursuant to the Federal Rules of Civil Procedure.

/s/ Joseph C. Welling
JOSEPH C. WELLING
Counsel for Petitioner, Stephen Stanko

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 22-2(L) **Caption:** Stanko v. Stirling, et al.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT
Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs if Produced Using a Computer: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

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(s) Joseph C. Welling

Party Name Stephen C. Stanko

Dated: Aug. 12, 2024

FILED: August 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2 (L)
(1:19-cv-03257-RMG)

STEPHEN C. STANKO

Petitioner - Appellant

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Secure Facility

Respondents - Appellees

No. 22-3
(1:19-cv-03257-RMG)

STEPHEN C. STANKO

Petitioner - Appellant

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Secure Facility

Respondents - Appellees

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Diaz, Judge Harris, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk

South Carolina Statutes Annotated - 2005

Code 1976 § 17-24-10

Code of Laws of South Carolina 1976 Annotated Currentness
Title 17. Criminal Procedures
Chapter 24. Mentally Ill or Insane Defendants
§ 17-24-10. Affirmative defense.

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

HISTORY: 1984 Act No. 396, § 1; 1988 Act No. 323, § 1; 1989 Act No. 93, § 1.

LIBRARY REFERENCES

Criminal Law 47, 331, 570.
WESTLAW Topic No. 110.
C.J.S. Criminal Law §§ 99 to 108, 692, 1112, 1114.

RESEARCH REFERENCE

ALR Library

72 ALR 5th 109, Adequacy of Defense Counsel's Representation of Criminal Client--Pretrial Conduct or Conduct at Unspecified Time Regarding Issues of Insanity.

Encyclopedias

S.C. Jur. Adultery and Fornication § 16, Absence of Intent.

S.C. Jur. Homicide § 3, Excusable Homicides.

LAW REVIEW AND JOURNAL COMMENTARIES

Fetzer, Execution of the mentally retarded: a punishment without justification. 40 SC L Rev 419 (Winter 1989).

NOTES OF DECISIONS

1. In general

Code 1976 § 17-24-10, Code 1976 § 17-24-10

State postconviction court did not unreasonably apply *Strickland,* so as to warrant federal habeas relief, in concluding that trial counsel did not violate petitioner's right to effective assistance at capital murder trial by failing to present an insanity defense, as psychiatrist's unexplained and conclusory assertion that petitioner was insane was insufficient in light of the overwhelming evidence that petitioner was criminally responsible, psychiatrist did not review petitioner's statements to his attorneys indicating premeditation and feelings of guilt, and insanity defense would have hindered assertion of potential mitigating circumstances. McWee v. Weldon (C.A.4 (S.C.) 2002) 283 F.3d 179, certiorari denied 123 S.Ct. 162, 537 U.S. 893, 154 L.Ed.2d 158. Habeas Corpus 486(2)

In every criminal case, it is presumed defendant is sane. State v. Lewis (S.C. 1997) 328 S.C. 273, 494 S.E.2d 115. Criminal Law 311

Insanity is an affirmative defense to prosecution for crime. State v. Lewis (S.C. 1997) 328 S.C. 273, 494 S.E.2d 115. Criminal Law 48

Key to insanity is the power of defendant to distinguish right from wrong in the act itself—to recognize the act complained of is either morally or legally wrong. State v. Lewis (S.C. 1997) 328 S.C. 273, 494 S.E.2d 115. Criminal Law 48

Defendant may rely on lay testimony to establish insanity. State v. Lewis (S.C. 1997) 328 S.C. 273, 494 S.E.2d 115. Criminal Law 570(1)

Jury may disregard expert testimony on issue of defendant's sanity. State v. Lewis (S.C. 1997) 328 S.C. 273, 494 S.E.2d 115. Criminal Law 494

Requested charge on insanity is properly refused where there is no evidence tending to show defendant was insane at time of crime charged. State v. Lewis (S.C. 1997) 328 S.C. 273, 494 S.E.2d 115. Criminal Law 814(10)

Murder defendant was not entitled to charge on insanity, even though defendant suffered from severe depression at time of shooting; defendant chased his former wife out of her home after shooting victim and then ran back inside when he saw police officers, defendant allowed emergency crew into home to remove victim, and defendant remained in his former wife's residence for hours and threatened to shoot himself but did not do so until police entered, all of which suggested that defendant recognized gravity of situation and that his conduct was wrong; overruling *State v. Campen*, 321 S.C. 505, 469 S.E.2d 619. State v. Lewis (S.C. 1997) 328 S.C. 273, 494 S.E.2d 115. Homicide 1502

It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong, or to recognize his act as being wrong. State v. Poindexter (S.C. 1993) 314 S.C. 490, 431 S.E.2d 254, rehearing denied. Criminal Law 48

A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong as defined in § 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirement of the law. State v. Poindexter (S.C. 1993) 314 S.C. 490, 431 S.E.2d 254, rehearing denied. Criminal Law 48

A defendant convicted of murder was not entitled to a new trial based on the discovery that he had a brain tumor at the time of the offense where his expert testified only that the tumor “may have” had an effect on his commission of the crime, and thus he failed to prove that the tumor had rendered the defendant legally insane. State v. South (S.C. 1993) 310 S.C. 504, 427 S.E.2d 666.

The trial court's determination that a mildly retarded defendant was competent to stand trial was sufficiently supported by the testimony of a forensic psychiatrist, who had tested and observed him, that (1) he understood the charges against him and the possible penalties if he were convicted, (2) he was able to assist his counsel with his defense, (3) he understood the role of the

various courtroom officers, and (4) he responded appropriately to inquiries and to his counsel's instructions. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

The defendant failed to meet his burden of proof to show that he was incompetent at the time of his guilty plea, even though medical records dated after the crime included statements that he had some problems with his mentation and was a little slow answering questions, where (1) such records were contradictory and were not the result of any psychological evaluation, (2) his attorney, who had known him for several years, testified that he did not "notice anything abnormal to make me think [the defendant] was mentally deficient," and (3) his pastor testified that the defendant was coherent at his plea hearing, and that he understood what was being said to him. Jeter v. State (S.C. 1992) 308 S.C. 230, 417 S.E.2d 594.

A defendant's counsel was ineffective in advising the defendant to plead "guilty but mentally ill" to murder where counsel was fully aware that the State's own psychiatrist had diagnosed the defendant as legally insane at the time of the crime, and failed to adequately apprise the defendant of the M'Naghten defense which, if established, would have relieved her of criminal responsibility. Davenport v. State (S.C. 1990) 301 S.C. 39, 389 S.E.2d 649. Criminal Law 641.13(5)

A defendant was entitled to present the defense of insanity or to attempt to obtain a verdict of guilty but mentally ill where he presented evidence that his use of drugs had caused permanent and irreversible brain damage which manifested itself in a mental illness. State v. Hartfield (S.C. 1990) 300 S.C. 469, 388 S.E.2d 802.

Although a criminal defendant is presumed to be sane, when a defendant offers evidence of insanity, the State no longer enjoys the presumption but must present evidence to the jury from which the jury could find the defendant sane. If the contention of insanity is suggested, the State may present evidence of sanity in its case-in-chief rather than waiting to do so during its case in reply. Even though a defendant presents expert testimony, the State is not required to also produce expert testimony; lay testimony may be sufficient. State v. Smith (S.C. 1989) 298 S.C. 205, 379 S.E.2d 287.

As literal reading of §§ 17-24-10 and 17-24-20 requires person having legal capacity to distinguish right from wrong, but who because of mental disease or defect is unable to recognize act charged as being wrong, may not be found either insane or guilty but mentally ill, court will therefore read "and" in § 17-24-10(A) to mean "or" so that statutory definition of insanity is equivalent to definition of insanity under case law. State v. Grimes (S.C. 1987) 292 S.C. 204, 355 S.E.2d 538.

Current through End of 2005 Reg. Sess.

End of Document

STATE OF SOUTH CAROLINA)) COUNTY OF Georgetown)	COURT OF GENERAL SESSIONS FIFTEENTH JUDICIAL CIRCUIT Warrants:H-750173; H-750181; H-750183; H-750185; H-929318
The State of South Carolina)) v.)) Stephen Christopher Stanko,)) Defendant.))	**MOTION TO DECLARE** **§ 17-24-10 UNCONSTITUTIONAL** (Conclusive Presumption #1)

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from moral or legal wrong in one area of the

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to

brain, one maintains the free will to act accordingly as a result of executive analysis occurring in a distinct and different area of the brain, notwithstanding physical defects in the latter existing either in the form of missing volumetric mass or low brain activity.

Respectfully submitted

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ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

---

establish the defense of insanity.

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181;
	H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Conclusive Presumption #2)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from moral or legal wrong in any area of the brain, under any circumstances, one is guilty of criminal conduct under

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence. (C) Evidence of a mental disease or defect

the circumstances presented in this case, notwithstanding the presence of physical defects in the brain in the form of missing volumetric mass or low brain activity.

Respectfully submitted

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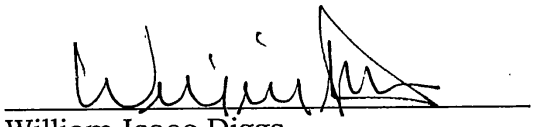

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ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

---

that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181; H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #1)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional arbitrary factor that allows the prosecution to establish "malice aforethought" as a requisite element of murder based solely on

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to

the conduct of the accused, while the statute denies the accused the ability to establish insanity; or a mental disease, defect, or illness, based solely on the conduct of the accused.

Respectfully submitted

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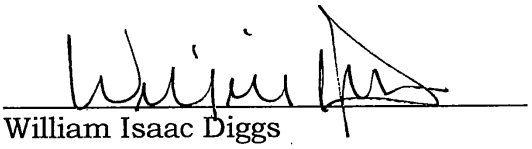

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ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

---

establish the defense of insanity.

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181; H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #2)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional arbitrary factor that allows the prosecution to establish "malice aforethought" as a requisite element of murder, based solely on

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to

the conduct of the accused, without requiring any corroborative evidence that the brain function of the accused included the capacity to form the intent to commit malicious acts and the executive analysis to willingly act thereon.

Respectfully submitted

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ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

---

establish the defense of insanity.

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181; H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #4)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute is arbitrary and violates due process of law because it labels "insanity" as affirmative defense thus shifting to the accused the burden of proof on each element

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to

of the defense. This relieves the prosecution from proving each element of the offenses charged.

Respectfully submitted

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ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

---

establish the defense of insanity.

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181;
	H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-20 UNCONSTITUTIONAL**
)	(Arbitrary Factor)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-20 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15.[1]

---

[1] **§ 17-24-20. Guilty but mentally ill; general requirements for verdict.**

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

Said motion is based on the grounds that the statute is arbitrary and violates due process of law because it contains an illusory defense of, "Guilty But Mentally Ill." Said defense is illusory because even if proved to exist by an accused by a preponderance of the evidence, the accused may still be sentenced to death under South Carolina law.

Respectfully submitted

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This 20th day of June, 2006
Myrtle Beach, South Carolina

(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

HISTORY: 1984 Act No. 396, § 2; 1988 Act No. 323, § 2; 1989 Act No. 93, § 2.

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181; H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE § 17-24-20 UNCONSTITUTIONAL**
Stephen Christopher Stanko,)	(Conclusive Presumption)
)	
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-20 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

---

[1] § 17-24-20. Guilty but mentally ill; general requirements for verdict.

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

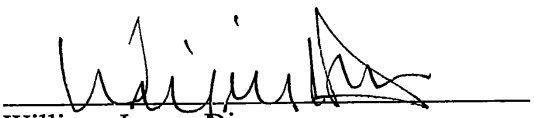
(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from wrong in one area of the brain, the accused is guilty, notwithstanding the absence of ability to perform executive analysis which would occur in a different area of the brain but does not, due to physical defects (in the latter area of the brain) which exist either in the form of missing volumetric mass or low or dead brain activity or tissue.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS



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(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

HISTORY: 1984 Act No. 396, § 2; 1988 Act No. 323, § 2; 1989 Act No. 93, § 2.

ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181;
	H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ § 16-3-10 et seq.**
)	**UNCONSTITUTIONAL**
Defendant.)	(Incomplete Evidentiary Basis)
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. §§ 16-3-10 et seq. unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the entire statutory complex is arbitrary and violates due process because it is allows for a conviction of an accused based on an incomplete evidentiary base which excludes evidence of brain function in the determination of guilt or innocence which is necessary to form an accurate assessment of mental health and to render a reliable verdict.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

[1] S.C. Code Ann.§ 16-3-10, defines "Murder" states as follows: *"Murder"* is the killing of any person with malice aforethought, either express or implied.

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ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Georgetown)	Warrants:H-750173; H-750181; H-750183; H-750185; H-929318
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**S.C. § 16-3-10 UNCONSTITUTIONAL**
)	(Vagueness)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Deadra L. Jefferson, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 16-3-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the arbitrary and vague and violates due process because it does not define the term "malice aforethought," and fails to acknowledge that malice is a complex concept that requires multiple brain functions or a number of different brain

---

[1] **§ 16-3-10. "Murder" defined.**

"Murder" is the killing of any person with malice aforethought, either express or implied.

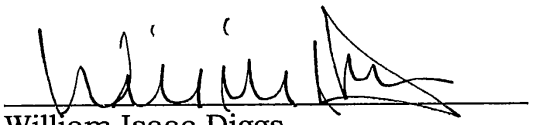
HISTORY: 1962 Code § 16-51; 1952 Code § 16-51; 1942 Code § 1101; 1932

Code § 1101; Cr. C. '22 § 1; Cr. C. '12 § 135; Cr. C. '02 § 108; G. S. 2453; R. S. 108; 1712 (2) 418.

activities and the statute fails to identify which brain functions are required by law to exist sufficiently to constitute the statutory element of murder of "malice aforethought."

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS



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ATTORNEYS FOR THE DEFENDANT

This 20th day of June, 2006
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2008-GS-22-01446

STEPHEN STANKO,)
)
Applicant,) **Transcript of Record**
)
vs.)
) April 27-28, 2015
STATE OF SOUTH CAROLINA,)
)
Respondent.)

B E F O R E:

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

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

Stuart Axelrod, Esquire
Bobby Frederick, Esquire
Tristan Shaffer, Esquire
Attorney for Applicant

Anthony Mabry, Esquire
Carolina M. Scrantom, Esquire
Attorney for Respondent

Kay H. Richardson
Circuit Court Reporter

I N D E X

I N D E X

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the skull.
Q: All right. And what was Dr. Sachy and Dr. Thrasher's opinion after the investigation and materials ---
A: They thought he was legally insane, met the definition of insanity, and I felt like we certainly had an obligation in that situation and it made sense. No one could look at the facts of this case and not come out saying this is sick, you know, this man is sick. Now, that might be just like kind of like rhetorical kind of statement but we know that's true. We know -- I think everyone knows there's a problem there and from there the decision has to be made or had to be made at that time. So, what effect does that have on the case and what are we gonna do with that.
Q: So, they -- Dr. Thrasher and Dr. Sachy both told you they believed he was insane?
A: Yes. They both testified to that.
Q: Okay.
A: And then we got an insanity instruction.
Q: Did the State try to keep the insanity instruction out?
A: Yeah, they did. We had a pretrial one-day hearing where Dr. Sachy had to come in and testify before Judge Jefferson as to what his trial testimony would be and he did that. And at the end of that testimony, the Judge, I think, heard arguments about the issue and decided, made a ruling that he would be permitted to testify and we would be permitted to proceed on

recognize the physical way in which the brain processes that signal from the base limbic system.

MR. AXELROD: Your Honor, I'm just gonna staple some stuff together if I may.

A: In other words, the malice could've been based on what was coming out of the limbic system at the time but that's not where malice forms. It wouldn't form in the limbic system, it forms in the frontal lobe.

Q: And if the frontal lobe is not working, you can't have malice and you can't be convicted of murder?

A: Right.

Q: And you can't get the death sentence?

A: Well, the statute doesn't allow for that and that's why we were arguing unconstitutional.

Q: Right. And that's what I want to get to. Let me staple this for you, first, and then I'm gonna show them to the Attorney General.

(REPORTER'S NOTE: Mr. Axelrod confers with Mr. Mabry.)

MR. AXELROD: Your Honor, I don't believe the State has objected to admitting this as one motion ---

THE COURT: I think -- is that correct?

MR. MABRY: As one exhibit ---

MR. AXELROD: I'm sorry. One exhibit and ---

THE COURT: A, B, C, D ---

MR. AXELROD: And if -- there's nine of them, so A, B, C,

A: I think reasonable minds can disagree on that. You don't want to -- you certainly don't want initially to say he's like Ted Bundy but I think most people understood Ted Bundy was sick as well.
Q: The question was, Was at a good person to compare ---
A: I don't know. It depends, you know, probably with most people it's not a good comparison but it might for some who understood what was going on.
Q: In your mind, was it a good comparison?
A: I wouldn't have chosen that. I wouldn't have compared him to Ted Bundy.
Q: Did you go over your -- his trial testimony prior to trial? Did he tell you he was going to call -- he was going to refer to him as an associate of Ted Bundy?
A: If you -- I think in the record you have the report from Dr. Sachy and I don't think it says stuff like that. I thought basically it was gonna come, you know, his testimony was coming from ---
MR. AXELROD: Court's indulgence.
A: --- in the way that it was described in his report.
Q: It might've been nice if we compared him somewhat to Mother Teresa, would that be a good comparison?
A: It would've been a good comparison.
Q: So ---
A: But you know what, he was highly thought of in school.

You go back and look at his early, you know, his school years, he was very much admired, respected, loved. But, you know, this is the type -- if the experts in my case, in Stephen's case, are right about this, you know, the frontal lobe doesn't fully mature until you're in your mid-twenties and so it's not really a defect that's gonna manifest and show itself until you get older and, you know, you continue to do these stupid teenage, you know, what you are doing at fifteen. I know my son fell off the top of the car one to because he was surfing, you know, on top of the car. He was about fifteen years of age. He wouldn't have done that at twenty-five.

Q: Bad behavior.

A: Yeah, it was stupid and you take risks and ---

Q: Volition ---

A: Those things continued with Stephen even after the age where they shouldn't have.

Q: And the risk refers to behavior.

A: Yeah, stupid things.

Q: And for Stephen it manifested all the way to antisocial behavior.

A: It's -- according to the experts, he did.

Q: But that's not -- you can't use that in determining someone to be insane by our statute.

A: Right.

Q: Okay. Now, Dr. Sachy, he wasn't done with Ted Bundy, he

thought he should compare Stephen to the jury to John Wayne Gacy.

A: Gacy.

Q: Yeah. Now, what did he do, do you know?

A: Killed a bunch of people and bury them under his house.

Q: Well, he actually killed thirty-three young boys, had sex with them and ate them. Was that beneficial to your client?

A: It wasn't that -- in terms of the mental defect, you know, proclivities might have been different but in terms of brain function -- and I don't know, I'm not familiar with the Gacy case in terms of what the mental experts said about him. Dr. Sachy would've been a lot more familiar with and understand what the mental situation was in both the Bundy case and the Gacy case. I am not -- and I think that if there's an error there it was the understanding that the jury probably didn't know any better either. I wouldn't have ---

Q: Question ---

A: I wouldn't have used that example.

Q: Question, if your mitigation person, Ms. Davis, had said that she felt that this type of testimony was damning to Stephen ---

A: Well, it's not -- I see where you're going with that, I wouldn't have used it intentionally but in terms of him -- in terms of the experts, how a psychiatrist is going view that, you know, they're going to view things differently from a

layperson. It might be somewhat, you know, they are more accustomed to those things, they're not going to be as taken aback by those things as a layperson, you know, as a jury Monday. So, and it's just an unfortunate situation. I wish it hadn't of happened but I don't think it distracted from the merits of the defense we were presenting. I think that we were correct to present the insanity defense and I think for the most part Dr. Sachy's testimony was very much beneficial, even if those kind of, you know, allusion to this person or that person -- it would've been better for it not to be there. I don't think it negates the merits of the insanity defense.

Q: During Dr. Thrasher's testimony, during Dr. Thrasher's testimony, on direct exam, on direct exam it came up that they were gonna start to talk about the McLendon case, if you remember that lady down ---

A: Yes.

Q: She got -- Stephen went to jail for eight and a half years, got a ten-year sentence ---

A: Right.

Q: Okay. And did you try to keep that information out?

A: I don't recall.

Q: Would you have liked to have kept it out?

A: I would -- I would be speculating at this point to go back and ---

Q: I don't want you to speculate. I don't want you to

will see. Bill.
Q: That's a wonderful email, isn't it, because we've discussed the issue of this. Let me ask you this, basically on June the 16th, you had guilty but mentally ill defense.
A: I know that I was thinking in that memorandum ---
Q: You ---
MR. MABRY: Let him answer the question.
A: Go ahead.
Q: In this email, did you state that Dr. Sachy would likely testify to GBMI under South Carolina law?
A: Dr. Sachy, I remember, had used that terminology because it was something that he was familiar with in Georgia. It's not anything that I ever intended to present as a defense in Stephen's case. That's why we -- I'm trying to like ease into that insanity concept by saying that this something that can negate malice.
Q: Because Dr. Sachy is from Georgia?
A: Right.
Q: Where is Dr. Thrasher from? What state?
A: He lived in Pennsylvania, I believe.
Q: Dr. Thrasher, where did he practice psychiatry at?
A: Here.
Q: And where did he do opinions?
A: While he was practicing here, he practiced here.
Q: Okay. And you also wrote ---

You argued in your close the family is not ---

MR. MABRY: Wait a minute ---

A: No, I didn't.

THE COURT: Let him answer the question.

A: No, let me say this, we wanted -- we tried to get the family to come to the trial. I didn't ask anybody not to contact them. I asked them to get the family there and the fact of the matter is, they refused to come and we used that as an example of Stephen's conduct. He had alienated -- he had done some ridiculous things, out of the ordinary to the extent he alienated every single person in his family, not one person would come to the trial to support him.

Q: Well, you even told the jury, heck, he's so crazy his family didn't even come in closing ---

A: Yeah, I didn't -- I don't know if I said that but I pointed out to the jury that not even his family would come to support him in this situation.

Q: Prior to Stephen moving in with Laura, isn't it true that he was living on his own at that time?

A: Yeah, on the street, I think.

Q: Excuse me?

A: He was living on the street.

Q: Didn't he have an apartment?

A: I don't recall. I know that he would've been homeless if Laura hadn't brought him in.

minute now, let's throw that over and let's don't consider the mental defect, let's go with the fact that she caused this whole thing by slapping him, you know, I think it undermines the credibility of your case.

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

MR. AXELROD: Court's indulgence, Your Honor.

THE COURT: Yes, sir.

MR. AXELROD: Because I'm almost done, Your Honor.

BY MR. AXELROD:

Q: So, you don't think the Judge erred in not charging the provocation mitigator?

A: I'm glad she didn't because, again, I think it undercuts, undermines the merits of the insanity defense that we put up.

Q: Even if she was required at that time?

A: Yeah.

Q: So, her not following the law was a good thing at that point?

A: I think it is. It's like I said before, simply because it's written in a statute doesn't make it right.

Q: But it makes it law.

A: But it makes it unfair. And if it's arbitrary, it makes the proceeding unfair. It undermines -- okay, if we're out there, we present a defense, we present evidence that supports the defense that we're asserting. And then we go out there and just throw darts at the dartboard, oh, yeah, and by the

way, if you don't buy that, then you've got all this stuff over here that the statute says might be applicable. You know, if the facts don't fit it properly, it undermines the credibility of your case, that does have an error. And I think counsel would have a right to make those decisions in the presentation of the defense.

Q: And if the law -- if you don't like the law, you just think it's unconstitutional.

A: Right. That's what you have an obligation to do if it's the case.

Q: And then basically, what you're basically telling the jury in your closing argument is you're basically saying, hey, you need to nulli -- you're looking for jury nullification ---

A: No, no, no.

Q: Aren't you?

A: No, not -- that's a different degree, it's a different ballpark.

Q: Well, you're basically telling the jury not to follow the law because it's not -- it's not right.

A: Well, I don't ---

Q: Isn't that nullification?

MR. MABRY: Judge, I object to that ---

THE COURT: Let him talk. You ask him a question and then you cut him off. Don't do that anymore.

MR. AXELROD: I'm sorry.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Stephen C. Stanko,

Petitioner,

v.

Bryan Stirling, Director,
South Carolina Department of Corrections,
and Michael Stephan, Warden,
Broad River Correctional Institution,

Respondents.

Case No. 19-cv-03257-RMG-SVH

ORDER AND OPINION

Before the Court is Petitioner's motion to supplement the record pursuant to Fed. R. App. P. 10(e). (Dkt. No. 140). Respondents filed a response in opposition and a sur-reply and Petitioner filed a reply. (Dkt. Nos. 142, 144, 145). For the reasons set forth below, the Court grants Petitioner's motion.

I. Background

Petitioner seeks federal habeas relief from his conviction by a Horry County jury for the first-degree murder and armed robbery of Charles Henry Turner. This conviction followed on the heels of Petitioner's conviction by a Georgetown County jury for the murder of Laura Ling and rape and attempted murder of her 15-year old daughter, which Petitioner committed one day prior to murdering Mr. Turner. Petitioner was represented by the same trial counsel, William Diggs, in both cases.

Among other claims Petitioner advances in his federal habeas petition, Petitioner alleges that Mr. Diggs was constitutionally ineffective in presenting the same "not guilty by reason of insanity" (NGRI) defense in Petitioner's Horry County trial which had proved unsuccessful in Petitioner's Georgetown County trial. This Court granted summary judgment in favor of

Defendants on this claim, citing *Strickland*'s deferential standard and Petitioner's failure to demonstrate that the offered defense fell below professional standards or that the jury would have reached a different result had a different defense strategy been used. (Dkt. No. 99 at 18-19). Petitioner appealed this Court's order to the Fourth Circuit (Dkt. No. 134), and now seeks to supplement the record with the entire Georgetown County record in support of his Sixth Amendment claim.[1]

II. Legal Standard

Rule 10(e) of the Federal Rules of Appellate Procedure permits a party to correct or modify the record:

> (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.
>
> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
>
> > (A) on stipulation of the parties;
> >
> > (B) by the district court before or after the record has been forwarded; or
> >
> > (C) by the court of appeals.

Fed. R. App. P. 10(e). "All other questions as to the form and content of the record must be presented to the court of appeals." (*Id.*). Because appellate courts are not courts of evidence or fact-finding bodies, they generally are confined to the trial court's record in reviewing its rulings. *See Schatz v. Rosenberger*, 943 F.2d 485, 487 n.1 (4th Cir. 1991) (reasoning that an appellate court

[1] The Fourth Circuit heard oral argument on Petitioner's appeal on March 19, 2024.

"must review the district court's decision on the same record as that before the district court"); *see also Aquino v. Stone*, 957 F.2d 139, 144 n.2 (4th Cir. 1992) ("Because we review appeals from summary judgment only upon the record available to the district court, *see* Fed. R. App. P. 10(a), we deny [plaintiff's] request to supplement the record and refuse to consider the offered additional materials."); *First Nat'l Bank of North East v. Fockler*, 649 F.2d 213, 215-16 (4th Cir. 1981) ("This court cannot consider materials outside the record, and declines the invitation to do so."). A court of appeals may allow a party to supplement the record on appeal in certain "exceptional circumstances," including where the appeal arises in the context of a habeas corpus action. *Acumed LLC v. Advanced Surgical Services, Inc*., 561 F.3d 199, 226 (3d Cir. 2009); *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982) (supplementing record with state court trial transcript where the federal district court had relied only on the state coram nobis proceedings transcript in denying habeas relief); *but see Shasteen v. Saver*, 252 F.3d 929, 934 n.2 (7th Cir. 2001) (declining to supplement record with state court trial transcript where petitioners failed to "specifically explain why the trial transcript would further assist [the court] in resolving the current issue on appeal").

III. Discussion

Petitioner contends that omitted portions of the Georgetown County record are "centrally relevant" to his Sixth Amendment claim by "mak[ing] clear that Mr. Diggs determined his approach a priori in Georgetown, before obtaining informed medical or scientific opinion on the matter, and doubled down in Horry County." (Dkt. No. 140 at 2). Specifically, Petitioner seeks to rebut Respondents' argument that Mr. Diggs altered the defense he presented on Petitioner's behalf in Horry County, and contends that Respondents omitted portions of the Georgetown County record in their summary judgment reply which would "undermine [their] characterization

of that record" and misstated the contents of that record to the Fourth Circuit in oral argument. (Dkt. No. 140 at 2 (citing Dkt. No. 86); *see also* Dkt. No. 142 at 5 (citing omitted portions of Georgetown County transcript contradicting State's claim at oral argument that Mr. Diggs first presented evidence of Petitioner's birth defect and head injury during the Horry County trial)).

Upon its own review, this Court determines that the State's oral argument testimony appears to conflict with portions of the Georgetown County record cited by Petitioner. (*See* Dkt. No. 142 at 5). Fed. R. App. P. 10(e) is geared towards correcting such accidental misstatements, and creates an avenue for the district court to supplement the record even after the record has been forwarded to the appellate court. Fed. R. App. P. 10(e). In light of the capital nature of Petitioner's sentence, and fact that his appeal arises in the context of a habeas corpus action, this Court recognizes an "exceptional circumstance" allowing Petitioner to supplement the record with materials not relied upon by this Court in reaching its summary judgment decision.[2]

IV. Conclusion

In light of the foregoing, Petitioner's motion to supplement the record (Dkt. No. 140) is **GRANTED**. Petitioner may supplement the record with the outstanding portions of the Georgetown Country record, including the pretrial motions attached to Petitioner's motion as Exhibit 2.

[2] Notwithstanding its review of the contradictory testimony cited by Petitioner, this Court reiterates the same view it expressed in granting summary judgment to Defendant on this claim – Petitioner's attack on Mr. Diggs' defense strategy in the Horry County trial does not remotely meet *Strickland* standards. (Dkt. No. 99 at 20). The Court considers the additional testimony cited by Petitioner as immaterial to Petitioner's Sixth Amendment claim, but determines the full Georgetown County record should be available for the Fourth Circuit's review out of an abundance of caution.

AND IT IS SO ORDERED.

_s/ Richard Mark Gergel_____
Richard Mark Gergel
United States District Judge

June 3, 2024
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Stephen C. Stanko, Petitioner, v. Bryan P. Stirling and Michael Stephan, Respondents.	)	No.: 1:19-mc-380-RMG-SVH ORDER

Stephen C. Stanko ("Petitioner") is a state prisoner sentenced to death. This matter is before the court on Petitioner's request for counsel [ECF No. 1] and motion to proceed in forma pauperis [ECF No. 2].[1] Respondents have filed a response [ECF No. 7], to which Petitioner replied [ECF No. 8].

I. Motion for Leave to Proceed In Forma Pauperis

After a careful review of Petitioner's motion for leave to proceed in forma pauperis and supporting affidavit, the court finds Petitioner should be relieved of the obligation to prepay the full filing fee. Petitioner's motion to proceed in forma pauperis [ECF No. 2] is granted.

II. Motion for Appointment of Counsel

Pursuant to 18 U.S.C. § 3599(a)(2), indigent death-sentenced prisoners are "entitled to the appointment of one or more attorneys" to pursue federal

[1]Petitioner has also moved for a stay of execution [ECF No. 1], which has been addressed by a separate order.

habeas corpus remedies. Further, "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994). Thus, § 3599 contemplates the appointment of qualified counsel prior to the filing of a petition for writ of habeas corpus. In addition, § 3599 sets forth the required qualifications for appointed counsel in capital cases:

> (c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.
>
> (d) With respect to subsection[] . . . (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

18 U.S.C. § 3599(c)–(d).

In addition, pursuant to the District of South Carolina's plan for implementing the Criminal Justice Act ("CJA"), this court maintains a panel of qualified attorneys available to represent indigent defendants. *See In re Amendments to the Plan of the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act*, No. 3:18-mc-00199-CIV (D.S.C. June 1, 2018) ("CJA Plan"). Recognizing the particular complexity of capital cases, the CJA Plan instructs the court to utilize the expert services available through the Administrative Office of the United States ("AO"), which

include capital habeas units and federal community defender offices, where appropriate. CJA Plan § XIV(B)(4). Further, "[a]ll attorneys appointed in federal capital cases must be well qualified, by virtue of their training, commitment, and distinguished prior capital defense experience at the relevant stage of the proceeding, to serve as counsel in this highly specialized and demanding litigation" and "must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases." *Id.* § XIV(B)(6), (7).

Specifically regarding appointment of counsel in capital habeas matters, the CJA Plan provides the following guidance:

> 3. Out-of-District Counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment as co-counsel in § 2254 cases to achieve cost and other efficiencies together with high quality representation.
>
> . . . .
>
> 6. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
>
> 7. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
>
> 8. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to the qualifications standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

> 9. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to represent effectively the interests of the client.

CJA Plan § XIV(F).

Petitioner requests the court appoint E. Charles Grose, Jr., of Greenwood, South Carolina, and Joseph J. Perkovich of New York, New York. [*See* ECF No. 1 at 1].

Mr. Grose has been licensed to practice before this court since 1994 and is currently counsel on three other federal capital habeas matters and several state capital post-conviction relief matters. He met the requirements for lead counsel on this court's former CJA Death Penalty Panel Attorney List[2] and is certified by the South Carolina Supreme Court to serve as lead counsel in capital cases. In addition, Mr. Grose regularly attends death penalty training seminars.

Mr. Perkovich is a founding principal attorney of Phillips Black, Inc., a nationwide, nonprofit law practice dedicated to the direct representation of individuals facing sentences of death or life without the possibility of parole. He is a member in good standing of the New York bar and admitted to practice in various federal courts throughout the country, including the Supreme Court and, since 2008, the Fourth Circuit Court of Appeals. In recent years, various

[2] Under the amended CJA Plan, the court no longer maintains a separate death penalty panel.

federal district courts have appointed Mr. Perkovich in habeas corpus proceedings pursuant to 18 U.S.C. § 3599, including pre-petition § 2254 cases in the Southern District of Indiana in October 2019 (Weisheit v. Neal, 4:19-cv-036-SEB-DML), in the Northern District of Mississippi in February 2018 (Pitchford v. Hall, 4:18-cv-002-MPM), and the Northern District of Texas in December 2017 (Cade v. Davis, 3:17-cv-3396-G-BN). In 2014, Mr. Perkovich co-founded the death penalty clinical curriculum at the Saint Louis University School of Law and in fall 2017 co-founded a post-conviction remedies clinical practicum in the Washington University School of Law, focusing on death penalty cases. Also, in fall 2019, he commenced a teaching partnership with the Georgetown Law Center's inaugural death penalty post-conviction clinic.

Based on the foregoing, the court finds Mr. Grose and Mr. Perkovich qualified to represent Petitioner under § 3599 and appoints Mr. Grose as lead counsel. The court also appoints Mr. Perkovich as second-chair counsel in this matter, contingent on his filing of a pro hac vice motion. Counsel are reminded that by accepting appointment, they are indicating their willingness and availability to represent Petitioner to the full extent of their professional ability in all phases of this litigation. If counsel's current caseloads do not allow for full commitment to representing Petitioner in this case, they must so inform the undersigned through a filing on the docket by December 2, 2019 so that alternate counsel may be appointed. Otherwise, the court will not extend

deadlines based on any claim of unavailability due to counsel's caseload.

III. Cost Containment and Budgeting

Counsel shall file an ex parte confidential proposed litigation budget within thirty days of this order. In preparing their budget, counsel should consult with Larry M. Dash, Fourth Circuit Case Budgeting Attorney. The court cautions counsel that duplication of efforts and unnecessary attorney time are to be avoided and will be struck.

Counsel shall submit interim payment vouchers every sixty days to Claire Woodward O'Donnell, Panel Administrator, Federal Public Defender's Office, for payment consideration and so that costs and fees can be monitored. As lead counsel, Mr. Grose shall be compensated at a rate of $190.00 per hour and Mr. Perkovich, as second-chair counsel, shall be compensated at a rate of $148.00 per hour.

IV. State Court Record

For the court's reference and for case management purposes, counsel for Respondents are directed to file a complete record of all state court proceedings to date in connection with this matter within thirty days of this order. Additionally, counsel shall provide one courtesy bound and tabbed copy each to the assigned District Judge and Magistrate Judge.

V. Petition and Scheduling

In accordance with 28 U.S.C. § 2251(a)(3), Petitioner shall file a petition

for a writ of habeas corpus within ninety days of this order appointing counsel. Petitioner shall then have until the expiration of the one-year limitation period prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to amend his petition. *See* 28 U.S.C. § 2244(d). The court will enter a scheduling order regarding responsive briefing after Petitioner amends his petition or the time to do so expires.

IT IS SO ORDERED.

Shiva V. Hodges

November 19, 2019
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

Ms. Williams appreciates it. Mr. Stanko appreciates it.

Thank you very much.

THE COURT: Ladies and gentlemen, if you don't mind, before we start the charge on the law I would like for you to take a very short break, so we'll just take a break for five minutes, so go to your jury room for five minutes and we'll come back and finish.

Thank you.

(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: Counsel, could y'all come up here for one second, please.

(BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

(THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: All right. Is the State ready for the jury to come back in?

MR. HUMPHRIES: Yes, Your Honor.

THE COURT: And Defense?

MR. DIGGS: Yes sir.

THE COURT: Very good. Ask the jury to come in, please.

(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE JURY.)

THE COURT: All right, ladies and gentlemen, it's now

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THE COURT: Defense.

MR. DIGGS: Defense is ready, Your Honor.

(AT THIS TIME THE COURT ADMONISHED THE AUDIENCE CONCERNING ANY DISPLAY OF EMOTION OR RESPONSE TO THE VERDICT.)

(THE FOLLOWING TAKES PLACE AT 5:10 P.M., WITHIN THE PRESENCE OF THE JURY.)

(THE ALTERNATES WERE ALSO BROUGHT INTO THE COURTROOM AT THIS TIME.)

THE COURT: All right, Mr. Foreman, has your jury reached a verdict in this particular matter?

FOREMAN: Yes sir, we have.

THE COURT: All right, sir, could you hand the verdict form to the Clerk, please sir.

Madame Clerk, you may publish the verdicts.

CLERK OF COURT: **(05-GS-26-02927), State of South Carolina versus Stephen C. Stanko**, count one, murder, on the charge of murder, we, the jury, by unanimous consent, find the Defendant, Stephen C. Stanko, guilty.

On count two, armed robbery, on the charge of armed robbery, we, the jury, by unanimous consent, find the Defendant, Stephen C. Stanko, guilty.

Signed by Johnny Marvin Chestnut, dated November 16, 2009.

THE COURT: All right, Mr. Foreman, ladies and gentlemen of the jury, twelve members of the jury, if this is

your verdict please so indicate by raising by right hand.

(AT THIS TIME ALL JURORS AFFIRMED THE VERDICT AS PUBLISHED BY THE RAISING OF HIS OR HER RIGHT HAND.)

THE COURT: Thank you very much.

Does the State wish the jury polled?

MR. HEMBREE: No, Your Honor.

THE COURT: Does the Defense wish the jury polled?

MR. DIGGS: Yes sir.

THE COURT: Madame Clerk, if you would please poll the jury, Ma'am.

CLERK OF COURT: When I call your name will you please stand and answer when I say, is this your verdict, and is it still your verdict.

Johnny Chestnut, is this your verdict and still your verdict?

MR. CHESTNUT: Yes Ma'am.

CLERK OF COURT: Thank you. You may have a seat.

Lakenya Jordan, is this your verdict, and still your verdict?

MS. JORDAN: Yes Ma'am.

CLERK OF COURT: Thank you.

Stephen D. Williams, is this your verdict, and still your verdict?

MR. WILLIAMS: Yes Ma'am.

CLERK OF COURT: Thank you.

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Brandon Boyd, is this your verdict, and still your verdict?

MR. BOYD: Yes Ma'am.

CLERK OF COURT: Thank you.

Margaret Bartomeo, is this your verdict, and still your verdict?

MS. BARTOMEO: Yes Ma'am.

CLERK OF COURT: Thank you.

James Berry, is this your verdict, and still your verdict?

MR. BERRY: Yes Ma'am.

CLERK OF COURT: Thank you.

Linda Morrison, is this your verdict, and still your verdict?

MS. MORRISON: Yes Ma'am.

CLERK OF COURT: Waverly Stanley, is this your verdict and still your verdict?

MR. STANLEY: Yes Ma'am.

CLERK OF COURT: Johnny Causey, Jr., is this your verdict and still your verdict?

MR. CAUSEY: Yes Ma'am.

CLERK OF COURT: Thank you.

Beverly Pitman, is this your verdict, and still your verdict?

MS. PITMAN: Yes Ma'am.

CLERK OF COURT: Thank you.

Ariane Joyce, is this your verdict, and still your verdict?

MS. JOYCE: Yes Ma'am.

CLERK OF COURT: Bonnie Oguin, is this your verdict and still your verdict?

MS. OGUIN: Yes Ma'am.

CLERK OF COURT: Thank you all.

THE COURT: The jury having affirmed the verdict in this matter, anything further at this point in time from the State?

MR. HEMBREE: No, Your Honor.

THE COURT: From the Defense ---

MR. DIGGS: No, Your Honor.

THE COURT: With the jury.

MR. DIGGS: No, Your Honor.

THE COURT: All right. Very good.

Mr. Foreman, on the original indictment there is a space for you to sign on the back of the indictment. The Clerk will direct you. If you would put the verdict and then sign your name on the back of the original indictment, please sir.

(AT THIS TIME THE FOREMAN SIGNED THE VERDICT PORTION OF THE INDICTMENT.)

THE COURT: All right, ladies and gentlemen, the law of the State of South Carolina mandates a twenty-four hour

waiting period between the receipt of a verdict of guilty in a capital case, therefore we will abide by the State Law. It being the time that it is, I hope you will find with me that it would not make sense to bring you back tomorrow, five-thirty, and have some short period of testimony. My intention is that we will start against Wednesday morning. You will be here by 8:30 and we will start as soon thereafter as possible in the second phase, or the sentencing phase of this trial.

As I have indicated to you, we will proceed with that. There will be instructions that the Court will give you at that point in time, but as of now you will please accompany the agents and I will see you back Wednesday morning.

Thank you very much.

MS. WILLIAMS: Your Honor, may we approach?

THE COURT: Yes Ma'am.

(BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

THE COURT: Deputy, can you see if you can catch Special Agent Howser real quick for me, please. Sheriff, if you don't mind.

SHERIFF THOMPSON: I think he's gone. Do you want me to ---

THE COURT: All right. Well, whoever is in charge right now. All right.

(THE FOLLOWING TAKES PLACE IN THE PRESENCE OF S.L.E.D. AGENT ASSIGNED TO THE JURY.)

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Q. Now, give us the benefit, please Ma'am, of your educational background and your training.

A. Just to make it briefer, I will say that I have a Doctorate in Christian Counseling, which also led to a licensure as a minister. I also before that had a Master of Education with a special services related to that. Before that, we have a Bachelor of Arts and so forth. Then I move on to getting more of various things.

I am certified as a psychometrist, that would be with children who are high school level, for testing. I went to Mississippi State University and received that, as well as a Master's. I then became a L.M.S.W., which is a Licensed Master Social Worker, and I do clinical involvement for the last -- I have completed clinician work since '83 here in this area. I also have, for benefit of the jurors, I do a lot of parenting and work very hard with a Parents Anonymous Group, which is a non-profit group, trying to assist parents who really are having difficulties with children.

I also have a non-profit Teens At Risk program, which is one that is working and helping kids who have law enforcement or rebellion, other issues, and I do -- I am certified as a divorce mediator here, and I also have certification as a sex offender treatment specialist. As you can see, I've lived a long time.

Q. All right. Let me ask you this. You had -- we came

and asked you to assist us in this case?
A. Yes.
Q. Now, what were you asked to do, please Ma'am, and tell us what you did.
A. You asked me to provide information, as much as I could, from the normal -- the normal developmental side where it is from his development early up through the school, just the general stuff like that.
Q. All right, and what did you do?
A. I did that. I went; I found out a lot of the issues related to that, talked to as many as I could, including as many of the children as I could in the family, looked at all the materials that were available, and decided that it was easier for me to explain it in the way of more of the family systems work, ---
Q. Okay.
A. --- which is what is normally done when you're looking at assessing a family and the children. It's like you have a mobile and if one part of the mobile moves in this family, which represent parents and children, then things are out of whack, and you have to figure out why that is happening.
Q. Now, did you put together a presentation ---
A. I did.
Q. --- to help with your testimony, and would it help to -- for us to look at that?

A. I think it would be informative, hopefully.

MR. DIGGS: And, Your Honor, I think, without objection, we are asking that we be permitted to publish her presentation at this point.

THE COURT: Is there any objection to that, Solicitor?

MR. HEMBREE: No, Your Honor.

THE COURT: All right. You may do so.

MR. DIGGS: Thank you.

(DVD PRESENTATION MADE IN OPEN COURT.)

Q. All right, now as you go through your testimony, Dr. Califf, I have the control over here, and you want me to change pages, you just tell me to advance the page. All right, are we ready to move?

A. Right. As you know, we are looking at the life and the circle of life of Stephen Christopher Stanko, and circle meaning that we all live within a beginning and throughout the issues of our life, and we go to an ending. Certainly I could not go or move toward the ending, so I began at the birth and the pre-school. You can change.

When you think about the picture that we have with the circle -- that's the one, Mr. Diggs; if you will move on, yes.

Q. Okay.

A. You will look to see birth, pre-school, elementary school. You will look at high school, and you will look after graduation. Move on.

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY) 05-GS-26-2927

The State,)
)
Plaintiff,) Transcript of Record
)
vs.)
)
Stephen C. Stanko,) November 15, 2006
)
Defendant.)

B E F O R E :

Honorable J. Michael Baxley
Georgetown County Courthouse
Georgetown, South Carolina

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

Greg Hembree, Esquire
Fran Humphries, Esquire
Attorneys for Plaintiff

William Diggs, Esquire
Orrie West, Esquire
Attorneys for Defendant

Grace L. Hurley, CVR-CM
Circuit Court Reporter

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S-1 8-18-06 Letter from Hembree

(On the record, Wednesday, November 15, 2006.)

THE COURT: All right, let me begin by introducing myself for the record to the parties here. My name is Judge Baxley and I'm here to preside by special appointment of the Chief Justice over this matter and, Mr. Solicitor, you may call your case, please, sir.

MR. HEMBREE: Thank you, Your Honor, we are here on indictment 2005-GS-26-2927 State versus Stephen Stanko. Mr. Stanko is accused of murder and armed robbery of Henry Lee Turner that occurred on April the 8th, 2005, in Horry County. On August the 18th of 2006 Mr. Stanko - the State served upon Mr. Stanko its notice of intent to seek the death penalty in this case. The purpose of our hearing today, Your Honor, is for the appointment of counsel for Mr. Stanko on this death penalty matter.

THE COURT: All right, anything further, Mr. Solicitor?

MR. HEMBREE: No, Your Honor. I have a copy of the indictment and the notice of intent to seek the death penalty that I'll pass up to the Court.

THE COURT: All right, thank you. All right, is there any objection to or dispute about the notice that's been served here? I'll ask you, Mr. Diggs, I'll note you're seated at counsel table.

MR. DIGGS: Your Honor, there's no dispute about it.

So, it seems to be in order from my perspective.

THE COURT: All right, sir, and let me ask you, if I may, do you have a position as to whether you would be an appropriate individual to be appointed to represent Mr. Stanko?

MR. DIGGS: Your Honor, I don't know of any reason, of course, on the way down here today and for the last several days I've been thinking about this issue and thinking what would be in the best interest of this Defendant at this time, I don't know of any reason that would exclude me being available for appointment in this case; and so, I think, you know, I can put it in the Court's hands and say, you know, it's in the discretion of the Court. Being pretty familiar with this case, you know, and the process that's going to take place both with respect to this particular indictment and the former indictment that is now in the appellate process, I really don't know of any reason that would again preclude me from serving in this case if the Court were so inclined.

THE COURT: All right, thank you. Our record should also reflect that Ms. Orrie West, Public Defender of Horry County, is also seated at defense table. The Court has reviewed the statutes in this matter, specifically 16-3-26(B) which refers to appointment of the public defender. What's your position, Ms. West, about your representation or ability to represent Mr. Stanko?

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MS. WEST: Your Honor, my office at this point has seven attorneys in General Sessions. To the extent we find ourselves a little overwhelmed with the caseload that we presently have, we have a substantial portion of the criminal cases in Horry County. I have even hired two attorneys on contract to try to help with the overload. We're, we're overwhelmed at this point, and if the Court could see fit to not have our office involved in this particular case because of, one, the caseload that we have it would be greatly appreciated.

THE COURT: All right, counsel, and I think the statute which says that the public defender shall be appointed in all cases where no conflict exists I believe the statute is probably referring not necessarily to a caseload problem but a legal conflict. I ask you are there any legal conflicts from your office to this matter to your knowledge?

MS. WEST: To my knowledge at this point I don't know of any specific legal conflict. I do know that at this particular point I think the Court's aware of the names of the attorneys in my office and I don't know if the Court's aware of the names of my contract attorneys but Mr. Axelrod is a contract attorney and Barbara Pratt, and if I could talk about what Mr. Diggs and I have discussed previously, should I discuss that at this point?

THE COURT: Go ahead, ma'am.

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MS. WEST: Mr. Diggs has indicated that while I don't know if the Court's aware that at one point Mr. Diggs and Mr. Axelrod actually were practicing law together. A conflict has arisen with them and I don't know how much of a conflict that continues to be but he is an employee of my office on contract.

THE COURT: All right, very good, thank you.

MS. WEST: You're welcome.

THE COURT: Do you have anything further you wish to offer on that issue, Mr. Diggs?

MR. DIGGS: Your Honor, there is a - there was a motion filed previously in the first case in Georgetown County to have me relieved as counsel in the case. That's been resolved, but it was based on a, an inquiry by Mr. Axelrod into the possibility with respect to the issue of possibly representing Mr. Stanko in the Georgetown case and that it encouraged Mr. Stanko at that time to make a motion on the record to have me relieved as his attorney and have Mr. Axelrod appointed in lieu of my representation. A hearing was held in the, in, in the matter and Judge Jefferson denied that request. I think that the underlying factual scenario that played out in that situation has created a conflict that would prevent Mr. Axelrod from working on this particular case simultaneously with me. I mean, I think it's a situation where certainly Mr. Axelrod is a good attorney, fine attorney

mental condition that Mr. or the brain condition that Mr. Stanko has. That issue has to be resolved in the direct appeal process before we ever get into the area of talking about ineffective assistance or collateral attack on that death sentence; and so, at this point while certainly there's a possibility down the road we're going to have to look at or the State of South Carolina is going to have to look at the effectiveness issue in the Georgetown County trial, at this point I believe that the and I would submit to the Court the benefits outweigh the negatives. It's just the way that I see it, and it's not, I think, just driven considering limited to the merits probably would make sense to continue representation, again either myself or Mr. Kelly, and then worry about collateral issues down the road should they arise, but remember, we're still in the direct appellate process with respect to the Georgetown County case and pending trial. So, we don't know what's going to happen with Horry County. It's going to be a different jury, a different set of facts.

THE COURT: All right, counsel, did I hear in what you said that you believe there would be a significant savings in terms of cost and time in developing a mitigation defense in this second case?

MR. DIGGS: Your Honor, all of that, absolutely, all of that evidence has already been developed and Judge Jefferson allowed us to have two very competent and well-

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qualified professionals to develop those mitigating factors that certainly won't have to be repeated again if we start with someone new. That evidence is available and can be used. The savings to the State will be substantial with respect to that evidence. To start over with a new defense team it just seems like even if you use the same evidence you're going to have to get up to speed with it. So, I don't know, it would just make sense that we use, continue on with the continuity.

THE COURT: All right, Madam Clerk, let's give this to our court reporter so we can mark that as State's Exhibit One for purposes of this hearing.

(Whereupon, State's Exhibit Number One [8-28-06 letter from Hembree - Intent to Seek Death Penalty] admitted into evidence and appropriately marked.)

THE COURT: Thank you. That's fine. You may leave it there.

All right, this, counsel, this really is a matter that the Court will - has been discussing with the Defense but does the State have anything you wish to offer further on this issue at this point in the record?

MR. HEMBREE: No, Your Honor.

THE COURT: All right, is there any objection from the State if the Court discusses with Mr. Stanko individually ex parte fashion matters relating to appointment of Defense counsel? What says the State?

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MR. HEMBREE: No objection from the State, Your Honor.
THE COURT: All right, Mr. Diggs, is there - would there be any objection to the Court discussing this outside of your presence with Mr. Stanko?
MR. DIGGS: No, certainly not.
THE COURT: All right, Ms. West, any objection to that, ma'am?
MS. WEST: None, Your Honor.
THE COURT: All right, counsel, I'm going to ask if you would kindly step from the room and let me speak with Mr. Stanko individually in ex parte fashion.
(All counsel and staff exit courtroom.)
THE COURT: All right, let's let the record reflect that the attorneys who are involved in the case all have left the room. The only individuals - is there anyone else from the Solicitor's Office who's present?
(No response.)
THE COURT: No one in the courtroom other than security, our court personnel, Mr. Stanko, myself and my law clerk. Mr. Stanko, we're going to begin by placing you under oath, sir. If you'd please follow our clerk's instructions just where you are will be fine.
MR. STANKO: Do you mind if I stay seated?
THE COURT: Yeah, that's fine. Go ahead. You may.
(Whereupon, Mr. Stanko is sworn by the Clerk.)

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THE COURT: All right, good morning, sir.

MR. STANKO: Good morning, sir.

THE COURT: Again, by introduction my name is Judge Baxley. I am from Darlington County. I've been appointed by court administration for the - to preside over this case from its beginning to its conclusion. I wanted to ask you about appointment of counsel. Is there some - I will give you an opportunity if you wish to tell me whether there was some conflict that you perceive with Mr. Diggs when he represented you previously, whether it's some personal conflict or you believe some legal issue was handled inappropriately or some tactic or defense was employed inappropriately and I'll be glad to hear from you if you have something to tell me about that.

MR. STANKO: The way we designed the defense, sir, I'm satisfied with what Mr. Diggs did. The truth of the matter is we had a couple of hundred thousand dollars worth of tests done and found that I have a left medial frontal orbital lobe that is not functioning. Where my problem came, Judge, is my problem came in the facts part of the case which was Mr. Kelly. I don't want to say that he didn't do his job or anything like that, but what happened was during certain phases of the case the State was allowed to parade witnesses up there that said basically anything that they wanted to say about me and it went un-argued even though we had

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investigators that had really uncovered the truth about things that were said. So, what I'm saying to you is if you choose to appoint Mr. Diggs as counsel I have no problem with that and would greatly appreciate it actually. I would not be happy if you went with Mr. Kelly. As far as Mr. Axelrod is concerned this is a touchy subject but what's important to me, sir, is that Mr. Diggs be able to do his job without any kind of confrontation. I believe that there are enough other attorneys out there and I'm sure that, sir, that you would be able to find me one that would be able to handle second chair. My greatest concern would be if Mr. Diggs had someone that he could not work with completely because I feel that's what happened with Mr. Kelly. In certain instances he went off in his own direction and was not able to bring things in. When we went through that court Mr. Diggs had things set up very well with the exception of the fact that we had scientists flying in from California, Pittsburgh and everywhere else, but when it came to certain parts of the facts in mitigation of the case we were flip-flopping and haphazard, and like I said the State was able to put anybody they wanted up there and they just, you know, I'm not an angel, sir, and I've made some mistakes in my life but people said anything they wanted to say and it went un-argued and that wasn't right. So, I hope that answers your question as best I can - I mean, I've done as best I can I think. I'm not - I'm familiar with the law.

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I'm not an idiot to the law and I don't and would not raise any kind of argument concerning Mr. Diggs and his representation. I would ask if you could to talk to Mr. Diggs about the situation with him and Stuart, but if there's going to be any kind of confrontation or if he's not happy with it I would like to submit to you just to find a second chair that you would find as eligible and competent to handle it and not Mr. Kelly though I hope.

THE COURT: All right, thank you, and I appreciate the candor of your response. All right, then, let's bring the attorneys back in.

(Whereupon, counsel enters courtroom.)

THE COURT: All right, counsel, just in case there should be some later question, you have a - tell us who all's here on the State's , please. You have one of your staff members with you.

MR. HEMBREE: Greg Hembree, Deputy Solicitor Fran Humphries and Legal Assistant Peggy Snowden.

THE COURT: Very good, thank you, and again so our record will reflect we have, Mr. Diggs, you have your assistant with you, sir?

MR. DIGGS: Your Honor, I have a paralegal, Johana Bufford here with me.

THE COURT: All right, now, let's let the record reflect that all of these individuals just introduced and

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STATE OF SOUTH CAROLINA)
IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)

STEVEN C. STANKO

APPLICANT,

-vs-

POST CONVICTION
RELIEF HEARING ON
#2008-CP-22-1946

STATE OF SOUTH CAROLINA

DEFENDANT.

NON JURY JUDICIAL PROCEEDINGS HELD BEFORE THE HONORABLE J. MICHAEL BAXLEY; commencing at the hour of 10:19 AM, on the 8th day of December, 2008, at the Horry County Courthouse, 15th Judicial District, Circuit Court, South Carolina.

REPORTED BY: H. Eugene Buckner, CVR

H. Eugene Buckner
Retired Court Reporter at Large
15th Judicial Circuit
State of South Carolina

APPEARANCES:

Steven Christopher Stanko
Appearing pro se

.... On Behalf of the Applicant

J. Anthony Mabry, Esquire
Assistant Attorney General
S. C. Attorney General's Office
PO Box 11549
Columbia, SC 29211
TEL: 803.734.3665

.... On Behalf of the Defendant

NO EXHIBITS WERE MARKED BY THE COURT REPORTER IN THIS HEARING AND NO SWORN TESTIMONY WAS TAKEN FROM WITNESSES.

APPLICANT STANKO:

Actually, I do too. And I have - I have one other query for you that needs to be presented right now at this time.

As you are aware, in the second trial William Diggs is going to be my attorney; or at least, I -- I hope he is.

The conundrum that I have is that:

In the same sense, this post-conviction relief may have allegations of ineffective assistance of counsel against him.

My argument is:

Just because I feel he may have been ineffective in the first case does not mean that he'll make those same ineffective mistakes in the second; because he's learned from them, or may see them differently.

So my conundrum is I don't want to lose him; because I believe in him.

He knows my case.

He's the one who had the test ordered and found out everything that was wrong with my medial frontal lobe.

I don't want to lose him.

On the other hand, I also, by keeping him in the second case, do not want to give him up by losing

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him with the possibility of arguing ineffective assistance of counsel argument against him, and thereby having a judge tell me that:

Because I filed an IAOC argument against him in PCR, I can't have him in the second case.

THE COURT:

All right, sir.

I'm going to leave you to discuss that -uh- matter with the attorney that's ultimately appointed for you.

Of course, by filing this -uh- post-conviction relief claim, you have taken the position -uh- that there was ineffective assistance of counsel.

APPLICANT STANKO:

Yes sir.

THE COURT:

And thus, that's a matter that you would need to discuss with your attorney who will be appointed.

And as you are aware, the statute requires The Court appoint two attorneys for you -

APPLICANT STANKO:

Yes sir.

THE COURT:

--- in post-conviction relief

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matters.

All right, then.

It would be my intention to adjourn these proceedings for 14 days.

I will give you 14 days to respond to The Court in writing; thereafter having -- whether I should not hear from you or whether I hear from you with certain suggestions, The Court will then make the appointment -uh- that The Court believes is the appropriate attorney to represent you.

Now, is there anything further from the State --

MR. MABRY:

Yes --

THE COURT:

-- with regard to this matter?

MR. MABRY:

Yes, Your Honor, just briefly.

At this time, we would -uh- place on the record our objection to any exparte -uh- funding request once counsel is appointed.

This is a post-conviction relief matter -uh- not a criminal prosecution.

So if there are any funding request from collateral counsel once they're appointed, we wish to

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) 05-GS-26-2927

State of South Carolina,
Plaintiff,
-VS-
Stephen Christopher Stanko,
Defendant.

TRANSCRIPT OF RECORD

March 4, 2009
Conway, South Carolina

B E F O R E:

HONORABLE STEVEN H. JOHN, Circuit Judge.

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

J. Gregory Hembree, Esquire
Francis A. Humphries, Jr., Esquire
Office of the Horry County Solicitor
P. O. Box 1276
Conway, South Carolina 29528
Attorney for the State

William I. Diggs, Esquire
Law Office of William Isaac Diggs
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Myrtle Beach, South Carolina 29577
Attorney for the Defendant

Brana J. Williams, Esquire
Williams Law Firm, LLC
1115 Third Avenue
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Attorney for the Defendant

Dixie Cox Eubank
Official Reporter

3074

I N D E X
(SW) STATE'S WITNESS
(DW) DEFENSE WITNESS

E X H I B I T I N D E X

(No Exhibits Marked)

THE COURT: All right, we are here on the record in 2005-GS-26-2927, the State of South Carolina, County of Horry, versus Stephen C. Stanko. As to this particular matter, let me cover just a couple of things with you gentlemen.

One, I guess it's administrative or not even a scheduling matter. The scheduling order that I sent to you and that we filed with the Clerk of Court, the very first item that's on that says Monday, August 24th, 2009, at 2:00 P.M. -- it says Thursday, August 24th, 2009, 2:00 P.M. Well, August 24th actually is a Monday, so y'all need to strike through where it says Thursday, August 24th, 2009, and put Monday, August 24th, 2009. The date was correct, but unfortunately we had interposed the wrong day on that, so if y'all will just put Monday on there.

All right, another matter, it's come to the Court's attention in this matter, and the reason that I now have this particular case, because Judge Baxley was asked by the Supreme Court to handle the post conviction relief matter that Mr. Stanko has filed as against Mr. Diggs and his former attorneys in the Georgetown case, and though Judge Baxley might have addressed this issue or questioned about this issue, since he is no longer the trial judge, I want to go over this particular issue.

It seems to me, at least questionable, if not inconsistent, that Mr. Diggs remain as the trial attorney in this particular case when a post conviction relief matter has been filed against him by Mr. Stanko. Mr. Diggs, I assume that you have, as best you could, covered that issue with Mr. Stanko.

MR. DIGGS: Your Honor, we've talked about it on a number of occasions, but to be honest with you, I haven't even -- I haven't seen the PCR application and I didn't have any input into, you know, the substance of that application, so, I mean, I understand ---

THE COURT: And obviously, you know, there are boundaries obviously that you cannot communicate with Mr. Stanko about that. You don't represent him in that particular matter and obviously he's filed a complaint in that matter or at least a PCR application that alleges at least in part of it ineffective assistance of counsel, so you being the -- not the responding party, but obviously there are issues and things that you may not discuss with him, but you can certainly, I assume, and have -- and if you haven't, you certainly need to, communicate with him about your continued representation of him regarding this particular case. Have you done that?

MR. DIGGS: We have, Your Honor. I have discussed it with him.

handle this case, (A) if he did commit errors that, let's say, he even determined as being errors, by looking at that case, I believe that Mr. Diggs would say, "Maybe I should have done this differently," and in this particular case, which is going to use a very similar defense, wouldn't he have learned from that?

(B) Even if I did file them, is it not a situation where it would have no effect on this case as long as I do trust and believe in him and his efforts toward this case?

THE COURT: All right, sir. Well, and I'll say, I mean, the Court is well aware of your Sixth Amendment right and the South Carolina Supreme Court decision in State v. Sanders regarding assistance of counsel, ---

MR. STANKO: Yes, sir.

THE COURT: --- and obviously you don't have the ability to pick and choose your attorneys per se, but certainly I will listen to you as to your request to have as -- if I understand you correctly that you want Mr. Diggs to remain as the lead counsel and remain as one of your attorneys in this particular case, the 2005-GS-26-2927?

MR. STANKO: Yes, sir.

THE COURT: Do you have now any date that you know that you're going to meet with the attorneys helping you

MS. WILLIAMS: Judge, and ---

THE COURT: --- and make my own determination based upon what he informed me about the continued representation of Mr. Diggs, and I am satisfied from what he has stated to me that he definitely wants Mr. Diggs to remain as his trial counsel. There is obviously apparently a good level of interaction and trust between Mr. Diggs and Mr. Stanko regarding this particular matter, and barring some unusual circumstances, it's not my intention at this point in time to interfere or interrupt that, so that -- but I don't want to foreclose the issue completely without having read and seen the amended PCR application if there is going to be one, so ---

MS. WILLIAMS: Certainly, Your Honor. If I may, ---

THE COURT: --- so I don't know that. You know, if we have to do that, then I'll hear from you at that point in time.

MS. WILLIAMS: That's all. I just wanted to say if we could certainly reserve the time frame issue at that point.

THE COURT: Well, I'm -- you know, timetables can be changed. I would hesitate to do so and would not want to do so. I think we have set a more than lenient

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
05-GS-26-2927

STATE OF SOUTH CAROLINA,
PLAINTIFF,
vs.
STEPHEN CHRISTOPHER STANKO,
DEFENDANT.

TRANSCRIPT OF RECORD

JUNE 5, 2009
CONWAY, SOUTH CAROLINA

BEFORE:

THE HONORABLE, STEPHEN H. JOHN, JUDGE

APPEARANCES:

BY: FRANCIS A. HUMPHRIES, JR., ESQ.
ATTORNEY FOR STATE

BY: WILLIAM I. DIGGS, ESQ.
BRANA J. WILLIAMS, ESQ.
ATTORNEYS FOR STEPHEN CHRISTOPHER STANKO

BRENDA R. BABB
Circuit Court Reporter

INDEX

THE COURT: WE'RE HERE IN THE CASE OF STATE V. STEPHEN C. STANKO, 2005-GS-26-2927 PURSUANT TO A NOTICE OF MOTION AND MOTION BY THE STATE OF SOUTH CAROLINA TO REVIEW THE STATUS OF DEFENDANT'S COUNSEL IN LIGHT OF A POST CONVICTION RELIEF ACTION BROUGHT BY MR. STANKO REGARDING THE PREVIOUS CASE IN GEORGETOWN COUNTY, THE STATE OF SOUTH CAROLINA V. STEPHEN C. STANKO.

ALL RIGHT, IS THE STATE READY TO PROCEED?

MR. HUMPHRIES: THE STATE IS READY TO PROCEED, YOUR HONOR.

THE COURT: DEFENSE READY TO RESPOND?

MS. WILLIAMS: YES, SIR, WE ARE.

THE COURT: VERY GOOD, ALL RIGHT, SOLICITOR, YOU MAY PROCEED.

MR. HUMPHRIES: THANK YOU, YOUR HONOR, YOU'VE RECEIVED MY WRITTEN MOTION, THAT ALSO HAS BEEN SERVED ON COUNSEL FOR DEFENDANT STANKO. WE'RE, THE STATE IS IN AN AWKWARD POSITION IN THAT IF WE WERE THE FEDERAL GOVERNMENT WE WOULD BE FILING A MOTION TO, TO HAVE MR. DIGGS REMOVED FROM THE CASE BASED ON A CONFLICT OF INTEREST. THEY DO THAT AS A MATTER OF COURSE AT THE U.S. ATTORNEY'S OFFICE. WE DON'T DO THAT BUT WE FELT BASED ON WHAT WE, AT LEAST WHAT WE OBSERVE TO BE APPARENT DIRECT CONFLICTS OF INTEREST BASED ON THE FILING OF THE POST CONVICTION RELIEF THAT BY OPERATION OF LAW WAIVES THE ATTORNEY/CLIENT PRIVILEGE TO A

CERTAIN EXTENT, WE BELIEVE THAT WE NEEDED TO BRING THIS BEFORE THE COURT.

OBVIOUSLY THESE CASES ARE, THEY'RE COMPLEX, THEY ARE COSTLY, THEY ARE TIME CONSUMING AND NO ONE WANTS TO DO THEM TWICE, ALTHOUGH OFTENTIMES WE DO, BUT THIS IS FORESEEABLE, I WOULD SUBMIT, AND, AND, THEREFORE, IT NEEDS TO BE ADDRESSED BY THE COURT AND SO, YOU KNOW, I COULD GO BACK THROUGH THE WRITTEN MOTION, I KNOW YOUR HONOR HAS REVIEWED IT BUT, BUT BASED, THE GIST OF IT IS THIS.

THERE HAS BEEN A POST CONVICTION RELIEF PETITION FILED BY DEFENDANT STANKO AND AS A PART OF THAT PETITION HE HAS ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, THAT BEING MR. DIGGS, AND BY THAT VERY FILING HE HAS WAIVED, ALREADY WAIVED ATTORNEY/CLIENT PRIVILEGE IN CONNECTION WITH THAT CASE. AND WE'VE BEEN ADVISED ON THE RECORD AND OTHERWISE BY MR. DIGGS, THE COURT HAS BEEN ADVISED AS WELL, THAT IT IS, IT IS MR. DIGGS AND DEFENDANT STANKO'S INTENTION TO, TO PRESENT BASICALLY THE SAME DEFENSE OR TYPE OF DEFENSE AND SAME WITNESSES AS WERE INVOLVED IN THE FIRST CASE AND THIS, THIS ATTORNEY/CLIENT PRIVILEGE IS WAIVED AS RELATES NOT ONLY TO MR. DIGGS BUT HIS COMMUNICATIONS WITH THOSE EXPERTS, THE SAME EXPERTS HE WOULD INTEND TO CALL, AT LEAST HE HAS STATED HE INTENDS TO CALL IN THIS CASE. SO WE BRING THAT TO THE COURT'S ATTENTION AND ASK THE COURT TO, TO REVIEW THAT SITUATION IN LIGHT OF THE UPCOMING TRIAL WHICH

I BELIEVE IS SCHEDULED IN THE FALL.

THE COURT: ALL RIGHT, WELL LET ME ASK, BEFORE YOU SIT DOWN, SOLICITOR --

MR. HUMPHRIES: YES, SIR.

THE COURT: LET ME ASK YOU A QUESTION, I'M A LITTLE CONFUSED. YOU'VE GOT HERE IN YOUR MOTION THAT THEY ARE FILING IN THE POST CONVICTION RELIEF APPLICATION MR. STANKO HAS WAIVED THE ATTORNEY/CLIENT PRIVILEGE. NOW AS I READ RULE 1.7 IT INDICATES THAT IT'S WAIVED TO THE EXTENT NECESSARY FOR THE COUNSEL TO RESPOND TO THE ALLEGATIONS MADE IN THE POST CONVICTION RELIEF APPLICATION.

MR. HUMPHRIES: YES, SIR, IT IS LIMITED NO QUESTION ABOUT THAT.

THE COURT: OKAY, ARE YOU INDICATING BY THE FILING OF THE MOTION, AND THIS IS THE PART THAT I FOUND A LITTLE CONFUSING, ARE YOU INDICATING THAT DEPENDING UPON WHAT EXPERT WITNESSES ARE PRESENTED IN THIS CASE AGAINST MR. STANKO HERE IN HORRY COUNTY THAT THE STATE MAY TRY TO CALL MR. DIGGS AS A WITNESS REGARDING CERTAIN COMMUNICATIONS?

MR. HUMPHRIES: NO, SIR, NO, SIR, AND LET ME, LET ME BE CLEAR ABOUT THAT. THIS REALLY HAD VERY LITTLE IF NOTHING TO DO WITH THE STATE'S CASE AGAINST MR. STANKO. WE DON'T, I DON'T INTEND, WE DON'T, THE STATE DOES NOT INTEND TO CALL MR. DIGGS AS A WITNESS. WE DON'T INTEND TO CONTACT

THE ATTORNEY GENERAL WHO WILL BE REPRESENTING THE STATE IN THE POST CONVICTION RELIEF WHO IS GOING TO HAVE COMMUNICATIONS WITH MR. DIGGS AS A NECESSITY BECAUSE OF THE POST CONVICTION RELIEF. WE DON'T INTEND TO TRY AND TAKE ADVANTAGE OF ANY INFORMATION THAT MAY HAVE RESULTED BY THAT WAIVER OF THE ATTORNEY/CLIENT PRIVILEGE. THE ISSUE IS NOT WITH US. THE ISSUE WE SUBMIT IS WITH MR. DIGGS AND MR. STANKO FOR FUTURE ACTIONS THAT CAN BE FILED BY MR. STANKO AND WE BELIEVE IT WOULD COMPOUND ---

THE COURT: AND THEN, THEN WHETHER OR NOT MR. DIGGS CONTINUED REPRESENTATION OF MR. STANKO THEN VIOLATES THE RULES THEN?

MR. HUMPHRIES: YES, SIR.

THE COURT: ALL RIGHT, ALL RIGHT, OKAY, I JUST WANTED TO MAKE, I JUST WANTED TO BE CLEAR TO SEE IF THERE WASN'T SOME FURTHER RAMIFICATION OF THIS THAT NEEDED TO BE EXPLORED AT THIS POINT IN TIME. ALL RIGHT.

MR. HUMPHRIES: AND I APPRECIATE IT CAUSE WE ABSOLUTELY DO NOT INTEND TO TRY AND TAKE ADVANTAGE OF ANY WAIVER OF ATTORNEY/CLIENT PRIVILEGE.

THE COURT: ALL RIGHT, GOOD DEAL, ALL RIGHT. WELL I JUST WANTED TO BE CLEAR ABOUT THAT.

ALL RIGHT, WHO'S GOING TO RESPOND TO THE STATE'S ARGUMENT?

MR. DIGGS: YOUR HONOR, LET ME JUST START OFF BY

SAYING I DON'T REALLY TAKE A POSITION IN THE CASE ON THE ISSUE. MR. STANKO HAS INDICATED HE WOULD LIKE FOR ME TO REMAIN ON HIS CASE AS PART OF HIS DEFENSE. I'M HAPPY TO DO THAT. I CERTAINLY DON'T TAKE ANY EXCEPTION TO ANY, ANY DEFENSE ATTORNEY WHO'S IN BUSINESS FOR ANY LENGTH OF TIME WILL GO THROUGH THE POST CONVICTION RELIEF PROCESS AS A WITNESS FROM TIME TO TIME. THAT DOESN'T CAUSE ME A PROBLEM SO I'M REALLY NOT GOING TO TAKE A POSITION. I CAN TELL THE COURT, YOU KNOW, I'M COURT APPOINTED ON THIS CASE. IF I REMAIN AS COUNSEL I WILL DO THE BEST THAT I CAN DO IN THE CASE THAT HAS NO AFFECT ON MY ABILITY OR WILLINGNESS TO REPRESENT THIS CASE.

THE COURT: ALL RIGHT, SO THAT, THAT WAS ONE OF THE QUESTIONS I WANTED TO COVER WITH YOU, MR. DIGGS, THAT THE FILING OF THAT POST CONVICTION RELIEF APPLICATION YOU DO NOT THINK HAS IMPACTED YOUR RELATIONSHIP WITH MR. STANKO OR YOUR ABILITY TO COMMUNICATE WITH HIM, YOUR ABILITY TO EFFECTIVELY REPRESENT HIM IN THIS CURRENT ACTION IN ANY WAY, IS THAT WHAT YOU'RE TELLING ME?

MR. DIGGS: IT HAS NOT, HAS NOT.

THE COURT: ALL RIGHT, AND THE FACT THAT CERTAIN MATTERS HAVE BEEN RAISED IN THE POST CONVICTION RELIEF APPLICATION THAT, THAT IN YOUR MIND AND IN YOUR WORKING ON THIS CASE THAT IS PROCEEDING AGAINST MR. STANKO IN HORRY COUNTY HAS NOT INTERFERED WITH YOUR REPRESENTATION OF HIM

IN ANY WAY; IS THAT RIGHT?

MR. DIGGS: THAT'S CORRECT, IT HAS NOT.

THE COURT: ALL RIGHT, VERY GOOD, YES, MA'AM?

MS. WILLIAMS: YOUR HONOR, FIRST LET ME SAY THAT, I WOULD RESPECTFULLY SAY THAT THIS IS THE GROUND THE COURT COVERED IN THE LAST MEETING MOTION HEARING THAT WE HAD WITH REWARD TO THIS, YOUR HONOR.

THE COURT: WELL IT ACTUALLY IS THE THIRD TIME BECAUSE JUDGE BAXLEY CONDUCTED AN EXTENSIVE HEARING THAT'S, YOU KNOW, OF RECORD WHERE JUDGE BAXLEY EXTENSIVELY QUESTIONED MR. STANKO ABOUT MR. DIGGS REPRESENTATION BECAUSE JUDGE BAXLEY WAS AWARE OF THE POST CONVICTION RELIEF FILING AN APPLICATION AND JUDGE BAXLEY AT THAT POINT IN TIME FOUND THAT IT WAS PROPER FOR MR. DIGGS TO CONTINUE HIS REPRESENTATION OF MR. STANKO AND THEN I CONDUCTED A HEARING IN WHICH I QUESTIONED MR. STANKO ABOUT ALL OF THESE MATTERS AND THE COURT FOUND AT THE POINT IN TIME THAT BASED UPON WHAT MR. STANKO HAD TOLD ME AND HIS KNOWLEDGE OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE U. S. CONSTITUTION AND THE NUMEROUS U. S. SUPREME COURT CASES AND SOUTH CAROLINA CASES LIKE THE STATE V. SANDERS, THAT HE WAS AWARE OF THE ISSUES, THAT HE INDICATED THAT HE WANTED MR. DIGGS TO CONTINUE THE REPRESENTATION SO ALL THAT IS, IS BACKGROUND.

HAS ANYTHING IN YOUR MIND THAT YOU KNOW OF, AND

I'LL ASK MR. STANKO AGAIN IN A MINUTE, BUT IN YOUR REPRESENTATION OF MR. STANKO HAS ANYTHING CHANGED IN THIS REGARD FROM THE TWO PRIOR HEARINGS WE'VE HAD ON THIS?

MS. WILLIAMS: THERE IS NOTHING THAT I AM AWARE OF, YOUR HONOR, IN FACT I WAS DISCUSSING WITH MR. STANKO, HE HAS ACTUALLY MET WITH HIS PCR ATTORNEYS AND THE GIST OF WHAT I UNDERSTAND IS ANY OF THE PROBLEMS THAT WILL BE ASSERTED AGAINST MR. DIGGS WITH REGARD TO THE PRIOR TRIAL ARE ISSUES OF A FAILURE TO OBJECT TO CERTAIN EVIDENCE OR FAILURE TO CROSS EXAMINE FARTHER OR MORE OF A TRIAL TECHNIQUE, IF THE COURT WILL.

THE COURT: AS TO MATTERS THAT AROSE IN THE TRIAL ITSELF?

MS. WILLIAMS: IN THE TRIAL ITSELF AND LIKE I SAID AS HIS, IF YOU WANT, AS HIS TRIAL TECHNIQUE CAPABILITIES/THINGS THERE'S ABSOLUTELY NOTHING THAT I AM AWARE OF THAT WOULD, WOULD BE WAIVING PRIVILEGE, IF YOU WILL, WITH REGARD TO OUR NEW TRIAL OR THE NEW EVIDENCE AND THINGS THAT WE HAVE GOING ON. YOU KNOW IF MR. DIGGS OBJECTED ONE TIME AND AT THIS TRIAL IF HE CERTAINLY CHOSE NOT TO OBJECT AGAIN I AM QUITE SURE THAT, YOU KNOW, LEGAL MINDS DIFFER AS TO WHAT IS APPROPRIATE AND WHAT'S NOT, HENCE THAT'S WHY YOUR HONOR MAKES THE CALL AND SO THERE'S NOTHING THAT I AM AWARE OF THAT'S ANY DIFFERENT AT THIS TIME.

THE COURT: ALL RIGHT, MR. STANKO, COULD YOU STAND, PLEASE SIR?

DEFENDANT STANKO: YES, SIR.

THE COURT: ALL RIGHT, AND JUST AS TO THE PURPOSES OF THIS HEARING THAT WE'RE HERE TODAY I'M GOING TO PLACE YOU UNDER OATH.

STEPHEN C. STANKO

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: NOW AS THE COURT INDICATED THIS ISSUE HAS BEEN COVERED WITH YOU BY JUDGE BAXLEY PREVIOUSLY, MYSELF PREVIOUSLY, AND I THINK THE ONLY DIFFERENCE BETWEEN THE TIME THAT I'M SPEAKING TO YOU NOW ABOUT THIS ISSUE AND THE TIME I SPOKE TO YOU PREVIOUSLY AND WE HAD THE HEARING ON THAT WAS I DON'T BELIEVE, AND YA'LL CORRECT ME IF I'M WRONG, BUT I'M NOT SURE THAT YOU HAD ANY KIND OF EXTENSIVE DISCUSSIONS WITH YOUR PCR ATTORNEYS AT THE TIME THE PREVIOUS MOTION WAS HEARD. AS I UNDERSTAND FROM THE OTHER COUNSEL YOU HAVE NOW HAD AN OPPORTUNITY TO TALK TO THE POST CONVICTION RELIEF APPLICATION ATTORNEYS; IS THAT CORRECT?

DEFENDANT STANKO: THAT'S CORRECT.

THE COURT: ALL RIGHT, SIR, NOW, NOT ASKING YOU TO DISCLOSE WHAT IT IS THAT YA'LL TALKED ABOUT, BUT BASED UPON THOSE CONVERSATIONS IS THERE ANYTHING DIFFERENT NOW BECAUSE NOW YOU'VE HAD AN OPPORTUNITY TO EXPLORE THE ISSUES WITH THE ATTORNEYS, GET THEIR ADVISE, GET THEIR INPUT AS TO

YOUR POST CONVICTION RELIEF APPLICATION, IS THERE ANYTHING DIFFERENT BETWEEN NOW AND THE PREVIOUS TIME THAT I ADDRESSED THIS MATTER WITH YOU?

DEFENDANT STANKO: NO, SIR, THERE'S NOT.

THE COURT: ALL RIGHT, SIR, DO YOU CONTINUE TO WANT TO HAVE MR. DIGGS REPRESENT YOU IN THIS CURRENT ACTION?

DEFENDANT STANKO: YES, SIR, I DO.

THE COURT: ALL RIGHT, SIR, AND DO YOU FEEL THAT THIS IS A FREE AND OPEN COMMUNICATION BETWEEN YOU AND MR. DIGGS DESPITE THE FACT THAT THE POST CONVICTION RELIEF APPLICATION HAS BEEN FILED?

DEFENDANT STANKO: YES, SIR, THERE IS.

THE COURT: AND YOU ARE ABLE TO FULLY DISCUSS ALL ISSUES THAT YOU DEEM NECESSARY WITH HIM?

DEFENDANT STANKO: YES, SIR.

THE COURT: ALL RIGHT, SIR, AND HAVE YOU FOUND IN ANY WAY THAT HE IS UNRESPONSIVE TO YOU OR IN ANY WAY, FOR WANT OF A BETTER WORD, HARBORING ANY ILL FEELINGS TO YOU BECAUSE OF THE FILING OF THE POST CONVICTION RELIEF APPLICATION?

DEFENDANT STANKO: NOT ONLY IS HE NOT NOW BUT I DO NOT BELIEVE THAT WHEN WE FILE THE SUPPLEMENTAL, WHICH IS GOING TO BE FILED, AND YOU HAD ASKED ME SPECIFICALLY TO HAVE MR. GODFREY CONTACT YOU AND GIVE YOU A COPY OF THAT

WHEN IT IS DONE AND IT WILL BE DONE SOON.

THE COURT: YES, SIR.

DEFENDANT STANKO: I DON'T THINK THERE WILL BE ANY PROBLEMS AT THAT TIME.

THE COURT: ALL RIGHT, SIR.

DEFENDANT STANKO: THE ISSUES THAT WE'RE GOING TO RAISE THAT HAVE HIM IN IT HAVE NOTHING TO DO WITH ANY ISSUES THAT WOULD CREATE A CONFLICT OR ANY ARGUMENT OR I FEEL CAUSE ANY COMMUNICATIVE PROBLEMS BETWEEN MR. DIGGS AND MYSELF. THEY'RE MORE AT TRIAL SITUATIONS THAT SHOULD HAVE BEEN OBJECTED TO, THINGS OF THAT NATURE, AND THERE IS, THERE ARE TWO ISSUES. BUT, SIR, I DO NOT BELIEVE THAT MR. DIGGS AND I ARE GOING TO HAVE ANY PROBLEMS PRESENTING THE SECOND TRIAL.

THE COURT: ALL RIGHT, SIR, AND AGAIN YOU CONTINUE TO WANT TO HAVE MR. DIGGS TO REPRESENT YOU IN THIS PARTICULAR MATTER?

DEFENDANT STANKO: YES, SIR, I DO.

THE COURT: ALL RIGHT, THANK YOU VERY MUCH.

DEFENDANT STANKO: AND BEFORE I END THIS, THOUGH, I WOULD LIKE TO MAKE ONE THING CLEAR AND ---

THE COURT: YES, SIR.

DEFENDANT STANKO: --- I FEEL THAT MR. HUMPHRIES IS KIND OF, AND THIS IS JUST MY THOUGHTS, BUT HE'S ALSO HAD LIKE HE SAID HE HAS TO PREPARE FOR POSSIBLE APPEALABLE

ISSUES LATER ON IN THE FUTURE AND I WANT TO CLARIFY ONE THING, TOO, IN THE INSTANCE THAT I DO RAISE AN ISSUE AGAINST MR. DIGGS IF IT DOES END UP BEING A MERITABLE ISSUE THAT COULD LATER BE REVERSED, REVERSE THAT CASE, THAT DOES NOT MEAN THAT IN THIS TRIAL HE WILL NOT BE EFFECTIVE COUNSEL FOR ME. I WANT TO MAKE THAT CLEAR BECAUSE I DON'T WANT WAIVE HIS ATTEMPTS AT CLARING, DECLARING THAT I'M WAIVING THINGS. I'M NOT DECLARING THAT THERE WEREN'T MISTAKES MADE IN THAT CASE BUT THAT DOES NOT MEAN THAT I DON'T TRUST MR. DIGGS 100 PERCENT IN THIS UPCOMING CASE.

THE COURT: ALL RIGHT, SIR, AND YOU ARE EXPRESSING TO ME THAT YOU DO ---

DEFENDANT STANKO: I JUST WANT TO MAKE THAT RECORD CLEAR ALSO.

THE COURT: RIGHT, THAT YOU DO, THAT YOU DO TRUST AS FAR AS HIS ABILITY TO PROPERLY REPRESENT YOU IN THIS ACTION?

DEFENDANT STANKO: ONE HUNDRED PERCENT.

THE COURT: VERY GOOD, THANK YOU VERY MUCH, SIR, YOU CAN HAVE A SEAT.

DEFENDANT STANKO: YES, SIR.

THE COURT: YES, SIR?

MR. HUMPHRIES: VERY BRIEFLY, IN MY MIND WE'VE ACCOMPLISHED WHAT, AT LEAST WHAT THE STATE FELT LIKE NEEDED TO BE DONE TODAY. IN FAIRNESS WE HAVE HAD AT LEAST TWO

HEARINGS IN CONNECTION WITH THIS ISSUE BUT IN NEITHER OF THOSE TWO PARTICULAR HEARINGS DID WE ADDRESS THE WAIVER OF ATTORNEY/CLIENT PRIVILEGE SPECIFICALLY. THAT'S WHY WE RAISED IT TODAY AND HAVING DONE THAT WE'VE ACCOMPLISHED WHAT WE INTENDED.

THE COURT: ALL RIGHT, SIR, AND I APPRECIATE THAT AND I BELIEVE WE ARE ALL CLEAR ON WHAT THE FACT AND THE FACT HAS NO AFFECT ON, ON THIS PARTICULAR TRIAL.

DEFENDANT STANKO: YOUR HONOR?

THE COURT: I'M SORRY, TALK TO YOUR ATTORNEYS AND SEE IF THERE IS ANYTHING THAT THEY WOULD LIKE TO PRESENT TO ME.

ALL RIGHT, AT THIS POINT IN TIME AGAIN AS THE COURT HAS PREVIOUSLY INDICATED AND I APPRECIATE THE NEW INFORMATION THAT HAS BEEN BROUGHT TO, TO THE COURT'S ATTENTION AND RECOGNIZE THAT WHILE THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT CONFER AN ABSOLUTE RIGHT TO A DEFENDANT TO BE REPRESENTED BY THEIR PREFERRED COUNSEL OF THEIR CHOICE, THE COURT IS MINDFUL OF THE MANDATES TO THAT AMENDMENT, THE U. S. SUPREME COURT DECISIONS AND THE S. C. SUPREME COURT DECISIONS THAT THIS COURT'S OBLIGATION IS TO SAFEGUARD THE INTEGRITY OF THE PROCEEDINGS AND TO ENSURE TRIALS ARE CONDUCTED ACCORDING TO ETHICAL STANDARDS BALANCING THAT WITH OBVIOUSLY THE SIXTH AMENDMENT RIGHTS GRANTED TO THE DEFENDANT.

IN THIS PARTICULAR MATTER I FIND THAT MR. STANKO HAS MORE THAN ONCE EXPRESSED FULL AND COMPLETE CONFIDENCE IN THE ABILITIES OF MR. DIGGS. THERE IS A FREE AND OPEN COMMUNICATION BETWEEN THE DEFENDANT AND MR. DIGGS. HE HAS RAISED NO ISSUES THAT WOULD IMPACT MR. DIGGS ABILITY TO PROPERTY REPRESENT MR. STANKO IN THE UPCOMING TRIAL AND, THEREFORE, I FIND THAT MR. DIGGS MAY CONTINUE TO REPRESENT MR. STANKO IN THE PROCEEDINGS THAT WILL BE FORTHCOMING IN NOVEMBER IN THIS ACTION OF 2005-GS-26-2927.

ANYTHING FURTHER FROM THE STATE AT THIS POINT IN TIME?

MR. HUMPHRIES: NOTHING FROM THE STATE, YOUR HONOR.

THE COURT: MR. DIGGS, ANYTHING FURTHER FROM THE DEFENSE ON THIS ISSUE OR ANY OTHER ISSUES THAT YOU NEED TO BRING TO MY ATTENTION?

MR. DIGGS: YOUR HONOR, I HAVE ONE OTHER ISSUE I'D LIKE TO BRING TO THE COURT'S ATTENTION IN CHAMBERS MAYBE OR UNDER THE STATUTE IN AN EX PARTE FASHION.

MR. HUMPHRIES: I OBVIOUSLY DON'T MIND IT ACTUALLY IN THE COURTROOM.

THE COURT: ALL RIGHT, SIR, VERY GOOD.

MR. HUMPHRIES: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, THANK YOU VERY MUCH.

ALL RIGHT, MR. DIGGS, WHAT IS IT THAT YOU'D LIKE

TO BRING TO THE COURT'S ATTENTION AT THIS TIME?

MR. DIGGS: YOUR HONOR, WE HAD GONE OVER SOME ISSUES LAST TIME WITH THE COURT AND I PROMISED YOU I WAS GOING TO GET YOU SOME PROPOSED ORDERS.

THE COURT: YES, SIR.

MR. DIGGS: I WAS GOING TO DO THAT AND THEN MY COMPUTER SYSTEM WENT DOWN, IT WAS OUT FOR AN ENTIRE WEEK, AND THEN ONE THING LED TO ANOTHER AND I DIDN'T GET THEM TO YOU BUT I DO HAVE SOME I'D LIKE TO HAND UP TODAY. THEY COVER BASICALLY THE SAME INDIVIDUALS THAT I WENT THROUGH LAST TIME WITH THE COURT ---

THE COURT: RIGHT.

MR. DIGGS: --- AND WHAT WE WOULD PROPOSE THEY DO IN THE CASE. I WANT TO MAKE SURE I'VE GOT THE CORRECT ONE HERE.

THE COURT: I HAVE EXECUTED THE ORDER FOR EXPERT SERVICES WHICH COVERS THOMAS H. SACHY, JOSEPH C. WU, MARK P. EINHORN, J. W. THRASHER, JR., AND RUBEN GUR. I HAVE EXECUTED THAT ORDER. I FIND THAT THE INFORMATION CONTAINED ALONG WITH YOUR PREVIOUS FILINGS REGARDING THOSE INDIVIDUALS ALONG WITH THE INFORMATION PROVIDED AT THE PROPER HEARING TO BE ADEQUATE FOR THE COURT TO EXECUTE THAT ORDER FOR EXPERT SERVICES.

REGARDING THE ORDERS FOR BERNARD ALBINIAK, JAMES EVANS AIKEN, AND EVELYN CALIFF, I DID NOT FIND ANYTHING IN

THOSE PARTICULAR ORDERS. YOU HAD PREVIOUSLY REGARDING THE ONES THAT I SIGNED YOU HAD GIVEN ME BACKGROUND INFORMATION AS TO THOSE INDIVIDUALS AND THE COURT WAS AWARE OF THEIR EXPERTISE THAT YOU HAD SET FORTH REGARDING THOSE INDIVIDUALS IN THE PRIOR HEARINGS AND I WAS AWARE OF ALL THAT INFORMATION ALONG WITH THE MONETARY COSTS THAT HAD BEEN EXPENDED PREVIOUSLY AS WELL AS THEIR SERVICES BUT I DON'T FIND ANY OF THAT INFORMATION.

MR. DIGGS: YOUR HONOR, I CAN CERTAINLY SUPPLEMENT THAT AND UNLIKE THE LAST TIME I'LL MAKE SURE I GET THAT TO YOU PROBABLY BY ---

THE COURT: EXPEDITIOUSLY?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT, VERY GOOD. SO IF YOU CAN JUST GET ME AND IT CAN BE FIND IF IT COULD JUST BE IN A, IN A ---

MR. DIGGS: I UNDERSTAND.

THE COURT: --- SUPPLEMENTAL AFFIDAVIT OR SOMETHING REGARDING THESE, THAT CAN BE ATTACHED TO THESE ORDERS THAT WILL BE GOOD, BUT LET ME GIVE YOU THE OTHER ORDER THAT I DID EXECUTE REGARDING THE, THOSE EXPERT SERVICES, ALL RIGHT.

MR. DIGGS: YES, SIR, THANK YOU VERY MUCH.

HE COURT: ALL RIGHT, THANK YOU. ALL RIGHT, MR. DIGGS, ANYTHING ELSE ON BEHALF OF MR. STANKO AT THIS POINT

IN TIME THAT YOU'RE AWARE OF?

MR. DIGGS: YOUR HONOR, WE MAY HAVE A COUPLE OF ADDITIONAL EXPERTS THAT WERE ASSOCIATED WITH THE CASE LAST TIME THAT WE WOULD ASK THE COURT TO APPROVE AT THIS TIME. I HAVEN'T PUT ANYTHING BEFORE THE COURT YET WITH RESPECT TO THOSE INDIVIDUALS.

THE COURT: ALL RIGHT.

MR. DIGGS: WOULD IT BE ACCEPTABLE TO SUPPLEMENT, WHEN I SUPPLEMENT WHAT WE'VE HANDED THIS MORNING TO GO AHEAD AND ADD A COUPLE OF ADDITIONAL NAMES?

THE COURT: YOU CAN AS LONG AS THE, YOU KNOW, THE AFFIDAVITS INFORMATION SETS FORTH THE NECESSARY BACKGROUND QUALIFICATIONS, EXPERTISE, THE MONETARY REQUESTS I'LL BE GLAD FOR YOU TO SEND IT TO ME IN WRITING. I DON'T HAVE ANY PROBLEM WITH THAT AT ALL.

MR. DIGGS: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: ALL RIGHT, MS. WILLIAMS, ANYTHING THAT YOU'RE AWARE OF AT THIS POINT IN TIME?

MS. WILLIAMS: NOTHING ELSE AT THIS POINT, YOUR HONOR.

THE COURT: ALL RIGHT, VERY GOOD,

MR. DIGGS: WELL, YOUR HONOR?

THE COURT: YES, SIR.

MR. DIGGS: THESE ARE SEALED, CORRECT, THEY'RE NOT AVAILABLE FOR PUBLIC ---

THE COURT: THEY ARE NOT. WHAT I, WHAT YOU CAN DO AT THAT POINT RIGHT NOW AT THIS POINT IN TIME IS IF YOU WOULD LIKE YOU CAN USE THE ORDER TO EMPLOY THE INDIVIDUALS AT THE TIME OF FILING WHEN YOU SEND THESE SUPPLEMENTS TO ME IF YOU WANT TO SEND AN ORDER FOR THESE TO BE SEALED DURING THE PENDENCY OF THE ACTION. OBVIOUSLY AFTER THE ACTION THEY WOULD BE UNSEALED BUT DURING THE PENDENCY OF THE ACTION THEY WOULD, THEY WOULD BE SEALED.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: JUST SEND ME A SUPPLEMENTAL ORDER TO THAT AFFECT, ALL RIGHT.

MR. DIGGS: YES, SIR.

THE COURT: ANYTHING ELSE?

MR. DIGGS: THAT'S IT.

THE COURT: ALL RIGHT, THANK YOU VERY MUCH, COUNSEL.

MR. DIGGS: THANK YOU VERY MUCH.

END OF REQUESTED TRANSCRIPT....

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED BRENDA R. BABB, OFFICIAL COURT REPORTER THE SOUTH CAROLINA COURT ADMINISTRATION, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA.

I DO FURTHER CERTIFY THAT I AM NEITHER KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

April 16, 2010

Brenda R. Babb

BRENDA R. BABB, CVR

OFFICIAL REPORTER

3507

STATE OF SOUTH CAROLINA)
) INDICTMENT FOR:
COUNTY OF HORRY)

COUNT ONE: MURDER
COUNT TWO: ARMED ROBBERY

At a Court of General Sessions convened on August 25, 2005, the Grand Jurors of Horry County present upon their oath:

COUNT ONE: MURDER

(CDR: 0116 16-03-0010,0020)

That STEPHEN C. STANKO did in Horry County, on or about the 8th day of April, 2005, willfully, feloniously, and intentionally, with malice aforethought, kill the victim, Henry Lee Turner, by means of shooting the victim with a handgun in the chest and back, and the victim did die as a proximate result thereof in Horry County on or about April 8, 2005, in violation of Section 16-3-10, S. C. Code of Laws, 2004, as amended, and the Common Law of South Carolina.

COUNT TWO: ARMED ROBBERY

CDR: 0139 16-11-0330(A)

That STEPHEN C. STANKO did in Horry County on or about the 8th day of April, 2005, while armed with a deadly weapon, to wit: a Taurus .357 Magnum caliber revolver and/or a Derringer handgun, take and carry away goods or monies of the victim, Henry Lee Turner, from the immediate presence of Henry Lee Turner, to wit: a Mazda truck, a cell phone, a Taurus .357 Magnum caliber revolver and /or a Derringer handgun, in violation of Section 16-11-330(A), S. C. Code of Laws, 2004, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. Gregory Hembree
SOLICITOR

3669

Defendant's Pretrial Motion # 1

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Conclusive Presumption #1)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from moral or legal wrong in one area of the

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

brain, one maintains the free will to act accordingly as a result of executive analysis occurring in a distinct and different area of the brain, notwithstanding physical defects in the latter existing either in the form of missing volumetric mass or low brain activity or function.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
1115 3rd Avenue
Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 2

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Conclusive Presumption #2)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from moral or legal wrong in any area of the

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

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brain, under any circumstances, one is guilty of criminal conduct under the circumstances presented in this case, notwithstanding the presence of physical defects in the brain in the form of missing volumetric mass or low brain activity.

Respectfully submitted

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ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 3

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #1)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional arbitrary factor that allows the prosecution to establish "malice aforethought" as a requisite element of murder based solely on

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

the conduct of the accused, while the statute denies the accused the ability to establish insanity; or a mental disease, defect, or illness, based solely on the conduct of the accused.

Respectfully submitted

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ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 4

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #2)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional arbitrary factor that allows the prosecution to establish "malice aforethought" as a requisite element of murder, based solely on

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

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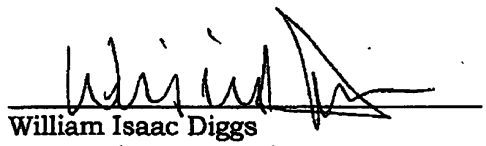
the conduct of the accused, without requiring any corroborative evidence that the brain function of the accused at the time of the alleged criminal act, included the capacity to form the intent to commit malicious acts and the executive analysis to willingly act thereon.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS



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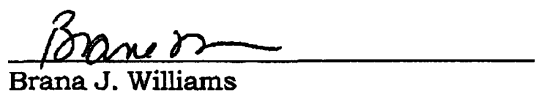

Brana J. Williams
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ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 5

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #4)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute is arbitrary and violates due process of law because it labels "insanity" as affirmative defense thus shifting to the accused the burden of proof on each element

[1] S.C. Code Ann. § 17-24-10 reads as follows:

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

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

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of the defense. This relieves the prosecution from proving each element of the offenses charged.

Respectfully submitted

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843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 6

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-20 UNCONSTITUTIONAL**
)	(Arbitrary Factor)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-20 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15.[1]

---

[1] **§ 17-24-20. Guilty but mentally ill; general requirements for verdict.**

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

Said motion is based on the grounds that the statute is arbitrary and violates due process of law because it contains an illusory defense of, "Guilty But Mentally Ill." Said defense is illusory because even if proved to exist by an accused by a preponderance of the evidence, the accused may still be sentenced to death under South Carolina law.

Respectfully submitted

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William Isaac Diggs
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843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
1115 3rd Avenue
Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

HISTORY: 1984 Act No. 396, § 2; 1988 Act No. 323, § 2; 1989 Act No. 93, § 2.

Defense Pretrial Motion # 7

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-20 UNCONSTITUTIONAL**
)	(Conclusive Presumption)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-20 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

---

[1] § 17-24-20. Guilty but mentally ill; general requirements for verdict.

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from wrong in one area of the brain, the accused is guilty, notwithstanding the absence of ability to perform executive analysis which would occur in a different area of the brain but does not, due to physical defects (in the latter area of the brain) which exist either in the form of missing volumetric mass or low or dead brain activity or tissue.

Respectfully submitted

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ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

HISTORY: 1984 Act No. 396, § 2; 1988 Act No. 323, § 2; 1989 Act No. 93, § 2.

Defense Pretrial Motion # 8

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ § 16-3-10 et seq.**
)	**UNCONSTITUTIONAL**
Defendant.)	(Incomplete Evidentiary Basis)
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. §§ 16-3-10 et seq. unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the entire statutory complex is arbitrary and violates due process because it is allows for a conviction of an accused based on an incomplete evidentiary base which excludes evidence of brain function in the determination of guilt or innocence which is necessary to form an accurate assessment of mental health and to render a reliable verdict.

[1] S.C. Code Ann.§ 16-3-10, defines "Murder" states as follows: *"Murder"* is the killing of any person with malice aforethought, either express or implied.

3527

Defense Pretrial Motion # 8

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

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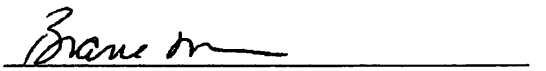
843-626-4243

WILLIAMS LAW FIRM, LLC



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Conway, SC 29526
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ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 9

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**S.C. § 16-3-10 UNCONSTITUTIONAL**
)	(Vagueness)
Defendant.)	
)	

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 16-3-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the arbitrary and vague and violates due process because it does not define the term "malice aforethought," and fails to acknowledge that malice is a complex concept that requires multiple brain functions or a number of different brain activities and the statute fails to identify which brain functions are

---

[1] **§ 16-3-10. "Murder" defined.**

"Murder" is the killing of any person with malice aforethought, either express or implied.

HISTORY: 1962 Code § 16-51; 1952 Code § 16-51; 1942 Code § 1101; 1932

Code § 1101; Cr. C. '22 § 1; Cr. C. '12 § 135; Cr. C. '02 § 108; G. S. 2453;

required by law to exist sufficiently to constitute the statutory element of murder of "malice aforethought."

Respectfully submitted

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843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
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ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

R. S. 108; 1712 (2) 418.

Defense Pretrial Motion # 10 -

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ § 16-3-20 et seq.**
)	**UNCONSTITUTIONAL**
Defendant.)	(Hypofrontality)
)	

FILED
HORRY COUNTY
2005 SEP 25 P 4:30
HELEN HUGGINS
CLERK OF COURT

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. §§ 16-3-10 et seq. unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the entire statutory complex is arbitrary and violates due process because it is allows for the death sentence to be imposed upon an accused who has hypofrontality, who possesses no more moral culpability than a juvenile or an adult who suffers from mental retardation.

[1] S.C. Code Ann.§ 16-3-10, defines "Murder" states as follows: *"Murder"* is the killing of any person with malice aforethought, either express or implied.

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Defense Pretrial Motion # 10

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

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843-626-4243

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Brana J. Williams
1115 3rd Avenue
Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

pending

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) INDICTMENT 2005-GS-26-2927

STATE OF SOUTH CAROLINA)

VS.) ORDER APPOINTING COUNSEL
(Death Penalty Case)

STEPHEN C. STANKO,)

DEFENDANT.)

FILED IN OFFICE
CLERK OF COURT
2006 NOV 21 PM 3:28

The State of South Carolina has served a Notice of Intent to Seek the Death Penalty in the above-captioned matter pursuant to S. C. Code of Laws, as amended. I find that it is necessary pursuant to Section 16-3-26(B) of the South Carolina Code of Laws, 1976, as amended, for counsel to be appointed in this matter. A hearing was held on November 15, 2006, at the Georgetown County Courthouse for the purpose of appointing counsel. Pursuant to said hearing, it is hereby

ORDERED that William I. Diggs, Esquire, is appointed to serve as first chair in the defense of Defendant Stephen C. Stanko in the above matter. The appointment of second chair in the defense of the defendant is taken under advisement by the Court.

AND IT IS SO ORDERED.

Hartsville, South Carolina

November 21, 2006

J. MICHAEL BAXLEY
CIRCUIT COURT JUDGE

3694

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) INDICTMENT NO. 2005-GS-26-2927
STATE) MOTION AND TO NOTICE OF MOTION
versus) TO REVIEW STATUS OF COUNSEL FOR
STEPHEN C. STANKO,) DEFENDANT IN LIGHT OF POST
Defendant.) CONVICTION RELIEF ACTION IN
) COMPANION CASE

2009 APR 28 PM 2:52
MELANIE HUGGINS
CLERK OF COURT

I-742833

The State, through J. Gregory Hembree, Solicitor of the Fifteenth Judicial Circuit, moves this Court to review the status of William I. Diggs, present counsel for the defendant, for conflict of interest and waiver of attorney-client privilege, as a result of the Post Conviction Relief petition filed by and/or on behalf of the defendant in the Georgetown County case of State v. Stephen C. Stanko in which the defendant was found guilty and sentenced to death. In support of the motion, the State would respectfully show to the Court:

1. William I. Diggs, Esquire, represented the defendant, as first chair, in the Georgetown County capital case in which the defendant was convicted and sentenced to death;
2. the defendant's case was affirmed on direct appeal by the South Carolina Supreme Court;
3. application for *cert.* was denied by the United States Supreme Court;
4. the Defendant filed a petition for Post Conviction Relief alleging, in part, the ineffective assistance of William I. Diggs, Esquire;
5. Rule 1.7 (a)(2) of Rule 407, SCACR, identifies a conflict of interest where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client . . . or by a personal interest of the lawyer.";
6. Rule 1.7 (b)(1) of Rule 407, SCACR, states the conflict of interest may only be waived if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;"
7. Section 17-27-130, Code of Laws of South Carolina, 1976, as amended, state, in pertinent part, "Where a defendant alleges ineffective assistance of prior trial counsel . . . as a ground for post-conviction relief . . ., the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney –client privilege shall be deemed automatic upon filing of the allegation alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for the purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation."(emphasis added);

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8. the State submits a non-waivable conflict of interest exists between William I. Diggs, Esquire, and the defendant, in that the defendant has, by the filing of his Post Conviction Relief petition, already waived attorney-client privilege in connection with the companion case;
9. William I. Diggs, Esquire, has represented to the Court in connection with the present case that he intends to offer a similar defense and similar mitigation utilizing the same experts from the companion case; and
10. waiver of the attorney-client privilege in the companion case would materially limit the representation of William I. Diggs, Esquire, in the present case.

Based upon the above, the State moves this Court to review the status of William I. Diggs, Esquire, as counsel for the defendant in the above captioned case and seeks a hearing so that this matter may be heard as soon as is practicable.

I SO MOVE:

J. Gregory Hembree, Solicitor
Fifteenth Judicial Circuit
Post Office Box 1276
Conway, South Carolina 29528
(843) 915-8609

April 28, 2009

Conway, South Carolina

3697

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

ROBERT PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

ORDER

The petition for rehearing filed in the above entitled matter is denied.

s/Jean H. Toal C.J.

s/Costa M. Pleicones J.

s/Donald W. Beatty J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

Columbia, South Carolina

April 3, 2013

cc:
Robert M. Pachak, Esquire
J. Anthony Mabry, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
John Gregory Hembree, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Stephen C. Stanko, #6022,	)	
	)	Case No. 2014-CP-26-035
Applicant,	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

APPLICANT'S MOTION FOR CONTINUANCE

Applicant Stephen C. Stanko, through undersigned counsel, respectfully moves for a continuance of the PCR merits hearing because the Court's blanket denial of all funding requests for reasonably necessary expert assistance has crippled counsel's ability to provide applicant with adequate post-conviction representation.

This Court scheduled a hearing on the merits of Stanko's post-conviction relief claims to begin on March 2, 2015. The Court also set a deadline for the completion of discovery for January 31, 2015. Despite undersigned counsel's diligent work since being appointed, counsel will be unable to prepare for a hearing by March 2, 2015 because the Court has denied all funding requests for expert services. Without expert assistance, Stanko cannot effectively prepare for a hearing on his claims. Stanko, therefore, respectfully requests this Court continue the hearing in this case for nine months from the date the Court rules on Stanko's October 14, 2014 *Ex parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services, and to adjust the deadline for

completing discovery accordingly.[1] Stanko further requests a hearing with oral argument on this motion as permitted by the Court's April 29, 2014 scheduling order.

The legal and factual bases for this motion are set forth below.

I. PROCEDURAL HISTORY

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[2] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014.

On February 21, 2014, this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014. Scheduling Order (Feb. 21, 2014). The Court subsequently, on April 29, 2014, amended the Scheduling Order to tentatively schedule a merits hearing for February of 2015. Amended Scheduling Order (Apr. 29, 2014). On September 25, 2014, the Court set a date certain for the merits hearing, scheduling the trial in this post-conviction relief proceeding to commence on March 2, 2015 and ordering the discovery be

[1] Counsel request a nine month continuance because the experts they consulted indicate six to nine months is the minimum amount of time it will take to prepare for a hearing on Stanko's claims.

[2] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

completed by January 31, 2015. Order for Date Certain Trial and Second Amended Scheduling Order (Sept. 25, 2014).

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation. On April 1, 2014, counsel filed Applicant's First Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B). During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[3] Specifically, the First Funding Motion requested the Court authorize funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Stanko

[3] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

First Funding Motion 6-7 (Apr. 1, 2014).

provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[4] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, this Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[5] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel

[4] The facts in support of Stanko's requests are set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[5] This motion was likewise filed *ex parte* as permitted by South Carolina law.

could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the Court denied all funding requested for a forensic psychologist. The Court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The Court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's

social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Stanko filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Stanko argued the Court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot be determined because Stanko could not present the Court with the conclusions the experts will reach. Stanko argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

The capital case funding statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services *prior to the court's authorization of funds*. The Court's interpretation of the "reasonably necessary" requirement impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). In light of the merits hearing scheduled for March 2, 2015, Stanko asked the Court to hold an *ex parte* hearing on the Second Motion to Reconsider as soon as possible.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the Court order Stanko transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the Court sent counsel an email canceling the *ex parte* hearing, informing Stanko the Court would decide the Second Motion to Reconsider without oral arguments, and ordering Stanko to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Stanko's Motion for Order of Transport. The Court has, thus, not ruled on Stanko's Second Motion to Reconsider and, as of the filing of this motion, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 2, 2015.

II. LEGAL BASIS FOR GRANTING A CONTINUANCE.

The South Carolina post-conviction relief statute explicitly authorizes this Court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). The statute does not set a limit for the amount of time the Court can continue the hearing. The statute requires only that the Court find good cause for the continuance granted.

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

III. ARGUMENT

Undersigned counsel have done everything in their power to attempt to prepare for Stanko's post-conviction relief hearing now-scheduled for March 2, 2015. Nevertheless, a continuance is necessary because the Court has continually denied counsel's requests for the assistance of experts, which counsel has demonstrated in multiple funding motions to be reasonably necessary for the representation of Stanko. S.C. Code § 16-3-26(C)(1). The Court has done so based on an improper reading of the capital case funding statute, finding that the necessity of expert assistance can only be determined after the expert services have been completed and result in a favorable outcome for the applicant.[6] Given the necessity of the assistance of the experts to effectively develop and present Stanko's claims for relief, the Court's denials have prohibited counsel from preparing for a hearing. *See Williams*, 618 F.2d 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided").

As described above, early on in their investigation in Stanko's case, counsel identified the need for expert assistance, contacted the experts able to provide the required assistance to determine their willingness and availability to assist on the case,[7] and asked the Court to authorize funding for their services. This was all completed in an attempt to prepare for the hearing date scheduled by this Court. Counsel then presented the Court with specific and detailed reasons necessitating the assistance of a licensed social worker, a forensic psychologist, and a media

[6] Due to the Court's denial of funding requests based on this standard, it would be futile for Stanko to request the services of any other experts that might assist in preparing and presenting his claims for relief.

[7] Dr. Arlene Andrews (licensed social worker), Dr. Susan Knight (forensic psychologist), and Professor Neil Vidmar (media expert) have been contacted by counsel, become somewhat familiar with the case, and have expressed their willingness and availability to work on the case. *See* Andrews Aff. ¶¶ 3, 5, *attached*; Knight Aff. ¶ 3, *attached*.

expert. In spite of the demonstrated necessity of expert services, the Court denied two *ex parte* funding requests and a motion to reconsider and has not ruled on counsel's Second Motion to Reconsider, though it was submitted to the Court over two months ago. Moreover, although counsel requested an opportunity to be heard at an *ex parte* hearing as permitted by the Court's scheduling order, the Court has now canceled the hearing and refused to hear argument on the funding denials. As a result, counsel's hands are tied and they cannot complete preparation for the hearing scheduled in less than two months.

The experts contacted by counsel, who have expressed a willingness to work on Stanko's case, cannot begin working on the case until this Court authorizes funding for their services. *See* Andrews Aff. ¶ 8 (stating she cannot complete a social history without authorization of funds by this Court); Knight Aff. ¶ 4 (stating she cannot complete a mental health evaluation without authorization of funds by this Court and that it would be unethical for her to provide services where her payment was contingent upon assisting in developing a winning claim). Even if the Court ruled immediately on the Second Motion to Reconsider, however, counsel could not effectively prepare for a hearing in March of 2015. The experts indicated the required preparation and evaluations in Stanko's case cannot be completed for six to nine months after the Court authorizes funding for their services. Andrews Aff. ¶ 9; Knight Aff. ¶ 6. That the experts cannot complete their services prior to the hearing date as scheduled cannot be held against Stanko because counsel have worked as diligently as possible to prepare for a hearing, given the denial of funding for experts, and this Court has thus far denied Stanko the expert assistance demonstrated to be reasonably necessary to prepare his defense in contradiction of the capital case funding statute. *See* S.C. Code §§ 16-3-26(C)(1).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Stanko's claims for relief. Accordingly, Stanko has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court continue the post-conviction relief hearing for nine months from the date it rules on the Second Motion to Reconsider and adjust the discovery deadline accordingly.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request this Court find good cause shown and continue the post-conviction relief hearing, currently scheduled for March 2, 2015, for nine months from the date it rules on Stanko's Second Motion to Reconsider and to adjust the discovery deadline accordingly. Counsel further requests this Court schedule a hearing for oral argument on this Motion for a Continuance as soon as practicable.

January 6, 2015

Respectfully submitted,

EMILY C. RAAVOLA
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803-765-1044

LINDSEY S. VANN
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803-765-1044

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Arlene Bowers Andrews, PhD, who appeared personally before me, affirms and states the following:

1. I, Arlene Andrews, am a Licensed Social Worker, have a PhD in psychology, and am a retired professor of social work.

2. I have been retained to evaluate and present a social history in approximately fifteen (15) capital cases at the trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on June 25, 2014 about evaluating and presenting Mr. Stanko's social history in his Horry County post-conviction relief proceedings.

4. I would typically not begin working on a capital case without a funding order from the Court authorizing payment for my services. However, I have worked with Ms. Paavola before, and she explained to me that Mr. Stanko's case was scheduled for hearing within a relatively short period of time and she was concerned about waiting to get started while the motion for funding remained pending. Therefore, I began working on Mr. Stanko's case prior to receiving an order from the Court authorizing funding for my services. I cannot, however, continue my social history evaluation or present my findings to the Court without an order authorizing payment for my services.

5. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client.

6. Since being contacted by Mr. Stanko's attorneys, I have reviewed the trial record to determine what social history evaluation had already been completed; I have reviewed social history records already collected by counsel and the mitigation investigator; I met and interviewed Mr. Stanko; and, I interviewed Mr. Stanko's brother.

7. Based on my preliminary evaluation, it is clear to me that a grossly inadequate social history was presented during Mr. Stanko's trial. My initial work has begun to reveal a compelling and mitigating social history story. Based on this initial review and my experience in other capital cases, I believe it is possible that an adequate investigation in Mr. Stanko's case could reveal mitigating evidence of physical abuse, sexual abuse, parental neglect and abandonment, and/or mental illness.

8. A significant amount of work remains to complete and present my social history evaluation. I must: (1) interview Mr. Stanko several more times; (2) interview Mr.

Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends from childhood and leading up to his crimes; (4) review the social history records counsel are continuing to collect; (5) conduct any additional work that may develop as the investigation progresses; and (6) prepare my opinion for presentation to the Court. This is work that cannot be completed without authorization of funds from the Court.

9. The work that remains will take approximately six (6) to nine (9) months to complete once the Court authorizes funding. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. My social history evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation. Additionally, I am currently preparing for a hearing on a case in Aiken County, which will not allow me to continue my work on Mr. Stanko's case until February 15, 2015.

10. I believe Mr. Stanko's social history is likely to provide powerful mitigating evidence, but without the authorization of funds from the Court and a continuance of the hearing, I cannot complete the social history evaluation or aid counsel in their presentation of Mr. Stanko's social history at a hearing.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Arlene Bowers Andrews
ARLENE BOWERS ANDREWS

Sworn to and subscribed before me
This 4th day of January, 2015

Jill R. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-14

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

Susan Knight, PhD, ABPP, who appeared personally before me, affirms and states the following:

1. I, Susan Knight, am a clinical psychologist with specialization and board-certification in forensic psychology. I am currently employed full-time in private practice conducting forensic psychological evaluations for various legal and organizational entities. I am also a Clinical Assistant Professor in Psychiatry and Behavioral Sciences at the Medical University of South Carolina, and hold adjunct professor positions at the Charleston School of Law and the Cornell Law School.

2. Over the course of my career, I have conducted hundreds of court-ordered forensic evaluations of criminal defendants, as well as many privately retained evaluations. These evaluations have primarily addressed the psycho-legal issues of legal competencies, mental state at the time of offense, and sentencing/mitigation considerations. Further, I have been retained for consultation and/or to conduct a mental health evaluation in approximately nine capital cases at the pre-trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on March 25, 2014 about conducting and presenting a mental health evaluation of Mr. Stanko for his Horry County post-conviction relief proceedings. I am available and willing to work on the case, but cannot begin doing so until the Court authorizes funding for my services.

4. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client. Further, per guidelines governing conduct for my profession, such contingent fees are considered a "threat to impartiality" and therefore "forensic practitioners strive to avoid providing professional services on the basis of contingent fees" (Specialty Guidelines for Forensic Psychology, 2013, p. 12). Therefore, in keeping with ethical practice standards, I would not be able to accept a case under such conditions.

5. In order to complete my evaluation, I must: (1) review the trial transcript; (2) conduct comprehensive interviews with Mr. Stanko on multiple occasions; (3) interview collateral sources, including Mr. Stanko's siblings, other family members, and friends from childhood and the time leading up to his crimes; (4) review the mental health and social history records counsel have collected; (5) conduct any additional work that may develop as the evaluation progresses; and (6) prepare my opinion for presentation to the Court, which would likely include an extensive and detailed report of my findings. This is work that cannot be completed without authorization of funds from the Court.

6. Once the Court authorizes funding for a mental health evaluation, the evaluation will take approximately six (6) months to complete. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. A mental health evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation.

7. Without the authorization of funds from the Court and a continuance of the hearing, I cannot complete a mental health evaluation or aid counsel in their presentation of Mr. Stanko's post-conviction claims.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

SUSAN KNIGHT

Sworn to and subscribed before me
This 5TH day of JANUARY, 2015

Notary Public for the State of South Carolina
My commission expires: My Commission Expires May 9, 2017

STATE OF SOUTH CAROLINA)	
)	
COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)	
)	
Applicant,)	Case No. 2014-CP-26-03
)	
vs.)	**CERTIFICATE OF SERVICE**
)	
State of South Carolina,)	
)	
Respondent.)	
)	

The undersigned certifies that a copy of the Applicant's Motion for Continuance was mailed today by first class United States mail, postage prepaid, this 6th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY)	FIFTEENTH JUDICIAL CIRCUIT
)	
Stephen C. Stanko, #6022,)	Case No. 2014-CP-26-035
)	
Applicant,)	**MOTION TO UNSEAL EX PARTE FUNDING REQUESTS AND ORDERS REGARDING THE SAME**
)	
vs.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This is a capital post-conviction relief action in which the Applicant has moved for a continuance of the March 2, 2015 trial date based on this Court's alleged denial of all *ex parte* funding requests. Respondent, through the undersigned attorneys, moves this Court to issue an Order unsealing any and all *ex parte* funding requests and Orders regarding the same so that Respondent may adequately and properly respond to Applicant's continuance motion whether in writing or at a scheduled hearing on said motion. Respondent has no knowledge of these *ex parte* matters except for the limited information set forth in Applicant's Motion for Continuance. Respondent does not know the validity of Applicant's assertions in his Motion or the basis of this Court's denial of such alleged funding requests.

There is no statutory or a constitutional right to be heard on funding requests *ex parte*[1] and *in camera*[2] in this setting. Respondent acknowledges, however, the right of the Court to

---

1 "A 'judicial proceeding ... taken ... for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 297(5th ed. 1983)).

2 "An *in camera* proceeding ... is a 'trial or hearing held in a place not open to the public...'." *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law

authorizes the PCR court to grant a continuance of the hearing beyond 180 days after the status conference where "good cause is shown." *Id.*

IV. ARGUMENT

Funding Standard

Undersigned counsel are in an impossible (and unprecedented) bind. The PCR court has denied requests for funding for necessary expert assistance on the basis that Petitioner cannot provide the court with the conclusions the experts will reach. This is not only inconsistent with the relevant statutory language, but it is also at odds with more than twenty years of capital post-conviction practice in this state; no other judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude. The statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. In counsel's experience, and in the experience of other practiced capital post-conviction attorneys in South Carolina, no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 5; Holt Aff. ¶ 4.[8] Instead, courts have required counsel for PCR applicants to simply explain that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* Norris Aff. ¶ 7, Bloom Aff. ¶ 7.

[8] In addition to other affidavits supporting Petitioner's specific funding requests, with the Second Motion to Reconsider, Petitioner submitted three affidavits from experienced counsel, which are attached to this Petition. The affidavits are attached as Exhibit F.

The Supreme Court of South Carolina

Stephen C. Stanko, SK 6022, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-000212

ORDER

Counsel for petitioner have filed a "Petition for Court Oversight of Capital PCR Action" in which they essentially ask this Court to review the circuit court's rulings on *ex parte* motions regarding funding for experts filed in this matter. The State has filed a return in which it requests this Court issue an order unsealing the *ex parte* funding requests and orders so that it may properly respond to the merits of the petition before this Court.[1] The petition and the State's request are denied.[2]

C.J.

J.

J.

J.

J.

[1] The State currently has such a motion pending before the circuit court, where it can be ably addressed.

[2] We note, however, that the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1986) and such proceedings were found to be improper.

4114

Columbia, South Carolina

February 25, 2015

cc:
Emily C. Paavola, Esquire
Lindsey Sterling Vann, Esquire
J. Anthony Mabry, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire

4115

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-26-035

Stephen C. Stanko, #6022
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court.*** The issues have been tried or heard and a decision rendered. ☑ See Page 2 for additional information

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Applicant's Motion to Reconsider Denial of Funding for Expert and Investigative Services and Request for Ex Parte Hearing filed 10/14/2014 is DENIED.

Applicant's Motion for Continuance filed 1/6/2015 is DENIED.

Applicant's Motion In Limine filed 2/16/2015 is DENIED. See page 2.

Applicant's Motion for Summary Judgment filed 2/16/215 is DENIED.

(*These motions are decided without oral arguments.)**

2015 FEB 27 PM 1:01

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A

If applicable, describe the property, including tax map information and address, referenced in the order: **4161**

SCRCP Form 4C (03/2013) Page 1

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Benjamin H. Culbertson

Benjamin H. Culbertson, Circuit Court Judge	2148	Feb. 27, 2015
	Judge Code	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the 27 day of Feb, 20 15 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Emily C. Paavola	Anthony Mabry
Lindsey S. Vann	Jimmy A. Richardson
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

Melanie Huggins-Ward
CLERK OF COURT

Court Reporter: None

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

In their briefs, the parties differ as to the proposed testimonies of Russell Stetler and Jeffrey P. Bloom. The court does not know which party's recitation of the testimonies is accurate and, therefore, is unable to rule as a matter of law in this Motion In Limine whether such testimonies are admissible or not. Therefore, the Motion In Limine is denied. The court will rule on the admissibility of such testimonies at trial. Respondent may challenge the admissibility of these testimonies when, and if, presented at trial.

4162

SCRCP Form 4C (03/2013) Page 2

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS	
COUNTY OF HORRY)	2014-CP-26-35	
Stephen C. Stanko,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	March 2-3, 2015
	)	
The State,	)	PCR Hearing
	)	
Defendant.	)	

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

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

Emily Paavola, Esquire
Lindsey Vann, Esquire
Attorneys for Plaintiff

Donald J. Zelenka, Esquire
Caroline Scrantom, Esquire
Attorneys for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

A Of course.
Q You testified that your understanding of the standard for South Carolina in a death penalty case was that Defense counsel should offer anything that a jury might consider mitigating in the penalty phase?
A Yes.
Q Did you think it was mitigating for your experts to testify that Mr. Stanko is a psychopath who cannot help killing people?
A Well, I, I would object. I wouldn't want them to use that word psychopath, but in effect, it's kind of an accurate way to describe Stephen when he's in that state.
Q Did you think it --
A You know, it's unfortunate but that's what happens.
Q Did you think it would be mitigating for your experts to compare him to Ted Bundy and Jeffrey Dahmer?
A I don't remember the context in which those comparisons were made, but I don't think it would be mitigating to do that in the fashion that you've set forth.
Q Did you think it was mitigating for your experts to testify that he lacks a part of his brain that makes him human?
A All right. Say it again. I didn't understand.
Q Did you think it would be mitigating for your experts to testify that Mr. Stanko lacks the part of his brain that makes

him human or that area of his brain does not function?
A Yes.
Q Did you think it would be mitigating for them to compare him to a great white shark?
A I think the way that the experts chose to describe him were descriptions that they chose based on their training and understanding, but in effect, you know, that's what the problem is with Stephen. We've seen what he does because of this defect. You know what I mean?
Q Thank you, Mr. Diggs. We have no further questions.
A All right. Thank you.
MR. ZELENKA: I've, I've got a question for the Court or for counsel. Where in the Horry County record is a reference made to Dahmer or Ted Bundy?
MS. PAAVOLA: Your Honor, those references are in the record either in the Georgetown or the Horry County. I don't have them right here in front of me, but I'd be happy to provide them if the Court wishes to know what page numbers those are on.
THE COURT: All right. We'll --
MS. PAAVOLA: Oh, we have -- I'm sorry. We have it right here. Sure. The Ted Bundy comparison, this is on page 2232, the Jeffrey Dahmer comparison also on page 2233. I didn't ask him about that one. Are those the only questions or were there others?

told the jury that Mr. Stanko is a psychopath who cannot help killing people?

A Dr. Sachy?

Q Yes.

A I was present through the entire trial. So I'm certain I was there when he said that.

Q Were you there when he said that Mr. Stanko's case was comparable to Ted Bundy's or Jeffrey Dahmer's?

A I'm sure I was there for that.

Q Were you aware that he told the jury that antisocial personality disorder is a disorder that cannot be cured or changed?

A I'm sure I was present if he said that.

Q Were you concerned that if the jury did not accept this evidence for your insanity defense they would later use these arguments as a reason to sentence Mr. Stanko to death?

A Yes. But I'm going to say it again, there was nothing else we had, and if you have a doctor who will say that your client is insane, I think it would have been absolutely inexcusable to go to trial and not put that evidence up.

Q Dr. Thrasher would not say that your client was insane; is that right?

A Correct. But Dr. Sachy did.

Q And the reason Dr. Thrasher didn't want to say that was because he felt Mr. Stanko's conduct did not demonstrate

FORM 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

2008CP22 1446

Stephen C. Stanko, #6022
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

2008 OCT 17 P4:17
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

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

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

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 05-GS-22-918

   (b) Murder, assault and battery with intent to kill, criminal sexual conduct first degree, kidnapping (2 counts), armed robbery.

   (c) _____

CERTIFIED A TRUE AND CORRECT COPY
DEPUTY CLERK OF COURT
GEORGETOWN COUNTY, SC

5. The date upon which sentence was imposed and the terms of the sentence:

(a) August 11, 2006.

(b) Death sentence

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(c) after a plea of nolo contendere _____

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

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

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

i. South Carolina Supreme Court

ii. United States Supreme Court

iii. _____

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

i. Sentence and conviciton affirmed.

ii. Certiorari denied.

iii. _____

(c) the date of each such result:

i. February 25, 2008, rehearing denied March 19, 08

ii. October 6, 2008

iii. _____

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

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

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

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

(a) Ineffective assistance of trial or appellate counsel

(b) _____

(c) _____

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

(a) Trial counsel failed to preserve for appellate review the judge's failure to instruct the jury on the statutory mitigating circumstance of the age or mentality of the defendant at the time of the crime as provided by S.C. Code Section 16-3-20 (C)(b)(7)

(b) _____

(c) _____

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

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

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

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

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

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

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

previously been presented:

(a) Issue was not preserved for appellate review.

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

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

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

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

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

i. William I. Diggs, 1700 Oak St. Suite D, Myrtle Beach, SC

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

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

iv. Kathrine H. Hudgins, 1330 Lady St. Suite 401, Columbia, SC

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

i. Trial

ii. Trial

iii. Appeal

iv. Appeal

19. State clearly the relief you seek in filing this application:

New trial and sentencing

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF Georgetown)

I, Stephen C. Stanko, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Stephen C. Stanko

Sworn to and subscribed before me
This 13th day of Oct., 2008.

L.S.
Notary Public for South Carolina
My Commission Expires _____

2008 OCT 17 P 4:2
CLERK OF COURT
GEORGETOWN, S.C.

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Stephen C. Stanko, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Stephen C. Stanko
Applicant

Sworn to and subscribed before me
This 13th day of Oct., 2008.

L.S.
Notary Public for South Carolina
My Commission Expires: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEROGETOWN)

IN THE COURT OF COMMON PLEAS

Stephen C. Stanko, #6022
Plaintiff(s)

vs.

State of South Carolina
Defendant(s)

CIVIL ACTION COVERSHEET

2008-CP - 22- 1446

(Please Print)
Submitted By: E. P. Bill Godfrey
Address: 10 East Ave., Greenville, SC 29601

SC Bar #: 13043
Telephone #: (864) 467-9196
Fax #: (864) 467-9427
Other: cell (864) 630-2274
E-mail: bill@godfreylawfirm.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** October 16, 2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

4519

SCCA / 234 (10/09)

FORM 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)
)
Stephen C. Stanko, #6022)
Full name and prison number (if any) of Applicant.)
)
v.)
)
State of South Carolina)
)

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

FILED
2009 OCT 21 A 11:04
GEORGETOWN COUNTY, S.C.
ALICIA [illegible]
CLERK OF COURT

FINAL AMENDED APPLICATION

FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

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

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

Revised 3/2003

4520

3. Name(s) of co-defendant(s) (if any) ___

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 05-GS-22-918

(b) Murder, Assault and Battery with Intent to Kill, Criminal Sexual Conduct, First Degree, Kidnapping (2 counts), and armed robbery

(c) ___

5. The date upon which sentence was imposed and the terms of the sentence:

(a) August 11, 2006

(b) Death Sentence

(c) ___

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ___

(b) after a plea of not guilty X

(c) after a plea of nolo contendere ___

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

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

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

I. South Carolina Supreme Court

ii. United States Supreme Court

iii. ___

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

I. Sentence and conviction affirmed

ii. Certiorari denied

iii. ___

(c) the date of each such result:

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

ii. October 6, 2008

iii. ___

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

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

ii. ___

iii. ___

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

(a) ___

(b) ___

(c) ___

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

(a) Ineffective assistance of trial and appellate counsel

(b) ___

(c) ___

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

(a) Trial counsel failed to preserve for appellate review the judge's failure to instruct the jury on the statutory mitigating circumstance of the age or mentality of the defendant at the time of the crime as provided by S.C. Code Section 16-3-20 (C)(b)(7)

(b) Trial counsel failed to request a change of venue based upon the pre-trial publicity of this case and based upon the fact that about 116 potential jurors were questioned, 72 excused, 44 qualified, and 50 had fixed opinions.

(c) Trial counsel was ineffective for seating 5 jurors on the panel who had formed opinions; and one juror who knew and was close friends with the minor victim's principal and was acquainted with a detective. The 5 jurors are as follows: Donald Horton, 161; Stephen Walters, 343; David Dubois, 84; Patricia Wofford, 363; and Larry Drake, 82. Trial counsel failed to question Carroll Eugene Baker, 368, who seemed anxious, based on notes, as the Court was questioning him and allegedly was formerly the Captain of the Fire and Rescue Squad and may have been present at the crime scene.

(d) Trial counsel failed and refused to use any of the documents showing defendant's desperate battle and eventual success to have his wrongful classification as a "sex offender" removed from his record. This information would have aided the insanity defense by showing how the adult victim's statement that she would call the defendant's Department of

Probation, Parole and Pardon Services agent and advise that the defendant had been improperly touching the minor victim created fear in the defendant which caused him to black out because of his mental defect to the point that he did not know the difference between moral and legal right and wrong at the time of the incident.

(e) Trial counsel failed and refused to allow defendant to have the witness list of the state. Trial counsel did not discuss the potential testimony of the witnesses with the defendant; therefore, counsel was unprepared to effectively cross examine the witnesses against the defendant to the point that the witnesses could say almost anything they wanted about defendant without any effective cross examination. Proper cross examination of the witnesses would have lessened the impact of the negative statements made against the defendant. The ineffective cross examination of Vernon House, Darrell Lewis, Steve Lee, James Jackson, Irby Walker and perhaps others was prejudicial to the defendant.

(f) Trial counsel failed to use all of the favorable or mitigating information contained in the defense file such as the Department of Probation, Parole &Pardon Services file and other information to the prejudice of defendant.

(g) Appellate counsel failed to request sufficient time to properly prepare the appeal in light of Justice Jean Toal's Order that the appeal should be expedited and that no extensions would be granted absent extraordinary circumstances and that such extensions were to be granted only by Justice Toal or the full Court. The defendant's due process rights were violated by appellate counsel not receiving sufficient time to research, write, and prepare the appeal.

(h) Appellate counsel failed to brief and argue that defendant's motion for directed verdict should have been granted by the trial court.

(I) Trial counsel was ineffective for failing/refusing to use documents provided by both the Defendant and defense investigators that would have refuted testimony and/or impeached state witnesses.

(j) The state committed prosecutorial misconduct in failing to provide discovery documents to the defense pursuant to statutory requirements and rules of procedure.

(k) Trial counsel was ineffective for failing to object to numerous statements of witnesses referencing the Defendant as "the murderer" and other inflammatory and prejudicial terms.

(l) The South Carolina Supreme Court violated the Defendant's due process rights by literally placing appellate attorneys in an unfair, unjust, and unreasonable position to perfect a complete appeal in a capital case with 3,000 pages of transcripts and highly complex arguments and issues with no provision for extensions which are normally and frequently granted in all other death penalty cases.

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

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

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

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

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

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

I. ___

ii. ___

iii. ___

iv. ___

(b) the name and location of the Court in which each was filed:

I. ___

ii. ___

iii. ___

iv. ___

(c) the disposition thereof:

I. ___

ii. ___

iii. ___

iv. ___

(d) the date of each such disposition:

I. ___

ii. ___

iii. ___

iv. ___

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

I. ___

ii. ___

iii. ___

iv. ___

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

___

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

I. ___

ii. ___

iii. ___

(b) the proceedings in which each ground was raised:

I. ___

ii. ___

iii. ___

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

(a) Issue was not preserved for appellate review

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

(c) ___

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

(a) your arraignment and plea? ___

(b) your trial, if any? Yes

(c) your sentencing? Yes

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

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

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

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

I. William I. Diggs, 1700 Oak St. Suite D, Myrtle Beach, SC 29577

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

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

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

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

I. Trial

ii. Trial

iii. Appeal

iv. Appeal

19. State clearly the relief you seek in filing this application:

New Trial and Sentencing

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Georgetown)

I, Stephen C. Stanko, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Stephen C. Stanko

SWORN to and subscribed before me this 2nd day of July, 2009.

Virginia L Walker (L.S.)
Notary Public

My Commission Expires: 4/4/2017

FILED
GEORGETOWN COUNTY, S.C.
2009 OCT 21 A 11:04
ALICIA C. WHITE
CLERK OF COURT

Revised 3/2003

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)) Applicant,)) vs.)) State of South Carolina,)) Respondent.))	Case No. 2014-CP-26-035 **EX PARTE** **TO BE FILED UNDER SEAL** **APPLICANT'S FIRST MOTION TO AUTHORIZE FUNDING FOR EXPERT AND INVESTIGATIVE SERVICES**

Applicant Stephen C. Stanko is an indigent, death-sentenced inmate. He is seeking post-conviction relief from his convictions and sentence. Mr. Stanko respectfully moves this Court to authorize the following amounts: (1) $10,000 for factual investigative services, (2) $15,000 for mitigation investigative services, and (3) $15,000 for the services of a forensic psychologist.

These funds are necessary to provide Mr. Stanko with constitutionally and statutorily adequate resources to pursue his post-conviction relief action. *See, e.g.*, U.S. Const. amends V, VI, VII, XIV; S.C. Const. arts. I, III, XIV; S.C. Code § 17-27-160; *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. App. Ct. R. 602. Applicant reserves the right to move for additional funds as they become necessary.

This motion is *ex parte* as authorized by state law. S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B). Mr. Stanko requests that this Court order this motion sealed and not filed in the public record of this proceeding or disclosed in any manner to the State or its attorneys.[1]

[1] Applicant does not request a hearing on this motion and anticipates the Court will decide the motion without a hearing, per the Court's scheduling order. If, however, the Court deems a hearing necessary, Applicant asks this Court to conduct any hearings ancillary to this motion outside the presence of the solicitor, the attorney general, law enforcement personnel, state and county officials, news media, and the general public and to enter an appropriate order under seal. *Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994).

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The legal and factual bases for this motion are set forth below.

I. LEGAL BASIS FOR AUTHORIZING THE EXPENDITURE OF FUNDS IN EXCESS OF THE STATUTORY LIMITS.

The South Carolina legislature has provided that indigents seeking post-conviction relief from capital judgments are entitled to expert assistance upon an *ex parte* finding by the court that such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant"); *see also* Rule 602(g)(6), SCACR ("In post-conviction relief matters, expenses related to representation and fees of appointed counsel may be paid where permitted and as prescribed in these Rules and the Defense of Indigents Act.").

The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings]

necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The ability to retain the services of experts and investigative assistance in various areas is particularly essential in capital cases. A capital case "is an extraordinary proceeding" where "the attorney is charged with the awesome responsibility of defending a person's life." *Bailey*, 309 S.C. at 460, 424 S.E.2d at 506. To prepare for the guilt or innocence phase of a capital trial, an attorney must vigorously and thoroughly investigate the facts and circumstances of the alleged crime, which often requires the assistance of various experts. *See id.* (recognizing that unlike the solicitor, the defense attorney does not have "the entire array of state, county, and municipal law enforcement" at his disposal). Just as assistance is imperative in the guilt or innocence phase of a capital case, it is equally necessary during the sentencing phase where counsel is challenged by novel and complex issues. *See id.* at 461, 424 S.E.2d at 506-07. Due to the finality and irrevocability of the penalty of death, the United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In order to ensure that the appropriate sentence is chosen, the Court has emphasized the importance of presenting to the sentencing body the fullest information possible concerning the defendant's life and characteristics. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that preventing the sentencer in a capital case from considering the defendant's characteristics "creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also Jurek v. Texas*, 428 U.S. 262, 271 (1976) (asserting that the sentencing body must have before it all possible relevant information about the individual whose fate it must determine).

Thus, in capital cases, defense counsel has a duty to vigorously investigate and present mitigating evidence. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Williams v. Taylor*, 529 U.S. 362, 393 (2000). This duty requires that counsel's investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." (internal quotation marks omitted)).

Post-conviction counsel must "continue an aggressive investigation of all aspects of the case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4); *see also id.* 10.15.1(E)(4) commentary ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."). Post-conviction counsel must review the record and conduct investigation to determine whether the applicant's conviction or sentence are "in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code § 17-27-20(A)(1). This responsibility necessarily includes determining whether the applicant received ineffective assistance of counsel during his trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). If trial counsel's decision to end investigation, including mitigation investigation, was either inconsistent with professional standards or unreasonable because known information should have led counsel to investigate further, a capital defendant may have a valid claim of ineffective assistance of counsel. *See Sears*, 130 S. Ct. at 3264; *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *Strickland*, 466 U.S.

688, 690-91 (1984). When evaluating *Strickland* claims, courts "evaluate the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*'" *Wiggins*, 539 U.S. at 536 (quoting *Williams*, 529 U.S. at 397-98).

II. FACTS RELEVANT TO MOTION FOR AUTHORIZATION TO EXPEND FUNDS FOR EXPERT SERVICES.

Mr. Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[2] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Mr. Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Mr. Stanko on February 4, 2014. On February 21, 2014 this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014.

At trial, the defense presented an insanity defense during the guilt phase. The defense presented the testimony of seven experts in an effort to prove that Mr. Stanko was legally insane at the time of the crime because he is a "psychopath." After presenting this testimony, the defense argued the jury should find Mr. Stanko not guilty by reason of insanity. The jury rejected this argument and found Mr. Stanko guilty at the conclusion of the guilt phase of the trial.

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[2] Mr. Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Mr. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Mr. Stanko in connection with his Georgetown County proceedings.

In the penalty phase, the prosecution presented three types of evidence. First, the prosecution offered evidence of Mr. Stanko's prior criminal history and criminal acts, including previous kidnapping and assault and battery of a high and aggravated nature convictions and numerous instances of Mr. Stanko defrauding people by passing himself off as a lawyer or a business person. Second, the prosecution presented evidence of Mr. Stanko's prior Georgetown County conviction for the murder of Laura Ling and rape of her teenage daughter. Finally, the prosecution presented victim impact evidence from Mr. Turner's family.

Trial counsel's strategy for the penalty phase was to essentially re-offer the defense theory that Mr. Stanko was insane at the time of the crimes—a theory the juries had previously rejected in both the Ling trial and in the guilt-or-innocence phase of the Turner trial. The defense also presented a hastily prepared mitigation case, comprising of the brief testimony of a neighbor, three former teachers, and three employees of the South Carolina Department of Corrections. Finally, the defense called a Licensed Social Worker who testified that she had only recently begun working on the case and felt that Mr. Stanko dealt with some largely unspecified "difficulties" during his childhood.

Undersigned counsel have been diligently working on this matter since their appointment on February 4, 2014. Based on the totality of circumstances in this case—including counsel's review of the record, initial meetings with Mr. Stanko, and preliminary investigation—counsel have determined that, at a minimum, the expert services of a fact investigator, a mitigation investigator, and a forensic psychologist are imperative to assist counsel in investigating and presenting Mr. Stanko's claims for post-conviction relief. Further, it is important to note that the scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-

conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance at adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

III. FACTS AND ARGUMENT RELEVANT TO REQUEST FOR A FACT INVESTIGATOR.

Undersigned counsel's preliminary review of the trial record, court exhibits, portions of trial counsel's files, interviews with Mr. Stanko, and interviews with a majority of the jurors for Mr. Stanko's trial have revealed a number of factual issues in need of investigation. For example, one juror who decided Mr. Stanko's fate at trial recently revealed new facts which, if true, suggest the possibility of juror bias, juror misconduct, and the inadequate assistance of counsel during jury selection. These allegations were not addressed on the trial record, and they require follow up investigation to fully develop the potential claims raised by this revelation. A fact investigator is, therefore, necessary to investigate the possible bias of one of the jurors, who decided whether Mr. Stanko should live or die. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process [requires] a jury capable and willing to decide the case solely on the evidence before it.").

Review of trial counsel's files and interviews with Mr. Stanko further reveal that trial counsel did not fully investigate the incidents presented by the state at trial in which Mr. Stanko was portrayed as a con-man with violent tendencies. The prosecution presented multiple witnesses who described instances where Mr. Stanko created fraudulent schemes by presenting himself as a lawyer or a person able to help with legal or business matters, taking money for his work but not completing the work he promised. Counsel's initial investigation indicates that some of this testimony presented by the state may have been false or misleading. A fact

investigator is necessary to investigate these incidents to determine whether trial counsel provided ineffective assistance in failing to investigate these incidents. *See Strickland*, 466 U.S. at 690-91.

The assistance of a fact investigator is necessary to aid Mr. Stanko in investigating these issues, identifying other issues for investigation, and presenting his claims for post-conviction relief. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1(A)(1), commentary ("The assistance of an investigator who has received specialized training is indispensable to discovering and developing facts that must be unearthed . . . in post-conviction proceedings. . . . Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case."); *see also id.* 10.4(C)(2)(a). A fact investigator is necessary to investigate and present Mr. Stanko's constitutional claims for post-conviction relief. This Court must, therefore, authorize funds for a mitigation investigator as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

An affidavit from private investigator Mark B. Harris is attached. The affidavit details Mr. Harris' experience in the field of factual investigation in capital cases. Undersigned counsel have conferred with Mr. Harris regarding Mr. Stanko's case and agree with Mr. Harris that the estimated expenditure of 200 hours is reasonably necessary to conduct the required factual investigation in this case. Mr. Harris' rate for his services is $50 per hour, which is reasonable given his experience, the complexities of investigating capital cases, and that $50 per hour is the standard rate authorized by of South Carolina Commission on Indigent Defense for fact investigators.

IV. FACTS AND ARGUMENT RELEVANT TO REQUEST FOR A MITIGATION INVESTIGATOR.

Undersigned counsel's preliminary review of the trial record, court exhibits, portions of trial counsel's files, and preliminary interviews with Mr. Stanko and the mitigation investigator retained for the Georgetown County trial have revealed that trial counsel unreasonably limited their mitigation investigation. Thus, an adequate mitigation investigation was never conducted in this case. Specifically, undersigned counsel's initial investigation makes clear that trial counsel committed to presenting Mr. Stanko as an insane psychopath early on in the course of preparation for the Georgetown County trial. As a result of this trial theory, trial counsel chose to present evidence tending to show Mr. Stanko as a psychopath and curtailed mitigation investigation, believing that evidence of Mr. Stanko's good character or other mitigating evidence contradicted the theory that he was a psychopath.[3] Trial counsel went so far as to tell defense witnesses not to testify about any good character evidence of which they may have had knowledge. During Mr. Stanko's Horry County trial, trial counsel did not retain a mitigation investigator, though trial counsel apparently asked a fact investigator, who did not have training or experience in mitigation investigation, to conduct mitigation investigation. Therefore, negligible mitigation investigation was conducted prior to Mr. Stanko's Horry County trial.

Counsel representing a capital defendant at any stage has "an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(A).

[3] Undersigned counsel's initial investigation reveals trial counsel knew, or should have known, that presenting evidence of psychopathy was not a reasonable trial strategy in either the guilt or penalty phase. Regardless of the reasonableness of the strategy, trial counsel failed to conduct an adequate investigation prior to settling on a trial strategy, creating a significant likelihood that Mr. Stanko has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*.

Counsel in capital cases have a well-established duty to present mitigating evidence. *See, e.g.*, *Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. 362; ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary. Mitigating evidence encompasses all information about a person's background and characteristics, not simply information directly related to the offense itself. *See Lockett*, 438 U.S. at 608. Therefore, investigations into mitigating evidence should comprise efforts to discover evidence related to topics including, but not limited to, the defendant's medical and mental health history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *See Porter v. McCollum*, 558 U.S. 30, 39-40, 453 (2009) (per curiam); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(A), commentary, 10.11(A). Moreover, counsel must discover all reasonably available evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11 (A).

Defense counsel in all stages of capital cases are charged with the enormous responsibility to investigate and pursue all leads that would reasonably uncover possible mitigating evidence, *see Wiggins*, 539 U.S. at 524, and it is unrealistic to believe that defense counsel can always manage this daunting task on their own. *See Bailey*, 424 S.E.2d at 460, 463-64 (explaining that capital cases require "extraordinary time, effort, and commitment" and noting that unlike solicitors, defense counsel normally does not have investigatory assistance at its disposal). Even if defense counsel is able to manage this task within the time constraints that they face, defense counsel may require expert assistance because such professionals have specialized knowledge and skill concerning mitigating issues that defense counsel lacks. *Cf.*

Ake v. Oklahoma, 470 U.S. 68, 80 (1985) (explaining the essential role experts perform through skills in gathering facts, interviewing, asking probative questions, and analyzing information).

A mitigation specialist is necessary to focus and direct the investigation of Mr. Stanko's life history and to uncover any mitigating factors that might exist. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1(A), commentary ("A mitigation specialist is . . . indispensable. . . throughout all capital proceedings" because "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."); *see also id* 10.4(C)(2)(a). A mitigation specialist is especially necessary in this case because Mr. Stanko's father was in the military when he was a child. Records for Mr. Stanko and his family are, therefore, in many different locations and in the custody of the United States military. A mitigation specialist with experience in complex record collection is necessary to complete a full investigation into Mr. Stanko's life history. *Id.* 10.7, commentary ("Counsel should use all appropriate avenues . . . to obtain all potentially relevant information pertinent to the client, his or her siblings and parents, and other family members including but not limited to . . . medical records [and] military records."). Additionally, Mr. Stanko has three living siblings, two of whom live outside of South Carolina. A mitigation expert is needed to develop a relationship with each of these siblings in order to obtain an understanding of Mr. Stanko's life growing up, the character of Mr. Stanko's now-deceased parents, and the effect the untimely death of one of Mr. Stanko's brothers had on Mr. Stanko. *See id.* 10.7, commentary ("It is necessary to locate and interview the client's family members.").

In Mr. Stanko's case, counsel did not conduct an adequate investigation into the available mitigating evidence. Given trial counsel's failure to conduct an adequate mitigation investigation, there is a strong possibility that Mr. Stanko has a viable ineffective assistance of

counsel claim under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("Counsel cannot responsibly advise a client about the merits of different courses of action [and] the client cannot make informed decisions . . . unless counsel has first conducted a thorough investigation.") (citing *Wiggins*, 539 U.S. 510; *Williams*, 539 U.S. at 395-96). A mitigation investigator is imperative to assist in the arduous task of exhaustively researching Mr. Stanko's life history in order to present this Court with evidence of the constitutional violation. This Court must, therefore, authorize funds for a mitigation investigator as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

An affidavit from mitigation specialist Drucy A. Glass is attached. The affidavit details Ms. Glass' experience in the field of mitigation investigation in capital cases. Undersigned counsel have conferred with Ms. Glass regarding Mr. Stanko's case and agree with Ms. Glass that the estimated expenditure of 200 hours is reasonably necessary to conduct the required mitigation investigation in this case. Ms. Glass' rate for her services is $75 per hour, which is reasonable given her experience and the complexities of mitigation investigation in capital cases.

V. FACTS AND ARGUMENT RELEVANT TO REQUEST FOR A FORENSIC PSYCHOLOGIST.

Mr. Stanko's mental health has been an issue in his case from the very beginning. Mr. Stanko has a high IQ of 143 and little history of violent behavior. The crimes Mr. Stanko was accused of, however, were extremely violent and poorly planned. The crimes, occurring when Mr. Stanko was in his late thirties, were an aberration, reflecting little of Mr. Stanko's known character. This immediately alerted trial counsel to consider a mental illness explanation for Mr. Stanko's actions. However, undersigned counsel's preliminary investigation reveals that trial counsel's inquiry into Mr. Stanko's mental health was inadequate in that counsel settled on a

theory that Mr. Stanko is a psychopath early on in their preparation for trial. Trial counsel's focus on this theory resulted in a curtailed mitigation investigation, as detailed above, and the failure of trial counsel to direct mental health experts to consider the relationship between Mr. Stanko's life history and brain damage and/or mental illness. Trial counsel utterly failed to present the jury with an overview of Mr. Stanko's life history. Trial counsel did not call any family members and called few friends, teachers, or employers.[4] Even the mitigation witnesses trial counsel did call were not people with the most relevant information regarding Mr. Stanko's mental health.

"Mental health experts are essential to defending capital cases." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary. Jurors making a determination of the punishment for a defendant often find "the defendant's psychological and social history and his emotional and mental health [to be] of vital importance." *Id.* Given the fact that trial counsel prematurely abandoned investigation into Mr. Stanko's life history and its effect on Mr. Stanko's mental health, there is a strong possibility that Mr. Stanko has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*. The assistance of a forensic psychologist is necessary to assist counsel in developing an understanding of Mr. Stanko's life history as it correlates to his mental health and presenting related issues to this Court in support of his post-conviction relief claims. This Court must, therefore, authorize funds for a forensic psychologist as they are "reasonably

[4] Trial counsel also failed to even interview the appropriate people in Mr. Stanko's life to develop a full understanding of his life history and mental health. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, parole officers, and others.").

necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

The current CV of forensic psychologist Dr. Susan Knight is attached. Undersigned counsel have conferred with Dr. Knight about being retained on Mr. Stanko's case. She is willing and able to assist counsel in Mr. Stanko's case. Counsel have conferred with Dr. Knight and estimate that expenditure of approximately 60 hours is reasonably necessary to conduct the required evaluation in this case. Dr. Knight's rate is $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area. Dr. Knight's rates are reasonable given her experience and the fact that, in counsel's experience, the rates are on the low end of the average rates charged by expert forensic psychologists in South Carolina.

VI. SUMMARY OF REQUESTED EXPENDITURES.

For all of the reasons set forth above, Mr. Stanko requests the following expenditures:

Fact Investigator

To investigate evidence presented in aggravation at Mr. Stanko's trial and possible juror bias and to identify issues related to the investigation, Mr. Stanko requests authorization for the initial expenditure of $10,000 to retain the services of a fact investigator to be paid at the rate of $50 per hour.

Mitigation Investigator

To exhaustively research and investigate Mr. Stanko's life history, including obtaining family records from the United States military and interviewing Mr. Stanko's out-of-state siblings, and to assist post-conviction counsel in presenting mitigating circumstances, Mr. Stanko requests authorization for the initial expenditure of $15,000 dollars and reasonable expenses to retain the services of a mitigation specialist to be paid at the rate of $75 per hour.

Forensic Psychologist

To investigate, evaluate, and develop an understanding of the correlation between Mr. Stanko's life history and his mental health and to assist post-conviction counsel in presenting mitigating evidence related to Mr. Stanko's life history and mental health, Mr. Stanko requests authorization for the initial expenditure of $15,000 and reasonable expenses to retain a forensic psychologist to be paid at a rate of $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area.

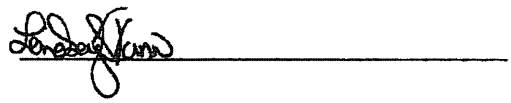
At this time, undersigned counsel are not aware of any additional investigators or experts who may be necessary for the adequate development and presentation of Mr. Stanko's claims for post-conviction relief. However, it is often the case that additional claims and corresponding needs arise as a capital post-conviction investigation progresses over time. In the event that counsel later becomes aware of a need for additional expert or investigative services, counsel will notify this Court in writing via a second motion for funding. Moreover, the specific funding requests included in this motion represent counsel's best effort, in consultation with the respective experts and investigators, to estimate the amount of time reasonably necessary to adequately investigate and present Mr. Stanko's claims. At this early stage in the investigation, however, it is often difficult to accurately predict the totality of the required funds, and it is not uncommon that counsel will need to file additional requests to make adjustments as necessary. Counsel will carefully monitor the progress of the investigation and the various expenditures required, and notify this Court in writing via additional funding motions if additional funds become necessary.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request the intimal funds requested in this motion for expert services. [5]

April 1, 2014

Respectfully submitted,



EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

[5] A proposed order granting this motion is attached for the Court's consideration.

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF MARK B. HARRIS
COUNTY OF CHARLESTON)

Mark B. Harris, who appeared personally before me, affirms and states the following:

1. I am a Private Investigator duly licensed by the State of South Carolina.

2. I am an Attorney duly admitted in the State of New York since February 1977. I retired in May 2009.

3. While practicing as an attorney, I concentrated on and specialized in Criminal Law and Criminal Trial Practice. I was an Assistant District Attorney for over six years and was a part time Assistant Public Defender, while also maintaining a private practice, for over fifteen years.

4. In 1995, I joined the New York State Capital Defender Office which provided death penalty defense in New York State. For the first four years there, I was the lead trial counsel in the Albany, New York Office. For the last six years, I was the First Deputy Capital Defender and the head of the Albany Office, which had responsibility for providing capital defense in twenty-nine of New York's sixty-two counties. My office was comprised of four or five attorneys, three investigators, a paralegal, and office personnel.

5. As a defense attorney, I was involved in over twenty homicide cases, many of which went to trial. As a Capital Defender, I was involved in over thirty capital cases. Also, as a Capital Defender I attended, and occasionally lectured at, numerous trainings, death penalty conferences, and the Santa Clara Death Penalty College. There were lengthy discussions of investigation at all of these. As a Prosecutor, I was involved in approximately a dozen homicide cases often starting with going to the body at the scene.

6. In virtually all of the above homicide cases, I was directly involved with the investigation, doing it myself or working with and/or directing an investigator or investigators. I am a firm believer that investigation is a cornerstone to preparation and as such to seeing that justice is done.

7. Over my years as an attorney, in addition to my own cases, I was often consulted by other attorneys who had homicide cases, and I gave advice as to tactics, theories, defenses, and areas to be investigated.

8. While working in the Capital Defender Office, we had a particular mantra which was that investigation was not complete until the case was over. In the cases where there was not a plea and the trial resulted in a guilty verdict, the investigation continued until all appeals were extinguished.

9. In South Carolina, I have worked as an investigator on two PCR cases. I worked as a mitigation investigator on one case, and as a result of extensive fact and mitigation

investigation, there was information uncovered that had been missed by trial attorneys and was crucial to the issue of whether a death verdict was proper or legal. I worked as a fact investigator on the other case, which was before this Court—*State v. Winkler*.

10. I have discussed the case of *Stanko v. State* with Mr. Stanko's appointed PCR counsel. Counsel informed me that they reviewed the trial record for both of Mr. Stanko's capital trials, conducted a preliminary review of trial counsel's files, and began interviewing witnesses and jurors. As a result, counsel have already identified a number of issues for investigation as being of importance for post-conviction review of Mr. Stanko's case in Horry County.

11. It is my opinion that there is substantial fact investigation that is still required, much of which was not done at all by the trial attorneys. At this point, it appears that, at a minimum, there is a need for at least 200 hours of file review, conferencing with attorneys and the mitigation investigator, interviews, and field work.

12. My regular hourly rate is fifty dollars per hour, a rate I believe to be reasonable in light of the complexity of the case and in light of my experience in capital litigation.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further affiant sayeth naught.

MARK B. HARRIS

Sworn to and subscribed before me
This 26th day of March, 2014

Notary Public for the State of South Carolina
My commission expires: 2/21/2024

COUNTY OF LEXINGTON
STATE OF SOUTH CAROLINA
AFFIDAVIT OF DRUCY GLASS

I, Drucy A. Glass, first being duly sworn do depose and say:

1. I am a Mitigation Specialist in the State of South Carolina. I have been working as a Mitigation Investigator/Specialist since 1990. I have a Bachelor of Arts Degree in Sociology from the University of South Carolina. I am also a licensed Baccalaureate Social Worker in the state of South Carolina.

2. Since 1990, I have worked on more than forty (40) Capital cases at both the trial level and the post-conviction level in State courts as well as Federal and Military courts.

3. The role of the Mitigation Specialist is to assist the attorneys in many areas related to the preparation of mitigation evidence for the penalty phase of the trial. Proper preparation of the mitigation in a death penalty case requires the following:

   a. Conducting a thorough social history investigation and compiling a multigenerational family chronology.

   b. Collection of multiple records from all aspects of the client's life including birth, childhood, and all medical records, educational records, employment records, mental health and psychiatric records, etc.

   c. Identifying and interviewing all potential penalty phase witnesses including multigenerational family members, friends, neighbors, physicians, mental health and social service personnel, co-workers, employers, wives, ex-wives, girlfriends, former girlfriends, teachers, coaches, past attorneys, police and sheriff personnel, DOC officers, etc.

   d. Further investigation of pertinent information discovered in collected documents and interviews.

e. Providing background materials, information, and documentation to experts to enable them to perform competent and reliable evaluations.

f. Ongoing contact and communication with the client and his family during the entire process.

4. The importance of a mitigation investigation flows from the constitutional requirement that there be individualized determination as to whether death is the appropriate penalty in any given case. In making the determination, the jury and the judge are required to consider not only the circumstances of the offense, but also all aspects of the client's life and personal attributes, including the milieu in which he or she was raised and the effects of the environment, his or her abilities, and or contributions to society, and the nature of the extent of any mental and medical impairments. The purpose of the mitigation investigation is to identify such factors.

5. For several reasons, locating and interviewing lay witnesses, especially family members is a sensitive endeavor, which requires exceptional time and patience. A primary reason is that, as with the client, family members frequently suffer from multiple impairments, including mental retardation, mental illness, and substance abuse. In addition, there are usually problems obtaining the trust of witnesses. In many cases lay witnesses are initially suspicious of talking to anyone about the client because it is assumed the purpose is to incarcerate or in other ways hurt the family members. Others are reluctant to reveal possibly painful and embarrassing facts regarding family history to a stranger. Consequently, a significant amount of time must be spent not only effectively evaluating and overcoming various impairments, but also in demonstrating one's sincere commitment to assisting the client. The limitations of the witnesses, combined with the length of the time between childhood and the time of the offense and trial (or post-conviction investigation or re-trial) necessitates the lay witnesses be interviewed on more than one occasion in order to obtain valid and reliable information.

6. The mitigation specialist is responsible for summarizing and analyzing documents and interview data, and for organizing and presenting information to the attorney and experts. Essential elements of this organization generally include preparation of chronologies and genograms. Chronologies are comprehensive, linear, documented summaries of all major conditions and life events and the effects of these life events on the client. Genograms are pictorial representations of family members revealing family histories of medical, psychological and social dysfunction.

7. Mitigation specialists require special knowledge and skill in the areas of collecting hard to find records, interviewing impaired clients and witnesses, mental illness, substance abuse, and addictions, trauma, indicators of physical and sexual abuse, grief reactions, and loss, and mediation negotiation. A competent mitigation specialist generally has additional training in the area of forensics, and basic investigative skills. I have attended numerous national and state training conferences and seminars in all the areas mentioned above.

8. A thorough mitigation investigation routinely requires between 200 and 400 hours over a period nine months to two years depending on the complexity of the case, the age of the client (and case), accessibility and location of family members and other lay witnesses, accessibility of records, the nature and extent of the impairment of the client and the availability of the expert witnesses. It is not possible to perform a competent investigation in the absence of adequate time and resources.

9. I have been asked by the attorneys who represent Stephen Christopher Stanko to be retained as a Mitigation Specialist in the Horry County post-conviction relief case of **STEPHEN CHRISTOPHER STANKO v. STATE OF SOUTH CAROLINA.**

10. Since being contacted by the attorneys for Mr. Stanko's post-conviction relief case, I have discussed the case with Mr. Stanko's appointed counsel, met with Mr. Stanko, conducted a preliminary review of the mitigation evidence collected by trial counsel, and conducted preliminary investigation by locating

and making initial contact with various members of Mr. Stanko's family.

11. Given the complexity of the case and the limited nature of trial counsel's mitigation investigation, I believe a thorough mitigation investigation in this case will require, at a minimum, 200 hours of work.

12. As a mitigation specialist in South Carolina, my fee is $75.00 per hour. In light of my experience and the complexities of conducting mitigation investigation in a post-conviction relief case, this rate is reasonably necessary to enable me to complete a competent and thorough mitigation investigation. I have been retained as a Mitigation Specialist at this rate in numerous post-conviction relief cases around the State of South Carolina, including in *State v. Winkler* in this Court.

13. It is known that two of Mr. Stanko's siblings and other family members live out of State which will possibly require additional travel time and expense. I will inform counsel for Mr. Stanko of the necessity of these expenses and of the specific costs to be incurred so they may seek approval from the Court specifically for these expenses.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further affiant sayeth naught.

Drucy A. Glass

Drucy A. Glass

Sworn to and Subscribed before me
this 31st day of March, 2014.

Notary Public of State of South Carolina
My commission expires 6-19-16.

SUSAN C. KNIGHT, PH.D, ABPP

Telephone: (843) 637-5729; **Facsimile:** (843) 410-2802
Electronic Mail: knight@apsforensic.com
Mailing Address: 1739 Maybank Hwy., Ste. T-606, Charleston, SC 29412

EDUCATIONAL HISTORY:

September 2004 - August 2005	**Postdoctoral Fellowship in Forensic Psychology** University of Southern California Keck School of Medicine Dept. of Psychiatry & Behavioral Sciences USC Institute of Psychiatry & Law P.O. Box 86125 Los Angeles, CA (ACGME Accredited)
September 2003 - August 2004	**Pre-doctoral Internship in Forensic Psychology** U.S. Department of Justice (USDOJ)/Bureau of Prisons Federal Correctional Complex and Medical Center Butner, NC (APA Accredited Internship)
August 1999 - August 2004	**Doctorate of Philosophy, Clinical Psychology** University of Louisville, Louisville, KY Department of Psychological and Brain Sciences (APA Accredited Program)
August 1999 - May 2002	**Master of Arts, Clinical Psychology** University of Louisville, Louisville, KY Department of Psychological and Brain Sciences [Degree embedded within the Clinical Psychology Doctoral program, APA Accredited]
August 1994 - May 1998	**Bachelors of Arts, Psychology, *Magna Cum Laude*** Trinity University, San Antonio, TX

PROFESSIONAL LICENSURE:

- Psychologist, State of North Carolina, License #3407 [June 2007]
- Psychologist, State of South Carolina, License #1053 [May 2007]

BOARD CERTIFICATION:

- ABPP- Board certification in Forensic Psychology awarded by the American Board of Professional Psychology (ABPP) [April 2009]

PROFESSIONAL EXPERIENCE

Clinical and Forensic Psychologist **August 2013 - Present**
Applied Psychological Services, LLC
1739 Maybank Hwy., Ste. T-606
Charleston, SC 29412

Conduct comprehensive forensic psychological evaluations on a wide variety of criminal and civil issues, to include, but not limited to, competency to stand trial, criminal responsibility, violence risk assessments, sexual behavior assessments, sentencing/mitigation, and fitness for duty evaluations. Provide clinical therapeutic services to an adult outpatient population.

Clinical Assistant Professor of Forensic Psychiatry **August 2013 - Present**
Community and Public Safety Psychiatry Division
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
29-C Leinbach Drive
Charleston, SC 29407

Responsibilities: Conduct comprehensive forensic psychological evaluations on a wide variety of criminal and civil issues, and provide consultation to the county, state and federal court systems as necessary. Types of evaluations include competency to stand trial, criminal responsibility, violence risk assessments, sexual behavior assessments, and fitness for duty assessments for health care, public safety and transportation personnel. Provide instruction, teaching and supervision to forensic post-doctoral fellows, medical residents, interns and students on forensic and general clinical psychological issues.

Assistant Professor of Forensic Psychiatry **January 2008-August 2013**
Associate Director of the Forensic Psychiatry Fellowship **July 2008-August 2013**
Director of the Progressive Professionals Program (PPP) **November 2010-August 2013**
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
29-C Leinbach Drive
Charleston, SC 29407

Responsibilities: Conduct comprehensive psychological forensic evaluations on a wide variety of criminal and civil issues, and provide consultation to the county, state and federal court systems as necessary. Types of evaluations include competency to stand trial, criminal responsibility, violence risk assessments, sexual behavior assessments, and fitness for duty assessments for health care, public safety and transportation personnel. Provide clinical therapeutic services (therapy and psychological assessment) to a general outpatient population as needed. Provide instruction, teaching and supervision to forensic post-doctoral fellows, medical residents, interns and students on forensic and general clinical psychological issues.

Clinical Psychologist **April 2007- November 2007**
Grew, Morter and Hartye, P.A.
3141 John Humphries Wynd, Ste. 275
Raleigh, NC 27612

Responsibilities: Provided mental health services in a private practice setting to an outpatient population. Clinical duties included providing short and long term individual therapy, and conducting psychological assessments addressing a wide range of psychological issues. Forensic duties included conducting psycho-legal evaluations and providing consultation as needed for forensic issues.

Clinical Psychologist **September 2005-December 2006**
Los Angeles County Department of Mental Health
Century Regional Detention Facility- Los Angeles County Jail
Women's Forensic Outpatient Program (WFOP)
11705 S. Alameda St.
Lynwood, CA 90262

Responsibilities: Provided mental health services to a correctional population, including diagnostic intake interviews, brief therapy, crisis intervention services and psychological assessments. Forensic duties included managing patients in the Misdemeanant Incompetent to Stand Trial (MIST) program, including competency restoration and consultation with the mental health court system.

Forensic Psychologist (Contract Basis) **September 2006- December 2006**
Metropolitan Detention Center- Los Angeles
Federal Bureau of Prisons
535 N. Alameda St.
Los Angeles, CA 90012

Responsibilities: Conducted pre-trial and post-trial psychological forensic evaluations for the Federal Bureau of Prisons on a contract basis. Evaluations covered a variety of psycho-legal issues, including competency to stand trial, criminal responsibility, dangerousness evaluations and sentencing issues. Duties included interviews, psychological assessment, report writing and providing consultation and/or testimony to the Federal Court system as needed.

Forensic Psychologist **September 2006- December 2006**
USC-Keck School of Medicine
Institute of Psychiatry, Law and Behavioral Science
Los Angeles, CA 90086-0125

Responsibilities: Conducted forensic evaluations for the juvenile court system in Los Angeles addressing a variety of psycho-legal issues. Dutics included evaluations, report-writing and providing consultation to the Juvenile Court System.

Postdoctoral Fellow in Forensic Psychology **September 2004 –August 2005**
University of Southern California/Keck School of Medicine
Institute of Psychiatry, Law & Behavioral Science
P.O. Box 86125
Los Angeles, CA 90086-0125

Responsibilities: Conducted psychological and legal evaluations for attorneys and courts related to criminal delinquency and dependency issues; evaluation, psychological assessment, and treatment of mentally disordered offenders, including outpatient sex offender treatment. Received specialized training on how to conduct psychological autopsies for the Los Angeles County Coroner's Office.

Pre-doctoral Clinical Psychology Intern **August 2003 - September 2004**
Federal Correctional Complex- Butner
Old N.C. Hwy 75
Butner, NC 27509

Responsibilities: Worked in the forensic evaluation program at the Federal Medical Center and conducted federal pre-trial forensic evaluations which involved comprehensive psychological evaluation and report writing. Provided expert testimony to federal court. Worked in the Sex Offender Treatment Program (SOTP), an intensive, residential therapeutic program for male sexual offenders. Employed specialized assessment, didactic, and cognitive-behavioral techniques to evaluate, treat, and manage sexual offenders. Also conducted individual and group therapy, and assisted in managing the special needs of mental health inmates.

Graduate Student Therapist **May 2002- May 2003**
Outpatient Psychiatry/Ambulatory Care Building
550 S. Jackson St.
Louisville, KY 40202

Responsibilities: Conducted individual and group psychotherapy as well as psychological testing with a variety of patients presenting at a local hospital for psychological treatment. Conducted initial intake interviews with potential patients presenting for medication and therapy; provided diagnosis, case formulation and treatment recommendations.

Clinic Assistant **August 2000- June 2002**
University of Louisville/Psychological Services Center
Davidson Hall, Suite 210, Louisville, KY 40292

Responsibilities: Conducted initial assessment intake interviews with potential clients for the psychology clinic. Assisted in diagnosis, treatment recommendations, and disposition of clients to specialty clinic teams. Maintained client database and records for clinic operation. Coordinated clinic in-services (professional presentations) for students and psychological community at large. Maintained subject records and billing for ongoing research project.

Research Assistant **August 1999 - July 2000**
Central State Hospital/Dept. of Psychology
10510 La Grange Rd.
La Grange, KY 40223

Responsibilities: Collected and analyzed data related to program evaluation from all disciplines (nursing, medical staff, psychologists, social workers and pastoral staff). Created and maintained comprehensive research database tracking all patients with a diagnosis of Mental Retardation and all patients with guardians

Caseworker / Case Manager **May 1998 - December 1998**
Crosspoint, Inc.
605 Augusta St.
San Antonio, TX, 78215

Responsibilities: This facility provided a structured program of re-socialization for female adults primarily referred from federal correctional and health care facilities. Responsibilities included administration of direct services provided to clients on an individual and/or group basis. Consulted with, and managed interface to local support agencies when and where necessary on behalf of the client.

CLINICAL PRACTICA/PSYCHOTHERAPY EXPERIENCE

Graduate Student Therapist **August 1999 - May 2003**
University of Louisville/Psychological Services Center
Louisville, KY 40292

Responsibilities: Conducted individual therapy sessions and a wide variety of full psychological assessments with outpatient clients (adults and children).

Doctoral Practicum Student (Assessment & Therapy) **August 2000 - September 2002**
Kentucky State Reformatory
La Grange, KY 40032

Responsibilities: Conducted psychological testing and individual therapy for adult male inmates housed in the Correctional Psychiatric Treatment Unit at a medium security state prison. Compiled and analyzed sex offender data in the Sex Offender Risk Assessment Unit (SORA) at Kentucky State Reformatory.

ACADEMIC APPOINTMENTS:

- **Clinical Instructor** — **August 2004 - September 2005**
  University of Southern California
  Keck School of Medicine
  Department of Psychiatry and Behavioral Sciences
  Los Angeles, CA 90033

- **Adjunct Faculty** — **August 2006 – December 2006**
  University of Southern California
  Department of Psychology
  Los Angeles, CA 90089

- **Assistant Professor** — **January 2008 – August 2013**
  Medical University of South Carolina
  Department of Psychiatry, Charleston, SC 29425

- **Clinical Assistant Professor** — **August 2013- Present**
  Medical University of South Carolina
  Department of Psychiatry, Charleston, SC 29425

- **Adjunct Professor** — **May 2011- Present**
  Charleston School of Law
  Charleston, South Carolina

PROFESSIONAL AFFILIATIONS

- American Psychological Association (APA) [1999 to Present]
- American Psychology-Law Society (APLS) [2003 to Present)
- South Carolina Psychological Association (SCPA) [2008 to Present]
- American Board of Professional Psychology (ABPP) [2009 to Present]
- Association for the Treatment of Sexual Abusers (ATSA) [2012 to Present]
- American Association for Sexuality Educators Counselors and Therapists (AASECT) [2012 to Present]

POSTERS/PRESENTATIONS

1. Knight, S.C. & Einstein, G. (1996). *Aging and Retrieval Inhibition in Prospective Memory.* Paper presented at the National Convention of Undergraduate Research (NCUR) in the Spring of 1997 in Austin, TX.

2. Weaver, C.M., Bock, P., Knight, S. & Gretarsdottir, E. (1999, November). *Demographic Study of 1998 Jefferson County Kentucky Guardianship Population.* Poster presented at the annual meeting of the Kentucky Psychological Association, Louisville, KY. Poster was awarded second prize for graduate research.

3. Knight, S.C., Scanish, J., Fintel, T., & Meyer, R.G. (2002, August). *Characteristic of the Female Sex Offender.* Poster presented at the 2002 APA conference in Chicago, Illinois in the APLS (Division 41) of research.

4. Knight, S.C. (2006). *The Sex Offender's Brain: A review of the etiological evidence towards a neurobiochemical basis.* Lecture presented to faculty, staff and students at the University of Southern California, Department of Psychology, as part of the Continuing Education (CE) colloquia.

5. Mulbry, L. W. & Knight, S.C. (March 2008). *Competency to Stand Trial, Criminal Responsibility and Capacity to Conform.* Talk given to the Charleston County Solicitor's Office.

6. Knight, S.C. (September 2008). *Psychological Autopsy: Determining the Manner of Death Through Investigative Psychological Analysis.* Lecture presented to the Medical University of South Carolina, Department of Psychiatry, Division of Forensic Psychiatry, Day of Discovery conference.

7. Stroud, Z., Knight, S.C., Halavonich, R.H., & Mulbry, L.W. (October 2008). *Mass Shooters: An Antihero of our Time.* Presentation presented at the national American Academy of Psychiatry and Law (AAPL) conference in Seattle, WA.

8. Knight, S.C. (July 2009). *The MMPI-2: Fundamentals of Interpretation.* Lecture to the Medical University of South Carolina Psychology Internship Program

9. Knight, S.C. (November 2009). *The Disruptive Professional.* Presentation given to the Senior Medical Leadership Council of the South Carolina Hospital Association. Columbia, South Carolina.

10. Knight, S.C. (November 2009). *South Carolina Mental Health Law: How to Proceed with a Mentally Disordered Defendant.* Presentation to the South Carolina Bar Association Distance Learning Division. Columbia, South Carolina.

11. Knight, S.C. (November 2009). *Psychiatric Malpractice: A review of select South Carolina cases.* [Invited Speaker]. Presentation given at the Medical University of South Carolina, Forensic Interest Group Meeting. Charleston, South Carolina.

12. Knight, S.C. (January 2010). *South Carolina Mental Health Law: How to Proceed with a Mentally Disordered Defendant.* Workshop on competency to stand trial and criminal responsibility presented to attorney participants at the Medical University of South Carolina. Charleston, South Carolina.

13. Knight, S.C. (April 2010). *The Mentally Ill Offender: An Epidemic in Courts and Corrections.* [Invited Speaker]. Presentation at the 2010 Mental Health Professionals Collaboration held at the Medical University of South Carolina for mental health professionals statewide. Charleston, South Carolina.

14. Knight, S.C. & Mulbry, L.W. (October 21, 2010). *Automatism: A 15-year review of criminal appellate case law.* Scientific paper presentation at the national American Academy of Psychiatry and Law (AAPL) conference in Tucson, AZ.

15. Knight, S.C. (October 29, 2010). *South Carolina Mental Health Law: How to Proceed with a Mentally Disordered Defendant.* Workshop on competency to stand trial and criminal responsibility presented to the Berkeley County Public Defender's Office.

16. Knight, S.C. & Mulbry, L.W. (January 30, 2011). *School Shooters: A Unique Class of Violent Offenders.* [Invited Speaker]. Presentation to the South Carolina Psychiatric Association (SCPA) statewide conference in Charleston, SC.

17. Knight, S.C. (June 2011). *Legal Insanity and Competence.* [Invited Spcaker]. Update in Psychiatry-Mental Illness, Victimization and Criminal Justice. A Forum for Clinicians, Policymakers, Judges, Attorneys and Law Enforcement. Charleston, South Carolina.

18. Knight, S.C. (June 2011). *Relationship Between Mental Illness and Criminal Behavior. Update in Psychiatry-Mental Illness, Victimization and Criminal Justice.* [Invited Speaker]. A Forum for Clinicians, Policymakers, Judges, Attorneys and Law Enforcement. Charleston, South Carolina.

19. Beck, B., Knight, S.C., & Mulbry, L.W. (October 2012). *Robotripping: Dextromethorphan's Link to Violent Crime, Rising Use and Emergent Legislation.* Poster presented at the national meeting of the American Academy of Psychiatry and Law (AAPL), Montreal, Canada.

20. Knight, S.C. (December 2012). *Sexual Predators: Pathology and the Law.* [Invited Speaker]. Judges and Attorneys Substance Abuse and Ethics Seminar, Medical University of South Carolina, Charleston, South Carolina.

21. Knight, S.C. (December 2012). *Legal Competence.* [Invited Speaker]. Judges and Attorneys Substance Abuse and Ethics Seminar, Medical University of South Carolina, Charleston, South Carolina.

22. Knight, S.C. (April 2013). *Legal Competence: Civil Competencies.* [Invited Speaker]. South Carolina Association of Probate Judge's Conference. Columbia, South Carolina.

23. Beck, B., Knight, S. C. & Mulbry, L.W. *Revisions in Gun and Mental Health Laws in the Wake of Newtown.* Poster accepted for presentation at the October 2013 national meeting of the American Academy of Psychiatry and Law (AAPL), San Diego, California.

24. Knight, S.C. (September 2013). *Workplace Violence: Assessment, Intervention and Prevention.* [Invited Speaker]. A Psychiatric Update: Annual conference held by the South Carolina Department of Mental Health.

25. Knight, S.C., Mulbry, L.W., Mullis, D. & Fields, C. (October 2013). *Guns and Psychiatry: Disarming the Mentally Ill.* Grand Rounds Presentation, Medical University of South Carolina, Department of Psychiatry and Behavioral Science.

26. Knight, S.C. (December 2013). *Ethical Considerations in Forensic Evaluations.* [Invited Speaker]. Judges and Attorneys Substance Abuse and Ethics Seminar, Medical University of South Carolina, Charleston, South Carolina.

PUBLICATIONS

1. Oliver, J. M., Knight, S.C., Weaver, C.M., Boyd, A.R. & Meyer, R.G. (2000). Attitudes of board certified forensic psychologists toward critical issues in forensic psychology and the legal system. *Bulletin of the American Academy of Forensic Psychology, 21 (1)*, 8-10.

2. Oliver, S.C., Knight, S.C., Weaver, C.M. & Meyer, R.G. (2001). Attitudes of forensic practitioners about competency to stand trial evaluations: Theoretical and practical considerations. *Bulletin of the American Academy of Forensic Psychology, 22 (1),* 20-22.

3. Knight, S.C. & Meyer, R.G. (2003). Gender Identity Disorder: The Case of Bruce/Brenda. In R.G. Meyer's, *Case Studies in Abnormal Behavior (6th ed.),* (pp. 134-140). Boston: Allyn & Bacon.

4. Knight, S.C. & Meyer, R.G. (2007). Forensic Hypnosis. In A. M. Goldstein's (Ed.) *Forensic Psychology: Emerging Topics and Expanding Roles*, NY: Wiley.

5. Gomez, A. & Knight, S.C. (2013). Disclosure of Mental Health Records in Court-Mandated Outpatient Treatment Proceeding and the Health Insurance Portability and Accountability Act (HIPPA). *Journal of the American Academy of Psychiatry and Law.* Vol. 41: 460-641.

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)) Applicant,)) vs.)) State of South Carolina,)) Respondent.))	Case No. 2014-CP-26-035 ***EX PARTE*** **TO BE FILED UNDER SEAL** **ORDER AUTHORIZING FUNDING FOR EXPERT AND INVESTIGATIVE SERVICES**

Applicant Stephen C. Stanko ("Applicant") is an indigent, death-sentenced inmate. He is seeking post-conviction relief ("PCR") from his convictions and sentence. This matter comes before this Court in an *ex parte* proceeding authorized pursuant to S.C. Code Ann. § 17-3-50(B) and *Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994), due to the confidential nature of the matters herein. Based on Applicant's motion setting forth with particularity the reasons for each request, supporting affidavits of Mark Harris and Drucy Glass, and a current C.V. of Dr. Susan Knight, this Court finds that some of these expenditures are appropriate because the services sought are reasonably necessary. S.C. Code Ann. § 17-27-160(C) (incorporating the funding provisions of Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant"); *see also, e.g.*, U.S. Const. amends V, VI, VII, XIV; S.C. Const. arts. I, III, XIV; S.C. Code § 17-27-160; *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. App. Ct. R. 602. However, this court denies the Applicant's request for certain funding as well.

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The Applicant did not request a hearing on this motion and the Court decides this motion without a hearing per the Court's February 21, 2014 scheduling order.

I. LEGAL BASIS FOR AUTHORIZING THE EXPENDITURE OF FUNDS IN EXCESS OF THE STATUTORY LIMITS.

The South Carolina legislature has provided that indigents seeking post-conviction relief from capital judgments are entitled to expert assistance upon an *ex parte* finding by the court that such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26, 17-27-160(B); *see also* Rule 602(g)(6), SCACR ("In post-conviction relief matters, expenses related to representation and fees of appointed counsel may be paid where permitted and as prescribed in these Rules and the Defense of Indigents Act.").

The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

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The ability to retain the services of experts and investigative assistance in various areas is particularly essential in capital cases. A capital case "is an extraordinary proceeding" where "the attorney is charged with the awesome responsibility of defending a person's life." *Bailey*, 309 S.C. at 460, 424 S.E.2d at 506. To prepare for the guilt or innocence phase of a capital trial, an attorney must vigorously and thoroughly investigate the facts and circumstances of the alleged crime, which often requires the assistance of various experts. *See id.* (recognizing that unlike the solicitor, the defense attorney does not have "the entire array of state, county, and municipal law enforcement" at his disposal). Just as assistance is imperative in the guilt or innocence phase of a capital case, it is equally necessary during the sentencing phase where counsel is challenged by novel and complex issues. *See id.* at 461, 424 S.E.2d at 506-07. Due to the finality and irrevocability of the penalty of death, the United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In order to ensure that the appropriate sentence is chosen, the Court has emphasized the importance of presenting to the sentencing body the fullest information possible concerning the defendant's life and characteristics. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that preventing the sentencer in a capital case from considering the defendant's characteristics "creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also Jurek v. Texas*, 428 U.S. 262, 271 (1976) (asserting that the sentencing body must have before it all possible relevant information about the individual whose fate it must determine).

Thus, in capital cases, defense counsel has a duty to vigorously investigate and present mitigating evidence. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Williams v. Taylor*, 529

U.S. 362, 393 (2000). This duty requires that counsel's investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." (internal quotation marks omitted)).

Post-conviction counsel must "continue an aggressive investigation of all aspects of the case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4); *see also id.* 10.15.1(E)(4) commentary ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."). Post-conviction counsel must review the record and conduct investigation to determine whether the applicant's conviction or sentence are "in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code § 17-27-20(A)(1). This responsibility necessarily includes determining whether the applicant received ineffective assistance of counsel during his trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). If trial counsel's decision to end investigation, including mitigation investigation, was either inconsistent with professional standards or unreasonable because known information should have led counsel to investigate further, a capital defendant may have a valid claim of ineffective assistance of counsel. *See Sears*, 130 S. Ct. at 3264; *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *Strickland*, 466 U.S. 688, 690-91 (1984). When evaluating *Strickland* claims, courts "evaluate the totality of the

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evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins*, 539 U.S. at 536 (quoting *Williams*, 529 U.S. at 397-98).

II. FINDINGS OF FACT RELEVANT TO MOTION FOR AUTHORIZATION TO EXPEND FUNDS FOR EXPERT SERVICES.

The Applicant was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[1] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* The Applicant subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned these PCR proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed Emily C. Paavola and Lindsey S. Vann as counsel to represent Mr. Stanko on February 4, 2014. On February 21, 2014 this Court entered a Scheduling Order in this PCR action. The trial of this PCR case is scheduled for November 3, 2014.

PCR counsel for the Applicant represent they have been diligently working on this matter since their appointment on February 4, 2014 and based on the totality of circumstances in this case—including counsel's review of the record, initial meetings with the Applicant, and preliminary investigation—counsel have requested the expert services of a fact investigator, a mitigation investigator, and a forensic psychologist to assist in investigating and presenting Applicant's claims for post-conviction relief. Specifically, counsel requests $10,000 for a fact investigator, $15,000 for a mitigation investigator, and $15,000 for a forensic psychologist.

[1] Applicant was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Mr. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Counsel in this action do not represent Mr. Stanko in connection with his Georgetown County proceedings.

III. REQUESTED EXPENDITURES.

a. FACT INVESTIGATOR.

PCR counsel submit that their preliminary review of the trial record, court exhibits, portions of trial counsel's files, interviews with the Applicant, and interviews with a majority of the jurors at the Applicant's criminal trial have revealed a number of factual issues in need of investigation. PCR counsel argue that one juror who decided the Applicant's fate at his criminal trial recently revealed new facts which, if true, suggest the possibility of juror bias, juror misconduct, and the inadequate assistance of counsel during jury selection. However, PCR counsel does not state what the "new facts" are that need investigating. This court finds that expenses for investigation of unspecified "new facts which, if true, suggest the possibility" of bias, misconduct and the inadequate assistance of counsel are neither reasonable nor necessary to provide the Applicant adequate representation in this action for post-conviction relief.

Counsel further indicate that a review of trial counsel's files and interviews with the Applicant reveal that trial counsel did not fully investigate the incidents presented by the state at trial in which the Applicant was portrayed as a con-man with violent tendencies. The prosecution presented multiple witnesses who described instances where the Applicant created fraudulent schemes by presenting himself as a lawyer or a person able to help with legal or business matters, taking money for his work but not completing the work he promised. Applicant's counsel argue that their initial investigation indicates that some of this testimony presented by the state "may" have been false or misleading, without stating specifically what the alleged false or misleading testimony was. Therefore, this court finds that expenses for investigation of unspecified trial testimony that "may" have been false or misleading are not reasonable or necessary to provide the Applicant adequate representation in this PCR action.

For the reasons set forth above, the Applicant's motion for expenses for a fact investigator is DENIED.[2]

b. MITIGATION INVESTIGATOR.

PCR counsel further submit their preliminary review of the trial record, court exhibits, portions of trial counsel's files, and preliminary interviews with the Applicant and the mitigation investigator retained for the Georgetown County trial have revealed that trial counsel unreasonably limited their mitigation investigation. Thus, an adequate mitigation investigation was never conducted in this case. Specifically, counsel's initial investigation makes clear that trial counsel committed to presenting the Applicant as an insane psychopath early on in the course of preparation for the Georgetown County trial. As a result of this trial theory, trial counsel chose to present evidence tending to show the Applicant as a psychopath and curtailed mitigation investigation, believing that evidence of the Applicant's good character or other mitigating evidence contradicted the theory that he was a psychopath.[3] During the Applicant's criminal trial, trial counsel did not retain a mitigation investigator, though trial counsel apparently asked a fact investigator, who did not have training or experience in mitigation investigation, to conduct mitigation investigation. Therefore, negligible mitigation investigation was conducted prior to the Applicant's criminal trial.

PCR counsel aver that a mitigation specialist is necessary to focus and direct the investigation of the Applicant's life history and to uncover any mitigating factors that might exist. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty

[2] Nothing herein shall prohibit the Applicant from seeking expenditures for a fact investigator in the future by presenting to the court, *ex parte*, specific allegations of jury misconduct, false trial testimony, etc.

[3] Counsel submit their initial investigation reveals trial counsel knew, or should have known, that presenting evidence of psychopathy was not a reasonable trial strategy in either the guilt or penalty phase. Regardless of the reasonableness of the strategy, counsel assert that trial counsel failed to conduct an adequate investigation prior to settling on a trial strategy, creating a significant likelihood that the Applicant has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*.

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Cases 4.1(A), commentary ("A mitigation specialist is . . . indispensable. . . throughout all capital proceedings" because "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."); *see also id* 10.4(C)(2)(a). According to PCR counsel, a mitigation specialist is especially necessary in this case because the Applicant's father was in the military when he was a child. Records for the Applicant and his family are, therefore, in many different locations and in the custody of the United States military. A mitigation specialist with experience in complex record collection is necessary to complete a full investigation into the Applicant's life history. *Id.* 10.7, commentary ("Counsel should use all appropriate avenues . . . to obtain all potentially relevant information pertinent to the client, his or her siblings and parents, and other family members including but not limited to . . . medical records [and] military records."). Additionally, PCR counsel submit that the Applicant has three living siblings, two of whom live outside of South Carolina. A mitigation expert is needed to develop a relationship with each of these siblings in order to obtain an understanding of the Applicant's life growing up, the character of the Applicant's now-deceased parents, and the effect the untimely death of one of the Applicant's brothers had on the Applicant. *See id.* 10.7, commentary ("It is necessary to locate and interview the client's family members.").

In order to conduct a thorough mitigation investigation, counsel request authorization for the expenditure of $15,000 to retain the services of mitigation specialist Drucy A. Glass. Counsel have conferred with Ms. Glass regarding Mr. Stanko's case and agree with Ms. Glass that the estimated expenditure of 200 hours is reasonably necessary to conduct the required mitigation investigation in this case. Ms. Glass' rate for her services is $75 per hour, which this Court finds is reasonable given her experience and the complexities of mitigation investigation in capital cases.

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c. FORENSIC PSYCHOLOGIST.

Finally, PCR counsel assert that the Applicant's mental health has been an issue in his case from the very beginning. PCR counsel argue that the Applicant has a high IQ of 143, little history of violent behavior and that the crimes for which the Applicant was convicted were extremely violent and poorly planned. PCR counsel further argues that the crimes, occurring when the Applicant was in his late thirties, were an aberration, reflecting little of the Applicant's known character. This immediately alerted the criminal trial counsel to consider a mental illness explanation for the Applicant's actions. However, PCR counsel argues that their preliminary investigation reveals that trial counsel's inquiry into the Applicant's mental health was inadequate in that trial counsel settled on a theory that the Applicant is a psychopath early on in their preparation for trial. Trial counsel's focus on this theory resulted in a curtailed mitigation investigation, as detailed above, and the failure of trial counsel to direct mental health experts to consider the relationship between the Applicant's life history and brain damage and/or mental illness. PCR counsel aver that trial counsel failed to present the jury with an overview of the Applicant's life history. Trial counsel did not call any family members and called few friends, teachers, or employers. Counsel assert that even the mitigation witnesses trial counsel did call were not people with the most relevant information regarding the Applicant's mental health.

Notwithstanding PCR counsels' argument regarding the Applicant's mental health, this court finds that expenses for a forensic psychologist are not reasonable or necessary without more substantial indications that the Applicant suffers a mental illness other than being a psychopath. The court notes that the Applicant's criminal trial counsel presented testimony from seven experts in support of their defense of insanity. Based upon PCR counsels' argument in support of its motion for forensic psychologist expenses, this court assumes that none of the

seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion that the Applicant suffered a mental illness other than being a psychopath.

Based upon the above, the Applicant's motion for expenses for a forensic psychologist is DENIED.[4]

IV. CONCLUSION

After reviewing the relevant statutory provisions, this Court specifically finds: (1) that the legislature has authorized death-sentenced applicants for post-conviction relief to obtain funds for reasonably necessary expert and investigative services; (2) that this Court is empowered to authorize the expenditure of funds if applicant can show that such expenditures are reasonably necessary in the case, and; (3) that the expenditures requested by the applicant are reasonably necessary for the representation of the Applicant.

ORDER

NOW, THEREFORE, based on the findings of fact and conclusions of law detailed herein, it is hereby

ORDERED, that the Applicant's motion for funding a mitigation investigator is **GRANTED** as follows:

> This Court finds that expenditure of the requested funds for a mitigation investigator is reasonably necessary for the representation of Applicant and orders that the Commission on Indigent Defense provide Applicant with state funds not to exceed $15,000.00 to secure the services of a mitigation investigator. The Commission on Indigent Defense will disburse the funds to the Applicant after invoices have been submitted to them, and have been approved for payment. This authorized expenditure establishes the maximum amount to be expended exclusively for a mitigation investigator without additional authorization from this Court.

[4] Nothing herein shall prohibit the Applicant from seeking expenditures for a forensic psychologist in the future by presenting to the court, *ex parte*, specific indications of mental illness other than psychopathy.

IT IS FURTHER ORDERED the Applicant's motion for funding a fact investigator is **DENIED.**

IT IS FURTHER ORDERED the Applicant's motion for funding a forensic psychologist is **DENIED.**

IT IS FURTHER ORDERED that this Order shall be sealed by the Clerk of Court and/or the Office of Indigent Defense on behalf of the Clerk of Court since this order deals with confidential defense matters. S.C. Code § 16-3-26(C); *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982).

ANY VIOLATION BY ANY PERSON OF THE CONFIDENTIAL NATURE OF THIS ORDER MAY CONSTITUTE CONTEMPT OF COURT.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Circuit Judge

April 29, 2014
Georgetown, SC

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)) Applicant,)) vs.)) State of South Carolina,)) Respondent.))	Case No. 2014-CP-26-035 **EX PARTE** **TO BE FILED UNDER SEAL** **APPLICANT'S MOTION TO RECONSIDER ORDER AUTHORIZING FUNDING FOR EXPERT AND INVESTIGATIVE SERVICES**

Applicant, Stephen Stanko, respectfully moves this Court to reconsider its April 29, 2014 Order Authorizing Funding for Expert and Investigative Services ("Order"). Specifically, Stanko asks the Court to reconsider its denial of funds for factual investigative services, in the amount of $10,000, and for a forensic psychologist, in the amount of $15,000.[1] Stanko submits that the Court should reconsider its Order in light of the specific facts, detailed below, that demonstrate the necessity of retaining a factual investigator and forensic psychologist in this case.

The funds requested are necessary to provide Stanko with constitutionally and statutorily adequate resources to pursue his post-conviction relief action. *See, e.g.*, U.S. Const. amends V, VI, VII, XIV; S.C. Const. arts. I, III, XIV; S.C. Code § 17-27-160; *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. App. Ct. R. 602. Stanko reserves the right to move for additional funds as they become necessary.

This motion is *ex parte* as authorized by state law and the Court's Order. S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B); Order, Apr. 29, 2014, at 7 n.2, 10 n.4. Stanko requests that this

[1] The Court's Order explicitly invites Stanko to move for reconsideration and to provide additional information in support of these requests. Order, Apr. 29, 2014, at 7 n.2, 10 n.4.

Court order this motion sealed and not filed in the public record of this proceeding or disclosed in any manner to the State or its attorneys.[2]

The factual bases for this motion are set forth below. For a discussion of the procedural background and legal basis for authorizing expenditure of the requested funds, please see Applicant's *Ex Parte* First Motion to Authorize Funding for Expert and Investigative Services, filed with the Court on April 1, 2014.

I. FACTS AND ARGUMENT RELEVANT TO REQUEST FOR A FACT INVESTIGATOR.

Undersigned counsel's preliminary review of the trial record, court exhibits, portions of trial counsel's files, interviews with Stanko, and interviews with a majority of the jurors for Stanko's trial have revealed a number of factual issues in need of investigation. For example, during an interview with Juror James Berry, who sat on Stanko's Horry County jury, Mr. Berry revealed that his wife worked for a rape crisis center, where she treated Laura Ling's teenaged daughter when the daughter was brought in after being sexually assaulted by Stanko on the night of Ling's murder (less than twenty-four hours before the murder of Henry Turner). Mr. Berry said that he was surprised that information about his wife's involvement with Ms. Ling's daughter was not elicited during the jury selection process. Mr. Berry thought he would have been found ineligible to serve on the jury if he had been questioned about Ms. Ling's daughter.[3] Thus, undersigned counsel's investigation—now in its preliminary stage—strongly suggests the possibility of juror bias, juror misconduct, and/or the inadequate assistance of counsel.

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[2] Stanko does not request a hearing on this motion and anticipates the Court will decide the motion without a hearing, per the Court's scheduling order. If, however, the Court deems a hearing necessary, Stanko asks this Court to conduct any hearings ancillary to this motion outside the presence of the solicitor, the attorney general, law enforcement personnel, state and county officials, news media, and the general public and to enter an appropriate order under seal. *Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994).

[3] Despite these statements, during voir dire, Mr. Berry stated that his only prior knowledge about Stanko's case was hearing Stanko's name on the news the morning of jury qualification.

A significant portion of the State's penalty phase case-in-chief in Stanko's Horry County trial focused on the murder of Laura Ling and the sexual assault of her teenaged daughter. The State presented the testimony of the EMT who responded to the Ling crime scene and the attending physician and one of the Sexual Assault Nurse Examiners who treated Ms. Ling's daughter. The State also played the sixteen minute 911 call Ms. Ling's daughter made after her assault. This evidence painted a vivid picture of the crimes against Ms. Ling and her daughter and would have jogged the memory of anyone who had previous knowledge of the crimes. The State's heavy reliance on the Ling crimes during Stanko's sentencing creates a significant likelihood that Mr. Berry was biased when determining whether Stanko should live or die.

These allegations that a juror had prior knowledge of the Ling incidents were not addressed on the trial record—no questions were asked during voir dire to specifically elicit whether a potential juror knew Ms. Ling or her daughter, nor did trial counsel learn of Mr. Berry's prior knowledge at the time of trial—and they require follow up investigation to fully develop the potential claims raised by Mr. Berry's revelation. This investigation will involve locating and obtaining a list of medical personnel who attended to Ms. Ling's daughter, interviewing the personnel who attended to Ms. Ling's daughter, interviewing Mr. Berry's wife, and re-interviewing Mr. Berry to ensure undersigned counsel have a full understanding of the nature of Mr. Berry's prior knowledge of the Ling incidents. In addition, the other jurors who served alongside Berry must be interviewed to determine whether Berry discussed his prior knowledge of the Ling crimes and his wife's direct involvement with one of the victims of that crime during the Turner trial and deliberations. A fact investigator is, therefore, necessary to investigate the possible bias of Mr. Berry, a juror who decided whether Stanko should live or die as well as the deficient performance of trial counsel and the resulting prejudice. *See Smith v.*

Phillips, 455 U.S. 209, 217 (1982) ("Due process [requires] a jury capable and willing to decide the case solely on the evidence before it."); *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991) (granting habeas relief in a case where battering and abuse issues were prominent and a juror did not acknowledge her own sexual abuse during voir dire); *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007) (finding trial counsel ineffective for failing to voir dire potential jurors on the elements of the State's case and other key issues in the case).

Review of trial counsel's files and interviews with Stanko further reveal that trial counsel did not fully investigate the incidents presented by the State at trial in which Stanko was portrayed as a con-man with violent tendencies. The prosecution presented multiple witnesses who described instances where Stanko created fraudulent schemes by presenting himself as a lawyer, or a person working for a lawyer, who was able to help with legal or business matters, taking money for his work but not completing the work he promised. Specifically, the State presented Kathleen Crolley, Richard Steve Lee, James Carson Jackson, and Don M. McAlister in the penalty phase of Stanko's case. Each of these witnesses testified about an instance, or instances, where Stanko allegedly told them he could help them with a legal matter, purchasing stocks, or donating to a charity, but then Stanko did not complete the service promised and used the money for personal gain.

Undersigned counsel's initial investigation indicates that some of this testimony presented by the State may have been false or misleading. For instance, counsel's preliminary investigation tends to show Stanko was, in fact, working for lawyers in the Horry County area. During a previous incarceration, Stanko worked on PCR Applications for other inmates. He continued doing this work with attorneys Harry Devoe and Irby Walker upon his release. Stanko

worked on PCR cases for Bret Barron, Laocia Brave, and another person (the son of JoAn Agoney). Had trial counsel investigated these incidents, it is possible the defense could have confronted the State's evidence in aggravation by showing that Stanko was, in fact, working with lawyers and was, in some instances, actually helping people with their legal issues. Each of the individuals involved with Stanko's legal activities must, therefore, be interviewed, along with the family members of the PCR applicants who appear to have met with Stanko and the lawyers regarding Stanko's PCR work. A fact investigator is necessary to investigate these incidents and interview these witnesses to determine whether trial counsel provided ineffective assistance in failing to investigate these incidents. *See Strickland*, 466 U.S. at 690-91.

A fact investigator is also necessary in this case to investigate the suspicious death of Stanko's older brother, William Stanko. Undersigned counsel's preliminary investigation reveals that William died when Stanko was fifteen years old. Stanko and his brother William were close as children and Stanko looked up to William. Prior to his death, Stanko's father kicked William out of the family home due to a conflict over William's drug activities. After William was kicked out, Stanko and his mother visited William without the father's knowledge. William died in 1983 and William's body was discovered in a house fire. Counsel's investigation indicates that William did not have smoke in his lungs and was, therefore, dead prior to the ignition of the fire. The cause of death on William's death certificate is "pending/undetermined." Nevertheless, trial counsel did not obtain the autopsy report for William and did not investigate William's death, despite the fact William's death was a significant event in Stanko's life history. A fact investigator is necessary to investigate the circumstances surrounding the death of William

Stanko to determine whether trial counsel provided ineffective assistance in failing to investigate the circumstances surrounding William's death.[4] *See Strickland*, 466 U.S. at 690-91.

Finally, a fact investigator is necessary in this case to work with Stanko. Stanko is highly intelligent and is very interested in the development of his PCR case. He has been diligently reviewing the transcript of his Horry County case and developing a lengthy list of issues he believes should be addressed in his PCR application as well as potential witnesses who have relevant information to support his claims. Fact investigator Mark Harris, whose affidavit is attached, has extensive experience working with capital clients and issues in capital cases due to his former work as an attorney in the New York Capital Defender Office. Mr. Harris would, therefore, be able to discuss potential fact issues with Stanko and help to determine whether the issues present viable PCR claims. This would reduce the number of trips and hours undersigned counsel will need to expend in meeting with Stanko in preparation of his PCR application. Additionally, Mr. Harris lives and works very close to the prison where Stanko is currently housed, which will decrease the expense of client meetings in instances where Mr. Harris is able to meet with the client to discuss issues related to factual investigation.

Given the above facts, the assistance of a fact investigator is necessary to aid Stanko in investigating the issues already identified, identifying other issues for investigation, and presenting his claims for post-conviction relief. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1(A)(1), commentary ("The assistance of an investigator who has received specialized training is indispensable to discovering and developing facts that must be unearthed . . . in post-conviction proceedings. . . . Counsel lacks the special

[4] Stanko's request for funding for a mitigation investigator indicated a mitigation investigator would investigate the effect of William's death on Stanko. The mitigation investigator will be responsible for discussing William's death and the effect it had on Stanko and his family with Stanko's family members. Separately, a fact investigator is necessary to investigate the suspicious circumstances surrounding the death itself.

expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case."); *see also id.* 10.4(C)(2)(a). A fact investigator is necessary to investigate and present Stanko's constitutional claims for post-conviction relief. This Court must, therefore, authorize funds for a fact investigator as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

An affidavit from private investigator Mark B. Harris is attached. The affidavit details Mr. Harris' experience in the field of factual investigation in capital cases. Undersigned counsel have conferred with Mr. Harris regarding Stanko's case and agree with Mr. Harris that the estimated expenditure of 200 hours is reasonably necessary to conduct the required factual investigation in this case. Mr. Harris' rate for his services is $50 per hour, which is reasonable given his experience, the complexities of investigating capital cases, and that $50 per hour is the standard rate authorized by of South Carolina Commission on Indigent Defense for fact investigators.

II. FACTS AND ARGUMENT RELEVANT TO REQUEST FOR A FORENSIC PSYCHOLOGIST.

In every capital case, trial counsel has a duty to conduct a thorough investigation into the client's mental health history and to consider all possible mental health diagnoses. *See* ABA for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 4.1, commentary ("[M]ental health experts are essential to defending capital cases. Neurological and psychiatric impairments . . . are common among persons convicted of violent offenses on death row."). However, undersigned counsel's preliminary investigation reveals that trial counsel's inquiry into Stanko's mental health was inadequate in that counsel settled on a theory that Stanko is a psychopath, to the exclusion of all other possible mental health theories, early on in their

preparation for trial. Undersigned counsel's interviews with members of Stanko's trial team suggest that (1) Stanko's attorney, William Diggs, selected the psychopathy defense prior to the completion of any mental health evaluation of Stanko; (2) Diggs sought out an expert (Dr. Thomas Sachy) who was obsessed with psychopathy and determined that this theory was the best fit for Stanko's defense prior to completing an evaluation of Stanko; and (3) that neither Diggs nor Sachy could be dissuaded from the psychopathy theory even though they were advised that psychopathy was a bad strategy, it was not mitigating, and it had no chance of success.

Trial counsel's focus on this theory resulted in a curtailed mitigation investigation and the failure of trial counsel to direct mental health experts to consider the relationship between Stanko's life history and brain damage and/or mental illness. One of the mental health experts, Dr. Joseph Wu, whom undersigned counsel has interviewed since their appointment, stated that he was not asked to do a full evaluation of Stanko or to offer a diagnosis. He was asked only to review Stanko's brain scans for evidence of a brain damage that would support the finding of psychopathy by Dr. Sachy. From counsel's preliminary investigation, it appears clear that Mr. Diggs and Dr. Sachy sought only evidence that would support a finding of psychopathy rather than seeking diagnoses from the other mental health experts based on full mental health evaluations. As a result, trial counsel mainly presented evidence that made Stanko appear to be "crazy" and more like a psychopath. Trial counsel thus utterly failed to present the jury with an overview of Stanko's life history. Trial counsel did not call any family members and called few friends, teachers, or employers.[5] Even the mitigation witnesses trial counsel did call were not

[5] Trial counsel also failed to even interview the appropriate people in Stanko's life to develop a full understanding of his life history and mental health. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, parole officers, and others.").

people with the most relevant information regarding Stanko's life history and mental health. Trial counsel's presentation of Stanko as a psychopath likely had the effect of dehumanizing him in the eyes of the jury and did not comport with reasonable professional standards. *See* ABA Guidelines 10.11(F) (admonishing trial counsel to present evidence at sentencing that can "humanize" the client).

While undersigned counsel cannot point to a specific diagnosis other than psychopathy, counsel's inability to do so is due to the fact that they themselves are not mental health experts and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses.[6] Due to trial counsel's myopic approach to presenting mental health evidence at Stanko's trial, undersigned counsel must complete the life history and mental health investigation trial counsel failed to conduct. This requires a creation of a full life history and a forensic psychologist to review the life history, evaluate the client for any mental health issues missed by trial counsel, and to present the life history in post-conviction proceedings.[7] Post-conviction relief counsel has a duty to reinvestigate the client as a whole. "Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1, commentary.

[6] Records from Stanko's mental health treatment prior to the instant crimes indicate an alternative diagnosis. The mental health provider in 1994 diagnosed Stanko with Adjustment Disorder with mixed features.

[7] Often in death penalty cases, a social worker is retained to present the client's life history. In this case, however, undersigned counsel request a forensic psychologist who will better be able to evaluate the life history in the context of Stanko's mental health, which has never been done in this case. Forensic psychologist Susan Knight, whose CV is attached, has the ability to review and present Stanko's life history and additionally will be able to present the Court with information regarding Stanko's mental health. Retaining a forensic psychologist in this fashion may eliminate the need for another mental health expert in preparation of Stanko's PCR case.

Finally, trial counsel's presentation of testimony from seven experts in support of the insanity defense, does not insulate trial counsel from being found ineffective by this Court. *See Sears v. Upton*, 561 U.S. 945, ____, 130 S. Ct. 3259, 3266 (2010). If trial counsel's decision to end or prematurely curtail their investigation, including mitigation investigation, was either inconsistent with professional standards or unreasonable because known information should have led counsel to investigate further, a capital defendant may have a valid claim of ineffective assistance of counsel. *See Sears*, 561 U.S. at ____, 130 S. Ct. at 3264; *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *Strickland*, 466 U.S. at 690-91. Due to the limited nature of trial counsel's investigation at trial, funding for a forensic psychologist in Stanko's PCR proceedings is neither duplicative nor without legal purpose.

Given the facts above, the services of a forensic psychologist are reasonably necessary in Stanko's case. "Mental health experts are essential to defending capital cases." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary. Jurors making a determination of the punishment for a defendant often find "the defendant's psychological and social history and his emotional and mental health [to be] of vital importance." *Id.* Given the fact that trial counsel prematurely abandoned investigation into Stanko's life history and its effect on Stanko's mental health, there is a strong possibility that Stanko has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*. The assistance of a forensic psychologist is necessary to assist counsel in developing an understanding of Stanko's life history as it correlates to his mental health and presenting related issues to this Court in support of his post-conviction relief claims. This Court must, therefore, authorize funds for a forensic psychologist as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

The current CV of forensic psychologist Dr. Susan Knight is attached. Undersigned counsel have conferred with Dr. Knight about being retained on Stanko's case. She is willing and able to assist counsel in Stanko's case. Counsel have conferred with Dr. Knight and estimate that expenditure of approximately 60 hours is reasonably necessary to conduct the required evaluation in this case. Dr. Knight's rate is $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area. Dr. Knight's rates are reasonable given her experience and the fact that, in counsel's experience, the rates are on the low end of the average rates charged by expert forensic psychologists in South Carolina.

III. SUMMARY OF REQUESTED EXPENDITURES.

For all of the reasons set forth above, Stanko requests the following expenditures:

Fact Investigator

To investigate evidence presented in aggravation at Stanko's trial and possible juror bias and to identify issues related to the investigation, Stanko requests authorization for the initial expenditure of $10,000 to retain the services of a fact investigator to be paid at the rate of $50 per hour.

Forensic Psychologist

To investigate, evaluate, and develop an understanding of the correlation between Stanko's life history and his mental health and to assist post-conviction counsel in presenting mitigating evidence related to Stanko's life history and mental health, Stanko requests authorization for the initial expenditure of $15,000 and reasonable expenses to retain a forensic psychologist to be paid at a rate of $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request the intimal funds requested in this motion for expert services.[8]

May 8th, 2014

Respectfully submitted,

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[8] A proposed order granting this motion is attached for the Court's consideration.

Mr. Harris' rate for his services is $50 per hour, which this Court finds is reasonable given his experience and the complexities of investigating capital cases. This court also finds that 80 hours of investigative services is required to complete the necessary fact investigation in this case and, therefore, authorizes up to $4,000.00 in funding for a fact investigator.

II. FUNDING REQUEST FOR A FORENSIC PSYCHOLOGIST.

Counsel also seeks reconsideration of the court's prior denial of Stanko's request for funding for a forensic psychologist.

In every capital case, trial counsel has a duty to conduct a thorough investigation into the client's mental health history and to consider all possible mental health diagnoses. *See* ABA for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 4.1, commentary ("[M]ental health experts are essential to defending capital cases. Neurological and psychiatric impairments . . . are common among persons convicted of violent offenses on death row."). However, nothing submitted in support of counsel's request for funding a forensic psychologist reveals that trial counsel's inquiry into Stanko's mental health was inadequate. Though Stanko' trial counsel settled on a theory that Stanko is a psychopath, to the exclusion of all other possible mental health theories, nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claim for post-conviction relief. Stanko's PCR attorneys argue that the services of a forensic psychologist is necessary to determine whether Stanko has any mental health issues that could have been presented at his criminal trial as mitigating evidence. In other words, the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Stanko.

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STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)) Applicant,)) vs.)) State of South Carolina,)) Respondent.))	Case No. 2014-CP-26-035 **EX PARTE** **TO BE FILED UNDER SEAL** **APPLICANT'S SECOND MOTION TO AUTHORIZE FUNDING FOR EXPERT SERVICES**

Applicant Stephen C. Stanko is an indigent, death-sentenced inmate. He is seeking post-conviction relief from his convictions and sentence. Mr. Stanko respectfully moves this Court to authorize the following amounts: (1) $13,000 for the services of a licensed social worker and (2) $9,000 for the services of a media expert.

These funds are necessary to provide Stanko with constitutionally and statutorily adequate resources to pursue his post-conviction relief action. *See, e.g.*, U.S. Const. amends V, VI, VII, XIV; S.C. Const. arts. I, III, XIV; S.C. Code § 17-27-160; *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. App. Ct. R. 602. Applicant reserves the right to move for additional funds as they become necessary.

This motion is *ex parte* as authorized by state law. S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B). Stanko requests that this Court order this motion sealed and not filed in the public record of this proceeding or disclosed in any manner to the State or its attorneys.[1]

[1] Applicant does not request a hearing on this motion and anticipates the Court will decide the motion without a hearing, per the Court's scheduling order. If, however, the Court deems a hearing necessary, Applicant asks this Court to conduct any hearings ancillary to this motion outside the presence of the solicitor, the attorney general, law enforcement personnel, state and county officials, news media, and the general public and to enter an appropriate order under seal. *Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994).

The legal and factual bases for this motion are set forth below.

I. LEGAL BASIS FOR AUTHORIZING THE EXPENDITURE OF FUNDS IN EXCESS OF THE STATUTORY LIMITS.

The South Carolina legislature has provided that indigents seeking post-conviction relief from capital judgments are entitled to expert assistance upon an *ex parte* finding by the court that such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant"); *see also* Rule 602(g)(6), SCACR ("In post-conviction relief matters, expenses related to representation and fees of appointed counsel may be paid where permitted and as prescribed in these Rules and the Defense of Indigents Act.").

The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a

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right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The ability to retain the services of experts and investigative assistance in various areas is particularly essential in capital cases. A capital case "is an extraordinary proceeding" where "the attorney is charged with the awesome responsibility of defending a person's life." *Bailey*, 309 S.C. at 460, 424 S.E.2d at 506. To prepare for the guilt or innocence phase of a capital trial, an attorney must vigorously and thoroughly investigate the facts and circumstances of the alleged crime, which often requires the assistance of various experts. *See id.* (recognizing that unlike the solicitor, the defense attorney does not have "the entire array of state, county, and municipal law enforcement" at his disposal). Just as assistance is imperative in the guilt or innocence phase of a capital case, it is equally necessary during the sentencing phase where counsel is challenged by novel and complex issues. *See id.* at 461, 424 S.E.2d at 506-07. Due to the finality and irrevocability of the penalty of death, the United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In order to ensure that the appropriate sentence is chosen, the Court has emphasized the importance of presenting to the sentencing body the fullest information possible concerning the defendant's life and characteristics. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that preventing the sentencer in a capital case from considering the defendant's characteristics "creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also Jurek v. Texas*, 428 U.S. 262, 271 (1976) (asserting that the sentencing body must have before it all possible relevant information about the individual whose fate it must determine).

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Thus, in capital cases, defense counsel has a duty to vigorously investigate and present mitigating evidence. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Williams v. Taylor*, 529 U.S. 362, 393 (2000). This duty requires that counsel's investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." (internal quotation marks omitted)).

Post-conviction counsel must "continue an aggressive investigation of all aspects of the case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4); *see also id.* 10.15.1(E)(4) commentary ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."). Post-conviction counsel must review the record and conduct investigation to determine whether the applicant's conviction or sentence are "in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code § 17-27-20(A)(1). This responsibility necessarily includes determining whether the applicant received ineffective assistance of counsel during his trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). If trial counsel's decision to end investigation, including mitigation investigation, was either inconsistent with professional standards or unreasonable because known information should have led counsel to investigate further, a capital defendant may have a valid claim of ineffective assistance of counsel. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *Strickland*,

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466 U.S. 688, 690-91 (1984). When evaluating *Strickland* claims, courts "evaluate the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins*, 539 U.S. at 536 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

II. FACTS RELEVANT TO MOTION FOR AUTHORIZATION TO EXPEND FUNDS FOR EXPERT SERVICES.

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[2] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014. On April 29, 2014 this Court entered an Amended Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for on or before February 28, 2015.

Prior to trial in Horry County, defense counsel decided to move for a change of venue. At the pre-trial motions hearing held one month prior to jury selection, however, trial counsel informed the trial court that they were not presenting the change of venue motion at that time. ROA 3110. Partway through voir dire, counsel asked for a change of venue based on members of the jury pool's prior knowledge of the case against Stanko. ROA 1284-90. The State suggested it would be better for the court to consider the change of venue argument after the jury had been

[2] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Mr. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

selected, but before it was sworn. ROA 1289. Defense counsel did not object to the State's suggestion and the court delayed consideration of the change of venue motion until after selection of the jury. ROA 1289-90. After the jury was selected, defense counsel formally moved for a change of venue. ROA 1334-1415. Defense counsel presented the testimony of Dr. Bernard Albiniak, an expert in social psychology, who testified that in public forums, people will conform their statements to what they believe will be generally accepted by the group even if that is not what they actually believe. ROA 1336-81. Dr. Albiniak is not an expert in media saturation; he has never conducted a media study; and, during his testimony, he did not even mention having reviewed such a study. Dr. Albiniak opined that the jurors selected in this case would do the same when asked by the court if they could set aside their prior knowledge of the case and would tell the judge they could do so even if it was not what they believed. The state pointed out that none of Dr. Albiniak's research or studies involved juror behavior. The court denied the defense motion for a change of venue. ROA 1415.

At trial, the defense presented an insanity defense during the guilt phase. The defense presented the testimony of seven experts in an effort to prove that Stanko was legally insane at the time of the crime because he is a "psychopath." After presenting this testimony, the defense argued the jury should find Stanko not guilty by reason of insanity. The jury rejected this argument and found Stanko guilty at the conclusion of the guilt phase of the trial.

Trial counsel's strategy for the penalty phase was to essentially re-offer the defense theory that Stanko was insane at the time of the crimes—a theory the juries had previously rejected in both the Ling trial and in the guilt-or-innocence phase of the Turner trial. The defense also presented a hastily prepared mitigation case, comprising of the brief testimony of a neighbor, three former teachers, and three employees of the South Carolina Department of Corrections. Finally,

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the defense called a Christian Counselor, with no capital case experience, who testified that she had only recently begun working on the case and felt that Stanko dealt with some largely unspecified "difficulties" during his childhood.

Undersigned counsel have been diligently working on this matter since their appointment on February 4, 2014. Based on the totality of circumstances in this case—including counsel's review of the record, meetings with Stanko, and investigation—counsel have determined the expert services of a licensed social worker with capital case experience and media expert are imperative to assist counsel in investigating and presenting Stanko's claims for post-conviction relief.

III. FACTS AND ARGUMENT RELEVANT TO REQUEST FOR EXPERT SERVICES OF A LICENSED SOCIAL WORKER.

In all capital cases, the defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, No. 2007-060700, 2014 WL 3610954, at *10 (S.C. July 23, 2014) ("Important sentencing 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'") (quoting *Wiggins*, 539 U.S. at 524); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary ("[T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase."). The testimony of a licensed social worker is one of the most basic, fundamental elements of virtually every capital sentencing proceeding in the modern era. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (2008) (instructing that it is the duty of the defense team to prepare experts to testify, including social

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workers "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning").

In this case, however, undersigned counsel's investigation reveals that trial counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial and failed to adequately investigate and present other available mitigation and social history evidence as a result. Undersigned counsel's investigation has made it clear that trial counsel focused on its psychopath "defense" without sufficient investigation and conducted the remainder of their trial preparation with a sort of "tunnel vision," ignoring anything that did not fit the psychopath theory. Trial counsel relied exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopath theory. These experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Trial counsel's focus on the psychopath theory thus resulted in a curtailed mitigation and social history investigation.

Trial counsel utterly failed to investigate and present the jury with an adequate and accurate overview of Stanko's life history as mitigation. Trial counsel did not call any family members and called few friends, teachers, or employers.[3] Instead, trial counsel relied solely on Evelyn C. Califf who has a doctorate in Christian Counseling and no prior capital case experience. Undersigned counsel's investigation has revealed that Califf spent only one hour with the client and spoke briefly with only one of Stanko's sisters over the telephone before trial.[4] As a result of her limited

[3] Trial counsel also failed to even interview the appropriate people in Stanko's life to develop a full understanding of his life history and mental health. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, parole officers, and others.").

[4] Undersigned counsel's investigation reveals that the mitigation specialist informed trial counsel that Stanko's family was reticent to become involved in the case. An experienced social worker might have been able to develop a relationship of trust with the family and develop a fuller

involvement, Califf was only able to testify generally and ineffectively about Stanko's upbringing and family life.

Undersigned counsel's investigation, conducted with the assistance of a mitigation investigator, has uncovered mitigating evidence in Stanko's social and family history that was not presented at trial. Counsel have begun to develop a relationship with Stanko's siblings and are beginning to understand the harsh environment created by Stanko's military father when the Stanko children were growing up. A licensed social worker with experience in developing, interpreting, and presenting a social history in capital cases is necessary in order to understand counsel's findings, to continue building a relationship with Stanko's siblings, and to develop and present Stanko's claims for post-conviction relief. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (instructing a defense team to work with a social worker "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning"). Given the fact that trial counsel prematurely abandoned investigation into Stanko's life history and its effect on Stanko's mental health, undersigned counsel believe that Stanko has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*.[5]

The fact that trial counsel presented the testimony of mental health experts and some social history evidence does not negate Stanko's claim. The Supreme Court of South Carolina recently overturned a circuit court's denial of post-conviction relief where trial counsel presented the

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understanding of Stanko's life history. At the very least, the involvement of a social worker earlier would have allowed that person to get a better understanding of the family dynamic and testify in detail with actual examples at trial.

[5] This claim was included in Stanko's First Amended Application for Post-Conviction Relief as Claim 10(e).

testimony of three mental health experts and a social history witness. *See Weik*, 2014 WL 3610954. The court found that "[t]hough counsel introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's *social history* even though there was abundant social history evidence available to them." *Id.* at *11 (emphasis original). Stanko's cases involve the same circumstances where trial counsel focused their investigation and mitigation presentation on mental health evidence, while ignoring social history evidence readily available to them.

The assistance of a licensed social worker with capital case experience is therefore necessary to assist undersigned counsel in developing an understanding of Stanko's social history as it mitigates his crime and correlates to his mental health and in presenting related issues to this Court in support of his post-conviction relief claims. This Court must, therefore, authorize funds for a licensed social worker as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

The current CV of licensed social worker Dr. Arlene Andrews is attached. Undersigned counsel have conferred with Dr. Andrews; she is willing and able to assist counsel in this case. Counsel, with input from Dr. Andrews, estimate that expenditure of approximately 100 hours is reasonably necessary to conduct the required evaluation in this case. Dr. Andrews' rate is $130 per hour. Dr. Andrew's rate is reasonable given her experience and the fact that, in counsel's experience, this rate is on the low end of the average rates charged by expert Licensed Social Workers in South Carolina.

IV. FACTS AND ARGUMENT RELEVANT TO REQUEST FOR EXPERT SERVICES OF A MEDIA SATURATION EXPERT.

The media coverage of Stanko's crimes and trial began immediately after the crimes occurred. Local and national media has continually covered all stages of Stanko's case, including

law enforcement's national manhunt for and arrest of Stanko, preparations for his trial in Georgetown, each day of the trial in Georgetown County, Stanko's conviction and death sentence in Georgetown County, and preparations for Stanko's trial in Horry County. In fact, the entire Georgetown County trial was covered by 48 Hours, which aired an hour long special on Stanko multiple times prior to Stanko's trial in Horry County. Trial counsel were aware of the media coverage surrounding Stanko's case before the jury was selected in Horry County, yet trial counsel did not present the trial court with any information about media coverage in moving for a change of venue.

The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury. U.S. Const. amend. VI. Pretrial publicity about a case can be so pervasive and saturate the community to such an extent as to make it impossible to select an impartial jury from the community where the crime occurred. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In such a case, the pretrial publicity creates a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected from a local jury pool. *See Skilling v. United States*, 561 U.S. 358 (2010).

In this case, the Horry County community was inundated with media detailing the crimes for which Stanko stood trial and Stanko's conviction and death sentence in Georgetown County. The media even extensively covered and detatiled the trial strategy used in Georgetown County which was again presented in a nearly identiecal fashion to the Horry County jury. This creates a likelihood that, with the services of an appropriate expert, Stanko could have shown that an impartial jury could not have been selected from residents of Horry County. Trial counsel, however, presented no evidence relating to the amount and type of media coverage the potential jurors encountered in their daily lives before becoming members of the jury pool. This creates a

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strong likelihood that Stanko has viable claim for ineffective assistance of counsel under *Strickland*. An expert in media studies and media saturation is therefore necessary to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court. The study, counsel believe, will demonstrate that the media surrounding Stanko's case saturated the Horry County community, making it impossible to select an impartial jury from that location. Further, the study will show the information that trial counsel should have presented to the trial court in support of the motion for a change of venue. This Court must, therefore, authorize funds for a media expert as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

The current CV for Professor Neil Vidmar is attached. Undersigned counsel have conferred with Professor Vidmar about being retained on Stanko's case. He is willing and able to assist counsel in conducting a media study for Stanko's case. Professor Vidmar made an initial review of the media surrounding the case and has confirmed the media study can be completed retroactively. Professor Vidmar has experience conducting and testifying regarding retroactive media studies in post-conviction cases. Counsel have conferred with Professor Vidmar and estimate that expenditure of approximately thirty hours[6] is reasonably necessary to conduct the required study and provide testimony in this case. Professor Vidmar's rate is $300 per hour. An affidavit from Professor Vidmar is also attached, demonstrating that his rates are reasonable given the fact that he has earned the same amount or significantly higher amounts in other cases on which he has recently been retained.

[6] The hours needed to conduct the media study are estimated at merely thirty hours because undersigned counsel, through their positions at the Death Penalty Resource & Defense Center and in an effort to conserve court resources, will have student assistance in collecting and organizing the relevant media for the study. Professor Vidmar, therefore, will require less time to review the materials and form his conclusions.

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V. SUMMARY OF REQUESTED EXPENDITURES.

For all of the reasons set forth above, Stanko requests the following expenditures:

Licensed Social Worker

To investigate, evaluate, and develop an understanding Stanko's social history, its mitigation of his crime and correlation to his mental health, and to assist post-conviction counsel in presenting mitigating evidence related to Stanko's social history, Stanko requests authorization for the initial expenditure of $13,000 and reasonable expenses to retain a Licensed Expert in Social Work to be paid at a rate of $130 per hour.

Media Expert

To conduct a study of the media surrounding his case and present the conclusions of that study to the Court, Stanko requests authorization for the expenditure of $9,000 and reasonable expenses to retain a media expert to be paid at a rate of $300 per hour.[7]

[7] At this time, undersigned counsel are not aware of any additional investigators or experts who may be necessary for the adequate development and presentation of Mr. Stanko's claims for post-conviction relief. However, it is often the case that additional claims and corresponding needs arise as a capital post-conviction investigation progresses over time. In the event that counsel later becomes aware of a need for additional expert or investigative services, counsel will notify this Court in writing via a second motion for funding. Moreover, the specific funding requests included in this motion represent counsel's best effort, in consultation with the respective experts, to estimate the amount of time reasonably necessary to adequately investigate and present Mr. Stanko's claims. At this early stage in the investigation, however, it is often difficult to accurately predict the totality of the required funds, and it is not uncommon that counsel will need to file additional requests to make adjustments as necessary. Counsel will carefully monitor the progress of the investigation and the various expenditures required, and notify this Court in writing via additional funding motions if additional funds become necessary. 4851

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request the funds requested in this motion for expert services.[8]

July 28, 2014

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[8] A proposed order granting this motion is attached for the Court's consideration.

4852

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NUMBER 2014-CP-26-035
Stephen C. Stanko, #6022, Applicant, vs. State of South Carolina, Respondent.	)	***Ex Parte* Order to be Filed Under Seal** **Order Denying Applicant's Second Motion To Authorize Funding For Expert Services**

Applicant, Stephen Stanko ("Stanko"), is an indigent, death-sentenced inmate. He is seeking post-conviction relief ("PCR") from his convictions and sentence. This matter comes before this Court in an *ex parte* proceeding authorized pursuant to S.C. Code Ann. §§ 16-3-26(C) and 17-3-50(B), due to the confidential nature of the matters herein.

Stanko moves this Court to authorize funding for a licensed social worker and a media expert. Stanko does not request a hearing on this motion and the Court decides this motion without a hearing per the Court's scheduling order dated April 29, 2014.

In support of his motion for funding a licensed social worker, Stanko argues that a licensed social worker with capital case experience is needed to investigate "mitigating evidence in Stanko's social and family history that was not presented at trial." However, the only mitigating evidence referenced is a "harsh environment created by Stanko's military father" when Stanko and his siblings were growing up. Stanko argues that his criminal trial counsel were ineffective because they only focused on Stanko's defense that Stanko was a psychopath and did not look more broadly to Stako's life history.

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In support of his motion for funding a media expert, Stanko argues that his criminal trial counsel was ineffective for failing to use a media expert in support of Stanko's motion for a change of venue in the criminal trial.

Stanko's basic argument for funding a licensed social worker and media expert is that their services are necessary because none were used during Stanko's criminal trial. Like his prior request for funding a forensic psychologist, the necessity of a licensed social worker and media expert in this PCR action cannot be determined until after they have completed their investigations.

This court finds that the argument presented by Stanko's PCR counsel do not satisfy the "reasonably necessary" requirements of S.C. Code Ann. § 17-3-50(B). Pursuant to S.C. Code Ann. § 17-3-50(B), the court may only authorize funding for investigative, expert or other services after the court finds that such services are reasonably necessary for the applicant's representation. The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in this first place. Therefore, Stanko's motion for funding a licensed social worker and media expert in this PCR action should be denied.

NOW, THEREFORE, it is hereby

ORDERED, that the Applicant's Second Motion To Authorize Funding For Expert Services is DENIED; it is further

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ORDERED that this Order shall be sealed by the Clerk of Court and/or the Office of Indigent Defense on behalf of the Clerk of Court since this order deals with confidential defense matters. S.C. Code § 16-3-26(C); *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982).

ANY VIOLATION BY ANY PERSON OF THE CONFIDENTIAL NATURE OF THIS ORDER MAY CONSTITUTE CONTEMPT OF COURT.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Circuit Judge

September 25, 2014
Georgetown, SC

4902

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)) Applicant,)) vs.)) State of South Carolina,)) Respondent.))	Case No. 2014-CP-26-035

EX PARTE
TO BE FILED UNDER SEAL

APPLICANT'S MOTION TO RECONSIDER DENIAL OF FUNDING FOR EXPERT AND INVESTIGATIVE SERVICES AND REQUEST FOR *EX PARTE* HEARING

Applicant Stephen C. Stanko is an indigent, death-sentenced inmate. He is seeking post-conviction relief from his convictions and sentence. In this motion, Stanko requests that this Court reconsider its previous denials of applicant's requests for funds for investigative and expert services. Stanko additionally requests an *ex parte* hearing in connection with this motion as soon as practicable. Specifically, Stanko asks the Court to reconsider its denial of the following funding requests: (1) $13,000 for the services of a licensed social worker, (2) $15,000 for the services of a forensic psychologist, and (3) $9,000 for the services of a media expert. These funds are necessary to provide Stanko with constitutionally and statutorily adequate resources to pursue his post-conviction relief action. *See, e.g.*, U.S. Const. amends V, VI, VII, XIV; S.C. Const. arts. I, III, XIV; S.C. Code § 17-27-160; *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. App. Ct. R. 602.

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This motion is *ex parte* as authorized by state law. S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B). Stanko requests that this Court order this motion sealed and not filed in the public record of this proceeding or disclosed in any manner to the State or its attorneys.

Stanko further requests an *ex parte* hearing for oral argument on this motion as permitted by the Court's April 29, 2014 scheduling order. Because an evidentiary hearing is scheduled in this case for March 2, 2015, less than five months from the filing of this motion, Stanko asks this Court to schedule the hearing as soon as practicable. Stanko asks this Court to conduct the hearing ancillary to this motion outside the presence of the solicitor, the attorney general, law enforcement personnel, state and county officials, news media, and the general public and to enter an appropriate order under seal. *Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994).

The legal and factual bases for this motion are set forth below.

I. PROCEDURAL HISTORY

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[1] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-

[1] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

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154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014.

On February 21, 2014, this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014. Scheduling Order (Feb. 21, 2014). The Court subsequently, on April 29, 2014, amended the Scheduling Order to tentatively schedule a merits hearing for February of 2015. Amended Scheduling Order (Apr. 29, 2014). On September 25, 2014, the Court set a date certain for the merits hearing, scheduling the trial in this post-conviction relief proceeding to commence on March 2, 2015 and ordering the discovery be completed by January 31, 2015. Order for Date Certain Trial and Second Amended Scheduling Order (Sept. 25, 2014).

After being appointed, undersigned counsel began diligently reviewing the record and conducting an independent investigation. On April 1, 2014, counsel filed Applicant's First Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion"). During the two months between their appointment and filing the First Funding Motion, undersigned counsel (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors who sat on Stanko's trial; and (4) began investigating by meeting with Stanko's sister and a friend and conducting preliminary interviews with trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case,[2] undersigned counsel moved for funding to aid in the investigation,

[2] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post- **4905**

development, and presentation of Stanko's claims. Specifically, the First Funding Motion requested the Court authorize funding of $10,000 for a fact investigator,[3] $15,000 for a mitigation investigator,[4] and $15,000 for the services of a forensic psychologist.[5]

On April 29, 2014, this Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funds for a fact investigator, finding counsel did not specifically identify new facts that required investigation and or trial testimony that may have been false or misleading. The Court denied funding for a

> conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

First Funding Motion 6-7 (Apr. 1, 2014).

[3] In support of the request for a fact investigator, counsel informed the Court that recently revealed facts suggested the possibility of juror bias and that the state may have presented false or misleading testimony regarding scams Stanko allegedly ran. Counsel, therefore, requested funding for a fact investigator to aid in investigating the issues already identified, identifying other issues for investigation, and presenting Stanko's claims for post-conviction relief.

[4] In support of the request for a mitigation investigator, counsel informed the Court that their preliminary investigation indicated trial counsel prematurely curtailed their mitigation investigation after settling on the theory that Stanko was a psychopath early on in the course of preparation for Stanko's Georgetown County trial and did not hire a mitigation investigator for the Horry County trial. Counsel also indicated that a mitigation investigator was needed to develop a relationship with Stanko's siblings, two of whom live outside of South Carolina and to conduct the record collection, which is complex due to Stanko's father's military service moving the family on numerous occasions.

[5] In support of the request for a forensic psychologist, counsel informed the Court their preliminary investigation revealed that trial counsel's inquiry into Stanko's mental health and life history was inadequate because counsel settled on a theory that Stanko is a psychopath early on in their trial preparation. As a result, trial counsel curtailed the mitigation investigation and failed to direct mental health experts to consider the relationship between Stanko's life history and brain damage and/or mental illness. Counsel, therefore, asserted that the assistance of a forensic psychologist was necessary to assist counsel in developing an understanding of Stanko's life history as it correlates to his mental health and presenting related issues to the Court. **4906**

forensic psychologist "without more substantial indications that the Applicant suffers a mental illness other than being a psychopath," because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist. *See* Applicant's Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to reconsider, counsel (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. In the motion to reconsider, counsel set forth the specific factual issues in need of investigation by a fact investigator.[6] Counsel further sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts

[6] Counsel informed the Court that (1) during a juror interview, Juror James Berry, who sat on Stanko's Horry County trial, revealed that his wife treated Laura Ling's teenage daughter when she was brought to the hospital after being sexually assaulted by Stanko and Mr. Berry though he would have been ineligible to serve as a juror had the fact been elicited during jury selection; (2) counsel's preliminary investigation tended to show that the state's portrayal of Stanko as a violent con-man who passed himself off as a lawyer was false or misleading because Stanko was, in fact, working for lawyers in the Horry County area; (3) trial counsel did not investigate the suspicious death of Stanko's older brother, despite the fact the death was a significant event in Stanko's life history; and (4) a fact investigator was necessary to discuss factual issues with Stanko, who is highly intelligent and very interested in the development of his PCR case.

and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses.[7] Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the Court partially granted and partially denied the motion to reconsider. The Court authorized $4,000 of the $10,000 requested for the fact investigator.[8] The Court, however, denied all funding requested for a forensic psychologist. The Court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The Court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute [S.C. Code § 17-3-50(B)] does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to

[7] Counsel also informed the court that they interviewed Dr. Joseph Wu, who testified at Stanko's trial. Dr. Wu stated that he was not asked to do a full evaluation of Stanko or to offer a diagnosis. He was only asked to review Stanko's brain scans for evidence of brain damage that would support the finding of psychopathy. Counsel further pointed out that trial counsel's presentation of Stanko as a psychopath likely had the effect of dehumanizing him in the eyes of the jury and did not comport with reasonable professional standards.

[8] The Court found the amount requested for the fact investigator to be excessive and denied funding for the fact investigator to investigate Stanko's brother's suspicious death and to work with Stanko on developing and investigating factual issues as unnecessary in this PCR case. **4908**

> determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's social history and records regarding trial counsel's perparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested $13,000 for the services of a licensed social worker[9] and $9,000 for the services of a media expert.[10]

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[9] In support of the request for a licensed social worker, counsel informed the Court that, in all capital cases, a defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014). Undersigned counsel stated that trial counsel focused on the psychopathy defense early in their preparation for trial and failed to adequately investigate and present other available mitigation and social history evidence by relying exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopathy theory. Those experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Undersigned counsel further submitted that the expert who testified regarding Stanko's life history at trial did little to prepare for trial and was only able to testify generally and ineffectively about Stanko's upbringing. Counsel indicated that their mitigation investigation had uncovered mitigating evidence in Stanko's social and family history, including information about the harsh environment created by Stanko's military father, that was not presented at trail and required the assistance of a licensed social worker to develop, interpret, and present.

[10] In support of the request for a media expert, counsel informed the Court that media coverage of Stanko's case began immediately after the crimes occurred. The case was covered by local and national media throughout all stages, including law enforcement's national manhunt for and arrest of Stanko, preparations for his trial in Georgetown, each day of his trial in Georgetown, Stanko's conviction and death sentence in Georgetown, and preparations for his trial in Horry County. Undersigned counsel submitted that trial counsel was aware of the massive media cov[illegible] 4909

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert. *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The Court interpreted counsel's funding requests as arguing that funding for a licensed social worker and a media expert is necessary because "none were used during Stanko's criminal trial." *Id.* at 2. The Court denied the requests, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *Id.* The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist. As of the filing of this motion, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 3, 2015.

II. LEGAL BASIS FOR AUTHORIZING THE EXPENDITURE OF FUNDS IN EXCESS OF THE STATUTORY LIMITS.

The legal basis for authorizing expenditure of the requested funds are set forth in Applicant's *Ex Parte* First Motion to Authorize Funding for Expert and Investigative Services, filed with the Court on April 1, 2014, and Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services, filed with the Court on July 28, 2014.

III. ARGUMENT IN SUPPORT OF RECONSIDERATION.

Undersigned counsel are in an impossible (and unprecedented) bind. This Court has denied requests for funding for necessary expert assistance on the basis that Stanko cannot provide the court with the conclusions the experts will reach. This is not only inconsistent with the relevant

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surrounding the case, but that trial counsel did not present the trial court with any information regarding media coverage in moving for a change of venue. Counsel, therefore, asked the Court to approve funding for an expert in media studies and media saturation to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court. **4910**

statutory language, but it is also at odds with more than twenty years of capital post-conviction practice in this state; no other judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude. The statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1).[11] Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. In counsel's experience, and in the experience of other practiced capital post-conviction attorneys in South Carolina, no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 5; Holt Aff. ¶ 4.[12] Instead, courts have required counsel for PCR applicants to simply explain that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 7.

The standard set forth in the Court's orders—requiring a favorable result for the applicant prior to authorizing expert funding—expects that counsel would be able to retain the services of an expert without being able to guarantee their services would be paid for. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to

[11] Stanko refers to the funding provision set forth in S.C. Code § 16-3-26 as the provision applicable to capital proceedings, whereas the Court's orders referred to the "reasonably necessary" standard in the funding provision found in the general provisions of the chapter regarding defense of indigents. *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 into the capital case post-conviction relief procedures). The "reasonably necessary" language, however, is the same in each funding provision.

[12] All affidavits referenced in this motion are attached.

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a winning claim in a PCR action.[13] Such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services. *See* Andrews Aff. ¶¶ 5, 9; Norris Aff. ¶ 8.

The Court's interpretation of the "reasonably necessary" requirement, therefore, impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). The right to the assistance of counsel when filing an application for post-conviction relief is hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *See Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). It is the state's duty to "ensure that a defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992).

The Supreme Court of the United States specifically recognized that the "right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to *research* and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 859 (1994) (emphasis added). Post-conviction counsel in capital cases "must continue an aggressive

[13] An expert could not ethically state before doing an evaluation what the evaluation will yield. Any expert who did so would be subject to impeachment on that basis.

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investigation of all aspects of the capital case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4). "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* 10.15.1(E)(4) commentary. Thus, though counsel has no way of knowing at the outset of its post-conviction preparation what claims will ultimately be presented to the court, post-conviction counsel have a duty to investigate the case entirely and often require the assistance of experts to do so. *See id.* 4.1 commentary ("Analyzing and interpreting [evidence in a capital case] is impossible without consulting experts.")

The Supreme Court of the United States has also established that a state court reviewing a state prisoner's federal claims must provide the prisoner with an opportunity to present evidence relevant to the federal claims. *See Coleman v. Alabama*, 377 U.S. 129, 133 (1964). In order to meaningfully access and to provide a fair opportunity to present all relevant evidence, a court must provide adequate funding for investigative and expert services. The Supreme Court has specifically acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007) (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

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Undersigned counsel have identified facts demonstrating that expert services in this case are reasonably necessary. Counsel, therefore, request the Court reconsider its denial of funding for a licensed social worker, a forensic psychologist, and a media expert. In support of this request, counsel submit the following facts, which include new facts uncovered by counsel's investigation since the original requests for funding were presented to the Court.

A. Facts and argument relevant to the request for a licensed social worker.

Counsel ask the Court to reconsider its denial of funding for a licensed social worker to investigate and present Stanko's social history. Despite the fact that there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's inadequate development and presentation of Stanko's social history as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(e)(3).

In this case, undersigned counsel's investigation reveals that trial counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial and failed to adequately investigate and present other available mitigation and social history evidence as a result. As part of their investigation, undersigned counsel interviewed Dale Davis, who served as the mitigation investigator for Stanko's Georgetown County trial. Davis stated that she objected to trial counsel's strategy to present Stanko as a psychopath. She told counsel their theory was not mitigating and that they needed to hire a social worker to aid in developing an presenting Stanko's social history. Over Davis' objections, trial counsel continued to pursue the psychopath strategy, limited their mitigation and mental health investigation accordingly, and did not hire anyone to aid in presenting Stanko's social history until approximately three weeks before trial.

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Thus, undersigned counsel's investigation has made it clear that trial counsel focused on its psychopath "defense" without sufficient investigation and conducted the remainder of their trial preparation with a sort of "tunnel vision," ignoring anything that did not fit the psychopath theory. Trial counsel relied exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopath theory. These experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Trial counsel's focus on the psychopath theory thus resulted in a curtailed mitigation and social history investigation.

In all capital cases, the defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) ("Important sentencing 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'") (quoting *Wiggins*, 539 U.S. at 524); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary ("[T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase."). The testimony of a licensed social worker is one of the most basic, fundamental elements of virtually every capital sentencing proceeding in the modern era. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (2008) (instructing that it is the duty of the defense team to prepare experts to testify, including social workers "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning"); *see also* Holt Aff. ¶ 7; Glass Aff. ¶ 7.

Here, trial counsel utterly failed to investigate and present the jury with an adequate and accurate overview of Stanko's social history as mitigation. Trial counsel did not call any family

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members and called few friends, teachers, or employers.[14] Instead, trial counsel relied solely on Evelyn C. Califf who has a doctorate in Christian Counseling. Undersigned counsel's investigation has revealed that Califf began working on this case only a few weeks prior to trial and spent only one hour with the client and spoke briefly with only one of Stanko's sisters over the telephone in preparation for trial. As a result of her limited involvement, Califf was only able to testify generally and ineffectively about Stanko's upbringing and family life.

Undersigned counsel's investigation, conducted with the assistance of a mitigation investigator, has uncovered mitigating evidence in Stanko's social and family history that was not presented at trial. Since their appointment, counsel and the mitigation investigator have interviewed roughly twenty lay witnesses with knowledge of mitigating evidence surrounding Stanko's social history. Specifically, counsel have developed a relationship with Stanko's siblings, which was not done in preparation for trial, and have interviewed over a dozen friends, classmates, and teachers who were not interviewed by the trial team. These lay witnesses have presented a portrait of Stanko vastly different from that presented at trial.

Witnesses have described Stanko as generally well-liked, smart, outgoing, and a person with vast potential. During his late teenage years, Stanko began exaggerating the truth and, in some instances, outright lying. Around the same time, almost all of Stanko's close friends went off to college. Stanko did not go to college, despite his unquestioned intelligence and potential to succeed in college. Stanko instead began working as a salesman and began scamming friends and strangers.

[14] Trial counsel also failed to even interview the appropriate people in Stanko's life to develop a full understanding of his life history and mental health. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, parole officers, and others.").

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This led to legal trouble and eventual incarceration during Stanko's mid to late 20s. This evidence demonstrates a need for a social worker to aid counsel in understanding the information provided by the lay witnesses, directing counsel toward other potentially mitigating evidence, and in presenting that evidence to the Court in support of Stanko's ineffective assistance of counsel claim. *See* Glass Aff. ¶ 7 ("A testifying social worker is, therefore, necessary to evaluate [mitigation] information like this and to describe how . . . events shaped Mr. Stanko's life, particularly in light of his significant brain damage."); ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (instructing a defense team to work with a social worker "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning").

Due to undersigned counsel's concerns about preparing for a hearing in this case in such a short period of time, counsel contacted licensed social worker Arlene Andrews, Ph.D. Though Dr. Andrews would not normally begin working on a capital case without a funding order from the court, she agreed to begin work on Stanko's case while the motion for her funding was pending.[15] Andrews Aff. ¶ 5. Dr. Andrews has, therefore, reviewed the trial mitigation testimony, reviewed Stanko family records, met with Stanko, and interviewed Stanko's brother. Andrews Aff. ¶ 7. As a result of her preliminary work on the case, Dr. Andrews believes there is a compelling mitigation story to be told in support of Stanko's PCR application. Andrews Aff. ¶ 8. In order to complete her social history evaluation and presentation, much work remains to be completed. Andrews Aff. ¶ 9. She must, (1) interview Mr. Stanko several more times; (2) interview Mr. Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends and former girlfriends from childhood and leading up to his crimes; (4) review the social history records

[15] The funding statute, S.C. Code § 16-3-26(C)(1), authorizes the court to approve funding *nunc pro tunc*.

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counsel are continuing to collect; and, (5) conduct any additional work that may develop as the investigation progresses. Andrews Aff. ¶ 9. However, Dr. Andrews cannot complete this work without authorization of funds from the Court. Andrews Aff. ¶ 9.

The fact that trial counsel presented the testimony of mental health experts and some social history evidence does not negate Stanko's claim. The Supreme Court of South Carolina recently overturned a circuit court's denial of post-conviction relief where trial counsel presented the testimony of three mental health experts and a social history witness. *See Weik*, 409 S.C. 214, 761 S.E.2d 757. The court found that "[t]hough counsel introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed 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 (emphasis original). Stanko's case involves the same circumstances where trial counsel focused their investigation and mitigation presentation on mental health evidence, while ignoring social history evidence readily available to them.

The assistance of a licensed social worker with capital case experience is therefore necessary to assist undersigned counsel in developing an understanding of Stanko's social history as it mitigates his crime and correlates to his mental health and in presenting related issues to this Court in support of his post-conviction relief claims. This Court must, therefore, authorize funds for a licensed social worker as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Undersigned counsel have conferred with Dr. Andrews; she is willing and able to assist counsel in this case.[16] Counsel, with input from Dr. Andrews, estimate that expenditure of approximately 100 hours is reasonably necessary to conduct the required evaluation in this case.

[16] Dr. Andrews' current CV was attached to the Second Funding Motion filed with this Cou**4918**

The hours requested are reasonable given that, in counsel's experience, the request is on the low end of the number requested in similar cases and the request takes into account the expectation that the mitigation investigation conducted by counsel and the mitigation investigator will locate and identify the significant social history witnesses for Dr. Andrews to interview allowing her to conduct her social history evaluation efficiently. Dr. Andrews' rate is $130 per hour. Dr. Andrew's rate is reasonable given her experience and the fact that, in counsel's experience, this rate is on the low end of the average rates charged by expert Licensed Social Workers in South Carolina.

B. Facts and argument relevant to the request for a forensic psychologist.

Despite the fact that Stanko's mental health has been an issue in this case since the very beginning, a competent and reliable mental health evaluation has never been completed. Though there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's inadequate mental health evaluation of Stanko as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(e)(4).

Stanko has a high IQ of 143 and little history of violent behavior. Undersigned counsel's investigation clearly reveals that trial counsel's inquiry into Stanko's mental health was inadequate in that counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial. Trial counsel then sought out an expert in psychopathy, Dr. Thomas Sachy, after learning of Dr. Sachy's involvement in a Georgia case where Dr. Sachy testified about his diagnosis of the defendant as a psychopath.[17] Undersigned counsel's interviews with members of Stanko's trial

[17] Undersigned counsel's investigation has revealed the inherent flaws in trial counsel's reliance on a diagnosis of psychopathy. Dr. Pamela Crawford, who testified as a court's forensic psychologist at trial, told undersigned counsel that the problem with trial counsel's use of the psychopathy diagnosis is that psychopathy is not an accepted clinical diagnosis, does not appear in the Diagnostic and Statistical Manual (the manual setting the standard for diagnosing mental disorders), and is not a mental illness. **4919**

team suggest that (1) Stanko's attorney, William Diggs, selected the psychopathy defense prior to the completion of any mental health evaluation of Stanko; (2) Diggs sought out an expert (Dr. Sachy) who was obsessed with psychopathy and determined that this theory was the best fit for Stanko's defense prior to completing an evaluation of Stanko; and (3) that neither Diggs nor Sachy could be dissuaded from the psychopathy theory even though they were advised that psychopathy was a bad strategy, it was not mitigating, and it had no chance of success.[18]

Undersigned counsel have diligently worked to interview the experts who testified at trial. Counsel's interview with Dr. Sachy confirmed that Dr. Sachy's work on the case began and ended with the theory that Stanko was a psychopath. Dr. Joseph Wu and Dr. Bernard Albiniak both informed counsel that their involvement in the case was limited in nature and they were never asked to conduct a formal mental health evaluation or provide a diagnosis. Counsel's investigation further indicates that Dr. Ruben Gur was only asked to analyze magnetic resonance imaging (MRI) of Stanko's brain and Dr. Marc Einhorn was only asked to conduct neurological testing, designed to evaluate brain functioning. Neither Dr. Gur nor Dr. Einhorn's reports indicate they conducted a mental health evaluation or made a mental health diagnosis. Finally, Dr. James Thrasher appears to have evaluated Stanko only for competency to stand trial and criminal responsibility. Dr. Thrasher's report does not indicate that he evaluated Stanko for mental illness as it related to mitigation. Accordingly, though six[19] psychological experts testified at Stanko's trial, none

[18] *See supra* Section III.A (describing undersigned counsel's interview with mitigation investigator Dale Davis, who objected to trial counsel's strategy because it was inherently not mitigating and encouraged trial counsel to continue investigating Stanko's social history and mental health).

[19] The Court's order indicates there were seven mental health experts who testified at trail. Undersigned counsel submits there were only six. Brent Turvey, who also testified at trial, specializes in crime scene reconstruction and did not conduct a mental health evaluation of Stanko. Additionally, Dr. Evelyn Califf, who testified during the penalty phase of the trial, is a certified Christian counselor, not a psychologist. Dr. Califf was asked to present a social history, not to conduct a mental health evaluation.

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completed a full mental health evaluation. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process" but is "often of vital importance to a jury's decision at the punishment phase.").

While undersigned counsel cannot point to a specific diagnosis at this time, counsel's inability to do so is due to the fact that they themselves are not mental health experts and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses. As the ABA Guidelines note, "Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions . . . that could be of critical importance." ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary. For this reason, the ABA Guidelines mandate that "at least one member of the defense team . . . be a person qualified by experience and training to screen for mental or psychological disorders or defects." *Id.*

"Mental health experts are essential to defending capital cases." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary. Jurors making a determination of the punishment for a defendant often find "the defendant's psychological and social history and his emotional and mental health [to be] of vital importance." *Id.* Given the fact that trial counsel prematurely abandoned investigation into Stanko's life history and its effect on Stanko's mental health, there is a strong possibility that Mr. Stanko has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*. Undersigned counsel, therefore, ask this Court to authorize the necessary funds for a forensic

psychologist to complete a competent and reliable mental health evaluation of Stanko as was never done before trial and cannot be completed without the assistance of a mental health expert. *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B); *see also* Norris Aff. ¶ 4 ("I do not recall even hearing of a capital post-conviction relief case in South Carolina where the court did not authorize funding for at least one mental health expert when a request was submitted by defense counsel.")

Undersigned counsel have conferred with Dr. Knight and she is willing to evaluate Mr. Stanko.[20] Dr. Knight estimates that it will require approximately 60 hours to review records, interview Stanko, conduct any needed psychological testing, interview relevant witnesses and prepare a report. Dr. Knight's rate is $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area. Dr. Knight's rates are reasonable given her experience and the fact that, in counsel's experience, the rates are on the low end of the average rates charged by expert forensic psychologists in South Carolina.

C. Facts and argument relevant to the request for a media expert.

Despite the fact that there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's ineffectiveness in failing to conduct a media saturation study and present it to the trial court in support of the motion for a change of venue as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(b)(1), 11(b)(2). Prior to trial in Horry County, defense counsel decided to move for a change of venue. At the pre-trial motions hearing held one month prior to jury selection, however, trial counsel informed the trial court that they were not presenting the change of venue motion at that time. ROA 3110. Partway through voir dire, counsel asked for a change of venue based on members of the jury pool's prior knowledge of

[20] Dr. Knight's current CV was attached to the First Funding Motion filed with this Court. **4922**

the case against Stanko. ROA 1284-90. The State suggested it would be better for the court to consider the change of venue argument after the jury had been selected, but before it was sworn. ROA 1289.

In support of the change of venue motion, defense counsel did not object to the State's suggestion and the court delayed consideration of the change of venue motion until after selection of the jury. ROA 1289-90. After the jury was selected, defense counsel formally moved for a change of venue. ROA 1334-1415. Defense counsel presented the testimony of Dr. Bernard Albiniak, an expert in social psychology, who testified that in public forums, people will conform their statements to what they believe will be generally accepted by the group even if that is not what they actually believe. ROA 1336-81. Dr. Albiniak is not an expert in media saturation; he has never conducted a media study; and, during his testimony, he did not even mention having reviewed such a study. Dr. Albiniak opined that the jurors, when asked by the court if they could set aside their prior knowledge of the case, would tell the judge they could do so even if it was not what they believed. The State pointed out that none of Dr. Albiniak's research or studies involved juror behavior. With no evidence of the extent of the media coverage surrounding Stanko's case, the court denied the defense motion for a change of venue. ROA 1415.

The media coverage of Stanko's crimes and trial began immediately after the crimes occurred. Local and national media has continually covered all stages of Stanko's case, including law enforcement's national manhunt for and arrest of Stanko, preparations for his trial in Georgetown, each day of the trial in Georgetown County, Stanko's conviction and death sentence in Georgetown County, and preparations for Stanko's trial in Horry County. In fact, the entire Georgetown County trial was covered by 48 Hours, which aired an hour long special on Stanko multiple times prior to Stanko's trial in Horry County. Trial counsel were aware of the media

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coverage surrounding Stanko's case before the jury was selected in Horry County, yet trial counsel did not present the trial court with any information about media coverage in moving for a change of venue.

The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury. U.S. Const. amend. VI. Pretrial publicity about a case can be so pervasive and saturate the community to such an extent as to make it impossible to select an impartial jury from the community where the crime occurred. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In such a case, the pretrial publicity creates a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected from a local jury pool. *See Skilling v. United States*, 561 U.S. 358 (2010).

In this case, the Horry County community was inundated with media detailing the crimes for which Stanko stood trial and Stanko's conviction and death sentence in Georgetown County. The media even extensively covered and detatiled the trial strategy used in Georgetown County, which was again presented in a nearly identical fashion to the Horry County jury. This creates a likelihood that, with the services of an appropriate expert, Stanko could have shown that an impartial jury could not have been selected from residents of Horry County. Trial counsel, however, presented no evidence relating to the amount and type of media coverage the potential jurors encountered in their daily lives before becoming members of the jury pool. This creates a strong likelihood that Stanko has viable claim for ineffective assistance of counsel under *Strickland*. An expert in media studies and media saturation is therefore necessary to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court. The study, counsel believe, will demonstrate that the media surrounding Stanko's case saturated the Horry County community, making it impossible to select an impartial jury from that location.

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Further, the study will show the information that trial counsel should have presented to the trial court in support of the motion for a change of venue. This Court must, therefore, authorize funds for a media expert as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Undersigned counsel have conferred with Professor Vidmar about being retained on Stanko's case.[21] He is willing and able to assist counsel in conducting a media study for Stanko's case. Professor Vidmar made an initial review of the media surrounding the case and has confirmed the media study can be completed retroactively. Professor Vidmar has experience conducting and testifying regarding retroactive media studies in post-conviction cases. Counsel have conferred with Professor Vidmar and estimate that expenditure of approximately thirty hours[22] is reasonably necessary to conduct the required study and provide testimony in this case. Professor Vidmar's rate is $300 per hour. An affidavit from Professor Vidmar attached to the Second Funding Motion, demonstrates that his rates are reasonable given the fact that he has earned the same amount or significantly higher amounts in other cases on which he has recently been retained.

IV. SUMMARY OF REQUESTED EXPENDITURES.

For all of the reasons set forth above, Stanko requests the following expenditures:

Licensed Social Worker

To investigate, evaluate, and develop an understanding Stanko's social history, its mitigation of his crime, and to assist post-conviction counsel in presenting mitigating evidence related to Stanko's social history, Stanko requests authorization for the initial expenditure of

[21] Professor Vidmar's current CV was attached to the Second Funding Motion filed with this Court.
[22] The hours needed to conduct the media study are estimated at merely thirty hours because undersigned counsel, through their positions at the Death Penalty Resource & Defense Center and in an effort to conserve court resources, will have student assistance in collecting and organizing the relevant media for the study. Professor Vidmar, therefore, will require less time to review the materials and form his conclusions.

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$13,000 and reasonable expenses to retain a Licensed Expert in Social Work to be paid at a rate of $130 per hour.

Forensic Psychologist

To investigate, evaluate, and develop an understanding of the correlation between Stanko's life history and his mental health and to assist post-conviction counsel in presenting mental health evidence, Stanko requests authorization for the initial expenditure of $15,000 and reasonable expenses to retain a forensic psychologist to be paid at a rate of $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area.

Media Expert

To conduct a study of the media surrounding his case and present the conclusions of that study to the Court, Stanko requests authorization for the expenditure of $9,000 and reasonable expenses to retain a media expert to be paid at a rate of $300 per hour.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel request the Court reconsider its denial of funding for a licensed social worker, a forensic psychologist, and a media expert. Counsel further ask this Court to schedule a hearing, as soon as practicable, for oral argument on this motion.

October 14, 2014

Respectfully submitted,

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STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)) Applicant,)) vs.)) State of South Carolina,)) Respondent.)	Case No. 2014-CP-26-035

EX PARTE
TO BE FILED UNDER SEAL

APPLICANT'S BRIEF IN SUPPORT OF MOTION TO RECONSIDER DENIAL OF FUNDING FOR EXPERT AND INVESTIGATIVE SERVICES

This Brief is filed in support of indigent capital post-conviction relief Applicant Stephen C. Stanko's Motion to Reconsider Denial of Funding for Expert and Investigative Services. Stanko requests that this Court reconsider its previous denials of his requests for funds for investigative and expert services. Specifically, Stanko asks the Court to reconsider its denial of the following funding requests: (1) $13,000 for the services of a licensed social worker, (2) $15,000 for the services of a forensic psychologist, and (3) $9,000 for the services of a media expert. These funds are necessary to provide Stanko with constitutionally and statutorily adequate resources to pursue his post-conviction relief action. *See, e.g.*, U.S. Const. amends V, VI, VII, XIV; S.C. Const. arts. I, III, XIV; S.C. Code § 17-27-160; *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. App. Ct. R. 602.

This Brief is *ex parte* as authorized by state law. S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B). Stanko requests that this Court order this Brief sealed and not filed in the public record of this proceeding or disclosed in any manner to the State or its attorneys.

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The legal and factual bases in support of the motion are set forth below.

I. PROCEDURAL HISTORY

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[1] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014.

On February 21, 2014, this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014. Scheduling Order (Feb. 21, 2014). The Court subsequently, on April 29, 2014, amended the Scheduling Order to tentatively schedule a merits hearing for February of 2015. Amended Scheduling Order (Apr. 29, 2014). On September 25, 2014, the Court set a date certain for the merits hearing, scheduling the trial in this post-conviction relief proceeding to commence on March 2, 2015 and ordering the discovery be completed by January 31, 2015. Order for Date Certain Trial and Second Amended Scheduling Order (Sept. 25, 2014).

[1] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

After being appointed, undersigned counsel began diligently reviewing the record and conducting an independent investigation. On April 1, 2014, counsel filed Applicant's First Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion"). During the two months between their appointment and filing the First Funding Motion, undersigned counsel (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors who sat on Stanko's trial; and (4) began investigating by meeting with Stanko's sister and a friend and conducting preliminary interviews with trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case,[2] undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims. Specifically, the First Funding Motion

[2] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

First Funding Motion 6-7 (Apr. 1, 2014).

requested the Court authorize funding of $10,000 for a fact investigator,[3] $15,000 for a mitigation investigator,[4] and $15,000 for the services of a forensic psychologist.[5]

On April 29, 2014, this Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funds for a fact investigator, finding counsel did not specifically identify new facts that required investigation and or trial testimony that may have been false or misleading. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness other than being a psychopath," because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the

[3] In support of the request for a fact investigator, counsel informed the Court that recently revealed facts suggested the possibility of juror bias and that the state may have presented false or misleading testimony regarding scams Stanko allegedly ran. Counsel, therefore, requested funding for a fact investigator to aid in investigating the issues already identified, identifying other issues for investigation, and presenting Stanko's claims for post-conviction relief.

[4] In support of the request for a mitigation investigator, counsel informed the Court that their preliminary investigation indicated trial counsel prematurely curtailed their mitigation investigation after settling on the theory that Stanko was a psychopath early on in the course of preparation for Stanko's Georgetown County trial and did not hire a mitigation investigator for the Horry County trial. Counsel also indicated that a mitigation investigator was needed to develop a relationship with Stanko's siblings, two of whom live outside of South Carolina and to conduct the record collection, which is complex due to Stanko's father's military service moving the family on numerous occasions.

[5] In support of the request for a forensic psychologist, counsel informed the Court their preliminary investigation revealed that trial counsel's inquiry into Stanko's mental health and life history was inadequate because counsel settled on a theory that Stanko is a psychopath early on in their trial preparation. As a result, trial counsel curtailed the mitigation investigation and failed to direct mental health experts to consider the relationship between Stanko's life history and brain damage and/or mental illness. Counsel, therefore, asserted that the assistance of a forensic psychologist was necessary to assist counsel in developing an understanding of Stanko's life history as it correlates to his mental health and presenting related issues to the Court.

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Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist. *See* Applicant's Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to reconsider, counsel (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. In the motion to reconsider, counsel set forth the specific factual issues in need of investigation by a fact investigator.[6] Counsel further sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses.[7] Given the limited nature of trial counsel's mental health and

[6] Counsel informed the Court that (1) during a juror interview, Juror James Berry, who sat on Stanko's Horry County trial, revealed that his wife treated Laura Ling's teenage daughter when she was brought to the hospital after being sexually assaulted by Stanko and Mr. Berry though he would have been ineligible to serve as a juror had the fact been elicited during jury selection; (2) counsel's preliminary investigation tended to show that the state's portrayal of Stanko as a violent con-man who passed himself off as a lawyer was false or misleading because Stanko was, in fact, working for lawyers in the Horry County area; (3) trial counsel did not investigate the suspicious death of Stanko's older brother, despite the fact the death was a significant event in Stanko's life history; and (4) a fact investigator was necessary to discuss factual issues with Stanko, who is highly intelligent and very interested in the development of his PCR case.

[7] Counsel also informed the court that they interviewed Dr. Joseph Wu, who testified at Stanko's trial. Dr. Wu stated that he was not asked to do a full evaluation of Stanko or to offer a diagnosis. He was only asked to review Stanko's brain scans for evidence of brain damage that would support the finding of psychopathy. Counsel further pointed out that trial counsel's presentation of Stanko

mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the Court partially granted and partially denied the motion to reconsider. The Court authorized $4,000 of the $10,000 requested for the fact investigator.[8] The Court, however, denied all funding requested for a forensic psychologist. The Court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The Court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute [S.C. Code § 17-3-50(B)] does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel (1) completed interviews with the remainder of Stanko's trial counsel; (2)

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as a psychopath likely had the effect of dehumanizing him in the eyes of the jury and did not comport with reasonable professional standards.

[8] The Court found the amount requested for the fact investigator to be excessive and denied funding for the fact investigator to investigate Stanko's brother's suspicious death and to work with Stanko on developing and investigating factual issues as unnecessary in this PCR case.

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continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's social history and records regarding trial counsel's perparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested $13,000 for the services of a licensed social worker[9] and $9,000 for the services of a media expert.[10]

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert. *See* Order Denying Applicant's Second Motion

[9] In support of the request for a licensed social worker, counsel informed the Court that, in all capital cases, a defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014). Undersigned counsel stated that trial counsel focused on the psychopathy defense early in their preparation for trial and failed to adequately investigate and present other available mitigation and social history evidence by relying exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopathy theory. Those experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Undersigned counsel further submitted that the expert who testified regarding Stanko's life history at trial did little to prepare for trial and was only able to testify generally and ineffectively about Stanko's upbringing. Counsel indicated that their mitigation investigation had uncovered mitigating evidence in Stanko's social and family history, including information about the harsh environment created by Stanko's military father, that was not presented at trail and required the assistance of a licensed social worker to develop, interpret, and present.

[10] In support of the request for a media expert, counsel informed the Court that media coverage of Stanko's case began immediately after the crimes occurred. The case was covered by local and national media throughout all stages, including law enforcement's national manhunt for and arrest of Stanko, preparations for his trial in Georgetown, each day of his trial in Georgetown, Stanko's conviction and death sentence in Georgetown, and preparations for his trial in Horry County. Undersigned counsel submitted that trial counsel was aware of the massive media coverage surrounding the case, but that trial counsel did not present the trial court with any information regarding media coverage in moving for a change of venue. Counsel, therefore, asked the Court to approve funding for an expert in media studies and media saturation to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court.

To Authorize Funding for Expert Services (Sept. 25, 2014). The Court interpreted counsel's funding requests as arguing that funding for a licensed social worker and a media expert is necessary because "none were used during Stanko's criminal trial." *Id.* at 2. The Court denied the requests, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *Id.* The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Stanko filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In light of the merits hearing scheduled for March 2, 2015, Stanko asked the Court to hold an *ex parte* hearing on the Second Motion to Reconsider as soon as possible. On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the Court order Stanko transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the Court sent counsel an email canceling the *ex parte* hearing, informing Stanko the Court would decide the Second Motion to Reconsider without oral arguments, and ordering Stanko to file a brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Stanko's Motion for Order of Transport.

This Brief is filed in support of the Second Motion to Reconsider. As of the filing of this Brief, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 3, 2015.

II. LEGAL BASIS FOR AUTHORIZING THE EXPENDITURE OF FUNDS IN EXCESS OF THE STATUTORY LIMITS.

The South Carolina legislature has provided that indigents seeking post-conviction relief from capital judgments are entitled to expert assistance upon an *ex parte* finding by the court that such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant"); *see also* Rule 602(g)(6), SCACR ("In post-conviction relief matters, expenses related to representation and fees of appointed counsel may be paid where permitted and as prescribed in these Rules and the Defense of Indigents Act.").

The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a

right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The ability to retain the services of experts and investigative assistance in various areas is particularly essential in capital cases. A capital case "is an extraordinary proceeding" where "the attorney is charged with the awesome responsibility of defending a person's life." *Bailey*, 309 S.C. at 460, 424 S.E.2d at 506. To prepare for the guilt or innocence phase of a capital trial, an attorney must vigorously and thoroughly investigate the facts and circumstances of the alleged crime, which often requires the assistance of various experts. *See id.* (recognizing that unlike the solicitor, the defense attorney does not have "the entire array of state, county, and municipal law enforcement" at his disposal). Just as assistance is imperative in the guilt or innocence phase of a capital case, it is equally necessary during the sentencing phase where counsel is challenged by novel and complex issues. *See id.* at 461, 424 S.E.2d at 506-07. Due to the finality and irrevocability of the penalty of death, the United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In order to ensure that the appropriate sentence is chosen, the Court has emphasized the importance of presenting to the sentencing body the fullest information possible concerning the defendant's life and characteristics. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that preventing the sentencer in a capital case from considering the defendant's characteristics "creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also Jurek v. Texas*, 428 U.S. 262, 271 (1976) (asserting that the sentencing body must have before it all possible relevant information about the individual whose fate it must determine).

Thus, in capital cases, defense counsel has a duty to vigorously investigate and present mitigating evidence. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Williams v. Taylor*, 529 U.S. 362, 393 (2000). This duty requires that counsel's investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." (internal quotation marks omitted)).

Post-conviction counsel must "continue an aggressive investigation of all aspects of the case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4); *see also id.* 10.15.1(E)(4) commentary ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."). Post-conviction counsel must review the record and conduct investigation to determine whether the applicant's conviction or sentence are "in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code § 17-27-20(A)(1). This responsibility necessarily includes determining whether the applicant received ineffective assistance of counsel during his trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). If trial counsel's decision to end investigation, including mitigation investigation, was either inconsistent with professional standards or unreasonable because known information should have led counsel to investigate further, a capital defendant may have a valid claim of ineffective assistance of counsel. *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *Strickland*,

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466 U.S. 688, 690-91 (1984). When evaluating *Strickland* claims, courts "evaluate the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins*, 539 U.S. at 536 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

III. ARGUMENT IN SUPPORT OF RECONSIDERATION.

Undersigned counsel are in an impossible (and unprecedented) bind. This Court has denied requests for funding for necessary expert assistance on the basis that Stanko cannot provide the court with the conclusions the experts will reach. This is not only inconsistent with the relevant statutory language, but it is also at odds with more than twenty years of capital post-conviction practice in this state; no other judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude. The statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1).[11] Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. In counsel's experience, and in the experience of other practiced capital post-conviction attorneys in South Carolina, no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 5; Holt Aff. ¶ 4.[12] Instead, courts have required counsel for PCR applicants to

[11] Stanko refers to the funding provision set forth in S.C. Code § 16-3-26 as the provision applicable to capital proceedings, whereas the Court's orders referred to the "reasonably necessary" standard in the funding provision found in the general provisions of the chapter regarding defense of indigents. *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 into the capital case post-conviction relief procedures). The "reasonably necessary" language, however, is the same in each funding provision.

[12] All affidavits referenced in this Brief were attached to the *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services, filed with this Court on October 14, 2014.

simply explain that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 7.

The standard set forth in the Court's orders—requiring a favorable result for the applicant prior to authorizing expert funding—expects that counsel would be able to retain the services of an expert without being able to guarantee their services would be paid for. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to a winning claim in a PCR action.[13] Many experts would not ethically be able to take a case under these conditions, which essentially create a contingency fee arrangement. *See* Knight Aff. ¶ 4 (stating that the ethics rules for forensic psychologists prohibit a forensic psychologist from taking a case on a contingent fee basis because contingent fees are considered a threat to impartiality).[14] Additionally, such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services. *See* Andrews Aff. ¶¶ 5, 9; Norris Aff. ¶ 8.

The Court's interpretation of the "reasonably necessary" requirement, therefore, impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). The right to the assistance of counsel when filing an application for post-conviction relief is hollow in the absence of the concomitant right of an indigent applicant to

[13] An expert could not ethically state before doing an evaluation what the evaluation will yield. Any expert who did so would be subject to impeachment on that basis.

[14] Dr. Susan Knight's affidavit is attached to this Brief.

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receive funding for expert and investigative services where appropriate. *See Williams*, 618 F.2d at 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). It is the state's duty to "ensure that a defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506.

The Supreme Court of the United States specifically recognized that the "right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to *research* and present a defendant's habeas claims." *McFarland*, 512 U.S. at 859 (emphasis added). Post-conviction counsel in capital cases "must continue an aggressive investigation of all aspects of the capital case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4). "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* 10.15.1(E)(4) commentary. Thus, though counsel has no way of knowing at the outset of its post-conviction preparation what claims will ultimately be presented to the court, post-conviction counsel have a duty to investigate the case entirely and often require the assistance of experts to do so. *See id.* 4.1 commentary ("Analyzing and interpreting [evidence in a capital case] is impossible without consulting experts.")

The Supreme Court of the United States has also established that a state court reviewing a state prisoner's federal claims must provide the prisoner with an opportunity to present evidence relevant to the federal claims. *See Coleman v. Alabama*, 377 U.S. 129, 133 (1964). In order to meaningfully access and to provide a fair opportunity to present all relevant evidence, a court must provide adequate funding for investigative and expert services. The Supreme Court has specifically

acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007) (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake*, 470 U.S. at 82 (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

Undersigned counsel have identified facts demonstrating that expert services in this case are reasonably necessary. Counsel, therefore, request the Court reconsider its denial of funding for a licensed social worker, a forensic psychologist, and a media expert. In support of this request, counsel submit the following facts, which include new facts uncovered by counsel's investigation since the original requests for funding were presented to the Court.

A. Facts and argument relevant to the request for a licensed social worker.

Counsel ask the Court to reconsider its denial of funding for a licensed social worker to investigate and present Stanko's social history. Despite the fact that there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's inadequate development and presentation of Stanko's social history as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(e)(3).

In this case, undersigned counsel's investigation reveals that trial counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial and failed to adequately

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investigate and present other available mitigation and social history evidence as a result. As part of their investigation, undersigned counsel interviewed Dale Davis, who served as the mitigation investigator for Stanko's Georgetown County trial. Davis stated that she objected to trial counsel's strategy to present Stanko as a psychopath. She told counsel their theory was not mitigating and that they needed to hire a social worker to aid in developing an presenting Stanko's social history. Over Davis' objections, trial counsel continued to pursue the psychopath strategy, limited their mitigation and mental health investigation accordingly, and did not hire anyone to aid in presenting Stanko's social history until approximately three weeks before trial.

Thus, undersigned counsel's investigation has made it clear that trial counsel focused on its psychopath "defense" without sufficient investigation and conducted the remainder of their trial preparation with a sort of "tunnel vision," ignoring anything that did not fit the psychopath theory. Trial counsel relied exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopath theory. These experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Trial counsel's focus on the psychopath theory thus resulted in a curtailed mitigation and social history investigation.

In all capital cases, the defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) ("Important sentencing 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'") (quoting *Wiggins*, 539 U.S. at 524); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary ("[T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase."). The testimony of a licensed social

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worker is one of the most basic, fundamental elements of virtually every capital sentencing proceeding in the modern era. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (2008) (instructing that it is the duty of the defense team to prepare experts to testify, including social workers "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning"); *see also* Holt Aff. ¶ 7; Glass Aff. ¶ 7.

Here, trial counsel utterly failed to investigate and present the jury with an adequate and accurate overview of Stanko's social history as mitigation. Trial counsel did not call any family members and called few friends, teachers, or employers.[15] Instead, trial counsel relied solely on Evelyn C. Califf who has a doctorate in Christian Counseling. Undersigned counsel's investigation has revealed that Califf began working on this case only a few weeks prior to trial and spent only one hour with the client and spoke briefly with only one of Stanko's sisters over the telephone in preparation for trial. As a result of her limited involvement, Califf was only able to testify generally and ineffectively about Stanko's upbringing and family life.

Undersigned counsel's investigation, conducted with the assistance of a mitigation investigator, has uncovered mitigating evidence in Stanko's social and family history that was not presented at trial. Since their appointment, counsel and the mitigation investigator have interviewed roughly twenty lay witnesses with knowledge of mitigating evidence surrounding Stanko's social history. Specifically, counsel have developed a relationship with Stanko's siblings,

[15] Trial counsel also failed to even interview the appropriate people in Stanko's life to develop a full understanding of his life history and mental health. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, parole officers, and others.").

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which was not done in preparation for trial, and have interviewed over a dozen friends, classmates, and teachers who were not interviewed by the trial team. These lay witnesses have presented a portrait of Stanko vastly different from that presented at trial.

Witnesses have described Stanko as generally well-liked, smart, outgoing, and a person with vast potential. During his late teenage years, Stanko began exaggerating the truth and, in some instances, outright lying. Around the same time, almost all of Stanko's close friends went off to college. Stanko did not go to college, despite his unquestioned intelligence and potential to succeed in college. Stanko instead began working as a salesman and began scamming friends and strangers. This led to legal trouble and eventual incarceration during Stanko's mid to late 20s. This evidence demonstrates a need for a social worker to aid counsel in understanding the information provided by the lay witnesses, directing counsel toward other potentially mitigating evidence, and in presenting that evidence to the Court in support of Stanko's ineffective assistance of counsel claim. *See* Glass Aff. ¶ 7 ("A testifying social worker is, therefore, necessary to evaluate [mitigation] information like this and to describe how . . . events shaped Mr. Stanko's life, particularly in light of his significant brain damage."); ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (instructing a defense team to work with a social worker "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning").

Due to undersigned counsel's concerns about preparing for a hearing in this case in such a short period of time, counsel contacted licensed social worker Arlene Andrews, Ph.D. Though Dr. Andrews would not normally begin working on a capital case without a funding order from the court, she agreed to begin work on Stanko's case while the motion for her funding was pending.[16]

[16] The funding statute, S.C. Code § 16-3-26(C)(1), authorizes the court to approve funding *nunc pro tunc*.

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Andrews Aff. ¶ 5. Dr. Andrews has, therefore, reviewed the trial mitigation testimony, reviewed Stanko family records, met with Stanko, and interviewed Stanko's brother. Andrews Aff. ¶ 7. As a result of her preliminary work on the case, Dr. Andrews believes there is a compelling mitigation story to be told in support of Stanko's PCR application. Andrews Aff. ¶ 8. In order to complete her social history evaluation and presentation, much work remains to be completed. Andrews Aff. ¶ 9. She must, (1) interview Mr. Stanko several more times; (2) interview Mr. Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends and former girlfriends from childhood and leading up to his crimes; (4) review the social history records counsel are continuing to collect; and, (5) conduct any additional work that may develop as the investigation progresses. Andrews Aff. ¶ 9. However, Dr. Andrews cannot complete this work without authorization of funds from the Court. Andrews Aff. ¶ 9.

The fact that trial counsel presented the testimony of mental health experts and some social history evidence does not negate Stanko's claim. The Supreme Court of South Carolina recently overturned a circuit court's denial of post-conviction relief where trial counsel presented the testimony of three mental health experts and a social history witness. *See Weik*, 409 S.C. 214, 761 S.E.2d 757. The court found that "[t]hough counsel introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed 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 (emphasis original). Stanko's case involves the same circumstances where trial counsel focused their investigation and mitigation presentation on mental health evidence, while ignoring social history evidence readily available to them.

The assistance of a licensed social worker with capital case experience is therefore necessary to assist undersigned counsel in developing an understanding of Stanko's social history

as it mitigates his crime and correlates to his mental health and in presenting related issues to this Court in support of his post-conviction relief claims. This Court must, therefore, authorize funds for a licensed social worker as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Undersigned counsel have conferred with Dr. Andrews; she is willing and able to assist counsel in this case.[17] Counsel, with input from Dr. Andrews, estimate that expenditure of approximately 100 hours is reasonably necessary to conduct the required evaluation in this case. The hours requested are reasonable given that, in counsel's experience, the request is on the low end of the number requested in similar cases and the request takes into account the expectation that the mitigation investigation conducted by counsel and the mitigation investigator will locate and identify the significant social history witnesses for Dr. Andrews to interview allowing her to conduct her social history evaluation efficiently. Dr. Andrews' rate is $130 per hour. Dr. Andrew's rate is reasonable given her experience and the fact that, in counsel's experience, this rate is on the low end of the average rates charged by expert Licensed Social Workers in South Carolina.

B. Facts and argument relevant to the request for a forensic psychologist.

Despite the fact that Stanko's mental health has been an issue in this case since the very beginning, a competent and reliable mental health evaluation has never been completed. Though there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's inadequate mental health evaluation of Stanko as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(e)(4).

[17] Dr. Andrews' current CV was attached to the Second Funding Motion filed with this Court. **4964**

Stanko has a high IQ of 143 and little history of violent behavior. Undersigned counsel's investigation clearly reveals that trial counsel's inquiry into Stanko's mental health was inadequate in that counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial. Trial counsel then sought out an expert in psychopathy, Dr. Thomas Sachy, after learning of Dr. Sachy's involvement in a Georgia case where Dr. Sachy testified about his diagnosis of the defendant as a psychopath.[18] Undersigned counsel's interviews with members of Stanko's trial team suggest that (1) Stanko's attorney, William Diggs, selected the psychopathy defense prior to the completion of any mental health evaluation of Stanko; (2) Diggs sought out an expert (Dr. Sachy) who was obsessed with psychopathy and determined that this theory was the best fit for Stanko's defense prior to completing an evaluation of Stanko; and (3) that neither Diggs nor Sachy could be dissuaded from the psychopathy theory even though they were advised that psychopathy was a bad strategy, it was not mitigating, and it had no chance of success.[19]

Undersigned counsel have diligently worked to interview the experts who testified at trial. Counsel's interview with Dr. Sachy confirmed that Dr. Sachy's work on the case began and ended with the theory that Stanko was a psychopath. Dr. Joseph Wu and Dr. Bernard Albiniak both informed counsel that their involvement in the case was limited in nature and they were never asked to conduct a formal mental health evaluation or provide a diagnosis. Counsel's investigation

[18] Undersigned counsel's investigation has revealed the inherent flaws in trial counsel's reliance on a diagnosis of psychopathy. Dr. Pamela Crawford, who testified as a court's forensic psychologist at trial, told undersigned counsel that the problem with trial counsel's use of the psychopathy diagnosis is that psychopathy is not an accepted clinical diagnosis, does not appear in the Diagnostic and Statistical Manual (the manual setting the standard for diagnosing mental disorders), and is not a mental illness.

[19] *See supra* Section III.A (describing undersigned counsel's interview with mitigation investigator Dale Davis, who objected to trial counsel's strategy because it was inherently not mitigating and encouraged trial counsel to continue investigating Stanko's social history and mental health).

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further indicates that Dr. Ruben Gur was only asked to analyze magnetic resonance imaging (MRI) of Stanko's brain and Dr. Marc Einhorn was only asked to conduct neurological testing, designed to evaluate brain functioning. Neither Dr. Gur nor Dr. Einhorn's reports indicate they conducted a mental health evaluation or made a mental health diagnosis. Finally, Dr. James Thrasher appears to have evaluated Stanko only for competency to stand trial and criminal responsibility. Dr. Thrasher's report does not indicate that he evaluated Stanko for mental illness as it related to mitigation. Accordingly, though six[20] psychological experts testified at Stanko's trial, none completed a full mental health evaluation. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process" but is "often of vital importance to a jury's decision at the punishment phase.").

While undersigned counsel cannot point to a specific diagnosis at this time, counsel's inability to do so is due to the fact that they themselves are not mental health experts and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses. As the ABA Guidelines note, "Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions . . . that could be of critical importance." ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary. For this reason, the ABA Guidelines mandate that "at least one member of the defense team . . . be a person

[20] The Court's order indicates there were seven mental health experts who testified at trail. Undersigned counsel submits there were only six. Brent Turvey, who also testified at trial, specializes in crime scene reconstruction and did not conduct a mental health evaluation of Stanko. Additionally, Dr. Evelyn Califf, who testified during the penalty phase of the trial, is a certified Christian counselor, not a psychologist. Dr. Califf was asked to present a social history, not to conduct a mental health evaluation.

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qualified by experience and training to screen for mental or psychological disorders or defects." *Id.*

"Mental health experts are essential to defending capital cases." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary. Jurors making a determination of the punishment for a defendant often find "the defendant's psychological and social history and his emotional and mental health [to be] of vital importance." *Id.* Given the fact that trial counsel prematurely abandoned investigation into Stanko's life history and its effect on Stanko's mental health, there is a strong possibility that Mr. Stanko has a viable claim for ineffective assistance of counsel under *Sears*, *Porter*, *Wiggins*, *Williams*, and *Strickland*. Undersigned counsel, therefore, ask this Court to authorize the necessary funds for a forensic psychologist to complete a competent and reliable mental health evaluation of Stanko as was never done before trial and cannot be completed without the assistance of a mental health expert. *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B); *see also* Norris Aff. ¶ 4 ("I do not recall even hearing of a capital post-conviction relief case in South Carolina where the court did not authorize funding for at least one mental health expert when a request was submitted by defense counsel.")

Undersigned counsel have conferred with Dr. Knight and she is willing to evaluate Mr. Stanko.[21] Dr. Knight estimates that it will require approximately 60 hours to review records, interview Stanko, conduct any needed psychological testing, interview relevant witnesses and prepare a report. Dr. Knight's rate is $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area. Dr. Knight's rates are reasonable given her experience and the fact that, in counsel's experience, the rates are on the low end of the average rates charged by expert forensic psychologists in South Carolina.

[21] Dr. Knight's current CV was attached to the First Funding Motion filed with this Court. **4967**

C. Facts and argument relevant to the request for a media expert.

Despite the fact that there is no way to know if the Court will ultimately deem it a winning claim, undersigned counsel have uncovered sufficient facts to identify trial counsel's ineffectiveness in failing to conduct a media saturation study and present it to the trial court in support of the motion for a change of venue as a claim for post-conviction relief. *See* Final Amended Application for Post-Conviction Relief, Claim 11(b)(1), 11(b)(2). Prior to trial in Horry County, defense counsel decided to move for a change of venue. At the pre-trial motions hearing held one month prior to jury selection, however, trial counsel informed the trial court that they were not presenting the change of venue motion at that time. ROA 3110. Partway through voir dire, counsel asked for a change of venue based on members of the jury pool's prior knowledge of the case against Stanko. ROA 1284-90. The State suggested it would be better for the court to consider the change of venue argument after the jury had been selected, but before it was sworn. ROA 1289.

In support of the change of venue motion, defense counsel did not object to the State's suggestion and the court delayed consideration of the change of venue motion until after selection of the jury. ROA 1289-90. After the jury was selected, defense counsel formally moved for a change of venue. ROA 1334-1415. Defense counsel presented the testimony of Dr. Bernard Albiniak, an expert in social psychology, who testified that in public forums, people will conform their statements to what they believe will be generally accepted by the group even if that is not what they actually believe. ROA 1336-81. Dr. Albiniak is not an expert in media saturation; he has never conducted a media study; and, during his testimony, he did not even mention having reviewed such a study. Dr. Albiniak opined that the jurors, when asked by the court if they could set aside their prior knowledge of the case, would tell the judge they could do so even if it was not

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what they believed. The State pointed out that none of Dr. Albiniak's research or studies involved juror behavior. With no evidence of the extent of the media coverage surrounding Stanko's case, the court denied the defense motion for a change of venue. ROA 1415.

The media coverage of Stanko's crimes and trial began immediately after the crimes occurred. Local and national media has continually covered all stages of Stanko's case, including law enforcement's national manhunt for and arrest of Stanko, preparations for his trial in Georgetown, each day of the trial in Georgetown County, Stanko's conviction and death sentence in Georgetown County, and preparations for Stanko's trial in Horry County. In fact, the entire Georgetown County trial was covered by 48 Hours, which aired an hour long special on Stanko multiple times prior to Stanko's trial in Horry County. Trial counsel were aware of the media coverage surrounding Stanko's case before the jury was selected in Horry County, yet trial counsel did not present the trial court with any information about media coverage in moving for a change of venue.

The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury. U.S. Const. amend. VI. Pretrial publicity about a case can be so pervasive and saturate the community to such an extent as to make it impossible to select an impartial jury from the community where the crime occurred. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). In such a case, the pretrial publicity creates a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected from a local jury pool. *See Skilling v. United States*, 561 U.S. 358 (2010).

In this case, the Horry County community was inundated with media detailing the crimes for which Stanko stood trial and Stanko's conviction and death sentence in Georgetown County. The media even extensively covered and detatiled the trial strategy used in Georgetown County,

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which was again presented in a nearly identical fashion to the Horry County jury. This creates a likelihood that, with the services of an appropriate expert, Stanko could have shown that an impartial jury could not have been selected from residents of Horry County. Trial counsel, however, presented no evidence relating to the amount and type of media coverage the potential jurors encountered in their daily lives before becoming members of the jury pool. This creates a strong likelihood that Stanko has viable claim for ineffective assistance of counsel under *Strickland*. An expert in media studies and media saturation is therefore necessary to conduct a study of the media coverage leading up to Stanko's trial and to present that evidence to the Court. The study, counsel believe, will demonstrate that the media surrounding Stanko's case saturated the Horry County community, making it impossible to select an impartial jury from that location. Further, the study will show the information that trial counsel should have presented to the trial court in support of the motion for a change of venue. This Court must, therefore, authorize funds for a media expert as they are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Undersigned counsel have conferred with Professor Vidmar about being retained on Stanko's case.[22] He is willing and able to assist counsel in conducting a media study for Stanko's case. Professor Vidmar made an initial review of the media surrounding the case and has confirmed the media study can be completed retroactively. Professor Vidmar has experience conducting and testifying regarding retroactive media studies in post-conviction cases. Counsel have conferred with Professor Vidmar and estimate that expenditure of approximately thirty hours[23] is reasonably

[22] Professor Vidmar's current CV was attached to the Second Funding Motion filed with this Court.

[23] The hours needed to conduct the media study are estimated at merely thirty hours because undersigned counsel, through their positions at the Death Penalty Resource & Defense Center and in an effort to conserve court resources, will have student assistance in collecting and organizing

necessary to conduct the required study and provide testimony in this case. Professor Vidmar's rate is $300 per hour. An affidavit from Professor Vidmar attached to the Second Funding Motion, demonstrates that his rates are reasonable given the fact that he has earned the same amount or significantly higher amounts in other cases on which he has recently been retained.

IV. SUMMARY OF REQUESTED EXPENDITURES.

For all of the reasons set forth above, Stanko requests the following expenditures:

Licensed Social Worker

To investigate, evaluate, and develop an understanding Stanko's social history, its mitigation of his crime, and to assist post-conviction counsel in presenting mitigating evidence related to Stanko's social history, Stanko requests authorization for the initial expenditure of $13,000 and reasonable expenses to retain a Licensed Expert in Social Work to be paid at a rate of $130 per hour.

Forensic Psychologist

To investigate, evaluate, and develop an understanding of the correlation between Stanko's life history and his mental health and to assist post-conviction counsel in presenting mental health evidence, Stanko requests authorization for the initial expenditure of $15,000 and reasonable expenses to retain a forensic psychologist to be paid at a rate of $250 per hour for clinical services and $125 per hour for travel outside of the Charleston area.

Media Expert

To conduct a study of the media surrounding his case and present the conclusions of that study to the Court, Stanko requests authorization for the expenditure of $9,000 and reasonable expenses to retain a media expert to be paid at a rate of $300 per hour.

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the relevant media for the study. Professor Vidmar, therefore, will require less time to review the materials and form his conclusions.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel request the Court reconsider its denial of funding for a licensed social worker, a forensic psychologist, and a media expert.

January 6, 2015

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
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Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2014-CP-26-035
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	
	)	
vs.	)	FINAL ORDER
	)	DENYING POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

2016 MAY 18 PM 2:28

TRIAL DATE ..... March 2 – 3, 2015
PRESIDING JUDGE ..... Benjamin H. Culbertson, Circuit Court Judge
APPLICANT'S ATTORNEYS ..... Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
RESPONDENT'S ATTORNEYS ..... Donald J. Zelenka, Assistant Attorney General
Caroline M. Scrantom, Assistant Attorney General
COURT REPORTER ..... Grace L. Hurley

This case comes before the court on an application for post-conviction relief. The applicant, Stephen C. Stanko ("Stanko"), seeks post-conviction relief from his conviction and sentence for murder and armed robbery occurring in Horry County, S.C.. On 11/19/2009, Stanko received a death sentence for murder and a 20-year sentence for armed robbery. His conviction and sentence were affirmed on appeal. See *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013), cert. denied *Stanko v. South Carolina*, 134 S.Ct. 247, 187 L.Ed.2d 183, 82 USLW 3186 (U.S.S.C. 10/7/2013).

In his Final Amended Application For Post-Conviction Relief, Stanko alleges the following grounds for post-conviction relief:

1. denial of the right to conflict-free assistance of counsel;
2. ineffective assistance of counsel during the pre-trial phase of his criminal trial;
3. ineffective assistance of counsel during guilt-or-innocence phase of his criminal trial;

4. denial of due process during the guilt-or-innocence phase of his criminal trial;
5. ineffective assistance of counsel during the sentencing phase of his criminal trial;
6. ineffective assistance of counsel during his appeal;
7. denial of an impartial jury;
8. unconstitutionality of his death sentence.

At the outset of this trial, Stanko voluntarily dismissed his claims for ineffective assistance of counsel arising out of his criminal attorneys' alleged failure to properly *voir dire* potential jurors regarding Stanko's prior conviction in Georgetown County, S.C.,[1] and their alleged failure to adequately impeach the State's expert witness, Dr. Pamela Crawford. Stanko also voluntarily dismissed his claim for post-conviction relief arising out of the alleged denial of his right to an impartial jury.

Prior to the presentation of his case, Stanko argued that he is unable to fully present a case for post-conviction relief on the following allegations due to inadequate funding from the Court:[2]

1. that he was denied effective assistance of counsel because his criminal trial attorneys "agreed to postpone raising the change of venue motion until after voir dire was completed and the jury was impaneled..."

2. that he was denied effective assistance of counsel because his criminal trial attorneys "failed to retain an appropriate expert or otherwise conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevelance [sic] of media coverage of the crimes and defendant in order to present the information to the trial court in support of the change of venue motion;"

3. that he was denied due process during the guilt-or-innocence phase of his criminal trial because "[t]he State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer..." and

[1] Prior to Stanko's criminal trial, he was convicted in Georgetown County, SC, of murder, criminal sexual conduct in the 1st degree, assault and battery with intent to kill, armed robbery and two counts of kidnapping ("Georgetown case").

[2] Pursuant to this Court's orders dated 4/29/2014, 6/3/2014, 9/25/2014 and Form 4 order dated 2/27/2015 (denying Stanko's Motion to Reconsider), the Court partially granted and partially denied Stanko's *ex parte* petition to authorize funding for expert and investigative services. The basis for this court's ruling is set forth in those orders. Further, pursuant to the South Carolina Supreme Court's Order in *Stanko v. State*, Appellate Case No. 2015-000212, the Supreme Court denied Stanko's "Petition for Court Oversight of Capital PCR Action" wherein Stanko petitioned the Supreme Court for continuance of this PCR trial pending reconsideration of this Court's denial of funding for investigative and expert services.

4. that he was denied effective assistance of counsel during the sentencing phase of his criminal trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the preponderance of the evidence presented during the trial of this case, I do hereby find the following salient facts and conclusions of law:

I. Right to Conflict-Free Assistance of Counsel

Stanko alleges that one of his criminal trial attorneys, William Diggs, had a conflict of interest in representing him in his criminal trial in Horry County. Mr. Diggs had previously represented Stanko in his Georgetown case.[3] At the time of Stanko's criminal trial in Horry County, he had an action for post-conviction relief pending in Georgetown County for alleged ineffective assistance of counsel by Mr. Diggs arising out of Mr. Diggs' representation of Stanko in the Georgetown case.[4] Stanko also alleges that he was denied effective assistance of counsel by his appellate attorneys for their failure to raise this issue on appeal.

Even if Mr. Diggs had a conflict of interest in representing Stanko in his criminal trial, that conflict was knowingly, voluntarily and effectively waived by Stanko. In pre-trial hearings, Stanko was questioned and advised extensively regarding Mr. Diggs' representation while Stanko's allegations of ineffective assistance of counsel were pending against Mr. Diggs for services rendered in the Georgetown case. Notwithstanding that advice, Stanko wanted Mr. Diggs to continue as his criminal attorney and waived any conflict of interest that may exist. Further, Stanko's appellate counsel raised this issue and it was addressed on appeal. See *State v. Stanko, id.* Therefore, Stanko's application for post-conviction relief on the grounds that he was denied conflict-free assistance of counsel in his criminal trial and that he was denied effective

[3] See Footnote 1, *ibid.*
[4] Stanko's action for post-conviction relief arising out of his conviction and sentencing in the Georgetown case is still pending and no ruling has been made on his allegation of ineffective assistance of counsel in that case.

assistance of counsel in his appeal due to appellate counsels' alleged failure to raise this issue should be denied.

II. Ineffective Assistance of Counsel in Pre-Trial Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the pre-trial phase of his criminal trial due to his criminal trial attorneys': 1) agreement to postpone raising a motion for change of venue until after a jury was impaneled; 2) failure to retain an expert or conduct a study to support a change of venue; and 3) failure to seek a pre-trial ruling that the South Carolina death penalty statute is unconstitutional.

Contrary to Stanko's allegations, his criminal trial attorney raised a motion for change of venue prior to jury selection. After the State objected to hearing the motion prior to jury selection, Stanko's attorney consented to argue his motion after striking the jury but before the jury was sworn. He argued his motion for change of venue at the agreed time but, the motion was denied. The court's denial of Stanko's motion to change venue was also addressed on appeal. See *State v. Stanko, id.*

Although Stanko's criminal attorney did not retain an "expert or otherwise conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevelance [sic] of media coverage of the crimes and defendant,"[5] he argued to the court about the amount of pre-trial publicity surrounding the criminal trial. He also retained a psychologist, Dr. Albiniak, who testified at the motion hearing that potential jurors' often fail to be totally forthcoming in their responses to *voir dire*.

As to Stanko's allegation that his criminal trial counsel was ineffective for not arguing that the South Carolina death penalty statute is unconstitutional "because [it] does not genuinely narrow the class of offenders eligible for a death sentence," his criminal attorney did argue in

[5] Final Amended Application For Post-Conviction Relief, ¶ 11(b)(2).

pre-trial motion that the death penalty is unconstitutional and that issue, likewise, was addressed on appeal. See *State v. Stanko, id.*

In an action for post-conviction relief, the applicant bears the burden of proving he is entitled to relief. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009). To establish ineffective assistance of counsel, one seeking post-conviction relief must prove that his counsel's performance was deficient and that a reasonable probability exists that, but for counsel's errors, the result of trial would have been different. *Brown v. State, id.* citing *Strickland v. Washington*, 466 U.S. 668 (1984).

In the case at hand, Stanko's criminal attorneys sought a change in venue and challenged the constitutionality of the South Carolina death penalty statute prior to trial. Both motions were denied and both decisions were affirmed on appeal. Therefore, nothing indicates that Stanko's criminal attorneys were deficient in their pre-trial representation or that they could have presented representation that would have achieved a result more beneficial to Stanko. Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel during the pre-trial phase of his criminal trial should be denied.

III. Ineffective Assistance of Counsel in Guilt-or-Innocence Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the guilt-or-innocence phase of his trial because his criminal attorney "failed to protect [Stanko's] right to conflict-free counsel by failing to adequately advise [Stanko] and the trial court of all relevant issues regarding the conflict of interest created by [Stanko's] then pending PCR application alleging counsel was ineffective in a prior, related proceeding."

As stated above, Mr. Diggs' representation of Stanko while allegations of ineffective assistanace of counsel were pending against him were extensively discussed with Stanko in pre-

trial hearings. Stanko wanted Mr. Diggs to continue as his attorney and knowingly, voluntarily and effectively waived any conflict of interest. The matter was raised, addressed and affirmed on appeal. The fact that the issue was not raised again in the guilt-or-innocence phase of the criminal trial is inconsequential. Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel in the guilt-or-innocence phase of his trial because his criminal attorney failed to protect his right to conflict-free counsel should be denied.

IV. Denial of Due Process of Law and Fair Trial in Guilt-or-Innocence Phase of Criminal Trial

Stanko alleges that he was denied due process of law and a fundamentally fair trial because "[t]he State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer who compared [Stanko's] brain PET scan to an inappropriate database and testified that the PET scan was 'perfectly normal,' despite knowing the database was inappropriate for comparison to [Stanko's] PET scan."

Dr. Kenneth Spicer testified on the State's behalf during in the criminal trial regarding Stanko's PET scan. However, Stanko challenged that testimony during his cross-examination of Dr. Spicer and through the testimony of Stanko's expert witness, Dr. Jospeh L. Chong-Sang Wu. Although Dr. Wu and Dr. Spicer rendered different opinions regarding Stanko's PET scan, nothing indicates that the State knowingly "presented false, misleading, inaccurate, and unreliable expert testimony...." Therefore, Stanko's application for post-conviction relief on the grounds that Dr. Spicer's testimony denied him due process of law and a fundamentally fair trial should be denied.[6]

[6] This court is aware that it denied Stanko's request for funding in this PCR action to obtain an expert who could dispute Dr. Spicer's testimony in the criminal trial. However, such evidence would have only corroborated the testimony of Dr. Wu and would not have indicated any due process violations by the State.

V. Ineffective Assistance of Counsel in Sentencing Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the sentencing phase of his criminal trial because his criminal trial attorneys: 1) informed the jury that Stanko's family did not like him and were not in attendance at trial; 2) elicited expert testimony that Stanko was a psychopath; 3) failed to investigate and present mitigating evidence of Stanko's life history and background; and 4) failed to investigate and present mitigating evidence of Stanko's mental health.

Stanko's criminal attorney admits that he informed the jury during the sentencing phase of the criminal trial that Stanko's family was not in attendance. This was a conscious decision on counsel's part. He opined that if he could persuade the jury that Stanko's family was so angry and disappointed with Stanko that they felt justified in refusing to attend the trial, that extreme perception of Stanko by his own family would support Stanko's defense that he could not function like a normal person and, thus, mitigate his culpability. Counsel's argument to the jury that Stanko's family was not in attendance at trial was an intentional trial strategy to curry sympathy for his client. Also, 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.

Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel during the sentencing phase of his trial because his criminal trial attorneys informed the

jury that Stanko's family was not at trial and because Stanko's expert witness testified as to his psychopathy should be denied.

Contrary to Stanko's allegations, his criminal attorneys investigated and presented mitigating evidence of Stanko's life history, background and mental health. Most of the investigation occurred in preparation of Stanko's Georgetown case. Rather than conducting extensive investigation into Stanko's life history, background or mental health again, his criminal attorneys decided not to retain a mitigating investigator but, rather, use the information obtained in preparation of Stanko's Georgetown case in the criminal trial of his Horry County case. Such a decision does not constitute ineffective assistance of counsel.[7] Therefore, Stanko's application for post-conviction relief on the grounds that his criminal trial attorneys failed to investigate and present mitigating evidence of Stanko's life history, background and mental health should be denied.

VI. Ineffective Assistance of Counsel in Appeal

Stanko alleges that he was denied effective assistance of counsel in his appeal because appellate counsel failed to raise the issue that the trial court erred in admitting significant amounts of prejudicial evidence relating to Stanko's prior murder conviction over trial counsel's consistent objections. Stanko's appellate attorney chose not to raise this issue on appeal because he felt the argument was futile.

During the sentencing phase of Stanko's criminal trial and over his criminal attorney's objection, the trial court permitted references to Stanko's murder conviction in the Georgetown case. A defendant's prior conviction for murder is admissible as an aggravating circumstance in

[7] In this case, the court granted up to $15,000.00 in funding for Stanko to retain a mitigation specialist, Drucy A. Glass. However, Ms. Glass did not testify in this PCR action and no evidence from her services was presented. Further, this court is mindful of its denial of Stanko's funding request for a fact investigator and forensic psychologist. However, the request to fund a fact investigator and forensic psychologist in this PCR action was not for the purpose of determining whether Stako's criminal trial attorneys were ineffective but, rather, to determine whether the investigators that were used missed anything.

the sentencing phase of a subsequent death penalty case for murder. Code of Laws of South Carolina 1976 §16-3-20(C)(a)(2). Therefore, Stanko's appellate counsel was not ineffective for failing to raise this issue on appeal.

VII. Unconstitutionality of South Carolina Death Penalty Statute

Stanko alleges that he is entitled to post-conviction relief because the South Carolina death penalty statute, Code §16-3-20, does not genuinely narrow the class of offenders eligible for death sentence.

The constitutionality of the Death Penalty Act is well settled. *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985), certiorari denied 106 S.Ct. 209, 474 U.S. 888, 88 L.Ed.2d 178 (U.S.S.C. 1985). Further, this issue was addressed in Stanko's appeal. See *State v. Stanko, id.* Therefore, Stanko is not entitled to post-conviction relief due to the alleged unconstitutionality of the South Carolina death penalty statute.

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the Applicant, Stephen C. Stanko, is **DENIED** post-conviction relief in this case.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

May 13, 2016
Georgetown, SC

Copy of Order/
filed 5-18-16 mailed to all
parties not in default on 5-18-16
initials BHC 4985

4:00 PM.)

VERDICT

THE COURT: YOU MAY BE SEATED. MADAM FORELADY, IS IT CORRECT THAT THE JURY HAS REACHED A VERDICT?

FORELADY: THAT'S CORRECT, YOUR HONOR.

THE COURT: IF YOU WOULD GIVE THE VERDICT FORMS TO THE BAILIFF.

(BAILIFF APPROACHED THE FORELADY THEN APPROACHED THE CLERK WHO HANDED TO JUDGE.)

THE COURT: MADAM CLERK, IF YOU COULD COME OVER HERE...

(WHEREUPON A BENCH CONFERENCE WAS HELD WITH THE CLERK AND THE COURT.)

THE COURT: IF THE DEFENDANT WOULD STAND FOR THE PUBLICATION OF THE JURY'S VERDICT.

THE CLERK: THE STATE OF SOUTH CAROLINA, THE STATE VERSUS STEPHEN CHRISTOPHER STANKO IN THE COURT OF GENERAL SESSIONS FOR THE 15TH JUDICIAL CIRCUIT, CASE NUMBER 2005-GS-22-918, AGGRAVATING CIRCUMSTANCES, WE THE JURY IN THE ABOVE-ENTITLED CASE FIND BEYOND A REASONABLE DOUBT THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES:

CRIMINAL SEXUAL CONDUCT; KIDNAPPING; ROBBERY WHILE ARMED WITH A DEADLY WEAPON; LARCENY WITH THE USE OF A DEADLY WEAPON; AND PHYSICAL TORTURE. DO YOU

WANT ME TO POLL THE JURY AFTER EACH?

THE COURT: YES.

THE CLERK: OKAY. LADIES AND GENTLEMEN OF THE JURY, IF THIS IS YOUR DECISION AND IT IS STILL YOUR DECISION, PLEASE LET IT BE KNOWN BY RAISING YOUR RIGHT HAND.

(ALL JURORS COMPLIED.)

THE CLERK: THANK YOU. STATE OF SOUTH CAROLINA, GEORGETOWN COUNTY, VERSUS STEPHEN CHRISTOPHER STANKO IN THE COURT OF GENERAL SESSIONS FOR THE 15TH JUDICIAL CIRCUIT, CASE NUMBER 2005-GS-22-918, RECOMMENDATION OF SENTENCE, DEATH PENALTY.

WE THE JURY IN THE ABOVE-ENTITLED CASE HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES. TO WIT: ONE, CRIMINAL SEXUAL CONDUCT; TWO, KIDNAPPING; ROBBERY WHILE ARMED WITH A DEADLY WEAPON; LARCENY WITH THE USE OF A DEADLY WEAPON; AND PHYSICAL TORTURE NOW RECOMMEND TO THE COURT THAT THE DEFENDANT, STEPHEN CHRISTOPHER STANKO, BE SENTENCED TO DEATH.

STATE OF SOUTH CAROLINA, GEORGETOWN COUNTY VERSUS STEPHEN CHRISTOPHER STANKO -- AND I'D LIKE TO GO BACK AND POLL THE JURY FOR THE ONE THAT I JUST READ.

IF THIS IS YOUR DECISION AND IT IS STILL YOUR

The Supreme Court of South Carolina

Stephen C. Stanko, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002281

ORDER

Lindsey S. Vann, Esquire, moves to be appointed counsel for petitioner in this appeal based on a conflict of interest on the part of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Ms. Vann represented petitioner before the circuit court in this matter and represents him in his companion PCR matter in Georgetown County. The motion is granted and Ms. Vann is hereby appointed to represent petitioner in this matter. Emily Paavola, Esquire, may assist Ms. Vann in representing petitioner in a *pro bono* capacity. The Division of Appellate Defense shall remain associated for the limited purpose of ordering and paying for any necessary transcript(s) and providing copies of the petition, appendix, and briefs. The transcript(s) shall be ordered within thirty days of the date of this order.

C.J.
FOR THE COURT

March 1, 2018
Columbia, South Carolina

cc:

The Supreme Court of South Carolina

Stephen C. Stanko, Petitioner,

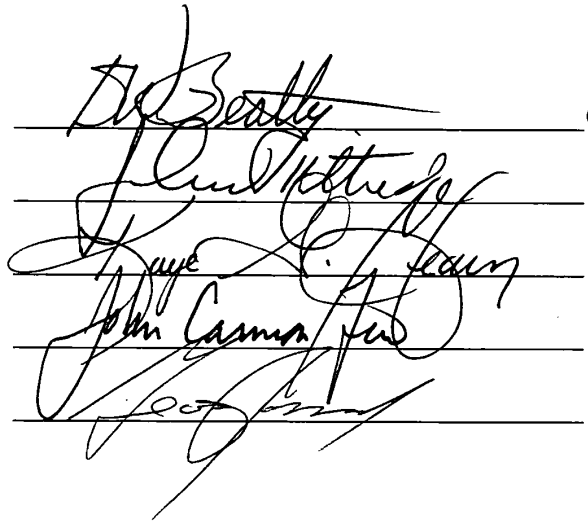
v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002281

ORDER

By order dated September 19, 2019, this Court denied Petitioner's request for a writ of certiorari to review the denial of his application for post-conviction relief. Petitioner now asks this Court to reconsider the denial. The petition for rehearing is denied.



_____ C.J.

_____ J.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

October 31, 2019

cc:

Lindsey Sterling Vann, Esquire
Emily C. Paavola, Esquire
Donald J. Zelenka, Esquire
J. Anthony Mabry, Esquire
Caroline M. Scrantom, Esquire

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July 2, 2020

VIA E-MAIL (mbrown@scag.gov)
Melody J. Brown
Senior Assistant Deputy Attorney General
Office of the Attorney General of South Carolina

RE: *Stanko v. Stirling, et al.*, No. 1:19-cv-380-RMG-SVH (D. S.C.)

Dear Ms. Brown:

This letter memorializes an agreement between the parties in the above-referenced federal capital habeas corpus action concerning the pleading of certain categories of claims by the Petitioner, Mr. Stanko, and potential affirmative defenses of untimeliness by the Respondents (the "Agreement"). Counsel for the undersigned parties hereby form this Agreement to clarify their handling of exigencies and impairments stemming from the novel coronavirus (SARS-CoV-2, known as COVID-19) pandemic. Due to the procedural history noted here,[1] the ordinary operation of the one-year federal limitations period pursuant to 28 U.S.C. § 2244(d)(1)(A) provides for Mr. Stanko to timely plead claims by August 4, 2020.

Earlier, on February 17, 2020, Petitioner filed a *Placeholder Petition for Writ of Habeas Corpus by a Person in State Custody (Verified)*, doing so "in accordance with the Court's November 19, 2019 scheduling order (ECF No. 11) and in substantially similar format to the form petition for writ of habeas corpus by a person in state custody available from this Court." ECF No. 24 at 1. The parties recognize that Petitioner intends to further amend his pleadings and shall do so in relation to the one-year statute of limitations generally set forth in § 2244(d). Thus, this Agreement contemplates two petition amendment dates for Petitioner. Each future amendment contemplated herein

[1] Mr. Stanko's state post-conviction litigation concluded when the Supreme Court of South Carolina issued the Remittitur concerning his application for relief on October 31, 2019 and it was filed on November 4, 2019. ECF No. 18-23. On February 13, 2013, the Supreme Court of South Carolina, on direct appeal, affirmed Mr. Stanko's present judgment from Horry County. On October 7, 2013, the United States Supreme Court denied Mr. Stanko's timely filed petition for writ of certiorari, resulting in the finality of that judgment under 28 U.S.C. § 2244(d)(1)(A). On January 6, 2014, ninety-one days later, Mr. Stanko filed his application for post-conviction relief.

§ Admitted in Texas
¥ Admitted in Texas and inactive in New York
† Admitted in Missouri and Pennsylvania
‡ Admitted in Arizona, California and North Carolina
•• Admitted in New York
• Admitted in Missouri

anticipates that, for each claim, Petitioner shall both plead its factual grounds and supply supporting point and authorities of law.

The parties hereby confirm that Petitioner shall have until (and including) August 4, 2020 to amend his petition positing any and all claims for which Mr. Stanko has exhausted his state remedies (hereinafter, the "First Amended Petition"), under 28 U.S.C. § 2254(b) and the federal case law. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). In determining this August 4, 2020 date under 28 U.S.C. § 2244(d)(1)(A), the parties rely on the filed date of the circuit court's remittitur in this case. *McGaha v. Stirling*, No. CV 6:18-01736-RMG, 2019 WL 3802774, at *3 (D. S.C. Aug. 13, 2019), citing *Beatty v. Rawski*, 97 F. Supp.3d 768, 780 (D. S.C. 2015). Further, Respondents understand that the operation of the one-year limitations period under § 2244(d)(1)(A) yields a timely filing deadline of August 4, 2020. To the extent the time between the issuance of the state court post-conviction remittitur on October 31, 2019 and its filing in the circuit court on November 4, 2019 would be included in calculating the one-year limitations period,[2] Respondents affirmatively waive timeliness as a defense under § 2244(d) for that four-day period. *See, e.g., Wood v. Milyard*, 566 U.S. 463, 466 (2012), and related cases (*infra*).

The parties recognize that the onset and persistence of the COVID-19 pandemic has profoundly impaired Petitioner's capacity to investigate, develop, and plead claims beyond those presented to the courts of the State of South Carolina in Mr. Stanko's prior proceedings. Due to these circumstances, the parties have agreed on a filing date for additional habeas corpus claims beyond those contemplated in the First Amended Petition, but only those claims presented under the specific parameters of *Martinez v. Ryan*, 566 U.S. 1 (2012).

The parties recognize that *Martinez*, 566 U.S. at 17, introduced the equitable exception that state post-conviction "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." *Id.* at 13. Such cause under *Martinez* thus may "excuse certain procedurally defaulted ineffective-assistance-of-trial-counsel claims." *Gray v. Zook*, 806 F.3d 783, 789 (4th Cir. 2015).

The parties recognize that it is incumbent on federal habeas counsel to plead claims that, pursuant to *Martinez*, may overcome a state procedural bar. It is also mutually recognized that the development of such claims requires investigation and the present consequences from the

[2] In their return to Petitioner's stay motion (Doc. 7 at 5), Respondents calculated a filing date of July 31, 2020 based on the use of the remittitur's issuance date of October 31, 2019 rather than the remittitur's filed date of November 4, 2019. The authorities are clear (*McGaha, Beatty, supra*), however, that the one-year period under § 2244(d) resumes as of the filed date—not the issuance date and thus in this case the one-year period runs until (and including) August 4, 2020.

pandemic have utterly impeded counsel's capacity to advance an investigation and fully enlist expert opinion in furtherance of Petitioner's pleadings.

Thus, the parties have agreed to permit Petitioner to further amend his petition by October 30, 2020 (the "Second Amended Petition"), with non-exhausted claims that may, under *Martinez*, establish cause and prejudice to overcome state procedural bars.

Under this Agreement, due to direct consequences from the pandemic, the State shall make the following deliberate, limited waiver of any untimeliness defense under the federal statute of limitations pursuant to § 2244(d)(1): With respect to any and all claims set forth in the Second Amended Petition that are unexhausted and presented under *Martinez*, the State shall deliberately waive any statute of limitations defense in this cause for the entire period prior to and including October 30, 2020. The parties have agreed to this October 30, 2020 date based on their best projection regarding the earliest timeline for the material alleviation of the circumstances impeding Petitioner's development of the contemplated claims.

This Agreement is premised upon the clearly established law which provides that the federal courts shall honor a State's waiver of an untimeliness defense under § 2244(d)(1). *Wood v. Milyard*, 566 U.S. 463, 466 (2012) ("A court is not at liberty, we have cautioned, to bypass, override, or excuse a State's deliberate waiver of a limitations defense."); *Day v. McDonough*, 547 U.S. 198, 202 (2006) (cautioning that federal court may not override State's deliberate waiver of untimeliness defense under § 2244(d)(1)); *see United States v. Melaku*, 799 Fed. Appx. 203, 204 (4th Cir. 2020) ("However, the Government has since opted to waive any limitations defense—a decision we are not at liberty to overlook."; citing *Wood*, 566 U.S. at 466 (2012)); *United States v. Lloyd*, 733 Fed. Appx. 132, 133 (4th Cir. 2018) ("Because the Government has affirmatively waived its statute of limitations defense, we must overlook any timeliness defect relating to Lloyd's burglary claim."; quoting *Wood*, 566 U.S. at 463); *see also Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 635 (4th Cir. 2017) (also citing *Wood*).

Given the foregoing, the parties shall jointly request a scheduling conference with Magistrate Judge Hodges both to apprise the Court of the terms of this Agreement and to request a companion scheduling order contemplating the next steps following the filings of the foregoing First and Second Amended Petitions. To that end, the parties expect to propose the following (i) Respondents' return and any dispositive motions shall be in response to both the First and Second Amended Petitions and shall be filed by December 18, 2020; (ii) Petitioner's response to the return and motion(s) shall be filed by February 18, 2020; and (iii) Respondents may reply by March 4, 2021.

By counsel for Respondents in the above-referenced action affixing a signature below, Respondents have acceded to this Agreement.

Very truly yours,

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Executed on: **July 2, 2020**

July 6, 2020

"initial-review collateral proceeding," as that term is used in *Martinez v. Ryan*, 566 U.S. 1 (2012) (*infra*).

After Mr. Stanko's *ex parte* motion for attorney fees in excess of the statutory rate, filed February 17, 2014 (ECF No. 18-5 at 9-11), was denied on February 18, 2014 on the grounds that the motion contained no showing that this case required more care and expertise than any other capital case (*id*. at 12-13), Mr. Stanko's counsel filed a motion to reconsider, noting that the requested rate was a standard one routinely approved in other capital cases and detailing some of the highly unusual aspects of this case, showing that it was "more complex than the average capital post-conviction case." *Id*. at 14-17. This greater complexity stemmed from the conflict issue arising from the Georgetown County post-conviction proceedings, which alleged Diggs's ineffectiveness, transpiring while Diggs represented Mr. Stanko in the Horry County case. *Id*. On March 27, 2014, the post-conviction court granted the excess rate "in light of the complex nature of this post-conviction relief case" chiefly arising from Diggs's representation in both this and the Georgetown County capital trials, necessitating that post-conviction counsel review "the entire record" in both trials. *Id*. at 31.

On April 1, 2014, post-conviction counsel filed an *ex parte* motion for expert funds in excess of the statutory limit, as "reasonably necessary for the representation of the defendant." *Id*. at 34-64. Counsel sought funding for: (i) a fact investigator necessary to follow up on facts revealed by post-conviction counsel's initial records review and preliminary investigation steps which revealed facts that if true suggest colorable claims of juror bias, juror misconduct, ineffective assistance of counsel at jury selection, and ineffective assistance in failure to investigate and rebut the state's case that Mr. Stanko is "a con-man with violent tendencies" (*id*. at 40-42); (ii) a mitigation investigator to investigate what was revealed in consultation with the Georgetown

mitigation investigator, that trial counsel unreasonably limited mitigation investigation due to his single-minded fixation on an NGRI defense and his baseless and premature conclusion that a "psychopath" diagnosis was the only outcome from mitigation inquiry (*id*. at 42-45); and (iii) a forensic psychologist to investigate the relationship between Mr. Stanko's life history and potential brain damage and/or mental illness (*id*. at 45-47). On April 29, 2014, the court granted the motion as to the mitigation specialist only, denying the other two funding requests. *Id*. at 66-76. The court said that the motion failed to say what facts it turned up that would necessitate a fact investigator, and that a forensic psychology is not reasonably necessary without "more substantial indication that [Mr. Stanko] suffers a mental illness other than being a psychopath." *Id*. at 71, 74.

On May 8, 2014, post-conviction counsel filed a motion to reconsider, providing the tentative facts associated with juror misconduct (possible intimate extrajudicial knowledge of the Georgetown case that would surely bias the juror) and information suggesting that much of the "con man with violent tendencies" testimony was false or unreliable, given that Mr. Stanko did in fact have experience working for a law office on the outside and helping inmates with legal filings in his prior incarceration; also preliminary investigation suggesting that the death of Mr. Stanko's brother Billy, when Mr. Stanko was 15 years old, was suspicious and needed to be fully investigated. The motion to reconsider also detailed that lead trial counsel's obsession with NGRI and the "psychopath" diagnosis foreclosed any meaningful investigation of other mental illness or brain damage. *Id*. at 77-88.

On June 3, 2014, the court partially granted the motion to reconsider, but only as to the fact investigator, and only for purposes of investigating the juror issues and the State's "con man with violent tendencies" testimony, thereby approving less than half the requested hours. *Id*. at 100-06. The order denied altogether the forensic psychologist, reasoning that under the statute, S.C. Code

Stanko also repeated his desire to ensure that retaining Mr. Diggs would not preclude prosecuting his ineffective assistance of trial counsel grounds for relief from the Georgetown judgment.

In the midst of Mr. Stanko's constitutional attack upon his Georgetown judgment, Mr. Diggs resolved to present a defense in Horry County nearly identical to the abysmal case he put forth in the Georgetown County trial. Eventually, on June 5, 2009, the trial court entertained—*upon the State*'s motion—whether this "non-waivable conflict of interest" constitutionally afflicted Mr. Stanko's attorney-client relationship.

The State's motion was correct: Mr. Diggs labored under an unwaivable conflict in light of the attorney's vital reputational interests at stake as a result of Mr. Stanko's first capital conviction. Further, the conflict precipitated various other attending implications and consequences concerning, inter alia, waiver of attorney-client privilege for both the then-pending Georgetown post-conviction litigation and the imminent Horry County capital trial. Finally, the post-conviction attack on his performance placed extraordinary pressure upon Mr. Diggs to retrospectively justify his numerous prior deficiencies by essentially duplicating his grossly failed approaches on all material aspects in the Horry County trial.[16]

Further, even if Mr. Diggs's conflict had been waivable in the Horry County proceedings, the trial court failed to meet the constitutional baseline for advising Mr. Stanko of his interests so that he could render a knowing, voluntary, and intelligent waiver. When presented with this conflict, the trial court should have secured independent conflict-counsel to advise Mr. Stanko as to Mr. Diggs's conflict against him. Further, the trial court failed to adequately explore with Mr.

[16] Further, as set forth below with respect to Petitioner's Horry County post-conviction claims, unbeknownst to Mr. Stanko during the Horry County trial proceedings, Mr. Diggs was conducting other attorney-client affairs in a deeply unethical manner, mishandling client funds and precipitating his eventual disbarment from the state bars of both South Carolina and North Carolina, placing the individual under tremendous personal financial strain.

b. Factual Grounds

The facts set forth herein support this claim and, by this specific reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein. In addition to the factual grounds specified *supra* in Claim 1, the following grounds, which emerged after the trial proceedings, also inform this claim.

In the Horry County post-conviction litigation, the state court held a brief evidentiary hearing on March 2-3, 2015, in which Mr. Diggs testified. ECF No. 18-2 at 150. At that time, he averred that he had been suspended from the practice of law. However, it emerged after his testimony that he was subject to a disciplinary complaint had been lodged against him with the North Carolina bar reflecting his theft of client funds from two clients of minority age in an amount exceeding $100,000. The disciplinary complaint in question reflects alleged criminal acts of transferring deposits from a trust account to other accounts in his control occurring between July 2009 and September 2014. ECF No. 18-7 at 113.

As explained *supra* at 39-40, the Horry County trial court accepted Mr. Stanko's ostensible waiver of Mr. Diggs's conflict of interest. As argued above, the trial court erred and thereby violated Mr. Stanko's constitutional right to a fair trial. In addition to that violation, Mr. Diggs's role as trial counsel despite his conflict against Mr. Stanko caused the deprivation of the defendant's right to conflict-free counsel, a right that counsel's conduct and performance transgressed. Thus, Petitioner hereby incorporates the authorities set forth in the argument and authorities in Claim 1 and supplements that with the foregoing information concerning Mr. Diggs's misconduct that occurred with respect to other clients at the time he was defending Mr. Stanko in Horry County and subjected to ineffectiveness claims in Georgetown County.

defendant's race disproportionately predisposed him to violent conduct, while the jury considered the principal question of defendant's likelihood of future violence). Expert testimony, especially from a medical expert, can carry more weight and influence the sentencing jury. *Id.* at 777. Such testimony can prejudice the jury against the defendant enough to create a reasonable probability that absent counsel's error, at least one juror would have "struck a different balance" regarding defendant's culpability. *Andrus*, 140 S. Ct. at 1886 (citation omitted).

b. Factual Grounds

The facts set forth herein support this claim and, by this specific reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

During direct examination of Dr. Evelyn C. Califf, counsel abandoned any strategy and unreasonably informed the jury that Petitioner's family did not like him and specifically pointed out the fact that none of Petitioner's family were in attendance at the trial.

Dr. Evelyn C. Califf, a psychometrist, was retained by the defense to provide information about Mr. Stanko's development from early years up through grade school, and this investigation included consultations with family members, such as Mr. Stanko's living siblings. ECF No. 17-9 at 237-38. While asking Dr. Califf about Mr. Stanko's family members, counsel asked, "Have any of the family members to your knowledge attended the trial here?," to which Dr. Califf responded no. *Id.* at 243. Counsel then asked Dr. Califf to speculate why that was so, to which she said, "I really think that they had some deep issues maybe of sadness that maybe they had not done more, as well as some of the things that have happened during the years after his school that he has–-his interaction with them, a couple of things." *Id.* at 243-44. During closing arguments, the State tried to anticipate the defense's argument, saying, "I don't know if they are going to argue [the insanity defense] to you again or not; I'm not sure, but here's how it goes." *Id.* at 269. State then said that

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

STEPHEN C. STANKO, *Petitioner*, v. BRYAN STIRLING, Director, South Carolina Department of Corrections, and MICHAEL STEPHAN, Warden Broad River Correctional Institution, *Respondents*.	)	CA: 1:19-cv-03257-RMG-SVH CAPITAL HABEAS CORPUS

***EX PARTE* MOTION FOR TRANSFER ORDER TO MEDICAL IMAGING FACILITY AND AUTHORIZATION OF BRAIN IMAGING FUNDING**

I. INTRODUCTION

Petitioner, by and through undersigned counsel, hereby moves the Court to order the Broad River Correctional Institute ("Broad River") to arrange for the transportation of Mr. Stanko to the Medical University of South Carolina ("imaging facility") at 171 Ashley Avenue, Charleston, South Carolina, or a suitable alternative preferred by Broad River, to conduct magnetic resonance imaging ("MRI") and positron emission tomography ("PET") of his brain, scans that are essential to certain specialist services already funded under 18 U.S.C. §3599(f), at a date and time set by mutual convenience to both prison and the imaging facility, but no later than 7 days from the order's entry. The imaging facility has indicated that scanning appointments may be established on approximately one week's notice, sometimes less. Petitioner also moves the Court, pursuant to 18 U.S.C. §3599(f), for authorization of funding up to $6,900 for the MRI and PET scans.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

STEPHEN C. STANKO, *Petitioner*, v. BRYAN STIRLING, Director, South Carolina Department of Corrections, River Correctional Institution, *Respondents*.	)	CA: 1:19-cv-03257-RMG-SVH ***Ex Parte* Order**

EX PARTE FUNDING ORDER

Upon consideration of Petitioner's *Ex Parte* Motion for Authorization of Brain Imaging Funding and Transport (Dkt. No. 74), the Court finds the requested services reasonably necessary. With the concurrence on October 14, 2021 of Chief Judge Roger L. Gregory, Court of Appeals for the Fourth Circuit, pursuant to 18 U.S.C § 3599(g)(2), **GRANTS** the motion as follows:

The Court authorizes up to $6,900 for magnetic resonance imaging (MRI) and position emission tomography (PET) scanning services. The Court authorizes timely, direct payment from the designated department of the Court to the imaging facility upon counsel's submission of the facility's invoice or pre-authorization of the imaging services. The Court further directs the South Carolina Department of Corrections (S.C.D.C.) to arrange for transport of Petitioner, as soon as is reasonably practicable, from the Broad River Correctional Institution to the Medical University of South Carolina or to any other MRI imaging facility preferable to S.C.D.C.

AND IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

STEPHEN C. STANKO, Petitioner, v. BRYAN P. STIRLING, Director, South Carolina Department of Corrections, and MICHAEL STEPHAN, Warden Broad River Correctional Institution, Respondents.	)	CA: 1:19-cv-03257-RMG-SVH **DEATH PENALTY CASE**

TRAVERSE, RESPONSE TO SUMMARY JUDGMENT MOTION, AND SUPPORT FOR PETITIONER'S PARTIAL SUMMARY JUDGMENT

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Counsel for Petitioner, Stephen C. Stanko

Id. at 122 (emphasis added).

Underlying this statutory conflict was Mr. Diggs's reputational self-interest. *See generally*, *Christeson v. Roper*, 574 U.S. 373 (2015); *Holloway v. Arkansas*, 435 U.S. 475 (1978). Trial counsel's dire financial predicament precipitated his effort to protect his appointment by, in part, advocating that he needed no funding for necessary specialist services for his client. ECF No. 17-9 at 362-63. Mr. Diggs was playing on the trial court's role as administrator of public funds in order to protect his own source of revenue pursuant to his appointment, maximizing the potential appeal of not seeking specialists' funding so that he could better protect his own income from the case in the face of his mounting personal financial crisis. ECF No. 17-9 at 362-63.

Under ABA Model Rules of Professional Conduct Rule 1.7, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Such a conflict exists owing to "significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." A concurrent conflict may not be waived unless, inter alia, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to" the client, and the client "gives informed consent, confirmed in writing."

Identical provisions are found in South Carolina's rules governing professional conduct included in Supreme Court Rule 407, Rule 1.7. Comment 2 requires that when a concurrent conflict exists, the attorney is required to determine whether the conflict is "consentable." Comment 10 provides more insight into concurrent conflicts arising out of the attorney's personal interests:

> The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in

> a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

Supreme Court Rule 407, Rule 1.7. Comment 10.

Mr. Diggs failed to disclose to the trial court or Mr. Stanko significant details of his personal self-interest conflict stemming therefrom: both reputational and the financial pressures motivating his desire to stay on the Horry County case. ECF No. 18-7 at 113. It is unreasonable to believe he could provide competent and diligent representation when he intended not to undertake investigation or development of mitigation evidence while planning to pursue the same theory of NGRI that was at the heart of Mr. Stanko's PCR claims, whatever counsel he was contemporaneously giving Mr. Stanko as to his trial strategy and tactics.

The Third Circuit recently examined these parameters of consent. A Criminal Justice Act attorney was appointed to represent a criminal defendant in a federal prosecution, and shortly theeafter moved to withdraw because he had joined a firm and was no longer a CJA-listed attorney. *United States v. Bellille*, 962 F.3d 731, 733 (3d Cir. 2020). After the district court denied his motion, he learned a principal attorney at the attorney's new firm represented one of the government's testifying witnesses in the case in question, and filed an emergency *ex parte* motion to withdraw. *Id.* at 734. The district court inquired as to his relationship with the new firm, denied the motion, and ordered that representation of the defendant and the witness be walled off one another within the firm. *Id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

STEPHEN C. STANKO, *Petitioner*, v. BRYAN P. STIRLING, Director, South Carolina Department of Corrections, and MICHAEL STEPHAN, Warden Broad River Correctional Institution, *Respondents*.	CA: 1:19-cv-03257-RMG-SVH CAPITAL HABEAS CORPUS **MOTION FOR PARTIAL SUMMARY JUDGMENT**

Petitioner, by and through undersigned counsel, pursuant to Fed. R. Civ. P. 56(b), hereby moves for summary judgment as to his grounds for a writ of habeas corpus for which there remains no genuine issue as to material fact. Petitioner so moves especially as to his claims related to the deprivation of his right to conflict-free counsel at trial. Should the Court determine there remains a genuine issue of material fact as to any of these claims, or as to the factual bases for any procedural threshold questions, further evidentiary development and a hearing are warranted prior to any dispositive ruling.

Petitioner requests this Court stay *Respondents' Motion for Summary Judgment* (ECF No. 70) pending opportunity for Petitioner to develop necessary evidence required to make that determination, including issuing an order for discovery, expansion of the record, and/or an evidentiary hearing, pursuant to Rules Governing Section 2254 Cases in United States District Courts. Petitioner herewith simultaneously files his *Traverse to the Return to Petitioner's Second Amended Petition for Writ of Habeas Corpus and Memorandum in Opposition to Respondents' Motion for Summary Judgment and in Support of Petitioner's Motion for Partial Summary*

Respondents' Motion for Summary Judgment, which is being filed today.

3. Based on Respondents' Return and Memorandum of Law, Motion for Summary Judgment, the state court record, and Respondents' Reply to Petitioner's Response to Respondents' Motion for Summary Judgment, there is no genuine issue of material fact on any claim, and Respondents are entitled to summary judgment on each claim raised in the Final Amended Federal Habeas Petition.

4. As a result of the above, Petitioner is not entitled to summary judgment on any claim and his Motion for Partial Summary Judgment must be denied.

WHEREFORE, based on the foregoing, Respondents respectfully request that Petitioner's Motion for Partial Summary Judgment [ECF #80] be denied and dismissed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

STEPHEN C. STANKO, *Petitioner*, vs. BRYAN STIRLING, Director, South Carolina Department of Corrections, and MICHAEL STEPHAN, Warden, Broad River Correctional Institution, *Respondents*.	)	C/A No. 1:19-cv-03257-RMG-SVH (Capital Case) **RESPONDENTS' REPLY TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Respondents hereby make a Reply to Petitioner Stanko's Response/Traverse[1] to Respondent's Motion for Summary Judgment and Return and Memorandum of Law. In Reply to Petitioner's "Response to Respondent's Motion for Summary Judgment" Respondent incorporates its Return and Memorandum of Law to the Amended Petition as if fully stated herein, and incorporates the entire state court record.

REPLY TO PETITIONER'S RESPONSE AND RESPONSE TO PARTIAL MOTION FOR SUMMARY JUDGMENT

A. Stanko concedes numerous claims are procedurally barred by not responding

In state court, Stanko raised 6 grounds on direct appeal (BOA, p. 1) and 2 grounds on appeal from the denial of PCR (PWC, p. 2). In Respondent's Return, Respondent asserted that 9 grounds [claims] of the federal habeas petition [Claims **6, 7, 8, 9, 10, 12, 13, 14, & 15**] are procedurally barred because they **were not raised on appeal to the South Carolina appellate courts.** (Return, pp. 15-17). In his Response, Stanko does not address, respond to, or even

[1] Respondent has used the title of Petitioner's pleading; however, Respondent notes "Traverse" is no longer a document. Rule 5 governs section 2254 actions. *Rule 5, Rules Governing Federal Habeas Proceedings*. A Traverse is not contemplated under the modern rules so Respondent will not respond to Petitioner Stanko's discussion of the same and its requirements.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

STEPHEN C. STANKO, Petitioner, v. BRYAN P. STIRLING, Director, South Carolina Department of Corrections, and MICHAEL STEPHAN, Warden Broad River Correctional Institution, Respondents.	)	CA: 1:19-cv-03257-RMG-SVH **DEATH PENALTY CASE**

REPLY TO RESPONSE TO PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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and the substance of the entire trial record yield a record demanding reversal and a return of this case to the Horry County Court of Common Pleas.

As that case headed toward its trial date under these circumstances and the developing record, the State recognized and expressly advocated that Mr. Diggs's appointment in Horry County presented an unwaivable conflict of interest. ECF No. 18-0 at 123. In stark conflict with his client's interest, Mr. Diggs responded to the prosecution's identification of this insurmountable problem with various attempts, on the record, to ingratiate himself to the court.[2] The attorney's self-interested campaign culminated in his promise not to seek investigator or expert funding:

> THE COURT: All right, counsel, did I hear in what you said you believed there would be a significant savings in terms of cost and time in developing a mitigation defense in this second case:
>
> MR. DIGGS: Your Honor, all of that, absolutely, all of that evidence has already been developed . . . that certainly won't have to be repeated again if we start with someone new. That evidence is available and can be used. The savings to the State will be substantial with respect to that evidence. To start over with a new defense team it just seems like even if you use the same evidence you're going to have to get up to speed with it. So, I don't know, it would just make sense that we use, continue on with the continuity.

ECF No. 17-9 at 362-63; *see* ECF No. 65 at 40-41.

At bottom, Mr. Diggs was highly motivated to keep the lucrative appointment in his desperate attempt to forestall his financial ruin.

Now, however, Respondents incorrectly assert, "There is **no evidence** Diggs agreed to Stanko's request to represent him again out of financial difficulties or distress." ECF No. 86 at 26 (emphasis in original). In addition to the sources cited herein, *see* ECF No. 17-9 at 362-63,

[2] The Response confuses Petitioner's arguments. ECF No. 86 at 26 ("There is also no evidence Diggs deceived the court into appointing him using the saving of state funds to deceive Judge John."). Mr. Diggs's promise not to request specialist funding in the Horry County case was not an attempt to "deceive" the court, rather it was an example of acting against the client's interests.

there were many unmistakable flags suggesting these problems, including those observed by Mr. Diggs's second chair, Mr. Gerald Kelly.[3, 4]

In 2016, disbarment proceedings in both North Carolina and South Carolina would corroborate Mr. Kelly's observations reflecting lead counsel's utter disarray at the time of the Horry County proceedings.

The North Carolina bar complaint alleges that Mr. Diggs was misappropriating funds amounting to over $100,000 from client trust accounts for his own personal use and benefit beginning in August 2009—just before Mr. Stanko filed his final amended post-conviction application in Georgetown County (filed October 21, 2009) and shortly before the beginning of Mr. Stanko's Horry County trial (jury selection began on November 13, 2009). *Matter of Diggs*, 792 S.E.2d 219 (S.C. 2016) (per curiam); ECF No. 18-7 at 115-18. Mr. Diggs depleted client trust accounts by electronically transferring money to his operating account, making checks from the trust accounts payable to cash or to himself, and through debit counter withdrawals from the trust accounts. ECF No. 18-7 at 115. These misappropriations ran the trust accounts to negative balances, and when Mr. Diggs attempted to disburse funds to at least two of Diggs's South

[3] For instance, Mr. Kelly observed Mr. Diggs's reluctance to run billing through his own trust account. Exhibit 1 at 117. "It's been my experience that if any attorney doesn't want to run billings through his trust account, there's something wrong with his trust account. That's been my experience so I was concerned about that when it appeared to me that that was the circumstance." *Id*. at 117-18. Instead, Mr. Kelly "offered to run all the payments" through his own trust account. *Id*. at 117. Mr. Kelly further suspected Mr. Diggs was using drugs during the trial and trial preparation. *Id*. at 116-17. Kelly observed that Mr. Diggs "had mood swings[,] and he was—his focus sometimes appeared to be unreasonable." *Id*. at 117. Kelly also knew Mr. Diggs was going without sleep for protracted periods of time. *Id*. Kelly observed that at any break in the trial, Mr. Diggs was first into the private restroom, and once observed him exiting a restroom during trial with "grainy white powder on his mustache." *Id*. at 118. Kelly told Diggs about the powder, and Diggs wiped it off. *Id.*

[4] The transcript of the Horry County post-conviction hearing on April 27-28, 2015, is part of the state court record, but has not previously been filed with this Court. Accordingly, Petitioner attaches it hereto in two parts as Exhibits 1 and 2.

Carolina probate court clients—"the Sapps Estate" and "the Tisdale minors"—funds were unavailable. *Id*. This brought his conduct to the attention of the probate judge who reported the failure to disburse funds to the South Carolina Commission on Lawyer Conduct, and Diggs's South Carolina law license was suspended. *Id*. Diggs failed to report the suspension to the North Carolina Bar triggering a grievance investigation by the North Carolina Bar. *Id*. Diggs then failed to timely respond to the disciplinary inquiry letter sent to him there. *Id*. His misconduct led to his disbarment in North Carolina on June 9, 2016. *Matter of Diggs*, 792 S.E.2d at 219. Diggs then failed to inform the South Carolina Office of Disciplinary Counsel of the disbarment as required by Rule 29(a) of South Carolina's Rules for Lawyer Discipline Enforcement. *Id*. On September 8, 2016, Mr. Diggs was disbarred in South Carolina. *Id*.

a. Inconsistently applied South Carolina issue preservation rules cannot foreclose consideration of federal issues

As with his multiple violations of duties in failing to disclose or report proceedings against his law licenses, Mr. Diggs failed to disclose information relevant to his appointment to represent Mr. Stanko in the Horry County case. Of course, at no point did Mr. Diggs communicate to Mr. Stanko or to the trial court his misappropriation of client trust funds, possible drug use, and whatever financial difficulties led to his misappropriating funds—all relevant to the State's motion for his removal under an unwaivable conflict.

The Response heavily relies on a dubious application of South Carolina law to insulate from review any conceivable claim that a defendant was subjected to a conflicted defense counsel. Respondents embrace the direct appeal at bar's holding that the issues of Mr. Diggs's conflict were not preserved for want of an objection on the trial record. *State v. Stanko*, 741 S.E.2d 708, 717 (S.C. 2013) (holding, in the alternative, that Mr. Stanko's waiver was sufficient). In a Hellerian Catch-22, the post-conviction court, in turn, denied relief based on Mr.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

STEPHEN C. STANKO, *Petitioner*, v. BRYAN STIRLING, Director, South Carolina Department of Corrections, and MICHAEL STEPHAN, Warden Broad River Correctional Institution, *Respondents*.	)	CA: 1:19-cv-03257-RMG-SVH CAPITAL HABEAS CORPUS

MOTION FOR TRANSFER ORDER TO MEDICAL IMAGING FACILITY

I. INTRODUCTION

Petitioner, by and through undersigned counsel, hereby moves the Court to order the Broad River Correctional Institute ("Broad River") to arrange for the transportation of Mr. Stanko to the Medical University of South Carolina ("MUSC") in, Charleston, South Carolina, on March 3, 2022to conduct certain magnetic resonance imaging ("MRI") and positron emission tomography ("PET").

On October 14, 2021, this Court issued an *Ex Parte Funding Order* finding the requested MRI and PET imaging requested (ECF No. 74 (*ex parte*)) to be "reasonably necessary" "pursuant to 18 U.S.C. § 3599(g)(2)." ECF No. 78 (*ex parte*).

Undersigned counsel have scheduled the scans at MUSC for the above specified date. The PET scan is to be conducted at the MUSC facility at 171 Ashley Avenue, and is scheduled to begin at 7:00 a.m. (arrive by 6:30 a.m.) and will require three hours to complete. The MRI is scheduled in the Rutledge Tower at MUSC, 135 Ashley Avenue, for 11:30 a.m. (arrive by 11:00) a.m., and is also estimated to require three hours to complete. The two locations are both in the

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Stephen Stanko, Petitioner, vs. Bryan P. Stirling, Director of South Carolina Department of Corrections; and Michael Stephan, Warden of Broad River Correctional Institution, Respondent.	C/A No.: 1:19-3257-RMG-SVH ORDER

This Court directs the South Carolina Department of Corrections ("SCDC") to secure the attendance of Stephen Stanko, SCDC ID #00006022 for a positron emission tomography ("PET") scan and brain magnetic resonance imaging ("MRI") at the Medical University of South Carolina ("MUSC") in Charleston, South Carolina on March 3, 2022. Specifically, SCDC is directed to deliver Stanko to the MUSC facility at 171 Ashley Avenue, by 6:30 a.m. for a PET scan. Following the PET scan, SCDC is directed to deliver Stanko to the Rutledge Tower at 135 Ashley Avenue, by 11:00 a.m. for the MRI scan, scheduled for 11:30 a.m.

IT IS SO ORDERED.

Shiva V. Hodges

February 15, 2022
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Stephen C. Stanko, Petitioner, v. Bryan P. Stirling, *Director, South Carolina Department of Corrections*, and Michael Stephan, *Warden, Broad River Correctional Institution*, Respondents.	Civil Action No. 1:19-03257-RMG **ORDER AND OPINION**

This habeas petition comes before the Court on Respondents' motion for summary judgment (Dkt. No. 70) and Petitioner's motion for partial summary judgment pursuant to 28 U.S.C. §2254 (Dkt. No. 80). Petitioner raises 15 separate claims in his habeas petition. Some of these claims are properly before the Court, having met all the prerequisites for habeas review. Others were not properly preserved in previous state court proceedings and have been procedurally defaulted. The Court will first address those claims properly preserved for habeas review and then address those claims which have been procedurally defaulted and barred.[1]

Legal Standards

A. Summary Judgment

Summary judgment is appropriate if a party "shows that there is no genuine dispute as to any material fact" and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In other words, summary judgment should be granted "only when it is clear that there is no

[1] This matter was initially referred to the Magistrate Judge for pretrial handling pursuant to 28 U.S.C. § 636(b)(1)(B). The Court elected to terminate the reference in this matter and to rule upon the motions without initially receiving a Report and Recommendation from the Magistrate Judge.

The Preserved Claims

1. The Alleged Non-Waivable Conflict of Petitioner's Counsel, William Diggs (Claims 1 and 2):

Petitioner asserts two habeas claims related to the representation of Petitioner's counsel William Diggs in the Horry County trial following the filing of a PCR petition alleging claims of ineffective assistance of counsel concerning Diggs' representation in the previous Georgetown County trial. The claims state as follows:

> Claim 1: The trial court erred both (a) in granting Mr. Stanko's ostensible waivers in Mr. Diggs' conflict of interest, and (b) in failing to substitute trial counsel pursuant to the State's pretrial submission of Mr. Diggs' "non-waivable conflict of interest," violating Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments.
>
> Claim 2: Trial counsel labored under a conflict of interest against Mr. Stanko and failed to adequately advise the client or request independent advice for the client on the issue, violating Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel.

(Dkt. No. 65 at 49, 56).

It is well settled that that a criminal defendant has the right to a counsel "free from conflicts of interest." *United States v. Swartz*, 975 F. 2d 1042, 1047 (4th Cir. 1992). It is also well settled that a defendant can generally waive an attorney conflict so long as there is a showing of "intentional relinquishment or abandonment" of a known right. *Hoffman v. Leeke*, 903 F. 2d 280, 288 (4th Cir. 1990). "To be valid, a waiver must not only be voluntary, it must be done knowingly and intelligently." *Id.* A determination of whether a waiver has been properly provided "depends on the particular facts of each case and the court must make as thorough and long an inquiry as necessary to determine whether the accused is voluntarily, knowingly and intelligently waiving his right." *Id*. Further, there are circumstances where a trial court may decline to accept a waiver of an attorney conflict where such a waiver may impair the defendant's right to a fair trial and

contravene the Sixth Amendment right to effective counsel. *See Wheat v. United States*, 486 U.S. 153, 161 (1988).

Respondents argues that this Court should find Claims 1 and 2 defaulted because Petitioner did not make a timely objection to the trial court regarding the decision to allow Diggs to remain as defense counsel, which both the South Carolina Supreme Court and the state PCR trial court found made the issue non-reviewable. The Court is unpersuaded by Respondents' argument. First, Petitioner raised the issue of the alleged non-waivable conflict before the South Carolina Supreme Court in both the direct appeal and review of the denial of the PCR petition. Second, if the attorney-client conflict between Petitioner and Diggs was, in fact, non-waivable and denied him a Sixth Amendment right to effective representation, he would have no practical way to challenge the state court decision allowing the waiver if, in fact, it was later determined to be a legally improper decision by the state trial court. The Court finds the more just and prudent course is to address the issue on the merits, which the South Carolina Supreme Court did after finding the claim non-reviewable**.** *See State v. Stanko*, 741 S.E. 2d at 717-720 (S.C. 2013).

The unusual circumstances of Petitioner's legal representation in his second capital trial in Horry County certainly merited a careful inquiry by the Horry County trial court, since appointed counsel, William Diggs, was the subject of a PCR petition filed by Petitioner claiming ineffective assistance of counsel from the prior Georgetown County capital trial. The trial judges, Baxley and John, made multiple inquiries regarding Diggs' continued representation of Petitioner in the second trial. Even before the PCR petition was filed, Judge Baxley conferred with Petitioner without any counsel in the courtroom regarding Diggs' prior representation. Petitioner spoke admirably about Diggs' representation and asked the court to continue Diggs' appointment in the second trial. (Dkt. No. 17-9 at 367). Judge John conducted an in-depth hearing on the matter on

2. "There is free and open communication between the Defendant and and Mr. Diggs;"

3. Petitioner "has raised no issues that would impact Mr. Diggs' ability to [properly] represent Mr. Stanko in the upcoming trial;"

4. "I find that Mr. Diggs may continue to represent Mr. Stanko in the proceedings that will be forthcoming in November . . . ."

(*Id.* at 428).

Petitioner now argues that his conflict with Mr. Diggs was non-waivable, based on the alleged damage to Diggs reputation from having Petitioner file a claim of ineffective assistance of counsel against him. This argument presumes that a filing of ineffective assistance of counsel by a criminal defendant is so devastating to an attorney's professional reputation that the attorney would act in a way contrary to his client's best interests. Motions for ineffective assistance of counsel are made routinely by criminal defendants after their convictions, and Petitioner has offered no evidence to support the claim that such motions are professionally devastating to criminal defense attorneys or that they would cause an attorney to act against a client's best interests. Further, the record evidence before the Court provides substantial support for Judge John's finding that the filing did not adversely affect Diggs' representation of Petitioner. Diggs explained that such post-trial motions against criminal defense attorneys are routinely made and that he did not take the claims personally. Petitioner likewise assured the court that whatever issues he had in Diggs' representation in the first trial, his expertise, understanding of the defense, and personal devotion to the case outweighed those issues.

A federal court, in habeas review of a state criminal proceeding, may provide a petitioner relief only where the state court decision was based on "an unreasonable determination of the facts

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the
District of South Carolina

Stephen C. Stanko,
Petitioner

v.

Bryan P. Stirling *Director, South Carolina Department of Corrections*; Michael Stephan *Warden, Broad River Correctional Institution*.
Respondents

Civil Action No. 1:19-cv-03257-RMG-SVH

SUMMARY JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

❒ the petitioner *(name)* _____ recover from the respondent *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

❒ the petitioner recover nothing, the action be dismissed on the merits, and the respondent *(name)* _____ _____ recover costs from the petitioner *(name)* _____.

■ other: Summary judgment is hereby entered for the respondents, Bryan P. Stirling *Director, South Carolina Department of Corrections* and Michael Stephan *Warden, Broad River Correctional Institution*. The petitioner, Stephen C. Stanko, shall take nothing of the respondents and this action is dismissed with prejudice.

This action was *(check one)*:

❒ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

❒ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■ decided by the Honorable Richard M. Gergel, United States District Judge, presiding, granting the respondent's motion for summary judgment.

Date: March 24, 2022

ROBIN L. BLUME, CLERK OF COURT

s/L. Baker

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

STEPHEN C. STANKO, *Petitioner*,	CA: 1:19-cv-03257-RMG-SVH
v.	CAPITAL HABEAS CORPUS
BRYAN STIRLING, Director, South Carolina Department of Corrections, and MICHAEL STEPHAN, Warden Broad River Correctional Institution, *Respondents*.	

RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT

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RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, petitioner Stephen C. Stanko, by and through undersigned counsel, moves this Court for an order withdrawing its Opinion (Dkt. No. 99, the "Opinion") and vacating the Summary Judgment entered March 24, 2022 (Dkt. No. 100). In the Opinion, this Court also refused to grant a Certificate of Appealability ("COA") on any issue (Dkt. No. 99 at 32), and Petitioner alternatively moves this Court to reconsider that ruling.

I. STANDARD OF REVIEW.

Rule 59(e) "gives a district court the chance 'to rectify its own mistakes in the period immediately following' its decision." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020). In keeping with the "Rule's corrective purpose," *id*. at 1704, this Court may grant relief under Rule 59(e) in three circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007) (quotation omitted). The Fourth Circuit has held that the Rule gives the district court substantial discretion "to correct its own mistake if it believes one has been made," including the "discretion to determine whether additional evidence should be considered or further argument heard." *Id*. at 637. Mr. Stanko requests this Court grant his Motion to Alter or Amend the Judgment to correct clear errors of law, correct manifest errors of fact, and prevent manifest injustice.

The relevant standard of review in the Order stems from Fed. R. Civ. P. 56(a): "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." The burden of proving there is no

genuine issue of material fact lies on the movant. *Sedar v. Reston Town Center Property, LLC*, 988 F.3d 756, 761 (4th Cir. 2021) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). For summary judgment purposes, "[a] fact is 'material' if proof of its existence or non-existence would affect disposition of the case under applicable law. An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Id*. (quoting *Wai Man Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020)). Ordinarily, facts are construed in the light most favorable to the non-movant,[1] but this standard is overlain with the statutory presumption in favor of state court fact findings rebuttable by clear and convincing evidence. § 2244(e); *Wolfe v. Weisner*, 488 F.3d 234, 238 (4th Cir. 2007) (affirming district court's grant of summary judgment for respondent).

Grant of summary judgement is premature when the non-moving party has not had an adequate opportunity for discovery. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244-45 (4th Cir. 2002); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 288-89 (4th Cir. 2013) (en banc) (grant of permanent injunction was erroneous without permitting discovery or adhering to the applicable summary judgment standard); *Elec., Inc. v. Mass Elec. Const. Co.*, No. 3:09CV361-RJC-DCK, 2010 WL 883670, at *1 (W.D.N.C. Mar. 5, 2010) (motion for summary judgment denied as premature).

Sufficient opportunity for factual development supporting the district court's fact findings is requisite before disposition of the petition. *Wolfe v. Johnson*, 565 F.3d 140, 165-67 (4th Cir. 2009) (district court erred in failing to make any fact-based threshold determinations regarding habeas petitioner's request for an evidentiary hearing on his Brady claims and claims that the

[1] *See*, *e.g.*, *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (abrogated on other grounds by *Tennard v. Dretke*, 542 U.S. 274 (2004)); *Parks v. Ames*, No. 2:20-CV-00691, 2021 WL 448555, at *3 (S.D.W. Va. Mar. 31, 2021) (citing *Smith*, 311 F.3d at 668).

prosecution used false evidence; district court failed to address whether petitioner exercised diligence in pursuing his assertion of actual innocence or his substantive claims, failed to accept as true the allegations of the habeas petition, and prematurely rejected the credence and relevance of affidavits).

Furtheremore, "[a] petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors" including whether "the material facts were not adequately developed at the state court hearing." *Conaway v. Polk*, 453 F.3d 567, 582 & n.16 (4th Cir. 2006) (quotation omitted).

The resolution of any contested facts in Mr. Stanko's pleadings that did not receive a full and fair hearing in state proceedings (Dkt. No. 65 at 18-23) requires an evidentiary hearing in this Court. *Juniper v. Zook*, 876 F.3d 551, 571-72 (4th Cir 2017); *Walker v. True*, 399 F.3d 315, 327 (4th Cir. 2005) (quoting *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("Where the facts are in dispute, the federal court in habeas corpus *must hold an evidentiary hearing* if the habeas applicant did not receive a full and fair evidentiary hearing in a state court.") (alteration and some emphasis removed)); *see generally Rogers v. McDade*, 23 F. App'x 102 (4th Cir. 2001), *aff'd on reh'g*, 32 F. App'x 81 (4th Cir. 2002)).

In short, when material facts are in dispute, summary judgment is not proper. *Fountain v. Filson*, 336 U.S. 681, 683 (1949) (summary judgment may not deprive party of opportunity to dispute material facts).

II. FACTUAL AND PROCEDURAL BACKGROUND.

Prior to the Horry County proceedings at bar, on August 11, 2006, and August 18, 2006, respectively, Mr. Stanko was convicted and sentenced to death in a separate proceeding in the State of South Carolina in the Court of General Sessions for Georgetown County. Dkt. No. 18-12 at 30-31. In that trial, the court appointed Messrs. William Diggs and Gerald Kelly to represent Mr. Stanko. Mr. Diggs adopted a strategy of pursuing a not guilty by reason of insanity (NGRI) verdict at the liability phase, to the detriment of a full investigation and presentation of mitigation. *See* Dkt. No. 65 at 19-20 and sources cited therein. The Supreme Court of South Carolina affirmed the Georgetown County judgment in *State v. Stanko*, 658 S.E.2d 94 (S.C. 2008). On October 17, 2008, Mr. Stanko initiated post-conviction proceedings, eventually raising eight distinct claims of ineffective assistance of trial counsel. Dkt. No. 18-4 at 37-42, 45-53.

During the pendency of post-conviction proceedings in the Georgetown case,[2] the Horry County trial began (jury selection began on November 13, 2009). Dkt. No. 17-3 at 460 et seq. Mr. Diggs was appointed to represent Mr. Stanko, despite being the subject of his claims of ineffective assistance of counsel in the Georgetown County case, and the appointment was allowed to continue despite the State's motion submitting that "a non-waivable conflict of interest exists between William L. Diggs Esquire, and the defendant, in that the defendant has, by the filing of his Post Conviction Relief petition, already waived attorney-client privilege in connection with the companion case," and observing that Mr. Diggs "intends to offer a similar defense and similar mitigation utilizing the same experts from the companion case" and that "waiver of the attorney-client privilege in the companion case would materially limit representation" in this case. Dkt. No. 18 at 122-23.

[2] As of the date of the present Motion, the Georgetown County post-conviction case remains pending in state court.

Mr. Diggs's repeated trial strategy again failed, and Mr. Stanko was convicted and sentenced to death in Horry County also. Dkt. No. 17-8 at 357-60; Dkt. No. 17-9 at 339. The state supreme court affirmed the judgment on February 27, 2013. *State v. Stanko*, 741 S.E.2d 708 (S.C. 2013). Post-conviction counsel litigated extensively in an ultimately unsuccessful effort to obtain adequate specialist funding, and post-conviction relief was denied. *See* Dkt. No. 65 at 19-23.

Subsequently, Mr. Diggs was disbarred in both North Carolina and South Carolina for egregious professional misconduct, including misappropriation of client trust funds and repeated failures to make required disclosures of disciplinary actions. Dkt. No. 92 at 6n.3, n.4, 6-7.

On November 19, 2019, undersigned counsel were appointed to represent Mr. Stanko in these proceedings pursuant to 18 U.S.C. § 3599. Dkt. No. 11. On February 17, 2020, Petitioner filed a "Placeholder Petition" pursuant to the Court's appointment order and adhering to the form petition in use for prisoners of South Carolina. Dkt. No. 24.

By March 16, 2020, Chief Judge Harwell entered a Standing Order, the first of numerous such orders, listing various material alterations to Court practices in response to the "national public health emergency" brought on by the COVID-19 global pandemic. *In re: Court Operations in Response to COVID-19*, Misc. No. 3:20-mc-105.

Upon establishing specialist services are "reasonably necessary" pursuant to § 3599(f), the capital petitioner is entitled to funding for such services. *Ayestas v. Davis*, 138 S. Ct. 1080, 1093-94 (2018).[3] This Court approved Petitioner's request for specialist services, which would develop and explore evidence beyond the state court record, finding the requisite necessity of

[3] *Ayestas* holds that while the term "reasonably necessary" does not mean the services are absolutely "essential" to the representation, the correct standard "requires courts to consider the potential merit of the claims that the applicant wants to pursue" in addition to "the likelihood that the services will generate useful and admissible evidence." 138 S. Ct. at 1093, 1094.

such services. Dkt. No. 30 (*ex parte*) (granting Dkt. No. 19 (*ex parte*)). Further recognizing the need to investigate and develop evidence outside the record and the barrier to timely achieving that necessary undertaking within the statute of limitations owing to the global pandemic, the parties entered into an agreement under which Petitioner would file a timely First Amended Petition pleading only record-based claims, to be followed by a subsequent amendment raising "additional habeas corpus claims beyond those contemplated" in that timely petition. Dkt. No. 34-1.

Petitioner timely filed the First Amended Petition on August 4, 2020, (Dkt. No. 36), but pandemic conditions mandated extensions of time to file the Second Amended Petition contemplated in the agreement to incorporate the fruits of field investigation and other specialist services authorized by this Court. Dkt. No. 40; Dkt. No. 50. But ultimately this Court set a final date for the Second Amended Petition of March 1, 2021, enunciating that the product of specialist services was not essential until Petitioner's response to Respondent's anticipated motion for summary judgment. Dkt. No. 61 (text order). It would be sufficient that the Second Amended Petition broadly state claims, while integration of the factual bases of those claims could come in a later responsive filing to Respondents' anticipated dispositive motion. *Id*. Undersigned counsel repeatedly expressed the belief that such pleadings should have been scheduled for a date after completion of funded specialist services and full development of the factual bases of the claims, and that a motion for summary judgment prior to evidentiary development would be premature, but accepted the Court's admonishment and observed that it has been the jurisdiction's practice to hold the motion for summary judgment until after conducting an evidentiary hearing. *See* Dkt. No. 93 (seeking scheduling conference to discuss "the parties' identification of stipulated and uncontested facts; contested issues of fact and/or

law; witnesses to be deposed and potentially to give evidence in a hearing; the period for discovery; record expansion; and the date and prospective duration of an evidentiary hearing); *Stokes v. Stirling*, 10 F.4th 236, 245 (4th Cir. 2021) (observing the "magistrate judge held an evidentiary hearing to determine whether there was good cause for the default under *Martinez*").[4]

Accordingly, undersigned counsel filed the *Second Amended Petition* on March 1, 2021, without the fruits of funded investigation and other specialist services that were deemed "reasonably necessary." Dkt. No. 65. On July 28, 2021, Respondents filed their Return in conjunction with a motion for summary judgment. Dkt. No. 70; Dkt. No. 71. On October 6, 2021, undersigned counsel filed another motion for specialist services, *viz*., certain brain imaging at the Medical University of South Carolina (MUSC) in Charleston, arguing they are reasonably necessary because they are "essential to certain specialist services already funded under 18 U.S.C. § 3599(f)." Dkt. No. 74 (*ex parte*) at 1.[5] Before and after Petitioner's response to Respondent's return and motion for summary judgment, and pleadings connected to Petitioner's Motion for Partial Summary Judgment, (Dkt. No. 79; Dkt. No. 80; Dkt. No. 85; Dkt. No. 86; Dkt. No. 92), this Court granted the brain imaging funding motion, (Dkt. No. 78 (*Ex Parte* Funding Order)) and associated transport order (Dkt. No. 98). As per the transport order, the

[4] The district court docket in *Stokes* makes clear through the sequence of discovery orders and scheduling conferences that the Motion for Summary Judgment was not decided until *after* substantial development of the evidence, including numerous depositions and the evidentiary hearing. *See Stokes v. Byars*, Case No. 1:16-cv-00845. The Fourth Circuit did not fault the district court's scheduling sequence, but rather that it "largely ignored PCR counsel's testimony" in deferring to their decision to drop the defaulted claim when counsel admitted there was no reasonable strategic explanation for doing so. *Stokes*, 10 F.4th at 249 n.6.

[5] Although some aspects of these expert services have necessarily been disclosed to Respondents, the basis for determining the scanning was reasonably necessary is "protected information that is properly withheld from the Respondent pursuant to the work product doctrine." Dkt. No. 74 at 2. The present Motion is distinguishable from the Rule 59(e) motion and related order unsealing *ex parte* funding motions in *Madhi v. Stirling*, No. 8:16-3911, Doc. No. 154 at 2-3 (2019). In *Mahdi*, the Petitioner challenged the district court's ruling on *ex parte* funding litigation arguing that it applied the wrong legal standard in denying expert funding. Here, Petitioner is *not* challenging this Court's dispositions of the *ex parte* funding litigation, so there is no reason to unseal the underlying motion practice, as was done in *Madhi*.

brain imaging took place on March 3, 2022. *See* Dkt. No. 98. To date, undersigned counsel have not yet obtained the resulting imaging essential to complete reasonably necessary work of previously funded specialists.[6]

Despite this Court's findings that the brain imaging and previously funded specialist services that relied on them were reasonably necessary, and despite its awareness that Petitioner has not yet had the opportunity to present the fruits of those specialist services to the Court, on March 24, 2022, this Court granted Respondents' *Motion for Summary Judgment*. Dkt. No. 99; Dkt. No. 100.

III. THE OPINION WORKS A MANIFEST INJUSTICE, COMMITTING MISSTATEMENTS OF LAW AND FACT WHILE DISREGARDING REMAINING GENUINE ISSUES OF MATERIAL FACT.

The Opinion addresses five claims on the merits (lumping two of them into a single analysis). Dkt. No. 99 at 14-27; *see infra*. It disposes of the remaining claims as barred in federal court due to procedural default in state court without permitting development of evidence necessary to demonstrate cause for the default and actual prejudice permitting merits review. *Supra*. Instead, it disposes of Claims 6, 7, 8, 9, 10, 12, 13, 14, and 15 with the single conclusory statement that Petitioner "has failed to demonstrate cause for default and actual prejudice or that failure to consider the claims would result in a fundamental miscarriage of justice." *Id*. at 30. *Infra* (discussion of the arguments and evidence proffered and ignored). The Opinion disposes of Claim 11 by arguing it was defaulted because the claim presented in state court raised an issue of state law, *id*. at 31, without addressing Petitioner's argument (*infra*), that the state supreme court opinion was fundamentally rooted in clearly established federal law.

[6] The records have not been released yet despite undersigned counsel's diligence. The initial record request was submitted on March 16, 2022, with follow up requests submitted on March 24, 2022, March 29, 2022, and April 11, 2022. In a phone conversation follow up, on April 14, 2022, MUSC's agent said the request had not yet been entered into the system and recommended following up again after another five business days.

In this very terse treatment of the claims, the Opinion makes several misstatements of fact and law. It incorrectly states that "Petitioner argues that this Court should provide *de novo* review of state court findings," (Dkt. No. 99 at 11) as if Petitioner had argued that *all* petition claims are subject to the same standard of review in this Court. Petitioner has correctly argued that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides a highly deferential standard of review "with respect to any claim that was adjudicated on the merits in state court proceedings." Dkt. No. 65 at 25-26 (quoting § 2254(d)). However, when a claim is adjudicated by a state-court decision "founded upon 'a materially incomplete record," that claim is "not adjudicated on the merits." *Id*. at 126 (quoting *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015)).

The standard of review of claims in this Court varies, depending on the handling of the claim in state court. For example, Respondents incorrectly argued that state court findings are entitled to "double deference" regardless of the issue raised. *See* Dkt. 71 at 24. In fact, "'double deference' refers to AEDPA deference layered onto deference to trial strategy decisions under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). *Harrington v. Richter*, 562 U.S. 86, 105 (2011)." Dkt. 79 at 25. As *Richter* cautioned, "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Richter*, 562 U.S. at 105. *Strickland* "reasonableness" concerns "whether *counsel*'s actions were reasonable," while AEDPA reasonableness is deferential to the state *court*'s application of clearly established federal law. *Id*. (emphasis added). Respondents seem to use "double deference" as meaning this Court is required to be extra deferential (beyond AEDPA's standard) to state court adjudications, whether or not the claim implicates trial counsel's strategic decision making. AEDPA deference does not preclude relief in federal habeas:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

The Opinion provides that "review of the habeas petition will be in accord with the highly deferential § 2254 standards and will rely on the record developed by the state court." Dkt. No. 99 at 13. However, review under the AEDPA standard applicable to claims adjudicated on the merits does not apply to claims that were defaulted in state court but reviewable via the equitable exception to that bar for certain claims procedurally defaulted in state court. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). *Martinez* and the line of cases on which it was predicated, contemplate federal habeas review of these claims can only be subject to *de novo* review. *Stokes*, 10 F.4th at 244-45 ("'[B]ecause a petitioner raising a *Martinez* claim never presented the claim in state court, a federal court considers it de novo, rather than under AEDPA's deferential standard of review.'") (quoting *Gray v. Zook*, 806 F.3d 783, 789 (4th Cir. 2015) (alterations in *Stokes*)).

The Opinion does not substantively engage in consideration of cause and prejudice to excuse the procedural default and justify merits review, disregarding the fact that "Petitioner does not have the burden to prove that § 2254(d)'s bar is inapplicable or satisfied." Dkt. 65 at 28 (citing *Lindh v. Murphy*, 521 U.S. 320, 330, 344 (1997)). Instead, it simply twice recites that Petitioner has failed to qualify for the equitable exception to the bar to merits review of procedurally defaulted claims: "Petitioner has failed to demonstrate cause for default and actual prejudice or that the failure to consider the claims would result in a fundamental miscarriage of justice," (Dkt. No. 99 at 30 as to Claims 6 through 15 except for Claim 11), and, "Petitioner has

failed to present any basis to demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or that a failure to consider the newly asserted claim will result in a fundamental miscarriage of justice" (*id*. at 31-32 as to Claim 11). Not only has Petitioner pleaded the bases for equitable exceptions, the parties have stipulated to the need for development of the bases for cause and prejudice outside the state court record. Dkt. No. 65 at 13, 2-22, 24-27; Dkt. No. 34-1 at 2. Notably, post-conviction counsel made a record of their ineffective assistance. Dkt. No. 65 at 21 (citing Dkt. No. 18-5 at 182). The Opinion fails to consider the bases pleaded and was taken without benefit of the newly developed evidence resulting from specialist services deemed "reasonably necessary" in part to provide the basis for clearing these procedural hurdles. *E.g.*, Dkt. No. 74 (*ex parte*) at 3-4 ("The evidence is also reasonably necessary for 'clearing any procedural hurdles'[7] to adjudication of this claim in federal habeas corpus by demonstrating cause and prejudice to excuse the procedural default of this claim in state court pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)."); Dkt. No. 78 (*ex parte* order granting the motion in Dkt. No. 74).

Finally, the Opinion recites the correct standard of review for summary judgment, including analysis relying on assessment of sufficiency of the evidence rather than the mere pleadings. Dkt. No. 99 at 1-2. But by failing to permit the development of evidence using specialist services it has deemed "reasonably necessary," the Court treats Respondents' *Motion for Summary Judgment* as imparting, instead, a sufficiency of the pleadings analysis applicable to the screening role of Habeas Rule 4.[8] *See* Dkt. No. 95 at 1-2.

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[7] Referencing citation in the motion to *Ayestas*, 138 S. Ct. at 1094 ("Proper application of the 'reasonably necessary' standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way."). Dkt. 74 at 4.

[8] Specifically, Habeas Rule 4 requires the Court to conduct an initial sua sponte screening of the petition. *Id*. Rule 4 screening is a sufficiency of the pleading review, analogous to the standard for motions to dismiss pursuant to Fed.

Claim 1: The Trial Court Erred both (a) in Granting Mr. Stanko's Ostensible Waivers of Mr. Diggs's Conflict of Interest, and (b) in Failing to Substitute Trial Counsel Pursuant to the State's Pretrial Submission of Mr. Diggs's "Non-Waivable Conflict of Interest," Violating Petitioner's Right to Effective Assistance of Counsel under the Sixth and Fourteenth Amendments.

In its handling of Claims 1 and 2, related to trial counsel's unwaivable conflict, the Opinion presumes the conflict is waivable, and disposes of the claims upon a finding that the ostensible waiver was voluntary, knowing, and intelligent. Dkt. No. 99 at 14The Court fails to give any weight or recognition to the fact that the State previously argued the conflict was *not* waivable. Dkt. No. 18 at 122-23. The Court ignores Petitioner's argument that the State is judicially estopped from now arguing the contrary position, and assumes without making a determination of this potentially dispositive question. *See* Dkt. No. 92 at 10-11.

Nowhere does the Opinion examine the rules governing professional conduct that are relevant to a determination of whether such a conflict is waivable. For example, the Court ignores the fact that South Carolina's rules require a determination of whether the conflict is "consentable." *See* Doc. 79 at 21 (quoting South Carolina Supreme Court Rule 407, Rule 1.7, Comment 2).

After finding the trial court's waiver process to be adequate and reciting its findings, the Opinion sidesteps the problem at the heart of this judgment, namely, that Mr. Diggs's conflict is not waivable: "This argument presumes that a filing of ineffective assistance of counsel by a criminal defendant is so devastating to an attorney's professional reputation that the attorney would act in a way contrary to his client's best interests." Dkt. No. 99 at 17. The Opinion supplies no authority for the "professionally devastating" standard it applies. Worse, it deflects a

R. Civ. P. 12(b)(6), which requires presuming true, all factual allegations other than conclusory statements that are mere recitations of the essential elements of a claim. *Townes v. Jarvis*, 577 F.3d 543, 550 (4th Cir. 2009); *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

central feature of this record, namely, the acute incentives for Mr. Diggs to secure the prospective compensation from staying on for the Horry County representation. *See* Dkt. No. 92 at 5-6 (pleading the factual basis of the argument that "Mr. Diggs was highly motivated to keep the lucrative appointment in his desperate attempt to forestall his financial ruin").

Further, invocation of that incorrect "professionally devastating" legal standard has the effect of ignoring Petitioner's evidence of Mr. Diggs's reputational and financial interest in hiding his professional misconduct during the time of his representation of Mr. Stanko that would result ultimately in his disbarment in North Carolina and South Carolina and motivations for keeping the Horry County appointment. Dkt. No. 99 at 17. ("Petitioner has offered no evidence to support the claim that such motion are professionally devastating to criminal defense attorneys . . . ."); Dkt. 65 at 50 n.16, 50-51; Dkt. 92 at 6 n.3 & n.4, 6-7 (describing Mr. Diggs's professional misconduct including misappropriation of client funds, repeated misrepresentations and failure to make mandated disclosures of disciplinary actions, and evidence of Mr. Diggs's likely financial troubles, including reluctance to run billing through his own trust account, and likely drug use during his representation of Mr. Stanko). In fact, disclosure of Mr. Diggs's conduct during the time of his representation of Mr. Stanko proved to be professionally devastating.

The Opinion endorses the trial court's unreasonable finding that waiver was adequate, in part, because Mr. Stanko "has raised no issues that would impact Mr. Diggs' ability to [properly] represent Mr. Stanko in the upcoming trial." Dkt. No. 99 at 17 (quoting Dkt. No. 17-9 at 428). That rationale is enveloped in the problem; it is the courts that must ultimately shield a defendant from the conflicted counsel—the onus cannot fall to a defendant to surmise the adverse effects from his conflicted attorney continuing as defense counsel, especially because many of these

adverse impacts may stem from factors well beyond the view of the incarcerated capital defendant.

The Opinion then incorrectly states that *any* claim of violation of the Sixth Amendment right to effective assistance of counsel "requires a petitioner to overcome the onerous standards of *Strickland*, establishing both that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, the result would have been different." *Id*. at 19. But *Strickland* involved deprivation of the right to counsel based on attorney performance, not a conflict of interest—a vital distinction that *Strickland*, itself, expressly recognizes. *See Strickland*, 466 U.S. at 688 (distinguishing "the duty of loyalty, a duty to avoid conflicts of interest" from the distinct "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process"). Clearly established federal law has long rejected the argument that cases of conflicted defense counsel were only reversible upon a showing of prejudice. *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978); *see Christeson v. Roper*, 574 U.S. 373, 378 (2015) (per curiam). In such cases "reversal is automatic" because "some degree" of prejudice is presumed. *Holloway*, 435 U.S. at 488-89. A rule requiring a showing of prejudice "would not be susceptible of intelligent, evenhanded application." *Id*. at 490. This is in large part because "the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing." *Id*. Unlike a discrete unreasonable trial decision that can be reviewed for harmlessness, "ineffectiveness arising from a conflict of interest pervades an entire proceeding." Eve Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STANFORD L. REV. 1581, 1599 (2020). The correct analysis is whether the conflict was actual and whether it adversely affected counsel's performance, not *Strickland*'s outcome-based prejudice. *Cuyler v. Sullivan*, 466 U.S. 335, 348 (1980) ("In order to

establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."); *United States v. Purpera,* 844 F. App'x 614, 620 (4th Cir.), cert. denied, 142 S. Ct. 256 (2021). Petitioner has pleaded and provided evidence substantiating such an adverse effect. *Infra* Claim 2 (*e.g.*, Diggs's underlying financial difficulties leading to decision to represent Mr. Stanko despite the conflict, together with his reputational interest in propounding his failed NGRI strategy led him to inform the trial court, contrary to Mr. Stanko's interests, that he would not seek additional specialist funding in this case). Dkt. No. 92 at 5-7.

The Opinion, correctly rejects Respondents' argument that review of Claims 1 and 2 is barred because the issue was not preserved by objection at trial. Dkt. No. 99 at 14. This position is flatly contravened by clearly established federal law. *Cuyler*, 466 U.S. at 349 (holding that a defendant who has not objected at trial to a conflict can establish a Sixth Amendment violation by demonstrating that an actual conflict existed which adversely affected the attorney's performance). The Court recognizes that Mr. Stanko presented the claim to the state supreme court twice (first on direct appeal and second on review of denial of his PCR petition), and observes that to accept the procedural default argument would as a practical matter deny Mr. Stanko from ever challenging the validity of waiver of the conflict "if, in fact, it was later determined to be a legally improper decision by the state court." Dkt. No. 99 at 14. But, of course, that is the effect of barring any procedurally defaulted claim. The reason an objection cannot be required must be based on agreeing with Petitioner's argument that the requirement of a trial court objection means either conflicted counsel would have had to object to his own presence while continuing to represent Mr. Stanko, or Mr. Stanko would have had to make a pro se objection despite being represented. *See* Dkt. No. 92 at 11-12.

The Opinion undertakes merits review ex gratia, suggesting that it is not required, but is simply, "the more just and prudent course." Dkt. No. 99 at 15. But it fails to address Petitioner's argument that South Carolina's inconsistently applied issue preservation rules cannot be adequate and independent state law grounds to foreclose this Court's merits review of federal issues. Dkt. No. 65 at 56 (citing *Brown v. Lee*, 319 F.3d 162, 170 (4th Cir. 2003) (citing *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); *Perkins v. Lee*, 72 F.App'x 4, 9 (4th Cir. 2003)); Dkt. No. 92 at 8-9 (providing multiple examples of reaching unpreserved issues on appeal).

However, the Opinion's merits analysis fails to recognize that Mr. Stanko, standing without the effective assistance of counsel, could not acquiesce to the conflict. In this analysis, the Court presumes without discussion that Mr. Diggs's conflict was waivable (*see supra* Part III), and focuses on the adequacy of the trial court's inquiry into waiver. "The trial judges, Baxley and John, made multiple inquiries regarding Diggs' continued representation of Petitioner." Dkt. No. 99 at 15. Most significant was the conference between Judge Baxley and Mr. Stanko "without any counsel in the courtroom." *Id*. In other words, the Opinion would deny a claim that trial court error deprived Mr. Stanko of the effective assistance of counsel by treating Mr. Stanko as a pro se defendant, fending for himself in the courtroom without the assistance of counsel.[9]

Instead, the Opinion reasons based on a hypothetical claim following a hypothetical trial:

> Additionally, there is little doubt that had the state trial court required the removal of Diggs as counsel over the vigorous objections of Petitioner, the motion before the Court would be that Petitioner had been denied his Sixth Amendment right to

[9] For such an *ex parte* trial hearing to have assisted the trial court in ascertaining whether the conflict could be waived or portended harmful impact on the defendant, the court should have secured conflict counsel to advise Mr. Stanko and advocate for his interests in that bounded context. *Infra* regarding Claim 2.

> effective counsel because he had exercised his right to seek post-conviction relief in the Georgetown County case. Surely, the law cannot be that whatever decision the state trial court made, Petitioner would have been denied his constitutional right to effective counsel.

Dkt. No. 99 at 18. This assumes, for no reason, that had Mr. Stanko received the assistance of conflict-free counsel, the judgment would have come out the same.

Further, the Opinion's untested assumption that Mr. Diggs's conflict is waivable ignores a genuine issue of material fact. Determinations of the adequacy of representation under the Sixth Amendment, including determinations of actual conflict, are generally mixed questions of fact and law. *Strickland*, 466 U.S. at 698; *Cuyler*, 446 U.S. at 342; *Purpera,* 844 F. App'x at 620 ("Like other ineffective assistance of counsel claims, claims that a defendant's representation at trial was tainted by a conflict of interest present mixed questions of law and fact that we review de novo.").

Assuming for sake of argument that the conflict is waivable, there remains a material factual dispute as to the sufficiency of the waiver. A defendant who may be aware of an actual conflict of interest does not validly waive it when he is, at the same time, unaware of the conflict's implications. *Purpera*, 844 F. App'x at 621. In *Purpera*, the Fourth Circuit concluded that waiver of the attorney conflict was not valid when it was "plausible that [the implications of the conflict] were never adequately explained" to the defendant. *Id*. The Opinion points to no record indicating Mr. Stanko was ever advised of the implications of Mr. Diggs's conflict. Mr. Diggs's failure to refer Mr. Stanko to conflict-free counsel for purposes of litigation of the conflict (*infra* Claim 2), means Mr. Stanko had only the assistance of Mr. Diggs himself. At best, he was left to fend for himself in the courtroom without the presence of any counsel. Dkt. No. 99 at 15 ("Judge Baxley conferred with Petitioner without any counsel in the courtroom regarding Diggs' prior representation.").

Finally, the Opinion decides the waiver was valid without benefit of the results of certain specialist services previously deemed necessary under § 3599(f) to "help establish that Petitioner's ostensible waiver of counsel's conflict was not knowing, voluntary, and intelligent." Dkt. No. 74 (*ex parte*) at 8; Dkt. No. 78 (*Ex Parte* Funding Order);[10] *see also* Dkt. No. 98. Granting summary judgment denying Claim 1 based essentially on the sufficiency of the waiver without development of the necessary evidence is irreconcilable with the finding that such evidence is "reasonably necessary." § 3599(f).

Claim 2: Trial Counsel Labored Under a Conflict of Interest Against Mr. Stanko and Failed to Adequately Advise the Client or Request Independent Advice for the Client on the Issue, Violating Petitioner's Sixth and Fourteenth Amendment Rights to the Effective Assistance of Counsel.

The Opinion fails to distinctly address Claim 2 at all.

Petitioner's Claim 1 recites multiple bases of *court error* violating Mr. Stanko's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments. Dkt. No. 65 at 49. Claim 2 asserts a theory of *attorney error* related to the conflict: deprivation of the right to counsel by Mr. Diggs's failure to discharge his professional, ethical obligations by disclosing the details of his conflict to Mr. Stanko or requesting independent counsel to advise Mr. Diggs on the handling of the conflict. *Id*. at 56.

By lumping the two claims together, and focusing on the trial court's waiver inquiries, the Opinion completely overlooks Claim 2, concerning Mr. Diggs's duties. *See* Dkt. No. 99 at 14-20. It is simply impossible to prove Mr. Stanko received the effective assistance of counsel in

[10] Although some aspects of these expert services have necessarily been disclosed to Respondents, the present Motion is distinguishable from the Rule 59(e) motion and related order unsealing *ex parte* funding motions in *Madhi v. Stirling*, No. 8:16-3911, Doc. No. 154 at 2-3 (2019). Critically, in *Mahdi*, the Petitioner challenged the district court's ruling on *ex parte* litigation arguing that it applied the wrong legal standard in denying expert funding. Here, Petitioner is *not* challenging this Court's dispositions of the *ex parte* funding litigation, so there is no reason to unseal the underlying motion practice.

handling trial counsel's conflict by pointing to ostensible process he received without the advice or even presence of any conflict-free counsel. While it was certainly proper to exclude Mr. Diggs from an inquiry into his conflict (other than as a witness), it was not proper to conduct such proceedings without providing Mr. Stanko the assistance of counsel.

In fact, the "in-depth hearing on the matter on March 4, 2009" (Dkt. No. 99 at 14-15) also illustrates the problem of the overlapping duties of the court and Mr. Diggs. Mr. Diggs was a material witness to the inquiry into his conflict. He could not be present in that role and simultaneously act as Mr. Stanko's counsel.

Mr. Diggs had his own duty "to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler*, 446 U.S. at 346. Mr. Diggs also had duties to determine whether the conflict was "consentable," and to refer neutral counsel to advise Mr. Stanko on the ramifications of the conflict. Dkt. No. 79 at 21-22 (and ethical rules cited therein).

But the Opinion presumed the conflict was waivable and endorsed the trial court's waiver process without acknowledging that Mr. Stanko's alleged waiver was provided without the effective assistance of counsel. *See* Dkt. 99 at 17. It found Mr. Stanko's acquiescence to Mr. Diggs's continued representation to settle the matter.

Withdrawal of the Opinion is necessary to prevent manifest injustice from its grant of summary judgment denying a claim it purports to treat on the merits without actually doing so.

Claim 3: The Trial Court Erred when it Qualified Juror #480 After She Admitted to Partiality Toward the Death Penalty and to Knowledge of Defendant's Previous Conviction and Present Charges Due to Media Coverage, Violating Petitioner's Right to an Impartial Jury under the Sixth and Fourteenth Amendments.

At voir dire, Juror # 480 recited her belief and impressions of Mr. Stanko's case based on pretrial publicity: "[Mr. Stanko] had murdered his girlfriend, and left the daughter for dead . . .

then came into Conway and murdered a man." Dkt. No. 18 at 166. Juror # 480 believed Mr. Stanko was guilty of murder in the case at bar before hearing any evidence in the case at all. She also knew that Mr. Stanko had already been convicted and sentenced to death in the Georgetown County case. Dkt. No. 65 at 60. She also expressed that she was predetermined to vote for death in every case in which the State presented evidence of an aggravating circumstance. Dkt. No. 18 at 166-67. The trial court "rehabilitated" her by eliciting statements that she could "impartially carry out her duties" despite her prior knowledge and opinions and that she could follow the court's instructions after the court explained that her automatic death position was not permitted. Dkt. No. 99 at 22

The Opinion defers to the trial judge's determination that the juror's demeanor led him to conclude she was "'very thoughtful' and ['honest.'" *Id*. But the trial judge was dismissive of her candor in her prejudging that Mr. Stanko was guilty of murder in the present case and that she would automatically vote for death whenever the state presented evidence of a statutory aggravator, attributing her statements to benign confusion. *Id*. Despite the inconsistency of the trial court's findings, the Opinion maintains, "These findings are entitled to special deference." *Id*.

Claim 4: The Trial Court Allowed All Prospective Jurors Over Sixty-Five Years Old—Eighty-Five Individuals in Total—to Opt-Out of Service, Denying Petitioner's Right to a Jury Drawn from a Fair Cross-Section of the Community, Thereby Violating the Sixth and Fourteenth Amendments.

The Opinion tacitly endorsed the Respondents' argument that South Carolina's opt-out provision for jurors over 65 years of age was not "systemic exclusion" but merely "self-exclusion" or "exemption" (Dkt. No. 99 at 23; *see also* Dkt. No. 71 at 63 (arguing senior citizens were "not systematically excluded" because they "could have served if they wanted to")), ignoring that the Supreme Court has determined both opt-in and opt-out schemes to be

systematic exclusion. *Duren v. Missouri,* 439 U.S. 357, 363-64 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

But the Opinion rests primarily on the state court reasoning, which is a misapplication of clearly established federal law prohibiting such systematic exclusion by concluding that, unlike women in *Duren* and *Taylor*, people older than 65 are not a "distinctive group." Dkt. No. 99 at 23-24. The state court reasoned that people over 65 are not a "distinctive group" because, despite the group's shared "generational values and experiences" and having "lived through some of the same world and national events," they are not a "distinctive group" because as a group, their values and experiences are not "monolithic." *Stanko*, 741 S.E. 2d at 281. Neither the state court, nor Respondents, nor the Opinion cites any federal law requiring that to be distinctive, the group must present "monolithic" values and experiences.[11] The Supreme Court has twice recognized that women comprise a "distinct group" without any such finding that their values or experiences are monolithic or cohesive. Surely all women do not more consistently share values and experiences than do all older adults. In fact, the Court rejected stereotyped characterizations of the members of the group as the proffered state interest in offering women the ability to avoid jury service. *Duren*, 439 U.S. at 369 ("[E]xempting all women because of the preclusive domestic responsibilities of some women is insufficient justification for their disproportionate exclusion on jury venires."). Whatever possible state interest South Carolina proffers to justify the systematic exclusion of older adults from jury service similarly represents stereotypical thinking because any actual need for exemption based on hardship can be handled for individual

[11] Even laying aside the term "monolithic," the idea that a "distinctive group" must have a "cohesiveness of ideas, attitudes, or experiences" comes from state court or non-binding lower federal court opinions, (*e.g.*, Dkt. No. 99 at 23-24 (citing *State v. Price*, 272 S.E.2d 103, 109 (N.C 1980), and opinions of the Seventh and Eighth Circuits, and opinions of state intermediate courts of appeals); Dkt. No. 71 at 60-61), and is anathema to the reasoning in *Duren* and *Taylor*.

senior citizens who need such an exemption, precisely because they are *not* a group with "monolithic" ideas, values, attitudes, or experiences. *Taylor*, 419 U.S. at 534-35 ("It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties.").

Claim 5: The Trial Court Denied Defendant's Request for a Change of Venue, Violating Mr. Stanko's Right to an Impartial Jury and Due Process Guaranteed by the Sixth and Fourteenth Amendments.

The Opinion granted summary judgment as to this claim primarily reasoning that it is always sufficient that prospective jurors exposed to substantial pre-trial publicity recited that they can "lay aside"[12] impressions and opinions formed based on that extrajudicial information. Dkt. No. 99 at 26.

Respondents rely on the state court's misstatement of the law, presuming that to prevail on a claim related to pretrial publicity, it is necessary to demonstrate at least "one juror who stated he or she could not ignore exposure to pretrial publicity." *See* Dkt. No. 71 at 66 (quoting *Stanko*, 741 S.E.2d at 721-22). Not only is there no such burden, clearly established federal law has held that pre-trial publicity can be so pervasive that individualized questioning is unnecessary to conclude that denial of change of venue violated the defendant's right to an unbiased jury. *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963). The Opinion dismisses these cases by claiming, "The record before the Court does not remotely suggest a trial so infected by unfairness and lack of due process." Dkt. No. 99 at 27. It then proceeds to recite the record at voir dire, rather than the relevant evidence (*see, e.g.*, Dkt. No. 17-2 at 64; Dkt. No. 17-4 at 172; Dkt. No. 18 at 164-67) that pretrial publicity was pervasive, reaching such a high proportion of

[12] Although it is true that the jury right does not *always* require jurors be "totally ignorant of the facts and issues involved" in a case, (Dkt. No. 99 at 26 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961))), there are cases like this one where due process "require[s] a trial before a jury drawn from a community of people who had not seen and heard" especially damning extrajudicial publicity. *Rideau*, 373 U.S. at 727.

the residents of Horry County as to make denial of change of venue a constitutional violation without the need "to examine a particularized transcript of the voir dire." *Rideau*, 373 U.S. at 727.

Claim 6: Trial Counsel Acquiesced to Postponing Motion for Venue Change Until After Jury Selection, Violating Petitioner's Right to Effective Assistance of Counsel guaranteed by the Sixth and Fourteenth Amendments.

The Opinion states that this claim was not raised in the highest state court. Dkt. No. 99 at 30. However, Petitioner raised this claim on post-conviction, and sought review of denial in the state supreme court pleading the relevant facts of the claim. Dkt. No. 18-17 at 18. The state supreme court summarily declined review. Dkt. No. 18-20.

Because the post-conviction court's opinion was the only explained opinion, per AEDPA, the federal court should "look through" the supreme court adjudication to the lower court adjudication and review that decision. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Petitioner has pleaded pointing to the record of the state supreme court petition and summary denial, and argued the correct federal law governing "look through" review. Dkt. No. 65 at 74. The Opinion makes no mention of it at all.

Respondents have argued inconsistently that this claim is procedurally barred because it was defaulted in state court and that the state court adjudication on the merits is subject to AEDPA deference. Dkt. No. 86 at 2, 43.

Claim 7: Trial Counsel Failed to Provide Available Evidence of Prejudice from Pretrial Publicity to Support a Venue Change, Violating Petitioner's Right to the Effective Assistance of Counsel and Right to a Fair and Impartial Jury Under the Sixth and Fourteenth Amendments.

The Opinion finds this claim was defaulted in state court, but Respondents have argued both that it was defaulted in state court and that the state court adjudication on the merits is entitled to "double deference." Dkt. No. 99 at 30; Dkt. No. 86 at 2, 43.

Assuming the claim was adjudicated, the state court opinion was unreasonable in that it was limited to the trial record even though a claim of ineffective assistance of counsel "often turns on evidence outside the trial record." *Martinez*, 566 U.S. at 12. Granting summary judgment was premature while further factual development was pending and there remain genuine issues of material fact.

Claim 8: Trial Counsel Failed to Adequately Challenge S.C. Code §16-3-20, Violating Petitioner's Right to the Effective Assistance of Counsel Under the Sixth and Fourteenth Amendments.

Claim 8 raises the ineffective assistance of counsel claim for failing to litigate what is Claim 15 *infra*. The challenge is that the South Carolina statutory aggravators scheme, in aggregate, fails to provide a rational basis for distinguishing the many who are not sentenced to death from the few who are. *See* Dkt. 65 at 78-80. In short, the proliferation of statutory aggravators means the statute fails to meaningfully narrow death-eligible cases, leaving any narrowing to fall to arbitrarily unrestricted prosecutorial discretion.

At trial, Mr. Diggs failed to raise this claim, but instead challenged the statute arguing it should include a new categorical eligibility rule based on the evolving standards of decency test recognizing the emergence of new national consensus following a two-prong test. *See* Dkt. No. 79 at 47. Mr. Diggs sought a new rule based on "hypofrontality," arguing incoherently that it is an extension of the categorical rule making the intellectually disabled ineligible for death. *Id* at 48.

The state post-conviction court disposed of the ineffective assistance of counsel claim raised here by simply stating that the statute is constitutional.

Claim 9: Trial Counsel Adduced Expert Testimony Labeling Mr. Stanko a Psychopath, Dehumanizing Him in the Jury's Eyes and Violating His Right to Effective Assistance of Counsel Under the Sixth and Fourteenth Amendments.

The Opinion states that Mr. Stanko failed to submit this claim to the highest state court. However, this claim was adjudicated by the trial court in post-conviction, which found, despite Mr. Diggs's testimony to the contrary, that he had a valid strategic reason for eliciting the dehumanizing labels from expert witnesses. Dkt. No. 18-7 at 58-59. Mr. Stanko appealed this ruling to the state supreme court, pleading the relevant facts of this claim, but the supreme court declined to grant review. Dkt. No. 18-17 at 53, 53 n.11; Dkt. No. 18-20. Mr. Stanko asked the court to reconsider its summary denial of his petition for a writ of certiorari, and the state supreme court summarily denied that as well. Dkt. No. 18-22. The trial court post-conviction opinion is thus entitled to "look through" review. *Wilson*, 138 S. Ct. at 1192.

Again, Respondents simultaneously argued this claim was procedurally defaulted in state court and that the state court adjudication on the merits is subject to AEDPA deference. Dkt. No. 86 at 2, 50 n.28.

Under the correct standard of review, this Court should have addressed the genuine issues of material fact at the heart of the state court adjudication, particularly which conflicting statements by Mr. Diggs are to be believed, especially in the light of his propensity for dishonesty and failing to make ethically obligatory disclosures. *See* Dkt. No. 92 at 6n.3, n.4, 6-7. Because there exists a genuine issue of fact at the heart of the state court disposition of this claim, summary judgment would deny Mr. Stanko the opportunity to dispute material facts. *Fountain*, 336 U.S. at 683.

Claim 10: The State Allowed its Impeachment Witness to Give Testimony Based on Inaccurate Information, Violating Petitioner's Right to Due Process and a Fair Trial under the Sixth, Eighth, and Fourteenth Amendments.

Respondents simultaneously allege that this claim of prosecutorial misconduct is procedurally barred and that the state court merits adjudication is subject to "double deference." Dkt. No. 86 at 2; Dkt. No. 71 at 51-53, 94. Respondents attempt to alter this claim to one of

ineffective assistance of counsel by focusing on whether defense counsel's cross examination was adequate. Plainly, this claim under federal law clearly established in *Napue v. Illinois*, 360 U.S. 264, 269 (1959), is not subject to "double deference." *See* Dkt. No. 71 at 94; Dkt. No. 86 at 55. The claim does not involve defense counsel's performance, thus it is not subject to *Strickland* deference and therefore not subject to "double deference." *See* Dkt. No. 92 at 24.

Claim 11: The Trial Court Improperly Instructed the Jury that Malice Could Be Inferred from the Use of a Deadly Weapon, Violating Petitioner's Guarantees to Due Process and the Presumption of Innocence under the Fourteenth Amendment.

The improper instruction permitted the jury to infer an essential element of the crime, violating Mr. Stanko's federal due process rights by relieving the State of its burden of proving each element beyond a reasonable doubt. The Opinion finds that the claim was defaulted in state court because Mr. Stanko referenced "the reasoning and logic of *State v. Belcher*[, 685 S.E.2d 802 (S.C. 2009)]," and thus litigated the issue "strictly on state law grounds." Dkt. No. 99 at 30-31. This ignores that "the reasoning and logic" of *Belcher* was clearly established federal constitutional law. *Belcher*, 685 S.E.2d at 703-04 ("[T]he Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant.") (citing *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975)). Petitioner has repeatedly argued this point, (Dkt. No. 65 at 90; Dkt. No. 79 at 53-55; Dkt. No. 92 at 24-25), but the Opinion fails utterly to address it.

Further, the state court adjudication found a due process violation pursuant to *Belcher*, but then applied an improper harmless error standard in violation of *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must

be able to declare a belief that it was harmless beyond a reasonable doubt."). *See Stanko*, 741 S.E.2d at 265.

Claim 12: Counsel Failed to Investigate and Present All Available Mitigating Evidence of Mr. Stanko's Life History, Background, Brain Damage, or Mental Illness, Violating the Sixth and Fourteenth Amendments.

The Opinion found this claim was defaulted in state court. Dkt. No. 99 at 30. However, the failure to fairly present the claim was because the state courts[13] denied adequate specialist funding to investigate and develop the factual bases of this claim. Dkt. 65 at 18-23, 95. The state courts denied funding by reading the funding statute to mean the post-conviction petitioner could only receive such funding authorization *after* specialist services had been rendered. *Id*. at 95. Accordingly, the claim was never fairly presented in state court. "'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him . . . ." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Because the denial of funding was external to Mr. Stanko and could not fairly be attributed to him, the deprivation of the effective assistance of counsel is cause under *Martinez* for the procedural default. The Opinion, as noted, failed to engage with this equitable exception to the bar to merits review of defaulted claims, simply denying Petitioner had asserted it.

Mr. Stanko must also demonstrate prejudice from the default, which entails showing the underlying claim is "substantial" in that it "has some merit." *Martinez*, 566 U.S. at 14. This showing, which requires evidence outside the trial court record to prove the underlying *Strickland* prejudice, requires the anticipated evidentiary development based on authorized specialist services. The Petition pleaded that the basis for prejudice was forthcoming: "preliminary investigation indicates that the opportunity to fully investigate Mr. Stanko's life

[13] Funding for these services was litigated to the state supreme court. Dkt. 65 at 22.

history and deploy funded experts (see [Dkt.] No. 30), will establish that mitigating evidence never presented to his jury, taken with all the other evidence, would have a reasonable probability to lead at least one hypothetical juror to strike a different balance." Dkt. No. 65 at 92-93.

Claim 13: Counsel Recklessly Elicited Unfounded Expert Testimony that Mr. Stanko's Family Disavowed Him, Violating the Sixth and Fourteenth Amendments.

The Opinion finds this was defaulted in state court because it was not presented to the state supreme court. Dkt. No. 99 at 30. However, the claim was adjudicated in post-conviction, and Mr. Stanko raised the relevant facts of it in his petition for certiorari in the state supreme court. Dkt. No. 18-17 at 53 n.10. The state supreme court summarily declined to review the claims presented in the petition. Dkt. No. 18-20. Mr. Stanko requested reconsideration, and the state supreme court summarily declined to provide it. Dkt. No. 18-22.

Respondents simultaneously argued this claim was defaulted in state court and that the state court adjudication of it is subject to AEDPA deference. Dkt. No. 86 at 2, 66 n.35.

On the merits, Respondents argue that all of Mr. Diggs's sentencing phase decisions were reasonable trial strategy. *Id*. at 66. This was also the basis of the state court denial of the claim on the merits. But Mr. Diggs declined even to request specialist funding and therefore conducted no mitigation investigation at all. Dkt. No. 17-9 at 362-63. Accordingly, any decision he made relative to potential mitigation evidence, and especially to allow aggravating expert testimony related to potential family witnesses, could not have been reasonable trial strategy. *See Wiggins v. Smith*, 539 U.S. 510, 522 (2003). ("'[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'") (quoting *Strickland*, 466 U.S. at 691).

Claim 14: Appellate Counsel, by Failing to Raise Trial Court Error in Admitting Evidence from Mr. Stanko's Prior Murder Conviction, Violated the Sixth and Fourteenth Amendments.

Respondents inconsistently argued this claim was procedurally defaulted and that the state court adjudication of it was entitled to "double deference." Dkt. No. 86 at 2, 43. The state court adjudication was unreasonable because it made no record that it conducted the requisite weighing of prejudicial effect against any probative value of the evidence. *See* Dkt. No. 79 at 61; Dkt No. 92 at 30. Respondents argued, irrelevantly, that the evidence "could have been excluded" had the weighing rule been applied. Dkt. No. 86 at 68.

The prejudice from appellate counsel's error is that the conviction and sentence were allowed to stand despite introduction of substantial prejudicial evidence from the Georgetown County case by way of five different witnesses, including the highly prejudicial audio recording of Christina Ling's 911 call, crime scene photographs, medical photographs and a diagram of Christina Ling, and Laura Ling's autopsy charts. Dkt. No. 65 at 99. The state court adjudication of this claim reasoned that the South Carolina statute endorses admissibility of evidence of another murder as an aggravating circumstance. *Id*. at 100. But clearly established federal law shows that evidence that is otherwise admissible should be excluded when the prejudicial effect outweighs any probative value. *E.g., Old Chief v. United States*, 519 U.S. 172, 181 (1997).

Claim 15: The South Carolina Capital Sentencing Statute Fails to Genuinely Narrow the Class of Offenders Eligible for A Death Sentence, Violating the Eighth and Fourteenth Amendments.

The Opinion concluded that this claim was defaulted in state court. However, the post-conviction court adjudication of the claim observed that the state supreme court addressed the claim on direct appeal, which precluded merits review in post-conviction. Dkt. No. 65 at 101 (citing Dkt. No. 18-7 at 61 ("Further, this issue was addressed in Stanko's appeal. See *State v. Stanko, id.*")).

Accordingly, summary judgment based solely on procedural default works a manifest injustice by depriving Petitioner of his right to federal habeas corpus review.

IV. ALTERNATIVELY, DENIAL OF A CERTIFICATE OF APPEALABILITY WAS NOT PROPER BECAUSE REASONABLE JURISTS COULD FIND ASSESSMENT OF THE CLAIMS DEBATABLE OR WRONG.

The Opinion recites the standard for determining a COA, but engages in no analysis, and merely pronounces conclusorily, "In this case, the legal standard for the issuance of a certificate of appealability has not been met." Dkt. No. 99 at 32. By implication, the reasoning presented throughout the Opinion, including sweeping denial of any merits review and merits review of Claims 1 through 5, substitutes for COA analysis.

But the Supreme Court has emphasized that a federal court's inquiry into whether to grant a COA "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). The Court distinguished the "COA stage" from review of the merits and made clear that, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U. S. at 338.

The Court further explained that it is improper for a federal court to "sidestep[]" the COA process by "first deciding the merits" of the claims under consideration, and then "'justify[] its denial of a COA based on its adjudication of the actual merits[.]'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336-37).

In *Buck*, the Supreme Court acknowledged that the lower court "phrased its determination [to deny COA] in proper terms." *Id*. Looking at the circumstances in which a COA was denied, however, the Court recognized that the lower court improperly reached its conclusion "only after essentially deciding the case on the merits." *Id*.

Here, the Opinion suffers the same flaw in its determination to deny a COA. The COA denial comes in a short paragraph on the final page of the Opinion. Dkt. No. 99 at 32. There is no analysis applying the COA standard to any claim. This Court neither invited nor considered any briefing on the question of whether a COA was warranted as to any claim. *But see* Rules Governing Section 2254 Cases in the United States District Court Rule 11(a) (allowing the district court to "direct the parties to submit arguments on whether a certificate should issue"). The District Court did not distinguish between unexhausted claims reviewed de novo and those that were adjudicated on the merits in state court and reviewed under 28 U.S.C. § 2254(d). The only review this Court provided to Mr. Stanko's claims was its consideration of the merits of the Claims 1 through 5 in assessing Respondents' motion for summary judgment.

But, when a court denies a COA after only reviewing the merits of a petitioner's claims, it improperly "inverts the statutory order of operations" and places "too heavy of a burden on the prisoner at the COA stage." *Buck*, 137 S. Ct. at 774. "*Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253." *Id*. (citing *Miller-El*, 537 U.S. at 336-37). Like the lower court in *Buck*, this Court used "proper terms" when addressing the COA inquiry, but the record does not support a finding that the Court analyzed Mr. Stanko's claims in the manner required by 28 U.S.C. § 2253 and *Miller-El.*

V. CONCLUSION

For the foregoing reasons, this Court should reconsider its Opinion dated March 24, 2022 (Dkt. No. 99), vacate the judgment, allow Mr. Stanko to complete the evidentiary development by conducting authorized specialist services, and convene an evidentiary hearing to address genuine issues of material fact and critical legal issues. In the alternative, this Court should grant a Certificate of Appealability.

Respectfully submitted,

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April 20, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2022, the foregoing was served upon all counsel of record in this case via the ECF filing system, pursuant to the Federal Rules of Civil Procedure.

/s/ E. Charles Grose, Jr.
E. CHARLES GROSE, JR. (Fed ID 6072)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Stephen C. Stanko, Petitioner, v. Bryan P. Stirling, *Director, South Carolina Department of Corrections,* and Michael Stephan, *Warden, Broad River Correctional Institution*, Respondents.	)	Civil Action No. 1:19-03257-RMG **ORDER**

Before the Court is Petitioner's Rule 59(e) motion to alter or amend the judgment (Dkt. No. 102). For the reasons set forth below, Petitioner's motion is denied.

Background

On March 24, 2022, the Court granted Respondent's motion for summary judgment and denied Petitioner's partial motion for summary judgment. (Dkt. No. 99) (the "Prior Order").

On April 20, 2022, Petitioner moved for reconsideration of the Prior Order. (Dkt. Nos. 102, 132).[1] Respondents oppose. (Dkt. No. 130).

[1] In his motion for reconsideration, Petitioner contends, inter alia, that the Court wrongfully granted summary judgment on two of his claims because it decided certain issues without the "results of certain specialist services previously deemed necessary under § 3599(f)." *See, e.g.*, (Dkt. No. 102 at 24) *citing* (Dkt. Nos. 74, 78) (the "Ex Parte Documents"). On April 21, 2022, at Respondent's request, the Ex Parte Documents were unsealed. (Dkt. No. 108). That same day, however, at Petitioner's request, the order to unseal was stayed and Petitioner was permitted time to respond to Respondents' motion to unseal. (Dkt. No. 110). On May 15, 2022, after considering the parties' respective arguments, the Court again ordered the Ex Parte Documents unsealed—at which point the Clerk removed the ex parte shield on the documents. (Dkt. No. 113). Petitioner then filed two further motions to stay the unsealing of the Ex Parte Documents, both of which the Court denied. (Dkt. No. 125).

Petitioner also filed an interlocutory appeal of the Court's May 15, 2022 order with the Fourth Circuit Court of Appeals. *Stanko v. Stirling, et. al.*, No. 22-2 (4th Cir.). On May 24, 2022, Petitioner

Legal Standard

Rule 59(e) of the Federal Rules of Civil Procedure governs motions to alter or amend a judgment; however, the rule does not provide a legal standard for such motions. The Fourth Circuit has articulated "three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) *citing EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). "Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Id.* at 403 (internal citations omitted). Rule 59(e) provides an "extraordinary remedy that should be used sparingly." *Id.* (internal citation omitted). The decision to alter or amend a judgment is reviewed for an abuse of discretion. *Id.* at 402.

Discussion

In the Prior Order, the Court found that while Petitioner's Claims 1, 2, 3, 4, and 5 were not procedurally defaulted, they nevertheless failed on the merits. (Dkt. No. 99 at 14-27). As to Petitioner's Claims 6, 7, 8, 9, 10, 12, 13, 14, and 15, the Court found the claims procedurally defaulted. (*Id.* at 27-32). As to Claim 11, the Court found the claim defaulted to the extent Petitioner attempted to assert federal constitutional challenges to contest an inferred malice charge. (*Id.* at 30-32). The Court denied a certificate of appealability. (*Id.* at 32).

filed a motion to suspend and stay this Court's order to unseal the Ex Parte Documents pending appeal. (Dkt. No. 6). On June 3, 2022, the Fourth Circuit denied that request. (Dkt. No. 24).

After careful consideration of the parties' arguments, the Court denies Petitioner's motion for reconsideration. Except as described *infra* with respect to limited aspects of Claims 1 and 12, as to Claims 1, 2, 3, 4, and 5, Petitioner merely rehashes arguments the Court considered and rejected. *Compare* (Dkt. No. 79 at 7-40) *with* (Dkt. No. 102 at 18-29). Such arguments are not proper, and the Court will not address them further. *United States v. Lovely*, 420 F. Supp. 3d 398, 403 (M.D.N.C. 2019) ("Rule 59(e) motions . . . 'should not be used to rehash arguments the court has already considered[.]'") *citing South Carolina v. United States*, 232 F. Supp. 3d 785, 793 (D.S.C. 2017). As to Claims 6-15, Petitioner now argues for the first time that these claims were not procedurally defaulted. (Dkt. No. 102 at 28-36). As Respondents correctly note, however, in opposing Respondents' motion for summary judgment, Petitioner "did not address, respond to, or even attempt to overcome the procedural bar" of said claims. (Dkt. No. 130 at 2); *see* Petitioner's Opposition, (Dkt. No. 79 at 40-66) (failing, except in part as to Claim 11, to address procedural default); Respondents' Motion for Summary Judgment, (Dkt. No. 71 at 17-21) (arguing said claims were procedurally barred). Petitioner's attempt to address for the first time on reconsideration Respondent's arguments as to procedural default is again improper, *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 404 (4th Cir. 1998) ("Rule 59(e) may not be used to raise new arguments or present novel legal theories that could have been raised prior to judgment."), and further devoid of merit. Thus, the Court addresses substantively only Petitioner's arguments on reconsideration which center—to some degree—around the previously noted Ex Parte Documents.

By way of background, on October 6, 2021, Petitioner moved for authorization of brain imaging funding pursuant to 18 U.S.C. § 3599(f). (Dkt. No. 74). Petitioner argued that such funding was needed to develop the factual basis for penalty phase ineffective assistance of counsel and excuse procedural default on "underlying viable claims." *See* (*id.* at 5-10). Petitioner stated

"scanning appointments may be established on approximately one weeks' notice, sometimes less." (*Id.* at 1). The Court granted the motion on October 14, 2021. (Dkt. No. 78). Even though Respondents had filed their motion for summary judgment nearly three months prior on July 28, 2021, (Dkt. No. 70), and despite the fact the Petitioner proceeded to file his motion for partial summary judgment on October 21, 2021, (Dkt. No. 80)[2], Petitioner then waited until February 14, 2022—after briefing was *complete* on both parties' motions for summary judgment—to move for a transfer order and obtain the requested medical scans. (Dkt. No. 97). Petitioner provided no reason for this delay. Petitioner further states that, as of April 20, 2022, "undersigned counsel have not yet obtained the resulting imaging[.]" (Dkt. No. 102 at 14).

Against this backdrop, the Court returns to the motion for reconsideration.

As to Claim 1,[3] Petitioner argues that the Court improperly granted summary judgment to Respondents because the Court deemed Petitioners' waiver "valid without benefit of the results of certain specialist services previously deemed necessary under § 3599(f)." (Dkt. No. 102 at 24).

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[2] In pertinent part, Petitioner's partial motion for summary judgment stated:

> Petitioner requests this Court stay Respondents' Motion for Summary Judgment (ECF No. 70) pending opportunity for Petitioner to develop necessary evidence required to make that determination, including issuing an order for discovery, expansion of the record, and/or an evidentiary hearing, pursuant to Rules Governing Section 2254 Cases in United States District Courts.

(Dkt. No. 80 at 1). Despite the stated need to "develop necessary evidence," while opposing Respondents' motion for summary judgment Petitioner made no mention of forthcoming evidence. *See* (Dkt. No. 79). Further, in his Reply to Respondents' opposition to his motion for partial summary judgment, Petitioner again made no mention of this "necessary evidence." (Dkt. No. 92).

[3] Claim 1: The trial court erred both (a) in granting Mr. Stanko's ostensible waivers in Mr. Diggs' conflict of interest, and (b) in failing to substitute trial counsel pursuant to the State's pretrial submission of Mr. Diggs' "non-waivable conflict of interest," violating Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments

The Court denies Petitioner's motion for reconsideration on the above point. Claim 1 was adjudicated on direct appeal and the Court's review is thus limited under § 2254(d)(1) to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011). Accordingly, Petitioner's argument that this Court's grant of summary judgment was in error because the Court did not have before it the above noted brain scans is unavailing. To the extent Petitioner is attempting to formulate a *Martinez*[4] claim regarding ineffective assistance of state postconviction counsel in relation to the above brain scans, *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022) bars such an argument because, "under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or *otherwise consider evidence beyond the state court record* based on ineffective assistance of state postconviction counsel." *Shinn*, 142 S. Ct. at 1734 (emphasis added).

Last, as to Claim 12,[5] Petitioner argues that though the claim was defaulted in state court, forthcoming evidence based upon the above-described brain scans establishes "prejudice" by showing "mitigating evidence never presented to [Petitioner's] jury." (Dkt. No. 102 at 33-34) (arguing "cause" under *Martinez* is established because the failure to present the claim was the "state courts[']deni[al] of adequate specialist funding").

The Court denies Petitioner's motion on this final point. As Respondents note, beyond being procedurally barred, *see supra*, Claim 12 is not even a *Martinez* claim, (Dkt. No. 130 at 75) ("*Martinez* does not apply to a claim raised at PCR and denied and then not raised on appeal at all.

[4] "In *Martinez v. Ryan*, this Court explained that ineffective assistance of postconviction counsel is cause to forgive procedural default of ineffective-assistance-of-trial-claims, but only if the State required the prisoner to raise that claim for the first time during state postconviction proceedings." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1727 (2022) (internal citation omitted).

[5] Claim 12: Counsel failed to investigate and present all mitigating evidence of Mr. Stanko's life history, background, brain damage, or mental illness, violating Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments.

Martinez applies to claims of ineffective assistance of PCR trial counsel in not raising a claim of IAC [of trial counsel] not raised at PCR.") (emphasis removed). Petitioner's argument is without merit and the Court overrules it.[6]

Conclusion

For the above reasons, Petitioner's Rule 59(e) motion to alter or amend the judgment is (Dkt. No. 102) **DENIED.**

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

July 1, 2022
Charleston, South Carolina

[6] Having rejected the substance of Petitioner's motion for reconsideration, the Court rejects Petitioner's further contention that the denial of a certificate of appealability was erroneous. *See* (Dkt. No. 102 at 36-37).