

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2012-212107

JONATHAN KYLE BINNEY, SK 6009, Petitioner/Respondent,

v.

STATE OF SOUTH CAROLINA, Respondent/Petitioner.

APPENDIX
VOLUME VIII OF XII

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1 of the symptoms that he was having.

2 Typically with nicotine intoxication, you would
3 see stomach upset, and that might be nausea,
4 vomiting, abdominal pain. You would be getting
5 cramping. You would see some agitation, some
6 restlessness, some confusion. One would see
7 potentially excessive motor movements, where people
8 moving around. One could see convulsions. One
9 could see coma, if there was too much nicotine. The
10 heart rate would increase. The respiration rate
11 would increase for a period of time, and then those
12 would start decreasing, because after awhile, while
13 nicotine stimulates everything, it actually
14 paralyzes everything at some point, and that's why
15 almost everyone dies from respiratory paralysis. It
16 paralyzes the diaphragm so people are not moving air
17 in and out, because it's just been stimulated so
18 much. But typically nausea symptoms, complaints of
19 cramps in the muscles.

20 Q Having read the hospital records from Upstate
21 Carolina Medical Center where he was kept from June
22 8th to June 9th, are his symptoms as reported in the
23 record consistent with nicotine poisoning?

24 A His symptoms are consistent with nicotine
25 poisoning, and he was diagnosed when he came into

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1 the hospital with nicotine intoxication. And when
2 he was discharged, he was discharged with nicotine
3 intoxication. A number of people looked at him
4 there. He was admitted to the intensive care unit
5 and monitored and then discharged back to jail, once
6 he was stable. But when he first came in, he was
7 having apparently great difficulty in breathing,
8 because he required ventilin, which is -- another
9 name for that is Albuterol, which is a medicine that
10 helps people breath, when people are not getting
11 enough air. So he was having problems breathing.
12 He also had a rapid heartbeat. He had a number of
13 symptoms that were consistent with nicotine
14 poisoning.

15 Now, he didn't have every symptom that you
16 could possibly have, and seldom does any patient
17 have every symptom that you would have -- potential
18 to have, but he had certainly enough that the
19 doctor, based on his history and the way he looked
20 and the way that they measured things, they were
21 confident that he had nicotine intoxication, and
22 treated him like that.

23 Q That diagnosis was made by the doctor who
24 actually saw him and was able to observe him?

25 A Yes, sir.

1 Q If I could consult with Mr. Slade, I believe I
2 am finished with Dr. Morton.

3 (off the record)

4 (back on the record)

5 MR. PRUETT: Thank you, Dr. Morton.

6 CROSS EXAMINATION BY MR. GOWDY:

7 Q Good afternoon, Dr. Morton.

8 A Good afternoon.

9 Q I was trying to pay close attention, but I may
10 have missed it. I heard something about psychiatry.
11 You're not a psychiatrist, is that right?

12 A No, sir, I'm not.

13 Q You --

14 A I'm not a physiatrist. I teach in the
15 Department of Psychiatry.

16 Q You can't prescribe medicine?

17 A No, sir.

18 Q You can't diagnose people with psychiatric
19 problems?

20 A No, I don't do any diagnosis.

21 Q I want you to tell me, Dr. Morton, every single
22 piece of evidence that you relied upon for the
23 proposition that Jonathan Binney had on nicotine
24 patches when he went inside Judy Southern's home on
25 June the 7th. List them out, every one of them.

1 A I first of all relied on the medical records
2 from Upstate.

3 Q Understand my question, Dr. Morton.

4 A Yes, sir.

5 Q Before he went into the house. Not before he
6 went to the hospital.

7 A Okay. I'm sorry.

8 Q Before he went into the house.

9 MR. PRUETT: He needs to specify which house.

10 MR. GOWDY: Judy Southern's house.

11 MR. PRUETT: Okay.

12 MR. GOWDY: I thought I did.

13 BY MR. GOWDY:

14 Q Judy Southern's house.

15 A The documents that I relied upon that said --
16 restate your question, I'm sorry.

17 Q I'm going to try to ask it even simpler than
18 that.

19 A Good.

20 Q The only way that you know or the only way that
21 you are able to tell this jury that Jonathan Binney
22 may have had on nicotine patches when he went into
23 Judy Southern's home is because he told you he did,
24 isn't that right?

25 A I did rely on his history, yes.

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1 Q Did you rely on the reason that he gave before
2 you were hired as an expert? Did you rely on the
3 reason that he gave for why he put those nicotine
4 patches on?

5 A At one point he said that he was -- did it for
6 an adrenalin effect.

7 Q Why did he need adrenalin, Dr. Morton? Did he
8 say that?

9 A He didn't say that.

10 Q I want you to look with me, if you would, Dr.
11 Morton. You tell me if I miss something. "He was
12 apparently running from the place after alleging
13 shooting a woman. He said he was aware the police
14 were looking for him --

15 MR. PRUETT: Could I ask what document he's
16 referring to?

17 MR. GOWDY: Be happy to. This is the Upstate
18 Carolina Medical Center document that Dr.
19 Schwartz-Watts looked at.

20 MR. PRUETT: Your Honor, that's not in response
21 to his line of examination, which is when he went in
22 the house. He's referring to a document after his
23 arrest.

24 THE COURT: Well, ask the witness if he's
25 familiar with the document.

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1 BY MR. GOWDY:

2 Q Are you familiar with this document? Did you
3 look -- you must be, because you just testified --

4 A Yes, sir. I am familiar with that document.

5 Q You just testified -- you testified, if I
6 remember correctly, when Mr. Pruett was asking you
7 the questions, that you thought, based on what I
8 held in my hand, that he was suffering from nicotine
9 poisoning or nicotine intoxication, is that right?

10 A Yes, sir.

11 Q The same document that he asked you to refer to
12 I'm going to ask you, did he say that he put on the
13 nicotine patches so he could run from the police?

14 A I will have to look.

15 Q First paragraph.

16 A (Witness reviewing document)

17 MR. PRUETT: Your Honor, if we could just
18 clarify. Again, he's asked him a bifurcated
19 question there about -- he asked about the Southern
20 residence, and now he's skipping to the end of when
21 after he's been arrested. So he's asked one
22 question, which I'm a little bit confused.

23 MR. GOWDY: Your Honor, if the witness is
24 confused, he can ask me to repeat it.

25 THE COURT: Let me hear the objection before we --

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1 MR. PRUETT: My objection was he's jumping from
2 one event to the other event. There are two events
3 involving nicotine patches, one where he went in the
4 residence and the other is where he was arrested.
5 So he asked Dr. Morton a few minutes ago what was
6 the reason he gave you for using the nicotine
7 patches inside the residence. That's completely
8 different from what he stated after he was arrested.

9 THE COURT: Well, you can clarify the question
10 then. And if the witness needs to have it clarified
11 or does not understand it, please ask the question
12 to clarify it for you.

13 BY MR. GOWDY:

14 Q Dr. Morton, would you agree with me that the
15 only evidence that you had before you that Jonathan
16 Binney had on nicotine patches before he went into
17 Judy Southern's home is that he told you he did?

18 A Yes, sir.

19 Q Would you agree with me that the only evidence
20 that you have that he put on nicotine patches while
21 he was in Judy Southern's home was that he told you
22 that he did it?

23 A Yes, sir.

24 Q While he was in Judy Southern's home, the only
25 evidence that exists that he put on nicotine patches

1 was his word?

2 A Yes, sir.

3 Q Did you find any -- were you shown any wrappers
4 from nicotine -- I mean, let's be very clear for the
5 jury. You open a nicotine patch, right?

6 A Yes, sir.

7 Q Usually it takes a pair of scissors. If you
8 are real good at it, you might could do it with your
9 hand, right?

10 A Yes, sir.

11 Q Is that right?

12 A Yes.

13 Q You peel off the two plastic pieces --

14 A That's correct.

15 Q -- That hold the adhesive on right?

16 A Yes.

17 Q So you have got three pieces of trash for each
18 nicotine patch, is that right?

19 A Approximately, yes.

20 Q And then you put the patch on, right?

21 A (no response)

22 Q Were you shown any evidence that any nicotine
23 patches were applied in Judy Southern's home?

24 A No, sir.

25 Q All right. That takes us up to the time that

1 he left Judy Southern's home.

2 My question, which Mr. Pruett didn't
3 understand, so I'll try to ask it differently.

4 MR. PRUETT: Your Honor, I object to any
5 reference to what I didn't understand.

6 THE COURT: Please do not comment upon Mr.
7 Pruett's objection.

8 BY MR. GOWDY:

9 Q The question that I asked was did he give a
10 reason at Upstate Carolina Medical Center for why he
11 put on nicotine patches?

12 A Yes, sir, he did.

13 Q What reason did he give?

14 A At that time he gave a reason for extra energy.

15 Q For what purpose?

16 A Because he was running from the police.

17 Q All right. I showed you this page, Dr. Morton.

18 Let me also show you this page from the same
19 summary of medical records from Carolina -- from
20 Upstate Carolina.

21 Admission diagnosis. Can you tell the jury
22 what that paragraph says?

23 A Starting?

24 Q Start right here.

25 A "This twenty-six year old patient was running

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1 from the police after allegedly shooting a woman.
2 Deliberately added multiple nicotine patches in an
3 attempt to increase his adrenaline and avoid
4 apprehension. He also had not drank anything for
5 thirty-six hours prior to coming into the emergency
6 room."

7 Q Thank you, doctor.

8 There is not one single shred of evidence that
9 you have seen that Jonathan Binney put on nicotine
10 patches before he went into Judy Southern's home, is
11 there?

12 A From his history.

13 Q When you say his history, let's be clear about
14 that, doctor. His history means that's what he told
15 you?

16 A Yes, sir, from what he told me.

17 Q Other than what he told you, is there any
18 evidence that he put on any nicotine patches before
19 he went into Judy Southern's home?

20 A No, sir.

21 Q Is there any evidence, other than what he told
22 you, that he put on nicotine patches while he was in
23 Judy Southern's home?

24 A No, sir.

25 Q You testified about Remeron. If I understood

1 your testimony correctly, Remeron is an
2 antidepressant?

3 A Yes, sir, antidepressant.

4 Q And at some point he was prescribed Remeron or
5 actually began taking Remeron?

6 A He was prescribed it, and he gave a history.
7 His verbal history was that he took it.

8 Q Do we actually know whether he ever took it?

9 A We don't actually know if he took it or not.

10 Q Again we are relying on his word that he took
11 Remeron?

12 A It's something that all modern medicine has to
13 rely on is what a patient tells us. Everything
14 about medicine and the practice involves taking a
15 history. And I guess for the last thirty years I
16 have been studying taking histories and talking to
17 people and that's -- so I certainly know that there
18 is something fraught with taking a history, and so I
19 don't have actual evidence that he actually took
20 that tablet, but I relied on that as, yes.

21 Q I'm not faulting you in any way, doctor, for
22 relying upon a patient's history.

23 A Okay.

24 Q That's what doctors do. All doctors do that?

25 A Right.

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1 Q From baby doctors, all the way up to
2 psychiatrists, and everything in between.

3 What I'm asking you is were you provided with
4 any filled prescription bottles for where he went
5 and got a refill on his Remeron prescription?

6 A No, sir, I don't think I saw any refilled
7 bottles and he did not tell me he got it refilled.
8 You know, he told me that he got initial
9 approximately two or three weeks worth, and then he
10 quit taking it after it ran out.

11 Q He quit taking it.

12 Now, he was depressed before he started taking
13 Remeron, right?

14 A I think he was.

15 Q Do you know why he was?

16 A He's got a number of potential reasons, yes.

17 Q The CSC case with his daughter would be a very
18 good reason to be depressed?

19 A That would be one, yes.

20 Q He presented to a hospital in Spartanburg on an
21 alleged overdose, is that right?

22 A Yes, sir.

23 Q Were you shown the medical records from
24 Spartanburg Regional?

25 A No, sir, I didn't.

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1 Q Were you shown Dr. Schwartz-Watts' report where
2 she said the urine -- his urine drug screen was
3 negative at the time of admission.

4 A I knew that, yes.

5 Q You did know that?

6 A Yes.

7 Q So he was prescribed Remeron because he was
8 depressed, according to your testimony. He may or
9 may not have taken Remeron?

10 A We don't know absolutely if he took it.

11 Q Right. And at some point we think he quit
12 taking Remeron, if he ever started taking it, and
13 went back to being depressed again?

14 A We are basing that on that he did get
15 prescribed Remeron. He reported taking it with
16 pretty consistent side effects of excessive
17 sedation, and reported not really responding very
18 quickly, is what I would expect and --

19 Q But one of the side --

20 A And responded fairly well when he was increased
21 to thirty milligrams by the mental health center
22 while he was in jail.

23 Q One of the side effects of Remeron, Dr. Morton,
24 is not committing homicide, isn't it?

25 A No, sir.

1 Q And one of the side effects of stopping taking
2 Remeron is not committing homicide, is it?

3 A No, sir.

4 Q In your preparation for today, have you had an
5 opportunity to -- are you familiar with the Journal
6 for Toxicology and Clinical Toxicology?

7 A Yes.

8 Q Are you familiar with the Journal for the
9 American Board of Family Practitioners?

10 A Yes, sir.

11 Q Are you familiar with the Journal of the
12 American Medical Association?

13 A Yes, sir.

14 Q Are you familiar with the article where they
15 profiled eleven people that they could find
16 worldwide who tried to kill themselves with nicotine
17 patches?

18 A I'm -- I'm not sure that I am.

19 Q Well, not a one of them was successful, were
20 they, Dr. Morton?

21 A I'm -- I'm familiar with three reports where
22 there were nine overdoses using patches, and all
23 nine of those patients were hospitalized. And eight
24 of those were suicide attempts. And then I think
25 there were two other reports, but I didn't read the

1 article that said that there were a total of eleven,
2 but I have looked at the individual reports that
3 looking at eleven, and all of them did survive that.

4 Q We will go with your article instead of mine.
5 They all survived, right?

6 A Yes, sir.

7 Q Would you agree with me that if your intention
8 was to kill yourself, there are a whole bunch of
9 better ways to do it than slapping on nicotine
10 patches?

11 A I think that's one alternative.

12 Q Well, there hasn't been much success in the
13 whole history of the world, has it, Dr. Morton?

14 A Those are only the cases that have been
15 reported.

16 Q Well, how about shooting yourself? Would you
17 think that more people had been successful
18 committing suicide shooting themselves or slapping
19 on nicotine patches?

20 MR. PRUETT: Your Honor, that question has
21 already been answered.

22 THE COURT: Sustained.

23 BY MR. GOWDY:

24 Q How about shooting yourself, is that a more
25 effective way?

1 MR. PRUETT: Your Honor.

2 THE COURT: I sustain the objection.

3 A Shooting --

4 BY MR. GOWDY:

5 Q You don't have to answer that. You don't have
6 to answer it.

7 You cannot tell this jury about a single
8 solitary instance where someone successfully
9 committed suicide by putting on nicotine patches?

10 A It's not written in the literature of a
11 successful suicide. There are a number of
12 unsuccessful suicides, which if had not been
13 treated, they would have probably died, but all of
14 those in the literature are people that were
15 treated.

16 Q And he was treated also, wasn't he?

17 A Yes, he was.

18 Q At Upstate Carolina's Medical Center, right?

19 A Yes, sir.

20 Q And his blood test showed what kind of nicotine
21 level?

22 A I don't think they did a nicotine level.

23 Q They didn't do a blood test for nicotine level?

24 A Not that I'm aware, no.

25 Q Dr. Morton, when did you become involved in

1 this case?

2 A I became involved in early October, when Dr.
3 Donna Schwartz-Watts consulted me on the phone, as
4 far as some of the toxicological effects of
5 excessive nicotine.

6 Q Are you being paid for your assistance in this
7 case?

8 A I'm being paid for my work, yes, sir.

9 Q On an hourly rate?

10 A Yes, sir.

11 Q How much an hour?

12 A I don't know. You will have to ask Judge Cole.

13 Q Do you know whether he kept any of his mental
14 health appointments after his what you have describe
15 as suicide attempt, the one where he ultimately went
16 to Patrick B. Harris? Do you know whether he kept
17 any of his mental health appointments after he was
18 discharged from Patrick B. Harris?

19 A He missed the only one that he had.

20 MR. GOWDY: Nothing else for Dr. Morton, Your
21 Honor.

22 MR. PRUETT: No redirect.

23 THE COURT: You may step down.

24 A Thank you.

25 NOEL SWAIN, having been first duly sworn,

1 testified as follows:

2 DIRECT EXAMINATION BY MR. SLADE:

3 Q Mr. Swain, I would like to ask you a couple of
4 questions, just to begin with, just so you introduce
5 yourself to the folks here on the jury.

6 Tell us what your full name is and where you
7 live, please, sir.

8 A My full name is Noel Swain. Noel Bateman
9 Swain, and I live in Spartanburg.

10 Q All right. Tell us what you do for a living.

11 A I am a certified financial planner.

12 Q How did you meet Jonathan Binney?

13 A He was referred to me as someone who could help
14 me with some computer work that I was doing or I was
15 wanting to do but I didn't know how to.

16 Q And what sort of computer work did you need
17 done?

18 A In early '97, my mother fell ill. And what I
19 had wanted to do was put together a video that would
20 encompass all the pictures that we had of my entire
21 family, my six brothers and sisters and me.

22 Q Let me stop you right there just a second, Mr.
23 Swain. Y'all were going to take family pictures?

24 A Uh-huh.

25 Q And put them on video?

1 A And scan them into the computer, put them on a
2 video --

3 Q Right.

4 A -- and do a video, that we could show her
5 hoping that that would help her in her recovery
6 efforts.

7 Q She was sick at the time?

8 A Yes, she had had an aortic aneurysm and had a --
9 had an operation in January of '97. And she was in
10 a rehabilitation hospital in Louisiana at the time.

11 Q Go ahead. Tell the jury what it was that you
12 wanted to do and if you had any further contact with
13 Jonathan Binney in the process of doing that.

14 A What happened was I talked to my nephew, who
15 owned a computer store at the time, and he told me
16 about John. And so I called John and he and Melanie
17 came over. Melanie at the time was pregnant with
18 their first child, and I told John what I wanted to
19 do. And he started helping me. It took us a long
20 time to get it right, because the program that we
21 had wasn't powerful enough for all the pictures that
22 we had, and it kept crashing, and so we worked on it
23 for approximately three or four months. John did a
24 lot of work for me. I paid him, but he did a lot of
25 work that he didn't get paid for. He was genuinely

1 interested in what I was doing. I guess he -- I
2 guess he developed a sort of an affection for my
3 family too, but -- but that's -- you know, I just
4 worked with him sometimes during the week, sometimes
5 on Sunday. And what happened was my mother fell
6 gravely ill and we worked to get it finished.

7 Q Let me interrupt you just a second, Mr. Swain.

8 A Okay.

9 Q Was any -- I think you were fixing to head in
10 that direction. Was any urgency to completing the
11 project?

12 A Yes, we knew we had to get it done quickly if
13 we were going to show it to her.

14 Q Because of her?

15 A Because of her illness, and the fact she was
16 fading. She was eighty-four years old.

17 Q Tell us, if you know, what kind of computer
18 skills Jonathan demonstrated in helping you with
19 this project.

20 A John is a wizard on the computer. He was just
21 absolutely fantastic. He knew what he was doing.

22 Q Could you run the program to put all the family
23 photo albums on it on the computer yourself, with
24 your software?

25 A The file was about four times as big as my

1 computer had the ability to hold, and he somehow
2 made it work. He got over there and made it work.
3 We put it together. We finally finished it Friday
4 night before my mother died on Sunday.

5 Q Were you able to -- I guess you weren't able to
6 get her to see it?

7 A No, sir.

8 Q Did you eventually use it?

9 A Sir?

10 Q Did you eventually use it? Did you show it to
11 your family?

12 A Yes, we showed it at her funeral.

13 Q And tell us what your impression of your
14 recollection of your association with Jonathan was?

15 A I saw John and Melanie as a nice couple. I
16 know that I had to go pick up John a time or two
17 because he had lost his license from driving, but I
18 have gotten a ticket or two myself in the past, but
19 that's -- that's all I knew. I -- he's -- as far as
20 I was concerned, I didn't -- you know, I didn't know
21 anything about his -- about his -- you know, about
22 all the things that I have learned here.

23 Q All the stuff that you heard this morning?

24 A But to me he was just a -- he is just a good
25 guy.

1 Q Was he willing to help?

2 A Yeah. Yeah, very much so. And -- and he even
3 requested to keep a copy of it, of the video, and he
4 did.

5 MR. SLADE: Beg the indulgence of the court for
6 one moment, Your Honor.

7 (off the record)

8 (back on the record)

9 MR. SLADE: I don't have any other questions
10 for Mr. Swain.

11 MR. GOWDY: May it please the court, we have no
12 questions for Mr. Swain.

13 THE COURT: Thank you. You may step down.

14 THE WITNESS: Thank you.

15 MR. SLADE: May he be excused, Your Honor?

16 THE COURT: He may be.

17 THE WITNESS: Thank you.

18 MR. SLADE: Your Honor, we call Jim Binney.

19 JAMES BINNEY, having been first duly sworn,
20 testified as follows:

21 DIRECT EXAMINATION BY MR. SLADE:

22 Q Reverend Binney, obviously you are Jonathan's
23 father?

24 A Right.

25 Q Could you tell us a little bit about who you

1 are and where you're from?

2 A Well, my name is James Dale Binney. I'm from
3 Ohio. I live here -- or that is, we have a
4 residence there. I lived in Greenville, South
5 Carolina.

6 And what I do, we have a -- primarily our
7 ministry is counseling those in ministry. We have a
8 center in Ohio where they come and stay with us for
9 a week at a time. And we counsel pastors,
10 missionaries, evangelists and those in the ministry.

11 Q All right. Can you tell us just a little bit
12 about your educational background?

13 A Yes, I graduated from high school, Bob Jones
14 Academy. I attended school there and university for
15 awhile, and ultimately graduated from a college in
16 Indiana, Baptist college, and got my doctorate from
17 a school in Arizona.

18 Q And do you have any associations now with Bob
19 Jones University?

20 A Well, I speak there as a lecturer often and
21 have spoken at their bible conference and some of
22 their meetings.

23 Q Now, you are presently married?

24 A Yes.

25 Q And can you tell us -- this is Ms. Binney

1 sitting out there beside Melanie --

2 A Yes.

3 Q -- in the pink shirt, pink blouse?

4 A Yes. Sandra.

5 Q Sandra. And when did the two of you y'all get
6 married?

7 A Over thirty-five years ago.

8 Q And where did you meet?

9 A We met at Bob Jones University.

10 Q Now, after you and Sandra were married, did
11 y'all have children?

12 A No, we could not have children. We tried to
13 have children.

14 Q How long were you married before you adopted?

15 A Eight years.

16 Q And that was Jonathan?

17 A Right.

18 Q And is that your only child?

19 A Yes.

20 Q Now, did you and Sandra, when you adopted --

21 Well, tell us how you and Sandra found out
22 about Jonathan and what your process of adopting of
23 him was.

24 A Well, we had been praying for awhile about
25 adopting a children and working with our pastor. At

1 least he had knowledge that we wanted to adopt, Dr.
2 Jack Howes in Indiana, and he knew the director of a
3 series of children's homes in the south by the name
4 of Lester Rouloff. And through him and through
5 their contact we found that there was a child
6 available.

7 Q All right. And where did y'all go get him?

8 A Hattiesburg, Mississippi.

9 Q How old was he when you got him?

10 A He was four days old.

11 Q Where were you and Jonathan and Sandra living?

12 A At that time?

13 Q Yes.

14 A Lansing, Illinois.

15 Q And what was your -- what was your job in
16 Lansing, Reverend Binney?

17 A Well, at the time I was still in school.

18 Q Okay. Where was your first pastorate? Where
19 did you first preach? Where were you?

20 A I pastored for sixteen years. My first church
21 was in Foxboro, Massachusetts, which was a church
22 that I founded.

23 Q Right. And how long did you stay there?

24 A Over three years, I think.

25 Q Can you tell us a little bit about Jonathan's

1 early years when he was a smaller child -- small
2 child?

3 A Well, one of the first things I noticed about
4 him was that he didn't like to eat. He would
5 actually fall asleep face down in his food.

6 Q Right.

7 A And he just didn't -- he was never heavy, never
8 seemed to gain a lot of weight. He seemed -- just
9 just didn't have much interest in eating.

10 Q Can you tell us a little bit with more? Did he
11 have basically a happy childhood? Can you tell us
12 anything about that?

13 A Yes, I think that -- of course, we didn't -- he
14 was the first child in our larger family as well.

15 Q Right.

16 A And so he got a lot of love. Everybody was
17 excited about him coming on the scene and we gave
18 him a lot of attention.

19 Q Right.

20 A But I think he had a -- I think that as a young
21 boy he had a very happy childhood.

22 Q Now, at the time that he began school, how did
23 he do? How did he do in school?

24 A He didn't do well. He struggled academically.
25 He excelled in other things, other than academics.

1 Q Tell us a little bit about that.

2 A Well, he was -- he was a tremendous musician.
3 He had -- he had natural gifts for that. I recall
4 one time when he had just started taking Suzuki
5 violin that it had been about two weeks, I guess,
6 after he was taking it, and there is a -- there is a
7 tape that they give you to play with, to accompany,
8 to train you by ear. And he was in the other room,
9 and -- as a little boy, and we heard two-part
10 harmony coming out of the room and asked him what
11 was going on, and he said he got bored playing it
12 the other way.

13 Q How old was he then, Reverend Binney?

14 A He was seven.

15 Q And then by age ten, he -- nine or ten he was
16 accompanying people in our church who were singing,
17 either with his violin or with a -- with the organ
18 that he had never taken lessons on.

19 Q He played an organ?

20 A Yes, and piano.

21 Q And by saying he never took lessons, are you
22 meaning he taught himself?

23 A At that point, yes.

24 Q Did he continue with his music?

25 A Well, he -- I remember an incident that seemed

1 to be kind of the watershed where he stopped
2 publicly playing, and that was when he was probably
3 about ten was accompanying or -- we had -- he had
4 played the violin duet in a church service and a
5 couple of his buddies, who were jocks -- and
6 Jonathan never was much of a great athlete, he
7 wasn't interested in athletics, they he made fun of
8 him because he was a sissy because he was playing
9 music, and that was sort of the end of that.

10 Q Did you ever get him to play --

11 A Not publicly.

12 Q -- for church services.

13 He actually played with some fairly large
14 church services, did he not?

15 A Yes.

16 Q Can you tell us something about the size of
17 some of the gatherings that he played for?

18 A Well, a couple hundred, and he sang solos at
19 other churches that were larger. I would say maybe
20 six or seven hundred.

21 Q Now, as he continued through school, and what
22 I'm talking about is on -- beyond the early grades,
23 5th, 6th, 7th, can you tell us whether he had any
24 problems or if he developed problems at that stage
25 in his academic development?

1 A Academically?

2 Q Yes, sir.

3 A He never did do well academically. In a
4 classroom setting, in a lecture setting, or
5 something like that, he really didn't retain. He
6 did better with his hands, like in computers and
7 music and things that he could use his hands with.

8 Q Tell us a few of the things that y'all did to
9 try to help him with his academic problems.

10 A Well, he was enrolled in the school where there
11 was individual instruction. And then he was also
12 tutored for awhile by one of these learning centers,
13 like Sylvan. I'm not sure of the exact name.

14 Q Sure.

15 A And he was also helped by faculty members in a
16 tutoring setting.

17 Q Now, as he -- as he continued his school, as he
18 is getting older, 6th, 7th, 8th grade, did he begin
19 to have problems outside of school, discipline
20 problems?

21 A Yes, he did. It was interesting. Before he
22 reached that age, he was -- he was notoriously
23 truthful; that is, he would tell a lie even if it
24 hurt -- or he would tell the truth, even if -- about
25 telling a lie, even if he knew he would get in

1 trouble.

2 Q Right.

3 A Until he realized that that was more painful
4 than was helpful. And then at age fourteen, and I
5 think that was -- I think that was related to his
6 impulsiveness, which he struggled with all of his
7 life.

8 Q Uh-huh.

9 A At age fourteen I think was the first time that
10 he had actually acted out his criminal behavior, the
11 first that we had seen of it.

12 Q The first that you were aware of?

13 A Uh-huh.

14 Q Tell us what he did. Tell us what your
15 recollection of it was.

16 A Well, he had done something or another that
17 required some discipline and I had sent him to his
18 room.

19 Q You mean discipline from you?

20 A From me.

21 Q Or Sandra?

22 A Right. And I had sent him to his room as part
23 of the process that we usually go through. We have
24 several -- we had several steps that we would go
25 through, but one of -- the first of which was sent

1 him to his room and let him think about what he had
2 done. And I went in to talk with him and he was
3 gone. He had disappeared. And he basically went
4 out the window and stole a bicycle in the
5 neighborhood and took off.

6 Q Uh-huh.

7 A And the next we knew he was at a police station
8 downtown, and they asked us to come down and get him
9 and then they questioned us at the same time.

10 Q Uh-huh. Well, what -- how did that progress?
11 Did he continue to get in further trouble?

12 A Yes. Shortly after that we had a retreat. We
13 had a Christian school in Fayetteville, North
14 Carolina.

15 Q You mean you had one, or you were responsible
16 for one?

17 A Yes, I was the administrator of the school and
18 a pastor of a church.

19 Q Okay.

20 A And --

21 Q How old was Jonathan when y'all were living in
22 Fayetteville?

23 A How old?

24 Q Can you just give us a range of age?

25 A I would say fourteen, fifteen.

1 Q Okay. Go ahead.

2 A So annually at this school what we would do is
3 we would take the junior high and high school to a
4 camp for kind of a spiritual emphasis. And while
5 they were there, he and a buddy broke into a -- I
6 think it was a candy machine or a Coke machine and
7 then they stole a motorcycle and left, kind of ran.

8 Q How long were they gone?

9 A I would say a day or two. They painted the
10 motorcycle, as I recall, to try to disguise it.

11 Q So you started to get these kind of problems
12 with Jonathan. What are you and Ms. Binney doing to
13 try to deal with it? Obviously, you know, with any
14 child you have some discipline problems, but tell us
15 what y'all were doing to try to deal with it.

16 A Well, we went through the usual process of
17 talking to him and disciplining him and either using
18 corporal punishment or taking away privileges.

19 Q Right.

20 A We were treating him conventionally, as a
21 normal parent would treat a child who is acting out.

22 Q Were you aware when he was growing up of any
23 incidents where he was molested or reported any
24 molestation?

25 A Yes.

1 Q Can you tell us about that?

2 A He was in grade school and an older boy had
3 molested him.

4 Q Yes, sir.

5 A We did not know about it right away. But when
6 we did find out about it, of course, we dealt with
7 the older boy. And then we talked with Jonathan.
8 We counseled him, tried to find out what had
9 happened and how serious this was, and he seemed to
10 be -- he seemed to be very well. In fact, we did
11 not know how the depth of the molestation at that
12 point. We just thought it was something that had
13 been flirtatious, or experimental, or -- rather than
14 anything of any serious depth.

15 Q And do you recall roughly how old Jonathan
16 would have been or what grade he would have been in?

17 A I'm going to guess 5th grade. Maybe 4th.

18 Q Now, tell us as he got into his mid-teens what
19 y'all did to try to help him with his
20 discipline/academic problems.

21 A Well, he -- he was getting in trouble. And
22 because he was getting in trouble as a teenager, we
23 sent him -- and we were getting concerned about his
24 behavior.

25 Q Uh-huh.

1 A We sent him to a program, a live-in psychiatric --
2 Christian psychiatric program in Chicago, called
3 Rapha, and it was --

4 Q I'm sorry, Rapha?

5 A Yes, R-a-p-h-a, which is Hebrew. The Hebrew
6 word for healing, I believe.

7 Q All right.

8 A And this is attached to a hospital and staffed
9 with medical doctors and psychiatrists,
10 psychologists, and so forth, with a Christian
11 emphasis.

12 Q Uh-huh.

13 A And he stayed there. It was kind of a lockdown
14 thing, and he was involved there for, I'm going to
15 say, thirty days, maybe forty.

16 Q Let me stop you right there, Reverend Binney.
17 Where were you and Sandra and Jonathan living at
18 that point, what part of the country?

19 A We were living in Ohio, at the Manor, the
20 Moorehead Manor.

21 Q Moorehead -- y'all were at the Moorehead Manor
22 then?

23 A Yes, the Moorehead Manor is the name of the
24 place where we conduct our ministry.

25 Q Now, when Jonathan completed this psychiatric

1 treatment at the Rapha Program, what did you and
2 Sandra do? What did y'all -- how did y'all handle
3 that?

4 A Well, we were going to have -- excuse me.

5 Q Go ahead.

6 A We were going to have a kind of a celebration,
7 because he had been away for awhile, and so the
8 family planned to go out for dinner and maybe go to
9 a dinner theatre, or something like that, just as a
10 way of celebrating.

11 Q So you and Ms. Binney went to Chicago from your
12 home?

13 A Yes, we went to Chicago to get Jonathan. And
14 then her folks lives in Hammond, Indiana, which was
15 just across the state line.

16 Q How far is it from Chicago to where Moorehead
17 Manor is?

18 A About seven and a half hours.

19 Q Go ahead.

20 A So we went to -- we picked him up and we took
21 him over to his grandparents. And the next day our
22 plan was to -- for the whole family to go out for
23 dinner and to a play.

24 Q Did that happen?

25 A Well, no, it didn't. That night -- we woke up

1 in the morning and he was gone. And he had -- he
2 had disappeared. He had hitchhiked back to the
3 Manor.

4 Q And what had happened?

5 A Well, when he got to the Manor, we got a call
6 that the police were -- had surrounded the house and
7 that they were trying to get him out because he was
8 threatening suicide.

9 Q Was Jonathan -- well, did he run away a lot?

10 A Yes.

11 Q How long -- would he stay gone? I mean, was
12 this an overnight?

13 A Well, it was a pattern -- I'm sorry. Go ahead.

14 Q Was it an overnight thing, or can you just give
15 us some idea of how long he would be gone?

16 A From high school he would occasionally leave
17 and disappear for -- from two or three days to two
18 or three months. He would always write the sweetest
19 notes when he left. You know, "dear mom and dad, I
20 love you and this doesn't have anything to do with
21 you. I just have to leave." And then we would find
22 him two months or three months later and he would be
23 living with some stranger.

24 Q Uh-huh.

25 A And usually they were -- they were biker types.

1 Q Right. By saying you would find him, I guess
2 in the interval that he was gone that you and Ms.
3 Binney would be hunting him?

4 A Well, we would be looking for him, as would
5 others, but he usually would come home. He would
6 return on his own accord.

7 Q And tell us, please, roughly how old he was
8 when he was running away during that period of time?

9 A I would say from fifteen to sixteen and
10 seventeen. Maybe as early as fourteen, but I know
11 at fifteen.

12 Q Did he ever complete his high school education?
13 Or tell us what you know about that.

14 A He had gotten in trouble and he was in a
15 juvenile type center, and they had a GED program
16 there. Attached --

17 Q Where?

18 A This was in Columbus, Ohio.

19 Q Okay.

20 A And it was attached to a high school in the
21 area. They worked through the high school called
22 Goddard High School in the area, but the GED program
23 was an extension kind of an program into the center
24 so that the young people could be involved in it.

25 Q When did he come to South Carolina?

1 A I believe he was twenty at the time.

2 Q In the period of time after he got his GED,
3 before he came down here, can you tell us a little
4 bit about what he was doing in terms of his
5 interests, his work?

6 A Well, he had gotten some jobs. One job locally
7 at a grocery store, and different jobs. One in
8 Columbus as a security guard. Just didn't hold any
9 job very long, though.

10 Q Did he do any work with computers?

11 A I know that when he got to North Carolina, he
12 was working with a computer company there. I'm not
13 sure the name of the company.

14 Q Right.

15 A I know that I was surprised and impressed to
16 know that they had sent him to Portland, Oregon to
17 work on either Adidas or Nike headquarters to
18 install or repair a system, a computer system,
19 throughout their headquarter building.

20 Q Okay.

21 A He did have that job for awhile.

22 Q Did he like computers, working with computers?

23 A Yes, he's very good with computers. He -- he
24 would always teach me how to work computers. Get
25 frustrated because I couldn't get it. I never have

1 gotten it.

2 Q Do you know how he got his knowledge of
3 computers? Did he take courses or --

4 A Well, he -- he enrolled in a course for a
5 little while, a correspondence course from LaSalle
6 Institute, or something like that, but he lost
7 interest in that. I would have to say that most
8 everything that he learned, he learned on his own.
9 He just picked it up.

10 Q And you touched on this topic just a little
11 while ago, but I wanted you to talk about it when
12 you brushed over it. How did he learn? I mean, you
13 referred to his problems with academic subjects.

14 A Right.

15 Q He wasn't very good at that, was he?

16 A No.

17 Q Did he learn with his hands? I mean, could he
18 do hands on things?

19 A Yes, he could -- he could -- he could repair
20 things. He just had a knack with doing things with
21 his hands.

22 I remember as a little boy we would visit
23 people and they would have appliances that wouldn't
24 work, and he would take them apart and put them back
25 together and fix them.

1 Q Did he have any training on that?

2 A No.

3 Q Just something that he learned?

4 A Right.

5 Q Now, you were about to tell me how he got to
6 South Carolina and roughly how old he was.

7 A What was the last part?

8 Q And roughly how old he was when he came.

9 A He was about twenty. I had -- I had met a man
10 at a camp nearby here in Brevard, in North Carolina,
11 it's called The Wilds. I had spoken there, and
12 there was a man there who owned -- or who actually
13 was general manager for Dick Brooks Chevrolet, or
14 whatever.

15 Q One of his automobile dealerships?

16 A I think his whole system --

17 Q Go ahead.

18 A -- at that point. And he had started an auto
19 dealership. And he invited Jonathan, if he wanted a
20 job, to come down there.

21 Q And that was where?

22 A Anderson. Anderson, South Carolina.

23 Q And that's what -- that's what brought Jonathan
24 to South Carolina?

25 A Yes.

1 Q How long did he stay in Anderson? I believe
2 that guy was Kerry Bolt?

3 A Yes, Kerry Bolt.

4 Q How long did he continue working at Mr. Bolt's
5 dealership in Anderson?

6 A It would be a guess. I'm going to say maybe a
7 year.

8 Q And --

9 A Year and a half, perhaps.

10 Q Did you have -- did you and Sandra -- did you
11 and Ms. Binney have much contact with him after he
12 came to South Carolina?

13 A Well, probably a couple times a month he would
14 call --

15 Q Okay.

16 A -- on the phone.

17 Q And while he -- when he first came here, to
18 outward appearances was his life normal?

19 A Yeah, we were very excited that he was -- you
20 know, that he was settling in, and this job, and
21 doing well. And he seemed to be on a track upward
22 and getting training and getting a profession, and
23 we were very pleased.

24 Q When did you find out that he was married?

25 A Well, he called us -- we found out when he

1 called us one day and he said he wanted us to come
2 down and meet our new daughter-in-law.

3 Q Had you heard anything about Melanie before
4 that point?

5 A Uh-uh.

6 Q And then did you do?

7 A Yes.

8 Q And once your grandchildren -- once your first
9 grandchild was born, did y'all come down here fairly
10 frequently or were y'all here fairly often?

11 A Yes. We were very excited, you know, about
12 [REDACTED] -- or Isaac being born and came down fairly
13 soon he was born.

14 Q Now, when did you learn of the molestation of
15 [REDACTED] Can you tell us about that?

16 A Pretty quickly after it happened, if not -- if
17 not immediately after it happened. And I can't -- I
18 can't tell you many details, except we learned about
19 it over the phone. We were, of course, heartbroken.

20 Q Did you come down here once you had found out
21 about that?

22 A We had come down initially when [REDACTED] had
23 been born because she had had a complication, a
24 physical complication, requiring even Life Flight.
25 We came down when she was in intensive care. And

1 then shortly after we learned of the molestation,
2 yes, we did come down.

3 Q Now, at the time that Jonathan was first
4 arrested for the molestation, did you and Sandra
5 help keep the children?

6 A Well, initially after -- after the molestation,
7 the State took the children.

8 Q And since --

9 A We came down during that time to be with
10 Melanie.

11 Q Now, in the two years or three years since his
12 arrest for that, almost three years, have you
13 developed a relationship with your grandchildren?

14 A Yes.

15 Q And --

16 A A very good relationship.

17 Q I'm going to show you several items, pictures.
18 Defendant's Exhibit No. 12.

19 A Yes.

20 MR. SLADE: These are admitted, are they not?

21 BY MR. SLADE:

22 Q And Defendant's Exhibit No. 13 and Defendant's
23 Exhibit No. 14. If you could just tell us who the
24 people are in those pictures.

25 A This is my wife Sandra and I, and Isaac and

1

2

MR. SLADE: These are admitted, are they not?

3

4

MR. GOWDY: There is no objection to any of the pictures.

5

BY MR. SLADE:

6

Q And those are pictures of you and [REDACTED]

7

A This is me and [REDACTED] yes.

8

Q And you and Isaac?

9

A Yes. Not my favorite picture, though, yes.

10

MR. SLADE: May I permission to publish these to the jury, Your Honor?

12

THE COURT: You may.

13

BY MR. SLADE:

14

Q Now, when did you first find out about this case? How did you first find out about this case?

16

A I was -- and part of my ministry includes editing a journal and writing and I do speaking. I also direct the graduate counseling program at a Baptist college in Wisconsin and teach there as an adjunct professor.

21

Q Right.

22

A I was there teaching. And it was about the middle of the week that I got a phone call that something had happened, that Jonathan had done something, and that the SWAT team and the police

23

24

25

1 were out looking for him.

2 Q Let me take you back to six months before that,
3 December of '99, when you came down here when
4 Jonathan was charged with criminal sexual conduct.
5 When did you -- how did you and Sandra deal with
6 that?

7 A Well, I don't know if you ever deal with it.
8 Quite frankly, it is -- I guess we -- we -- I know
9 there were tears and shock and dismay. A lot of
10 grief and puzzlement, bewilderment, how could this
11 happen. I guess, if I could say it, there was --
12 the way we dealt with it was trying to focus more on
13 helping Melanie at that point get the children back,
14 because they were taken from her.

15 Q Okay.

16 A For thirty days, I think, which was, you know,
17 a very horrible thing for her.

18 Q All right. And did y'all continue to try to
19 help her get her children back?

20 A Yes.

21 Q And, of course, Jonathan was not permitted to
22 come home, of course?

23 A Right.

24 Q Do you know where he was staying when he first
25 got out of jail on the criminal sexual conduct

1 charge, molestation charge against him?

2 A We knew he was staying at a motel.

3 Q Right. And did he attempt to see or stay with
4 his birth mother?

5 A Yes, there was a -- he had met his birth mother
6 on the -- he had found her through the computer,
7 through a search program on the computer.

8 Q Right.

9 A And she, because she didn't have children, got
10 very -- got very interested in the grand kids and
11 Jonathan. Of course, you know, not having seen
12 them, moved to, I think Boiling Springs, if I'm not
13 mistaken, and bought a house. And for a while
14 Jonathan was living with her.

15 Q And this was --

16 A And her father.

17 Q And that would have been sometime in, what, the
18 spring of 2000?

19 A I would say so.

20 Q After the molestation?

21 A Uh-huh.

22 Q And did -- did Jonathan stay with her for
23 awhile?

24 A Yes.

25 Q All right. Now, you have sat through this

1 trial from Monday a week ago?

2 A Yes, sir.

3 Q And you, of course, sat through the criminal
4 sexual conduct trial, which was, what, in April of
5 2001. Last year, right?

6 A Yes, sir.

7 Q How do you, as the grandparent of [REDACTED]
8 manage to deal with that, what your son has done to
9 her?

10 A Well, it is still a shock and it's still
11 disappointing. I guess spending time with the
12 grandkids has helped enormously. We see them very
13 regularly and it -- it has helped us to see [REDACTED]
14 particularly, growing into a normal, happy, adjusted
15 child, with a lot of life and no memory of this.

16 Q Uh-huh.

17 A It is difficult to hear them explain that why
18 their daddy is not around, which they explain as
19 saying that daddy lives far away and we can't go
20 visit him.

21 Q Now, since Jonathan was arrested for the murder
22 charge, for murdering Judy Southern --

23 A Yes.

24 Q -- can you tell us how you have managed to deal
25 with that?

1 A Well, it's very difficult. Again, I don't know
2 dealing, I think that's probably too comprehensive a
3 word. This week has been very difficult because
4 there were details that have come out during the
5 trial that we were not aware of. We -- and -- and
6 as we have learned of what our son has done, as a
7 father, it's just -- and I speak for her mother, --
8 for his mother, and I -- the fact that she -- she's --
9 this is more difficult for her, I believe, as a
10 mother, and -- which is why I have opted to speak
11 for her on her behalf in this setting, but I think
12 that the difficult thing -- the hardest thing I have
13 ever done in my life is sit through this trial. And
14 yet at the same time he is my son, and I love him.
15 I don't want -- I mean, as wrong as all this has
16 been, I -- I want to be with him, but it's been very
17 difficult. And it's been especially painful to
18 realize what he's done. That, you know -- and I
19 guess yesterday I was most moved by the family.
20 He's taken a life, but he's destroyed a family, and
21 that can't be repaired. There is nothing that we
22 can do to help them.

23 Q To help them?

24 A Them.

25 You know, I listened to these children and --

1 and the brother and the sister. I feel horrible. I
2 don't know what to do, how -- I can't take their
3 hurt away, and yet we have our own hurt that we are
4 dealing with." It's nothing like theirs, but I guess
5 the hard thing for me right now is as a counselor
6 and having a ministry of wanting to help people, is
7 to watch people hurt who -- who I can't even begin
8 to help.

9 But our focus, you know, as Jonathan's father
10 and mother right now is our prayers at this point
11 are, again, we're focusing can we help our son.
12 That has helped us to get through this too, because
13 we can do something there. And being here is a step
14 toward that goal.

15 Q Well, with respect to Jonathan's fate, is there
16 anything that you want to say to the jury?

17 MR. WILLINGHAM: Your Honor, may we approach a
18 minute?

19 (Lawyers approached the bench)

20 MR. WILLINGHAM: Thank you, Your Honor.

21 BY MR. SLADE:

22 Q With respect to your son's fate, what do you --
23 what do you -- what do you want? What do you wish
24 for? What -- can you address that for me?

25 A Yes. I would say to this jury, to each one of

1 you, that I am very aware of what has happened and
2 that my son has been convicted of murder.

3 I'm also aware that this has to be very hard
4 for you to make that decision. The decision that
5 you have already made, that was obvious to me by the
6 fact it took you six or seven hours, so I know you
7 are not taking this lightly.

8 What I'm asking you to do is that -- I know
9 that there is justice that is need for. I'm not a
10 judge or a lawyer. I don't know -- I don't know
11 what is ultimately just or not.

12 I know that my son has never had the privilege,
13 because of what we have heard today, because of his
14 psychological problems, because of his -- I think --
15 I believe problems related to the fetal alcohol that
16 Dr. Schwartz-Watts related to, he has -- he has not
17 operated at full capacity. He doesn't have the
18 advantage of having -- he's not had the advantage of
19 being able to think normally.

20 I guess if I were to ask you anything, it would
21 be to -- I know that justice has to be done, but I
22 would ask for mercy for my son, because of his
23 limitations. I think he's had limitations and I
24 think it would be -- I think it would be fitting and
25 proper that he pay for his crime, but I hope that

1 you will consider in your -- in your discussion and
2 your consideration, I hope that you will give
3 thought to the fact that he's not had the advantage
4 that you and I have had of being able to make these
5 choices.

6 I don't in any way -- I don't in any way,
7 excuse what he's done. I don't in any way suggest
8 he's not responsible. Determining the degree of
9 responsibility and inability is a very hard thing,
10 even for professionals, and you are being called on
11 to do that. I just ask that -- I ask that you be
12 sensitive to his need in this, and I ask you that
13 because he's my son.

14 I can't give you -- I'm not going to offer any
15 deep theological philosophical reasons, but I love
16 him. I think that Jonathan is sorry for what he's
17 done. We certainly are sorry for what he's done,
18 but I think everything that needs to be accomplished
19 could be accomplished by a life without parole
20 sentence, that you are hoping -- that the State is
21 hoping to accomplish. And that -- I would ask you
22 for that consideration.

23 The book on Jonathan Binney's life has not been
24 finished. We, as parents, had a big part in writing
25 the first part of it, he wrote the middle part of

1 it, and you have an opportunity to help write the
2 last part of it. I just pray that in good
3 conscience before God that you will be able to know
4 that you have done what's right in the years to
5 come, and I hope that you will give full
6 consideration to one man's life, and that is not to
7 diminish what he's done. I ask for mercy.

8 MR. SLADE: I don't have any other questions
9 Your Honor.

10 I just would like to note for the record that
11 we have another -- I believe there is ten exhibits,
12 primarily pictures. I think they have been admitted
13 without objection. If I could publish them to the
14 jury, Your Honor.

15 THE COURT: You may.

16 MR. GOWDY: We have no questions for Dr.
17 Binney, Your Honor.

18 THE COURT: Thank you. You may step down.

19 Let me see y'all just a minute.

20 (Lawyers approached the bench)

21 THE COURT: Ladies and gentlemen, it's a
22 convenient time for you -- you will have all those
23 exhibits in the jury room with you.

24 I'll ask you at the present time to please go
25 to your jury room. You will be excused for lunch

1 and we resume this afternoon with the conclusion of
2 the trial.

3 If you will, you could just leave all those
4 exhibits on the rail as you walk out.

5 (The following takes place outside the presence
6 of the jury panel)

7 THE COURT: Does the defense intend to call any
8 other witnesses?

9 MR. SLADE: No, sir.

10 THE COURT: Have you discussed with your client
11 his right again to testify at this particular
12 proceeding?

13 MR. SLADE: Yes, sir, we have.

14 THE COURT: Has he indicated to you his desire
15 in that regard?

16 MR. SLADE: Yes, sir.

17 THE COURT: What has he indicated to you?

18 MR. SLADE: He doesn't wish to testify, Your
19 Honor.

20 THE COURT: And do you believe that the
21 decision that he has made in that regard is one that
22 he has reached of his own free will and accord?

23 MR. SLADE: Yes, sir.

24 THE COURT: Do you agree with him?

25 MR. SLADE: Yes, sir.

1 THE COURT: Do you believe he understands the
2 decision?

3 MR. SLADE: Yes, sir.

4 THE COURT: Mr. Binney, you have heard what
5 your lawyer have told me?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you understand that, as I have
8 previously informed you, you have a right to testify
9 at this particular proceeding also? Do you
10 understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: But only you can make the decision.
13 No one can require that you take the witness stand.
14 But if you wish to testify during this particular
15 proceeding, now is the opportunity, and the only
16 opportunity, that you will have to do so. Do you
17 understand the right?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you understand the advantages
20 and disadvantages of testifying and of not
21 testifying?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Understanding those factors, have
24 you reached a decision?

25 THE DEFENDANT: I have.

1 THE COURT: What is your decision?

2 THE DEFENDANT: I do not wish to testify.

3 THE COURT: Has anyone forced you into that
4 decision?

5 THE DEFENDANT: No, sir.

6 THE COURT: Anyone placed any pressure upon
7 you?

8 THE DEFENDANT: No, sir.

9 THE COURT: That's a decision that you made of
10 your own free will and accord?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You are satisfied with it?

13 THE DEFENDANT: Yes, sir, I am.

14 THE COURT: All right. Thank you.

15 MR. PRUETT: Your Honor, put on the record we
16 have discussed that this morning prior to commencing
17 of our case. And, again, he even though we have
18 discussed it numerous times, we did discuss it again
19 before the trial being commenced.

20 THE COURT: Does the State have some reply
21 testimony?

22 MR. GOWDY: No, sir, Your Honor.

23 THE COURT: All right.

24 MR. PRUETT: We do have some legal motions to
25 make. We can do it after lunch or do it now.

1 THE COURT: Yeah, we will do them after lunch.
2 Mr. Binney, during the -- we can do them now,
3 if you want to, but, Mr. Binney, let me address one
4 other matter with you.

5 Your lawyers have indicated that they do not
6 have any other witnesses to call. And now the State
7 has indicated that they have no evidence in the
8 reply, so what remains to be done are the final
9 summations to be accomplished by your lawyers and
10 you, if you wish to make a final argument to the
11 jury. Have you discussed with your lawyers again
12 your right to make a final argument or statement to
13 the jury?

14 MR. SLADE: Your Honor, if I can interrupt, we
15 have discussed that. And, Your Honor, we have not
16 reached a conclusion on that.

17 THE COURT: Well, I'm going to let him tell me
18 after lunch, but I just want to be sure that he
19 understands that he has that right.

20 Do you understand that you have that right?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And your lawyers have indicated
23 that you have not made a decision yet as to whether
24 or not you will address the jury.

25 THE DEFENDANT: That's correct.

1 THE COURT: Do you understand that is a
2 decision that you have to make and it is yours to
3 make?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: But you understand you have the
6 right?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: I'll address that with you after
9 lunch.

10 Mr. Pruett.

11 MR. PRUETT: The motions, Your Honor, relate
12 again at the end of the trial to directed verdicts
13 of dismissal on the remaining aggravating
14 circumstance of burglary.

15 Again, I argued that point three or four times
16 throughout the course of the trial, since we have
17 commenced it, but, again, the same grounds. Factual
18 basis, his true intent was to commit suicide when he
19 entered the residence, as evidenced by what has been
20 put before the court. And, therefore, there should
21 be a directed verdict of dismissing that one
22 statutory aggravating circumstance.

23 THE COURT: All right, that motion is denied
24 for the reasons as previously given.

25 MR. PRUETT: The other matter, Your Honor, is

1 at this point in the trial there is undisputed
2 evidence in the record that he suffers from mental
3 illnesses. That is undisputed at this point. There
4 has been a recent United States Supreme Court case
5 that has held that it is a violation of the Eighth
6 Amendment ruling clause to execute persons with
7 severe mental retardation.

8 By analogy we present to the court the same
9 argument as to Mr. Binney, who the testimony of the
10 expert witness said that out of the hundreds of
11 people that she has interviewed over the course of
12 her career, he's probably one of the worst cases of
13 a person inflicted with mental disorders in the area
14 that she's diagnosed. And on that basis, Your
15 Honor, using the same argument, same analogy, that
16 it is cruel and unusual punishment to execute
17 persons who are mentally retarded, certainly persons
18 with severe mental illnesses, that's been testified
19 to in the course of this trial that would also
20 apply. And, therefore, we would ask for a directed
21 verdict dismissing the last aggravating circumstance
22 or the imposition of the death penalty against Mr.
23 Binney.

24 THE COURT: Does the State wish to address the
25 motion?

1 MR. WILLINGHAM: Your Honor, I was not aware
2 that he was going to make that motion at this time.
3 I believe there are a number of cases that hold it's
4 not a violation of the Eight Amendment to execute a
5 person that is mentally ill.

6 I am aware of the case that Mr. Pruett speaks
7 of talking about mental retardation, but this other
8 line of cases -- and, again, if the court would
9 grant me until after lunch to cite those cases to
10 you, there is a long line of cases that hold it's
11 not a violation, it is not cruel and unusual
12 punishment, not a violation of the protection nor
13 due process to execute an individual that is
14 mentally ill.

15 MR. PRUETT: Your Honor, Mr. Willingham doesn't
16 have to look those cases up. I agree that as of
17 this moment in time there has not been a decision of
18 our State Supreme Court or yet from the United
19 States Supreme Court that has held that the fact
20 that somebody may be severely mentally ill will not
21 prevent the imposition of the death penalty and it
22 being carried out; only that when somebody is
23 incompetent that the death penalty cannot actually
24 be carried out or imposed.

25 I'm just arguing by analogy, making the

1 argument that if we are going to extrapolate the
2 logic of I think it's Adkins v. Virginia, that when
3 someone who is severely mentally retarded cannot be
4 executed, then by analogy or taking that logic --
5 the argument out to its logical conclusion, somebody
6 who is severely mentally ill also cannot be
7 executed. And there was a case recently the Supreme
8 Court has taken under advisement where there was
9 somebody who was severely mentally ill, they have
10 been granted a reprieve in that case in the State of
11 Alabama, perhaps to address that very issue.

12 Again, there is no case out there that I am
13 saying that supports my position. I am arguing
14 again by analogy to the case decided recently by the
15 Supreme Court on the issue of mental retardation,
16 applying the fairness on severe mental illness.

17 THE COURT: Well, based upon the evidence that
18 I have seen and heard during the course of this
19 trial, I do not think that the testimony elicited or
20 evidence presented during the trial of this case
21 would rise to the level that there would be any
22 Constitutional deprivation if the jury were to find
23 that the death sentence was appropriate in this
24 case. And, therefore, based upon that I find your
25 motion to should be denied.

1 Any other matters to address before we recess
2 for lunch?

3 MR. PRUETT: And this would be the last one I
4 know of, judge, unless you want to conduct a charge
5 conference when we return for lunch.

6 THE COURT: We will have a charge conference
7 after lunch.

8 All right. Court is in recess until 2:15.
9 Until 2:15.

10 (Proceedings recessed)

11 (Proceedings reconvened)

12 THE COURT: All right. Any matters to address
13 before we conclude?

14 MR. SLADE: Yes, sir. We had one matter we
15 wanted to include. We had asked the court in
16 chambers if we could use the statutory life
17 expectancy tables that are found at 19-1-150, and
18 our understanding is that the solicitor objects.

19 We just wanted to ask the court if we could put
20 our request to use it on the record and get a ruling
21 on it.

22 THE COURT: Well, let me see --

23 MR. SLADE: I don't intend to -- certainly I
24 don't want to offer it. I just want to use it in
25 closing. I don't ask --

1 THE COURT: Have you seen it?

2 MR. WILLINGHAM: Yes, sir, Your Honor.

3 MR. SLADE: I don't want them to have a chance
4 to take it back to the jury room.

5 THE COURT: What's the State's position?

6 MR. WILLINGHAM: Your Honor, we do object. I
7 don't believe it would be improper for Mr. Slade in
8 his closing to refer to how long the life expectancy
9 of Jonathan Binney would be, but as far as
10 introducing the tables that are used for civil
11 courts incurring damages, I don't believe would be
12 proper. There are a lot of other ages on there that
13 are clearly not Jonathan Binney's age. I think he
14 could simply accomplish his purpose by stating what
15 the age is, without having demonstrative evidence to
16 be used during his closing.

17 THE COURT: I sustain the objection.

18 MR. SLADE: Thank you, Your Honor.

19 THE COURT: What about the issue of the
20 defendant making a final statement? Have you
21 discussed that with him?

22 MR. PRUETT: We have, Your Honor, and we
23 explained the parameters in which he's allowed to
24 make a statement. He's not testifying. He's not
25 under oath. He's not to present any new matter, and

1 we have discussed the contents of the statement he
2 might make.

3 THE COURT: And does he wish to make a final
4 statement?

5 MR. PRUETT: I believe he intends to. It may
6 change in the course of the trial, but for the
7 court's information it would be considered during
8 the closing of the prosecutor at this point, yes.

9 At this point, yes.

10 THE COURT: Is that correct, Mr. Binney?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right. Any other matters to
13 address before the jury is brought in?

14 MR. GOWDY: Not from the State, Your Honor.

15 THE COURT: Okay. Bring them in.

16 (The following takes place in the presence of
17 the jury panel)

18 THE COURT: All right. The jury is present.

19 Is there any other evidence to be offered by
20 the defense?

21 MR. PRUETT: Your Honor, at this time the
22 defense rests its case in the sentencing phase of
23 this trial.

24 THE COURT: Any reply from the State?

25 MR. GOWDY: None, Your Honor.

1 THE COURT: Ladies and gentlemen, all the
2 additional evidence has been received and what
3 remains to be done, therefore, are the final
4 summations to be accomplished by the lawyers, after
5 which I will give you additional instructions as to
6 the law, and then you will be asked to go back and
7 begin with your deliberations.

8 So please give the lawyers your attention now
9 as they give you their final summations.

10 Mr. Gowdy.

11 MR. GOWDY: May it please the court, Your
12 Honor.

13 THE COURT: Yes, sir.

14 MR. GOWDY: Good afternoon, ladies and
15 gentlemen. I would be remiss if I did not begin
16 this by thanking you again, not just on behalf of
17 Deputy Willingham and myself, but on behalf of
18 everybody in this part of this process for the
19 sacrifice that you have made for the week and a
20 half. Not just the sacrifice in the time being away
21 from your families, but frankly, ladies and
22 gentlemen, some of the things that you have seen and
23 perhaps heard over the past week you might not have
24 ever seen or heard before in your lifetime. It's
25 difficult to serve on a capital jury. And for that

1 reason I'm going to thank you again on behalf of
2 everybody for your service in the case.

3 It is difficult to stand in judgment of other
4 people. It is difficult to pass judgment on issues
5 as serious as life and death. It's difficult.

6 The first task that you will have when you
7 retire to the jury room is to decide whether or not
8 the State of South Carolina has proven an
9 aggravating circumstance. There is just one that's
10 going to be before you. Was this murder committed
11 during the commission of a burglary. That's it.
12 Was the murder committed during the commission of a
13 burglary.

14 Frankly, ladies and gentlemen, your verdicts on
15 Monday answered that question. You found him guilty
16 of murder beyond a reasonable doubt. You found him
17 guilt of burglary beyond a reasonable doubt. This
18 was a murder committed during the commission of a
19 burglary. That part of the process is not hard.

20 What becomes hard is to stand in judgment of
21 another human being. And I don't belittle the task
22 that is in front of you. It is an awesome task, but
23 ladies and gentlemen, every one of you, every one,
24 sat in that seat and you told the court that if you
25 thought it was right, you could give somebody life;

1 if you thought it was right, you could give somebody
2 death. And then you told both sets of lawyers that
3 if you thought it was right, appropriate. Nobody
4 looks forward to it. Nobody is talking about being
5 in favor of the death penalty. The question is-is
6 it necessary. Is it appropriate in this case. And
7 each one of you said that you could do it, if you
8 thought it was appropriate. And now we are about
9 the business of deciding what is appropriate in this
10 case.

11 What is appropriate in this case. It's not a
12 hypothetical anymore. It's real. And the law
13 allows you to consider three things. It allows you
14 to consider the circumstances of the crime. It
15 allows you to consider the character of the
16 defendant. And it allowed you yesterday, for the
17 first time, to consider something else about the
18 victim.

19 If you will notice during the guilt phase of
20 this case she was referred to as the victim. She
21 was a diagram on an overhead projector so a
22 pathologist could show you which parts of her
23 stomach were hit by a bullet. That's the nature of
24 the guilt phase. We're in a different phase. This
25 is the sentencing phase. And yesterday you became

1 introduced to not a victim, but a human being - a
2 wife, a mother, a twin sister, a younger sister, a
3 daughter. For the first time you met her yesterday.
4 And we are going to talk about all three of those
5 factors that the law allows you to consider, but I'm
6 going to start by talking about Judy Southern.

7 Her sister Barbara told us she had a smile that
8 could light up the darkest night, that she was a ray
9 of sunshine. When Deputy Willingham said "what do
10 you miss most about your sister," do you remember
11 her answer? "Everything."

12 And then we heard from her niece, Sarah, the
13 little sixteen year old girl that took the witness
14 stand and said what she missed was the older woman
15 younger girl relationship that she had with Judy.
16 They talked about going to the prom. They shared a
17 love of horses. They shared a bond that sometimes
18 only can exist with women other than your mother.
19 Older woman that you can go to and confide in, other
20 than your mother.

21 And then we heard from Wayne, the brother. And
22 for those of us -- for those of you that may have a
23 younger sibling, that may have a younger sister, his
24 testimony was absolutely piercing. He viewed his
25 job as protecting his younger sister. He didn't do

1 it. He views himself as somehow being responsible
2 because his baby sister isn't here. And he talked
3 about having to leave the courtroom and call his
4 father and update him on the trial. There is
5 something about older brothers and younger sisters.
6 He told us about her being in the 1st grade with
7 Trudy. And he was wise and perceptive enough to
8 pick out of Agent Bogan's testimony about DNA, an
9 almost obscure fact that you might have overlooked,
10 but he didn't overlook it. The only people in the
11 world that have the same DNA are identical twins -
12 Trudy and Judy Southern. He said they are two
13 halves to a whole. Well, the whole is no longer.
14 The whole is gone.

15 There is something about the love of a sibling.
16 You fight like hell at two, but when you are growing
17 up, you fight. But thank goodness for getting
18 older. The maturity that brings you a different
19 kind of relationship, and you saw that firsthand
20 yesterday.

21 She's a beloved woman, beloved by her -- the
22 people that have worked with her, the people on her
23 mail route, her family, and then we get to her son.
24 With the courage of a lion, a little eight year old
25 boy walked in here yesterday and he told you that he

1 missed his mom and that he remembered his momma and
2 that she was killed two weeks before his sixth
3 birthday. And when we talked about what he missed
4 the most, he talked about jumping on the trampoline.
5 And then the thing that just tears your heart up, he
6 says "she corrected my misspelled words on the"
7 letter to Santa Clause." Well, she hadn't done that
8 in the past two years, because she died two weeks
9 before that boy's sixth birthday.

10 And, ladies and gentlemen, she did not deserve
11 to die. She did absolutely nothing to bring this on
12 herself. She did not know him. She did not bait
13 him. She did not tempt him. She never met him.
14 She deserved better than what she got on June the
15 7th.

16 You can consider, I want you to consider, the
17 impact that this crime has had. When growing up our
18 parents talked to us about first impressions and how
19 important they are. They are important. It's also
20 important how you leave people in life, the last
21 conversation that you had with them. What's the
22 last conversation that you had with a family member
23 before they died? Have you ever stood out in front
24 of an elementary school and watched the moms and
25 dads drop their kids off? That's for a day. That's

1 for six hours. And a lot of the parents can't
2 handle that and the kids can't handle that. Say
3 good-bye for a lifetime. Say good-bye forever to a
4 five year old boy, without so much as a kiss or a
5 brush of the hair, or an I love you. You can
6 consider the impact that this woman, this mother's
7 death, has had on those folks.

8 And you can consider the circumstances of the
9 crime. Yesterday one of the defense attorneys, I
10 can't remember which one it was, but one of them
11 wanted to give some credit to the defendant for
12 confessing. He said that the government's case --
13 the State's case would have crumbled into a thousand
14 pieces if it had not been for his confession. A
15 thousand is a lot. A thousand is a big number.
16 It's not quite as big as 4.3 trillion, which is the
17 number that Agent Bogan gave you on the DNA. 4.3
18 trillion to 1 that this man was inside her home.

19 And it's not as big as the number that Dan
20 DeFreese gave, the ballistics expert. This gun is
21 the only gun in the world that could have fired the
22 two bullets, which are the only two bullets found
23 inside Judy Southern's home. The only gun, to the
24 exclusion of all others, is the gun that David
25 Meyers gave Jonathan Binney. We don't need his

1 confession to know that. Confessions are great.
2 That's why law enforcement tries to take them, but
3 don't give the defendant credit because he admits
4 what's so painfully obvious. His DNA is inside the
5 house. This is the only gun known to man that could
6 have fired the two bullets that were found in her
7 house, a gun that was given to him by David Meyers.
8 His handwriting, his fingerprints. Law enforcement
9 takes confessions. They are helpful, but let's keep
10 in mind this is an overwhelming case. It's
11 overwhelming evidence.

12 I want to address one other point in Agent
13 DeFreese's testimony. Sixteen pounds of pressure to
14 pull the first time. Five or six pounds of pressure
15 to pull the second time. When was the last time any
16 of us accidentally picked up a five pound bag of
17 sugar or accidentally picked up a sixteen pound
18 bowling ball? You don't accidentally do anything
19 that requires sixteen-pounds. You don't
20 accidentally do anything that requires five pounds.
21 This was an intentional shooting. He shot Judy
22 Southern before she had a chance to get the words
23 "oh-my-God" out of her mouth.

24 And for what purpose? What purpose did her
25 death accomplish? What had she done to bring this

1 on herself? She did not deserve to die on June the
2 7th, and she did not deserve to die the way that she
3 did, running through her own house, the sanctuary of
4 her own house, being chased out of it into a field
5 to bleed to death. Dead before she hit Mary Black
6 Hospital, is what Dr. Tate told you. He got her
7 back three times. She's dead. Why? What purpose?

8 And then we get to the burglary. The defendant
9 would have you believe that the one thing that he
10 was not able to do in the six hours he was inside
11 that house was the one reason that he went in in the
12 first place. I said it in my original closing to
13 you. I'm going to say it again. Perhaps the two
14 best qualities a juror can have are fairness and
15 common sense. Common sense. You do not need a
16 police scanner to commit suicide. You do not need
17 gloves and a flashlight to commit suicide. You do
18 not need the tape, the two clips that David Meyers
19 gave you, and the twelve bullets and add to it
20 another clip and another stack of bullets to commit
21 suicide. State's Exhibit 78, count the bullets in
22 that magazine clip. He added more bullets to it.
23 You don't need to add more bullets if all you are
24 looking for is one.

25 We heard this morning about nicotine patches.

1 I'm going to ask you again to use your common sense.
2 There is no evidence whatsoever, none, except his
3 word, that he put on the first nicotine patch before
4 he went into Judy Southern's home or while he was in
5 Judy Southern's home, and here is where the common
6 sense comes in, I respectfully submit to you. He
7 left cigarette butts all over the place. He didn't
8 even flush his own, whatever you want to call it,
9 down the commode. He left it in the shower. And
10 yet he is not going to leave nicotine patches in the
11 plastic and the wrapper? Well, I believe he put on
12 nicotine patches. I believe that he did, right
13 after he shot Judy Southern and he needed to stay
14 alert and stay awake. That's what's in the medical
15 records. That's what the experts today had to read
16 to you.

17 On the issue of burglary -- on the issue
18 murder, ladies and gentlemen, the cases is
19 overwhelming.

20 And that brings us to a motive, because as I
21 keep telling you why -- I keep asking you why, why
22 Jonathan Binney broke into somebody he never met
23 house, a stranger who never done a thing to him, and
24 shot her before she could get anything out of her
25 mouth. And no point to this, whoever does the

1 closing for the defense will point to this, he'll
2 call it a suicide note. I want you to keep two
3 things in mind. I want you to keep in mind that
4 when he was asked about it, he said he never meant
5 to leave it. Suicide notes aren't much good if you
6 don't mean to leave it. He didn't mean to leave it.
7 And number two, you go back there and read the
8 suicide note and you do begin to get a glimpse, a
9 glimpse of why he did what he did. "First of all,
10 because I will not let them send me to prison.
11 Second, they think I was a horrible person. Well, I
12 have decided to prove them right. The pressure I am
13 or was under was intense. I could not deal with it.
14 I knew from the moment that I tried to do what was
15 right and be honest about it." [REDACTED] Read the
16 rest of it. "I was screwed." Those are his words.
17 He thinks he's the one being screwed because of what
18 he did to [REDACTED] and he's not happy about it.

19 You want a motive? Danny Edwards gave you a
20 motive. Mr. Slade asked him, prison is about the
21 strong and prison is about the weak. I tell you,
22 ladies and gentlemen, child molesters are weak in
23 prison. They are weak. Murderers, they are strong.

24 Six months to the day after he either stuck a
25 sexual device or himself in a three-month old girl,

1 he shot Judy Southern. They will stand up and they
2 will beg you to separate these two incidents;
3 they're not related; he's already been punished for
4 what he did to [REDACTED] separate the two out in your
5 mind. He's serving the maximum amount of time you
6 can serve on what he did with [REDACTED]

7 They are inextricably linked. He admits as
8 much by mentioning [REDACTED]'s name in the suicide
9 note. He did not want to go to jail for what he did
10 to [REDACTED]. He wanted to go out with a bigger bang.
11 He wanted to go as either a rapist or a murderer
12 because they are strong in prison. Child molesters
13 are weak. These two incidents are inextricably
14 linked. They cannot be separated by time or by
15 action. There is no other explanation for why he
16 did what he did.

17 The defense will ask you for mercy. They will
18 ask you for compassion. And as I listened to Dr.
19 Binney testify this morning, if this case were about
20 showing mercy and compassion for that man or his
21 wife or to the Southern family, the trial never
22 would have gotten started. We all have compassion
23 and mercy for the families. For the families. What
24 a wonderful man. What a great opportunity to grow
25 up in the home of a man like Dr. Binney. Four days

1 old. He's got a better head start on life than
2 bunches of other people do. Mercy and compassion.
3 Sometimes the folks that ask you for mercy and
4 compassion aren't ever willing to show it to anybody
5 else.

6 Mercy manifests itself in a number of different
7 ways. Mercy can a second chance at life. Mercy can
8 be a new beginning. Mercy can be the blessing of a
9 child. This defendant has been shown mercy all
10 over.

11 Judy Southern deserved mercy. She was solely
12 for justice. She didn't do anything wrong. She
13 didn't get any.

14 This morning Dr. Schwartz-Watts talked about
15 all the difficulties that this defendant suffers
16 from or has suffered from and her opinion on what he
17 suffers from. Mental illness is real. I'm not
18 belittling that. It is real. It is real. But
19 ladies and gentlemen, it's ironic when defendants
20 only seem to seek psychiatric help when they are
21 fixing to have to sit in front of a jury like y'all.
22 Where was the help sought when he had twenty
23 thousand child porn images on his computer? Where
24 was the help sought when he thought about having sex
25 with his birth mother? Where was the help sought

1 when he wanted to kill his wife's brother's --
2 wanted to rape his wife's brother's wife and kill
3 his wife's brother. Mental illness is real, but I
4 want you to remember one other thing about Dr.
5 Schwartz-Watts' testimony. All of the things that
6 she listed had one big red X on them by the time
7 Donnie Willingham got through getting her to admit a
8 none of those cause you to do what he did to Judy
9 Southern. None of them.

10 Ladies and gentlemen, you will be asked in just
11 a minute to show mercy. I guess if we were to look
12 at -- if we look at it on a continuum, we have mercy
13 on this end. All of us need mercy. We have all
14 benefited from mercy. It manifests itself in so
15 many different ways. We have all needed mercy.
16 He's been shown mercy.

17 If you walk to the other end of the continuum,
18 the other end of the spectrum, you have got
19 vengeance, retribution, an eye for an eye, a tooth
20 for a tooth.

21 I'm not asking you for vengeance. I'm not
22 asking you to do to Jonathan Binney what he did to
23 Judy Southern. I'm not going to ask you for mercy
24 either, because he has taken too much from too many
25 people for too long. He's been shown mercy and it

1 didn't take. I'm not asking you for vengeance. I'm
2 going to stand in the middle of those two on a rock
3 called justice and from this site I can see the full
4 panoply of Judy Southern's life and she did not
5 deserve what happened to her on June the 7th.

6 And standing on that rock, you can see the
7 whole panoply of Jonathan Binney. And I'm watching
8 as the gate is locked and a father goes and gets
9 vasoline or K-Y jelly and either holds that little
10 child, or worse yet, and he splits her from her
11 vagina to her rectum. You are going to see why I'm
12 not asking you for mercy? And he lied about it and
13 he lied about it.

14 And finally the medical experts, what they were
15 saying didn't match up with what he was saying and
16 he was caught.. He didn't want to go to jail for
17 what he did to his three-month old doubt.

18 I'm not going to ask you for mercy, for someone
19 who did not show it. I'm not going to ask you for
20 vengeance. I'm going to ask you for justice. And
21 what justice tell us in some cases death is right
22 and some cases life is right. And what you need to
23 consider is what's right for a man that is capable
24 of taking something as close as his own daughter and
25 doing that to her and what's right for a man who is

1 capable of taking something as far away and remote
2 as a stranger he's never met and gut shooting her.
3 You want to talk about the two extremes, something
4 as close as your own child and as distant as
5 somebody else's daughter that you have never met.

6 Tonight separated by about four miles and a
7 faint county line two kids are going to go to bed.
8 One little girl is going to go to bed with a scar
9 that she got from her father and one little boy is
10 going go to bed with a scar that reaches all the way
11 around his heart, and you have got to decide how do
12 we punish that. You have got to decide how you are
13 going to punish a man that could hurt something that
14 looked like that and that could rip the momma out of
15 this picture, how to decide it.

16 I'm going to sit down, ladies and gentlemen. I
17 don't want to. It's the last time that I'll ever
18 stand before you. I don't want to sit down. When I
19 sit down, because I'm the voice of Judy Southern,
20 I'm the person that that family trusts enough to
21 stand in front of you and try to tell you what she
22 was like. I don't think I have done a good enough
23 job, but I'm going to sit down because it's time.
24 And may her life be a ray of sunshine live on. May
25 [REDACTED] scar heal and may Jacob's scar heal.

1 Before I do, I ought just put it on you to do
2 justice. I'm going to ask you on behalf of the
3 State of South Carolina and the County of Cherokee
4 to conclude that the only appropriate punishment for
5 a man that can do what he's done is to forfeit his
6 life. Not the way she had to. He can turn around
7 and say good-bye to whoever he wants to. He can
8 write notes to his children. He can see them again.
9 I'm not asking to treat him like he treated her, but
10 I am asking you to speak in a loud, clear,
11 unmistakable voice that what he did warrants
12 society's stiffest legal punishment.

13 THE COURT: Mr. Slade.

14 THE DEFENDANT: I wanted you to hear from my
15 words and my heart, that on June 7th, 2000, without
16 everybody else's knowledge, I killed Judy Southern.
17 It was my fault. I'm sorry for that and I can't
18 take that away.

19 Dad, I'm sorry I have been such a failure. I
20 wish I could have been more of what you wanted me to
21 be. I'm sorry for that.

22 Maybe not now, maybe not ever, but I do want
23 you to know that I'm sorry. Maybe one day I hope
24 you forgive me. And I stand before you ready to
25 accept judgment to whatever it may be.

1 MR. SLADE: I'm sure you must be wondering what
2 I can say at this point. And I wanted to begin by
3 saying you have seen certainly some new evidence in
4 this portion of the case, as we have told y'all that
5 you would, and there is absolutely no question about
6 it, that what you have seen that Jonathan did in
7 [REDACTED] case was wicked and evil. For that he
8 received a sentence of thirty years. And your
9 decision now is going to be what punishment he
10 should receive in this murder case. Make no
11 mistake. Whatever decision you make or whatever
12 your judgment gives in this case, the law requires
13 that it be carried out.

14 So that means if you decide that you are going
15 to rule that Jonathan be put to death, that means
16 that the law requires that your order be carried
17 out. And that means that if the twelve of you sign
18 his death warrant, that he's going to be taken to
19 death row, as the law requires. And if the twelve
20 of you sign his death warrant, an execution date
21 would be set. And he will be taken to the execution
22 chamber. Poison will be -- he will be strapped to
23 the execution gurney. Guards will stick needles in
24 his arms, put poison in his veins. The muscles
25 around his lungs will be paralyzed. His heart will

1 stop beating, and your order will be carried out.
2 And you can rest assured that decision is yours, and
3 yours alone.

4 Likewise, if you decide that the punishment
5 that is appropriate to inflict on Jonathan in this
6 case is life without parole, then the law requires
7 that Jonathan serve every day of the rest of his
8 life in prison. He will receive -- because the law
9 requires the law carries out your order, he will
10 receive life without parole. So make no mistake
11 about it. When you pass sentence on Jonathan,
12 whether he dies at the time that y'all choose or at
13 the time God chooses, he will never live outside of
14 prison walls again.

15 Now, I heard in Solicitor Willingham's opening
16 remarks to y'all in this part of the trial him say
17 something, and you may remember, "he earned it."
18 Well, when we talked with y'all at the beginning of
19 this case, we asked you if you could follow the
20 judge's instructions and the law in this case. And
21 I'm sure that when we talked to y'all two weeks ago
22 now, almost, a week and a half ago, it seemed fairly
23 simple, yeah, we can follow what the judge tells us
24 to do.

25 What the law is in this state with regard to

1 cases like this, nobody earns the death penalty.
2 The law says, and what Judge Cole is going to tell
3 you, and the solicitor himself alluded to it a
4 minute ago, nobody earns the death penalty. The law
5 says that it does not favor death over life. And at
6 this phase in the trial you are required to find an
7 aggravating circumstance, and Judge Cole is going to
8 tell you that even where you find an aggravating
9 circumstance, such as burglary, which is the
10 aggravating circumstance in this case, even where
11 you find an aggravating circumstance, the law is so
12 concerned that those people who deserve a life
13 sentence get life; that Judge Cole will tell you
14 despite the fact that an aggravating circumstance is
15 found, the jury can impose the life sentence. The
16 law in this state is that even if the jury finds an
17 aggravating circumstance, that the jury may impose a
18 life sentence.

19 Now, when we talked with you when you took the
20 witness stand, you told us that if you were called
21 to serve on this jury and chosen to serve on this
22 jury, and you had an opinion for life and others
23 chose death, you could stand up for your opinion.
24 And the judge is also going to tell you that's the
25 law in this state. So make no mistake about it.

1 The decision in this case is yours, and yours alone.
2 And, in fact, the law so respects the fact that this
3 decision is yours, and yours alone, that it's
4 against the law for anybody after you reach your
5 decision to try to talk with you about this case, if
6 you don't want to, because the law emphasizes that
7 this decision is yours, and yours alone. And the
8 reason that it does that is because the law is very
9 concerned that even where aggravating circumstances
10 exist, that there are some cases where the defendant
11 should get a life sentence and a life sentence is
12 appropriate. And I submit to you that the reason for
13 that, the reason the law is made that way, is
14 because the death sentence should be applied when it
15 is the sole and only justice for all the people
16 whose lives are touched by the case. And in this
17 case we have two families whose lives are touched by
18 what Jonathan Binney has done. We have the Southern
19 family, whose family was crushed by Jonathan's
20 murder of Trudy Southern. And we have the Binney
21 family, which was crushed by Jonathan's molestation,
22 Jonathan's rape, of [REDACTED] And I submit to you
23 that the law says that the death sentence is
24 appropriate when it is the sole and only way that
25 every life touched by this case requires the death

1 sentence for justice to be done.

2 Now, let's look at what justice will be for the
3 people in this case. Does it require for Allan
4 Southern to get justice in this case that the
5 defendant receive the death penalty? Is that the
6 sole and only way that justice can be done for Allan
7 Southern and the Southern family? Would life
8 without parole do justice for them?

9 And take the Binney family. The solicitor says
10 that he can stand on a rock and see the life of
11 Jonathan Binney. Well, I want to tell you. One of
12 the hardest -- the biggest, the hardest part of the
13 burden that you have here in this case is that you
14 have to look all the way down the road of the lives
15 of the people involved in this case, because your
16 decision is eternal and you can make no mistake.
17 And the decision you have to make requires you to be
18 able to look all the way down the road. And can you
19 look down the road of [REDACTED] life, when this
20 little girl, who is now three, becomes seven, ten,
21 fifteen? Can you look down the road of her life and
22 see that she's going to feel cheated of justice if
23 you don't put her daddy to death?

24 You know, Reverend Binney in his testimony said
25 that she is a happy child, she has no memory of

1 this. That would be obvious, given her age. Dr.
2 Mainman testified that she thought that she was not
3 permanently injured.

4 Now, at some point Reverend Binney, or Mrs.
5 Sandra Binney, or Melanie is going to have to
6 inflict this memory on her, this memory she doesn't
7 have. And when she knows what's happened, is she
8 going to feel cheated of justice if you don't put
9 her daddy to death?

10 The solicitor says that he can look all the way
11 down the road of her life and that she will want you
12 to do that, that that's the only way justice can be
13 done for her, because I submit to you that that is
14 the entire and real reason this case has been chosen
15 as a death penalty case.

16 Now, you know, because you have been told, that
17 Jonathan Binney is serving thirty years for
18 molesting [REDACTED] the maximum the law allows for
19 that crime. You heard the witnesses who came here
20 to tell you about what Jonathan said. They
21 testified in that case. You heard the doctor who
22 came to tell you of the injury who testified about
23 that case. And I submit to you that the whole
24 reason that the solicitor is seeking the death
25 penalty in this case is on account of that crime.

1 And the reason I submit to you, you will be able --
2 you can tell when you go back to the jury room that
3 that's the reason for this, because, you know, at
4 the end -- almost at the end of his remarks to
5 y'all, he showed you a picture and he wants that
6 picture to make you so angry, that you put aside the
7 duty that you have told the judge and both sides
8 that you could do.

9 Now, the reason that he wants to make you
10 angry, to make you angry about this case that
11 Jonathan is serving thirty years for, because that's
12 why he showed you that picture, because if all he
13 wants to put in is the knowledge of what Jonathan
14 did in molesting [REDACTED] Do you remember when you
15 first heard from Solicitor Willingham what he had
16 done, what Jonathan was already serving time for? I
17 think, if I'm not mistaken, I heard people -- some
18 people in this jury box gasp; could not believe that
19 someone could do that. And I submit to you that the
20 reason he produces -- you already knew, once
21 Solicitor Willingham told you what he had done, what
22 Jonathan had done, you knew. There is no need to
23 introduce a picture to further make you angry. So I
24 ask you to consider the reasons that he introduced
25 that picture.

1 Now, one of the other things that you have to
2 consider when you consider whether in order for
3 everyone whose lives have been touched by this case
4 to get justice, you have to impose the death
5 penalty, you also need to think about the community.
6 Does it require Jonathan's death? Does it require
7 the twelve of y'all to sign Jonathan's death warrant
8 for the community to get justice?

9 You know, the burden that you have is very
10 heavy when you have to decide whether someone should
11 live or die. And just suppose that he had committed
12 suicide after he had shot Judy Southern, he would be
13 dead. Just exactly what the solicitor wants. Just
14 exactly what the solicitor says he wants. Would
15 that be justice? Doesn't it somehow feel like
16 Jonathan has escaped justice?

17 Remember, in these statements that he has
18 given, he said that he wanted death. He was
19 suicidal at the time that he was in the jail. Dr.
20 Schwartz-Watts has testified to many suicide
21 attempts. But suppose he had committed suicide and
22 was dead. Doesn't that seem like he has escaped
23 punishment?

24 You know, when you think about punishment, you
25 realize that an important part of punishment is for

1 the criminal to be brought in front of the community
2 and be subjected to the community's contempt and
3 righteous wrath for what he's done, so that he can
4 know that what he has done is wrong. But, ladies
5 and gentlemen, the dead don't feel any pain. The
6 dead don't feel any humiliation. The dead don't
7 feel any loneliness. And you need to consider that
8 when you go to sentence Jonathan Binney.

9 Now, in civil cases we have a chart that we use
10 of how long life expectancies are. I think you
11 probably have a general idea of what that is. The
12 life expectancy of a person my age, I'm forty-eight,
13 is twenty-seven years. For someone Jonathan's age,
14 it's about forty-five years.

15 What I want you to think about is that for
16 those of us who are forty-eight years old, or older,
17 if Jonathan lives a life in prison, twenty-seven
18 years, when these bones have turned to dust,
19 Jonathan still has another ten, twelve years of a
20 normal life span to be serving life in prison
21 without parole. Each day he will be subjected to
22 the punishment of prison. The dead don't feel that
23 kind of humiliation. The dead don't feel that pain.

24 You have been shown a lot of very bad terrible
25 pictures. You seen and have been shown pornography.

1 Pornography by definition is something degrading
2 that one human being does to another. And what I
3 want you to think about as you are considering this
4 sentence is that the solicitor told you that there
5 were twenty thousand of these images. And if you
6 take one of these -- take the worst one, the most
7 degrading one, and you think of Jonathan in there.
8 This is just one day, one degrading day that he
9 spends in prison, because in prison the strong prey
10 on the weak. What you need to do is think about
11 Jonathan's fate is right here, because this is what
12 his day is going to be, where the strong prey on the
13 weak. And the next day, and the next day, and the
14 next day will all be the same. Day after day after
15 day.

16 And so when those of us who are in our forties
17 are long gone, Jonathan will be still serving time
18 for what he did back on December the 7th of 1999 and
19 June the 7th of 2000.

20 And I ask you to consider when you are deciding
21 what sentence to pass in this case, I ask you to
22 consider also you are going to have to weigh the
23 life of Jonathan Binney.

24 Now, the solicitor, both solicitors, Mr. Gowdy
25 and Mr. Willingham, when they talked with you, they

1 asked you to consider certain parts of these
2 statements, this letter to Allan. They asked you to
3 consider certain parts of this confession that he
4 gave to Agent McCraw. And they asked you to X out
5 the rest of it.

6 Well, you heard from Dr. Schwartz-Watts some
7 pretty convincing evidence that Jonathan is somebody
8 who is mentally ill. And she gave you all of the
9 reasons that clearly show that. And I think you
10 probably suspected that already when you saw the
11 evidence that was gathered in the Southern house.
12 And I ask you to weigh the entire statement that he
13 has given, because, you see, that Dr. Schwartz-Watts
14 told you Jonathan's character, his soul, is very
15 twisted. And like all people who have some kind of
16 deformity like that, they know that they are
17 different. And as Dr. Schwartz-Watts told you, he
18 doesn't want to be that way. And as we know about
19 people who suffer some type of deformity, they hate
20 themselves more than others people hate them. And
21 you can see, if you read these whole statements,
22 this letter to Allan and this statement to Agent
23 McCraw, how much Jonathan despises himself, how
24 self-destructive he was. And the solicitor says
25 that you just take all that about suicide and

1 self-destructiveness out. It doesn't count. But
2 you know that he is that way. And in these
3 statements that he gave, and there is no reason for
4 him not to be telling the truth, he's asking for the
5 death penalty. He's making -- he's
6 self-destructive. He's making it sound as bad for
7 himself as he can. And these letters -- this letter
8 and these statements are full of the shame and
9 remorse that he feels. He says "I'm hoping that
10 through my death it will bring you and your family
11 some emotional closer, as well as my family, as I
12 have brought them great shame and disappointment."

13 Look, the solicitor says you need to X that
14 out, like they did on that chart that they did
15 during Dr. Schwartz-Watts testimony, because the
16 parts about suicide and self-destructiveness aren't
17 true. But you understand Jonathan was deeply
18 ashamed.

19 And if you look over there and see, he was
20 ashamed for his parents. He said "I have brought
21 them great shame and disappointment." Is that not
22 the truth? Can you not imagine that he feels that
23 someone, his father, who has gone to Bob Jones
24 University, graduated Bob Jones Academy, that by
25 what he has done, he has not greatly shamed them? I

1 mean, we see this family torn apart and crushed by
2 what he's done to [REDACTED] And yet his daddy and
3 mom, you can't see their orange jumpsuits, but they
4 are prisoners of their love for him. They are here
5 with him. And you can see the shame and humiliation
6 and disappointment that they feel. And yet the
7 solicitor says that all these things in Jonathan's
8 statements about his self-destructiveness and
9 suicide are not so.

10 We brought you Noel Swain to show you that all
11 of the stuff that you have seen about Jonathan, this
12 human, is his expressions of remorse, his expression
13 of shame. And we wanted you to see that there are
14 times, as Dr. Binney has seen, where he has done
15 good things. He has tried to help people. And what
16 we wanted you to see was that his family is also
17 broken and crushed.

18 So in this case you have the power that's
19 usually reserved to God. The only way that I know
20 to approach people with the power that you have is
21 just to simply ask. Please give Jonathan a sentence
22 of life without parole. Because in order to give
23 him the death penalty, a human being, someone who
24 feels remorse, feels shame, not only for what he's
25 done to his parents and for what he's done to the

1 Southerns, you can see that there is humanity in
2 him. And any time that someone has a -- any time a
3 human being, however wrong they have done, has some
4 touch, some remaining humanity, I suggest that death
5 is not the appropriate sentence, because in order to
6 impose the death penalty, you have to decide that it
7 is the sole and only justice for all the people
8 involved in this case, both for the Southerns, as
9 well as the Binneys. And I suggest to you that
10 that's not the case here; that in order to sentence
11 him to death, you have to find that this is the
12 appropriate sentence for the Binneys, as well as the
13 Southerns. So I ask you for the life of Jonathan
14 Binney. I ask you to sentence him to life without
15 parole. Thank you.

16 THE COURT: Does the jury panel need to take a
17 short break before I instruct you on the law? Does
18 anyone need to take a short break? No one? If you
19 do, raise your hand.

20 (no response)

21 (Whereupon, at 4:00 p.m., the Court instructed
22 the jury panel)

23 THE COURT: Ladies and gentlemen, now it's
24 comes the time for me to instruct you on the law.
25 You, of course, have heard all and seen all the

1 additional evidence that was introduced in the case
2 and you have heard the final summations that have
3 been accomplished, and so I will instruct you on the
4 law that is applicable. And then again you will be
5 asked to go back into your jury room and to begin
6 with your deliberations. And through that process
7 you twelve jurors will carefully examine all that
8 evidence, you will decide the facts, you will apply
9 the law, and you will arrive at what you have
10 determined to be the fair and appropriate sentence
11 in this case.

12 Now, the same law that provides that you are
13 the judges of the facts, as I have told you
14 previously, provides that ~~I am the judge of the law~~,
15 and you must accept the law as I give it to you as
16 being the law that's applicable in this case and you
17 are not to concern yourself with what you thought
18 the law was or what you think it ought to be. You
19 must simply accept the law as I give it to you as
20 being the law that is applicable in this case. And
21 you take that law and you apply it to the facts as
22 you determine those facts to be, based upon your
23 consideration of all of the evidence in the case.

24 Now, again, you must judge the credibility of
25 the witnesses, just as you have done previously. It

1 is your sole duty to determine the credible evidence
2 in the case. You judge the credibility of each
3 witness, just as you have done previously, and that
4 includes expert witnesses, as well as lay witnesses.
5 You will decide what weight, value and effect to
6 give any particular witness' testimony or portion of
7 testimony. And so you may accept it in its
8 entirety. You may reject it in its entirety. You
9 may accept some portion of it and reject some other
10 portion of it.

11 Now, as I also previously told you at the prior
12 hearing, you will also judge the voluntariness of
13 any statement that has been admitted into the trial
14 of the case that is alleged to have been made by the
15 defendant.

16 Also during this sentencing proceeding there
17 have been additional statements which have been
18 introduced during the course of this proceeding.
19 You will judge the voluntariness of those
20 statements, based upon the totality of the
21 circumstances and the evidence that relates to the
22 taking of those particular statements. If you find
23 the statement to have been voluntarily made by the
24 defendant, then you may give it whatever weight you
25 deem is appropriate.

1 If you find that the statement was not
2 voluntarily made by the defendant, then you may not
3 consider it in any fashion whatsoever in your
4 decision in this case.

5 You are also further instructed, as I have
6 instructed you previously, that the fact that the
7 defendant does not take the witness stand and
8 testify during the trial of the case is not a factor
9 which you may consider in any way in your
10 determination as to what the appropriate sentence
11 is.

12 Now, Mr. Foreman and ladies and gentlemen of
13 the jury, the defendant, having been found guilty by
14 you of the crime of murder, it now becomes your duty
15 to decide what sentence that you will recommend that
16 this Court shall impose upon the defendant, Jonathan
17 Kyle Binney, for his commission of the crime of
18 murder.

19 There are two possible verdicts that you will
20 consider as the punishment in this case. One is a
21 sentence of death. The other is a sentence of life
22 imprisonment.

23 The term life imprisonment means until the
24 death of the defendant, without the possibility of
25 parole.

1 You will make your determination as to the
2 appropriate sentence, based upon your consideration
3 of all of the evidence received during the course of
4 this trial. That includes any evidence as to
5 aggravation of punishment, as well as evidence of
6 mitigation or extenuation. After you have
7 considered all of that evidence, you will apply the
8 law that I have provided you and you will arrive at
9 what you believe to be the appropriate sentence.

10 Now, while the sentence that you recommend is
11 referred to in the law as a recommendation, it is a
12 recommendation that must be followed by the court.
13 Therefore, whatever sentence that you recommend that
14 this court shall impose, this court will impose that
15 sentence upon the defendant.

16 Now, there are certain forms which I have
17 prepared and that you will have in the jury room
18 during the course of your deliberations and they
19 relate to this instruction and to your duties as
20 jurors in the case.

21 You will be requested to complete the
22 appropriate forms, depending upon your unanimous
23 findings resulting from your deliberations in the
24 case.

25 Now, before you are permitted to make any

1 recommendation as to a sentence, whether it be a
2 sentence of death or whether it be a sentence of
3 life imprisonment, it would be necessary that the
4 jury has unanimously found the existence of a
5 statutory aggravating circumstance beyond a
6 reasonable doubt.

7 A statutory aggravating circumstance is a fact,
8 an incident, a detail, or an occurrence which the
9 state legislature has declared by statute to be a
10 circumstance which may make worse or aggravate the
11 crime of murder when it accompanies that offense.
12 It is something which may increase the enormity of
13 or adds to the injurious consequences of the offense
14 of murder.

15 Now, in this case the State has offered
16 evidence of the defendant having been previously
17 convicted of other criminal offenses unrelated to
18 the ones for which he has stood trial this week.
19 Such evidence has been offered and it has been
20 received in the trial of this case, but only for a
21 very limited purpose. Such evidence may be
22 considered by you, if you find it to be probative,
23 solely on the issue of the character of the
24 defendant. Such evidence may not be considered by
25 you as evidence of the statutory aggravating

1 circumstance that the State is relying upon in
2 seeking the imposition of the death sentence in this
3 case.

4 Now, as is reflected in the statutory
5 instructions form -- now, Mr. Foreman, I realize you
6 and your fellow jurors can't see these forms from
7 where you are, but I simply hold them up so that you
8 will understand that you will have these forms in
9 the jury room when you go back to begin with your
10 deliberations.

11 The first form that I'm going to address is one
12 which is entitled statutory instructions. In that
13 form are set forth the statutory aggravating
14 circumstance that you may consider in arriving at
15 your decision in this case. And the statutory
16 instruction form also sets forth the statutory
17 mitigating circumstances that you may consider in
18 arriving at your decision in this case.

19 Now, as is reflected in that statutory
20 instruction form, in making your determination as to
21 whether to recommend a sentence of death or to
22 recommend a sentence of life imprisonment, you may
23 consider the following statutory aggravating
24 circumstance:

25 That is, that the murder of Judy Lynn Southern

1 was committed while in the commission of the crime
2 or act of burglary in the first degree.

3 This is the only circumstance that you may
4 consider as a statutory aggravating circumstance in
5 your determination as to what sentence shall be
6 imposed upon the defendant.

7 Now, should you twelve jurors unanimously find
8 the existence of the statutory aggravating
9 circumstance as set forth in the form beyond a
10 reasonable doubt, then you are permitted to make a
11 recommendation as to what sentence the court shall
12 impose in this case; whether it be a sentence of
13 death, or a whether it be a sentence of life
14 imprisonment.

15 You are not authorized, nor are you permitted,
16 to return a recommendation for the imposition of any
17 sentence, whether it be a sentence of life or a
18 sentence of death, unless you have found the
19 existence of the statutory aggravating circumstance
20 beyond a reasonable doubt.

21 Now, as I have previously instructed you, a
22 reasonable doubt is the kind of doubt that would
23 cause a reasonable person to hesitate to act.

24 Now, should you unanimously find that the State
25 has not proven to your satisfaction beyond a

1 reasonable doubt the existence of the statutory
2 aggravating circumstance, then you would complete
3 the form indicating that unanimous finding, and your
4 deliberations would end, because, as I have already
5 stated, you must find the existence of the statutory
6 aggravating circumstance before you may make a
7 recommendation as to sentence.

8 So, Mr. Foreman, you will also have the form
9 which indicates a jury finding of no statutory
10 aggravating circumstance.

11 If you and your fellow jurors unanimously
12 determine that no statutory aggravating circumstance
13 has been established beyond a reasonable doubt, then
14 you would complete that form by signing each of your
15 individual names to that particular form.

16 Should you jurors unanimously find that the
17 State has proven the existence of the statutory
18 aggravating circumstance beyond a reasonable doubt,
19 then you would complete the form which indicates
20 that unanimous finding and then you would continue
21 with your deliberations as to what sentence shall be
22 imposed by the court, whether it be a sentence of
23 death, or whether it be a sentence of life
24 imprisonment.

25 So you will also have the form in the jury room

1 which indicates a jury finding of the existence of
2 the statutory aggravating circumstance.

3 In that event, if you were to find that was
4 proven beyond a reasonable doubt, you would complete
5 that form. Again, each of the jurors would sign
6 their names indicating that unanimous consent. And
7 you would also state in the form what the statutory
8 aggravating circumstance was.

9 And, as I have stated, the only statutory
10 aggravating circumstance that is applicable is that
11 which is shown on the statutory instructions form,
12 and that is that the murder of Judy Lynn Southern
13 was committed while in the commission of the crime
14 or act of burglary in the first degree.

15 Now, the remaining two forms are the
16 recommendation of a death sentence form and the
17 recommendation of a life sentence form.

18 I will begin with the recommendation of a death
19 sentence.

20 Now, by that particular recommendation of death
21 sentence form, which you will also have in the jury
22 room with you, you, the jury, may recommend that the
23 defendant be sentenced to death.

24 Now, please note that immediately below the
25 recommendation language are twelve lines where each

1 of you jurors would be required to sign your name,
2 should you unanimously determine that a sentence of
3 death should be imposed. In that event you would
4 complete the form indicating what the statutory
5 aggravating circumstance was that you found beyond a
6 reasonable doubt, and then, again, each of the
7 jurors would be called upon to sign that form
8 indicating that unanimous finding.

9 The law does require that a recommendation for
10 the imposition of a death sentence be a unanimous
11 recommendation, and each jury must sign his or her
12 name to the form reflecting that unanimous decision.

13 Now, before you are permitted to return a
14 recommendation of the imposition of a death
15 sentence, as I have stated, it would be necessary
16 that all twelve jurors had unanimously found the
17 existence of the statutory aggravating circumstance
18 beyond a reasonable doubt. And that particular
19 statutory aggravating circumstance would then be
20 written in the space that is provided on the
21 recommendation of death sentence form located
22 directly above where the juror signature lines are
23 located.

24 Should the jury unanimously find beyond a
25 reasonable doubt the existence of the statutory

1 aggravating circumstance accompanying the murder,
2 and should you further unanimously find that the
3 defendant should be sentenced to death, after having
4 also considered all the evidence in favor of a
5 recommendation of a life imprisonment sentence, then
6 it would be your duty, Mr. Foreman, to write on the
7 recommendation of death sentence form the statutory
8 aggravating circumstance that you and your fellow
9 jurors have found, and then each jury would be
10 called upon to sign your individual names indicating
11 your unanimous decision.

12 You will also have in the jury room a form
13 indicating a recommendation of a life sentence.
14 Again, that form would have to be completed, based
15 upon the instruction as given.

16 Now, by this particular form, you, the jury,
17 may recommend that the defendant be sentenced to a
18 term of life imprisonment.

19 And Section 16-3-20, Subsection A, provides
20 that a sentence of life imprisonment means until the
21 death of the defendant, without the possibility of
22 parole.

23 Now, in arriving at your decision as to what
24 the appropriate sentence shall be in this case, you
25 are instructed that you must also consider any

1 statutory mitigating circumstances.

2 And as I have indicated to you, Mr. Foreman,
3 those statutory mitigating circumstances that you
4 may -- that you and your fellow jurors may consider
5 are also set forth on the statutory instructions
6 form.

7 Now, a statutory mitigating circumstance is a
8 fact, an incident, a detail, or an occurrence which
9 the State legislature has declared by statute to be
10 a circumstance which may make less or reduce the
11 severity of the crime of murder. It is a
12 circumstance which may be considered as mitigating
13 or extenuating the degree of moral culpability of
14 the defendant for the commission of the crime of
15 murder.

16 Mitigating circumstance is neither a
17 justification nor an excuse for the crime of murder.
18 It is simply a fact or a circumstance which may
19 lessen the degree of the defendant's guilt or make
20 the defendant less blameworthy or less culpable.

21 Now, as is reflected in the statutory
22 instructions form, in making your determination as
23 to whether or not to recommend a sentence of death
24 or a sentence of life imprisonment, you shall
25 consider the following statutory mitigating

1 circumstances:

2 One is the murder was committed while the
3 defendant was under the influence of mental or
4 emotional disturbance.

5 Two is the capacity of the defendant to
6 appreciate the criminality of his conduct or to
7 conform his conduct to the requirements of the law
8 was substantially impaired.

9 And, three, the age or mentality of the
10 defendant at the time of the commission of the crime
11 of murder.

12 Now, you shall consider any nonstatutory
13 mitigating circumstances which have been shown to
14 exist by the evidence in the case.

15 Now, a nonstatutory mitigating circumstance is
16 one which may serve the same purpose as a statutory
17 mitigating circumstance; that is, to lessen or to
18 reduce the degree of the defendant's guilt in the
19 commission of the crime of murder.

20 Now, while there must be some evidence which
21 supports a finding by you of the existence of any
22 mitigating circumstance, it is not necessary that
23 you find the existence of such circumstance or
24 circumstances beyond a reasonable doubt. You must
25 simply find that in your view such is supported by

1 the evidence in the case.

2 You are not, however, at any time asked to
3 indicate any mitigating circumstances that you might
4 find exist in the evidence on any form that you will
5 have in the jury room.

6 I do emphasize to you, however, that you are
7 permitted under the law to impose a sentence of life
8 imprisonment, whether or not you find the existence
9 of any statutory or nonstatutory mitigating
10 circumstance.

11 In making your determination as to which
12 sentence to recommend in this case, you shall
13 consider the statutory aggravating circumstance, as
14 well as the statutory and nonstatutory mitigating
15 circumstances in arriving at your decision.

16 Now, as I have previously stated, while you
17 must find the existence of the statutory aggravating
18 circumstance beyond a reasonable doubt before you
19 are permitted to make any recommendation as to
20 sentence, once such a finding is made, you are
21 permitted to recommend a sentence of death, even
22 though you may also find the existence of one, or
23 more, of the mitigating circumstances.

24 The existence of any statutory and/or
25 nonstatutory mitigating circumstances is not a bar

1 to the recommendation of a death sentence, so long
2 as you have found the existence of the statutory
3 aggravating circumstance beyond a reasonable doubt
4 and your decision to impose the death sentence is a
5 unanimous decision of the jury.

6 Conversely, you may also recommend a sentence
7 of life imprisonment, even though you did find the
8 existence of the statutory aggravating circumstance
9 beyond a reasonable doubt and you find no mitigating
10 circumstances to be supported by the evidence in the
11 case.

12 Simply stated, you may recommend a sentence of
13 life imprisonment for any reason, or for no reason
14 at all, ~~other than as an act of mercy.~~

15 As I have previously instructed you, whatever
16 your decision may be regarding a recommendation of
17 sentence, the decision of the jury must be
18 unanimous. All twelve of you must be in agreement
19 in order to return any recommendation as to
20 sentence.

21 Now, ladies and gentlemen, you must decide the
22 issue involving this proceeding without bias and
23 without prejudice to any person. You have been
24 selected as fair and impartial jurors, to
25 impartially try and determine the facts of this case

1 and to determine the appropriate punishment to be
2 imposed. And when you comply with your oath to do
3 so, then no one will have a right to criticize you
4 or your verdict and you will have fully discharged
5 your duty as jurors under your oath.

6 You are to decide the case according to the
7 testimony that you have heard from the witnesses,
8 along with all the other evidence introduced during
9 the trial. You may not allow yourself to be
10 governed by any prejudice, passion, or any other
11 arbitrary factor. Both the State and the defendant
12 have a right to expect that each of you will
13 carefully and impartially consider all the evidence
14 in this case and that you will follow the law as I
15 have instructed you.

16 Now, ladies and gentlemen, at this time I'm
17 going to ask you if you will please retire to your
18 jury room, but I'll ask that you not begin your
19 deliberations until I send you word to do so. I
20 have got some matters that I'll need to address with
21 the lawyers.

22 If I do not need to bring you back for any
23 reason, I will simply send word by way of the
24 bailiff that you may begin with your deliberations.
25 And, in that event, he will bring to the jury room

1 all of the exhibits which have been admitted during
2 the trial of the case. And to you, Mr. Foreman, he
3 will also bring each of the forms which you will
4 complete, depending upon you and your fellow jurors
5 unanimous determination.

6 Obviously some forms will be completed. Some
7 forms will not be completed. That will depend upon
8 your determination in the case.

9 So simply put, once you have concluded with
10 your deliberations, you will be completing the forms
11 as instructed and notifying us of your decision.

12 So if you will retire presently to the jury
13 room, but do not begin your deliberations until I
14 send you word to do so.

15 (Whereupon, at 4:20 p.m., the jury panel
16 retired to the jury room to await instructions to
17 begin deliberations)

18 THE COURT: All right, the alternate jurors,
19 you, of course, will remain sequestered. You will
20 be taken to another room awaiting any word from the
21 primary jurors. So please retire to your room, but
22 do not discuss the case with anybody.

23 (Whereupon, at 4:21 p.m., the alternate jurors
24 were taken to another room)

25 THE COURT: Are there any exceptions taken to

1 the instruction or requests for additions to the
2 instruction, by the State?

3 MR. GOWDY: No exceptions, no objections.

4 THE COURT: By the defense?

5 MR. PRUETT: No, sir.

6 THE COURT: Let me ask you, please, again each
7 to verify the additional exhibits before we send
8 those back.

9 (off the record)

10 (back on the record)

11 MR. PRUETT: Your Honor, I have checked them
12 off, as Mr. Watts did. I'm satisfied all the
13 exhibits are properly in evidence and accounted for.

14 THE COURT: You may take the exhibits and the
15 appropriate forms back to the jury room and tell
16 them to begin with their deliberations, and notify
17 us when they have reached a decision.

18 (Whereupon, at 4:32 p.m., the jury panel was
19 instructions to begin deliberations)

20 THE COURT: We will be at ease while the jury
21 is deliberating.

22 (Whereupon, at 4:32 p.m., proceedings were
23 recessed, pending the verdict of the jury panel)

24 (Whereupon, at 8:55 p.m., proceedings were
25 reconvened)

1 THE COURT: I understand the jury has reached a
2 decision. Are we ready to receive the verdict?

3 MR. GOWDY: The State is, Your Honor.

4 MR. SLADE: Yes, sir.

5 THE COURT: Bring the jury in, please.

6 (Whereupon, at 8:56 p.m., jury panel returned
7 to open court to report its verdict)

8 THE COURT: Have the record reflect that all
9 the jurors are present.

10 Mr. Foreman, have you and your fellow jurors
11 reached a unanimous decision as to the punishment to
12 be imposed in this case?

13 JURY FOREMAN: Yes, sir, we have.

14 THE COURT: And have you reflected that
15 unanimous decision on the verdict form as requested?

16 JURY FOREMAN: Yes, sir.

17 THE COURT: If you will please hand those forms
18 up by way of the bailiff.

19 Mr. Foreman, I'm going to ask you if you and
20 your fellow jurors will go back to the jury room.
21 Understand, if you will look at the statutory
22 instructions form, the language as to the statutory
23 aggravating circumstance, that will need to be
24 written in, if it is your finding, your unanimous
25 finding, written in as it is set forth on the

1 statutory instruction form.

2 You will see where -- on the statutory
3 instruction form, you will see where it references
4 the statutory aggravating circumstance? It has to
5 be written out exactly as that -- as explained on
6 the form, if that is, in fact, you and your fellow
7 jurors unanimous finding. Do you understand?

8 JURY FOREMAN: Yes, I think so.

9 THE COURT: Let me ask you and fellow jurors --
10 hand this back. If you and your fellow jurors will
11 return to your jury room and look at the statutory
12 instructions form to reference what the aggravating
13 circumstance is. And if that statutory aggravating
14 circumstance is your unanimous decision, then you
15 will need to complete the appropriate sentence form
16 with that exact language.

17 JURY FOREMAN: All right.

18 THE COURT: And when you go back, if you don't
19 understand, let me know and I'll try to clarify that
20 for you.

21 (Whereupon, at 8:58 p.m., the jury panel
22 returned to the jury room)

23 (off the record)

24 (back on the record)

25 (Whereupon, at 9:02 p.m., the jury panel

1 returned to open court to report its verdict)

2 THE COURT: Mr. Foreman, if you will hand those
3 verdict forms up, please.

4 Mr. Foreman, as I had instructed you, the
5 statutory aggravating circumstance that you and your
6 fellow jurors may consider in arriving at a
7 recommendation as to sentence is the following:
8 That the murder of Judy Southern was committed while
9 in the commission of the crime or act of burglary in
10 the first degree.

11 That is the statutory aggravating circumstance.
12 If you and your fellow jurors have arrived at a
13 unanimous decision as to that circumstance, that
14 exact language needs to be written into the verdict
15 form as it appears on the statutory aggravating --
16 as it appears on the statutory instructions defining
17 the aggravating circumstance. Do you understand?

18 JURY FOREMAN: Yes, sir.

19 THE COURT: If you will please then retire to
20 the jury room and complete the form and let us know
21 when you have accomplished that.

22 (Whereupon, the at 9:05 p.m., the jury panel
23 returned to the jury room)

24 (off the record)

25 (back on the record)

1 (Whereupon, at 9:10 p.m., the jury panel
2 returned to open court to report its verdict)

3 THE COURT: Mr. Foreman, have you completed the
4 verdict form in accordance with the instructions?

5 JURY FOREMAN: Yes, I have.

6 THE COURT: If you will please hand those up by
7 way of the bailiff.

8 You may publish the verdict.

9 THE CLERK: Your Honor, the verdict in the case
10 of the State versus Jonathan Kyle Binney, Indictment
11 2000-GS-11-526, we, the jury, in the above entitled
12 case, having unanimously found beyond a reasonable
13 doubt to exercise the following statutory
14 aggravating circumstance, to-wit: That the murder
15 of Judy Southern was committed while in the
16 commission of the crime or act of burglary in the
17 first degree;

18 Now unanimously recommend to the court that the
19 defendant Jonathan Kyle Binney, be sentenced to
20 death.

21 Signed by Bruce Lavender, Foreman.

22 Joyce Rochester.

23 Freida Spencer.

24 Kayce Daniels.

25 Bradley Robbins.

1 Charlean Tate.

2 Dedra Porter.

3 Tammy Cole.

4 Henry Viquez.

5 Marion Peeler.

6 Mickey Smith.

7 Robert Pettit.

8 Ladies and gentlemen of the jury, as I call
9 your names, please raise your hand and respond to
10 the question by answering yes.

11 Was this your verdict then and is it your
12 verdict now, Bruce Lavender?

13 JUROR NUMBER 166: Yes.

14 THE CLERK: Joyce Rochester?

15 JUROR NUMBER 261: Yes.

16 THE COURT: Freida Spencer.

17 JUROR NUMBER 285: Yes.

18 THE COURT: Kayce Daniels?

19 JUROR NUMBER 56: Yes.

20 THE CLERK: Bradley Robbins.

21 JUROR NUMBER 258: Yes.

22 THE COURT: Charlean Tate?

23 JUROR NUMBER 302: Yes.

24 THE CLERK: Dedra Porter.

25 JUROR NUMBER 242: Yes.

1 THE CLERK: Tammy Cole.
2 JUROR NUMBER 43: Yes.
3 THE CLERK: Henry Viquez.
4 JUROR NUMBER 317: Yes.
5 THE CLERK: Marion Peeler.
6 JUROR NUMBER 226: Yes.
7 THE CLERK: Mickey Smith.
8 JUROR NUMBER 277: Yes.
9 THE CLERK: Robert Pettit.
10 JUROR NUMBER 229: Yes.
11 THE CLERK: Signed November the 14th, 2002.
12 Unanimous, Your Honor.
13 THE COURT: All right, ladies and gentlemen, if
14 you will please be patient with me, and if you will
15 go back to your jury room one more time, I'll be
16 with you shortly.
17 (Whereupon, at 9:15 p.m., the jury panel
18 returned to the jury room)
19 THE COURT: All right, gentlemen, would you
20 like to review the verdict form?
21 MR. SLADE: Yes, sir.
22 (Whereupon, all the lawyers reviewed the
23 verdict forms)
24 MR. PRUETT: Your Honor, just for the record, I
25 know the jury came in and out two or three times.

1 And looking at the form now, I see what they had
2 written in burglary first degree. Was that the
3 defect?

4 THE COURT: Yes.

5 MR. PRUETT: Okay.

6 THE COURT: It was not in its proper form and
7 that's the reason that I had them go back to --
8 well, you heard the explanation.

9 MR. PRUETT: Yes.

10 THE COURT: That's the reason I had them go
11 back to be certain that it was written in the proper
12 form.

13 Any other matters to be addressed before this
14 jury is excused?

15 MR. GOWDY: Not from the State, Your Honor.

16 MR. PRUETT: No matters. No matters dealing
17 with the jury, Your Honor.

18 THE COURT: All right. Bring the jury back in,
19 please.

20 (Whereupon, at 9:17 p.m., the jury panel
21 returned to open court)

22 THE COURT: Mr. Foreman and ladies and
23 gentlemen of the jury, after your service in this
24 trial has been concluded, you have the right to
25 either refuse to discuss this case and/or the

1 verdict that you have rendered, and you also have
2 the right to discuss this case and/or the verdict
3 that you have rendered to the extent that you have
4 desire.

5 If you choose to discuss your service in this
6 case or your verdict, you are free to terminate any
7 such discussion at any point. If the person with
8 whom you are speaking continues to pursue a
9 discussion of the case or your verdict with you
10 after you have communicated your desire to terminate
11 the discussion, or if the person continues to harass
12 you after you have refused to discuss the case or
13 your verdict, you may report that person to the
14 sheriff of Cherokee County, to the Clerk of Court
15 for Cherokee County, or to the chief of police of
16 any town or municipality wherein you are residing
17 here in Cherokee County, in order that they may take
18 the appropriate action to inform this Court of this
19 inappropriate contact with you.

20 By that I simply mean that now that your
21 decision has been rendered, you are free to discuss
22 this case as much or as little as you would like, to
23 as many or as few as you would like, but no one has
24 a right to discuss this case with you, unless you
25 wish to discuss it with them. So if you are in any

1 way pursued or harassed or bothered about your
2 decision or your service in the case, you notify the
3 sheriff or the Clerk of Court or the chief of police
4 of any town that you happen to reside in in this
5 county, they will bring that matter to the attention
6 of the court and I will address the matter with that
7 person. Otherwise, you may discuss it as you would
8 like.

9 Now, before I let you go, I do want to
10 sincerely thank you for your service this week and
11 last week. I recognize that this has been a very
12 difficult process that you have been involved in and
13 that you are not ordinarily involved in this type of
14 service. You have carried out your service in a
15 commendable fashion. You should be proud of the
16 service that you have performed and you should be
17 proud of the manner in which you have carried out
18 your service.

19 Your verdict in this case is clearly supported
20 by the evidence. You have made the decision. You
21 should be satisfied with that decision, since you
22 have all collectively reasoned together and come to
23 that conclusion. No one can quarrel with you. No
24 one can question your decision in this case. I do
25 sincerely want to thank you for your participation.

1 I do sincerely hope that your service has not posed
2 too much of a hardship or inconvenience on you,
3 although I recognize that it has been quite an
4 imposition. But, again, you are to be commended for
5 the manner in which you have carried out your duties
6 in this case.

7 You are now going to be excused. You will need
8 to go back to your jury room one more time. When
9 you go back, Ms. Baines will be there to speak with
10 you and also to provide you with a pay voucher for
11 your service as a juror. Once you have received
12 those pay vouchers and any information that you need
13 to get from Ms. Baines, the SLED agents will again
14 or the custodians will again take you back to the
15 motel so that you can make those arrangements to
16 return to your homes.

17 So, again, we appreciate the sacrifice that you
18 have given. We appreciate your service and we wish
19 you the best.

20 You may be excused.

21 (Whereupon, at 9:50 p.m., the jury panel was
22 discharged).

23 THE COURT: All right. Any other matters to
24 address prior to the sentence being imposed?

25 MR. GOWDY: Not from the State, Your Honor.

1 MR. PRUETT: Just a renewal of our previous
2 motions, Your Honor.

3 A motion for new trial on the sentencing phase.
4 Our directed verdict on two previous arguments
5 again related to burglary, first degree, and as to
6 the cruel and unusual punishment argument under
7 Adkins v. Virginia case. Mental retardation. I
8 have already stated on the record. I don't have to
9 state it again. I renew those same motions at this
10 time.

11 THE COURT: Those motions are again denied for
12 the same reason.

13 MR. PRUETT: That's all we have, Your Honor,
14 insofar as post-trial motions.

15 THE COURT: Y'all can just have a seat. I'm
16 going to have to wait for the clerk to return.

17 (off the record)

18 (back on the record)

19 THE COURT: Are there any matters to address
20 prior to the sentence being imposed?

21 MR. PRUETT: No, sir, none that I can think of.

22 THE COURT: Mr. Binney, do you have anything
23 that you would like to tell the court prior to
24 sentence being imposed?

25 THE DEFENDANT: No, sir.

1 THE COURT: Mr. Pruett or Mr. Slade, anything?

2 MR. SLADE: Nothing, Your Honor.

3 MR. PRUETT: No, sir.

4 THE COURT: All right. In the case of the
5 State versus Jonathan Kyle Binney, Indictment Number
6 00-GS-11-526, as the trial judge in this case, and
7 prior to the imposition of the death sentence upon
8 the defendant, Jonathan Kyle Binney, for his
9 conviction for murder, I do affirmatively find as a
10 fact that the evidence of the case warrants the
11 imposition of the death penalty, and its imposition
12 is not a result of passion, prejudice, caprice or
13 any arbitrary factor.

14 And, therefore, in the case of the State versus
15 Jonathan Kyle Binney, it is the sentence of the
16 court that the defendant, Jonathan Kyle Binney,
17 having been found guilty by a jury of the offense of
18 murder, the jury has recommended that the sentence
19 should be -- the defendant should be sentenced to
20 death.

21 It is, therefore, the judgment of the law and
22 the sentence of this court that the defendant,
23 Jonathan Kyle Binney, shall be taken to the county
24 jail of Cherokee County, and thence to the State
25 Department of Corrections henceforth, to be kept in

1 close and safe confinement until the 14th day of
2 January, 2003, upon which day between the hours of
3 six o'clock a.m. and six o'clock p.m. the defendant,
4 Jonathan Kyle Binney, shall suffer death by
5 electrocution or lethal injection in the manner
6 provided by law.

7 (Whereupon, the Defendant was taken out of the
8 courtroom)

9 MR. PRUETT: Your Honor, on the burglary
10 matter.

11 THE COURT: I have got -- yeah, bring him back.
12 I have got to have the other indictment.

13 MR. PRUETT: I didn't want to speak out of
14 turn.

15 THE COURT: I'm sorry.

16 (Whereupon, the Defendant was brought back into
17 the courtroom)

18 THE COURT: Mr. Binney, prior to the trial of
19 this case, the defendant was noticed personally and
20 through counsel of the State's intention to seek the
21 imposition of a life sentence pursuant to 17-25-45
22 upon his conviction for the crime of burglary in the
23 first degree, and that he has a prior conviction for
24 a most serious offense, that being for criminal
25 sexual conduct in the first degree.

1 MR. PRUETT: Yes.

2 THE COURT: On Indictment 00-GS-11-525, the
3 State versus Jonathan K. Binney, having been found
4 guilty by a jury of the crime of burglary in the
5 first degree, and having a prior conviction for a
6 most serious offense, the sentence of the court is
7 that you, Jonathan K. Binney, be confined to the
8 South Carolina Department of Corrections for the
9 period of your natural life.

10 (Whereupon, the Defendant was taken out of the
11 courtroom)

12 THE COURT: Court is adjourned.

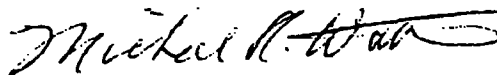
13 (END OF REQUESTED TRANSCRIPT OF RECORD)
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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the Jury Trial of the captioned cause, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 4th day of November, 2003 through the 14th day of November, 2003.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 14, 2003



Michael R. Watts

Circuit Court Reporter

VOLUME TWELVE OF TWELVE VOLUMES

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHEROKEE COUNTY

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN KYLE BINNEY,

APPELLANT

RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHEROKEE) IN THE COURT OF GENERAL SESSIONS

3
4 The State,)
5 -vs-) TRANSCRIPT OF RECORD
6 Jonathan K. Binney,) 2000-GS-11-525;526
7 Defendant.) July 11, 2001
8 Spartanburg, South Carolina

9 B E F O R E:

10 HONORABLE J. DERHAM COLE, JUDGE

11
12 A P P E A R A N C E S:

13 DONNIE WILLINGHAM, ESQUIRE
14 Attorney for the State

15 DON THOMPSON, EQUIRE
16 Attorneys for the Defendant

17
18
19
20
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22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

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1

2 Motion -- page 3.

3 No sworn testimony; no exhibits entered into evidence.

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1 (Proceedings July 11, 2001)

2 THE COURT: All right. This is in the matter of the
3 State vs. Jonathan Kyle Binney. Mr. Binney is present
4 represented by Mr. Thompson; the state is represented by
5 Solicitor Gowdy and Assistant Solicitor Willingham.

6 This is a defendant's motion, Mr. Thompson?

7 MR. THOMPSON: It is, Your Honor.

8 Judge, Mr. Binney -- a little background. Mr. Binney
9 on June the 8th of last year, 2000, was arrested and charged
10 with burglary first degree and assault and battery with
11 intent to kill arising out of an incident that occurred that
12 same day.

13 Later that evening the young lady -- after he was
14 arrested, the young lady died. And the assault and battery
15 with intent to kill charge was upgraded to murder.

16 The state has filed its notice of intention to seek the
17 death penalty on Mr. Binney.

18 Judge, I started representing Mr. Binney on -- he was
19 arrested on the 8th, and I started representing him, oh,
20 sometime a day or two shortly thereafter.

21 On the 14th of June a SLED agent, Spike McCraw,
22 contacted me. And, well, I came into my office and there
23 was a message to call him. He had called my office wanting
24 to talk with me. I called him back.

25 And at that point in time he wanted to know if I would

1 let him question Mr. Binney. And I told him I wouldn't let
2 him question Mr. Binney without me being present. He really
3 didn't want to do that.

4 In fact, at that point in time, he specifically asked
5 me on June the 14th if it was okay if he approached
6 Mr. Binney after I had told him he could not question him
7 unless I was present.

8 He specifically asked me if I would give him permission
9 to ask Mr. Binney or approach Mr. Binney and ask Mr. Binney
10 if Mr. Binney would waive his right to counsel and let him
11 question him; and I told him no, that if he was going to
12 question him, I was going to be present.

13 He and I talked a little more. I informed him that I
14 had met with Mr. Binney and that I thought Mr. Binney had
15 mental problems, that Mr. Binney was on suicide watch in the
16 jail at that time, and that I felt that he was suicidal.

17 And I even told the, told the SLED agent, I said, right
18 now he's telling me he wants the death penalty. He said,
19 well, what if we could guarantee him the death penalty. I
20 said, well, you can't guarantee him the death penalty.
21 Nobody can guarantee him a death penalty, even if the state
22 seeks it.

23 I said the only way I'm going to let you, consider
24 letting you talk with him or letting him give answers is if
25 the state guarantees me they're not going to seek the death

1 penalty.

2 He said that he would contact the solicitor's office
3 and see if they would make that guarantee.

4 He called me back. I don't recall whether it was late
5 that afternoon or the very next morning, but it was a short
6 period of time after that conversation. He called me back,
7 advised me that he had talked with Mr. Mabry in the
8 solicitor's office, and the solicitor's office was not going
9 to make any guarantee one way or the other at that point in
10 time, that they didn't know enough about the case.

11 I told him, given that, we had nothing else to talk
12 about because I wasn't going to let Mr. Binney talk with
13 him. You know, I said you can attempt to question him if
14 you want to with me present, but I'm going to tell him not
15 to talk.

16 On Friday, the 16th, Mr. Spike called me again and
17 wanted to know if I was going to let Mr. Binney talk with
18 him, and I told him no.

19 I went home that Friday afternoon thinking that was the
20 end of it.

21 On Monday morning I come in and discover that on Friday
22 afternoon -- now, Friday afternoon, it was about 12:30 when
23 I talked to Spike, when he called me and wanted to know if I
24 was going to let Mr. Binney talk to him.

25 Monday morning I come in and I discover that around

1 three o'clock Friday afternoon -- I wasn't present when this
2 happened, so I don't know exactly what happened. I know
3 what Spike says happened and I know what Mr. Binney tells me
4 happened. But I was told that Mr. Binney signed a letter
5 waiving his right to counsel, gave a complete confession and
6 took them to show them where he disposed of the property.

7 I beeped -- I had a beeper number for Spike. I beeped
8 that beeper number to find out what was going on. I'll be
9 honest with you. I was mad; I was hot. I probably said
10 some things to him I shouldn't have; but to find out what
11 was going on. He told me what happened Friday afternoon,
12 his version of it. I told him not to contact my client any
13 further.

14 I went to the jail an hour later to see Mr. Binney.
15 Mr. Binney wasn't in the jail. When I questioned where he
16 was at, I find out that he's in the sheriff's department
17 with Spike questioning him again. This would have been on
18 Monday, the 19th.

19 I went over to the sheriff's office. I had one of the
20 jailers take me over to the sheriff's office and let me in.
21 And we had some words.

22 The problem I have, Judge, now is I know what the state
23 is saying transpired on Friday afternoon. Mr. Binney has a
24 different version of what transpired on Friday afternoon.

25 I am possibly a witness in this case to my

1 conversations prior to that Friday afternoon with Spike
2 McCraw. I didn't go to my client and tell him. These are
3 the conversations I had with Spike prior to those questions.

4 And what he's telling me transpired would actually make
5 my conversation with Spike pertinent to his defense in the
6 case, not only on the issue of a violation of his Sixth
7 Amendment right to counsel but also as to the voluntariness
8 of the statement.

9 And given that, in a suppression motion I feel certain
10 I would be needed to testify. And I would probably need to
11 testify during the trial of the case also.

12 Given that, I think I'm now a witness and I need to
13 move to be relieved and have other counsel appointed.

14 THE COURT: All right. Mr. Willingham.

15 MR. WILLINGHAM: Your Honor, very briefly.

16 I know this is not the hearing to determine the
17 voluntariness or the violation of counsel in this matter,
18 but the reason the SLED agents talked to Mr. Binney on
19 Friday, June the 16th, is Mr. Binney sent them a letter
20 saying, "I request to see a detective without the presence
21 of my attorney. This request is only valid for the days of
22 June the 16th and 17th, and any further contact is not
23 initiated on my part unless further indicated by me."

24 Signed by Jonathan Binney.

25 They talked to him at 3:16 in the afternoon, and a

1 statement followed.

2 Additionally, Your Honor, on June the 19th, Mr. Binney
3 sent another letter. "I wish to talk to Detective Spike
4 McCraw without any attorney present. Until further notice,
5 he's welcome to contact me." Signed Jonathan Binney.

6 They talked to him at 3:05 on that afternoon.

7 Your Honor, the right to counsel is a right belonging
8 to the defendant. He can waive that at any time. It's not
9 a right belonging to Mr. Thompson to be present when his
10 client is questioned if the client does not want him there.

11 For that reason, I don't believe the conversations are
12 material and would make Mr. Thompson a material witness in
13 this case.

14 THE COURT: There are two letters that the state
15 contends were received from the defendant?

16 MR. WILLINGHAM: Yes, sir, Your Honor, I will hand to
17 the Court.

18 THE COURT: And the first was dated what?

19 MR. WILLINGHAM: June the 16th, Friday, June the 16th.

20 THE COURT: And the second was the 19th?

21 MR. WILLINGHAM: June the 19th, yes, Your Honor.

22 THE COURT: And, Mr. Thompson, you have each of these,
23 I assume.

24 MR. THOMPSON: Yes, sir, I do.

25 Judge, we don't deny the letters exist. The issue, I

1 think, and as to the letters, the issue where I would come
2 into play would be who approached who to get those letters
3 written, whether Mr. Binney of his own volition approached
4 the officer to get them written or whether the officer
5 approached Mr. Binney and had him write them.

6 What I would be able to testify to at that point in
7 time is that on Wednesday, June the 14th, the officer tried
8 to get me to allow him to approach Mr. Binney and get him to
9 waive his right to counsel. That's where my testimony would
10 come in as to the letters themselves.

11 THE COURT: Well, what's the state's position?

12 MR. WILLINGHAM: Your Honor, I'll be honest with you.
13 I have not talked to Agent McCraw, but I can't help but
14 think he would testify truthfully to any conversations he
15 may have with Mr. Thompson about talking to Mr. Binney.

16 I don't believe that Mr. McCraw approached Mr. Binney
17 in order to get those letters written. I think he talked to
18 Mr. Binney after receiving notice that Mr. Binney wanted to
19 talk, and so that's why he went to talk to him. Again, I
20 can't -- the testimony of Mr. Thompson has indicated he
21 would be a witness to is testimony that he would be able to
22 elicit from Agent McCraw.

23 THE COURT: Well, Mr. Thompson seems to believe, or at
24 least he seems to indicate to the Court that he believes,
25 there may be a conflict in testimony as to how the

1 circumstances developed which resulted in Mr. Binney's
2 letters of June the 16th and June the 19th.

3 I mean, you know, I would assume that you all have --
4 when I say you all, I am referring to the solicitor's office
5 and to the public defender's office. I assume that you all
6 have talked to Agent McCraw about how these or how the
7 contact with -- the direct contact with Mr. Binney without
8 Mr. Thompson's presence came to be.

9 MR. WILLINGHAM: It's my understanding that the agents
10 were working at the sheriff's department and received a
11 letter from the jail from Mr. Binney indicating his
12 willingness to talk to them, and they went over there to
13 talk to him. They did not initiate contact with him.

14 THE COURT: All right. So the state's position is that
15 any contact between Mr. McCraw, Agent McCraw, and Mr. Binney
16 was initiated by the defendant.

17 MR. WILLINGHAM: That's correct, Your Honor.

18 THE COURT: And, Mr. Thompson, do I understand that the
19 defendant's position is that that contact was not initiated
20 by the defendant but was, in fact, initiated by Agent McCraw
21 or someone acting on his behalf?

22 MR. THOMPSON: That's correct.

23 THE COURT: Mr. Thompson, have you talked to Agent
24 McCraw?

25 MR. THOMPSON: Not since Monday, June the 19th, of

1 2000.

2 THE COURT: Okay. So you don't personally know what he
3 says or what he would say if he were asked who initiated the
4 contact with your client.

5 MR. THOMPSON: What he told me when I talked with him
6 that day on the phone was that Mr. Binney had initiated it.

7 THE COURT: On June the 19th?

8 MR. THOMPSON: On the 19th.

9 THE COURT: Okay.

10 MR. THOMPSON: And I went to the solicitor's office
11 after that and talked with Mr. Wright, Eric Wright. And
12 Mr. Wright told me that Mr. -- that Spike McCraw had
13 contacted him. And I realize this is hearsay, but had also
14 told him that Mr. Binney had initiated the conversation.

15 So, I mean, that -- I'm operating on the basis that's
16 going to be the state's testimony, is that Mr. Binney
17 initiated the conversation.

18 Now, my understanding -- I brought Mr. Wright up. My
19 understanding is Mr. Wright wasn't there and didn't take
20 part in it. I went to the solicitor's office because I was
21 so mad that day. He is the person I got ahold of. He told
22 me that McCraw had called him and told him that.

23 But, so that's my belief that the state's position is
24 going to be that Mr. Binney initiated the conversation.
25 That's based on my conversation with Spike McCraw on the

1 19th of June and my conversation on that same day with Eric
2 Wright.

3 THE COURT: Well, let's just assume for the moment that
4 Agent McCraw made the initial contact and told your client
5 that he couldn't talk with him without his permission and
6 without him waiving his right to counsel, and, so, as a
7 result, Mr. Binney sent these letters.

8 Is it your position that that violates the Sixth
9 Amendment right to counsel?

10 MR. THOMPSON: I think at that point in time -- to be
11 honest with you, Judge, I did some research on that. I
12 mean, I would try to develop my argument along those lines.

13 But I don't think that's the entire gist of --
14 Mr. Binney has advised me that there was a purpose that he
15 sent those letters. And the purpose didn't deal necessarily
16 with the facts -- well, the facts of this case.

17 Mr. Binney was being held in the Cherokee County
18 Detention Center on a suicide watch.

19 The first time I went to talk with him, he was naked
20 and handcuffed with a pair of paper underwear on. And
21 that's the way they left him for me to talk to him.

22 He continued to be on that suicide watch for a long
23 period of time.

24 Mr. Binney advises me that they contacted him; that he
25 told a jailer that he wanted to talk some somebody about

1 getting off suicide watch; that the jailer went away, came
2 back in a little while and said the only way they'll talk to
3 you is if you sign a letter saying you'll talk to them.

4 He said, so, I wrote a letter telling them I'd talk to
5 them about getting off suicide watch. I was then taken to
6 the county jail and questioned on the crime.

7 I think given that, if that's the case, then, yes, they
8 have violated the Sixth Amendment right to counsel. They
9 knew he had an attorney, and they approached him knowing he
10 had an attorney and knowing that the attorney was telling
11 him not to.

12 Where this would come into play, Judge, is probably
13 eighty percent or more of the evidence they have was
14 obtained during that confession. If it should be kept out
15 in a suppression motion, that's going to take a huge section
16 out of the state's case.

17 THE COURT: Well, now, I recognize, as you told me,
18 that your client was on suicide watch. For what reason he
19 was placed on suicide watch, I don't know. But is it the
20 defendant's position that he was not competent to waive his
21 right to counsel?

22 MR. THOMPSON: Yes, sir; yes, sir. He was on a suicide
23 watch because at the time of his arrest the state alleges
24 that he attempted a suicide. And he was actually carried to
25 the -- oh, I can't think of the name of the hospital in

Motions

1 Cherokee -- Upstate Carolina for respiratory problems.

2 THE COURT: So not only would you make the argument
3 that the contact was a violation of the defendant's right to
4 counsel, but that also any statement provided could not be
5 voluntary because the defendant was not competent --

6 MR. THOMPSON: Yes, sir, and --

7 THE COURT: -- and was misled in some fashion.

8 MR. THOMPSON: And I was about to say then we would go
9 to the content of the statement. And he tells me what
10 happened in the office and how he was led to give the
11 statement, and that goes into play with the conversation
12 that I had with Spike McCraw on that Wednesday about, well,
13 let's promise him something to get him to talk.

14 I wasn't present during the questioning. I don't know
15 what transpired. I just know what Mr. Binney tells me; I
16 know what the state has; and I know the conversation that I
17 had with the officer. And the conversation I had with an
18 officer supports to a certain degree, the conversation prior
19 to questioning supports to a certain degree, what Mr. Binney
20 is telling me happened. And I believe that makes me a
21 witness.

22 MR. WILLINGHAM: I believe, Your Honor, that would make
23 him a witness only if Agent McCraw testified to something
24 other than having a conversation with Mr. Thompson. I do
25 not -- I don't believe that he would testify in any fashion

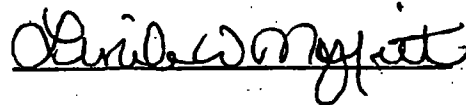
Certificate

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 11th day of July 2001.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 11, 2003



Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA))
COUNTY OF CHEROKEE) IN THE COURT OF GENERAL SESSIONS

THE STATE)
-vs-) TRANSCRIPT OF RECORD
JONATHAN KYLE BINNEY,) 2002-GS-11-525
Defendant.) 2002-GS-11-526
OCTOBER 25, 2002
GAFFNEY, SOUTH CAROLINA

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE; and a jury.

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

HAROLD "TREY" GOWDY, III, SOLICITOR
JAMES "DONNIE" WILLINGHAM, ASSISTANT SOLICITOR
Attorneys for the State.

TRENT N. PRUETT, ESQUIRE
SAM "MITCH" SLADE, JR., ESQUIRE
Attorneys for the Defendant.

Michael R. Watts
Circuit Court Reporter

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WITNESSES

PAGE

(NO WITNESSES CALLED)

3520

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EXHIBITS

1	NO.	DESCRIPTION	ID.	EV.
2				
3		(NO EXHIBITS MARKED)		
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1 (Proceedings October 25, 2002)

2 THE COURT: All right. Let the record reflect
3 that we are here in the matter of the State versus
4 Jonathan K. Binney with reference to juror excusals.

5 The State is represented by Mr. Willingham.
6 The defendant is present and represented by his
7 appointed counsel, Mr. Pruett and Mr. Slade.

8 Gentlemen, as I understand it, all of you have
9 been through the juror questionnaires and
10 information cards that have been returned by those
11 jurors who have been served with a summons. And I
12 understand that there are a number of jurors which
13 have requested to be excused or to invoke some
14 exemption, or, otherwise, there is some obvious
15 disqualification. And as to those, a number of
16 those, there has been an agreement reached that
17 would not require those jurors to actually appear on
18 November the 4th. So I simply want to be able to
19 place those jurors on the record that each side has
20 agreed to be excused or recognize the exemption.

21 MR. PRUETT: I can read down in the order that
22 they have been assigned numbers 1 through 350, the
23 once which we have consented to that are either
24 disqualified or exempt, and state the reason for
25 each.

1 THE COURT: I just want to be sure that I have
2 got --:

3 All right, Mr. Pruett, do you just want to go
4 ahead and recite the list and then I'll --

5 MR. PRUETT: Yes, sir.

6 Beginning with number 1, Susan Allison,
7 disqualified. She's employed as an officer of the
8 Cherokee County Sheriff's Office.

9 Number 5, Joseph Barnanski, deceased.

10 Number 6, Kenneth Batcheler is a full-time
11 student.

12 Number 13, Lemuel Blanton. He's over
13 sixty-five.

14 Number 14, Mr. James Bloomer, deceased.

15 Number 15, Patty Bloomer, a child or children
16 under the age of seven. Is primary caretaker.

17 Number 16, Betty Boleman, consent by reason of
18 age.

19 THE COURT: Excuse me just a second.

20 (off the record)

21 (back on the record)

22 THE COURT: Mr. Pruett.

23 MR. PRUETT: Start back. Number 16 was the
24 last one. Betty Boleman, consent by reason of age.

25 Number 18, is a nonresident, Thomas Bowden.

1 Number 20, Betty Bramlett, age exemption.

2 Number 21, Kenneth Branch is a nonresident.

3 Turn over to the next page.

4 Number 29, Barry Burgess is deceased.

5 Juror 31, Charles Burr is a nonresident.

6 Juror 32, Billy Byars is in jail. He has a
7 criminal record.

8 Juror 36, Marshall Camp. Also has a criminal
9 record. That would disqualify him from service.

10 Juror number 40, Edna Cash, age exemption.

11 Juror 41, Aliene Clary, age exemption.

12 Juror number 47, Harry Cook, Sr., medical and
13 age exemption.

14 Turning to page three.

15 Juror 60, Roy Davis, Sr., age exemption.

16 Juror 69, Vivian Douglas, for a medical excuse.

17 That would qualify for her being exempted.

18 Juror 71, Crystal Drum, as a nonresident.

19 Juror turn to page four.

20 Juror 73, Ricky Durham is a full-time school
21 teacher. Therefore, would be exempt, and has asked
22 to be exempt.

23 Juror 74 has a child under the age of seven.

24 Juror number 91, Tonya Gaffney, has a child
25 under the age of seven.

1 Juror 92, James Gardner, is a medical excuse
2 that would qualify for him an exemption.

3 Juror 93, Peggy Gibson, age exemption and
4 medical exemption.

5 Turn to page five.

6 Juror number 99 is a nonresident, Shelia
7 Graham.

8 Juror 101, Robert Gregory, is a medical
9 exemption.

10 Juror 104, James R. Hairston, age exemption.

11 Juror 105, Willard Hall, medical and age
12 exemption.

13 Juror number 113, Judy Harris, medical
14 exemption.

15 Juror 114, Raymond Harris, disqualified by
16 reason of a criminal record.

17 Juror 115, medical exemption.

18 Juror 117, Denis Heath, disqualified for
19 reasonable of a criminal record.

20 Turn to page six.

21 Juror 130, Karen Horton, children under age
22 seven exemption.

23 Juror 131, Carl Houch, age exemption.

24 Juror 135, Margaret Hulsey, age exemption.

25 Juror 140, Mary Isler, age exemption and also a

1 medical exemption.

2 Turn to page seven.

3 Juror 147, Carl Jenkins, age and medical
4 exemption.

5 Juror 152, Annie Jolly, age exemption.

6 Juror 154, Elizabeth Jones is employed as a
7 full-time teacher and has asked to be exempted.

8 Juror 155, Jennie Jones, as a age exemption.

9 Juror 158, Barbara Keenan, is a medical
10 exemption.

11 Juror 159, Leroy Keeney is deceased.

12 Turn to page eight.

13 Juror 169, Beth Linder has a child under the
14 age of seven. Primary caretaker.

15 Juror 176, Leroy Littlejchn, is an age
16 exemption.

17 Juror 180, Charles Littlejohn, Sr., medical
18 exemption.

19 Juror 181, A.C. Long, medical exemption.

20 Juror 186, Chad Marett is employed as a
21 full-time teacher and has requested to be exempted.

22 Juror 190, Monica Martin is deceased.

23 Juror 191, Robert B. Martin, Jr. is a
24 nonresident.

25 Turn to page nine.

1 Juror 197, Shirley McSwain is a medical
2 exemption.

3 Juror 206, Marguerite B. Montgomery, age
4 exemption.

5 Juror 207, Martha Moore, medical exemption.

6 Juror 211, Roy D. Moss, age exemption.

7 Turn to page ten.

8 Juror 219, Jennifer O'Brien, is present
9 suspected to have her child I think during the term
10 of court. Would be exempt by reason of a medical
11 condition.

12 Juror 220, Virginia Owens, age exemption.

13 Juror 223, Betty Parris, age and medical
14 condition.

15 Juror 228, Robert Peterson, age exemption.

16 Juror 230, Thomas Pettit, age exemption.

17 Juror 239, Shirley Pool, age exemption.

18 Turn to page eleven.

19 Juror 245, Katheryne Price has a child under
20 the age of seven, is pregnant, and has asked to be
21 exempted.

22 Juror 246, Charles Pridmore. We have agreed to
23 excuse him. He's a close friend of the victim's
24 husband in this case and works next door to him. We
25 have agreed to excuse him. He's asked to be

1 excused. We have agreed to do that.

2 I have juror 248, Louis Pustay, deceased.

3 I have juror 247 circled. Any reason?

4 MR. WILLINGHAM: No.

5 MR. PRUETT: Juror 251, Herbert Ramsey, age
6 exemption.

7 Juror 253, Arthur Randolph, disqualified by
8 reason of holding a state constable commission.

9 Juror 264, James Rogers, medical exemption.

10 Juror 265, Stephen Romberg is a nonresident.

11 Juror 266, Stephanie Salmon is a full-time
12 student.

13 Juror 268, Arbutis Scruggs, age exemption,
14 health exemption.

15 Juror 270, Daniel Shaw, age exemption, medical
16 exemption.

17 Juror 283, Gay Snellings, employed with the
18 sheriff's department and is on medical leave from
19 there and medical exemption.

20 Juror 284, Margaret Sparks, age exemption.

21 Turn to page number thirteen.

22 Juror 295, Lorene Stroupe, age and medical
23 exemptions.

24 Juror 307, Tizer Tate, age exemption.

25 Juror 310, Thelma Thompson, age exemption.

1 Turn to page fourteen.

2 Juror 313, Richard Truluck, age exemption.

3 Juror 316, Joe Vaughn, age exemption.

4 Juror 324, Brandi Wessinger is a nonresident.

5 Juror 331, Doris Wilkerson, age exemption.

6 Juror 336, Steve Wilson is full-time teacher

7 and has asked to be exempted.

8 Turn to page fifteen, the last page.

9 Juror 337, Ida Windle, age exemption.

10 Juror 341, Charles Woodward is a nonresident.

11 Juror 346, Willie C. Wyatt is an age exemption

12 and medical exemption.

13 Those are all the jurors that we have agreed.

14 When I referred to the medical exemption when I was
15 reading these names, these are individuals that have

16 provided statements from their attending physicians,
17 that is their opinion they would be unable to

18 perform service. And having reviewed those

19 different doctors statements, we are of the opinion

20 that they could not by reason of physical impairment
21 serve on a jury.

22 MR. WILLINGHAM: If it please the court, Your
23 Honor, all those are agreed upon by the State.

24 I had one additional one, number 156, Karen

25 A. Jones. She works at the building level of

1 Limestone College, and I believe we had agreed to
2 excuse her as well.

3 MR. PRUETT: That's correct, judge.

4 I wanted to say also that I have conferred with
5 Mr. Binney and explained what we were doing this
6 morning, in terms of reviewing the statutory
7 disqualifications and statutory exemptions, and he's
8 in agreement with what I have explained, what I have
9 stated to the court.

10 There are number of jurors that still have not
11 been located for service. I understand that efforts
12 have been made. I didn't know what instructions the
13 court might want to give to the sheriff's office
14 with respect to locating those individuals who thus
15 far have not been located for service.

16 THE COURT: Well, the sheriff's office, where
17 the summons was returned, have been going to the
18 actual location of the address, the residence, to
19 determine whether or not anyone was residing there,
20 and then providing the clerk with the information as
21 to any response or the presence of any individual at
22 those locations.

23 And have those been marked, Ms. Baines, on the
24 summons, by the sheriff's department?

25 THE CLERK: Yes, sir.

1 THE COURT: Have each of you been provided a
2 copy of the returned summons? The handwriting
3 that's on the returned summons is the handwriting of
4 the sheriff's department personnel that has --
5 noting what they learned upon actually visiting the
6 residence.

7 All right. Are there any other juror matters
8 that we need to address?

9 MR. WILLINGHAM: Your Honor, I have got a copy
10 of all the juror's criminal histories. I understand
11 that pursuant to State v. Childs I'm not required to
12 disclose it to the defense, but unless the court
13 wants a copy, I was going to go ahead and give to
14 the defense a copy of the juror's criminal
15 histories.

16 THE COURT: All right.

17 MR. WILLINGHAM: I have got a summary to
18 provide to the court.

19 MR. PRUETT: Your Honor, after I have had a
20 chance to go through these NCIC printouts as to each
21 juror, I'm sure that there will be a few more that
22 are disqualified. I just haven't had a chance and I
23 didn't want to agree to a disqualification until I
24 have had an opportunity to review the criminal
25 record myself. So there would probably be about

1 four or five, at least, I would guess, that they put
2 me on notice that are disqualified, but I just want
3 to look at the rap sheets myself.

4 THE COURT: Now, there are -- any other matters
5 relating to the jury?

6 MR. WILLINGHAM: No.

7 THE COURT: There are, or is, a -- or are
8 motions pending by the State. As I understand it
9 from the file, there appears to have been two
10 motions filed relating to the State's request to
11 have the defendant examined for competency to stand
12 trial pursuant to Section 44-53-410, Subsection 1 or
13 Subsection 2.

14 As I understand it from other motions that have
15 been filed and responses thereto, there is no issue
16 as to the competency of the defendant to stand
17 trial, is that true?

18 MR. PRUETT: That's correct, Your Honor.

19 THE COURT: And the defendant has retained
20 psychiatric experts?

21 MR. PRUETT: Yes, sir.

22 THE COURT: And have those experts done a
23 competency evaluation?

24 MR. PRUETT: Not as such, no. It was not asked
25 of them to do, Your Honor, because that is -- there

1 is no question but that he is competent to stand
2 trial. The sole purpose of our retaining an expert
3 was to develop evidence to present in the sentencing
4 phase for trial.

5 THE COURT: No, I understand that -- I
6 understand that the experts were not retained
7 because of an issue relating to competency, but
8 simply since I am certain they have examined and
9 interviewed the defendant, I'm simply assuming that
10 if there were any issue relating to competency, that
11 the court would be notified.

12 MR. PRUETT: Yes, sir.

13 THE COURT: And so apparently in the opinion of
14 the experts that have been retained, the defendant
15 is competent --

16 MR. PRUETT: Yes, sir.

17 THE COURT: -- to stand trial. And, therefore,
18 any examination by the Department of Mental Health
19 would be unnecessary.

20 There is also a motion pending by the State for
21 a court-ordered mental health evaluation, and a
22 motion to compel production of certain documents
23 under Rule Five, and a motion to compel response
24 under Rule Five(a) as to the defendant's intent to
25 rely upon the defense of alibi, insanity, or seek a

1 verdict but guilty, but mentally ill.

2 As I understand it, and, of course, you will
3 correct me if I'm wrong, the defense has responded
4 to the motion regarding information relating to his
5 intent to rely upon the defense of alibi, insanity
6 or guilty but mentally ill. The defendant has not
7 responded -- or has responded to the motion for
8 production of documents and has responded by stating
9 that he does not believe that the rules stated in
10 support of the motion is applicable, that being Rule
11 Five. And there has been a memorandum submitted to
12 the court addressing those issues, and then the
13 issue of the independent mental health evaluation,
14 which I will address by way of a written order, but
15 is there -- I know that each side has submitted
16 memorandums related to those issues. Is there any
17 additional memorandum or any additional argument or
18 authority that either would like to submit to the
19 court for my consideration on the issue of the
20 motion to order an independent mental health
21 evaluation and the motion to require production of
22 certain documents?

23 MR. WILLINGHAM: Your Honor, I believe I have
24 covered everything in my brief and in the reply to
25 the defense answer. I don't believe there is

1 anything else I can add.

2 MR. PRUETT: The same here, judge. I don't
3 have anything to add to the memorandum that I have
4 already submitted to the court, and you are going to
5 file a written order and send it to the parties just
6 to --

7 THE COURT: I'm hoping to have -- I'm hoping to
8 have -- now that I understand it, there is nothing
9 else to be submitted, I am hoping to have that order
10 done right away.

11 MR. PRUETT: Just for purposes, if need be, I
12 may not have to, but if you rule against the defense
13 on those issues, to preserve an objection, since we
14 won't be in court and it won't be an on-the-record
15 ruling, so to speak, just the preserve that issue
16 for appeal, if need be. I'm just going to file a
17 written objection. Would that be sufficient, to the
18 order?

19 THE COURT: If you think that's necessary. I
20 understand that what your position is as to the
21 motion. And if I rule against you, I don't know
22 that it's necessary to file an objection until the
23 time comes for an appeal, should that be necessary,
24 but I'll leave that to your discretion.

25 MR. PRUETT: I'll probably just do that, Your

1 Honor, just to make the record -- so there is no
2 question that I did not agree with the court's
3 ruling, if you do indeed rule against me on that
4 issue.

5 THE COURT: All right. Any other matters we
6 need to address before we recess?

7 MR. PRUETT: There is one other matter, and I
8 just want to put on the record, I have had told Mr.
9 Willingham this. We have been in contact the last
10 few weeks with respect to obtaining to expert in the
11 area of pharmacology, and I have put him on notice
12 of that. We haven't gotten a written report done up
13 yet, but I put Mr. Willingham on notice as to what
14 the subject matter of his testimony would be. I
15 don't know if my expert, Dr. Morton, will intend to
16 actually submit a written report prior to trial, but
17 I have told Mr. Willingham that he would be
18 testifying as to the effects of any drugs that Mr.
19 Binney might have been taking during the time period
20 in question.

21 THE COURT: Is that correct?

22 MR. WILLINGHAM: That's correct.

23 THE COURT: All right. If nothing further,
24 then we are in recess.

25 (END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the Motion Hearing of the captioned cause, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 25th day of October, 2002.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 17, 2003



Michael R. Watts

Circuit Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHEROKEE) IN THE COURT OF GENERAL SESSIONS
3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5 Jonathan K. Binney,) 2000-GS-11-525;526
6 Defendant.) March 25, 2002
7) Spartanburg, South Carolina
8
9

B E F O R E:

10 HONORABLE J. DERHAM COLE, JUDGE
11
12

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

13 DONNIE WILLINGHAM, ESQUIRE
14 BARRY BARNETTE, ESQUIRE
15 HAROLD W. GOWDY, III, ESQUIRE
16 Attorneys for the State

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18 SAM MITCHELL SLADE, JR., ESQUIRE
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23 Linda D. Moffitt
24 Circuit Court Reporter
25

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No sworn testimony; no exhibits entered into evidence.

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Motions

1 (Proceedings March 25, 2002)

2 THE COURT: All right. This is in the matter of the
3 State vs. Binney.

4 MR. WILLINGHAM: Yes, sir, Your Honor. He's charged
5 with two indictments, 2000-GS-11-525 and 526 with murder and
6 burglary. This is the state's motion for a competency
7 evaluation.

8 Your Honor, I filed that motion in July of 2001. At
9 that time he had Don Thompson as his attorney. We were
10 going to address that issue, but then Mr. Thompson moved to
11 be relieved as counsel.

12 The purpose of filing the motion for a competency
13 evaluation, it is my understanding the defense has not
14 consented to an evaluation at William S. Hall Psychiatrist
15 Institute.

16 However, Mr. Binney was tried in April of 2001 in front
17 of Judge Few for criminal sexual conduct with a minor. He
18 was convicted of that charge.

19 During that trial the defense introduced evidence of
20 the defendant's mental capacity or competency. They
21 introduced the testimony of Dr. Jeffrey McGee and asked
22 whether or not he was mentally ill at the time of the
23 alleged crime.

24 Mr. McGee testified, and I have a copy of the
25 transcript about him.

1 MR. PRUETT: Is this the same thing?

2 MR. WILLINGHAM: May it please the Court, the Court
3 will reference page 17 beginning on line ten, asked about he
4 was mentally ill at the time of the crimes alleged. Answer
5 is yes. A litany follows.

6 On page 18 about line eight McGee testifies that as a
7 result of his mental illness or defect or mental disease
8 defect that resulted in him lacking sufficient capacity to
9 conform his conduct to the requirements of the law.

10 That was the basis of our motion. We did not want to
11 be unprepared when we were trying the case in this matter in
12 October.

13 We believe that by the prior trial, prior evidence that
14 mental, his mental capacity, mental state will be an issue.

15 44-23-410 provides that the Court may order an
16 evaluation for the Court's purpose to determine whether or
17 not he is fit to stand trial and is competent to go forward
18 and assist with his defense.

19 In that earlier C. S. C. case, Your Honor, in fact,
20 that motion had been made to have him evaluated, and then
21 withdrawn.

22 Then at trial they produced the testimony of Mr. McGee
23 to argue for a guilty but mentally ill verdict. We don't
24 believe that would -- in order to do that in this case, Your
25 Honor, I believe it is only proper pursuant to the rules and

1 pursuant to the case law in this state that he be evaluated
2 for the Court's purposes by someone at William S. Hall
3 Psychiatric Institute.

4 THE COURT: Well, in the, in the case that was tried in
5 April of this year before Judge Few --

6 MR. WILLINGHAM: Yes, sir.

7 THE COURT: -- in that case there was not an issue of
8 competency. It was an issue of whether or not he suffered
9 from some mental illness?

10 MR. WILLINGHAM: That's correct.

11 THE COURT: All right. Let the record reflect that the
12 defendant, Mr. Binney, is present, along with counsel, Mr.
13 Pruett and Mr. Slade.

14 Mr. Pruett.

15 MR. PRUETT: Yes, sir.

16 We oppose the motion on different grounds. One is we
17 don't intend to raise competency as an issue. Mr. Slade and
18 I both conferred with Mr. Binney Binney in person on
19 different occasions and corresponded with him. There is no
20 question in our minds that he is competent to stand trial.

21 We don't intend to raise the defense of insanity during
22 the course of the trial, nor do we intend to raise the issue
23 or ask for a verdict in the form of guilty but mentally ill.
24 So none of those issues are contemplated being raised, and I
25 am sure they won't be.

1 He was just evaluated less than 12 months ago and tried
2 in this circuit. Again, competency wasn't found to be an
3 issue in that case. So it would appear that there would be
4 no necessity for a court-ordered evaluation for mental
5 competency, which was the limit of the motion filed by the
6 prosecution.

7 If it's not an issue and wasn't an issue 12 months ago,
8 I can't see the necessity for that or any basis for it, Your
9 Honor.

10 THE COURT: But, now, you said that he was evaluated
11 less than 12 months ago. But, now, not was not for
12 competency, was it?

13 MR. PRUETT: He was tried, Your Honor. I'm not saying
14 he was evaluated. He was tried less than 12 months ago, and
15 competency was not an issue in that trial. And we don't
16 intend to make it an issue in the trial of our case.

17 We have had personal contact with Mr. Binney Binney the
18 last few months. Clearly, he is able to interact with us
19 and understands the role of the various court officers and
20 what our role is as his counsel. He is able to converse
21 with us as to the specifics of the case, the facts.

22 So I have no reason to believe, based upon my
23 interaction with him, that he is incompetent and that he
24 would be incompetent seven months from now.

25 MR. WILLINGHAM: Your Honor, those are the issues that

Motions

1 were raised also in State vs. Locklair before Your Honor
2 back in 1999 and 2000. The Court decided, the Supreme Court
3 decided, in April and June of 2000. Locklair had been
4 ordered to submit to a psychiatrist evaluation by the Court.
5 There was no question about his mental condition.

6 THE COURT: Well, that was by consent, wasn't it?

7 MR. WILLINGHAM: Sir?

8 THE COURT: I said that was by consent, was it not?

9 MR. WILLINGHAM: No, sir; no, sir. According to the
10 case, Locklair argues the trial judge abridged his Fifth
11 Amendment rights by ordering him to submit to a psychiatric
12 examination where he did not assert an insanity defense and
13 did not give notice that he would plead guilty but mentally
14 ill. The Court disagreed.

15 The Court -- I will hand it up to the Court. The
16 Supreme Court indicates that the trial judge has the
17 inherent, discretionary authority to order an independent
18 psychiatric evaluation if he believes Locklair is not fit to
19 stand trial or believes Locklair's mental competency would
20 be an issue at trial.

21 Your Honor, we have a reason to believe, not
22 necessarily from my discussions with this trial counsel but
23 with previous trial counsel, that mental issues will be
24 raised in this trial, including the voluntariness of the
25 statement that was given to law enforcement, as well as

1 should we get to the sentencing phase, that would be an
2 issue that is possibly one of the mitigating factors.

3 MR. PRUETT: Your Honor, I understood when a motion is
4 filed by the prosecution where they're asking for a mental
5 competency evaluation -- that's the scope of the motion that
6 I received, and that's the only issue I understood that was
7 going to be argued this morning by the prosecution.

8 These other matters that are relating to what evidence
9 we might present, if any, in the mitigating phase of the
10 trial, I understand, weren't going to be raised this
11 morning.

12 At this point we haven't made a decision as to whether
13 or not we will put up any kind of mitigating evidence in the
14 sentencing phase of the trial.

15 So what they're asking to do is basically jump ahead in
16 the proceedings of this case to the mitigating phase where
17 we haven't made that decision ourselves.

18 Now, Locklair, Your Honor, that case is obviously
19 distinguishable from our case in that the defense had that
20 kind of evidence and by their expert intended to present
21 evidence at trial either in the guilt phase or sentencing
22 phase that the defendant in that case could not conform his
23 conduct to the law. And that was the written opinion of
24 their expert at the time that motion was made by the
25 prosecution.

Motions

1 We're not there yet, and I am not sure we will be there
2 in this case. We have began working on the case. We have
3 interviewed witnesses; we have met with Mr. Binney. We've
4 reviewed most of the file. I understand there is still
5 evidence we have yet to receive. The state has yet to file
6 their notice of aggravating circumstances.

7 So it seems at this point untimely to jump to what
8 evidence the defense might would present in mitigation in
9 the sentencing phase. We have yet to receive from the state
10 their evidence that they intend to use in aggravation.

11 MR. WILLINGHAM: But, Your Honor, it's also not only
12 mitigation. It's also Jackson vs. Denno whether he -- they
13 understand that he waived, voluntarily waived, his rights to
14 talk to the officers.

15 THE COURT: Well, I understand, of course, that there
16 are two different issues. One is competency, and perhaps
17 one is whether or not he suffers from any type of mental
18 illness, whether it be insanity or other.

19 As I understand the purpose of this motion, is to have
20 him evaluated strictly for the purpose of determining his
21 competency to stand trial and not for the determination of
22 any other mental state.

23 MR. WILLINGHAM: Well, at that point, Your Honor, I
24 guess I do need to amend that motion, or maybe we could come
25 on a different another day.

1 I didn't -- as a normal course when we do competency
2 evaluations, you order competency, as well as M'Naughton at
3 the same time. It's all on the same order.

4 THE COURT: Well, it's often done, but those are two
5 separate issues. In fact, the statute specifies that
6 they're separate issues.

7 And, in fact, if you send a defendant down for an
8 evaluation for competency, the experts, wherever they may
9 be, can't even address any issues or cannot provide any
10 reports or any evidence or testimony or otherwise relating
11 to the issue of sanity unless further ordered or directed by
12 the Court. So those are two different issues.

13 If what you are seeking to have performed is an
14 evaluation not only of competency but of capacity to conform
15 and being able to distinguish or differentiate between right
16 and wrong at the time of the offense in question, then that
17 would be a different, a different motion. And I don't know
18 whether the defense is prepared to argue that today or not.

19 MR. PRUETT: I am prepared to argue the issue of
20 competency, Your Honor.

21 And I would say this. We have not prepared, began to
22 prepare, evidence in mitigation at this point in time.

23 We have yet to receive the entire file, I understand.
24 And I think it would be premature on our part to begin
25 planning a strategy as to what evidence we intend to present

1 in the absence all of the evidence relevant to that
2 decision.

3 We obtained the transcript of his prior trial about a
4 month ago and began reading through that.

5 As Your Honor knows, we're had some discussions with
6 you, but none relate to obtaining or paying an expert to
7 present evidence that would relate to the issue of mental
8 illnesses or capacity. So we have yet to get to that point
9 ourselves.

10 And if the state wants to basically jump over us and
11 begin planning their rebuttal to evidence we have yet to
12 develop or to see if we intend to, in fact, do that --

13 THE COURT: Well, they are just anticipating. Since
14 certain issues have been raised previously in the prior
15 trial, they're simply trying to anticipate that there is
16 that distinct possibility that it might be raised in the
17 trial of this case.

18 If that were to be the case, then the state's position,
19 I assume, is that they have a right to have an independent
20 examination.

21 So, but perhaps it is a little bit premature, depending
22 upon what the defense intends to, intends to present,
23 because, as I say, the issue of competency is a totally
24 different issue than whether or not he is to be examined for
25 mental illness or capacity to conform or insanity.

1 Let me simply ask, Mr. Pruett. Do you have any idea
2 when you might be in a position to know what you will likely
3 offer as it relates to any capacity?

4 MR. PRUETT: We were hoping by May, Your Honor, because
5 there are -- I won't say who at this point, but persons we
6 contemplated contacting and really reviewing within the
7 transcript of the prior proceeding to actually read over the
8 testimony by Dr. McKee, I believe it was, who testified on
9 behalf of the defense and try to give us some idea as what
10 they might could add to that or not, or whether or not we
11 would use it at all. It might not be helpful, because,
12 again, that case was a criminal sexual conduct case. Mental
13 illness was testified to by Dr. McKee related to that
14 particular offense.

15 We are dealing with a homicide case here. We may want
16 to take a different approach than what was presented in the
17 criminal sexual conduct case.

18 We just haven't made that decision yet, but I would
19 think by the end of May. That would give us basically 60
20 days to make that decision. This trial, I believe, is about
21 seven months, seven months out.

22 THE COURT: What about that, Solicitor?

23 MR. WILLINGHAM: Your Honor, I have no, really no,
24 response to that other than we do not want to be called at
25 the 12-hour trial --

Motions

1 THE COURT: Oh, no. I understand. And you are not
2 going to be. Mr. Pruett says he believes that that
3 determination can be made. And I assume that there has been
4 reciprocal discovery requests --

5 MR. WILLINGHAM: Yes, sir.

6 THE COURT: -- for insanity and the like.

7 MR. PRUETT: Yes, sir.

8 THE COURT: Mr. Pruett's indicated that he will know by
9 the end of May, 60 days, let's say, what they intend to
10 submit by way of evidence as it relates to those issues.

11 If they do intend to offer such, it seems to me that in
12 the event the defendant is to be examined by experts at the
13 state hospital, that should be able to be accomplished way
14 in advance of the trial of the case.

15 The trial, we anticipate, is October?

16 MR. WILLINGHAM: Yes, sir. October the 14th, I
17 believe, Your Honor.

18 THE COURT: Well, I think that should give plenty of
19 time to -- for the state to seek an evaluation and, if
20 ordered, to have one accomplished and provide you a
21 meaningful opportunity to have that evidence in advance.

22 But if you are seeking that evaluation with this
23 motion, you do need to amend it.

24 MR. WILLINGHAM: Yes, sir.

25 THE COURT: Let's do this. Let's file the amended

1 motion, and we will simply schedule it when it's necessary
2 to be heard, but certainly way in advance of trial.

3 MR. WILLINGHAM: Yes, sir.

4 MR. PRUETT: Judge, again I'm using 60 days, but
5 definitely by June. I say 60 days is what I would think,
6 but it also depends upon our perspective expert's
7 scheduling, if they can meet with him. He is down in
8 Charleston. We are up here.

9 We prefer to retain somebody within the upstate area so
10 we can converse with them easier. They would have to travel
11 to Lieber where he is currently incarcerated.

12 That would be the only continuance that I could pursue
13 that might go on beyond that 60-day period. But still that
14 should give them more than adequate time once we receive a
15 written report to have an evaluation done.

16 And I am aware of the need to obviously have their
17 psychiatrist examine him in the event we intend to offer
18 that kind of evidence.

19 THE COURT: All right. Well, Solicitor, if you will,
20 just file an amended motion. And then we'll address it in
21 plenty of time for that to be conducted if need be.

22 MR. WILLINGHAM: Okay.

23 THE COURT: Let me see y'all just a second.

24 (Bench conference held off the record.)

25 END OF PROCEEDINGS MARCH 25, 2002

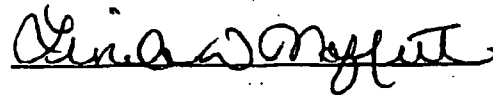
Certificate

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 25th day of March 2002.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 11, 2003



Linda D. Moffitt
Circuit Court Reporter

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF CHEROKEE)

IN THE COURT OF GENERAL SESSIONS

3 The State,)

4 -vs-)

TRANSCRIPT OF RECORD
2000-GS-11-525;526

5 Jonathan K. Binney,)

6 Defendant.)

July 12, 2002
Spartanburg, South Carolina

11 B E F O R E:

12 HONORABLE J. DERHAM COLE, JUDGE

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

15 DONNIE WILLINGHAM, ESQUIRE
16 BARRY BARNETTE, ESQUIRE
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No sworn testimony; no exhibits entered into evidence.

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1 (Proceedings July 12, 2002)

2 THE COURT: All right. Have the record reflect that
3 this is in the matter of the State vs. Jonathan K. Binney.

4 These are certain motions, specifically, the first
5 having been made by Mr. Binney wherein he is seeking to have
6 present counsel relieved.

7 The solicitor is present, along with Mr. Barnette, Mr.
8 Willingham; the defendant's counsel, Mr. Pruett and
9 Mr. Slade, are present; as is the defendant, Mr. Binney.

10 Mr. Slade.

11 MR. SLADE: Your Honor, I think that the matters that
12 are going to be discussed in this hearing on Mr. Binney's
13 motion ought to be discussed ex parte. I think there's
14 going to be some discussion of privileged matters, and I
15 would ask that you conduct this hearing ex parte.

16 I don't have any objection to Mr. Briggs being there,
17 because, evidently, he has, I think, spoken to our client.
18 And Mr. Briggs has played a role in this from the beginning.
19 So, you know, I think he needs to be there. But I do think
20 there is going to be some privileged material discussed. So
21 I would ask it be conducted ex parte.

22 MR. BRIGGS: I --

23 THE COURT: Just a minute. The record shall also
24 reflect that Mr. Orin Briggs is present.

25 Mr. Briggs what's your position?

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1 MR. BRIGGS: Your Honor, I represent the defendant's
2 parents. I have been retained by them.

3 And my only contact with him until this morning has
4 been through the parents, because I still don't have a
5 release from him, but it's in the mail.

6 But my position is the State vs. Smart case, we are
7 talking about, 299 S. E. 2d., 686, which I've got a copy of
8 if the Court needs to see it. I am sure the Court is
9 familiar with it. These matters that involve confidential
10 information and the possibility of potential defenses at
11 this stage in the trial are simply just no business of the
12 solicitor's office, Your Honor.

13 In fact, I would go one step further and ask the Court
14 to secure the courtroom and give proper instructions for
15 those who are here that there be no discussion of this
16 matter outside of this courtroom, Your Honor.

17 This is, this is the very essence of the right of free
18 trial, a fair trial and the confidentiality. And also I
19 join in with Mr. Pruett's -- Mr. Slade's motion. And I will
20 be glad to refresh the Court's memory of that case if it
21 needs to be.

22 THE COURT: All right. Does the state wish to be
23 heard?

24 MR. GOWDY: Your Honor, I don't have any idea what they
25 are planning on talking about. I don't have any reason

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1 to -- I obviously would like to be present for this hearing,
2 but we don't have any interest in hearing anything about
3 their defense or any privileged communication. But I don't
4 have any way of -- we certainly trust the Court. If it's
5 going to be privileged information, we don't want to hear
6 it. And I don't have any reason to disbelieve what they
7 say.

8 THE COURT: Well, I'll simply make that determination.
9 And if there's matters that the state is entitled to be
10 privileged in, then obviously we'll address that subsequent
11 to my discussion with counsel and the defendant.

12 All right. All persons shall be excluded from the
13 courtroom with the exception of defense counsel and the
14 defendant.

15 And I understand Mr. Briggs has requested to remain.

16 MR. SLADE: Yes, sir.

17 THE COURT: And Mr. Briggs, with the consent of the
18 defendant, Mr. Binney, shall remain.

19 MR. WILLINGHAM: Your Honor, you will summons us back
20 for the remaining motions?

21 THE COURT: Sure.

22 MR. WILLINGHAM: Thank you.

23 (Whereupon, counsel for the state was excused from the
24 courtroom.)

25 THE COURT: All right. The record shall also reflect

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1 that there are officers with the Spartanburg County
2 Sheriff's Department present for the purpose of providing
3 court security, as well as an officer with the Spartanburg
4 County Detention Facility that is providing custodial and
5 security for the defendant; and, of course, a member of the
6 clerk of court staff.

7 All persons present are admonished that nothing
8 occurring during the course of this hearing shall be
9 disclosed to any person or any entity in any fashion
10 whatsoever.

11 MR. BRIGGS: Your Honor, could we let the deputy make
12 sure nobody else comes in here except maybe the clerk of
13 court if he's needed for some reason, Your Honor?

14 THE COURT: Yeah. Let's be certain that no one enters
15 the courtroom. And ask the bailiff. Is the bailiff outside
16 the door there? Ask the bailiff to be certain that no one
17 is near or around the entrance.

18 All right. Who wants to address the issue with the
19 motion to be relieved?

20 Mr. Binney.

21 MR. BRIGGS: I don't mind going first, Your Honor.

22 THE COURT: Well, now, Mr. Briggs, you know, I don't
23 want to prohibit you from participating if it's necessary,
24 but understand that you're not involved in the case.

25 You may be representing Mr. Binney's family, but this

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1 is not a matter involving Mr. Binney's family. This is a
2 matter involving the defendant's motion to have his present
3 lawyers relieved as counsel..

4 Now, if you're here for the purpose of assuming the
5 representation of Mr. Binney, then you're welcome to
6 participate.

7 MR. BRIGGS: No, Your Honor. I am not qualified to
8 represent Mr. Binney, and never attempted to do that; and
9 this is very clear to appointed counsel.

10 My role is very limited in two respects; one, to try to
11 convince them, if they have not already been convinced, that
12 there is a certain defense that involves potential mental
13 impairment that should be pursued very vigorously; and, two,
14 the concern of the parents. There hasn't been very much
15 communication between the defense team and the parents.
16 That's, that's why I was hired, because the defense has not.

17 But I would submit to the Court, with their permission,
18 I might be better able to in a real nonadversary way solicit
19 some questions from them as to their qualifications to do
20 defense death penalty cases and eventually ask the defendant
21 what he wants.

22 And I told, I told counsel I have not made a
23 recommendation to him. This is not my role. But I can
24 explain the concerns to the Court. And if the Court didn't
25 let me ask questions of appointed counsel, then I wouldn't

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1 do that. I would just make an argument.

2 I will defer to the Court on this kind of an informal
3 hearing, Your Honor.

4 THE COURT: Well, since Mr. Binney made the motion, I'm
5 going to allow Mr. Binney to address the Court on his
6 motion.

7 Mr. Binney, what's your support for your motion to have
8 Mr. Pruett and Mr. Slade relieved as counsel?

9 THE DEFENDANT: Well, Your Honor, first of all,
10 throughout my childhood into my adult life a lot of my
11 decisions have not necessarily been appropriate. Mental
12 capacity that I have had to make right decisions has been
13 impaired.

14 One person or two people in my life that I have been
15 able to count on has been my parents, and that's why they
16 hired Mr. Briggs, basically to be my voice.

17 It is true that in the past six months there has been
18 almost no communication between Mr. Pruett and Mr. Slade and
19 myself, as well as my parents. That and the expressed
20 desire to seek mitigating circumstances with the medical
21 problems that I have been met with indifference. All of
22 these problems combined is why I brought it today.

23 THE COURT: All right. Mr. Pruett or Mr. Slade, do
24 you-all wish to be heard on the defendant's concern?

25 MR. SLADE: Your Honor, I think both Mr. Pruett and I

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1 would like to be heard on this.

2 Your Honor, we have pursued mental examinations of our
3 client, Mr. Binney. We have had Mr. Binney examined by a
4 psychologist from Charlotte, Dr. McNulty, and we have had
5 him examined by Dr. Schwartz-Watts who has done extensive
6 death penalty work here in South Carolina.

7 Your Honor, the first I knew of any conflict in our
8 efforts to defend Mr. Binney have stemmed from my
9 conversations with Mr. Briggs and/or my conversation with
10 Mr. Briggs. I have only had one conversation with him.

11 But he has faxed me a number of documents, letters,
12 from himself on behalf of the Binneys. And I would like to
13 present them to you, Your Honor, if you don't mind so you
14 can see the course of the discussion in this.

15 MR. BRIGGS: And I have no objection to the Court
16 seeing that correspondence, Your Honor.

17 MR. PRUETT: And, Judge, we may need to copy these at a
18 later point in time to make them a part of the record. I
19 want to be sure we've got them all. But I believe we have
20 all of the correspondence.

21 MR. BRIGGS: Do you-all want to compare?

22 MR. SLADE: Your Honor, I, of course, want to note I am
23 not having these marked. But there is a May the 29th letter
24 from me to Mr. Briggs, and a June the 1st letter from
25 Mr. Briggs to me.

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1 I think I misspoke on the first one. All of these are
2 from Mr. Briggs to me.

3 There is a June the 11th fax; there's a fax dated June
4 the 15th from Mr. Briggs that is a draft of a letter he was
5 planning to send to Representative Mike Fair. There is a
6 June the 9th fax to Trent, to Mr. Pruett; and there is a
7 June the 11th fax to Mr. Pruett.

8 And, Your Honor, I don't have, and I apologize. I
9 don't have a separate copy. I'm sure Mr. Pruett has a
10 separate copy of the letter that I --

11 MR. BRIGGS: The June 18th letter? Do you want that
12 one that you wrote me? You probably ought to put your
13 letter in there too.

14 MR. SLADE: I have what I'm about to hand over to you,
15 Your Honor, is a fax that I sent to Mr. Briggs on June the
16 14th via both fax and mail. And then I have Mr. Briggs'
17 June the 18th letter. And all of those letters I am
18 describing as letters. I think most of them actually are
19 faxes, Your Honor.

20 Your Honor, where I started my discussion before I
21 handed up all of that material, is to the point that I did
22 not know of any conflict between my view of the way this
23 case ought to be handled, and my view and Trent's view, my
24 view and Mr. Pruett's view, in the way this case ought to be
25 handled and Mr. Briggs' and Mr. Binney's disagreement with

1 that until I started getting some faxes from Mr. Briggs.

2 Your Honor, as I was telling you a moment ago, we have
3 had Mr. Binney examined by Dr. Schwartz-Watts and Dr.
4 McNulty.

5 There is a particular defense that they are very eager
6 and determined -- by they, I mean Reverend and Mrs. Binney.
7 Reverend and Mrs. Binney live in Ohio. They have been to
8 South Carolina several times. Trent and I, excuse me, Mr.
9 Pruett and I have spent several hours talking to them about
10 this case. I have called Mrs. Binney several times to
11 discuss different things in this case with her.

12 I have not contacted her since Mr. Briggs told me he
13 represented them just because I didn't think that I could,
14 that they are represented by a lawyer. So I didn't think I
15 was able to talk with them. I don't think I am able to talk
16 with them.

17 But I think the way this evolved, Your Honor, is that
18 there is a particular defense that they are bound and
19 determined to present at all costs.

20 I have -- Mr. Briggs has also told me, and I think it's
21 reflected in those documents, that he has a, what I think he
22 characterized as a political approach to help defend
23 Mr. Binney, that he would like, and has taken some steps to
24 put into play.

25 I had asked him, I think, in that June the 14th letter

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1 to stop those efforts, and essentially Mr. Briggs has
2 continued those efforts.

3 MR. BRIGGS: Your Honor, that is not true.

4 THE COURT: Well, right now I'm hearing from Mr. Slade,
5 and perhaps I will give you an opportunity to correct
6 anything that you feel is deficient. But, now, I'm not
7 going to preside over an argument between counsel.

8 If y'all want to discuss the matter among yourselves
9 and disagree or agree, y'all can do it outside. I'm here
10 for the purpose of hearing the motion that Mr. Binney has
11 made for relieving his present counsel and to determine
12 whether or not that's appropriate or it's not appropriate.

13 MR. SLADE: Your Honor, I certainly don't want to
14 mischaracterize any, any of Mr. Briggs' actions. It appears
15 to me that he was telling me from his letters that he
16 intended to continue the political efforts, as he described
17 it. Again, I hope I am not mischaracterizing that. But he
18 intended to continue in that.

19 Mr. Briggs has -- you know, I had asked Mr. Briggs to
20 step back out of the case, essentially, I think in my
21 June the 14th letter. And at least in my judgment he has
22 not.

23 I think it is very difficult to conduct a case of this
24 magnitude, of this seriousness, with another lawyer who is
25 without responsibility in making the decisions in the case

1 continually injecting themselves in the case.

2 We really need to have the confidence of our client.

3 And I think at this point that the possibility of
4 maintaining our client's confidence in us and our confidence
5 in the client or our ability to work with our client is
6 irretrievably broken, Your Honor. ~~I just don't think that,~~
7 ~~I don't think that can be repaired. And I just, I think we~~
8 ~~have reached a point, Your Honor, where we're just not going~~
9 ~~to be able to -- I don't think we're going to be able to~~
10 ~~sustain our client's confidence~~ in us in order to go forward
11 to present a viable defense on his behalf.

12 MR. PRUETT: I would like to address the Court also,
13 Your Honor, on matters not touched on by Mr. Slade.

14 Your Honor, originally you may recall Don Thompson
15 represented Mr. Binney. There was a long period of time
16 before the state even filed its intent to seek the death
17 penalty. I think along that same time period Mr. Thompson
18 asked to be relieved as counsel. There was a potential
19 conflict he might have as a witness, or there might have
20 been some other conflict.

21 In October of last year I was appointed, along with
22 Mr. Slade, to represent Mr. Binney. It wasn't until the
23 middle of November we actually got the file from the
24 prosecutor's office. And the next month Mr. Slade and I
25 drove down to Lieber Correctional, made that trip and met

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1 with Mr. Binney specifically to discuss the strategy, to
2 discuss, excuse me, to discuss the strategy in the
3 presentation of the guilt phase and sentencing phase of this
4 anticipated trial. And we went over certain factual
5 allegations.

6 And at that meeting it impressed both Mr. Slade and I
7 that he wouldn't answer some questions we were putting to
8 him. He specifically on a crucial point or fact said he
9 wanted to think about it and get back with us.

10 So given, Your Honor, the fact that he wouldn't discuss
11 with us some of the facts of the case, we told him what our
12 plan was for the handling of the case, what we anticipated
13 doing.

14 We also explained that Mr. Slade and I both had several
15 other commitments we had to fulfill before we could turn our
16 full attention to his case. I had three homicide cases and
17 Mr. Slade had several other cases he was in.

18 What we conveyed to Mr. Binney was probably towards
19 late spring and certainly early summer we would be turning
20 our attention towards his case.

21 The case has been scheduled for October the 14th, I
22 believe that week. And we thought that would give us more
23 than enough time to prepare our defense.

24 Even so, Your Honor, in the times since we've met with
25 Mr. Binney, we have met with witnesses on the case. We met

1 with an investigator to persue certain avenues that may
2 enlighten us on some of the facts we could not get from
3 Mr. Binney.

4 We went before the Court, I believe, about two or three
5 months ago on this issue of mental evaluations. And after
6 that I had contacted Dr. Schartz-Watts and Mr. Slade had
7 contacted Dr. McNulty to do these evaluations. They have
8 both done the initial evaluations.

9 My concern was, Your Honor, as we got into this process
10 of having the evaluations done and began working on the
11 actual facts of the case and after meeting with some of the
12 fact witnesses, Mr. Binney filed his motion to be relieved
13 as counsel, which was on May the 4th.

14 From that point forward it put us in a position where
15 we maybe not should be communicating with him in an effort
16 to try to persuade him one way or the other with respect to
17 his motion to have us relieved as counsel. So we haven't
18 had contact with him since May. And this would have been
19 the time period that we would have ideally been having those
20 contacts.

21 We are now three months away from the anticipated trial
22 date. So for the last two months we have intentionally and
23 consciously made the decision not to have direct contact
24 with him. So maybe that clarifies or explains Mr. Binney's
25 complaint.

1 More to the point, now before the Court are motions to
2 be relieved. I think there is a disagreement, and that's
3 putting it mildly, as to which way this case should go.

4 Experts that we have retained and the state has paid
5 for, I believe, are of one mind as to what the mental
6 disabilities of Mr. Binney are.

7 The parents of Mr. Binney have come up with the wrong
8 theory or idea as to how the case should be handled. And
9 it's not just a disagreement as to which of the proper
10 avenues to proceed when it comes to presenting mitigating
11 evidence of any mental impairment or disability. I think it
12 has gone beyond that where mainly in communications with
13 Mr. Binney, and vice versa, he has basically stated that
14 these persons aren't representing their interest.

15 MR. BRIGGS: Meaning us.

16 MR. PRUETT: Meaning us, Mr. Slade and I; and they're
17 not doing the job they should do.

18 In turn, I think that has to a large degree
19 deteriorated our effectiveness in representing him.

20 It's hard enough to represent somebody on a murder
21 case, but where you have a death penalty sentence
22 potentially that can be imposed, without having somebody
23 second-guess you as to what you're doing and why you're
24 doing it, and our manner of handling this case has been
25 based upon our own experience in having tried death penalty

1 cases and numerous homicide cases. And we're doing what we
2 think is the right thing to do in the case.
3 But you can't effectively represent your client when
4 not only your client but also his family and immediate
5 contacts who would be potential witnesses in the sentencing
6 phase are all opposed to the way you're handling the case.

7 ~~For that reason, I already believe that the~~
8 ~~deterioration of our relationship is such that I think it~~
9 ~~jeopardizes our effectiveness.~~

10 The letters that Mr. Binney has written to me also have
11 suggested that you're not doing this, you're not doing that,
12 you know, I'm going to file a P.S.C. R. action against you.
13 You usually don't hear that until after the trial,
14 Judge. We are not even in the stages, post preparation,
15 stage of the trial, and we're already being threatened with
16 post conviction relief actions.

17 So my feeling is we may just be ~~laying the groundwork~~
18 ~~for Mr. Binney's future post conviction relief action~~ if he
19 and his family, and he himself, is at that point where
20 they're really not going to cooperate because they think
21 we're not pursuing the proper mitigating evidence or
22 other mitigating factors that they think should be handled
23 in the case or presented in the case. That's all.

24 I just wanted to let the Court know that there was a
25 reason why there hasn't been contact in the last few months,

1 and that there was initially. And we did have an overall
2 strategy how to prepare for the case and present it in
3 October.

4 THE COURT: All right. Mr. Binney, would you like to
5 respond to anything that Mr. Slade or Mr. Pruett have told
6 me?

7 THE DEFENDANT: Yes, sir.

8 First of all, all of the documents that they handed
9 you, if I am correct, I heard nothing but the month of June.
10 Most of those were from Mr. Briggs trying to get in touch
11 with them, which they did not respond as far as I know.

12 As far as getting in contact with my parents, I know
13 that they said they talked with them once or twice. And on
14 numerous occasions my mother has complained multiple times
15 that nobody has returned her phone calls, could not get in
16 touch with them. They weren't in the office, which, of
17 course, I understand that they are busy, and I am not
18 grumbling with that.

19 There are indeed plenty of disagreements. But maybe
20 you can correct me if I am wrong, but I was under the
21 impression that an attorney is supposed to help present the
22 facts in the way that the client wants, not how they want
23 it, which of course they are not doing, and they have said
24 so themselves that since November of last year they have
25 come to visit one time, and one time only.

1 Other than that, it has been strictly one-way
2 communication from me to them. And that's about it.

3 THE COURT: All right. Well, Mr. Binney, let me just
4 say one thing.

5 I would not have appointed Mr. Pruett and Mr. Slade to
6 represent you in this case had I not had confidence and a
7 firm belief that they are not only qualified and certified
8 by the South Carolina Supreme Court to handle a death
9 penalty case but that they are also competent and qualified
10 based upon their experience and their knowledge to properly
11 represent a person who has been charged with a crime wherein
12 the ultimate punishment of death might be imposed.

13 So I don't have any question about the qualifications
14 and the competence of these two lawyers to properly
15 represent you in this case.

16 Oftentimes it does occur where defendants disagree with
17 their lawyers' advice. There's nothing wrong with that. It
18 happens all of the time. But I would assume that if you
19 were more capable and more competent to represent yourself
20 than these lawyers are that you would not have sought
21 counsel, that you would have simply told the Court that you
22 prefer to represent yourself in the case.

23 Oftentimes people refuse to accept advice from
24 professionals, whether they be lawyers, doctors, accountants
25 or the like. Oftentimes they do that to their detriment.

1 That's the reason that you have professionals in various
2 fields to provide you with proper advice as it relates to a
3 matter wherein they have a particular speciality or
4 experience that you may not have.

5 So while persons charged with crimes often disagree
6 with their lawyers' strategy, or perhaps not often, but it
7 does occur that they disagree with their lawyers' strategy,
8 often it's not based upon a proper consideration of the
9 facts that relate to your case and the overall method in
10 which the case should be tried or the strategy implemented.
11 That's what you have experienced lawyers for.

12 Usually defendants who attempt to represent themselves
13 or dictate or direct the course of the strategy are not
14 successful in those efforts, and that's because they don't
15 have the proper perspective; they don't have the proper
16 experience; they don't have the proper training to carry out
17 the task that they apparently are attempting to undertake.

18 And I can tell you that there is nothing more difficult
19 in trying to properly represent a criminal defendant than to
20 have other persons outside of the case, whether they be
21 family members or relatives or acquaintances or lawyers or
22 friends or whatever, there is nothing more difficult than to
23 have outside people interfering in the proper presentation
24 of the case.

25 They are not involved in the case. It's easy for

1 outsiders to criticize what someone else is doing when
2 they're not involved in the case themselves.

3 And, as I say, if you have someone else or you have
4 another lawyer or a team of lawyers that you would prefer to
5 represent you and they are willing to undertake that
6 representation and you or your family wants to compensate
7 them for that representation, then you could have had any
8 lawyer you want to.

9 However, understand that the purpose of having legal
10 representation is not to find someone who will agree with
11 you. It's to find someone with the practical experience and
12 the knowledge and the competence and the qualifications to
13 properly present your case. And a proper presentation of a
14 case does not necessarily mean you do whatever the defendant
15 wants done or you do whatever the defendant's family wants
16 done.

17 A lawyer is not under an obligation just to do whatever
18 you think he or she ought to be doing. A lawyer's
19 obligation is to do what he or she believes is in your best
20 interest, and is a proper way of handling and preparing your
21 case for trial.

22 So I don't question, nor do I have any difficulty with,
23 the fact that oftentimes a defendant and his lawyers might
24 disagree on certain points, but the point being is that
25 there should be a reasonable and open discussion. And both

1 should be willing to accept the opinions and the views of
2 each other in order to try to arrive at an ultimate and
3 proper conclusion or decision so that the case can be
4 properly prepared and the case can be properly presented.

5 If you have some special training or education or
6 special experience that you think qualifies you more than
7 these lawyers to handle your own case, then obviously you
8 can ask the Court to permit you to prepare your own case and
9 to represent yourself.

10 I don't recommend that. I don't think that's an
11 appropriate course of action to take in a case, certainly
12 not a case of this magnitude and of this serious nature.
13 But that's a decision that you have to make, and only you
14 can make it. But you have a right to make it if you wish
15 to.

16 But, as I tell defendants all of the time, if I had to
17 have surgery, I would ask that a competent and qualified
18 surgeon perform the procedure. I wouldn't do it myself.

19 And I might have questions to ask my doctor. I might
20 wonder why he or she is doing certain things, and I might
21 question them or ask them perhaps shouldn't they do
22 something else. But ultimately I know that they are the
23 expert. They are the persons that have been trained. They
24 are the persons who have been educated. They are the
25 persons who have the experience.

1 And, you know, I think it's a very big mistake to seek
2 professional advice and assistance and then try to undermine
3 that representation or that assistance by attempting to
4 conduct my own professional conduct where I don't have the
5 experience or the education or the training to accomplish
6 it.

7 I certainly can understand why you might have some
8 questions. You might believe that certain things ought to
9 be done, and you might discuss those concerns with your
10 lawyers. That's the, that's how you arrive at decisions,
11 through frank and open discussion.

12 But when you get down to the bottom line, that's also
13 the reason that you seek, that you ask for and that you
14 accept competent professional assistance, because it's not
15 likely that you have the proper background and training to
16 accomplish the task that these lawyers have been appointed
17 for your benefit to accomplish.

18 So what I am hearing certainly I have concerns with, so
19 far as the lawyers and the client being able to work
20 together for a common goal. And I can certainly understand
21 that there might be some concerns or some disagreements.

22 But I would hope that, Mr. Binney, that you and your
23 lawyers would work together. Discuss any concerns that you
24 have with them; express your opinions to them. And I am
25 certain that your lawyers, any lawyers, must talk to your

1 parents and family and friends about you and your background
2 and the like in order to properly prepare your case.

3 But the same considerations apply to your parents and
4 your friends as apply to you. Unless they are qualified,
5 unless they are experienced, unless they are educated and
6 unless they are trained in the law, they can't make those
7 types of decisions.

8 They certainly ought to have input. Their feelings and
9 their knowledge and their concerns ought to be addressed,
10 but, again, the bottom line is in situations such as this
11 99.9 percent of the time it's important that a qualified
12 professional trained in the law make those ultimate
13 judgments and decisions in your best interest.

14 As I say, I don't really know of any example where that
15 I can think of or that I have experienced with, where a
16 defendant who has no training and education and experience
17 in the law has taken over the handling and the preparation
18 of his case and been successful in doing so.

19 Lawyers don't always accomplish what they set out to
20 accomplish, nor do doctors, nor do any other type of
21 professionals. But so long as they put forth their best
22 judgment after proper preparation and they work diligently
23 in order to accomplish the task that they have been asked to
24 accomplish, that's really all they can do.

25 And, as I've stated, these two lawyers would not have

1 been appointed to represent you if I were not confident in
2 their ability to assume that task. They are certified by
3 the highest court in this state as qualified to represent
4 criminal defendants in capital cases.

5 I know from personal experience with both of them,
6 having practiced law in this circuit and also presiding over
7 cases as a judge, these lawyers are more than capable and
8 more than competent and more than able to properly represent
9 you.

10 You certainly should provide them with your thoughts
11 and opinions, as well as your family, but you should not in
12 any way in my view try to deter them in the proper
13 preparation of your case. Certainly you might have
14 disagreements, but you need to work together towards a
15 common goal.

16 If these lawyers were to be relieved and two other
17 lawyers were to be appointed, you know, those two lawyers
18 might have the very same opinion that these lawyers have,
19 and we would be right back where we are today. You would be
20 dissatisfied. We would be looking for more lawyers.

21 And, as I say, the purpose of legal representation is
22 not, or any type of professional representation is not, to
23 just find somebody who will agree with you. It's to find
24 somebody who can properly represent you. And I have
25 confidence that these lawyers can properly handle that task.

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1 Now, Mr. Briggs, I will be glad to hear from you.

2 MR. BRIGGS: Your Honor, let me very brief.

3 But the Court has gotten an incomplete picture of the
4 situation.

5 First of all, nobody has tried to undermine anything
6 these attorneys have done. The disagreement is in a degree.

7 I will just give you a couple of illustrations. First,
8 if the Court will read my June 18 letter.

9 THE COURT: Mr. Briggs, let me say this before you go
10 any further. I'm going to obviously let you complete
11 whatever statement you would like to make.

12 My comments did not intend to insinuate that you or the
13 family or anyone else was undermining these lawyers'
14 preparation --

15 MR. BRIGGS: The word was used, Your Honor.

16 THE COURT: I understand that, but I want you to
17 understand I was speaking in a generic sense from -- what I
18 meant to say was I know there are times when lawyers are
19 appointed to represent clients, and clients disagree.
20 Families disagree.

21 They discuss it with family, friends or whoever, and it
22 tends to undermine the case. It doesn't have to necessarily
23 be intentionally for that purpose. I'm just saying it
24 undermines the proper preparation.

25 And obviously I want you to understand I'm not, I'm not

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1 insinuating or accusing you or Mr. Binney's parents or
2 anybody else of engaging in that sort of conduct.

3 I'm not familiar with what's gone on. I couldn't
4 possibly know that. I'm just speaking in a general sense so
5 that Mr. Binney would understand that sometimes that can be
6 unproductive as opposed to productive.

7 In any event, you may continue.

8 MR. BRIGGS: Your Honor, the intent was solely to
9 increase, if you will, the enthusiasm of the defense team
10 for a possible mental impairment defense.

11 It is my understanding, and I want to be corrected if I
12 am wrong, that Dr. Schwartz-Watts was not retained until
13 like two or three weeks ago.

14 Well, everybody that I've talked to, and I need to go
15 back and tell you this. I talked to five defense attorneys
16 in this case, including two solicitors from this circuit,
17 both of whom give these gentlemen high marks. I won't quote
18 them, but they give Mr. Pruett as high of marks as anybody
19 else in this circuit. So we are not talking about
20 qualifications, as such, Your Honor, but we're talking about
21 little distinctions.

22 Let me make sure I make the point for the parents.
23 There are a lot of parents in this state who wouldn't want
24 maybe the most qualified solicitor in the state to defend
25 their parents, their kid, on a death penalty, namely my

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1 friend in Lexington, Donnie Myers, because he's got a
2 predisposition, Your Honor.

3 Most of these guys' experience is with prosecution; not
4 questioning their qualifications. They're a lot more
5 qualified than I am. I have seen one murder trial, and I
6 have tried C. S. C. cases and I won them all, but not very
7 many of them, but I won. But I don't know anything about
8 that. I was never even attempting to do that.

9 The second point that needs to be made, Your Honor, in
10 talking to three different psychiatrists this week, one at
11 the Medical University, one at Emory University and then Dr.
12 Schwartz-Watts; and I have to say, Your Honor, and I'm
13 sorry, but I sent three faxes to Mr. Pruett this week asking
14 him for the name of this psychiatrist. He didn't even
15 bother to answer my request.

16 I found Dr. Schwartz-Watts through my own research.
17 When I talked to her, she is very excited, very enthusiastic
18 about the potential for a mental impairment defense.

19 This case can be solved in one, in one minute, Your
20 Honor, if these two defense attorneys will make a commitment
21 to vigorously, an unequivocal commitment, vigorously pursue
22 any possible mental impairment.

23 It's not even going to be a defense, as I understand
24 the facts, Your Honor. It's going to be mitigation against
25 the death penalty. If they make that commitment, that's

1 what the parents want.

2 And let me make my third point about the concern of the
3 parents. I have been in this case since the first week of
4 June. I have two and a half inches of communication with my
5 client. I get paid ex-number of dollars, no matter whether
6 I do two or three times as much work as I have been doing,
7 and I've done more than they have paid me for. You can be
8 assured of that.

9 There was no problem with me communicating with them.
10 And the Court needs to, the Court needs to check on me and
11 read that letter. I made the commitment to Mr. Slade that I
12 would not pursue the political thing until after this
13 hearing. I have done that. I'm going to make sure you know
14 exactly what I did.

15 The only thing I did was send the draft letter to one
16 of your representatives in the general assembly who is on
17 the list and say do you think this is feasible. He
18 understood it was a draft. It was a member you served with
19 in the legislature. You know him, but I'm not going to
20 mention the name. He has done nothing with it; I have done
21 nothing with it. It's not time to do anything with it.

22 The purpose of that is to have a meeting with four
23 representatives. Two senators in Greenville know this
24 family.

25 Your Honor, I probably ought to go back. This is not a

1 run-of-the-mill type family. This defendant's father runs a
2 postoral counseling program in Ohio. He is connected with
3 the Greenville Christian community. He speaks over there in
4 those. He goes to the Wilds Christian Camp and speaks up in
5 North Carolina.

6 They are outstanding parents, but, unfortunately, this
7 child was 14 before they realized he had a problem.

8 That program is run at what we call Morehead Manor on
9 an estate donated to a South Carolina Christian ministry by
10 Agnes Morehead, the actress.

11 So we are not talking about people who can't read a
12 letter from a lawyer and know what they're saying, Your
13 Honor.

14 I did this much communication. Defense counsel did
15 zero during this period of time. That's not right, Your
16 Honor. I'm sorry. It's not an excuse that I thought we
17 couldn't talk to her. All they had to do was ask me the
18 question. No problem.

19 Again, this is a question of degree, Your Honor. Will
20 this defense team pursue vigorously a potential mental
21 impairment defense and will they better communicate with
22 their client and their parents?

23 If we get an unequivocal on that, I think Mr. Binney's
24 prepared to go with them. I have not made a recommendation
25 to him; his parents has not made a recommendation to him. I

1 need to make that clear, Your Honor.

2 And I will quit with this unless the Court has -- two
3 more points.

4 Just yesterday, Your Honor, the parents asked me to
5 convey this message to the Court. "Please convey to the
6 judge that it is our desire to have a credible lawyer with
7 death penalty experience added to the team. We would like
8 to keep Mitchell Slade and Trent Pruett. We believe their
9 prosecution expertise would be an advantage. If we can only
10 keep one of them, it would be their choice."

11 Your Honor, they are not trying to undermine these
12 fellows. I've done my homework. They are both qualified.
13 But if the Court will let me, I'd ask them a question. The
14 question is how many death penalty cases have you defended
15 as opposed to prosecution. That's the question.

16 The communication and the mental impairment. That's
17 the only three questions these parents have; that's the only
18 three questions Mr. Binney has.

19 So if those, if the two, let's forget about the
20 qualification. I heard what this Court said. I've got high
21 regards for both of these men from people who know here.

22 Now, obviously the death penalty gooroos, they don't
23 think they got enough experience. But that's an opinion,
24 Judge. I understand that.

25 But it's not just that I'm blowing smoke. I have done

1 my homework. And this problem ought to be resolved, because
2 you've got a defendant facing maybe certain death for a
3 serious crime unless the defense team comes up with
4 something that fits into the category under the statute of
5 mitigating circumstances.

6 Now, just so the Court knows, I wrote this in bold, and
7 I'll quit with this unless the Court has some response or
8 they have some response.

9 When you look at the fact, there's been very little
10 communication in here. This is the position of the parents.
11 Frankly, that secretiveness from the former prosecutors
12 causes great concern for these parents.

13 They don't know these gentlemen, Your Honor. They have
14 no way of questioning their integrity, and I wouldn't. You
15 know, but why can't they communicate? If they need a
16 release from him, get it.

17 Now, I will tell the Court this. I want to do two more
18 things. I want to give to Mr. Pruett the memo I got from
19 Jeffrey Blume about not only the kinds of psychiatrists you
20 need but a special investigator to go back and look at the
21 family.

22 There is some evidence that this guy may have a birth
23 defect. That's not the primary opinion of Dr. Watts, but
24 it's a concern of the parents. It ought to be investigated.

25 Nobody is telling them use this defense. They're

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1 saying do your homework and then decide whether the defense
2 is valid. That's all we are asking for.

3 I have given you the opinion of the parents, and that's
4 their position.

5 Your Honor, I think there is two ways of doing this.
6 Either we apologize to them, because I've already told my
7 client I can work myself out of a job. I don't have to be
8 here beyond this little political thing if we decide to do
9 it.

10 And they would have participated, Your Honor. They
11 would have been full participants in this thing. I think it
12 has potential of four senators, maybe even the senator from
13 Cherokee if we can persuade him to get in there, going and
14 seeing the solicitor and saying, listen, why are you
15 insisting on the death penalty in this case in light of all
16 of this. Now, we wouldn't show him everything we've got.
17 Of course you don't do that.

18 I was hired for two things, solve the communication
19 problem, do the political thing. Period. I'm out of here.
20 And I haven't been paid for any in August, Your Honor. I
21 may be out the end of this month. So it's not that anybody
22 is trying to interfere. It's trying to get the problem
23 resolved.

24 It's a perception, problem, Your Honor. It's not
25 necessarily a real disagreement. It's a degree thing.

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1 So that's my position on behalf of the parents, Your
2 Honor. Thank you.

3 THE COURT: All right. Does anybody wish to respond?

4 MR. SLADE: Yes, sir, I do. And I apologize for taking
5 up the Court's time on this.

6 Your Honor, when you were addressing Mr. Binney a few
7 minutes ago, you told him that disagreements over strategy
8 between counsel and clients is not uncommon. I agree."

9 I have had those types of disagreements before, Your
10 Honor. In those cases we have successfully worked through
11 those problems. I have never seen it this bad, Your Honor.
12 And I don't think this problem can be worked through.

13 I disagree with Mr. Briggs. He says that nobody is
14 telling us to use a particular defense. That's incorrect.
15 The family is insisting that we use a particular type of
16 mental incapacity defense.

17 It happens to be so that it is a mental -- well, I
18 don't want to phrase it that way -- a mental defense that
19 will certainly serve the purpose of exculpating them from
20 any responsibility for his mental conditions, if such
21 exists. And they are very, very insistent, as I think you
22 can see from Mr. Briggs' presentation, that this defense be
23 presented.

24 We are certainly not -- I mean, we spent a good bit of
25 time and a good bit of resources trying to develop or trying

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1 to take a look at, investigate, whether or not there are A,
2 B, C or D type of mental defenses out there or mental
3 conditions that would allow us to predicate a defense based
4 on that condition.

5 However they have chosen a particular one. I mean by
6 that Mr. Binney, our client, Mr. Briggs and the parents have
7 chosen a particular one that at all costs must be pursued.

8 I think you can see the degree of intensity with which
9 they intend that that defense be pursued.

10 I want to -- I would like to reiterate, along with Your
11 Honor, that I don't -- I certainly don't accuse any of them
12 of bad motive in this case. Not Mr. Binney. He's facing
13 the death penalty. He is certainly entitled to be very
14 concerned about this case, and the outcome and the strategy.

15 I certainly understand the parents' intense concern,
16 and Mr. Briggs on behalf of his clients, Reverend and
17 Mrs. Binney.

18 But, at the same time, Your Honor, they are intent on
19 pursuing a particular type of defense, and I think from the
20 beginning when we have told them, and, Your Honor, we have
21 met with Mr. and Mrs. Binney literally for hours; several
22 hours, I think back in March. In April, I think I spent,
23 well, I have called Reverend Binney several times and had
24 discussions with him. I've had discussions with Mrs. Binney
25 on the phone. As far as I know, there's not -- she's never

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1 called, and I have not returned her call.

2 So, Your Honor, I certainly don't think there is any
3 negligence on our part in trying to communicate with
4 Mr. Binney's parents.

5 I think that Mr. Briggs' presentation, as well as his
6 actions and the parents' actions, has been an effort from
7 the beginning to get a lawyer in this case who would follow
8 what they believe is their -- what is certainly their chosen
9 defense and the defense that they think ought to be
10 presented.

11 I just refer you, Your Honor, to Mr. Briggs' June 11th
12 letter when he was still writing to me. He refers to
13 replacing the other state-appointed attorney, Mr. Pruett.
14 At first I think Mr. Briggs took the position that Trent
15 ought to be out of the case, and they wanted somebody else
16 in here that agreed with them to be with me now or to help
17 me with the case. I told them I was not interested in being
18 in this case if Trent, Mr. Pruett, was not in the case.

19 So, I think, Your Honor, again, I'm not attributing a
20 bad motive when I say that they are undermining our efforts
21 to have a working relationship with our client. But the
22 point is the intensity of their effort and their belief to
23 carry out this defense that they have decided on has the
24 effect of undermining.

25 They are communicating to Mr. Binney. Mr. Briggs is

1 communicating to him through the parents. That has the
2 effect of undermining. As you can see from what Mr. Briggs
3 has said in his presentation, he has solicited opinions of
4 the way that this case ought to be handled from Mr. Blume
5 and communicated that to the parents. I'm sure they, in
6 turn, communicated that to Jonathan.

7 And, you know, where that differs from the way that we
8 think it ought to be pursued, they are insistent that it be
9 pursued the way Mr. Briggs and his consultants think it
10 ought to be tried.

11 Your Honor, I'm sorry. I know the Court's reluctance
12 to substitute counsel, and I know that disagreements between
13 client and counsel is something that you have to deal with,
14 and I know -- but I am sorry. I think the well has just
15 been poisoned to the point that we're not going to be able
16 to work with Mr. Binney.

17 So that's my response to Mr. Briggs, Your Honor.

18 MR. BRIGGS: Your Honor, one other point.

19 The Court is still being given an inaccurate picture,
20 Your Honor, and I, and I, and I have no reason to think --
21 Mr. Slade is just mistaken. I don't think he is
22 intentionally doing it. But nobody, and I am going to
23 repeat that, nobody has insisted on the use of what is
24 referred to as a fecal (sic) alcohol syndrome, a fecal (sic)
25 alcohol effect defense.

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1 The mother believes it, but I'm going to read you two
2 things so that you will know that neither I nor the parents
3 are prepared to say that has to be used.

4 I went to the trouble, Your Honor. And I am not even
5 counsel. I went to the trouble of reading an entire book on
6 this subject, and I did a short summary of it. And all
7 three of the psychiatrists I talked to, and we are talking
8 about experts now, agree with me that all of the study -- I
9 could have brought the book -- is antidotal, Your Honor.

10 Here is what the law is. "The defense would probably
11 be unsuccessful by itself." This is quoting from this book.
12 "To date there are no scientific studies following children
13 with F. A. S. to determine if they have more trouble with
14 the law than other groups, nor studies in prisons to see if
15 there are disproportionate numbers of inmates with F. A. S."

16 The problem is, Your Honor, when you read a book,
17 they're about stories. And these children, in fact, have
18 mental defects. If they're F. A. S., they have facial
19 features, Your Honor. If they're F. A. E., they don't have
20 facial features. But they have real problems.

21 Just so you know this as a legitimate concern, Your
22 Honor, there are numbers of stories. The one I liked the
23 best was the boy was ten or 11, I think. He ran into some
24 kids following him from home. They started telling the
25 little neighborhood girl we want to "F" you. She starts

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1 swinging a book bag. The other two, the non-F. A. S. kid,
2 leaves. The F. A. S. kid follows the girl all the way home,
3 Your Honor, goes in her front door, walks right by her
4 father and tried to walk up to her bedroom still saying
5 those words. They have real judgmental problems, Your
6 Honor.

7 Now, the second point I wanted to make, so you know
8 that, no, nobody has asked him to use that defense. Dr.
9 Schwartz says she doesn't think he's got it. Even if he
10 has, he can't use it because of this.

11 She says you need a neurological psychiatrist to do a
12 frontal lobe study, M. R. I.s and all of that bit. I'm
13 telling you there's more work to be done, Your Honor.
14 That's all the parents want, is for all of the work to be
15 done, then these guys, based upon that research, make their
16 minds up. But don't make up your mind now that you're not
17 going to use a defense before you even know what it is.

18 Now, I'm not going to sit here and let somebody
19 misrepresent my position, Your Honor. I told you what the
20 right position is. No -- the mother is enamored by the F.
21 A. E. defense, but Dr. Schwartz-Watts is not. And I'm going
22 to quote again. The psychiatrist at Emory University told
23 me the same thing that this says. "Mr. Briggs, nobody has
24 studied 20 children with F. A. S. or F. A. E. for 20 years
25 and found out whether "X" number of them are criminals.

1 It's just not there, Your Honor.

2 Now, they have a lot of problems. They have problems
3 with math. They have problems, but I won't get into all of
4 that. But it is not true.

5 Yeah. The mother likes it, but it's not true that
6 anybody said you have to use this defense. All we're saying
7 is do your homework before you make up your mind.

8 THE COURT: All right. Well, in that respect, let me
9 just say that I know also I have had experience with Dr.
10 Schwartz-Watts.

11 I know Dr. Schwartz-Watts has testified and has been
12 employed by both defense and prosecution sides in cases.
13 And, quite frankly, I think she's immanently qualified to
14 render opinions in the fields that she has expertise in,
15 which are more than one but --

16 MR. BRIGGS: And she's not there yet, Your Honor. She
17 hasn't done her homework.

18 MR. PRUETT: Just I don't want to interrupt the Court,
19 but statements made on direct about that, I don't want that
20 to come back later to kind of haunt me in a later
21 proceeding.

22 I did contact Dr. Schwartz-Watts back in May, beginning
23 of May, and she had several other commitments. And she told
24 me if you want me to do this evaluation, you want me on the
25 case, it may be a month before I can do it.

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1 So that's why it's only been in the last few weeks that
2 she's gotten back in touch with me. And she made these
3 recommendations when I told her, I said, look, we need to
4 find out where we're at on the case, because this case may
5 be going in an entirely different direction before I spend,
6 what she was recommending, anywhere from ten to fifteen
7 thousand dollars in additional tests.

8 I just said let's just wait and see what the judge
9 rules. We may be off the case. New counsel may come in and
10 say, well, we intend to take this case in a different
11 direction.

12 Some of the things he's alluded to that need to be
13 done, I've known about two or three weeks. I intentionally
14 held off for the reason we had this hearing this morning.

15 THE COURT: All right. Well, in any event, it appears
16 to me that there has been obviously some breakdown in
17 communication.

18 I don't, based upon what I've heard and what I can see
19 and what I believe, I don't believe that the breakdown in
20 communication is such that the proper preparation and
21 presentation of Mr. Binney's defense cannot be
22 rehabilitated, if that's a proper word to use. Perhaps it's
23 not.

24 Nevertheless, I know there's been apparently some
25 miscommunication or failure to communicate perhaps, and I

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1 think that's all that exists. I don't think it bears at all
2 upon -- or at least it doesn't appear to me to this point
3 that it would bear at all upon counsels' ability to properly
4 prepare and present Mr. Binney's defense in his case.

5 I know that counsel have, in fact, contacted the Court
6 ex parte, and appropriately so, for the purpose of seeking
7 funds to hire competent psychiatric experts for consultation
8 and perhaps for presentation of some type of a defense.

9 So I know that work has been done, and I also know that
10 apparently the breakdown in communication between the,
11 perhaps the, parents and the defendant and the counsel has
12 perhaps resulted in the preparation of this case not being
13 able to move forward like it otherwise would have been able
14 to move forward.

15 But it appears to me that counsel does have
16 Mr. Binney's interest at the forefront. They have contacted
17 proper and experienced and qualified experts in order to
18 develop any potential defense that the defendant might have
19 so far as mental health issues are concerned. But those
20 have to be developed, and that can only be developed if
21 there is cooperation and communication between the defendant
22 and counsel and the experts.

23 And, you know, while there is no question that counsel
24 is going to have to talk to the parents in the case, counsel
25 doesn't represent the parents. Counsel represents

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1 Mr. Binney.

2 The parents have their own interest. Mr. Binney might
3 have a different interest, but his interest is what counsel
4 has been appointed to represent.

5 And if that is not in concert with the parents'
6 interest, it's not in concert with the parents' interest.

7 Mr. Briggs, you have been apparently hired by the
8 parents to represent them, to protect their interest, and of
9 course their interest perhaps in their son's situation. But
10 while counsel is going to have to talk to the parents in
11 order to properly prepare Mr. Binney's defense, and they
12 do -- you know, I honestly don't think they ought to have to
13 go through counsel to do it.

14 And I'm not saying, Mr. Briggs, that you think they
15 should. All I'm saying is perhaps by your presence, whether
16 you conveyed that impression or not, or whether it was
17 conveyed by the parents in simply hiring a lawyer to
18 supervise or to keep watch over the defense team, perhaps it
19 gave counsel the impression that they perhaps don't need to
20 be contacting the parents and that they have to go through
21 you. And that's not going to work. I mean, everyone needs
22 to be working together in order for a proper presentation
23 and presentation to occur in the case.

24 And I, quite honestly, feel that from what I see and
25 what I hear that there's no reason why that cannot be

1 accomplished. And it should be accomplished. And
2 apparently the case is progressing like it should.

3 Proper experts have been contacted and are being
4 consulted. Whether those experts can assist or can support
5 what perhaps Mr. Binney's parents believe is a proper course
6 of conduct, maybe they can support that, maybe they cannot.
7 But I don't think it's the obligation of counsel to simply
8 find -- I don't think it's the obligation of the Court, of
9 this Court, to find counsel that will agree with Mr. Binney.
10 And I don't think it's the obligation of counsel to find
11 experts that will agree with parents or anybody else's
12 theory of the case.

13 I think it's counsel's obligation to use their
14 experience and their knowledge and their training to
15 properly prepare and present Mr. Binney's case, the task
16 that they have been appointed and have agreed to assume.

17 And I have the absolute utmost confidence in not only
18 their ability but in their willingness to properly represent
19 Mr. Binney.

20 If I did not have that confidence, they would not have
21 been appointed. And I can honestly say I don't know of any
22 two other lawyers in the Seventh Judicial Circuit that can
23 any better represent Mr. Binney in this case than these two
24 lawyers who have been appointed.

25 I could have appointed any number of lawyers. I

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1 appointed these two. And I would not have done so had I not
2 been confident in their ability to properly handle the
3 matter.

4 So I'm going to look over these letters just a moment
5 before I make a final decision.

6 (Pause.)

7 THE COURT: All right. Well, I have had an opportunity
8 to review the material.

9 Yes, sir.

10 MR. BOGGS: Your Honor, could I note a concurrence in
11 what you assessed awhile ago and offer some kind of
12 suggestion as a mitigating thing, as it were, but there
13 won't be any other appearance of interference.

14 I don't know how long I will be involved, but I'm
15 prepared to immediately give permission to defense counsel
16 to communicate directly with the parents. That's not a
17 problem.

18 And I would further suggest that the only reason I
19 would communicate with them, that is defense counsel, would
20 be at the appropriate time ask them if they wanted to pursue
21 the political thing.

22 They could do that themselves, Your Honor. I don't
23 even have to be there for such a meeting. I just think it's
24 feasible that this Court knows that I started out working
25 with Senator Thurmond. So I do have some political

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1 know-how, Your Honor.

2 And I do know that sometimes when politicians are
3 earnest they have a way of persuading other folks to do
4 things, but that's these folks' choice if they were always
5 going to be involved in it. So I will not have further
6 communication with them directly except to ask at an
7 appropriate time whether they want to do that little
8 venture.

9 Now, my other suggestion to them is that I know
10 Mrs. Binney is, let's say, enthusiastic. I have had to tell
11 her, listen, and I am telling the Court, I tell her you
12 don't have to question me, you know. You don't have any
13 basis for that. Just slow down and wait until the time
14 comes and then you and I will discuss that.

15 So all I'm saying is if they want some help with
16 explaining things to the Binneys, I will be glad to provide
17 that. I do know the family will be in town August the 14th
18 and 15th if there is a need to see them.

19 But I have never attempted to tell these guys how to do
20 their job, Your Honor, because I wasn't in a position to do
21 that. But if that helps in any way, the Court can order me
22 to do whatever it wants to do. Okay.

23 THE COURT: All right. Anything further from anybody?
24 Mr. Binney, have you got anything you want to add?

25 THE DEFENDANT: No, sir.

1 THE COURT: All right. Based upon everything that has
2 been presented, I do find that ~~the defendant's motion should~~
3 ~~be denied~~. Counsel will continue with their representation.

4 And, Mr. Binney, just let me say that, you know,
5 obviously you have a very serious case. These lawyers have
6 a very difficult job to do.

7 Understand that you will have concerns, your parents
8 will have concerns about the course of the case. And that's
9 perfectly understandable.

10 But let me say that it's important, I believe, that all
11 of you work together and that you listen to your lawyers,
12 you take advice. You don't always have to accept it. I'm
13 not insinuating in that that you should just always do
14 whatever the lawyers say necessarily.

15 But my point is, is that they are trained; they are
16 experienced; they are competent; they are capable; they are
17 qualified. I don't know what your background or
18 qualifications are, but I do know what theirs are. And, as
19 I have already stated, I have the utmost confidence in their
20 ability to properly represent you and to properly prepare
21 your case for presentation.

22 So let me suggest that you try to work with them and
23 cooperate fully with them, and your parents too. And I
24 believe that if you do that, then you will be able to
25 present your case in the best light that it could possibly

1 be presented.

2 All right. Anything further?

3 MR. PRUETT: Your Honor, we may need to address with
4 the prosecutor in here the scheduling of the case. It's 90
5 days away. I think we have been somewhat hampered by the
6 pendency of this motion in our preparation of his defense.

7 I'm not sure we can be ready to try the case should it
8 be in 90 days.

9 THE COURT: Okay. Well --

10 MR. PRUETT: I know you don't like continuances, and
11 both and myself in this case and arranged my own schedule
12 around that October trial date.

13 And I am concerned. We have kind of stopped in many
14 respects what we were doing on the case.

15 THE COURT: All right. Well, let's ask.

16 See if the solicitor is outside, or ask someone to
17 contact them.

18 MR. BRIGGS: I believe, Your Honor, for whatever it is
19 worth, that Dr. Schwartz, she feels like there may be as
20 many as four or five doctors that need to see this guy, the
21 medical exam, M. R. I.s, CAT scans and all of this, because
22 she feels like there might be some physical damage to the
23 frontal lobe and that kind of stuff. And that's all. She
24 doesn't know. She hasn't done her homework yet. But I am
25 sure she would give you an affidavit as to how much more

1 time she needs, Your Honor.

2 THE COURT: I understand.

3 MR. BRIGGS: I have my phone in the car. May I go --

4 (Whereupon, Mr. Briggs was excused from the courtroom.

5 Counsel for the state was returned to the courtroom.)

6 THE COURT: All right. Let the record reflect that

7 Mr. Briggs has left.

8 Defense counsel and the defendant are present, as is

9 the solicitor.

10 I understand that other issues that we had to address

11 was the issue of the state's motion previously made to

12 acquire an independent examination of the defendant.

13 And I understand now from the hearing that was just

14 held ex parte that that issue is not going to be able to be

15 resolved today. There are other matters that the defense

16 has to address before that issue can be resolved, and I will

17 need to address that issue with defense counsel in order to

18 ensure a timetable to determine when we can address the

19 state's motion.

20 So I've got to address with the defense potential

21 defenses and the time necessary that it will take for any

22 employed experts to complete that or make that

23 determination.

24 Any comments?

25 MR. GOWDY: No, sir.

1 MR. PRUETT: I would like to say, Judge, we have been
2 diligently pursuing these mental health evaluations since
3 the last hearing. We've retained one expert to do an
4 evaluation, and we've talked to another expert, Dr.
5 Schwartz-Watts.

6 THE COURT: I understand.

7 MR. PRUETT: I wanted the prosecution to know that.
8 Her schedule didn't permit her to immediately go down and
9 see Mr. Binney, and she didn't do it until the end of June,
10 and there was a report made about a week or so later.

11 Her recommendations are going to largely depend on
12 whether we are going to continue as counsel with the motion
13 pending. So we have been pursuing that. It has just been a
14 question of scheduling them to go see Mr. Binney and working
15 around this hearing.

16 MR. GOWDY: Is it too early, Judge, to have another be
17 it artificial deadline for knowing or for -- do we know yet
18 when we will know whether or not that will be part of the
19 analysis, whether or not we will be --

20 THE COURT: That's what I have got to determine. I
21 mean, that was not a part of the -- that issue was not
22 addressed at the hearing just completed. That was a totally
23 different issue. That was simply the motion for relieving
24 counsel, but I want to address that.

25 I just brought you back so you will understand where we

1 are, but I want to address with them now what they perceive
2 the timetable to be so that we can determine when the state
3 can be heard on their motion.

4 MR. BARNETTE: Your Honor, do you have the motion under
5 advisement, Your Honor, or have you made a ruling concerning
6 counsel?

7 THE COURT: I have denied the motion to relieve them as
8 counsel, so they will be continuing. I mean, hopefully I
9 will know very soon what the timetable looks like, but I
10 won't know it until I address it with them. In any event, I
11 just brought you back so we would know where we are. But
12 that's all we need today.

13 MR. GOWDY: Thank you, Judge.

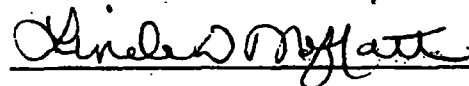
14 END OF REQUESTED TRANSCRIPT OF RECORD
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 12th day of July 2002.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 11, 2003



Linda D. Moffitt
Circuit Court Reporter

WITNESSES

Michael Fowlkes, CCSO

3604

ARREST WARRANT NO. F981512

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

VERDICT

GUILTY

Foreman of Petit Jury

Date:

DUCKET NO.

The State of South Carolina,

County of Cherokee

COURT OF GENERAL SESSIONS

JUL 12 2000 TERM

THE STATE

vs.

Jonathan K. Binney

Indictment for Burglary
(Dwelling)

Holman C. Gossett

A TRUE COPY
Katie W. Brown
CLERK OF COURT
CHEROKEE COUNTY, S.C.

3735

3605

STATE OF SOUTH CAROLINA)
COUNTY OF Cherokee)

INDICTMENT FOR BURGLARY
(DWELLING)

At a Court of General Sessions, convened on JUL 12 2000,
the Grand Jurors of Cherokee County present upon their oath:

COUNT ONE — BURGLARY IN THE FIRST DEGREE
(DWELLING)

That Jonathan K. Binney
did in Cherokee County on or about June 7, 2000,
willfully and unlawfully enter the dwelling of Judy L. Southern
without consent and with the intent to commit a crime therein and the defendant
was armed with a deadly weapon, to-wit: a pistol

COUNT TWO — BURGLARY IN THE SECOND DEGREE
(DWELLING)

That _____
did in _____ County on or about _____,
willfully and unlawfully enter the dwelling of _____
without consent and with the intent to commit a crime therein.

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

Jason G. Wall
SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATECherokee

3606

VS.

Jonathan K. Binnery

AKA:

Race:

W

Sex:

M

Age:

DOB:

SS#:

Address:

4471 Old Pacolet Hwy.Cowpens, SC

DL#

SID#:

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:00 -GS- 11 - 525

A/W#:

F 981512

Date of Offense:

6/7/00

S.C. Code §:

16-11-311

CDR Code #:

21 41 11 7☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Burglary 1st Degreein violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 21 41 11 7☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of Life days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for days/months jail time.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ set by SCDPPPS Recipient: *Fine: \$§14-1-206 (Assessments 100%) \$§14-1-211(A)(1) (Surcharge) \$§14-1-211(A)(2) (Surcharge) \$§56-5-2995 (DUI Assessment) \$1% to County (if paid in installments) \$TOTAL \$

Clerk of Court/Deputy Clerk

Court Reporter:

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

PRESIDING JUDGE Judge Code: Sentence Date: November 14, 2002

SCCA/217 (1/2001)

WITNESSES

Michael Fowlkes, CCSO

3607
209C

ARREST WARRANT NO. F981513

ACTION OF GRAND JURY

TRUE BILL

C. J. Depner
Foreman of Grand Jury

VERDICT

Guilty

Brutus W. Linder 11-11-02

DOCKET NO.

00-GS-11-526

The State of South Carolina,

County of

Cherokee

COURT OF GENERAL SESSIONS

JUL 12 2000

TERM

THE STATE

vs.

Jonathan K. Binney

Indictment for Murder

§16-3-10

Holman C. Gossett

3608

STATE OF SOUTH CAROLINA)
COUNTY OF Cherokee)

INDICTMENT FOR MURDER

At a Court of General Sessions, convened on JUL 12 2000,
the Grand Jurors of Cherokee County present upon their oath:

COUNT ONE — MURDER

That Jonathan K. Binney
did in Cherokee County on or about June 7, 2000,
feloniously, wilfully and with malice aforethought, kill one Judy L. Southern
by means of gunshot
and that the said victim died as a proximate result thereof.

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

Jason G. Wall
SOLICITOR

A TRUE COPY
Katie W. Babin
CLERK OF COURT
CHEROKEE COUNTY, S.C.

3609

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

THE STATE,

vs.

JONATHAN KYLE BINNEY,

DEFENDANT.

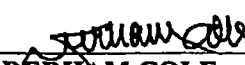
IN THE COURT OF GENERAL SESSIONS

SENTENCE

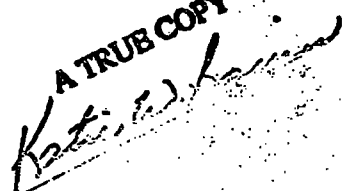
CASE NO.: 00-GS-11-526

The Defendant, Jonathan Kyle Binney, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the defendant, Jonathan Kyle Binney, be taken to the County Jail of Cherokee County, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 14th day of January, 2003, upon which day between the hours of six o'clock A.M. and six o'clock P.M. the defendant, Jonathan Kyle Binney, shall suffer death by electrocution or lethal injection in the manner provided by law.


J. DERHAM COLE, Presiding Judge

November 14, 2002
Gaffney, South Carolina

A TRUE COPY


VOLUNTARY STATEMENT

PAGE

3610

STATEMENT OF

Jonathan Bracey

AGE

25

DATE

12-8-99

ADDRESS:

4471 Old Parker Rd - Springfield, SC 29307

PHONE:

864-474-1724 CASE

2:30 pm on the 7th of December my wife left for work. My son & Daugh were both asleep. My usual is playing on the computer which I didn't. My son, Isaac, wake up sometime around 3:40 ~~4:00~~ 4:00 pm to which I fed him then got him down from his high chair to play in his playroom which has a child gate in the doorway. [redacted] woke up sometime around 4:30 or a little after and I opened the bathroom door so I could hear Isaac if he fell or bumped his head. I started the shower & got [redacted] undressed, got her soap and styrofoam tub cushion in case I needed both hands. The water was too hot so I laid [redacted] against my forearm so I could soothe her better. My right hand was under her vaginal & buttocks area as I applied some soap with my left hand, with her back against my chest. [redacted] started to wiggle & fall out of my hand. As she was falling, my hand was somewhat still under her vaginal area and I squeezed with my right hand thinking I had shook off mainly her butt, with my left hand I tried to get my hand under her chest. I did not notice the blood on the tub floor till I turned [redacted] around and noticed the blood on my finger and her vagina.

End of Statement



I have read this statement consisting of 1 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 905 P.M. on the 7th day of Dec 1999.

WITNESS:

[Signature]

[Signature]

VOLUNTARY STATEMENT 3611

PAGE 1

991200504

Jonathan Rinney AGE 25 DATE 12-8-99

ADDRESS: 4471 Old Pavalot Road Spots

PHONE # 474-1724 CASE:

A month ago I used my ~~finger~~ finger to dig out some feces that I thought could irritate ~~Mika~~ I did not use something like a Q-tip as I thought that it may get pushed down further or some of the cotton might come off the Q-tip. I told my wife about this and that it had made the vaginal opening feel irritated. We took her to her pediatrician, Dr. Miles (In Pavalot) & he said there was no need to worry. On December 7,

after putting my son in his playroom & putting the gate in the doorway, I had taken

~~Mika~~ so I could feed & bathe her. In the shower with my back against the

shower curtain, ~~she~~ I was standing sideways in the shower. With ~~Mika~~

chest laying in a forward position on my left arm, her bottom against my

stomach, I changed the water temperature as it was too warm. I then moved

Mika's bottom on to my right hand with her back facing my chest &

laying against me I used my left hand to apply some soap to ~~Mika~~

In the process of soaping her, she started to wiggle & toss her weight.

My left hand ~~was~~ was not around her at this but I was able to place my

left hand under her chest in time to shift her falling weight to her bottom.

My right hand was under her vaginal & bottom area & as ~~she~~ was falling. As my

left hand began to regain control of her upper body, my right hand was squeezing

to try and grasp hold of her bottom. Upon doing this, ~~she~~ had squatted; so when

she landed on my right knee, she landed with some force. Upon picking her back

up, in a cradle position, in my left hand, I noticed that there was blood

on my right hand, and on the tub floor. I immediately called my wife & told her

so she could drive us to the hospital. I then called ~~on~~ Doctor and

was told to take Mika to Mary Black. End of

I have read this statement consisting of 1 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 3:50 P.M. on the 8th day of Dec. 1999

WITNESS: Diane Heatare J.R.

VOLUNTARY STATEMENT 3612

PAGE 1

991200504

STATEMENT OF: Jonathan Binnely AGE 25, DATE 12-9-99

ADDRESS: _____

PHONE # 864-474-1724 CASE: _____

On 12-7-99 I had decided to give my two children a shower so my wife could relax when she got home from work. Some time around 4:30 I had started to give [REDACTED] my daughter, a shower. Everything I had stated in my other statements, such as holding [REDACTED] with my right hand under her butt & vaginal area & about washing her was true. The one thing I had left out was that while holding her in my right hand & washing her with my left hand, I started to daydream or drift with my mind. I had not physically touched or placed any object or finger inside her vagina but mentally, I feel I was somewhat aroused by [REDACTED] squirming in my hands while daydreaming. I feel that her squirming had brought me out of this daydream or whatever, into the realization that she was beginning to fall. Scared & frightened by this realization of both the horrid thought that took place & with [REDACTED] starting to fall caused my attention to greatly increase. In reacting to this, with my hand that was still around her vaginal area, I ^{do} squeezed my hand trying to grab hold of [REDACTED]. In doing so, my middle finger caught her vagina & I believe that ^{do} maybe even my right hand ring finger touched [REDACTED] vagina. End of Statement.

I have read this statement consisting of 1 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 12:50 p.m. on the 9th day of December, 1999.

WITNESS: Leanne BinnelyJonathan Binnely

VOLUNTARY STATEMENT 3613

PAGE 1

991200504

STATEMENT OF: Jonathan Binney AGE 25 DATE 12-9-99ADDRESS: 4471 Old Parcel Rd.ONE # 8644741724 CASE:

In a prior statement today I had told about some inappropriate thoughts. The first time I had these thoughts was when I was cleaning the feces from

[redacted] vagina. The second time was in the shower as well as the third

me. Before these thoughts of [redacted] there were previous thoughts of my

mother of whom I only had a picture of while with my adoptive parents. ^{and}

^{I also} had thoughts of my cousin, two years ago, when she said she

bisexually liked me. The thought of [redacted] that happened in the shower

2 days ago ^{on} the 7th, occurred while washing her. I was washing her

army & then her vaginal area, which in a previous statement I said I

did not penetrate her. This was true at this point, before the accident.

I had started to daydream I suppose about what it would be like to have a

sexual relationship some years in the future. Not about the present

because I knew she ^{was} too young & was not interested while daydreaming

about this and having my hand on her vagina, is when [redacted] started

a shift and squirm and because my hand was between the vagina (labia)

^{and} her vaginal opening was right at my finger tip. I believe that when

he squirmed, because of where my hand was, it startled me into reality

and I instinctively squeezed my right hand. Because my finger had slipped

it and was at the vaginal opening, the squeezing of my hand pushed

my finger in. Because I was startled, I didn't realize how much

pressure I used, causing her vagina to react out of fear.

End of statement

I have read this statement consisting of 1 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

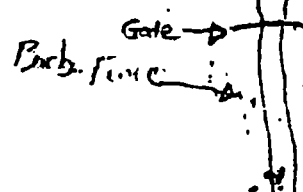
This statement was completed at 2:10 P.M. on the 9th day of December, 1999

WITNESS:

Dina [redacted]Jonathan Binney

Melaney, 4471 ... 44-1724-3614

This is my wife Melan C. My scooter is back about 2 or 3 drive way here. ← looks like this



Scooter is about 15ft behind tree line

It's no more than a Quarter mile from this house. I had to go off all because I will not let them send me to prison. I was a horrible person ... Well, I decided to prove them wrong. I was under a lot of pressure I am, or was under a lot of pressure, I couldn't deal with it. I tried to do what was right & better. Well, I was screwed. I really wanted to try but I didn't. When even the lawyer figured I would get 10 yrs or more. I love you, sorry I had to end like this. I have to my loving, caring wife.

Joshua Berry

Stacy

Friday
June 16th C

I request to see a Detective without the presence of my attorney. This is my request that this only be val. For the dates of June 16th & 17th, ^{and} any further contact ~~is~~ ^{is} not initiated on my part, unless further indicated by me. The undersigned.

Jonathan Biny

CHEROKEE COUNTY SHERIFF'S OFFICE
200 West Montgomery Street
Gaffney, South Carolina 29341

3616

CASE NUMBER

Pre-Interrogation Waiver Form

Name: JONATHAN KYLE BINNEY Address: 4471 OLIVET RD SPAR
Telephone Number: 864-474-1724 Social Security Number: [REDACTED]
Date of Birth: [REDACTED] Today's Date: 6-16-00 Time: 3:16 P.M.

STATEMENT OF RIGHTS

Before any questions are asked of you, you must understand your rights.

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and to have a lawyer present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, a lawyer will be appointed, free of any costs, to represent you before any questioning begins.
5. You have the right to stop answering questions at any time.

The above rights have been read to me by SPIKE McCRAW

I have read the above rights, and I understand them fully.

Witness [Signature]

Signed [Signature]

WAIVER OF RIGHTS

Fully understanding my rights as they have been explained to me, I wish to waive (give up) my rights and talk to officer McCRAW & MIKE FOWLKES in reference to A HOMICIDE.

I have waived my rights freely and voluntarily, without being threatened or coerced; and without being promised any leniency or reward.

Signed [Signature]

Witness [Signature]

Time Interview Began: 3:20 P.m. Time (Statement/Interview) was completed: 6:19 P.m.

I have made this statement freely and voluntarily, without being threatened or coerced; and without being promised any leniency or reward.

I have read this statement consisting of 5 page(s), and I swear or affirm that the facts contained therein are true and correct.

I further state that I have received a copy of this statement.

SWORN TO AND SUBSCRIBED TO BEFORE ME

THIS 16TH DAY OF JUNE 2000

E. J. "Spike" McCraw
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 9-23-2002

Signed: [Signature]

Witness: [Signature]

Witness: [Signature]

VOLUNTARY STATEMENT

PAGE 1 OF 5

CASE NUMBER

NAME: Jonathan Kyle Binney

On June 6th I went to a bank at Hillcrest Shopping center where a friend of mine was a board & an acquaintance for about 3 or 4 years. The reason I went to see him that day was that he had a Makarov 9x18 hand gun that he said he would sell to me. I purchased the handgun from him & returned the Villageer Lodge motel Room. I had been in the process of finding a permanent job & had been really depressed ⁸⁸ about finances. My wife and I really couldn't afford for me to be staying in a hotel room. Unknown to my wife, I had stayed in the basement of our house a few times because of a lack of funds. Sometime in the evening, my wife had called, which was still the evening of the 6th, my wife had called me at the Motel around 9pm to see if I was OK & to chat. After getting off the phone, having a fresh set of ⁸⁹ batteries, I went to Big K, at Hillcrest and purchased some lightbulbs for my flash light & proceeded to Perclet-Campers highway, where I had previously recalled a house being somewhat secluded & in the woods, I would go visit. ⁹⁰ I found a place that I could hide my scanner about a quarter mile down the road on some one else's property. I then walked back to the Southers' Residence, who I had never met, seen or talked to previously, stayed just beyond their property line, and watched the house for any activity, or if I could tell how many people lived there I circled the property once or twice that night & listened to my scanner that I had brought with me. JB

WITNESS:

M. A. F. J.

WITNESS:

Spike McLean

Jonathan Binney

Signature of person giving voluntary statement

VOLUNTARY STATEMENT

PAGE 2 OF 5

NAME: Jonathan Kyle Binney

CASE NUMBER

Between the hours of 12 midnight & 7am on June the 7th, I basically just walked around & waited for day light to come. At this point, I wasn't sure if I just wanted to go in the house to commit suicide, or to rape some one, or to just shoot all of them then kill myself. I started roaming the property around 8:45 cause I thought I heard one car leave. I continued on around & took the long way around the property to make sure I had given plenty of time for them to get out of the house. I approached the ~~stable~~ ^{stable} sometime around 9:30 & heard another vehicle start up. I climbed up into the stable & watched a green truck go down the driveway to leave. I waited for awhile & then hopped down & proceeded toward the house. I went to the side entrance and rang the doorbell & waited for a minute to see if anyone would answer the door. No answer. I went to the front door & rang that doorbell as well. No answer. I proceeded to walk around the house & check for open windows or doors. I found a few unlocked windows & a door on the back side of the house that was open. I entered the house & went through the entire house to make sure no one was home. It was approx. 10:00am - 10:05am on the 7th of June I hadn't had much to drink or eat so I started going first of all, to the kitchen. I grabbed a beer & some pop tarts & smoked a cig while I calmed down. I was, at this point, bent on suicide, so I had some nicotine patches ^{on my} and I put around 3 or 4 of them on. I started going through drawers and such, looking for possible medicine that I could overdose on.

WITNESS: M. A. FugleWITNESS: Spike Mc

Jonathan B.
Signature of person giving voluntary statement

VOLUNTARY STATEMENT

PAGE 3 OF 5

NAME:

Jonathan Biny

CASE NUMBER

I had seen some prescription papers for Judy Southern on a desk, so I proceeded to go through judy's clothes & bureau & dumping things out on the floor. I also went through some of the things in the bathroom. I had ^{DO} a problem with constipation & went and took a laxative & shower to which I relieved myself in the bathtub. Also during this time I had another beer or two & continued to nibble on some food that was in the house. Around the 4-6h. beer I started to think about going ahead & raping judy, Southern & then killing her. I continued to drink beer & started to cut the phone lines in - sick the house. I started to look for possible weapons like guns & knives & started hiding them in closets & cubboards, out of instant reach. I then started to really feel drunk & started to play with a nintendo game that was present in the boys' room. About some time around 230-3:00pm I had dozed off for awhile and when I woke ^{DO} back up it was around 7:30pm. I grabbed another beer and started eating again, thinking I might change my mind & just steal some stuff & leave. I went into the guest bathroom in the hallway and urinated in the sink so it ^{DO} make so much noise & I could hear if someone came in. As I started to zip up my pants, I thought I heard something. I grabbed my gun & turned around & saw someone there. I closed my eyes & pulled the trigger on the gun. I heard a female voice say "oh my God" and started to run ^{DO} ^{DO} down the hallway. I chased after whoever it was as they continued out the side door of the house.

WITNESS:

M.A. Foulk

WITNESS:

Spoke McLean

Jonathan Biny
Signature of person giving voluntary statement

VOLUNTARY STATEMENT

PAGE 4 OF 5

NAME: Jonathan Kyle Biane

CASE NUMBER

JB Once outside the residence, the female, I assumed to be Judy Southern, didn't look like she had been shot from the way she was running. I fired two more shots into the back to keep her scared & running from me as I ran the opposite direction into the woods. I continued to run for a few hours, eluding Sheriff & deputies & dogs. In the process of running, I hid the handgun, which I will be taking Spike & Mike to, at the end of this statement. I ran ~~for~~ over a period of 4-5 hours, heading towards my home. Without the knowledge of my wife, I hid in the basement for a period of 4hrs. In that time frame I had a few munchies, stretched in my belongings, slept for about 2 hrs & put on a few more nicotine patches. There I was until Spartanburg County Sheriff's Dept. showed up & arrested me, along with SLED & Cherokee County Sheriff's Dept. The clothes I was arrested in were the same clothes I had worn that previous night. Also, Before Judy Southern had arrived at her home, I had written a note, basically a suicide note detailing where my Maped where abouts & a map showing where it was at. My name ~~had~~ had been signed on the bottom by me. I wrote my wife's name & phone number so she could be contacted if I had killed myself or whatever the outcome was. I had left this note in the bathroom of the master bedroom, and had not really intended to leave it. Being of sound mind & judgement I would like to request that I be given the death penalty. The crime that I committed deftly warrants it & I request it. JB

WITNESS:

M. A. Fry

WITNESS:

Spike M. LeeJonathan Biane

Signature of person giving voluntary statement

VOLUNTARY STATEMENT

PAGE 5 OF 5

CASE NUMBER

NAME Jonathan Kyle Binney

I would ask that all proceedings, rights, etc ^{be} ~~be~~ believed & that I be given a quick hearing so that I may plea to Murder & Burglary in the first degree with the penalty being death by lethal injection. I have & believe that I have the mental capacity to make this decision. I graduated Highschool, I have 2 semesters of college & some minor technical school diplomas under my belt. I have worked on computers for companies such as Duke Power, Alidas & a few certifications under my belt. I make this statement of my own free will. No one has threatened or promised me in any way, anything or any possibilities of a lightened sentence, etc. I knew what the consequences were when I wrote the note to talk to detective of my free will. I am currently held at Cherokee County Detention Center, free from alcohol or drugs which could impair my judgement. I make this statement in front of Mike & Spike & it is the whole truth, and I waive my right to an attorney. JB

End of Statement

WITNESS:

WITNESS:

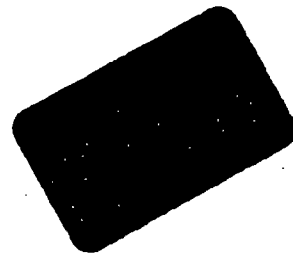
Jonathan Binney
Signature of person giving voluntary statement

3622

10-19-00

I wish to talk with Detective Spike McCraw with
out any attorney present, and until further notice, he
is welcome to contact me.

Jonathan Biny



SOUTH CAROLINA LAW ENFORCEMENT DIVISION

3623



YOUR RIGHTS

DATE: 6-19-2000

TIME: 3:05 P.M.

BEFORE WE ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS.

JB YOU HAVE THE RIGHT TO REMAIN SILENT.

JB ANYTHING YOU SAY, CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.

JB YOU HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE BEFORE WE ASK YOU ANY QUESTIONS AND TO HAVE HIM OR HER PRESENT WITH YOU DURING QUESTIONING.

JB IF YOU HAVE NO MONEY FOR LAWYER'S FEES, THE COURT WILL APPOINT ONE TO REPRESENT YOU WITHOUT COST TO YOU IF YOU WISH.

JB IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU WILL STILL HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME. YOU ALSO HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANYTIME UNTIL YOU TALK WITH A LAWYER.

JB I HAVE READ THIS STATEMENT OF MY RIGHTS AND I UNDERSTAND WHAT MY RIGHTS ARE.

SIGNED: *Janith Biny*

WAIVER OF RIGHTS

I AM WILLING TO MAKE A STATEMENT AND ANSWER QUESTIONS. I DO NOT WANT A LAWYER AT THIS TIME. I UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES OR THREATS HAVE BEEN MADE TO ME AND NO PRESSURES OR COERCION OF ANY KIND HAS BEEN USED AGAINST ME.

SIGNED: *Janith Biny*

WITNESS: *E. S. "Spike" McLean*

WITNESS: *[Signature]*

CASE# _____ DATE: / / EXAMINER: _____

DOCUMENT 7



LAB FORM # 135
MARCH 1, 1994

Dear Allen, I know that you must be furious & angry, hurting & beating yourself over the head because of this. I can say I know how it feels to lose a loved one, but not in this tragic manner. The detectives asked me if there was any one thing that may have changed my mind about why I chose your house. I firmly believe that if it had contained an alarm system, not just the lame stickers, I would have over baked your house. I had alot of anger, frustration, bitterness & resentment inside of me and had decided to not control my actions. There was nothing you could have done. As a matter of fact, by you not being there, you spared the life of your son and yourself. At the time I was in your house, there were only 3 possible outcomes. The death of all 3 of you plus me attempting suicide, ^{or} just me either robbing you & or committing suicide, or lastly me killing & or raping Judy. At the time Judy came into the house, I didn't hear her, & when I did, it was done out of being scared. I truly had hoped that I had only wounded her instead of killing her when it happened, cause I ran out of the house like a scared rabbit. I am truly sorry that this happened to you, & your family. I never knew you or your wife, never had any grudge against you. I do want you to know that it is my wish & I am trying to seek the death penalty. I believe my death is warranted not only by "man's" law but also by "Gods" law.

67.1 PL 8
Loo-06255

3625

I am hoping that through my death, it will bring you and your family some emotional closure as well as my family, as I have brought them great shame and disappointment. This act would also bring myself closure. I am religious and do believe in God & have spent the last week trying to get my heart right with God which is also why I came forward and confessed instead fighting this, letting it go on for years, essentially bringing everyone, mostly you, greater heart aches. I pray that even though I committed this great sin & crime, you can find it in your heart to forgive me for what I've done. Not that the hurt will go away, but the the healing process can begin. Don't let bitterness set in. I know where I did was wrong, and I'm try to make it right.

I'm Sorry,

James B.

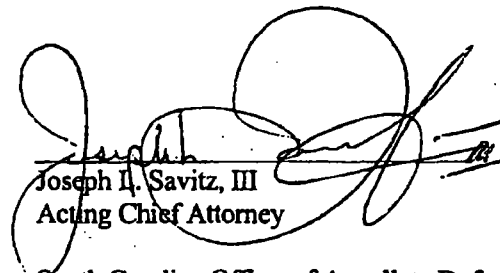
If detectives will let you, and you want to yell at me or ask me questions or write back, I would welcome the chance to apologize to you face to face.

67.2 p. 8
Leo-07-150

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 12th, 2004



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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN KYLE BINNEY,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The judge erred by admitting into evidence a statement Binney gave the police, in which he confessed that he was indeed guilty of murder and first degree burglary and requested "the death penalty" because "[t]he crime that I committed definitely warrants it," because this statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of Edwards v. Arizona, 451 U.S. 477 (1981).

STATEMENT OF FACTS

On December 9, 1999, twenty-five year old Jonathan Binney was arrested in Spartanburg County for first degree criminal sexual conduct with a minor. The victim was his three month old daughter, [REDACTED] Binney was free on bail for this offense at the time of the incident underlying the present appeal. (In April 2001, a jury convicted Binney of first degree CSC with a minor and he received the maximum sentence of thirty years.)

On July 12, 2000, a Cherokee County grand jury indicted Binney for murder and first degree burglary. The victim was Judy Southern. The afternoon of the previous June 7, Southern was shot once in the abdomen when she surprised an intruder in the home where she lived with her husband, Allan, and their six year old son, Jacob, both of whom were elsewhere at the time. The State contended that Binney had murdered Southern so that he would be sent to jail as a killer, not a child molester. The defense countered with evidence that Binney had broken into the Southern residence to commit suicide, not murder or burglary.

The State sought the death penalty, ultimately relying on the single statutory aggravating circumstance of murder during the commission of burglary. S.C. Code Section 16-3-20(C)(a)(1)(c). The solicitor rejected Binney's offer to plead guilty to life without parole. ROA p. 45, line 23 – p. 46, line 6.

Judge J. Derham Cole presided at Binney's jury trial November 4 through 14, 2002. The jury found Binney guilty of murder and first degree burglary. At sentencing, the judge charged the jury on the three statutory mitigating circumstances provided by S.C. Code Section 16-3-20(C)(b)(2), (6) and (7):

The murder was committed while the defendant was under the influence of mental or emotional disturbance.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The age or mentality of the defendant at the time of the crime.

These mitigators were based on evidence that Binney was intoxicated and suicidal when he shot Southern.

After deliberating for just over four hours, the jury recommended a death sentence.

The judge then sentenced Binney accordingly.

ARGUMENT

The judge erred by admitting into evidence a statement Binney gave the police, in which he confessed that he was indeed guilty of murder and first degree burglary and requested "the death penalty" because "[t]he crime that I committed definitely warrants it," because this statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

Cherokee County police obtained an arrest warrant charging Jonathan Binney with assault and battery with intent to kill almost immediately after the shooting, when they discovered a handwritten suicide note outside the Southern residence apparently connecting Binney with the incident. ROA p. 2220, lines 16-21; ROA p. 2227, line 19 – p. 2228, line 22; ROA p. 3614. (Judy Southern died later that night, so the charge was eventually upgraded to murder. ROA p. 2374, line 23 – p. 2375, line 7; ROA p. 2663, lines 12-14.) The next day, the Cherokee officers discovered Binney hiding in the basement of his Spartanburg County home. ROA p. 2299, line 12 – p. 2301, line 25. They handcuffed Binney and brought him around to the front of the house. ROA p. 2302, lines 3-6. According to the officer who arrested Binney, at this point he asked, "She's dead, isn't she?" ROA p. 2309, lines 18-25. The officer responded, "Who?" ROA p. 2310, lines 5-7. Binney answered, "The woman I shot." ROA p. 2310, lines 14 and 15.

SLED Agent DeWitt "Spike" McCraw arrived at the Binney residence, served the warrant for assault and battery with intent to kill and provided the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). ROA p. 1903, line 7 – p. 1904, line 20. A Cherokee County officer present at the scene later prepared an investigative report which

stated, "Binney asked for his attorney while still at the residence." ROA p. 1904, line 23 – p. 1905, line 2. During a suppression hearing held at the start of Binney's trial, this officer explained that Binney's wife, Melanie, had come out of the couple's house with a telephone in her hand and informed the arresting officers, within Binney's earshot and possibly even before Agent McCraw arrived and gave him Miranda warnings, that her husband would be represented by the attorney who was already handling the criminal sexual conduct charge. ROA p. 1905, line 4 – p. 1906, line 6. "It was my understanding," the officer testified, "at the time that we left the scene that Mr. Binney was represented by [counsel]." ROA p. 1906, lines 7-10. Agent McCraw testified during the suppression hearing that he had taken the phone from Melanie Binney and spoken directly with the attorney representing Binney on the CSC charge. ROA p. 1936, lines 3-14.

I told him we had just served an arrest warrant on Mr. Binney for assault and battery with intent to kill. He said that he was representing him on another charge and he didn't know if he was going to be his attorney or not.

ROA p. 1936, lines 15-20. Since the Cherokee police officers and Agent McCraw believed Binney was invoking his right to counsel, they did not attempt to interrogate him. ROA p. 1906, lines 11-14.

The arresting officers observed that Binney had stuck a number of nicotine patches to his bare chest. ROA p. 1866, line 1 – p. 1867, line 5; ROA p. 2312, line 21 – p. 2313, line 1; ROA p. 2314, line 6 – p. 2316, line 12. He was transported to the hospital complaining of nausea and from there to the Spartanburg County jail, where he was placed on suicide watch. ROA p. 1923, line 13 – p. 1924, line 21.

The day after Binney's arrest, the lawyer who was representing Binney on the CSC charge advised Agent McCraw that he would not be handling the murder charge. ROA p. 1937, lines 19-25. McCraw then learned that Melanie Binney was hiring a prominent lawyer/legislator from Greenville to represent her husband. ROA p. 1938, lines 1-3. This attorney met with McCraw in Cherokee County and also declined to represent Binney. ROA p. 1938, lines 4-7. Finally, McCraw learned that Binney would be represented by the Cherokee County public defender. ROA p. 1938, lines 8-10.

Every day for the next week, Agent McCraw telephoned Binney's attorney and told him "I would like to talk to his client." ROA p. 1938, lines 14-23. Counsel told McCraw that he could not speak with Binney "unless I could get some kind of a guarantee that the State would not seek the death penalty." ROA p. 1959, lines 19-22; ROA p. 2029, line 15 – p. 2030, line 1. The solicitor informed McCraw that it was "way too early" in the case to commit to a plea agreement. ROA p. 1960, lines 7-9. McCraw communicated the solicitor's response to defense counsel, but stated that he still wanted to talk to Binney about the case. ROA p. 1960, lines 10-15; ROA p. 2033, lines 8-12.

At the suppression hearing, Agent McCraw claimed that defense counsel never told him not to talk to Binney. ROA p. 1962, line 23 – p. 1963, line 4. He testified that counsel told him that Binney was "wanting to talk, but he hadn't had time to sit down and fully talk to him." ROA p. 1960, lines 19-23. Neither defense counsel nor (as will be seen) events subsequent to the interrogation support McCraw on this point, nor did the judge find him to be credible concerning this matter. Compare State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). The public defender, who had since been relieved as Binney's counsel for obvious reasons, testified at the suppression hearing that "[McCraw] called me again and wanted to

know if I had changed my mind and would allow him to question Mr. Binney, and I told him no." ROA p. 2033, lines 13-18. Counsel then went home for the weekend. ROA p. 2033, lines 19 and 20.

At this point, Agent McCraw decided to take matters into his own hands:

[N]ot hearing back from any attorney, I called the jail and asked the jailer that answered the phone... when he saw Jonathan Binney, to tell him that if he would like to talk to detectives, to put it in written request then to see detectives.

ROA p. 1939, line 9 – p. 1940, line 2. His purpose for proceeding in this manner, McCraw added, was "to make sure that Mr. Binney's rights to an attorney were protected, so I wanted him to do the request to see me... [I]f he would like to speak to detectives without an attorney, I need that in writing." ROA p. 1940, lines 3-12. McCraw had to admit, though, that Binney had not initiated contact with the police before he called the jail. ROA p. 1961, lines 15-17.

The jailer then "went and found [Binney] a little while after and gave him that message." ROA p. 1981, line 9 – p. 1982, line 4. He testified, "I told him that if he would like to talk to a detective, just to... put it in writing, if he wants to talk to him." ROA p. 1982, lines 5-9. Binney wrote by hand the following note and gave it to the jailer:

I request to see a Detective without the presence of my attorney (sic). This is my request that this only be valid [today and tomorrow] & any further contact is not initiated on my part, unless further indicated by me.

ROA p. 1982, lines 17-20; ROA p. 3615. The jailer gave this note to Agent McCraw. ROA p. 1982, line 25 – p. 1983, line 1. McCraw then contacted Cherokee County police and informed them that Binney was ready to talk. ROA p. 1906, line 15 – p. 1907, line 17.

Binney was transported from suicide watch at the jail to the law enforcement center. ROA p. 1907, line 21 – p. 1908, line 6; ROA p. 1941, lines 1-10. Agent McCraw and a Cherokee County officer conducted the interrogation. ROA p. 1908, lines 14-16; ROA p. 1943, lines 6-8. They again advised Binney of his Miranda rights. ROA p. 1908, lines 17-20; ROA p. 1941, lines 11-13. Binney agreed to talk without his attorney being present. ROA p. 1911, line 22 – p. 1912, line 4; ROA p. 3616 and 3623. McCraw and the Cherokee officer then began to question Binney about “the events that happened at the Southern home.” ROA p. 1914, lines 9-13.

Binney eventually gave his interrogators a five-page statement. ROA p. 1914, lines 14-22; ROA p. 3617-3621. According to Agent McCraw, Binney revealed that his motive for committing the crimes was that “he didn’t want to go to prison known as a child molester.” ROA p. 1945, lines 8-22.

In this statement, Binney describes his preparation for, and commission of, the crimes in detail. He did not know the Southern and had selected their residence at random. Binney wrote, “I wasn’t sure if I just wanted to go in the house to commit suicide, or to rape someone, or to just shoot all of them, then kill myself.” After the Southern family left that morning, Binney broke into their house, where he stayed for the next six hours, until Judy Southern returned home. When she startled him, “I closed my eyes & pulled the trigger on the gun,” Binney recounted. His statement concludes:

Being of sound mind & judgment, I would like to request that I be given the death penalty. The crime that I committed deffinately (sic) warrants it & I request it. I would ask that all proceedings, rights, etc., be waived & that I be given a quick hearing so that I may plea (sic) to Murder & Burglary in the first degree, with the penalty being death by lethal injection.

I have & believe that I have the mental capacity to make this decision.

Next, in response to his interrogators' request, Binney accompanied Agent McCraw and at least two Cherokee County officers to a wooded area near the Southern residence and showed them where he had hidden his gun under fallen leaves at the base of a tree. ROA p. 1916, line 9 – p. 1917, line 7; ROA p. 1946, line 15 – p. 1947, line 25.

Two days later, after the weekend, Binney sent McCraw another handwritten note which stated, "I wish to talk with detective Spike McCraw without any attorney (sic) present, and until further notice, he is welcome to contact me." ROA p. 1947, line 17 – p. 1948, line 6; ROA p. 3622. McCraw and another SLED agent met with Binney that afternoon and again provided Miranda warnings. ROA p. 1948, line 20 – p. 1949, line 16. Binney wanted to talk to the Southern's husband "to tell him he was sorry for what he had done." ROA p. 1951, lines 6-19. McCraw told Binney that anything he wanted to say would have to be transmitted "in letter form." ROA p. 1951, lines 20-25. Binney then wrote a two-page letter and gave it to McCraw. ROA p. 1952, lines 1-22; ROA pp. 3624 and 3625.

Binney's attorney returned to work that same day to discover that Binney had confessed to the police three days earlier. ROA p. 2034, lines 4-19. He immediately telephoned Agent McCraw and, when the SLED agent confirmed what he had been told, lost his temper and "that was the end of that conversation." ROA p. 2034, lines 20-24. After unsuccessfully seeking redress at the solicitor's office, then learning that Binney had been removed from the jail, counsel drove to the law enforcement center, burst into the room where the two SLED agents were interrogating Binney and directed him to stop talking. ROA p. 1953, lines 1-13; ROA p. 2034, line 25 – p. 2035, line 22. The second

SLED agent present with McCraw described counsel as "very agitated." ROA p. 1993, lines 8-12. By all accounts, Binney rejected his attorney's advice and the letter to the victim's husband followed. ROA p. 1953, line 17 – p. 1954, line 25; ROA p. 1993, line 15 – p. 2000, line 24; ROA p. 2035, line 23 – p. 2036, line 14; ROA p. 2065, line 16 – p. 2066, line 2.

Less than one month later, defense counsel appeared before the judge who had been assigned Binney's trial to place his concerns about Agent McCraw's unauthorized interrogation on the record. His comments at that time are entirely consistent with his subsequent testimony at the suppression hearing. For example:

[Agent McCraw] wanted to know if I would let him question Mr. Binney. And I told him I wouldn't let him question Mr. Binney without me being present. He really didn't want to do that.

Pretrial Hearing ROA p. 3, line 25 – p. 4, line 3. The solicitor was apparently oblivious to McCraw's machinations:

I don't believe that Mr. McCraw approached Mr. Binney in order to get those letters written. I think he talked to Mr. Binney after receiving notice that Mr. Binney wanted to talk, and so that's why he went to talk to him... It's my understanding that the agents were working at the sheriff's department and received a letter from the jail from Mr. Binney indicating his willingness to talk to them, and they went over there to talk to him. They did not initiate contact with him.

Pretrial Hearing ROA p. 9, line 12 – p. 10, line 13.

At the start of Binney's trial, the defense attorneys who had replaced the public defender moved to suppress all of Binney's statements to the police. ROA p. 1835, lines 12-22. As to the statement and letter obtained by Agent McCraw at the law enforcement

center, counsel argued that they were the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of Edwards v. Arizona, 451 U.S. 477 (1981). ROA p. 2143, line 15 – p. 2149, line 17. The solicitor argued that Binney had never invoked his right to counsel. ROA p. 2150, line 5 – p. 2158, line 1. The judge agreed:

With respect to the invocation of his right to counsel, I do not recall any testimony at any time where Mr. Binney invoked his right to counsel. At no time when he was advised did he say, "Well, I prefer to have a lawyer or talk to a lawyer before I answer any questions that you might pose to me." So, at no time during this process... did he invoke his right to counsel. And, therefore, there is no Fifth Amendment violation...

ROA p. 2165, line 17 – p. 2166, line 2. As to Agent McCraw's contact with Binney via the jailer, the judge found:

Mr. McCraw did send word to Mr. Binney... inviting him to initiate contact if he wish to talk. I do not find that that invitation to initiate contact was in any way an interrogation... [W]hile Mr. McCraw may have been hoping that some questioning of Mr. Binney would result in some sort of incriminating response, to offer to discuss the case with Mr. Binney and the invitation from Mr. Binney (sic) to initiate contact with the police if he wanted to talk cannot in any way be interpreted as interrogation under the law. Therefore, I do find that while Agent McCraw did send a message to Mr. Binney after he was in fact represented by counsel, I do not find that that contact or that message sent was in any way, or can in any way, be described as interrogation... Mr. Binney, in response to receiving that message, did initiate contact with Agent McCraw. He did send a message to Agent McCraw reflecting that he did wish to talk with Agent McCraw. And, therefore, Agent McCraw responded to that initiation of contact by Mr. Binney. When Mr. Binney initiated that contact, he waived his right to counsel, as he has every right to do.

ROA p. 2169, lines 17 – p. 2171, line 11. He therefore denied the motion to suppress. ROA p. 2177, lines 16-18.

Binney's statement was the centerpiece of the State's case. The judge allowed its admission early in the guilt phase over the renewed objection of defense counsel. ROA p. 2335, lines 8-19; ROA p. 2343, line 23 – p. 2350, line 1. The State reintroduced the statement at the beginning of the sentencing phase, again over defense counsel's objection. ROA p. 3051, line 18 – p. 3052, line 1.

The judge erred by admitting this statement into evidence, as it was the result of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel. The error could not have been harmless, particularly at sentencing.

In Miranda v. Arizona, 384 U.S. 479, the Supreme Court set forth the now-famous "Miranda warnings," which must be given to an accused prior to custodial interrogation by the police. They are:

He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

As to the right to counsel, the Court continued:

Once warnings have been given, the subsequent procedure is clear... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Id. at 473-4.

In Edwards v. Arizona, the Court elaborated:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights... [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-5 (footnote omitted). In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Court explained that "[t]he purpose of the Miranda - Edwards guarantee... is to protect... the suspect's 'desire to deal with the police only through counsel'." 501 U.S. at 178, quoting Edwards, 451 U.S. at 484.

It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.

Id. (emphasis omitted). Conversely, "when a reasonable inference may be drawn from the conduct or statements of the accused that he does not wish to be represented by an attorney prior to discussing the matters under investigation, questioning may be initiated." State v. Drayton, 293 S.C. 417, 361 S.E.2d 329, 335 (1987).

The State bears the burden of proving that a defendant has voluntarily waived his right to counsel. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). However, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Miranda, 384 U.S. at 475.

Binney invoked his Fifth Amendment right to counsel by obtaining counsel to represent him on the murder and burglary charges. Compare State v. McCray, 332 S.C.

536, 506 S.E.2d 301 (1998). Agent McCraw was well aware that Binney was represented by counsel at the time he initiated contact with Binney by telephoning his jailer. McCraw also conceded that Binney had not contacted the police before he called the jail. ROA p. 1961, lines 15-17.

The judge found that Agent McCraw's "invitation to initiate contact" was not the functional equivalent of interrogation. However, Rhode Island v. Innis, 446 U.S. 291 (1980), holds:

[T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect... A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

446 U.S. at 300-1 (footnotes omitted). McCraw's unauthorized contact with Binney plainly falls within this definition. Compare State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). Even the judge recognized that McCraw's ultimate objective was to elicit "some sort of incriminating response." Moreover:

[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

Miranda, 384 U.S. at 476. McCraw's ploy was designed for no other purpose than to circumvent Binney's right to counsel and the protection afforded by Miranda and Edwards.

The erroneous admission of Binney's statement was particularly harmful at sentencing. In that statement, as previously noted, Binney admits that he is guilty of murder

and burglary and asks for "death by lethal injection" as soon as possible because "[t]he crime that I committed definitely warrants it."

As the Court observed in State v. McClure, 342 S.C. 403, 537 S.E.2d 273, 275 (2000):

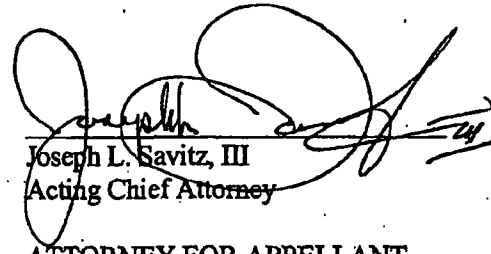
[T]he evaluation of the consequences of an error in the sentencing phase of a capital trial [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.

In State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), a Fifth Amendment violation led to a capital defendant's admission during the guilt phase of trial that "[a]nybody that would do something like this" should die. 283 S.E.2d at 584. The Court reversed both the murder conviction and death sentence, holding that "[t]he effect of having the [defendant] unwittingly state that he deserved the death sentence prior to the jury having even considered the matter created an 'arbitrary factor' intolerable to this Court." *Id.* at 585, citing S.C. Code Section 16-3-25(C).

To summarize: The judge erred by allowing Binney's statement into evidence at the guilt phase and at sentencing. Agent McCraw violated Edwards v. Arizona by contacting Binney after he had invoked his right to counsel. Neither Miranda, Edwards nor Innis permit (in the judge's words) an "invitation to initiate" interrogation once an accused has invoked his Fifth Amendment right to counsel. The error was especially harmful at sentencing, since the statement contains not only an admission of guilt, but the request for a speedy execution.

Because of this error, the Court should reverse Jonathan Binney's convictions for murder and first degree burglary, as well as his death sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III
Acting Chief Attorney

ATTORNEY FOR APPELLANT

This 28th day of May, 2004.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 28, 2004



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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

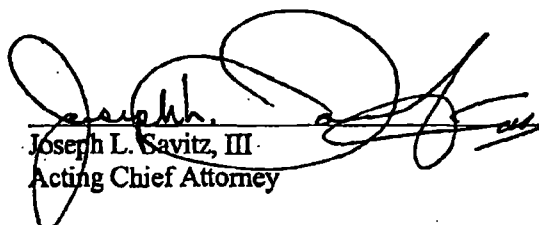
V.

JONATHAN KYLE BINNEY,

APPELLANT

CERTIFICATE OF SERVICE

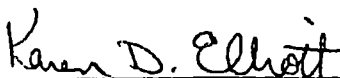
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 28th day of May, 2004.



Joseph L. Savitz, III
Acting Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 28th day of May, 2004.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KYLE BINNEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Cherokee County Grand Jury indicted Jonathan Kyle Binney (Appellant) at the July, 2000 term of court for murder (2000-GS-11-526) and burglary in the first degree (2000-GS-11-525). These charges stemmed from the June 8, 2000 shooting of Judy L. Southern in her Cherokee County home. The State timely served a Notice of Intent to Seek the Death Penalty on Appellant pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2003). On July 11, 2001, the Honorable J. Derham Cole held a pretrial hearing in the matter. Don Thompson, Esquire, represented Appellant at that hearing, while Deputy Seventh Circuit Solicitor Donnie Willingham represented the prosecution. Mr. Thompson was subsequently relieved as counsel, and Trent N. Pruett, Esquire, and Samuel "Mitch" Slade, Jr., Esquire, represented him in all subsequent proceedings in the trial court. Seventh Circuit Solicitor Trey Gowdy, III, and Mr. Willingham represented the State.

Judge Cole held pretrial hearings on March 25, and October 25, 2002. Appellant thereafter received a jury trial before Judge Cole on November 4-14, 2002. The jury convicted Appellant of murder and burglary in the first degree on November 11, 2002.

The sentencing phase was conducted following Appellant's exercise of the twenty-four hour waiting period in § 16-3-20(B). The State relied upon the statutory aggravating circumstance that the murder was committed while in commission of burglary. §16-3-20(C)(a)(1)(c). Judge Cole also charged the jury on the three statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7), that they were to consider any nonstatutory mitigating circumstance which had been shown to exist by the evidence presented and that they could recommend a life sentence even though they did not find the existence of a statutory or non statutory mitigating circumstance because the jury could

recommend a sentence of life imprisonment "for no reason at all, other than as an act of mercy." Finally, he instructed the jury that pursuant to § 16-3-20(A), a sentence of life imprisonment meant until the death of Appellant, without the possibility of parole. **R. pp. 3469-86.** The jury found the alleged statutory aggravating circumstance and recommended a sentence of death. Judge Cole sentenced Appellant to death for murder and to life without parole for burglary in the first degree. See S.C. Code Ann. § 17-25-45(Supp. 2003). **R. pp. 3491-94; 3499-3501.**

ARGUMENT

The trial judge properly ruled that Appellant's June 16, 2000 statement to law enforcement did not violate his Fifth Amendment right to counsel under *Edwards v. Arizona* because he initiated contact with law enforcement before giving the statement and because he never invoked his right to counsel at any point following his arrest.

Despite Appellant's contention that his June 16, 2000 statement to law enforcement (State's Exhibit #3) was taken in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), the State submits that the trial judge properly ruled that there was no Fifth Amendment violation because Appellant initiated the contact with police which led to his June 16, 2000 statement; and, more importantly, because he never invoked either his right to counsel or his right to remain silent at any point following his June 8, 2000 arrest. Finally, Appellant cannot show any conceivable prejudice resulting from introduction of State's Exhibit #3 because it was merely cumulative to (1) a handwritten suicide note addressed to his wife that was found at the scene (State's Exhibit #34, R. p. 3614), (2) his June 19, 2000 letter to the victim's husband (State's Exhibit #6) and (3) oral admissions made to a fellow inmate.

The trial judge held a pretrial *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing to determine the admissibility of statements which Appellant made to law enforcement on June 8, 16, and 19, 2000, as well as a letter which he had written to the

victim's husband on June 19 (State's Exhibit #6).¹ Nine witnesses testified at the hearing.

R. pp. 1835-2092.

Deputy Steve Reynolds, of the Cherokee County Sheriff's Department, is a part of that agency's Special Emergency Response Team (S.E.R.T.). Before noon on June 8, 2000 - the day after the victim was killed - he went to Appellant's Spartanburg County home² with Detectives Mike Fowlkes, and David Oglesby, as well as Deputies Dean McAbee and Wes Foster, all with the Cherokee County Sheriff's Department. Although they had an arrest warrant charging Appellant with A.B.I.K., they did not have a search warrant. Detectives Fowlkes and Oglesby knocked on the door and spoke briefly to Appellant's wife, who gave the officers permission to search the house for Appellant. Deputies Reynolds, Foster and McAbee searched a large crawl space or basement and found Appellant in it, along with his sleeping bag and a police scanner. Deputy Reynolds handcuffed Appellant and removed him from the basement. **R. pp. 1860-66; 1871-78. See also R. pp. 1899-1900.**

Deputy Reynolds remembered that Appellant had some nicotine patches on his chest. However, he was fairly alert and understood who Reynolds was and what he was doing at Appellant's residence. After removing Appellant from the basement, Deputy Reynolds escorted him to the edge of the front yard and they waited on SLED Agent Eldon Dewitt "Spike" McCraw, Jr., to come and serve the arrest warrant on Appellant, since the officers

¹ Appellant only challenges the admissibility of the June 16 statement and has apparently abandoned the challenges to the admissibility of the other exhibits as well as his argument that State's Exhibit 3 was taken in violation of his Sixth Amendment right to counsel. **R. pp. 2135-61. See State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (exceptions taken to trial court's rulings were abandoned where not briefed on appeal).**

² The victim's residence, on Cowpens-Pacolet Road, is only a couple of miles away from Appellant's residence.

were outside of their jurisdiction. Deputy Reynolds did not read Appellant's *Miranda*³ rights to him and did not question him. Nevertheless, Appellant looked up and asked Reynolds "she's dead, isn't she?" Deputy Reynolds asked "who?" Appellant's response was, "the woman I shot." Agent McCraw thereafter arrived, and someone eventually transported Appellant to the detention center. R. pp. 1866-70; 1878-79.

Detective Mike Fowlkes, a captain with the Criminal Investigation Division of the Cherokee County Sheriff's Department, was the chief investigator in this case. He went to Appellant's Spartanburg County residence on June 8, 2000, with Detective Oglesby and Deputies Foster, McAbee, and Reynolds. He spoke to Appellant's wife, and she gave them permission to search for Appellant. The other deputies found Appellant and Deputy Reynolds arrested him. The officers had an ABIK arrest warrant for Appellant, which had been signed by a Cherokee County magistrate and countersigned by a Spartanburg County magistrate, but they lacked jurisdiction in Spartanburg County. R. pp. 1898-1903.

Therefore, they waited on Agent McCraw to serve the arrest warrant on Appellant because he had statewide jurisdiction. After Agent McCraw read Appellant's *Miranda* rights to him, Appellant did not make any response and did not ever request an attorney. R. pp. 1903-04.

While they were waiting Agent McCraw to arrive, Appellant's wife walked onto the front porch with a cordless phone and advised Detective Fowlkes that she was on the phone with a Greenville County attorney, Bill Bannister. She also yelled at Appellant and twice told him "not to say anything." Mrs. Binney informed Detective Fowlkes that she was

³*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

holding on the phone for Mr. Bannister. Agent McCraw arrived as they were talking and served the warrant. He then joined their conversation and eventually spoke to Mr. Bannister, who represented Appellant on a prior charge of criminal sexual conduct. Detective Fowlkes' understanding when they left the residence was that Mr. Bannister represented Appellant. **R. pp. 1904-06; 1923.**

Detective Fowlkes was conducting field interviews in the case on June 16, 2000, when a member of his agency directed him to contact Agent McCraw and he did so. Agent McCraw told him that the officers had received a handwritten note from Appellant (State's Exhibit #1, R. p. 3615) indicating that he wished to speak to an investigator. At 3:16 p.m. on June 16, Detective Fowlkes and Agent McCraw began an interview with Appellant at the law enforcement center.⁴ They were the only ones present. Before they began, Agent McCraw read Appellant's *Miranda* rights to him using a pre-interrogation waiver form (State's Exhibit #2, R. p. 3616). Appellant initialed each paragraph of his rights to indicate that he understood the rights, and he appeared to understand what the officers were explaining to him. Although he was quiet and distant, Detective Fowlkes described him as "real talkative. He really wanted conversation." Also, he was "clear headed" and "seemed to be very coherent." Appellant signed the State's Exhibit #2 indicating that he understood his rights and Detective Fowlkes witnessed his signature. **R. pp. 1906-11; 1924-26; State's Exhibit #2, R. p. 3616).**

Appellant also signed a waiver of these rights on State's Exhibit #2 and Detective Fowlkes witnessed his signature. The subsequent interview lasted until 6:19 p.m. During

⁴They were in a 12 x 12 office belonging to Captain Broome.

the three hour interview, Appellant never appeared to be under the influence of drugs, alcohol or any other substance; he appeared to understand the rights as they were explained to him; and he was able to communicate with the officers. When advised of his right to a lawyer, he said that he had previously had little or no contact with his attorney, and he did not wish for his attorney to be present. He was also warned of his right to remain silent but agreed to continue talking. He was not promised anything, threatened or coerced in any manner to waive his rights. **R. pp. 1910-12.**

The waiver of rights specifically provides that:

Fully understanding my rights as they have been explained to me, I wish to waive, give up, my rights to talk to Officer McCraw and Mike Fowlkes in reference to a homicide. I have waived my rights freely and voluntarily, without being threatened or coerced, without being promised any leniency or reward.

After waiving his rights, Appellant discussed his family and he brought up the subject of the death penalty because he seemed to be very interested in receiving the death penalty. However, the officers told him that they were not there to discuss either the death penalty or his criminal sexual conduct case from Spartanburg, and they continued talking about the facts of this case. He thereafter discussed the facts of the case. **R. pp. 1912-14; 1926-30; State's Exhibit 2, R. p. 3616.**

The officers spoke with Appellant for approximately an hour before he made a written statement. He then hand wrote a five page statement concerning the facts of the murder and burglary. **State's Exhibit #3, R. pp. 3617-21.** He initialed the top and bottom of each page and any changes that he made to the statement. He then signed the statement when he finished it, and both officers witnessed his signature. Following the statement,

Appellant took the officers to a wooded area near the victim's residence and showed them where he had hidden the murder weapon. He also showed them a well in which he had slept on the night before the murder. He was later returned to the detention center, and Detective Fowlkes did not have any further contact with him.⁵ R. pp. 1914-18; 1930.

Detective Fowlkes indicated on cross-examination that he was aware that Appellant had been transported to the hospital roughly an hour or so after he was arrested because he was nauseated. However, Detective Fowlkes did not know how long he remained in the hospital. Appellant was placed on suicide watch when he was returned to the jail and was not allowed to have any clothes while in the cell. Yet he was clothed when he gave a statement to the officers. Detective Fowlkes did not recall Appellant asking the officers about how he could get off of suicide watch. R. pp. 1924-29.

Lt. Eldon DeWitt McCraw is a SLED agent who works the Piedmont region of South Carolina and was assigned to assist in the investigation of the present murder. Appellant was already being detained in his front yard by the time he arrived at Appellant's residence on the morning of June 8, 2000. Agent McCraw served the AWIK arrest warrant on Appellant and immediately read Appellant's *Miranda* rights to him from a card. Appellant did not respond in any way after the rights were read to him and he did not ask for an attorney. Appellant's wife was standing on the front porch on a cordless phone during this process, screaming to Appellant, "don't say nothing. Don't say nothing." R. pp. 1931-36.

Agent McCraw approached her and ascertained that she was speaking to Mr. Bannister, whom she identified as Appellant's counsel. Agent McCraw identified himself

⁵Detective Fowlkes testified that Appellant did not tell the officers anything different from the information which he provided in the statement. R. p. 1931.

to her and spoke to Mr. Bannister at his request. Agent McCraw explained that they had arrested Appellant for ABIK. Mr. Bannister stated that he was representing Appellant on another charge but did not know if he was going to represent Appellant on this charge or not. Appellant was subsequently transported to the detention center, and Agent McCraw did not have any further contact with him on June 8. R. pp. 1936-37.

On June 9, Mr. Bannister and his son advised Agent McCraw that they were not going to represent Appellant. Agent McCraw then learned from Appellant's wife that Appellant had supposed hired Senator David Thomas, of Greenville. However, when Agent McCraw contacted Senator Thomas, Senator Thomas said he was not going to represent him. Captain Fowlkes then told Agent McCraw that Cherokee County Public Defender Don Thompson was going to represent Appellant. Agent McCraw contacted Mr. Thompson.

Mr. Thompson was interested in getting a deal on Appellant's behalf. Therefore, Agent McCraw contacted then-Deputy Solicitor Anthony Mabry to see if the State was interested in making a deal, but Mr. Mabry said it was too early in the case to "be talking deal." Agent McCraw then reinitiated contact with Mr. Thompson to see if Mr. Thompson would allow him to speak with Appellant. He denied that Mr. Thompson informed him that he could not speak to Appellant. Instead, he said that Mr. Thompson told him that Appellant wanted to talk, but that counsel had not had time to sit down and fully discuss the case with him. R. pp. 1937-38; 1957-60.⁶

Because he had not heard anything from counsel, on June 16, 2000, Agent McCraw contacted the jail. McCraw asked the jailer, Travis Alexander, to tell Appellant when

⁶ Agent McCraw said that her tried to contact Thompson at least once a day on the week days between June 8 and June 16.

Alexander saw him that if Appellant wished to speak to the detectives, he should make a written request. Agent McCraw did not advise Alexander that Alexander had to obtain something in writing from Appellant and he was not told to interrogate Appellant. Likewise, he was not told to promise, threaten or coerce Appellant in any manner. Rather, Agent McCraw's purpose in contacting Alexander was to make sure that Appellant's right to counsel was protected by making sure that any requests for an interview came from Appellant. R. pp. 1939-40; 1960-62.

In response to this conversation, Agent McCraw received State's Exhibit #2, Appellant's written request to speak with a detective without the presence of counsel.⁷ Appellant was then brought to the detective's division of the Sheriff's Department, and the interview began at 3:16 p.m. Agent McCraw corroborated that he advised Appellant of his *Miranda* rights from the pre-interrogation waiver form. (State's Exhibit #2). And Appellant initialed each right as it was read to him by Agent McCraw. Appellant signed a waiver form indicating that he understood his rights and his signature was witnessed by both officers. R. pp. 1940-43; 1960-63.⁸

Agent McCraw was aware that Appellant had been taken to the hospital shortly after his arrest, was placed on suicide watch upon his return to the jail, and had remained there

⁷State's Exhibit #1 read as follows: "Friday, June 16, 2000. I request to see a detective without the presence of my attorney. This is my request. May this only be valid for the dates of June 16 and 17 only and any further contact is not initiated on my part, unless further indicated by me. The undersigned Jonathan Binney." See R. p. 3615.

⁸On cross-examination, Agent McCraw repeatedly denied that Mr. Thompson had told him in their last conversation that he should not talk to Appellant because Appellant was suicidal and would say anything. R. pp. 1962-63.

through June 16, 2000.⁹ However, Appellant appeared to be normal. Also, he did not appear to be under the influence of either drugs or alcohol at the time he had his statement; he appeared to understand the questions of him and was able to respond intelligently; and his speech was coherent. When advised of his right to counsel, Appellant did not request an attorney; and he indicated that he wished to talk when advised of his right to remain silent. He was not threatened or coerced in any manner or promised anything in exchange for his subsequent statement. R. pp. 1943-45; 1957-58.

Appellant had brought a Bible with him to the interview, and the officers discussed his family, faith and background with him before discussing the details of the crime. Appellant told Agent McCraw that he had just spoken to Mr. Bannister several days before the murder. Counsel had advised him that the very least he could receive was ten years imprisonment even if he pled guilty and he did not wish to go to prison and be known as a child molester. He explained that this was his motive for the murder. Appellant then went into the details of the crime. After a discussion concerning the facts of the case, Appellant made the handwritten, signed statement (State's Exhibit #3), which was initialed and signed as noted. After this interview was completed, Appellant led the officers to where he had hidden the murder weapon. He was subsequently transported back to the jail. R. pp. 1943; 1945-47; 1963-67.¹⁰

⁹ Agent McCraw denied that Appellant was interested in getting off of suicide watch on June 16 or telling Appellant that he had to get back in touch with McCraw if he was interested in getting off of suicide watch. Instead, Appellant was interested in getting the death penalty. R. pp 1969-71.

¹⁰ Agent McCraw confirmed that Appellant had been interested in getting the death penalty but denied that Appellant had asked the officers what they could do to help him receive it. Also, Agent McCraw did not remember pulling out a copy of the Code and looking up the statutory provision concerning the death penalty. McCraw felt Appellant had done enough

On June 19, 2000, Agent McCraw received a telephone call from the jail informing him that Appellant had made a written request to see him. (State's Exhibit #4). Agent McCraw had not made any additional calls to the detention center before he received this request, and he had not asked anyone else to talk to Appellant or request that Appellant make another request to speak. Later that same day, he spoke to Appellant in the conference room of the Sheriff's Department. Appellant, McCraw and SLED Agent Mike Prodan (a behavioral scientist working on another case in the county) were the only people present. The interview began at 3:05 p.m. R. pp. 1947-49.

Using a SLED advice of rights form (State's Exhibit #5, R. p. 3623), Agent McCraw advised Appellant of his rights on June 19. Again, Appellant initialed each right as it was read to him by Agent McCraw, and Agent Prodan explained each of these rights in even simpler terms. Appellant was not under the influence of drugs or alcohol at the time; he was not promised anything, threatened, or coerced in any fashion; and he appeared to understand his rights. He signed the statement of rights form, and his signature was witnessed by the officers. Appellant did not invoke his right to counsel or his right to remain silent. Agent Prodan conducted the subsequent interview in which Appellant provided "[b]asically the same thing from the first statement, except with a little more of the little things we missed from the first interview." R. pp. 1949-51.

Approximately ten to fifteen minutes into their interview, Mr. Thompson burst into the room and advised Appellant not to talk to the officers any further because he was Appellant's attorney. Appellant looked at Agent McCraw, who told him that "he [Mr.

to receive the death penalty. R. pp. 1963-64; pp. 1969-71.

Thompson] works for you. You don't work for him." Appellant said, "well, I want to talk to ya'll." Thompson threatened to contact the Chief of SLED and have the agents fired. At that point, Appellant called counsel a disparaging name and directed him to leave the room. Counsel left and the interview continued. R. pp. 1953-54.

Once Appellant had completed the interview, he asked to speak to the victim's husband, Allan Southern, to apologize for what he had done. The officers told him this would not be possible and that if he wished to say something to Mr. Southern, he should put it in letter form. He then wrote a letter to Mr. Southern (State's Exhibit #6, R. pp. 3624-25) in their presence. At the conclusion of their interview, the officers took the letter from him. They later gave it to Sheriff Blanton because the sheriff and the victim's advocates were dealing with Mr. Southern. R. pp. 1951-52; 1967-68; State's Exhibit #6, R. pp. 3624-25.

Officer Travis Alexander, who was employed at the Cherokee County Detention Center at the time of Appellant's arrest, testified that he answered a telephone call from Agent McCraw at the jail on June 16, 2000. Agent McCraw told him that if he saw Appellant, "just to tell him that if he wants to talk to him, he is going to have to do it in writing." Shortly thereafter, he found Appellant and gave him the message. Alexander never asked Appellant any questions and did not tell him that he had to talk to the police. He also did not threaten or coerce Appellant in any manner. Appellant then wrote a letter in his presence and Alexander took it. He called Agent McCraw, told him that he had received a written request and asked what to do. He later gave the letter (State's Exhibit #2) to Agent

McCraw. He had never been asked to do this before and has not been asked to do this again.

R. pp. 1980-85.¹¹

Special Agent Michael Prodan, the lead agent in SLED's Behavioral Science Unit and Special Operations, was not working on the present case before his participation in the June 19, 2000 interview of Appellant. His testimony concerning that interview corroborated Agent McCraw's testimony concerning both the knowing and voluntary nature of Appellant's decision to waive his rights to speak with the officers, as well as Appellant's decision to continue talking even after his attorney advised him not to do so. **R. pp. 1990-94.**

He further explained that the officers were attempting to discover Appellant's motive for the crime. Appellant first said that he had selected the residence because it was secluded but then said he actually picked the house because it appeared to be more affluent when Agent Prodan noted that other houses in the area were equally secluded. Appellant also said that he knew there was a husband and wife living there because he had ascertained that two cars were in the garage. He had not previously had any contact with the victim and did not know her. However, he explained that he was anxious and angry on the day of the crimes and that he commenced "a burglary or does some snooping" when he has these types of feelings. **R. pp. 1994-95.**

Appellant provided several possible motives for the crimes. "He said that he had gone there to commit a burglary. And then he said that he had gone there to commit a sexual

¹¹ Alexander specifically denied telling Appellant that he needed to put in writing that he wished to see the detective without the presence of his attorney. **R. p. 1985.** Officer Alexander could not remember where Appellant was housed at the time of the request and did not recall him being on suicide watch. **R. pp. 1986-87.**

assault and he had a fantasy involving the rape of his wife's brother's wife, which would result in a murder. And then he also said something about committing some mass murders and then a suicide, and then going into the residence to commit a suicide at that residence."

R. pp. 1995-96. Agent Prodan also explained other details of the interview, such as Appellant's explanation that he had previously engaged in a purported suicide, but this was actually a ruse for him to get out of trouble; and that Appellant had only felt depressed after his conviction for criminal sexual conduct. R. pp. 1996-99.

Following the interview, Appellant also asked to speak with the victim's husband. Agent Prodan "explained that it would be very difficult, if not impossible, for that to happen under the circumstances, but if he wanted to write a letter or write a message of some type to the victim's husband, that we would see that the letter was available." Appellant then wrote State's Exhibit #6 in his presence. The officers were quiet while he wrote the letter and did not suggest what he should put in it. Agent McCraw took the letter after Appellant had completed it and it was "ultimately put into evidence." Agent Prodan did not have any further contact with Appellant after June 19. R. pp. 2000-01.¹²

Cherokee County Chief Public Defender Donald Anthony Thompson, Esquire, testified for the defense at the suppression hearing.¹³ Mr. Thompson testified that he had seen a report on the news of the crime as well as Appellant's arrest on June 8, 2000, and he felt that the State might end up seeking the death penalty in this case. So, he went to the

¹²It was Agent Prodan's impression from speaking with Appellant that he was not in such hopeless despair that he could not understand the circumstances around him. R. pp. 2009-10.

¹³Mr. Thompson has been the chief public defender in Cherokee County since August, 1999, and has been practicing law since November, 1980.

detention center on June 9, 2000 and met with Appellant. Appellant was in what Thompson described as "the suicide cell," which is a small cell immediately adjacent to the booking room. While Appellant had not been clothed when he was in the cell, he was wearing a pair of "paper underwear and handcuffs" when they met. The first meeting only lasted approximately 30 minutes or so. **R. pp. 2022-27.**

In response to a query by defense counsel as to whether he had seen any signs of Appellant being suicidal, Mr. Thompson explained that he felt Appellant was suicidal because Appellant wanted to receive the death penalty in this case. He acknowledged on cross-examination that the fact Appellant was placed on suicide watch did not necessarily mean that he was suicidal because individuals were often placed on suicide watch even though they are not suicidal. Mr. Thompson asked Appellant whether he was going to retain counsel or wanted to use the services of the public defender, and Appellant said that he wanted to be represented by the public defender. Also, Appellant indicated that he had not yet given a statement to the police. Mr. Thompson told him to make sure that he did not give any statement in the future. **R. pp. 2028; 2039-45.¹⁴**

Mr. Thompson next met with Appellant on June 14, 2000. Between the first and second meetings, he was contacted by Inv. Eric Wright, of the Seventh Circuit Solicitor's Office and Agent McCraw. McCraw wanted to see if counsel would allow him to question Appellant. Mr. Thompson testified that:

I told him no, that Mr. Binney was, in my opinion, suicidal and self-destructive and that he was seeking the death penalty. And that unless I could get some kind of a guarantee that the

¹⁴Mr. Thompson was also aware of Appellant's hospitalization on the day before he met Appellant because Appellant had placed nicotine strips "all over his body."

State would not seek the death penalty, there is no way I was going to let him talk to him.

R. pp. 2029-30.

Agent McCraw told Thompson that he would contact the Solicitor to see whether the State would guarantee that it would not seek the death penalty. Subsequently, Agent McCraw phoned Mr. Thompson and told him that he had been unable to contact Deputy Solicitor Mabry but that he would continue to do so. Also, Agent McCraw wanted to know whether he could meet with Appellant. Again, Thompson claimed that he told McCraw that McCraw could not meet with Appellant unless the State agreed not to seek the death penalty. Thompson further testified that he told Agent McCraw that they would consider, at that point, letting him speak with Appellant. Agent McCraw also wanted to know whether it was okay if McCraw directly approached Appellant and asked Appellant if he would waive his right to counsel and speak with McCraw. "And I think at that point and time my answer was not only no, but hell no." **R. pp. 2030-32.**

In Mr. Thompson's meeting with Appellant on June 14, Appellant was still on suicide watch and was still interested in receiving the death penalty. Counsel indicated that it was hard to get Appellant to talk about anything because he mainly wished just to talk about receiving the death penalty. Thompson did not have any further contact with Appellant on either June 15 or 16. However, he had one or possibly two telephone conversations with Agent McCraw. McCraw told him that he had contacted Deputy Solicitor Mabry and was told that it was too early in the case to make any decision not to seek the death penalty. On June 16, Agent McCraw phoned him "somewhere around noon" and asked if counsel had changed his mind and would allow Agent McCraw to question Appellant. Again, counsel

claimed that he told Agent McCraw told no. He then left work for the weekend. **R. pp. 2030-33.**

Mr. Thompson learned of Appellant's June 16th statement on Monday morning, June 19. He then called Agent McCraw and learned what had happened. This conversation ended after Thompson lost his temper. He then went to the Solicitor's Office and was told, sometime between 1:30 and 2:00 p.m., what had occurred. Counsel then went to jail to see Appellant, but Appellant had already been transported to the Sheriff's Department for questioning. **R. pp. 2034-35.**

Thompson then had one of the jailers take him to the Sheriff's Department and he went into the conference room, where he confronted Appellant. When asked why he was talking to law enforcement, Appellant said "because I want to." Counsel reminded him that this was against his advice, but said that he should go ahead and do so if that it what he wanted to do. Counsel then left the room. However, he returned to the conference room moments later to change his advice. This time, he told Appellant, as his attorney, "to be quiet and to quit answering their questions and to quit talking to him." After this exchange, counsel left. **R. pp. 2035-36.**

Counsel next met with Appellant on June 21 to ascertain what had occurred on June 16 and 19. Even though counsel recalled the conversations he had with Agent McCraw differently from McCraw, he admitted that he was not aware that Appellant had, at any time, told law enforcement that he had a lawyer, or that he wanted a lawyer present. To the contrary, the only time he was a witness to a conversation between Appellant and law enforcement, counsel advised Appellant not to speak but Appellant indicated his desire to do so. **R. pp. 2038-40.**

Appellant testified *in camera* that he was currently serving a thirty year sentence for criminal sexual conduct and that he was out on bond for that offense at the time of his June 8, 2000 arrest. Before June 8, 2000, he had been treated for "[s]evere depression, anxiety, panic attacks, and . . . A.D.D." He had last been hospitalized on May 5, 2000 at Patrick B. Harris hospital for depression. After he was released, he was given Remeron, an antidepressant, and was told to take 15 milligrams a day. However, he quit taking the medication within a week to ten days because it caused him to oversleep. R. pp. 2047-50.

After his release from the psychiatric facility, he was living in a motel room.¹⁵ It was his understanding that he was facing "quite a bit of time" on the CSC charge, which caused him to be depressed. He claimed that he had taken Lortabs and had placed fourteen nicotine patches on himself on June 7-8, 2000, in a purported effort to overdose. Also, he was taken to the Cherokee County Jail immediately following his arrest, and was placed on suicide watch when he was returned to the detention center the following day. Nevertheless, no one at the hospital or the jail spoke to him about treating his depression. R. pp. 2053-54.

Appellant further testified that the purpose of his June 9 meeting with Mr. Thompson was "[j]ust to touch base, [and] let me know that he was going to indeed represent me, . . . if I so desired." Additionally, counsel wanted to find out more about Appellant and to update him as far as where law enforcement was in the case. Appellant inquired about the possibility of receiving the death penalty during this meeting and counsel grudgingly spoke to him about the issue. Also, counsel told him not to speak to any detective in the case. He

¹⁵He could not return home because of the pending CSC charge and DSS's intervention with his children. R. p. 2050.

still did not speak to any mental health professional nor was he taken to mental health in the days which followed. R. pp. 2053-54.

Thompson met with Appellant several days later to discover how Appellant was being treated. Appellant told him that he was unhappy about being on suicide watch, that the depression was getting worse and that he wanted to die. With respect to his meeting with Detective Fowlkes and Agent McCraw, Appellant claimed that he had been trying to get off of suicide watch. He had asked several people in the jail how he could do so and received different answers. Finally, someone told him that he would have to ask one of the detectives. When asked how the meeting with the officers took place, Appellant stated that he told the jailer after his other conversations about getting off suicide watch, that he wanted to talk with McCraw about getting off of suicide watch. R. pp. 2053-56.

He further claimed that during the June 16th meeting with Officers Fowlkes and McCraw, he initially asked them about the possibility of being removed from suicide watch. Agent McCraw told him that he would have to go to either the Sheriff of another member of the Sheriff's Department and that McCraw could not give him a definite answer but would take him around later to talk to someone who could. Appellant claimed that he then decided to find out what his possibilities were of receiving the death penalty. He entered a conversation with the officers during which they discussed the possibility of his receiving the death penalty. "That's when he said he couldn't go any further" without receiving a signed waiver. R. pp. 2056-58.

Appellant signed the waiver of rights form (State's Exhibit #2) and began a discussion with the officers. The officers made it clear that they did not have any control over whether he would receive the death penalty because the Solicitor had that authority.

Because Agent McCraw was supposedly unsure as to how the law applied to Appellant's case, McCraw asked Detective Fowlkes to retrieve the appropriate volume of the code, which he did. They then explained to Appellant that his case would "have to have certain situations in it in order to be eligible for the death penalty." R. pp. 2057-59.

This portion of the interview lasted for approximately 30 or 40 minutes. Afterward, Appellant discussed the facts of the case for roughly an hour. Then, he began writing his statement (State's Exhibit #3). He claimed that he stopped on several occasions and asked if what he had written was in accordance with what they had read in "the book" because he was still confused.¹⁶ Appellant also claimed that he wrote "almost verbatim" what Agent McCraw told him to on pages 4-5 of State's Exhibit #3 because McCraw felt that it would make him appear to be more credible. This was allegedly necessary because, according to Appellant, Agent McCraw told him that a lot of attorneys (including trial counsel, Mr. Thompson) would try to attack the statement and have it "dismissed." Appellant admitted that he signed the statement and initialed it as reflected thereon. R. pp. 2059-62.

After he had completed his statement, Appellant led the officers to where he had hidden the murder weapon. There were no further discussions between him and Agent McCraw about the facts of the case at that time. However, Appellant told him that he wanted to get some of his items from his moped and he asked if there was any possibility that he and his wife could meet, alone, "kind of a last rites type thing." Agent McCraw supposedly told him to write another letter several days later saying that he wanted to see McCraw. Appellant claimed this was the only reason he wrote the June 19, 2000 request (State's

¹⁶Sometimes he would write a paragraph but more often would write an entire page and ask them if it was "okay." R. p. 2061.

Exhibit #4). He had not received any counseling or treatment for depression throughout his incarceration, but he had been evaluated by a mental health counselor. According to Appellant, Mr. Thompson entered the room during the interview on June 9 and told Appellant that he was making a mistake and should not say anything else. Appellant, however, told him that he wished to talk to the officers and that this was something that he needed to do.¹⁷ Appellant was still on suicide watch at the time of the interview. At the conclusion of the interview on June 9, Agent McCraw took him to see the Sheriff and another officer in the Sheriff's Department. At that point, Appellant was removed from suicide watch; and he was subsequently prescribed 30 milligrams of Remeron each day. R. pp. 2054-55; 2063-67.

Appellant admitted on cross-examination that he was 28 years old; that he had obtained his GED while in prison; and that he had thereafter attended several months of college and had taken several correspondence courses in micro computer repair but had never completed his education. He also admitted that he was able to read and write; that he understood his conversations with his attorneys and the questions by the prosecution; that he did not have any trouble understanding or communicating with any of the officers with whom he had previously spoken or his prior trial attorneys. Moreover, he had had quite a few jobs; he and his wife had made a family together; he paid bills and functioned "[s]omewhat" normally. R. pp. 2067-70.

Appellant likewise admitted that he had previously given a number of statements to other officers in the past and that he had received his *Miranda* warnings in a number of those

¹⁷Appellant stated that counsel did not know anything about his promise or his conversations with Agent McCraw. R. p. 2065.

instances.¹⁸ Appellant admitted that he had previously lied about his educational background in one statement and had lied on a job questionnaire about his prior criminal background several years earlier. **R. pp. 2070-77.**

More importantly, Appellant admitted that he was not intoxicated and knew what he was doing when he gave his statements on June 16 and 19 and that he had not included information in State's Exhibit #3 that he was taking Lortab although he had included information that he had been drinking beer and mentioned the nicotine patches. Additionally, he claimed that Agent McCraw told him some of the information to put in State's Exhibit #3 and that some of the information in there simply was untrue. Other portions, whether true or not, were not his words. Finally, in spite of his claim that State's Exhibit #4 was given because he wanted to have "last rites with his wife" and receive items from his moped, there was no mention of that in State's Exhibit #4. Of greatest significance to the present issue, he admitted that he never told law enforcement that he wanted a lawyer or that he didn't want to talk to law enforcement unless a lawyer was present. To the contrary, when his lawyer arrived on June 16, he told his lawyer that he didn't want to have him in the room and counsel left the room because he wanted to talk to law enforcement.¹⁹ **R. pp. 2076-88.**

The parties also presented conflicting expert testimony concerning the effect of Appellant's failure to continue taking Remeron at the time of his arrest, as well as the effects

¹⁸Appellant had prior convictions for breaking and entering (in Ohio), larceny (in North Carolina), and CSC (in Spartanburg) in 2001.

¹⁹Again, however, he maintained this was the result of a prior arrangement with Agent McCraw.

of the nicotine patches on his chest. Appellant's expert, Dr. William Alexander Morton, Jr., was qualified as an expert in pharmacy practice, psychiatry, and behavioral sciences. Dr. Morton testified that Appellant had been treated at Patrick B. Harris Hospital for symptoms of depression and was prescribed 15 milligrams of Remeron each day. He discontinued taking it within two and a half or three weeks. When someone stops taking Remeron, one would expect to find a return of the original symptoms as well as some mild to moderate withdrawal symptoms.²⁰ R. pp. 1836-43.

Also, Dr. Morton explained that Appellant had been using nicotine patches to the point where he had to be hospitalized following his arrest for nicotine poisoning. He was briefly hospitalized until his condition was stabilized. Morton opined that nicotine poisoning of the type evidenced in Appellant's records could potentially cause some depressive symptoms; and that nicotine poisoning would aggravate or enhance previous depression symptoms. On cross-examination, Morton admitted that the only way to know whether or not Appellant was actually taking Remeron at the time of his arrest was based on his self-reporting. Also, Appellant provided varying accounts as to the number of nicotine patches he was wearing at the time of his arrest to the individuals at the hospital. Further, Morton admitted that the symptoms of depression caused from not taking previously prescribed Remeron would only last from several days up to one week. R. pp. 1846-60.

SLED Agent David Eagerton is the Chief Toxicologist at SLED's forensics toxicology lab. He was present when Dr. Morton testified and had reviewed Appellant's medical records. Although a few of the symptoms reflected in the medical records might be

²⁰The symptoms would include muscle cramps, insomnia, and anxiety symptoms that could include virtually every part of the body.

consistent with some of the effects of nicotine intoxication, they did not impress Agent Eagerton as being severe intoxication and clearly not an overdose of nicotine. Appellant had a pulse rate of 104, but he also had normal sinus rhythm which indicated to Agent Eagerton that his symptom was not that drastic.²¹ Also none of the other factors one would expect in a case of severe nicotine overdose were present, such as an elevated potassium level; seizures; hypotension; or diaphragmatic paralysis. R. pp. 1880-85.

Agent McCraw was presented as a reply witness and testified that nothing was promised to Appellant in connection with the June 16, 2000 interview. Visiting his wife was mentioned when Agent McCraw was inventorying the items that she needed from Appellant's moped, but Appellant was never told that he would only be able to see his wife and get the inventory from his moped if he gave a statement. No conditions were placed upon seeing his wife or on getting the moped inventoried. Also, no promises were made to him about getting off the suicide watch in exchange for a statement, either on June 16 or 19. R. pp. 2089-92.

After listening to the arguments of the parties, R. pp. 2135-61, the trial judge ruled that each of Appellant's statements was admissible. R. pp. 2161-78. With respect to State's Exhibit #3, he specifically found that Appellant was in custody. He further found that on every occasion when the police questioned him, he was advised of his *Miranda* rights but never asserted his right to counsel. As a result, the trial judge found there was no Fifth Amendment violation. R. pp. 2165-66.

²¹In fact, it could have been caused by one nicotine patch or other factors. R. p. 1883.

In connection with finding that there was no Sixth Amendment violation, the trial judge found that there was no credible evidence that Appellant had any mental condition or medication that he may have taken which affected his ability to fully understand the circumstances that he was in, to fully understand the circumstances of any statements that he may make, to understand his rights or any questions that law enforcement asked. Moreover, the trial judge found that Agent McCraw's invitation to Appellant to make contact was not interrogation despite Agent McCraw's hope that some questioning may result. Rather, the judge found that Appellant initiated contact with law enforcement. The trial judge specifically found that Appellant's statement was freely and voluntarily given after he made a knowing and intelligent waiver of his *Miranda* rights.²² R. pp. 2165-77.

Additionally, the trial judge found that Appellant may have had reasons why he wished to talk to law enforcement, but that this was not unconstitutional and that he could initiate contact for whatever reason he wished. The trial judge further found there was no credible evidence which tended to show that law enforcement ever promised Appellant anything in return for his cooperation, or that he was tricked, threatened or coerced in any fashion. Also, the trial judge found there was no credible evidence that Appellant did not fully understand what he was doing and the importance of his decision. Therefore, he denied Appellant's motion to suppress. R. pp. 2165-77.

In *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486 (1990), the United States Supreme Court held that the holding in *Edwards v. Arizona*, *supra*, prevented officers from

²²The trial judge also noted that Appellant had a vast experience in the criminal law based upon his prior convictions. R. p. 2173.

re-initiating interrogation after a suspect's invocation of his right to counsel, without counsel present. In doing so, the Court explained the *Edwards* rule as follows:

In *Miranda v. Arizona*, *supra*, 384 U.S. at 474, 86 S.Ct. at 1627, we indicated that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present;" at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Edwards* gave force to these admonitions finding it "inconsistent with *Miranda* and its progeny for the authorities, at their insistence, to re-interrogate an accused in custody if he has clearly asserted his right to counsel." 451 U.S. at 485, 101 S.Ct. at 1885. We held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484, 101 S.Ct. at 1884-85. Further, an accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Id.* at 484-85, 101 S.Ct. at 1885.

Minnick, 498 U.S. at 150, 111 S.Ct. at 489 (*emphasis added*).

The Court subsequently explained that "[t]he purpose of the *Miranda-Edwards* guarantee . . . – and hence the purpose of invoking it – is to protect . . . the suspect's 'desire to deal with the police only through counsel.'" *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209 (1991). "The rule of [*Edwards*] applies only when the suspect 'ha[s] expressed' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda. Edwards, supra*. 451 U.S. at 484, 101 S.Ct. at 1884. . . . It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil*, 501

U.S. at 178, 111 S.Ct. at 2209. See also *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (To be unequivocal invocation of right to counsel, the desire must be "presented 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney'" (citation omitted)).

Applying this criteria to the case at bar, it is clear that Appellant's argument must be rejected for two reasons. First, and despite his claim that he invoked his right to counsel, the record clearly reflects that he never invoked either his right to remain silent or his right to counsel at any point from the time of his June 8 arrest through the time he gave the June 16 (or June 19), 2000 statement. The record clearly reflects that by the time the Appellant discussed the facts of the case with Agent McCraw and Detective Fowlkes on June 16, he had previously been advised of his *Miranda* rights on two separate occasions and expressly waived those rights. The waiver on June 16 (State's Exhibit #2, R. p. 3616) was written. While it is true that Mr. Thompson represented Appellant, Appellant never "expressed his desire to deal with the police only through counsel." *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1885. See also, *McNeil*, 501 U.S. at 178, 111 S.Ct. at 2209; *State v. Owens*, 346 S.C. 637, 659, 552 S.E.2d 745, 756-57 (2001) (holding that there was no evidence that the accused declined to speak with police without the presence of counsel in connection with the "Speedway matter;" rather, he waived his right to counsel); *United States v. Jordan*, 38 M.J. 346 (U.S. Ct. Mil. App. 1993) (despite numerous advisements of his *Miranda* rights, defendant never invoked the right to counsel until after giving statements in issue despite fact that defense counsel was assigned to defendant while he was still under Naval control). Indeed, both Mr. Thompson, (R. pp. 2039-40) and Appellant (R. pp. 2077; 2088) testified that Appellant never invoked his right to counsel at any point and, when counsel appeared

on June 19, 2000, Appellant directed him to leave because Appellant wished to speak with the officers. Thus, the present case is unlike *State v. Kennedy, supra*.

Nor is there any merit to Appellant's contention that Agent McCraw and the members of the Cherokee County Sheriff's Department believed that Appellant was invoking his right to counsel at the time of his arrest and therefore did not attempt to interrogate him. In support of his proposition, he relies upon Detective Fowlkes' testimony that he was under the impression Mr. Bannister was representing Appellant when the officers left the scene. R. p. 1906, L. 11-14. However, it is clear from Agent McCraw's testimony that Bannister was uncertain as to whether or not he would be representing Appellant on the present charge. R. p. 1936, L. 9-20. Also, even though Appellant may have secured an attorney to represent him, it is clear that he never indicated, in any fashion, that he wished to deal with police only through counsel. See, *McNeil v. Wisconsin, supra*; *State v. Owens, supra*; *United States v. Jordan, supra*.

Additionally, even if Appellant had invoked his right to counsel at some point before the June 16, 2000 statement, it is clear that his statement was nevertheless admissible because he initiated the contact resulting in the statement by making a written request to speak to the detectives without counsel being present. See State's Exhibit #2. See *Minnick, supra*; *Edwards, supra*. Agent McCraw's testimony supports the trial judge's finding in this regard. McCraw testified that in his communications with Mr. Thompson, Thompson indicated that Appellant wished to give a statement but Thompson had not had an opportunity to adequately sit down and discuss the case with him. McCraw specifically

denied that Thompson told him he could not speak with Appellant because Appellant was suicidal and would say anything. R. pp. 1938-39; 1959-63.²³

In light of this information, Agent McCraw then sent word to Appellant, through a jailer, that if Appellant wished to talk to law enforcement, he had to make a written request to do so. Appellant refers to this as a "ploy [which] was designed for no other purpose than to circumvent [Appellant]'s right to counsel and the protection afforded by *Miranda* and *Edwards*." FBOA, at p. 16. However, Agent McCraw did not initiate contact by merely telling Appellant that he would have to make a request to speak to the officers. *State v. Smith*, 494 M.W.2d 558, 562-64 (Neb. 1993) ("there can be no doubt" that defendant initiated further conversation in the ordinary "dictionary sense of the word" when he asked to speak to the officer; and the fact the officer "had told defendant that she would be around for a little while prior to defendant's request does not negate the fact that defendant initiated the dialogue." The officer's statement "was not intended to start a conversation but merely inform defendant that she would be available if he wished to initiate a dialogue." And the prosecution met its burden of proving that defendant waived his right to counsel). Rather, Agent McCraw was avoiding direct contact with Appellant and any questioning unless and until Appellant desired to initiate contact. Because Appellant initiated the contact with the officers, there can be no *Edwards* violation. *Id.* See also *State v. Franklin*, 299 S.C. 133, 382 S.E.2d 911 (1989).

²³Appellant further asserts that Mr. Thompson's testimony that he told McCraw that he could not speak to Appellant was credible, based in large measure upon Thompson's representations at a July 11, 2001 pretrial hearing. R. pp. 3505-06. However, this ignores that the trial judge's findings are supported by competent evidence. Moreover, the Fifth Amendment right to counsel was Appellant's right to invoke, and he never did so.

Finally, an *Edwards* violation is subject to harmless error analysis. See, *Shea v. Louisiana*, 470 U.S. 51, 59 n. 4, 105 S.Ct. 1065, 1070 n. 4 (1985); *Cooper v. Taylor*, 103 F.3d 366 (4th Cir. 1996) (*en banc*). Here, any admission in State's Exhibit #3 must be deemed as harmless in both the guilt and penalty phases of Appellant's trial because it was merely cumulative to other statements made by Appellant and other evidence presented by the State. First, Appellant left a handwritten suicide note with his fingerprint on it (State's Exhibit #34, R. p. 3614) at the crime scene. R. pp. 2200; 2322; 2541-43; 2652-54. This note stated where he had hidden the "scooter" which he used for transportation as well as a sketch with where he had hidden it. More importantly, Appellant stated in the note that "Honey, I did this first of all because I will not let them send me to prison. Second, they think I was a horrible person. Well, I decided to prove them right." This note also provides a motive for the murder, *i.e.*, that he was facing ten years imprisonment. See R. pp. 2227-28; 3614.

State's Exhibit #3 is also cumulative to statements Appellant made to fellow inmate, Danny Edwards, and a map which he provided to Edwards while both men were housed at the Cherokee County Detention Center.²⁴ In the course of a conversation with Edwards, Appellant told Edwards that:

He told me that he had scoped the house out a few days prior, and that he went there on a moped, and that he went in the house, burglarizing the house. He said that he was in the bathroom and using the bathroom. This was in the evening time, and . . . that a lady came in and seen him. They saw each other about the same time that he was in the bathroom using the bathroom. He said that he pulled a 9-millimeter and

²⁴Edwards was being housed there pending his transportation to a federal facility to serve a sixty-three months sentence for interstate transportation of stolen property.

shot . . . at the lady, and said she went to run and he ran behind her and he shot her again, I guess in the living room area. And then he ran out and went behind the house and went into the woods. And he said that the helicopters were hovering over him and after him, but they never [caught] him and he made it to his home. And he said that when he got to his home, he hid down in the basement of the house. When the agent or officers got to him, they found him [hidden] behind some boxes and all down in the basement of his house.

R. pp. 2618-19.²⁵

Edwards told Appellant that he would have to have some proof to show the agent if Appellant wanted to become more involved. Appellant then drew Edwards a map of the house, the driveway and the area around the residence. (State's Exhibit #107). R. pp. 2620; 2648-54. Rather than keep the drawing, however, Edward gave it to Inmate Jerry Johnson, Jr. Johnson came forward because he felt that Appellant did not "need to be back out on the streets."²⁶ Appellant never mentioned suicide as a possible motive for the burglary and murder to Edwards. Instead, he had intended to find whatever he could steal in the Southern's residence. R. pp. 2620-22; 2628-35.

The State was able to corroborate most details of State's Exhibits #3 and the information he provided to Edwards. For instance, Appellant's DNA was found on cigarette butts in the victim's residence, as well as on a marital device found in a trash can in the victim's master bathroom. His DNA was also found on cigarette butts located in the woods

²⁵Appellant had told Edwards about the crime because he had heard that it was easier to do time in a federal facility, and he wanted Edwards to talk to an FBI agent to see if the Feds would take his case. R. pp. 2619-20.

²⁶Johnson was facing charges of manufacturing methamphetamines and was facing between 0 to 15 years but had not received any preferential treatment in exchange for his testimony. R. p. 2635.

along the fence line of the victim's residence. A pair of gloves and a flashlight were found in one of these locations. R. pp. 2478-90; 2599-2602. Law enforcement was likewise able to tie the murder weapon to Appellant; and shell casings and projectiles that were found in the areas of residence described by Appellant to Edwards (and in State's Exhibit #3) were also positively determined to have been fired by the murder weapon. R. pp. 2332-33; 2468-75; 2491; 2552-64.²⁷ Finally, State's Exhibit #3 was cumulative to the June 19 statement, which was introduced in the penalty phase. Therefore, any error in its introduction must be viewed as harmless beyond a reasonable doubt.

²⁷Also, magazine chips and ammunition, consistent with the murder weapon, were discovered in a consensual search of a motel room in which Appellant had been living. Even if law enforcement could not have discovered the weapon without Appellant's assistance, which is not altogether clear in light of State's Exhibit 34, a weapon consistent with that used would have been traced to him, through ballistics testimony and the testimony of the gun's former owner, who had loaned it to him to shoot chickens.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
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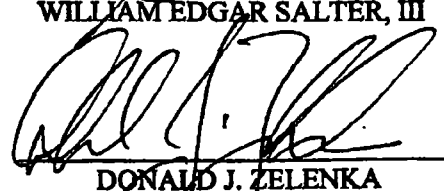
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June 1, 2004.

WES

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KYLE BINNEY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with SCACR 211(b).

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Solicitor, Seventh Judicial Circuit

By: 

WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

June 1, 2004.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KYLE BINNEY,

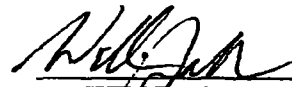
Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Esquire, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 1st day of June, 2004.



WILLIAM EDGAR SALTER, III

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Jonathan Kyle Binney,

Appellant.

Appeal from Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 25920
Heard September 21, 2004 – Filed January 10, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Harold W. Gowdy, III, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: In November 2002, Appellant Jonathan Kyle Binney (Binney) was convicted of murder and first-degree burglary and sentenced to death by a Cherokee County jury. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In early June 2000, Cherokee County police received a call that a local resident, upon returning home from work, was surprised and shot by a man who was hiding inside her house. When police went to the victim's residence to investigate, they found a suicide note Binney wrote and signed. Binney was later found in the crawl space of his Spartanburg County residence.

Before Binney was arrested and was read his *Miranda* rights, Binney turned to Cherokee County Sheriff's Deputy Steve Reynolds and said, "she's dead isn't she?" Reynolds replied, "who?" And Binney responded, "the woman I shot."

During Binney's detainment and eventual arrest, Binney's wife was talking on a cordless phone to Bill Bannister (Bannister), Binney's attorney in another matter.¹ Captain Mike Fowlkes (Fowlkes) with the Cherokee County Sheriff's Department testified that while Binney's wife was on the phone, she repeatedly told Binney not to say anything to the officers. Eventually, while still at the residence, SLED agent DeWitt "Spike" McCraw (McCraw) spoke with Bannister and assumed that Bannister would continue to represent Binney in the present matter.²

After hearing of Binney's arrest, Don Thompson (Thompson), Public Defender for Cherokee County, went to the jail to talk to Binney. Binney told Thompson that he wanted the death penalty, and Thompson told Binney

¹ Bannister was representing Binney in a pending case where Binney was charged with criminal sexual conduct with a minor (CSC).

² Later, Bannister declined to represent Binney, and Don Thompson, public defender for Cherokee County, was appointed; however, Thompson did not represent Binney at trial. Instead, Binney hired Trent N. Pruett and Sam "Mitch" Slade, Jr., both of the Pruett Law Firm in Gaffney, SC, as his trial counsel.

not to talk to the police. Thompson met with Binney again a few days later, and Binney was still determined to get the death penalty.³

At trial, Thompson testified that almost everyday during the first week of Binney's incarceration, either agent McCraw or the solicitor's office asked for permission to interrogate Binney. Thompson testified that he repeatedly refused their requests and told them that they could not talk to Binney.

On Friday, June 14, 2000, approximately a week after Binney's arrest, Thompson visited Binney and later testified that "it was hard to talk to him about anything," and that Binney mostly wanted to talk about the death penalty. On that same day, McCraw called Thompson and asked if he could send Binney a message asking Binney to submit to an interrogation without the presence of an attorney. Thompson told McCraw that he could not.

Also on June 14, McCraw contacted Travis Alexander (Alexander), a jailer who worked at the prison where Binney was incarcerated. McCraw told Alexander to find Binney and let him know that if he wanted to talk then he had to make a written request to talk with a detective without the presence of an attorney.⁴ Within hours of contacting Alexander, McCraw received a handwritten note from Binney, which included a request to see a detective, without the presence of an attorney.

On that same day, McCraw and Fowlkes picked Binney up and brought him to the Sheriff's Office. Before questioning began, Binney was advised of his rights, and he signed a pre-interrogation waiver form. In addition, at trial, he testified that he did not have any trouble understanding what the officers told him about his right to an attorney. McCraw and Fowlkes

³ Binney was put on suicide watch for the first several days that he was incarcerated.

⁴ McCraw denies that he told Alexander to tell Binney that he would have to specify in writing that he did not want an attorney present; however, Binney testified that he included this specification in his request at Alexander's instruction.

testified that during the interrogation, Binney appeared coherent, indicated that he understood the nature of the interrogation, and was never promised anything or coerced in anyway. Eventually, Binney wrote and signed a five-page statement confessing to the murder.⁵ At no time during Binney's arrest, incarceration, or questioning did Binney ask to have his attorney present.

During his confession, Binney told police what took place during the commission of the murder. He explained that before he was tried for the CSC charge, Bannister, Binney's lawyer at the time, told him that, if convicted, he would be sentenced to ten years, at the very least. The potential for substantial, future jail time made Binney very anxious. He went to a local shopping center and found a friend who sold him a handgun. He then went to the victim's house and hid just off the property line and watched the house and looked for activity. Binney never met the victim before the day of the murder. He stayed in the surrounding woods overnight thinking about whether he should just go into the house "to commit suicide or rape someone, or to just shoot all of them and kill [himself]."

The next morning, he waited until the victim and her husband left the house and then entered the house through an unlocked window. He cut all the phone lines in the house and put kitchen knives and other possible weapons out of reach. Late that afternoon, the victim came home and found Binney in her bathroom. The victim startled Binney because he did not hear her enter the house. Binney fired the gun in her direction and then chased her out of the house. Once outside, he shot in her direction again to "keep her scared and running" and then ran in the opposite direction into the woods. He ran home and hid under his house, where he was later found by police.

In his June 14 statement, Binney requested that he be given the death penalty: "the crime I committed definitely warrants it." In addition, he stated that he was not promised anything or coerced in any way. In addition, Binney wrote "I waive my right to an attorney." After Binney wrote and signed his June 14 statement, he took McCraw and Fowlkes to the woods next to the victim's house where he hid his moped and the murder weapon.

⁵ This is the June 14 statement that Binney argues was improperly admitted.

On Monday, June 17, three days after Binney sent his first written request, Binney sent McCraw another request to meet. Again, McCraw read Binney his rights and had him sign another waiver. Mike Prodan (Prodan), head of the Behavioral Science Unit at SLED, also attended the June 17 interrogation, because McCraw requested the assistance of someone with experience in investigating crimes involving sexual motives.

Meanwhile, on that same day, Thompson received a message that Binney met with police and signed a statement the previous Friday, June 14. Thompson eventually found Binney at the Sheriff's Office. McCraw and Prodan testified that Thompson "burst in" to the interrogation room and told Binney to quit talking. When Binney turned to McCraw and asked him what to do, McCraw responded, "*he works for you.*" (Emphasis added.) Binney told Thompson to leave so that he could continue talking to the officers.

At the suppression hearing, McCraw testified that Thompson never told him not to talk to Binney. The judge found that Binney never invoked his Fifth Amendment right to an attorney. Moreover, the judge found that Binney knowingly and intelligently waived his Fifth Amendment right to an attorney and that McCraw's communication to Binney inviting him to request a meeting was not an "interrogation."

Binney raises the following issue on appeal:

Did the trial judge err in admitting into evidence Binney's June 14 statement because it was taken in violation of Binney's Fifth Amendment right to have an attorney present during a custodial interrogation?

LAW/ANALYSIS

Binney argues that the trial judge erred in admitting the June 14 statement in which he confessed to murder because the statement was procured in violation of his Fifth Amendment right to have an attorney present during a custodial interrogation. We disagree.

The State has the burden to show by the preponderance of the evidence that a defendant has voluntarily waived his right to counsel. *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989). Police must inform criminal suspects of their right to have an attorney present during a custodial interrogation before the interrogation commences. *Miranda v. Arizona*, 384 U.S. 436, 473-474 (1966). The Court went on to say that "[o]nce warnings have been given, the subsequent procedure is clear...[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* In addition, police are restricted from initiating contact with a suspect when that contact is the "functional equivalent" of an interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The "functional equivalent" of an interrogation is

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a suspect.

Id.

In *Edwards v. Arizona*, the United States Supreme Court elaborated on one's right to have an attorney present during a custodial police interrogation. 451 U.S. 477 (1981). In that case, the police reinitiated an interrogation and eventually elicited a confession sometime after the defendant requested an attorney and interrogation had ceased. The Supreme Court of Arizona upheld the conviction, holding that the defendant's confession was voluntarily given. The United States Supreme Court reversed, holding "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.* at 483.

To invoke a Fifth Amendment right to counsel, one must give "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991); *see also State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (holding that an unequivocal invocation of the Fifth Amendment right to counsel must be presented in a manner that a reasonable police officer, under similar

circumstances, would understand the statement to be a request for the presence of an attorney).

Nevertheless, this Court has held that

[a] valid waiver of the right to counsel will not be presumed simply from the silence of the accused after *Miranda* warnings are given. The record must show an accused was offered counsel but intelligently and knowingly rejected the offer.

State v. McCray, 332 S.C. 536, 546, 506 S.E.2d 301, 306 (1998).

In addition, a criminal suspect's rights are not violated when the suspect, not the police, "initiates further communication, exchanges, or conversations with the police." *State v. Howard*, 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing *Edwards*, 451 U.S. at 485). Finally, this Court has held that, after it has been determined that the waiver was valid, the analysis is over:

[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

State v. Drayton, 293 S.C. 417, 426, 361 S.E.2d 329, 334-335 (1987) (citing *Moran v. Burbine*, 475 U.S. 412 (1986)).

In the present case, we find that the following facts support the conclusion that Binney's Fifth Amendment rights were not violated and that his June 14 statement was admissible:

- (1) There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning.
- (2) Binney has an adequate level of intelligence, and he has been arrested and read his rights before.

- (3) In his written request, Binney stated that he did not want an attorney present during the meeting with detectives.
- (4) Before Binney provided police with a statement, he was again read his rights and he signed a waiver of rights.

In addition, McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact. Moreover, Binney's request to meet with a detective and his later confession both were made out of his own free will, without coercion or deception. In fact, the record indicates that Binney was motivated to talk with police to get off of suicide watch. Finally, nothing in the record suggests that Binney was not fully informed of his rights, did not understand his rights, or that the confession was not the product of his own free will.

SENTENCE REVIEW

The Court must conduct a proportionality review of Binney's death sentence based on the record. S.C. Code Ann. § 16-3-25(A) (2003). In conducting the review, the Court considers similar cases in which the death penalty has been upheld. *See* S.C. Code Ann. § 16-3-25(E) (2003).

We find Binney's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the trial judge's findings of aggravation. *See* S.C. Code Ann. § 16-3-25(C) (2003). In addition, Binney's sentence, in relation to the sentences this Court has upheld in similar cases, was not excessive or disproportionate to his crime. *See State v. Tench*, 353 S.C. 531, 59 S.E.2d 314 (2003); *State v. Weik*, 356 S.C. 76, 507 S.E.2d 683 (2002), *cert denied*, 539 U.S. 930 (2003); *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000).

CONCLUSION

For the foregoing reasons, we affirm Binney's conviction and sentence and hold that the trial judge did not err in admitting the June 14 statement into evidence.

AFFIRMED.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

JONATHAN KYLE BINNEY,

APPELLANT

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

Opinion No. 25920

PETITION FOR REHEARING

Pursuant to Appellate Court Rule 221(a) counsel for Jonathan Kyle Binney petitions for rehearing on two points the Court may have overlooked or misapprehended.

The Court affirmed Binney's murder and first degree burglary convictions and death sentence on January 10, 2005. See State v. Jonathan Kyle Binney, Opinion No. 25920, filed January 10, 2005. Binney had argued:

The judge erred by admitting into evidence a statement Binney gave the police, in which he confessed that he was indeed guilty of murder and first degree burglary... because his statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his First Amendment right to counsel in violation of Edwards v. Arizona, 451 U.S. 477 (1981).

The Court found, in relevant part:

There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning... In addition, [SLED Agent] McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact.

Binney petitions for rehearing of both these points.

As to the first, Binney invoked his Fifth Amendment right to counsel by obtaining counsel to represent him on the murder and burglary charges. In addition, Agent McCraw was well aware that Binney was represented by counsel at the time he initiated contact with Binney. The Court's opinion apparently requires an express oral or written invocation of the right to counsel. To the contrary, Binney's conduct constituted an invocation of his right to counsel under McNeil v. Wisconsin, 501 U.S. 171 (1991).

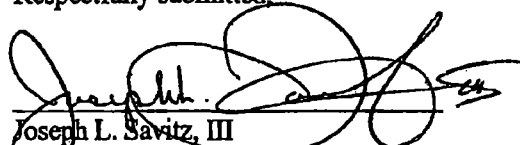
In regard to the Court's second finding, that the police may issue "an invitation... to initiate contact," Binney argues that such "invitations" are not permitted by Miranda v. Arizona, 384 U.S. 436 (1966), or Edwards v. Arizona, 451 U.S. 477 (1981), and in fact constitute the functional equivalent of interrogation. Rhode Island v. Innis, 446 U.S. 291, 301-1 (1980) holds:

[T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [Footnotes omitted.]

Even the trial judge recognized that McCraw's ultimate objective was to elicit an incriminating response.

For this reason, counsel for Jonathan Kyle Binney petitions the Court for rehearing and asks the Court to reverse Binney's convictions and death sentence.

Respectfully submitted,


Joseph L. Savitz, III
Acting Chief Attorney

This 25th day of January, 2005.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

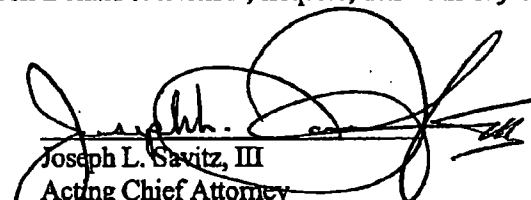
V.

JONATHAN KYLE BINNEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, this 25th day of January, 2005.


Joseph L. Savitz, III
Acting Chief Attorney
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day
of January, 2005.

Karen D. Elliott (L.S.)
Notary Public for South Carolina
My Commission Expires: March 13, 2007.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

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February 17, 2005

✓ Acting Chief Attorney Joseph L. Savitz, III
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Binney, Jonathan Kyle

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

February 17, 2005."

The remittitur is today being forwarded to the lower court.

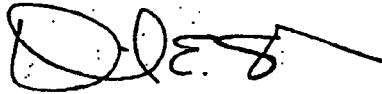
A13

Acting Chief Attorney Joseph L. Savitz, III

Page Two

February 17, 2005

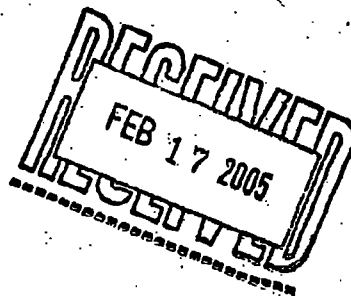
Very truly yours,



CLERK

DES/dmh

cc: Senior Assistant Attorney General William Edgar Salter, III
The Honorable Harold W. Gowdy, III



A14

3832

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 2004

No. 2004-_____

JONATHAN KYLE BINNEY,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

JOSEPH L. SAVITZ, III
Attorney at Law

**South Carolina Office
Of Appellate Defense
1205 Pendleton St., Room 306
Columbia, SC 29201
(803) 734-1330**

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

May the police send the accused "an invitation... to initiate contact" with them for further questioning about the crime charged, after the accused has invoked his Fifth Amendment right to counsel, or does such an "invitation" constitute police-initiated custodial interrogation in violation of Edwards v. Arizona, 451 U.S. 477 (1981)?

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SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-_____

JONATHAN KYLE BINNEY,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

Counsel for Jonathan Kyle Binney asks the Court to issue a writ of certiorari to review the decision of the South Carolina Court Supreme Court affirming his convictions for murder and first-degree burglary and the death sentence which resulted from those convictions.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as State v. Jonathan Kyle Binney, 362 S.C. 553, 608 S.E.2d 418 (2005), and is printed in the Appendix to this petition at pages A1-A9.

JURISDICTION

The final judgment of the South Carolina Supreme Court in this case was entered January 10, 2005. The Supreme Court denied rehearing February 17, 2005. (The petition for rehearing and order denying rehearing are printed at pages A10-A14 in the Appendix to this petition.)

The Court's jurisdiction is invoked pursuant to 28 U.S.C §1257(a), since Binney is asserting the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself."

It also involves the Fourteenth Amendment to the Constitution, which provides that "no state shall... deprive any person of life, liberty, or property without due process of law."

STATEMENT OF FACTS

On December 9, 1999, twenty-five year-old Jonathan Binney was arrested in Spartanburg County, South Carolina, for first-degree criminal sexual conduct with a minor. The victim was his three month old daughter, [REDACTED] Binney was free on bail for this offense at the time of the incident underlying the present appeal. (In April 2001, a jury convicted Binney of first-degree CSC with a minor and he received the maximum sentence of thirty years.)

On July 12, 2000, a Cherokee County, South Carolina, grand jury indicted Binney for murder and first-degree burglary. The victim was Judy Southern. The afternoon of the previous June 7, Southern was shot once in the abdomen when she surprised an intruder in the home where she lived with her husband, Allan, and their six year-old son, Jacob, both of whom were elsewhere at the time. The State contended that Binney had murdered Southern so that he would be sent to jail as a killer, not a child molester. The defense countered with evidence that Binney had broken into the Southern residence to commit suicide, not murder or burglary.

The State sought the death penalty, ultimately relying on the single statutory aggravating circumstance of murder during the commission of burglary. S.C. Code Section 16-3-20(C)(a)(1)(c). The solicitor rejected Binney's offer to plead guilty to life without parole. ROA p. 45, line 23 - p. 46, line 6.

Judge J. Derham Cole presided at Binney's jury trial November 4 through 14, 2002. The jury found Binney guilty of murder and first degree burglary. At sentencing, the judge charged the jury on the three statutory mitigating circumstances provided by S.C. Code Section 16-3-20(C)(b)(2), (6) and (7):

The murder was committed while the defendant was under the influence of mental or emotional disturbance.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The age or mentality of the defendant at the time of the crime.

These mitigators were based on evidence that Binney was intoxicated and suicidal when he shot Southern.

After deliberating for just over four hours, the jury recommended a death sentence. The judge then sentenced Binney accordingly.

How the federal issue was raised below

Cherokee County police obtained an arrest warrant charging Jonathan Binney with assault and battery with intent to kill almost immediately after the shooting, when they discovered a handwritten suicide note outside the Southern residence apparently connecting Binney with the incident. ROA p. 2220, lines 16-21; ROA p. 2227, line 19 – p. 2228, line 22; ROA p. 3614. (Judy Southern died later that night, so the charge was eventually upgraded to murder. ROA p. 2374, line 23 – p. 2375, line 7; ROA p. 2663, lines 12-14.) The next day, the Cherokee officers discovered Binney hiding in the basement of his Spartanburg County home. ROA p. 2299, line 12 – p. 2301, line 25. They handcuffed Binney and brought him around to the front of the house. ROA p. 2302, lines 3-6. According to the officer who arrested Binney, at this point he asked, "She's dead, isn't she?" ROA p. 2309, lines 18-25. The officer responded, "Who?" ROA p. 2310, lines 5-7. Binney answered, "The woman I shot." ROA p. 2310, lines 14 and 15.

South Carolina Law Enforcement Division (SLED) Agent DeWitt "Spike" McCraw arrived at the Binney residence, served the warrant for assault and battery with intent to kill and provided the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). ROA p. 1903, line 7 – p. 1904,

line 20. A Cherokee County officer present at the scene later prepared an investigative report which stated, "Binney asked for his attorney while still at the residence." ROA p. 1904, line 23 - p. 1905, line 2. During a suppression hearing held at the start of Binney's trial, this officer explained that Binney's wife, Melanie, had come out of the couple's house with a telephone in her hand and informed the arresting officers, within Binney's earshot and possibly even before Agent McCraw arrived and gave him Miranda warnings, that her husband would be represented by the attorney who was already handling the criminal sexual conduct charge. ROA p. 1905, line 4 - p. 1906, line 6. "It was my understanding," the officer testified, "at the time that we left the scene that Mr. Binney was represented by [counsel]." ROA p. 1906, lines 7-10. Agent McCraw testified during the suppression hearing that he had taken the phone from Melanie Binney and spoken directly with the attorney representing Binney on the CSC charge. ROA p. 1936, lines 3-14.

I told him we had just served an arrest warrant on Mr. Binney for assault and battery with intent to kill. He said that he was representing him on another charge and he didn't know if he was going to be his attorney or not.

ROA p. 1936, lines 15-20. Since the Cherokee police officers and Agent McCraw believed Binney was invoking his right to counsel, they did not attempt to interrogate him. ROA p. 1906, lines 11-14.

The arresting officers observed that Binney had stuck a number of nicotine patches to his bare chest. ROA p. 1866, line 1 - p. 1867, line 5; ROA p. 2312, line 21 - p. 2313, line 1; ROA p. 2314, line 6 - p. 2316, line 12. He was transported to the hospital complaining of nausea and from there to the Spartanburg County jail, where he was placed on suicide watch. ROA p. 1923, line 13 - p. 1924, line 21.

The day after Binney's arrest, the lawyer who was representing Binney on the CSC charge

advised Agent McCraw that he would not be handling the murder charge. ROA p. 1937, lines 19-25. McCraw then learned that Melanie Binney was hiring a prominent lawyer/legislator from Greenville, South Carolina, to represent her husband. ROA p. 1938, lines 1-3. This attorney met with McCraw in Cherokee County and also declined to represent Binney. ROA p. 1938, lines 4-7. Finally, McCraw learned that Binney would be represented by the Cherokee County public defender. ROA p. 1938, lines 8-10.

Every day for the next week, Agent McCraw telephoned Binney's attorney and told him "I would like to talk to his client." ROA p. 1938, lines 14-23. Counsel told McCraw that he could not speak with Binney "unless I could get some kind of a guarantee that the State would not seek the death penalty." ROA p. 1959, lines 19-22; ROA p. 2029, line 15 — p. 2030, line 1. The solicitor informed McCraw that it was "way too early" in the case to commit to a plea agreement. ROA p. 1960, lines 7-9. McCraw communicated the solicitor's response to defense counsel, but stated that he still wanted to talk to Binney about the case. ROA p. 1960, lines 10-15; ROA p. 2033, lines 8-12.

At the suppression hearing, Agent McCraw claimed that defense counsel never told him not to talk to Binney. ROA p. 1962, line 23 — p. 1963, line 4. He testified that counsel told him that Binney was "wanting to talk, but he hadn't had time to sit down and fully talk to him." ROA p. 1960, lines 19-23. The public defender, who had since been relieved as Binney's counsel for obvious reasons, testified at the suppression hearing that "[McCraw] called me again and wanted to know if I had changed my mind and would allow him to question Mr. Binney, and I told him no." ROA p. 2033, lines 13-18. Counsel then went home for the weekend. ROA p. 2033, lines 19 and 20.

At this point, Agent McCraw decided to take matters into his own hands:

[N]ot hearing back from any attorney, I called the jail and asked the jailer that answered the phone... when he saw Jonathan Binney, to tell him that if he would like to talk to detectives, to put it in written request then to see detectives.

ROA p. 1939, line 9 – p. 1940, line 2. His purpose for proceeding in this manner, McCraw added, was “to make sure that Mr. Binney’s rights to an attorney were protected, so I wanted him to do the request to see me... [I]f he would like to speak to detectives without an attorney, I need that in writing.” ROA p. 1940, lines 3-12. McCraw had to admit, though, that Binney had not initiated contact with the police before he called the jail. ROA p. 1961, lines 15-17.

The jailer then “went and found [Binney] a little while after and gave him that message.”

ROA p. 1981, line 9 – p. 1982, line 4. He testified, “I told him that if he would like to talk to a detective, just to... put it in writing, if he wants to talk to him.” ROA p. 1982, lines 5-9. Binney wrote by hand the following note and gave it to the jailer:

I request to see a Detective without the presence of my attorny (sic).
This is my request that this only be valid [today and tomorrow] &
any further contact is not initiated on my part, unless further
indicated by me.

ROA p. 1982, lines 17-20; ROA p. 3615. The jailer gave this note to Agent McCraw. ROA p. 1982, line 25 – p. 1983, line 1. McCraw then contacted Cherokee County police and informed them that Binney was ready to talk. ROA p. 1906, line 15 – p. 1907, line 17.

Binney was transported from suicide watch at the jail to the law enforcement center. ROA p. 1907, line 21 – p. 1908, line 6; ROA p. 1941, lines 1-10. Agent McCraw and a Cherokee County officer conducted the interrogation. ROA p. 1908, lines 14-16; ROA p. 1943, lines 6-8. They again advised Binney of his Miranda rights. ROA p. 1908, lines 17-20; ROA p. 1941, lines 11-13.

Binney agreed to talk without his attorney being present. ROA p. 1911, line 22 – p. 1912, line 4; ROA p. 3616 and 3623. McCraw and the Cherokee officer then began to question Binney about “the events that happened at the Southern home.” ROA p. 1914, lines 9-13.

Binney eventually gave his interrogators a five-page statement. ROA p. 1914, lines 14-22; ROA p. 3617-3621. According to Agent McCraw, Binney revealed that his motive for committing the crimes was that “he didn’t want to go to prison known as a child molester.” ROA p. 1945, lines 8-22.

In this statement, Binney describes his preparation for, and commission of, the crimes in detail. He did not know the Southern family and had selected their residence at random. Binney wrote, “I wasn’t sure if I just wanted to go in the house to commit suicide, or to rape someone, or to just shoot all of them, then kill myself.” After the Southern family left that morning, Binney broke into their house, where he stayed for the next six hours, until Judy Southern returned home. When she startled him, “I closed my eyes & pulled the trigger on the gun,” Binney recounted. His statement concludes:

Being of sound mind & judgment, I would like to request that I be given the death penalty. The crime that I committed deffinately (sic) warrants it & I request it. I would ask that all proceedings, rights, etc., be waived & that I be given a quick hearing so that I may plea (sic) to Murder & Burglary in the first degree, with the penalty being death by lethal injection. I have & believe that I have the mental capacity to make this decision.

Next, in response to his interrogators’ request, Binney accompanied Agent McCraw and at least two Cherokee County officers to a wooded area near the Southern residence and showed them where he had hidden his gun under fallen leaves at the base of a tree. ROA p. 1916, line 9 – p. 1917, line 7; ROA p. 1946, line 15 – p. 1947, line 25.

Two days later, after the weekend, Binney sent McCraw another handwritten note which stated, "I wish to talk with detective Spike McCraw without any attorney (sic) present, and until further notice, he is welcome to contact me." ROA p. 1947, line 17 – p. 1948, line 6; ROA p. 3622. McCraw and another SLED agent met with Binney that afternoon and again provided Miranda warnings. ROA p. 1948, line 20 – p. 1949, line 16. Binney wanted to talk to the Southern's husband "to tell him he was sorry for what he had done." ROA p. 1951, lines 6-19. McCraw told Binney that anything he wanted to say would have to be transmitted "in letter form." ROA p. 1951, lines 20-25. Binney then wrote a two-page letter and gave it to McCraw. ROA p. 1952, lines 1-22; ROA pp. 3624 and 3625.

Binney's attorney returned to work that same day to discover that Binney had confessed to the police three days earlier. ROA p. 2034, lines 4-19. He immediately telephoned Agent McCraw and, when the SLED agent confirmed what he had been told, lost his temper and "that was the end of that conversation." ROA p. 2034, lines 20-24. After unsuccessfully seeking redress at the solicitor's office, then learning that Binney had been removed from the jail, counsel drove to the law enforcement center, burst into the room where the two SLED agents were interrogating Binney and directed him to stop talking. ROA p. 1953, lines 1-13; ROA p. 2034, line 25 – p. 2035, line 22. The second SLED agent present with McCraw described counsel as "very agitated." ROA p. 1993, lines 8-12. By all accounts, Binney rejected his attorney's advice and the letter to the victim's husband followed. ROA p. 1953, line 17 – p. 1954, line 25; ROA p. 1993, line 15 – p. 2000, line 24; ROA p. 2035, line 23 – p. 2036, line 14; ROA p. 2065, line 16 – p. 2066, line 2.

Less than one month later, defense counsel appeared before the judge who had been assigned Binney's trial to place his concerns about Agent McCraw's unauthorized interrogation on

the record. His comments at that time are entirely consistent with his subsequent testimony at the suppression hearing. For example:

[Agent McCraw] wanted to know if I would let him question Mr. Binney. And I told him I wouldn't let him question Mr. Binney without me being present. He really didn't want to do that.

Pretrial Hearing ROA p. 3, line 25 – p. 4, line 3. The solicitor was apparently oblivious to McCraw's machinations:

I don't believe that Mr. McCraw approached Mr. Binney in order to get those letters written. I think he talked to Mr. Binney after receiving notice that Mr. Binney wanted to talk, and so that's why he went to talk to him... It's my understanding that the agents were working at the sheriff's department and received a letter from the jail from Mr. Binney indicating his willingness to talk to them, and they went over there to talk to him. They did not initiate contact with him.

Pretrial Hearing ROA p. 9, line 12 – p. 10, line 13.

At the start of Binney's trial, the defense attorneys who had replaced the public defender moved to suppress all of Binney's statements to the police. ROA p. 1835, lines 12-22. As to the statement and letter obtained by Agent McCraw at the law enforcement center, counsel argued that they were the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of Edwards v. Arizona, 451 U.S. 477 (1981). ROA p. 2143, line 15 – p. 2149, line 17. The solicitor argued that Binney had never invoked his right to counsel. ROA p. 2150, line 5 – p. 2158, line 1. The judge agreed:

With respect to the invocation of his right to counsel, I do not recall any testimony at any time where Mr. Binney invoked his right to counsel. At no time when he was advised did he say, "Well, I prefer to have a lawyer or talk to a lawyer before I answer any questions that you might pose to me." So, at no time during this process... did he invoke his right to counsel. And, therefore, there is no Fifth Amendment violation...

ROA p. 2165, line 17 – p. 2166, line 2. As to Agent McCraw's contact with Binney via the jailer, the judge found:

Mr. McCraw did send word to Mr. Binney... inviting him to initiate contact if he wish to talk. I do not find that that invitation to initiate contact was in any way an interrogation... [W]hile Mr. McCraw may have been hoping that some questioning of Mr. Binney would result in some sort of incriminating response, to offer to discuss the case with Mr. Binney and the invitation from Mr. Binney (sic) to initiate contact with the police if he wanted to talk cannot in any way be interpreted as interrogation under the law. Therefore, I do find that while Agent McCraw did send a message to Mr. Binney after he was in fact represented by counsel, I do not find that that contact or that message sent was in any way, or can in any way, be described as interrogation... Mr. Binney, in response to receiving that message, did initiate contact with Agent McCraw. He did send a message to Agent McCraw reflecting that he did wish to talk with Agent McCraw. And, therefore, Agent McCraw responded to that initiation of contact by Mr. Binney. When Mr. Binney initiated that contact, he waived his right to counsel, as he has every right to do.

ROA p. 2169, lines 17 – p. 2171, line 11. He therefore denied the motion to suppress. ROA p. 2177, lines 16-18.

Binney's statement was the centerpiece of the State's case. The judge allowed its admission early in the guilt phase over the renewed objection of defense counsel. ROA p. 2335, lines 8-19; ROA p. 2343, line 23 – p. 2350, line 1. The solicitor reintroduced the statement at the beginning of the sentencing phase, again over defense counsel's objection. ROA p. 3051, line 18 – p. 3052, line 1.

How the federal issue was decided on direct appeal

On direct appeal to the South Carolina Supreme Court, Binney argued:

The judge erred by admitting into evidence a statement Binney gave the police, in which he confessed that he was indeed guilty of murder and first-degree burglary and requested "the death penalty" because "[t]he crime that I committed definitely warrants it," because this statement was the product of police-initiated custodial

interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel in violation of Edwards v. Arizona, 451 U.S. 477 (1981).

The Supreme Court found, in relevant part:

There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning... In addition, [SLED Agent] McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact.

The Court subsequently denied rehearing on both of these points.

WHY THE WRIT SHOULD BE GRANTED

The police may not send the accused "an invitation... to initiate contact" with them for further questioning about the crime charged, after the accused has invoked his Fifth Amendment right to counsel.

In Miranda v. Arizona, 384 U.S. 479, the Supreme Court set forth the now-famous "Miranda warnings," which must be given to an accused prior to custodial interrogation by the police. They are:

He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

As to the right to counsel, the Court continued:

Once warnings have been given, the subsequent procedure is clear... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Id. at 473-4.

In Edwards v. Arizona, the Court elaborated:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights... [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-5 (footnote omitted). In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Court explained that "[t]he purpose of the Miranda - Edwards guarantee... is to protect... the suspect's

'desire to deal with the police only through counsel'." 501 U.S. at 178, quoting Edwards, 451 U.S. at 484.

It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.

Id. (emphasis omitted).

Binney invoked his Fifth Amendment right to counsel by obtaining counsel to represent him on the murder and burglary charges. Agent McCraw was well aware that Binney was represented by counsel at the time he initiated contact with Binney by telephoning his jailer. McCraw also conceded that Binney had not contacted the police before he called the jail. ROA p. 1961, lines 15-17.

The judge found that Agent McCraw's "invitation to initiate contact" was not the functional equivalent of interrogation. However, Rhode Island v. Innis, 446 U.S. 291 (1980), holds:

[T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect... A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

446 U.S. at 300-1 (footnotes omitted). McCraw's unauthorized contact with Binney plainly falls within this definition. Even the judge recognized that McCraw's ultimate objective was to elicit "some sort of incriminating response." Moreover:

[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

Miranda, 384 U.S. at 476. McCraw's ploy was designed for no other purpose than to circumvent Binney's right to counsel and the protection afforded by Miranda and Edwards.

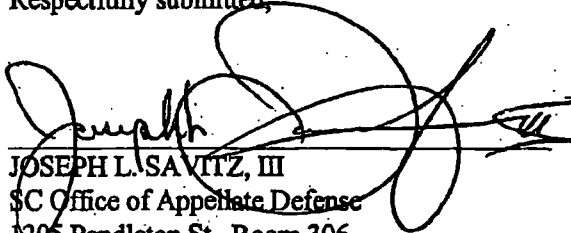
The South Carolina Supreme Court's opinion apparently requires an express oral or written invocation of the right to counsel. To the contrary, Binney's conduct constituted an invocation of his right to counsel under McNeil v. Wisconsin, 501 U.S. 171 (1991). "[A]n invitation... to initiate contact" is not permitted by Miranda v. Arizona or Edwards v. Arizona and in fact constitutes the functional equivalent of interrogation under Rhode Island v. Innis.

To summarize: The judge erred by allowing Binney's statement into evidence at the guilt phase and at sentencing. Agent McCraw violated Edwards v. Arizona by contacting Binney after he had invoked his right to counsel. Neither Miranda, Edwards nor Innis permit (in the judge's words) an "invitation to initiate" interrogation once an accused has invoked his Fifth Amendment right to counsel. The error was especially harmful at sentencing, since the statement contained not only an admission of guilt, but the request for a speedy execution.

CONCLUSION

The Court should issue a writ of certiorari and reverse the convictions (murder and first-degree burglary) and death sentence of Jonathan Kyle Binney.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

May 18, 2005

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-_____

JONATHAN KYLE BINNEY,

PETITIONER,

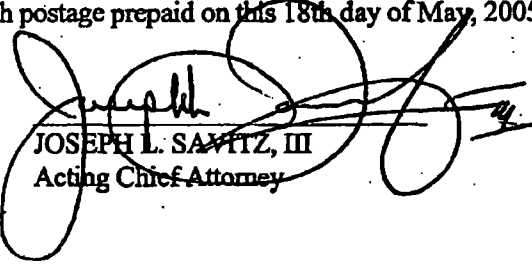
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari, appendix, and the motion for leave to proceed in forma pauperis in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 18th day of May, 2005.


JOSEPH L. SAMTIZ, III
Acting Chief Attorney

SWORN TO BEFORE me this 18th day
of May, 2005.

Karen D. Elliott (L.S.)
Notary Public for South Carolina
My Commission Expires: March 13, 2007

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04 -

JONATHAN KYLE BINNEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

JOSEPH L. SAVITZ, III
Attorney at Law

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ATTORNEY FOR PETITIONER.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State,

Respondent,

v.

Jonathan Kyle Binney,

Appellant.

Appeal from Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 25920

Heard September 21, 2004 – Filed January 10, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Harold W. Gowdy, III, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: In November 2002, Appellant Jonathan Kyle Binney (Binney) was convicted of murder and first-degree burglary and sentenced to death by a Cherokee County jury. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In early June 2000, Cherokee County police received a call that a local resident, upon returning home from work, was surprised and shot by a man who was hiding inside her house. When police went to the victim's residence to investigate, they found a suicide note Binney wrote and signed. Binney was later found in the crawl space of his Spartanburg County residence.

Before Binney was arrested and was read his *Miranda* rights, Binney turned to Cherokee County Sheriff's Deputy Steve Reynolds and said, "she's dead isn't she?" Reynolds replied, "who?" And Binney responded, "the woman I shot."

During Binney's detainment and eventual arrest, Binney's wife was talking on a cordless phone to Bill Bannister (Bannister), Binney's attorney in another matter.¹ Captain Mike Fowlkes (Fowlkes) with the Cherokee County Sheriff's Department testified that while Binney's wife was on the phone, she repeatedly told Binney not to say anything to the officers. Eventually, while still at the residence, SLED agent DeWitt "Spike" McCraw (McCraw) spoke with Bannister and assumed that Bannister would continue to represent Binney in the present matter.²

After hearing of Binney's arrest, Don Thompson (Thompson), Public Defender for Cherokee County, went to the jail to talk to Binney. Binney told Thompson that he wanted the death penalty, and Thompson told Binney

¹ Bannister was representing Binney in a pending case where Binney was charged with criminal sexual conduct with a minor (CSC).

² Later, Bannister declined to represent Binney, and Don Thompson, public defender for Cherokee County, was appointed; however, Thompson did not represent Binney at trial. Instead, Binney hired Trent N. Pruett and Sam "Mitch" Slade, Jr., both of the Pruett Law Firm in Gaffney, SC, as his trial counsel.

not to talk to the police. Thompson met with Binney again a few days later, and Binney was still determined to get the death penalty.³

At trial, Thompson testified that almost everyday during the first week of Binney's incarceration, either agent McCraw or the solicitor's office asked for permission to interrogate Binney. Thompson testified that he repeatedly refused their requests and told them that they could not talk to Binney.

On Friday, June 14, 2000, approximately a week after Binney's arrest, Thompson visited Binney and later testified that "it was hard to talk to him about anything," and that Binney mostly wanted to talk about the death penalty. On that same day, McCraw called Thompson and asked if he could send Binney a message asking Binney to submit to an interrogation without the presence of an attorney. Thompson told McCraw that he could not.

Also on June 14, McCraw contacted Travis Alexander (Alexander), a jailer who worked at the prison where Binney was incarcerated. McCraw told Alexander to find Binney and let him know that if he wanted to talk then he had to make a written request to talk with a detective without the presence of an attorney.⁴ Within hours of contacting Alexander, McCraw received a handwritten note from Binney, which included a request to see a detective, without the presence of an attorney.

On that same day, McCraw and Fowlkes picked Binney up and brought him to the Sheriff's Office. Before questioning began, Binney was advised of his rights, and he signed a pre-interrogation waiver form. In addition, at trial, he testified that he did not have any trouble understanding what the officers told him about his right to an attorney. McCraw and Fowlkes

³ Binney was put on suicide watch for the first several days that he was incarcerated.

⁴ McCraw denies that he told Alexander to tell Binney that he would have to specify in writing that he did not want an attorney present; however, Binney testified that he included this specification in his request at Alexander's instruction.

testified that during the interrogation, Binney appeared coherent, indicated that he understood the nature of the interrogation, and was never promised anything or coerced in anyway. Eventually, Binney wrote and signed a five-page statement confessing to the murder.⁵ At no time during Binney's arrest, incarceration, or questioning did Binney ask to have his attorney present.

During his confession, Binney told police what took place during the commission of the murder. He explained that before he was tried for the CSC charge, Bannister, Binney's lawyer at the time, told him that, if convicted, he would be sentenced to ten years, at the very least. The potential for substantial, future jail time made Binney very anxious. He went to a local shopping center and found a friend who sold him a handgun. He then went to the victim's house and hid just off the property line and watched the house and looked for activity. Binney never met the victim before the day of the murder. He stayed in the surrounding woods overnight thinking about whether he should just go into the house "to commit suicide or rape someone, or to just shoot all of them and kill [himself]."

The next morning, he waited until the victim and her husband left the house and then entered the house through an unlocked window. He cut all the phone lines in the house and put kitchen knives and other possible weapons out of reach. Late that afternoon, the victim came home and found Binney in her bathroom. The victim startled Binney because he did not hear her enter the house. Binney fired the gun in her direction and then chased her out of the house. Once outside, he shot in her direction again to "keep her scared and running" and then ran in the opposite direction into the woods. He ran home and hid under his house, where he was later found by police.

In his June 14 statement, Binney requested that he be given the death penalty: "the crime I committed definitely warrants it." In addition, he stated that he was not promised anything or coerced in any way. In addition, Binney wrote "I waive my right to an attorney." After Binney wrote and signed his June 14 statement, he took McCraw and Fowlkes to the woods next to the victim's house where he hid his moped and the murder weapon.

⁵ This is the June 14 statement that Binney argues was improperly admitted.

On Monday, June 17, three days after Binney sent his first written request, Binney sent McCraw another request to meet. Again, McCraw read Binney his rights and had him sign another waiver. Mike Prodan (Prodan), head of the Behavioral Science Unit at SLED, also attended the June 17 interrogation, because McCraw requested the assistance of someone with experience in investigating crimes involving sexual motives.

Meanwhile, on that same day, Thompson received a message that Binney met with police and signed a statement the previous Friday, June 14. Thompson eventually found Binney at the Sheriff's Office. McCraw and Prodan testified that Thompson "burst in" to the interrogation room and told Binney to quit talking. When Binney turned to McCraw and asked him what to do, McCraw responded, "*he works for you.*" (Emphasis added.) Binney told Thompson to leave so that he could continue talking to the officers.

At the suppression hearing, McCraw testified that Thompson never told him not to talk to Binney. The judge found that Binney never invoked his Fifth Amendment right to an attorney. Moreover, the judge found that Binney knowingly and intelligently waived his Fifth Amendment right to an attorney and that McCraw's communication to Binney inviting him to request a meeting was not an "interrogation."

Binney raises the following issue on appeal:

Did the trial judge err in admitting into evidence Binney's June 14 statement because it was taken in violation of Binney's Fifth Amendment right to have an attorney present during a custodial interrogation?

LAW/ANALYSIS

Binney argues that the trial judge erred in admitting the June 14 statement in which he confessed to murder because the statement was procured in violation of his Fifth Amendment right to have an attorney present during a custodial interrogation. We disagree.

The State has the burden to show by the preponderance of the evidence that a defendant has voluntarily waived his right to counsel. *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989). Police must inform criminal suspects of their right to have an attorney present during a custodial interrogation before the interrogation commences. *Miranda v. Arizona*, 384 U.S. 436, 473-474 (1966). The Court went on to say that "[o]nce warnings have been given, the subsequent procedure is clear...[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* In addition, police are restricted from initiating contact with a suspect when that contact is the "functional equivalent" of an interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The "functional equivalent" of an interrogation is

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a suspect.

Id.

In *Edwards v. Arizona*, the United States Supreme Court elaborated on one's right to have an attorney present during a custodial police interrogation. 451 U.S. 477 (1981). In that case, the police reinitiated an interrogation and eventually elicited a confession sometime after the defendant requested an attorney and interrogation had ceased. The Supreme Court of Arizona upheld the conviction, holding that the defendant's confession was voluntarily given. The United States Supreme Court reversed, holding "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.* at 483.

To invoke a Fifth Amendment right to counsel, one must give "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991); see also *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (holding that an unequivocal invocation of the Fifth Amendment right to counsel must be presented in a manner that a reasonable police officer, under similar

circumstances, would understand the statement to be a request for the presence of an attorney).

Nevertheless, this Court has held that

[a] valid waiver of the right to counsel will not be presumed simply from the silence of the accused after *Miranda* warnings are given. The record must show an accused was offered counsel but intelligently and knowingly rejected the offer.

State v. McCray, 332 S.C. 536, 546, 506 S.E.2d 301, 306 (1998).

In addition, a criminal suspect's rights are not violated when the suspect, not the police, "initiates further communication, exchanges, or conversations with the police." *State v. Howard*, 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing *Edwards*, 451 U.S. at 485). Finally, this Court has held that, after it has been determined that the waiver was valid, the analysis is over:

[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

State v. Drayton, 293 S.C. 417, 426, 361 S.E.2d 329, 334-335 (1987) (citing *Moran v. Burbine*, 475 U.S. 412 (1986)).

In the present case, we find that the following facts support the conclusion that Binney's Fifth Amendment rights were not violated and that his June 14 statement was admissible:

- (1) There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning.
- (2) Binney has an adequate level of intelligence, and he has been arrested and read his rights before.

- (3) In his written request, Binney stated that he did not want an attorney present during the meeting with detectives.
- (4) Before Binney provided police with a statement, he was again read his rights and he signed a waiver of rights.

In addition, McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact. Moreover, Binney's request to meet with a detective and his later confession both were made out of his own free will, without coercion or deception. In fact, the record indicates that Binney was motivated to talk with police to get off of suicide watch. Finally, nothing in the record suggests that Binney was not fully informed of his rights, did not understand his rights, or that the confession was not the product of his own free will.

SENTENCE REVIEW

The Court must conduct a proportionality review of Binney's death sentence based on the record. S.C. Code Ann. § 16-3-25(A) (2003). In conducting the review, the Court considers similar cases in which the death penalty has been upheld. *See* S.C. Code Ann. § 16-3-25(E) (2003).

We find Binney's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the trial judge's findings of aggravation. *See* S.C. Code Ann. § 16-3-25(C) (2003). In addition, Binney's sentence, in relation to the sentences this Court has upheld in similar cases, was not excessive or disproportionate to his crime. *See State v. Tench*, 353 S.C. 531, 59 S.E.2d 314 (2003); *State v. Weik*, 356 S.C. 76, 507 S.E.2d 683 (2002), *cert denied*, 539 U.S. 930 (2003); *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000).

CONCLUSION

For the foregoing reasons, we affirm Binney's conviction and sentence and hold that the trial judge did not err in admitting the June 14 statement into evidence.

AFFIRMED.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

JONATHAN KYLE BINNEY,

APPELLANT.

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

Opinion No. 25920

PETITION FOR REHEARING

Pursuant to Appellate Court Rule 221(a) counsel for Jonathan Kyle Binney petitions for rehearing on two points the Court may have overlooked or misapprehended.

The Court affirmed Binney's murder and first degree burglary convictions and death sentence on January 10, 2005. See State v. Jonathan Kyle Binney, Opinion No. 25920, filed January 10, 2005. Binney had argued:

The judge erred by admitting into evidence a statement Binney gave the police, in which he confessed that he was indeed guilty of murder and first degree burglary... because his statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his First Amendment right to counsel in violation of Edwards v. Arizona, 451 U.S. 477 (1981).

A10

The Court found, in relevant part:

There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning... In addition, [SLED Agent] McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact.

Binney petitions for rehearing of both these points.

As to the first, Binney invoked his Fifth Amendment right to counsel by obtaining counsel to represent him on the murder and burglary charges. In addition, Agent McCraw was well aware that Binney was represented by counsel at the time he initiated contact with Binney. The Court's opinion apparently requires an express oral or written invocation of the right to counsel. To the contrary, Binney's conduct constituted an invocation of his right to counsel under McNeil v. Wisconsin, 501 U.S. 171 (1991).

In regard to the Court's second finding, that the police may issue "an invitation... to initiate contact," Binney argues that such "invitations" are not permitted by Miranda v. Arizona, 384 U.S. 436 (1966), or Edwards v. Arizona, 451 U.S. 477 (1981), and in fact constitute the functional equivalent of interrogation. Rhode Island v. Innis, 446 U.S. 291, 301-1 (1980) holds:

[T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [Footnotes omitted.]

Even the trial judge recognized that McCraw's ultimate objective was to elicit an incriminating response.

For this reason, counsel for Jonathan Kyle Binney petitions the Court for rehearing and asks the Court to reverse Binney's convictions and death sentence.

Respectfully submitted


Joseph L. Savitz, III
Acting Chief Attorney

This 25th day of January, 2005.

A12



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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February 17, 2005

✓ Acting Chief Attorney Joseph L. Savitz, III
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Binney, Jonathan Kyle

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

February 17, 2005."

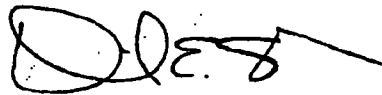
The remittitur is today being forwarded to the lower court.

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Acting Chief Attorney Joseph L. Savitz, III
Page Two
February 17, 2005

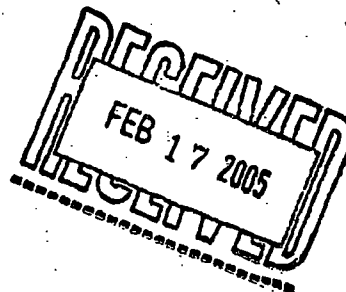
Very truly yours,



CLERK

DES/dmh

cc: Senior Assistant Attorney General William Edgar Salter, III
The Honorable Harold W. Gowdy, III



A14

3869

**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term 2004

04-10101

JONATHAN KYLE BINNEY,

Petitioner

V.

STATE OF SOUTH CAROLINA,

Respondent

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE SOUTH CAROLINA SUPREME COURT**

HENRY DARGAN McMASTER
Attorney General

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ATTORNEYS FOR RESPONDENT

PETITIONER'S QUESTION PRESENTED

May the police send the accused "an invitation ... to initiate contact" with them for further questioning about the crime charged, after the accused has invoked his Fifth Amendment right to counsel, or does such an "invitation" constitute police-initiated custodial interrogation in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981)?

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**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term 2002

02-10101

JOHN EDWARD WEIK,

Petitioner

V.

STATE OF SOUTH CAROLINA,

Respondent

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE SOUTH CAROLINA SUPREME COURT**

The Respondent, State of South Carolina, hereby makes a Brief in Opposition to the
Petition.

CITATION TO OPINION BELOW

The Opinion of the South Carolina Supreme Court affirming Petitioner's murder conviction and death sentence is reported as *State v. Jonathan Kyle Binney*, Op. No. 25920 (S.C. S. Ct., filed January 10, 2005). The decision is published as *State v. Binney*, 362 S.C. 353, 608 S.E.2D 418 (2005) and is reprinted in the Appendix to the Petition at pages A1-9. Petitioner filed a timely Petition for Rehearing, which was denied on February 17, 2005.

JURISDICTION

The final judgment of the South Carolina Supreme Court was entered on February 17, 2005. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTION PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part, "No person ... shall be compelled in any criminal case to be a witness against himself" U.S. Const. Amend. V.
2. This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]o state shall...deprive any person of life, liberty, or property without due process of law..." U.S. Const. Amend. XIV.

RESPONDENTS STATEMENT OF THE CASE

The Cherokee County Grand Jury indicted Jonathan Kyle Binney (Petitioner) at the July, 2000 term of court for murder (2000-GS-11-526) and burglary in the first degree (2000-GS-11-525). These charges stemmed from the June 8, 2000 shooting of Judy L. Southern in her Cherokee County home. The State timely served a Notice of Intent to Seek the Death Penalty on Petitioner pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2003). On July 11, 2001, the Honorable J. Derham Cole held a pretrial hearing in the matter. Don Thompson, Esquire, represented Petitioner at that hearing, while Deputy Seventh Circuit Solicitor Donnie Willingham represented the prosecution. Mr. Thompson was subsequently relieved as counsel, and Trent N. Pruett, Esquire, and Samuel "Mitch" Slade, Jr., Esquire, represented him in all subsequent

proceedings in the trial court. Seventh Circuit Solicitor Trey Gowdy, III, and Mr. Willingham represented the State.

Judge Cole held pretrial hearings on March 25, and October 25, 2002. Petitioner thereafter received a jury trial before Judge Cole on November 4-14, 2002. The jury convicted Petitioner of murder and burglary in the first degree on November 11, 2002.

The sentencing phase was conducted following Petitioner's exercise of the twenty-four hour waiting period in § 16-3-20(B). The State relied upon the statutory aggravating circumstance that the murder was committed while in commission of burglary. §16-3-20(C)(a)(1)(c). Judge Cole also charged the jury on the three statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7), that they were to consider any nonstatutory mitigating circumstance which had been shown to exist by the evidence presented and that they could recommend a life sentence even though they did not find the existence of a statutory or non statutory mitigating circumstance because the jury could recommend a sentence of life imprisonment "for no reason at all, other than as an act of mercy." Finally, he instructed the jury that pursuant to § 16-3-20(A), a sentence of life imprisonment meant until the death of Petitioner, without the possibility of parole. *R. pp. 3469-86*. The jury found the alleged statutory aggravating circumstance and recommended a sentence of death. Judge Cole sentenced Petitioner to death for murder and to life without parole for burglary in the first degree. See S.C. Code Ann. § 17-25-45(Supp. 2003). *R. pp. 3491-94; 3499-3501*.

Petitioner then made an appeal to the South Carolina Supreme Court. Pertinent to this issue, he raised the following question:

The judge erred by admitting into evidence a statement Binney gave the police, in

which he confessed that he was indeed guilty of murder and first degree burglary and requested "the death penalty" because "[t]he crime that I committed definitely warrants it," because this statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of Edwards v. Arizona, 451 U.S. 477 (1981).

The South Carolina Supreme Court affirmed the conviction and sentence on January 10, 2005.

State v. Jonathan Kyle Binney, Op. 25920 (S.C. S.Ct. January 10, 2005). This decision is published as *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005). A timely petition for rehearing was denied on February 17, 2005.

RESPONDENTS STATEMENT OF THE FACTS

The South Carolina Supreme Court set forth the facts surrounding Petitioner's arrest in the following manner:

In early June 2000, Cherokee County police received a call that a local resident, upon returning home from work, was surprised and shot by a man who was hiding inside her house. When police went to the victim's residence to investigate, they found a suicide note Binney wrote and signed. Binney was later found in the crawl space of his Spartanburg County residence.

Before Binney was arrested and was read his *Miranda* rights, Binney turned to Cherokee County Sheriff's Deputy Steve Reynolds and said, "she's dead isn't she?" Reynolds replied, "who?" And Binney responded, "the woman I shot."

Binney, 362 S.C. at 355, 608 S.E.2d at 419 On June 16, 2000, Petitioner initiated contact with authorities and, ultimately, gave a statement which is the subject of the Petition for Writ of Certiorari. He thereafter gave another statement on June 19, 2000. The South Carolina Supreme Court set forth the facts surrounding the June 16 statement¹ as follows:

Binney told police what took place during the commission of the murder.

¹ The South Carolina Supreme Court's decision erroneously reflects that the date of the interview was June 14. However, the remaining factual findings are clearly supported by the record.

said he actually picked the house because it appeared to be more affluent when Agent Prodan noted that other houses in the area were equally secluded. Petitioner also said that he knew there was a husband and wife living there because he had ascertained that two cars were in the garage. He had not previously had any contact with the victim and did not know her. However, he explained that he was anxious and angry on the day of the crimes and that he commenced "a burglary or does some snooping" when he has these types of feelings. **R. pp. 1994-95.**

Petitioner provided several possible motives for the crimes. "He said that he had gone there to commit a burglary. And then he said that he had gone there to commit a sexual assault and he had a fantasy involving the rape of his wife's brother's wife, which would result in a murder. And then he also said something about committing some mass murders and then a suicide, and then going into the residence to commit a suicide at that residence."

R. pp. 1995-96. Agent Prodan also explained other details of the interview, such as Petitioner's explanation that he had previously engaged in a purported suicide, but this was actually a ruse for him to get out of trouble; and that Petitioner had only felt depressed after his conviction for criminal sexual conduct. **R. pp. 1996-99.**

Following the interview, Petitioner also asked to speak with the victim's husband. Agent Prodan "explained that it would be very difficult, if not impossible, for that to happen under the circumstances, but if he wanted to write a letter or write a message of some type to the victim's husband, that we would see that the letter was available." Petitioner then wrote **State's Exhibit #6** in his presence. The officers were quiet while he wrote the letter and did not suggest what he should put in it. Agent McCraw took the letter after Petitioner had completed it and it was "ultimately put into evidence." Agent Prodan did not have any further contact with Petitioner

after June 19. **R. pp. 2000-01.**¹³

Cherokee County Chief Public Defender Donald Anthony Thompson, Esquire, testified for the defense at the suppression hearing.¹⁴ Mr. Thompson testified that he had seen a report on the news of the crime as well as Petitioner's arrest on June 8, 2000, and he felt that the State might end up seeking the death penalty in this case. So, he went to the detention center on June 9, 2000 and met with Petitioner. Petitioner was in what Thompson described as "the suicide cell," which is a small cell immediately adjacent to the booking room. While Petitioner had not been clothed when he was in the cell, he was wearing a pair of "paper underwear and handcuffs" when they met. The first meeting only lasted approximately 30 minutes or so. **R. pp. 2022-27.**

In response to a query by defense counsel as to whether he had seen any signs of Petitioner being suicidal, Mr. Thompson explained that he felt Petitioner was suicidal because Petitioner wanted to receive the death penalty in this case. He acknowledged on cross-examination that the fact Petitioner was placed on suicide watch did not necessarily mean that he was suicidal because individuals were often placed on suicide watch even though they are not suicidal. Mr. Thompson asked Petitioner whether he was going to retain counsel or wanted to use the services of the public defender, and Petitioner said that he wanted to be represented by the public defender. Also, Petitioner indicated that he had not yet given a statement to the police. Mr. Thompson told him to make sure that he did not give any statement in the future. **R. pp.**

¹³It was Agent Prodan's impression from speaking with Petitioner that he was not in such hopeless despair that he could not understand the circumstances around him. **R. pp. 2009-10.**

¹⁴Mr. Thompson has been the chief public defender in Cherokee County since August, 1999, and has been practicing law since November, 1980.

2028; 2039-45.¹⁵

Mr. Thompson next met with Petitioner on June 14, 2000. Between the first and second meetings, he was contacted by Inv. Eric Wright, of the Seventh Circuit Solicitor's Office and Agent McCraw. McCraw wanted to see if counsel would allow him to question Petitioner. Mr. Thompson testified that:

I told him no, that Mr. Binney was, in my opinion, suicidal and self-destructive and that he was seeking the death penalty. And that unless I could get some kind of a guarantee that the State would not seek the death penalty, there is no way I was going to let him talk to him.

R. pp. 2029-30.

Agent McCraw told Thompson that he would contact the Solicitor to see whether the State would guarantee that it would not seek the death penalty. Subsequently, Agent McCraw phoned Mr. Thompson and told him that he had been unable to contact Deputy Solicitor Mabry but that he would continue to do so. Also, Agent McCraw wanted to know whether he could meet with Petitioner. Again, Thompson claimed that he told McCraw that McCraw could not meet with Petitioner unless the State agreed not to seek the death penalty. Thompson further testified that he told Agent McCraw that they would consider, at that point, letting him speak with Petitioner. Agent McCraw also wanted to know whether it was okay if McCraw directly approached Petitioner and asked Petitioner if he would waive his right to counsel and speak with McCraw. "And I think at that point and time my answer was not only no, but hell no." **R. pp. 2030-32.**

¹⁵Mr. Thompson was also aware of Petitioner's hospitalization on the day before he met Petitioner because Petitioner had placed nicotine strips "all over his body."

In Mr. Thompson's meeting with Petitioner on June 14, Petitioner was still on suicide watch and was still interested in receiving the death penalty. Counsel indicated that it was hard to get Petitioner to talk about anything because he mainly wished just to talk about receiving the death penalty. Thompson did not have any further contact with Petitioner on either June 15 or 16. However, he had one or possibly two telephone conversations with Agent McCraw. McCraw told him that he had contacted Deputy Solicitor Mabry and was told that it was too early in the case to make any decision not to seek the death penalty. On June 16, Agent McCraw phoned him "somewhere around noon" and asked if counsel had changed his mind and would allow Agent McCraw to question Petitioner. Again, counsel claimed that he told Agent McCraw told no. He then left work for the weekend. **R. pp. 2030-33.**

Mr. Thompson learned of Petitioner's June 16th statement on Monday morning, June 19. He then called Agent McCraw and learned what had happened. This conversation ended after Thompson lost his temper. He then went to the Solicitor's Office and was told, sometime between 1:30 and 2:00 p.m., what had occurred. Counsel then went to jail to see Petitioner, but Petitioner had already been transported to the Sheriff's Department for questioning. **R. pp. 2034-35.**

Thompson then had one of the jailers take him to the Sheriff's Department and he went into the conference room, where he confronted Petitioner. When asked why he was talking to law enforcement, Petitioner said "because I want to." Counsel reminded him that this was against his advice, but said that he should go ahead and do so if that is what he wanted to do. Counsel then left the room. However, he returned to the conference room moments later to change his advice. This time, he told Petitioner, as his attorney, "to be quiet and to quit

answering their questions and to quit talking to him." After this exchange, counsel left. **R. pp. 2035-36.**

Counsel next met with Petitioner on June 21 to ascertain what had occurred on June 16 and 19. Even though counsel recalled the conversations he had with Agent McCraw differently from McCraw, he admitted that he was not aware that Petitioner had, at any time, told law enforcement that he had a lawyer, or that he wanted a lawyer present. To the contrary, the only time he was a witness to a conversation between Petitioner and law enforcement, counsel advised Petitioner not to speak but Petitioner indicated his desire to do so. **R. pp. 2038-40.**

Petitioner testified *in camera* that he was currently serving a thirty year sentence for criminal sexual conduct and that he was out on bond for that offense at the time of his June 8, 2000 arrest. Before June 8, 2000, he had been treated for "[s]evere depression, anxiety, panic attacks, and . . . A.D.D." He had last been hospitalized on May 5, 2000 at Patrick B. Harris hospital for depression. After he was released, he was given Remeron, an anti-depressant, and was told to take 15 milligrams a day. However, he quit taking the medication within a week to ten days because it caused him to oversleep. **R. pp. 2047-50.**

After his release from the psychiatric facility, he was living in a motel room.¹⁶ It was his understanding that he was facing "quite a bit of time" on the CSC charge, which caused him to be depressed. He claimed that he had taken Lortabs and had placed fourteen nicotine patches on himself on June 7-8, 2000, in a purported effort to overdose. Also, he was taken to the Cherokee County Jail immediately following his arrest, and was placed on suicide watch when he was

¹⁶He could not return home because of the pending CSC charge and DSS's intervention with his children. **R. p. 2050.**

returned to the detention center the following day. Nevertheless, no one at the hospital or the jail spoke to him about treating his depression. **R. pp. 2053-54.**

Petitioner further testified that the purpose of his June 9 meeting with Mr. Thompson was "[j]ust to touch base, [and] let me know that he was going to indeed represent me, . . . if I so desired." Additionally, counsel wanted to find out more about Petitioner and to update him as far as where law enforcement was in the case. Petitioner inquired about the possibility of receiving the death penalty during this meeting and counsel grudgingly spoke to him about the issue. Also, counsel told him not to speak to any detective in the case. He still did not speak to any mental health professional nor was he taken to mental health in the days which followed. **R. pp. 2053-54.**

Thompson met with Petitioner several days later to discover how Petitioner was being treated. Petitioner told him that he was unhappy about being on suicide watch, that the depression was getting worse and that he wanted to die. With respect to his meeting with Detective Fowlkes and Agent McCraw, Petitioner claimed that he had been trying to get off of suicide watch. He had asked several people in the jail how he could do so and received different answers. Finally, someone told him that he would have to ask one of the detectives. When asked how the meeting with the officers took place, Petitioner stated that he told the jailer after his other conversations about getting off suicide watch, that he wanted to talk with McCraw about getting off of suicide watch. **R. pp. 2053-56.**

He further claimed that during the June 16th meeting with Officers Fowlkes and McCraw, he initially asked them about the possibility of being removed from suicide watch. Agent McCraw told him that he would have to go to either the Sheriff or another member of the

Sheriff's Department and that McCraw could not give him a definite answer but would take him around later to talk to someone who could. Petitioner claimed that he then decided to find out what his possibilities were of receiving the death penalty. He entered a conversation with the officers during which they discussed the possibility of his receiving the death penalty. "That's when he said he couldn't go any further" without receiving a signed waiver. R. pp. 2056-58.

Petitioner signed the waiver of rights form (State's Exhibit #2) and began a discussion with the officers. The officers made it clear that they did not have any control over whether he would receive the death penalty because the Solicitor had that authority. Because Agent McCraw was supposedly unsure as to how the law applied to Petitioner's case, McCraw asked Detective Fowlkes to retrieve the appropriate volume of the code, which he did. They then explained to Petitioner that his case would "have to have certain situations in it in order to be eligible for the death penalty." R. pp. 2057-59.

This portion of the interview lasted for approximately 30 or 40 minutes. Afterward, Petitioner discussed the facts of the case for roughly an hour. Then, he began writing his statement (State's Exhibit #3). He claimed that he stopped on several occasions and asked if what he had written was in accordance with what they had read in "the book" because he was still confused.¹⁷ Petitioner also claimed that he wrote "almost verbatim" what Agent McCraw told him to on pages 4-5 of State's Exhibit #3 because McCraw felt that it would make him appear to be more credible. This was allegedly necessary because, according to Petitioner, Agent McCraw told him that a lot of attorneys (including trial counsel, Mr. Thompson) would try to

¹⁷Sometimes he would write a paragraph but more often would write an entire page and ask them if it was "okay." R. p. 2061.

attack the statement and have it "dismissed." Petitioner admitted that he signed the statement and initialed it as reflected thereon. **R. pp. 2059-62.**

After he had completed his statement, Petitioner led the officers to where he had hidden the murder weapon. There were no further discussions between him and Agent McCraw about the facts of the case at that time. However, Petitioner told him that he wanted to get some of his items from his moped and he asked if there was any possibility that he and his wife could meet, alone, "kind of a last rites type thing." Agent McCraw supposedly told him to write another letter several days later saying that he wanted to see McCraw. Petitioner claimed this was the only reason he wrote the June 19, 2000 request (State's Exhibit #4). He had not received any counseling or treatment for depression throughout his incarceration, but he had been evaluated by a mental health counselor. According to Petitioner, Mr. Thompson entered the room during the interview on June 9 and told Petitioner that he was making a mistake and should not say anything else. Petitioner, however, told him that he wished to talk to the officers and that this was something that he needed to do.¹⁸ Petitioner was still on suicide watch at the time of the interview. At the conclusion of the interview on June 9, Agent McCraw took him to see the Sheriff and another officer in the Sheriff's Department. At that point, Petitioner was removed from suicide watch; and he was subsequently prescribed 30 milligrams of Remeron each day. **R. pp. 2054-55; 2063-67.**

Petitioner admitted on cross-examination that he was 28 years old; that he had obtained his GED while in prison; and that he had thereafter attended several months of college and had

¹⁸Petitioner stated that counsel did not know anything about his promise or his conversations with Agent McCraw. **R. p. 2065.**

taken several correspondence courses in micro computer repair but had never completed his education. He also admitted that he was able to read and write; that he understood his conversations with his attorneys and the questions by the prosecution; that he did not have any trouble understanding or communicating with any of the officers with whom he had previously spoken or his prior trial attorneys. Moreover, he had had quite a few jobs; he and his wife had made a family together; he paid bills and functioned "[s]omewhat" normally. **R. pp. 2067-70.**

Petitioner likewise admitted that he had previously given a number of statements to other officers in the past and that he had received his *Miranda* warnings in a number of those instances.¹⁹ Petitioner admitted that he had previously lied about his educational background in one statement and had lied on a job questionnaire about his prior criminal background several years earlier. **R. pp. 2070-77.**

More importantly, Petitioner admitted that he was not intoxicated and knew what he was doing when he gave his statements on June 16 and 19 and that he had not included information in State's Exhibit #3 that he was taking Lortab although he had included information that he had been drinking beer and mentioned the nicotine patches. Additionally, he claimed that Agent McCraw told him some of the information to put in State's Exhibit #3 and that some of the information in there simply was untrue. Other portions, whether true or not, were not his words. Finally, in spite of his claim that State's Exhibit #4 was given because he wanted to have "last rites with his wife" and receive items from his moped, there was no mention of that in State's Exhibit #4. Of greatest significance to the present issue, he admitted that **he never told law**

¹⁹Petitioner had prior convictions for breaking and entering (in Ohio), larceny (in North Carolina), and CSC (in Spartanburg) in 2001.

He explained that before he was tried for the CSC charge, Bannister, Binney's lawyer at the time, told him that, if convicted, he would be sentenced to ten years, at the very least. The potential for substantial, future jail time made Binney very anxious. He went to a local shopping center and found a friend who sold him a handgun. He then went to the victim's house and hid just off the property line and watched the house and looked for activity. Binney never met the victim before the day of the murder. He stayed in the surrounding woods overnight thinking about whether he should just go into the house "to commit suicide or rape someone, or to just shoot all of them and kill [himself]."

The next morning, he waited until the victim and her husband left the house and then entered the house through an unlocked window. He cut all the phone lines in the house and put kitchen knives and other possible weapons out of reach. Late that afternoon, the victim came home and found Binney in her bathroom. The victim startled Binney because he did not hear her enter the house. Binney fired the gun in her direction and then chased her out of the house. Once outside, he shot in her direction again to "keep her scared and running" and then ran in the opposite direction into the woods. He ran home and hid under his house, where he was later found by police.

Id at 357-58, 608 S.E.2d at 420.

How The Issue Was Raised Below

1. Jackson v. Denno hearing

The trial judge held a pretrial *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing to determine the admissibility of statements which Petitioner made to law enforcement on June 8, 16, and 19, 2000, as well as a letter which he had written to the victim's husband on June 19 (State's Exhibit #6).² Nine witnesses testified at the hearing. R. pp. 1835-2092.

Deputy Steve Reynolds, of the Cherokee County Sheriff's Department, is a part of that agency's Special Emergency Response Team (S.E.R.T.). Before noon on June 8, 2000 - the day

² Petitioner only challenges the admissibility of the June 16 statement and has apparently abandoned the challenges to the admissibility of the other exhibits as well as his argument that State's Exhibit 3 was taken in violation of his Sixth Amendment right to counsel. R. pp. 2135-61. See *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (exceptions taken to trial court's rulings were abandoned where not briefed on appeal).

after the victim was killed - he went to Petitioner's Spartanburg County home³ with Detectives Mike Fowlkes, and David Oglesby, as well as Deputies Dean McAbee and Wes Foster, all with the Cherokee County Sheriff's Department. Although they had an arrest warrant charging Petitioner with ABIK, they did not have a search warrant. Detectives Fowlkes and Oglesby knocked on the door and spoke briefly to Petitioner's wife, who gave the officers permission to search the house for Petitioner. Deputies Reynolds, Foster and McAbee searched a large crawl space or basement and found Petitioner in it, along with his sleeping bag and a police scanner. Deputy Reynolds handcuffed Petitioner and removed him from the basement. **R. pp. 1860-66; 1871-78. See also R. pp. 1899-1900.**

Deputy Reynolds remembered that Petitioner had some nicotine patches on his chest. However, he was fairly alert and understood who Reynolds was and what he was doing at Petitioner's residence. After removing Petitioner from the basement, Deputy Reynolds escorted him to the edge of the front yard and they waited on SLED Agent Eldon Dewitt "Spike" McCraw, Jr., to come and serve the arrest warrant on Petitioner, since the officers were outside of their jurisdiction. Deputy Reynolds did not read Petitioner's *Miranda*⁴ rights to him and did not question him. Nevertheless, Petitioner looked up and asked Reynolds "she's dead, isn't she?" Deputy Reynolds asked "who?" Petitioner's response was, "the woman I shot." Agent McCraw thereafter arrived, and someone eventually transported Petitioner to the detention center. **R. pp. 1866-70; 1878-79.**

³ The victim's residence, on Cowpens-Pacolet Road, is only a couple of miles away from Petitioner's residence.

⁴*Miranda v. Arizona*, 384 U.S. 436 (1966).

Detective Mike Fowlkes, a captain with the Criminal Investigation Division of the Cherokee County Sheriff's Department, was the chief investigator in this case. He went to Petitioner's Spartanburg County residence on June 8, 2000, with Detective Oglesby and Deputies Foster, McAbee, and Reynolds. He spoke to Petitioner's wife, and she gave them permission to search for Petitioner. The other deputies found Petitioner and Deputy Reynolds arrested him. The officers had an ABIK arrest warrant for Petitioner, which had been signed by a Cherokee County magistrate and countersigned by a Spartanburg County magistrate, but they lacked jurisdiction in Spartanburg County. **R. pp. 1898-1903.**

Therefore, they waited on Agent McCraw to serve the arrest warrant on Petitioner because he had statewide jurisdiction. After Agent McCraw read Petitioner's *Miranda* rights to him, Petitioner did not make any response and did not ever request an attorney. **R. pp. 1903-04.**

While they were waiting Agent McCraw to arrive, Petitioner's wife walked onto the front porch with a cordless phone and advised Detective Fowlkes that she was on the phone with a Greenville County attorney, Bill Bannister. She also yelled at Petitioner and twice told him "not to say anything." Mrs. Binney informed Detective Fowlkes that she was holding on the phone for Mr. Bannister. Agent McCraw arrived as they were talking and served the warrant. He then joined their conversation and eventually spoke to Mr. Bannister, who represented Petitioner on a prior charge of criminal sexual conduct. Detective Fowlkes' understanding when they left the residence was that Mr. Bannister represented Petitioner. **R. pp. 1904-06; 1923.**

Detective Fowlkes was conducting field interviews in the case on June 16, 2000, when a member of his agency directed him to contact Agent McCraw and he did so. Agent McCraw told him that the officers had received a handwritten note from Petitioner (**State's Exhibit #1, R. p.**

3615) indicating that he wished to speak to an investigator. At 3:16 p.m. on June 16, Detective Fowlkes and Agent McCraw began an interview with Petitioner at the law enforcement center.⁵ They were the only ones present. Before they began, Agent McCraw read Petitioner's *Miranda* rights to him using a pre-interrogation waiver form (State's Exhibit #2, R. p. 3616). Petitioner initialed each paragraph of his rights to indicate that he understood the rights, and he appeared to understand what the officers were explaining to him. Although he was quiet and distant, Detective Fowlkes described him as "real talkative. He really wanted conversation." Also, he was "clear headed" and "seemed to be very coherent." Petitioner signed the State's Exhibit #2 indicating that he understood his rights and Detective Fowlkes witnessed his signature. R. pp. 1906-11; 1924-26; State's Exhibit #2, R. p. 3616).

Petitioner also signed a waiver of these rights on State's Exhibit #2 and Detective Fowlkes witnessed his signature. The subsequent interview lasted until 6:19 p.m. During the three hour interview, Petitioner never appeared to be under the influence of drugs, alcohol or any other substance; he appeared to understand the rights as they were explained to him; and he was able to communicate with the officers. When advised of his right to a lawyer, he said that he had previously had little or no contact with his attorney, and he did not wish for his attorney to be present. He was also warned of his right to remain silent but agreed to continue talking. He was not promised anything, threatened or coerced in any manner to waive his rights. R. pp. 1910-12.

The waiver of rights specifically provides that:

Fully understanding my rights as they have been explained to me, I wish to waive, give up, my rights to talk to Officer McCraw and Mike Fowlkes in reference to a homicide. I have waived my rights

⁵They were in a 12 x 12 office belonging to Captain Broome.

freely and voluntarily, without being threatened or coerced, without being promised any leniency or reward.

After waiving his rights, Petitioner discussed his family and he brought up the subject of the death penalty because he seemed to be very interested in receiving the death penalty. However, the officers told him that they were not there to discuss either the death penalty or his criminal sexual conduct case from Spartanburg, and they continued talking about the facts of this case. He thereafter discussed the facts of the case. **R. pp. 1912-14; 1926-30; State's Exhibit 2, R. p. 3616.**

The officers spoke with Petitioner for approximately an hour before he made a written statement. He then hand wrote a five page statement concerning the facts of the murder and burglary. **State's Exhibit #3, R. pp. 3617-21.** He initialed the top and bottom of each page and any changes that he made to the statement. He then signed the statement when he finished it, and both officers witnessed his signature. Following the statement, Petitioner took the officers to a wooded area near the victim's residence and showed them where he had hidden the murder weapon. He also showed them a well in which he had slept on the night before the murder. He was later returned to the detention center, and Detective Fowlkes did not have any further contact with him.⁶ **R. pp. 1914-18; 1930.**

Detective Fowlkes indicated on cross-examination that he was aware that Petitioner had been transported to the hospital roughly an hour or so after he was arrested because he was nauseated. However, Detective Fowlkes did not know how long he remained in the hospital. Petitioner was placed on suicide watch when he was returned to the jail and was not allowed to

⁶Detective Fowlkes testified that Petitioner did not tell the officers anything different from the information which he provided in the statement. **R. p. 1931.**

have any clothes while in the cell. Yet he was clothed when he gave a statement to the officers. Detective Fowlkes did not recall Petitioner asking the officers about how he could get off of suicide watch. **R. pp. 1924-29.**

Lt. Eldon DeWitt McCraw is a SLED agent who works the Piedmont region of South Carolina and was assigned to assist in the investigation of the present murder. Petitioner was already being detained in his front yard by the time he arrived at Petitioner's residence on the morning of June 8, 2000. Agent McCraw served the AWIK arrest warrant on Petitioner and immediately read Petitioner's *Miranda* rights to him from a card. *Petitioner did not respond in any way after the rights were read to him and he did not ask for an attorney.* Petitioner's wife was standing on the front porch on a cordless phone during this process, screaming to Petitioner, "don't say nothing. Don't say nothing." **R. pp. 1931-36.**

Agent McCraw approached her and ascertained that she was speaking to Mr. Bannister, whom she identified as Petitioner's counsel. Agent McCraw identified himself to her and spoke to Mr. Bannister at his request. Agent McCraw explained that they had arrested Petitioner for ABIK. Mr. Bannister stated that he was representing Petitioner on another charge but did not know if he was going to represent Petitioner on this charge or not. Petitioner was subsequently transported to the detention center, and Agent McCraw did not have any further contact with him on June 8. **R. pp. 1936-37.**

On June 9, Mr. Bannister and his son advised Agent McCraw that they were not going to represent Petitioner. Agent McCraw then learned from Petitioner's wife that Petitioner had supposedly hired Senator David Thomas, of Greenville. However, when Agent McCraw contacted Senator Thomas, Senator Thomas said he was not going to represent him. Captain

Fowlkes then told Agent McCraw that Cherokee County Public Defender Don Thompson was going to represent Petitioner. Agent McCraw contacted Mr. Thompson.

Mr. Thompson was interested in getting a deal on Petitioner's behalf. Therefore, Agent McCraw contacted then-Deputy Solicitor Anthony Mabry to see if the State was interested in making a deal, but Mr. Mabry said it was too early in the case to "be talking deal." Agent McCraw then reinitiated contact with Mr. Thompson to see if Mr. Thompson would allow him to speak with Petitioner. He denied that Mr. Thompson informed him that he could not speak to Petitioner. Instead, he said that Mr. Thompson told him that Petitioner wanted to talk, but that counsel had not had time to sit down and fully discuss the case with him. **R. pp. 1937-38; 1957-60.⁷**

Because he had not heard anything from counsel, on June 16, 2000, Agent McCraw contacted the jail. McCraw asked the jailer, Travis Alexander, to tell Petitioner when Alexander saw him that if Petitioner wished to speak to the detectives, he should make a written request. Agent McCraw did not advise Alexander that Alexander had to obtain something in writing from Petitioner and he was not told to interrogate Petitioner. Likewise, he was not told to promise, threaten or coerce Petitioner in any manner. Rather, Agent McCraw's purpose in contacting Alexander was to make sure that Petitioner's right to counsel was protected by making sure that any requests for an interview came from Petitioner. **R. pp. 1939-40; 1960-62.**

In response to this conversation, Agent McCraw received State's Exhibit #2, Petitioner's

⁷ Agent McCraw said that her tried to contact Thompson at least once a day on the week days between June 8 and June 16.

written request to speak with a detective without the presence of counsel.⁸ Petitioner was then brought to the detective's division of the Sheriff's Department, and the interview began at 3:16 p.m. Agent McCraw corroborated that he advised Petitioner of his *Miranda* rights from the pre-interrogation waiver form. (State's Exhibit #2). And Petitioner initialed each right as it was read to him by Agent McCraw. Petitioner signed a waiver form indicating that he understood his rights and his signature was witnessed by both officers. R. pp. 1940-43; 1960-63.⁹

Agent McCraw was aware that Petitioner had been taken to the hospital shortly after his arrest, was placed on suicide watch upon his return to the jail, and had remained there through June 16, 2000.¹⁰ However, Petitioner appeared to be normal. Also, he did not appear to be under the influence of either drugs or alcohol at the time he had his statement; he appeared to understand the questions of him and was able to respond intelligently; and his speech was coherent. When advised of his right to counsel, Petitioner did not request an attorney; and he indicated that he wished to talk when advised of his right to remain silent. He was not threatened or coerced in any manner or promised anything in exchange for his subsequent statement. R. pp. 1943-45; 1957-58.

⁸State's Exhibit #1 read as follows: "Friday, June 16, 2000. I request to see a detective without the presence of my attorney. This is my request. May this only be valid for the dates of June 16 and 17 only and any further contact is not initiated on my part, unless further indicated by me. The undersigned Jonathan Binney." See R. p. 3615.

⁹On cross-examination, Agent McCraw repeatedly denied that Mr. Thompson had told him in their last conversation that he should not talk to Petitioner because Petitioner was suicidal and would say anything. R. pp. 1962-63.

¹⁰ Agent McCraw denied that Petitioner was interested in getting off of suicide watch on June 16 or telling Petitioner that he had to get back in touch with McCraw if he was interested in getting off of suicide watch. Instead, Petitioner was interested in getting the death penalty. R. pp. 1969-71.

Petitioner had brought a Bible with him to the interview, and the officers discussed his family, faith and background with him before discussing the details of the crime. Petitioner told Agent McCraw that he had just spoken to Mr. Bannister several days before the murder. Counsel had advised him that the very least he could receive was ten years imprisonment even if he pled guilty and he did not wish to go to prison and be known as a child molester. He explained that this was his motive for the murder. Petitioner then went into the details of the crime. After a discussion concerning the facts of the case, Petitioner made the handwritten, signed statement (State's Exhibit #3), which was initialed and signed as noted. After this interview was completed, Petitioner led the officers to where he had hidden the murder weapon. He was subsequently transported back to the jail. R. pp. 1943; 1945-47; 1963-67.¹¹

On June 19, 2000, Agent McCraw received a telephone call from the jail informing him that Petitioner had made a written request to see him. (State's Exhibit #4). Agent McCraw had not made any additional calls to the detention center before he received this request, and he had not asked anyone else to talk to Petitioner or request that Petitioner make another request to speak. Later that same day, he spoke to Petitioner in the conference room of the Sheriff's Department. Petitioner, McCraw and SLED Agent Mike Prodan (a behavioral scientist working on another case in the county) were the only people present. The interview began at 3:05 p.m. R. pp. 1947-49.

Using a SLED advice of rights form (State's Exhibit #5, R. p. 3623), Agent McCraw

¹¹Agent McCraw confirmed that Petitioner had been interested in getting the death penalty but denied that Petitioner had asked the officers what they could do to help him receive it. Also, Agent McCraw did not remember pulling out a copy of the Code and looking up the statutory provision concerning the death penalty. McCraw felt Petitioner had done enough to receive the death penalty. R. pp. 1963-64; pp. 1969-71.

advised Petitioner of his rights on June 19. Again, Petitioner initialed each right as it was read to him by Agent McCraw, and Agent Prodan explained each of these rights in even simpler terms. Petitioner was not under the influence of drugs or alcohol at the time; he was not promised anything, threatened, or coerced in any fashion; and he appeared to understand his rights. He signed the statement of rights form, and his signature was witnessed by the officers. Petitioner did not invoke his right to counsel or his right to remain silent. Agent Prodan conducted the subsequent interview in which Petitioner provided "[b]asically the same thing from the first statement, except with a little more of the little things we missed from the first interview." **R. pp. 1949-51.**

Approximately ten to fifteen minutes into their interview, Mr. Thompson burst into the room and advised Petitioner not to talk to the officers any further because he was Petitioner's attorney. Petitioner looked at Agent McCraw, who told him that "he [Mr. Thompson] works for you. You don't work for him." Petitioner said, "well, I want to talk to ya'll." Thompson threatened to contact the Chief of SLED and have the agents fired. At that point, Petitioner called counsel a disparaging name and directed him to leave the room. Counsel left and the interview continued. **R. pp. 1953-54.**

Once Petitioner had completed the interview, he asked to speak to the victim's husband, Allan Southern, to apologize for what he had done. The officers told him this would not be possible and that if he wished to say something to Mr. Southern, he should put it in letter form. He then wrote a letter to Mr. Southern (State's Exhibit #6, **R. pp. 3624-25**) in their presence. At the conclusion of their interview, the officers took the letter from him. They later gave it to Sheriff Blanton because the sheriff and the victim's advocates were dealing with Mr. Southern.

R. pp. 1951-52; 1967-68; State's Exhibit #6, R. pp. 3624-25.

Officer Travis Alexander, who was employed at the Cherokee County Detention Center at the time of Petitioner's arrest, testified that he answered a telephone call from Agent McCraw at the jail on June 16, 2000. Agent McCraw told him that if he saw Petitioner, "just to tell him that if he wants to talk to him, he is going to have to do it in writing." Shortly thereafter, he found Petitioner and gave him the message. Alexander never asked Petitioner any questions and did not tell him that he had to talk to the police. He also did not threaten or coerce Petitioner in any manner. Petitioner then wrote a letter in his presence and Alexander took it. He called Agent McCraw, told him that he had received a written request and asked what to do. He later gave the letter (State's Exhibit #2) to Agent McCraw. He had never been asked to do this before and has not been asked to do this again. **R. pp. 1980-85.¹²**

Special Agent Michael Prodan, the lead agent in SLED's Behavioral Science Unit and Special Operations, was not working on the present case before his participation in the June 19, 2000 interview of Petitioner. His testimony concerning that interview corroborated Agent McCraw's testimony concerning both the knowing and voluntary nature of Petitioner's decision to waive his rights to speak with the officers, as well as Petitioner's decision to continue talking even after his attorney advised him not to do so. **R. pp. 1990-94.**

He further explained that the officers were attempting to discover Petitioner's motive for the crime. Petitioner first said that he had selected the residence because it was secluded but then

¹² Alexander specifically denied telling Petitioner that he needed to put in writing that he wished to see the detective without the presence of his attorney. **R. p. 1985.** Officer Alexander could not remember where Petitioner was housed at the time of the request and did not recall him being on suicide watch. **R. pp. 1986-87.**

enforcement that he wanted a lawyer or that he didn't want to talk to law enforcement unless a lawyer was present. To the contrary, when his lawyer arrived on June 16, he told his lawyer that he didn't want to have him in the room and counsel left the room because he wanted to talk to law enforcement.²⁰ R. pp. 2076-88.

The parties also presented conflicting expert testimony concerning the effect of Petitioner's failure to continue taking Remeron at the time of his arrest, as well as the effects of the nicotine patches on his chest. Petitioner's expert, Dr. William Alexander Morton, Jr., was qualified as an expert in pharmacy practice, psychiatry, and behavioral sciences. Dr. Morton testified that Appellant had been treated at Patrick B. Harris Hospital for symptoms of depression and was prescribed 15 milligrams of Remeron each day. He discontinued taking it within two and a half or three weeks. When someone stops taking Remeron, one would expect to find a return of the original symptoms as well as some mild to moderate withdrawal symptoms.²¹ R. pp. 1836-43.

Also, Dr. Morton explained that Petitioner had been using nicotine patches to the point where he had to be hospitalized following his arrest for nicotine poisoning. He was briefly hospitalized until his condition was stabilized. Morton opined that nicotine poisoning of the type evidenced in Petitioner's records could potentially cause some depressive symptoms; and that nicotine poisoning would aggravate or enhance previous depression symptoms. On cross-examination, Morton admitted that the only way to know whether or not Petitioner was actually

²⁰ Again, however, he maintained this was the result of a prior arrangement with Agent McCraw.

²¹ The symptoms would include muscle cramps, insomnia, and anxiety symptoms that could include virtually every part of the body.

taking Remeron at the time of his arrest was based on his self-reporting. Also, Petitioner provided varying accounts as to the number of nicotine patches he was wearing at the time of his arrest to the individuals at the hospital. Further, Morton admitted that the symptoms of depression caused from not taking previously prescribed Remeron would only last from several days up to one week. **R. pp. 1846-60.**

SLED Agent David Eagerton is the Chief Toxicologist at SLED's forensics toxicology lab. He was present when Dr. Morton testified and had reviewed Petitioner's medical records. Although a few of the symptoms reflected in the medical records might be consistent with some of the effects of nicotine intoxication, they did not impress Agent Eagerton as being severe intoxication and clearly not an overdose of nicotine. Petitioner had a pulse rate of 104, but he also had normal sinus rhythm which indicated to Agent Eagerton that his symptom was not that drastic.²² Also none of the other factors one would expect in a case of severe nicotine overdose were present, such as an elevated potassium level; seizures; hypotension; or diaphragmatic paralysis. **R. pp. 1880-85.**

Agent McCraw was presented as a reply witness and testified that nothing was promised to Petitioner in connection with the June 16, 2000 interview. Visiting his wife was mentioned when Agent McCraw was inventorying the items that she needed from Petitioner's moped, but Petitioner was never told that he would only be able to see his wife and get the inventory from his moped if he gave a statement. No conditions were placed upon seeing his wife or on getting the moped inventoried. Also, no promises were made to him about getting off the suicide watch in exchange for a statement, either on June 16 or 19. **R. pp. 2089-92.**

²²In fact, it could have been caused by one nicotine patch or other factors. **R. p. 1883.**

After listening to the arguments of the parties, **R. pp. 2135-61**, the trial judge ruled that each of Petitioner's statements was admissible. **R. pp. 2161-78**. With respect to **State's Exhibit #3**, he specifically found that Petitioner was in custody. He further found that on every occasion when the police questioned him, he was advised of his *Miranda* rights but never asserted his right to counsel. As a result, the trial judge found there was no Fifth Amendment violation. **R. pp. 2165-66**.

In connection with finding that there was no Sixth Amendment violation, the trial judge found that there was no credible evidence that Petitioner had any mental condition or medication that he may have taken which affected his ability to fully understand the circumstances that he was in, to fully understand the circumstances of any statements that he may make, to understand his rights or any questions that law enforcement asked. Moreover, the trial judge found that Agent McCraw's invitation to Petitioner to make contact was not interrogation despite Agent McCraw's hope that some questioning may result. Rather, the judge found that Petitioner initiated contact with law enforcement. The trial judge specifically found that Petitioner's statement was freely and voluntarily given after he made a knowing and intelligent waiver of his *Miranda* rights.²³ **R. pp. 2165-77**.

Additionally, the trial judge found that Petitioner may have had reasons why he wished to talk to law enforcement, but that this was not unconstitutional and that he could initiate contact for whatever reason he wished. The trial judge further found there was no credible evidence which tended to show that law enforcement ever promised Petitioner anything in return for his

²³The trial judge also noted that Petitioner had a vast experience in the criminal law based upon his prior convictions. **R. p. 2173**.

cooperation, or that he was tricked, threatened or coerced in any fashion. Also, the trial judge found there was no credible evidence that Petitioner did not fully understand what he was doing and the importance of his decision. Therefore, he denied Petitioner's motion to suppress. **R. pp. 2165-77.**

The direct appeal.

The South Carolina Supreme Court applied this Court's decisions in *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), *Edwards v. Arizona*, 451 U.S. 477 (1981) and *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) and rejected Petitioner's claimed Fifth Amendment violation. In doing so, that Court. found that:

In the present case, we find that the following facts support the conclusion that Binney's Fifth Amendment rights were not violated and that his June 14 statement was admissible:

- (1) There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning.
- (2) Binney has an adequate level of intelligence, and he has been arrested and read his rights before.
- (3) In his written request, Binney stated that he did not want an attorney present during the meeting with detectives.
- (4) Before Binney provided police with a statement, he was again read his rights and he signed a waiver of rights.

In addition, McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact. Moreover, Binney's request to meet with a detective and his later confession both were made out of his own free will, without coercion or deception. In fact, the record indicates that Binney was motivated to talk with police to get off of suicide watch. Finally, nothing in the record suggests that Binney was not fully informed of his rights, did not understand his rights, or that the confession was not the product of his own free will.

Binney, 362 S.C. at 360-61, 608 S.E.2d at 422.

WHY THE WRIT SHOULD BE DENIED

- I. The South Carolina Supreme Court properly applied *Edwards v. Arizona*, 451 U.S. 477 (1981) and its progeny in holding that Petitioner's June 16, 2000 statement to law enforcement did not violate his Fifth Amendment right to counsel because he initiated contact with law enforcement before giving the statement and because he never invoked his right to counsel at any point following his arrest.**

In his argument before this Court, Petitioner contends that the South Carolina Supreme Court misapplied the precedent of this Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), and asserts that his June 16, 2000 statement was taken in violation of his Fifth Amendment right to counsel because police initiated the interview after he had supposedly invoked his right to counsel. Respondent disagrees and submits that the South Carolina Supreme Court properly applied *Edwards v. Arizona*, 451 U.S. 477 (1981) and its progeny in holding that Petitioner's June 16, 2000 statement to law enforcement did not violate his Fifth Amendment right to counsel because he initiated contact with law enforcement before giving the statement and because he never invoked his right to counsel at any point following his arrest.

In *Minnick v. Mississippi*, 498 U.S. 146 (1990), this Court held that the holding in *Edwards v. Arizona*, *supra*, prevented officers from re-initiating interrogation after a suspect's invocation of his right to counsel, without counsel present. In doing so, the Court explained the *Edwards* rule as follows:

In Miranda v. Arizona, supra, 384 U.S. at 474, 86 S.Ct. at 1627, we indicated that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present;" at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Edwards* gave force to these admonitions finding it "inconsistent with *Miranda* and its progeny for the authorities, at their insistence, to re-interrogate an accused in custody if he has

clearly asserted his right to counsel.” 451 U.S. at 485, 101 S.Ct. at 1885. We held that “when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.” *Id.* at 484, 101 S.Ct. at 1884-85. Further, an accused who requests an attorney, “having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Id.* at 484-85, 101 S.Ct. at 1885.

Minnick, 498 U.S. at 150 (*emphasis added*).

The Court subsequently explained that “[t]he purpose of the *Miranda-Edwards* guarantee . . . – and hence the purpose of invoking it – is to protect . . . the suspect’s ‘desire to deal with the police only through counsel.’” *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). “The rule of [*Edwards*] applies only when the suspect ‘ha[s] expressed’ his wish for the particular sort of lawyerly assistance that is the subject of *Miranda. Edwards, supra*. 451 U.S. at 484, 101 S.Ct. at 1884. . . . It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.” *McNeil*, 501 U.S. at 178. See also *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (To be unequivocal invocation of right to counsel, the desire must be “presented ‘sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney’”) (citation omitted).

Applying this criteria to the case at bar, it is clear that Petitioner’s argument must be rejected for two reasons. First, and despite his claim that he invoked his right to counsel, the record clearly reflects that he never invoked either his right to remain silent or his right to

counsel at any point from the time of his June 8 arrest through the time he gave the June 16 (or June 19), 2000 statement.

To the contrary, the record clearly reflects that by the time Petitioner discussed the facts of the case with Agent McCraw and Detective Fowlkes on June 16, he had previously been advised of his *Miranda* rights on two separate occasions and expressly waived those rights. The waiver on June 16 (State's Exhibit #2, R. p. 3616) was written. While it is true that Mr. Thompson represented Petitioner, Petitioner never "expressed his desire to deal with the police only through counsel." *Edwards*, 451 U.S. at 484-85. See also *McNeil*, 501 U.S. at 178; *State v. Owens*, 346 S.C. 637, 659, 552 S.E.2d 745, 756-57 (2001) (holding that there was no evidence that the accused declined to speak with police without the presence of counsel in connection with the "Speedway matter;" rather, he waived his right to counsel); *United States v. Jordan*, 38 M.J. 346 (U.S. Ct. Mil. App. 1993) (despite numerous advisements of his *Miranda* rights, defendant never invoked the right to counsel until after giving statements in issue despite fact that defense counsel was assigned to defendant while he was still under Naval control), *cert. denied sub nom., Jordan v. United States*, 510 U.S. 1177 (1994). Indeed, both Mr. Thompson, (R. pp. 2039-40) and Petitioner (R. pp. 2077; 2088) testified that Petitioner never invoked his right to counsel at any point and, when counsel appeared on June 19, 2000, Petitioner directed him to leave because Petitioner wished to speak with the officers. Thus, the present case is unlike *State v. Kennedy*, *supra*.

Nor is there any merit to Petitioner's contention that Agent McCraw and the members of the Cherokee County Sheriff's Department believed that Petitioner was invoking his right to counsel at the time of his arrest and therefore did not attempt to interrogate him. In support of

his proposition, he relies upon Detective Fowlkes' testimony that he was under the impression Mr. Bannister was representing Petitioner when the officers left the scene. **R. p. 1906, l. 11-14.** However, it is clear from Agent McCraw's testimony that Bannister was uncertain as to whether or not he would be representing Petitioner on the present charge. **R. p. 1936, l. 9-20.** Also, even though Petitioner may have secured an attorney to represent him, it is clear that he never indicated, in any fashion, that he wished to deal with police only through counsel. See *McNeil v. Wisconsin*, *supra*; *State v. Owens*, *supra*; *United States v. Jordan*, *supra*.

Additionally, even if Petitioner had invoked his right to counsel at some point before the June 16, 2000 statement, it is clear that his statement was nevertheless admissible because he initiated the contact resulting in the statement by making a written request to speak to the detectives without counsel being present. See *State's Exhibit #2*. See *Minnick*, *supra*; *Edwards*, *supra*. Agent McCraw's testimony supports the trial judge's finding in this regard. McCraw testified that in his communications with Mr. Thompson, Thompson indicated that Petitioner wished to give a statement but Thompson had not had an opportunity to adequately sit down and discuss the case with him. McCraw specifically denied that Thompson told him he could not speak with Petitioner because Petitioner was suicidal and would say anything. **R. pp. 1938-39; 1959-63.**²⁴

In light of this information, Agent McCraw then sent word to Petitioner, through a jailer, that if Petitioner wished to talk to law enforcement, he had to make a written request to do so.

²⁴Petitioner further asserts that Mr. Thompson's testimony that he told McCraw that he could not speak to Petitioner was credible, based in large measure upon Thompson's representations at a July 11, 2001 pretrial hearing. **R. pp. 3505-06.** However, this ignores that the trial judge's findings are supported by competent evidence. Moreover, the Fifth Amendment right to counsel was Petitioner's right to invoke, and he never did so.

Petitioner refers to this as a "ploy [which] was designed for no other purpose than to circumvent [Petitioner]'s right to counsel and the protection afforded by *Miranda* and *Edwards*." FBOA, at p. 16. However, Agent McCraw did not initiate contact by merely telling Petitioner that he would have to make a request to speak to the officers. *State v. Smith*, 494 N.W.2d 558, 562-64 (Neb. 1993) ("there can be no doubt" that defendant initiated further conversation in the ordinary "dictionary sense of the word" when he asked to speak to the officer, and the fact the officer "had told defendant that she would be around for a little while prior to defendant's request does not negate the fact that defendant initiated the dialogue." The officer's statement "was not intended to start a conversation but merely inform defendant that she would be available if he wished to initiate a dialogue." And the prosecution met its burden of proving that defendant waived his right to counsel). Rather, Agent McCraw was avoiding direct contact with Petitioner and any questioning unless and until Petitioner desired to initiate contact. Because Petitioner initiated the contact with the officers, there can be no *Edwards* violation. *Id.* See also *State v. Franklin*, 299 S.C. 133, 382 S.E.2d 911 (1989).

Further, Petitioner has not pointed to any conflict among the circuit courts of appeals or state supreme courts with respect to the issue now before the Court and Respondent submits that none exists. Also, this Court has denied certiorari in cases presenting similar issues. See *Jordan*, *supra*; *State v. Howard*, 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing *Edwards*, 451 U.S. at 485), *cert. denied*, 490 U.S. 1113 (1989).

II. Any alleged violation of *Edwards v. Arizona* is harmless beyond a reasonable doubt.

Finally, an *Edwards* violation is subject to harmless error analysis. See *Shea v.*

Louisiana, 470 U.S. 51, 59 n. 4 (1985); *Cooper v. Taylor*, 103 F.3d 366 (4th Cir. 1996) (*en banc*).

Here, any admission in State's Exhibit #3 must be deemed as harmless in both the guilt and penalty phases of Petitioner's trial because it was merely cumulative to other statements made by Petitioner and other evidence presented by the State. First, Petitioner left a handwritten suicide note with his fingerprint on it (State's Exhibit #34, R. p. 3614) at the crime scene. R. pp. 2200; 2322; 2541-43; 2652-54. This note stated where he had hidden the "scooter" which he used for transportation as well as a sketch with where he had hidden it. More importantly, Petitioner stated in the note that "Honey, I did this first of all because I will not let them send me to prison. Second, they think I was a horrible person. Well, I decided to prove them right." This note also provides a motive for the murder, *i.e.*, that he was facing ten years imprisonment. See R. pp. 2227-28; 3614.

State's Exhibit #3 is also cumulative to statements Petitioner made to fellow inmate, Danny Edwards, and a map which he provided to Edwards while both men were housed at the Cherokee County Detention Center.²⁵ In the course of a conversation with Edwards, Petitioner told Edwards that:

He told me that he had scoped the house out a few days prior, and that he went there on a moped, and that he went in the house, burglarizing the house. He said that he was in the bathroom and using the bathroom. This was in the evening time, and . . . that a lady came in and seen him. They saw each other about the same

²⁵Edwards was being housed there pending his transportation to a federal facility to serve a sixty-three months sentence for interstate transportation of stolen property.

time that he was in the bathroom using the bathroom. He said that he pulled a 9-millimeter and shot . . . at the lady, and said she went to run and he ran behind her and he shot her again, I guess in the living room area. And then he ran out and went behind the house and went into the woods. And he said that the helicopters were hovering over him and after him, but they never [caught] him and he made it to his home. And he said that when he got to his home, he hid down in the basement of the house. When the agent or officers got to him, they found him [hidden] behind some boxes and all down in the basement of his house.

R. pp. 2618-19.²⁶ Edwards told Petitioner that he would have to have some proof to show the agent if Petitioner wanted to become more involved. Petitioner then drew Edwards a map of the house, the driveway and the area around the residence. **(State's Exhibit #107). R. pp. 2620; 2648-54.**

Rather than keep the drawing, however, Edward gave it to Inmate Jerry Johnson, Jr. Johnson came forward because he felt that Petitioner did not "need to be back out on the streets."²⁷ Petitioner never mentioned suicide as a possible motive for the burglary and murder to Edwards. Instead, he had intended to find whatever he could steal in the Southern's residence. **R. pp. 2620-22; 2628-35.**

The State was able to corroborate most details of **State's Exhibits #3** and the information he provided to Edwards. For instance, Petitioner's DNA was found on cigarette butts in the victim's residence, as well as on a marital device found in a trash can in the victim's master

²⁶Petitioner had told Edwards about the crime because he had heard that it was easier to do time in a federal facility, and he wanted Edwards to talk to an FBI agent to see if the Feds would take his case. **R. pp. 2619-20.**

²⁷Johnson was facing charges of manufacturing methamphetamines and was facing between 0 to 15 years but had not received any preferential treatment in exchange for his testimony. **R. p. 2635.**

bathroom. His DNA was also found on cigarette butts located in the woods along the fence line of the victim's residence. A pair of gloves and a flashlight were found in one of these locations. R. pp. 2478-90; 2599-2602. Law enforcement was likewise able to tie the murder weapon to Petitioner; and shell casings and projectiles that were found in the areas of residence described by Petitioner to Edwards (and in State's Exhibit #3) were also positively determined to have been fired by the murder weapon. R. pp. 2332-33; 2468-75; 2491; 2552-64.²⁸ Finally, State's Exhibit #3 was cumulative to the June 19 statement, which was introduced in the penalty phase. Therefore, any error in its introduction must be viewed as harmless beyond a reasonable doubt. The Petition must be denied.

CONCLUSION

For all the foregoing reasons, certiorari should be denied.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

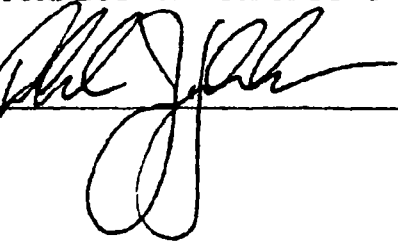
JOHN W. McINTOSH
Deputy Attorney General

²⁸Also, magazine chips and ammunition, consistent with the murder weapon, were discovered in a consensual search of a motel room in which Petitioner had been living. Even if law enforcement could not have discovered the weapon without Petitioner's assistance, which is not altogether clear in light of State's Exhibit 34, a weapon consistent with that used would have been traced to him, through ballistics testimony and the testimony of the gun's former owner, who had loaned it to him to shoot chickens.

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

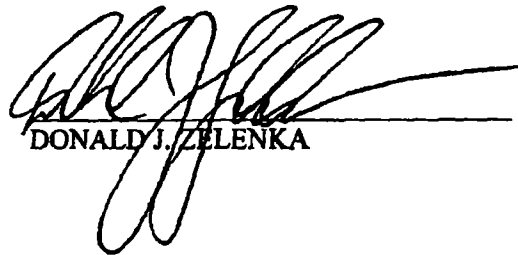
ATTORNEYS FOR RESPONDENT

By: _____

July 5, 2005
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Brief in Opposition to Petition for Writ of Certiorari to the South Carolina Supreme Court* in the foregoing action by depositing three (3) copies in the United States mail, postage prepaid, to Joseph L. Savitz, III, Acting Chief Attorney, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201 this 5th day of July, 2005.



DONALD J. ZELENA

v.

No. 04-10455.
Oct. 3, 2005.

U.S.,2005
Binney v. South Carolina
546 U.S. 852, 126 S.Ct. 115, 163 L.Ed.2d 125, 74
USLW 3205

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006 CP-11223

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

JONATHAN KYLE BINNEY)

Applicant,)

v.)

JON OZMINT, Director, South Carolina)

Department of Corrections, and)

HENRY MCMASTER, Attorney General,)

State of South Carolina)

Respondents.)

IN THE COURT OF COMMON PLEAS

Case No.:

APPLICATION FOR
POST-CONVICTION RELIEF

1. Place of detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Sentencing court: Cherokee County Court of General Sessions.
3. Not applicable.
4. Indictment number(s) upon which and offenses for which sentence was imposed:
 - a. Burglary: 2000-GS-11-525
 - b. Murder: 2000-GS-11-526
5. Date upon which sentence was imposed and terms of the sentence:
 - a. Sentenced on November 14, 2002
 - i. First-degree burglary: Life imprisonment
 - ii. Murder: Death by electrocution or lethal injection
6. A finding of guilty was made after a plea of not guilty.
7. Applicant appealed from judgment of conviction and imposition of sentence.
8. Appeals:
 - a. Courts to which applicant appealed:
 - i. The South Carolina Supreme Court
 - ii. The United States Supreme Court

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CHEROKEE COUNTY, S.C.
2006 APR -7 A 11:39
BRANDY WILCOX

b. Result in each court to which appellant appealed:

- i. Convictions and sentences were affirmed.
- ii. Petition for Writ of Certiorari denied.

c. Date of each such result:

- i. Convictions and sentences affirmed on January 10, 2005.
- ii. Petition for Writ of Certiorari denied on October 3, 2005.

d. Citations of written opinion or orders entered pursuant to such results:

- i. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005).
- ii. *Binney v. South Carolina*, 126 S.Ct. 115 (2005).

9. Not applicable.

10. & 11. **GROUND S FOR RELIEF WITH SUPPORTING FACTS**

10(a): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

11(a): **Supporting facts:** Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to ensure that jurors were not aware that applicant was shackled during proceedings.
- 2) Counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case.
- 3) Counsel failed to seek an instruction stating the specific elements of the crime named in the burglary charge.
- 4) Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of applicant's guilt or innocence. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

**10(b): Applicant was denied the right to effective assistance of counsel—
guaranteed by the Sixth and Fourteenth Amendments to the United States
Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—
during the sentencing phase of his capital trial.**

11(b): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. *See Wiggins v. Smith*, 539 U.S. 510 (2003). As a result of counsel's failure to uncover and present this evidence, applicant's death sentence is unreliable.
- 2) Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsel's failure to make all appropriate objections, applicant's death sentence is unreliable.

**10(c): Applicant was denied the right to effective assistance of counsel—
guaranteed by the Sixth and Fourteenth Amendments to the United States
Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—
during the appellate phase of his trial.**

11(c): Supporting facts: Counsel's performance on direct appeal was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following: Counsel failed to raise all relevant and meritorious issues in applicant's appeal to the South Carolina Supreme Court.

12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief or a petition for a writ of habeas corpus in either state or federal court.
13. Not applicable.
14. The grounds set forth in (10) have not previously been presented to this or any other court, state or federal.
15. Not applicable.
16. These grounds rely on facts beyond those set forth in the record that was before previous courts.
17. Applicant was represented by counsel during trial and appeal.

18. Counsel:

a. Name and address of each attorney who represented appellant:

- i. Trent N. Pruett, Esquire
202 N. Petty Street #B
Gaffney, SC 29340
(864) 488-0120
- ii. Mitch "Sam" Slade, Jr., Esquire
145 N. Church Street
Spartanburg, SC 29306
(864) 582-4212
- iii. Joseph L. Savitz III
Acting Chief Attorney of the South Carolina Office of Appellate Defense
1122 Lady Street Suite 940
Columbia, SC 29201-3218
(803) 734-1330

b. Proceedings at which each attorney represented appellant:

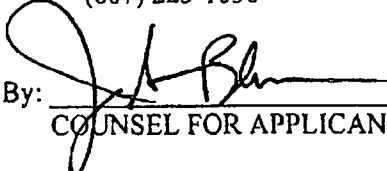
- i. Trial counsel
- ii. Trial counsel
- iii. Appellate counsel

19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court.

Respectfully Submitted,

JOHN H. BLUME
SHERI L. JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 225-1030

By: 

COUNSEL FOR APPLICANT

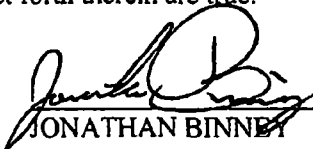
April 5th, 2006

000 CP-11223

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

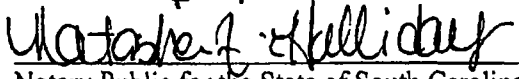
VERIFICATION

I, Jonathan Binney, 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 convictions and sentence attacked in this application; and that the matters and allegations set forth therein are true.


JONATHAN BINNEY

SWORN to and subscribed before me this

5th day of April, 2006.


Notary Public for the State of South Carolina

My Commission Expires: 8-29-08

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2006 APR -7 A 11:40
BRANDY W. MCBEE

006 OP-11223

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

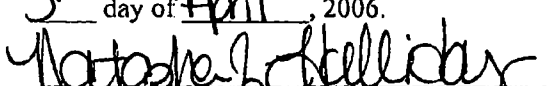
APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS
AND AFFIDAVIT IN SUPPORT THEREOF

I, Jonathan Binney, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of 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 said proceeding or give security thereof.


JONATHAN BINNEY
APPLICANT

SWORN to and subscribed before me this

5th day of April, 2006.

Notary Public for the State of South Carolina

My Commission Expires: 8-29-08

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
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CLERK OF COURT

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE	)	
	)	
Jonathan Kyle Binney,	)	C. A. No. 06-CP-11-223
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
Jon Ozmint, Director, South Carolina	)	
Department of Corrections; and	)	
Henry McMaster, Attorney General	)	
State of South Carolina,	)	
	)	
Respondents.	)	
	)	

Respondents hereby make Return to the Application for Post-Conviction Relief (PCR) filed on April 7, 2006. Respondent would show this Court that:

I. PROCEDURAL HISTORY

Applicant (Jonathan Kyle Binney) presently is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) pursuant to commitment orders from the Cherokee County Clerk of Court. The Cherokee County Grand Jury indicted him at the July, 2000 term of court for murder (2000-GS-11-526) and burglary in the first degree (2000-GS-11-525). Both charges stemmed from the June 8, 2000 shooting of Judy L. Southern in her Cherokee County home. The State timely served a Notice of Intent to Seek the Death Penalty on Applicant pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2003). On July 11, 2001, the Honorable J. Derham Cole held a pretrial hearing in the matter. Don Thompson, Esquire, represented Applicant at that hearing, while Deputy Seventh Circuit Solicitor Donnie Willingham represented the prosecution.

Mr. Thompson was subsequently relieved as counsel, and Trent N. Pruett, Esquire, and Samuel "Mitch" Slade, Jr., Esquire, represented him in all subsequent proceedings in the trial court.

Seventh Circuit Solicitor Trey Gowdy, III, and Mr. Willingham represented the State. Judge Cole held pretrial hearings on March 25, and October 25, 2002. Applicant thereafter received a jury trial before Judge Cole on November 4-14, 2002. The jury convicted him of murder and burglary in the first degree on November 11, 2002. The sentencing phase was conducted following Applicant's exercise of the twenty-four hour waiting period in § 16-3-20(B).

The State relied upon the statutory aggravating circumstance that the murder was committed while in commission of burglary. § 16-3-20(C)(a)(1)(c). Judge Cole also charged the jury on the three statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7), that they were to consider any nonstatutory mitigating circumstance which had been shown to exist by the evidence presented and that they could recommend a life sentence even though they did not find the existence of a statutory or nonstatutory mitigating circumstance because the jury could recommend a sentence of life imprisonment "for no reason at all, other than as an act of mercy." Finally, he instructed the jury that pursuant to § 16-3-20(A), a sentence of life imprisonment meant until the death of Applicant, without the possibility of parole. **R. pp. 3469-86.** The jury found the alleged statutory aggravating circumstance and recommended a sentence of death. Judge Cole sentenced Applicant to death for murder and to life without parole for burglary in the first degree. See S.C. Code Ann. § 17-25-45(Supp. 2003). **R. pp. 3491-94; 3499-3501.**

Applicant served and filed a timely notice of appeal. Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented him on direct appeal. Applicant filed a Final Brief of Appellant in the South Carolina Supreme Court on May 28, 2004, in which he raised the following issue:

The judge erred by admitting into evidence a statement Binney gave to the police, in which he confessed to that he was guilty of murder and first degree burglary and requested "the death penalty" because

"[t]he crime I committed definitely warrants it" because this statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

The State filed a Final Brief of Respondent on December 10, 1997. The State framed the issue as follows:

The trial judge properly ruled that Appellant's June 16, 2000 statement to law enforcement did not violate his Fifth Amendment right to counsel under *Edwards v. Arizona* because he initiated contact with law enforcement before giving the statement and because he never invoked his right to counsel at any point following his arrest.

Following oral argument, the South Carolina Supreme Court filed a published opinion on September 21, 2004, in which it affirmed his convictions and sentence. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 115 (2005). A timely petition for rehearing was denied on February 17, 2005, and the South Carolina Supreme Court sent the Remittitur to the Cherokee County Clerk of Court on the same date.

Petitioner, who was still represented by Mr. Savitz, filed a Petition for Writ of Certiorari to the South Carolina Supreme Court in the United States Supreme Court on . The State filed a Brief in Opposition dated July 5, 2005. Petitioner only raised one issue in that Petition:

May the police send the accused "an invitation ... to initiate contact" with them for further questioning about the crime charged, after the accused has invoked his Fifth Amendment right to counsel, or does such an "invitation" constitute police-initiated custodial interrogation in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981)? .

The United States Supreme Court denied certiorari on October 3, 2005. *See Binney v. South Carolina*, 126 S.Ct. 115 (2005).

On October 18, 2005, Mr. Savitz filed a Motion for Stay of Execution so that Mr. Binney could pursue Post-Conviction Relief remedies. Respondent did not oppose the request, and the

Supreme Court granted a stay pursuant to *In Re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996) in a November 3, 2005 Order. In the same Order, the Supreme Court appointed the Honorable John C. Few to preside over this case and directed Judge Few to hold a hearing to determine whether Mr. Binney desired to pursue an Application for Post-Conviction Relief and whether he wished to have counsel appointed. However, the Honorable Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, filed an Order dated November 10, 2005, in which she found that Judge Few had to recuse himself and appointed the Honorable J. Michael Baxley to preside over this case, with exclusive jurisdiction over the case.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's November 3, 2005 Order; Chief Justice Toal's November 10, 2005, Order and S.C. Code Ann. § 17-27-160 (Supp. 2006), Judge Baxley convened a hearing at the Darlington County Courthouse on Wednesday, March 1, 2006. Mr. Binney was present at this hearing, as was Senior Assistant Attorney General William Edgar Salter, III, who represented the State. Judge Baxley filed an Order Appointing Counsel For Post-Conviction Relief on March 15, 2006, in which he appointed John H. Blume, III, and Sheri Lynn Johnson, Esquires, to represent Applicant.

Respondent incorporates the following documents by reference and will provide the Court with a copy of these documents at the time of any hearing:

1. The Final Brief of Appellant;
2. The Final Brief of Respondent;
3. The Record on Appeal from Applicant's direct appeal;
4. The South Carolina Supreme Court's published opinion affirming Applicant's convictions and sentence in *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 115 (2005);

5. The Petition for Writ of Certiorari;
6. The Brief in Opposition to the Petition for Writ of certiorari dated July 5, 2005;
7. The letter Order of the United States Supreme Court denying certiorari;
8. The October 14, 2005 from counsel for Respondent to the South Carolina Supreme Court requesting the Court to set a date of execution;
9. The October 18, 2005 Motion for Stay of Execution;
10. The October 24, 2005 letter from counsel for Respondent to the Clerk of the South Carolina Supreme Court not opposing the stay request;
11. The Supreme Court November 3, 2005 Order granting a stay of execution pursuant to *In Re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996) and appointing the Honorable John C. Few to preside over the case.
12. The November 10, 2005 Order filed by the Honorable Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, filed an dated, finding that Judge Few had to recuse himself and appointing the Honorable J. Michael Baxley to preside over this case, with exclusive jurisdiction over the matter;
13. The March 15, 2006 Order Appointing Counsel For Post-Conviction Relief.

Respondent will serve Applicant's current PCR counsel with documents 1-12 as soon as possible after the filing of this Return and will file a certificate of service with the Cherokee County Clerk of Court. Additionally, Respondent has previously served counsel with document 13.

II. ALLEGATIONS

Applicant raises the following grounds for relief in his PCR Application:

1. Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth

Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt-or-innocence phase of his capital trial.

2. Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial.
3. Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the appellate phase of his trial.

III. DISCUSSION

GROUND 1

Applicant's first allegation is that trial counsel were ineffective in the guilt phase of his capital trial. Upon information and belief, Respondents submit that this allegation is without merit.

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his application. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Florida v. Nixon*, ___ U.S. ___, 125 S.Ct. 551 (2004); *Palacio v. State*, 511 S.E.2d 62 (S.C. 1999). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998) (petitioner did not meet burden).

Respondents submit that Applicant cannot satisfy either requirement of the *Strickland* test. Here, the record clearly reveals that counsel, both of whom were former prosecutors with extensive experience in trying capital cases, (1) participated in several pre-trial motions hearings [R. pp. 3503-3609]; (2) conducted *voir dire* of potential jurors and selected a fair and impartial jury [R. pp. 414-1833]; (3) vigorously but unsuccessfully challenged the admissibility of Applicant's custodial statements [R. pp. 1835-2179]; and (4) cross-examined prosecution witnesses, ably presented a defense and argued the case. [R. pp. 2205-2820]. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

GROUND 2

Petitioner next contends that he was denied the right to effective assistance of counsel in the sentencing phase of his trial. Respondents submit that Applicant cannot satisfy either requirement of the *Strickland* test. Much like their conduct in the guilt phase, counsel ably challenged the State's

case in aggravation (including by way of a suppression hearing), presented the defense's case in mitigation and argued their client's position. R. pp. 3052-3498. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. See *Sharper v. State, supra*.

GROUND THREE

Applicant's remaining allegation is that appellate counsel, Mr. Savitz, was ineffective in the handling of his appeal. Again, Respondents submit that this allegation is meritless and that Applicant cannot satisfy either requirement of the *Strickland* test.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). Where ineffective assistance of appellate counsel is alleged, to get relief the PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.*

Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.* However, the allegation of ineffective assistance of counsel probably raises questions

of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State, supra.*

IV.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Return, Respondent, therefore, requests a hearing limited to Applicant's request to withdraw his PCR Application.

Respectfully submitted,

HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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Columbia, South Carolina 29211
(803) 734-6305

By: 

ATTORNEYS FOR RESPONDENT

May 5, 2006.

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

Jonathan Kyle Binney,)

Applicant,)

v.)

Jon Ozmint, Director, South Carolina)

Department of Corrections; and)

Henry McMaster, Attorney General)

State of South Carolina,)

Respondents.)

IN THE COURT OF COMMON PLEAS

C. A. No. 06-CP-11-223

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Return in the foregoing action on counsel for Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

John H. Blume, III, Esquire
Cornell Law School
Myron Taylor Hall
Ithaca, New York, 14853

Sheri Lynn Johnson, Esquire
Cornell Law School
Myron Taylor Hall
Ithaca, New York, 14853

This 5th day of May, 2006.


WILLIAM EDGAR SALTER, III

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

JONATHAN KYLE BINNEY)
Applicant,)

v.)

JON OZMINT, Director, South Carolina)
Department of Corrections, and)
HENRY MCMASTER, Attorney General,)
State of South Carolina)
Respondents.)

IN THE COURT OF COMMON PLEAS

Case No.: 06-CP-11-223

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

1. Place of detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Sentencing court: Cherokee County Court of General Sessions.
3. Not applicable.
4. Indictment number(s) upon which and offenses for which sentence was imposed:
 - a. Burglary: 2000-GS-11-525
 - b. Murder: 2000-GS-11-526
5. Date upon which sentence was imposed and terms of the sentence:
 - a. Sentenced on November 14, 2002
 - i. First-degree burglary: Life imprisonment
 - ii. Murder: Death by electrocution or lethal injection
6. A finding of guilty was made after a plea of not guilty.
7. Applicant appealed from judgment of conviction and imposition of sentence.
8. Appeals:
 - a. Courts to which applicant appealed:
 - i. The South Carolina Supreme Court
 - ii. The United States Supreme Court

b. Result in each court to which appellant appealed:

- i. Convictions and sentences were affirmed.
- ii. Petition for Writ of Certiorari denied.

c. Date of each such result:

- i. Convictions and sentences affirmed on January 10, 2005.
- ii. Petition for Writ of Certiorari denied on October 3, 2005.

d. Citations of written opinion or orders entered pursuant to such results:

- i. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005).
- ii. *Binney v. South Carolina*, 126 S.Ct. 115 (2005).

9. Not applicable.

10. & 11. **GROUND FOR RELIEF WITH SUPPORTING FACTS**

10(a): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

11(a): Supporting facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to form a meaningful attorney-client relationship with Applicant.
- 2) Counsel failed to conduct an adequate voir dire. Counsel's failures include, but are not limited to, failing to obtain the assistance of a jury selection expert, failing to ask potential jurors whether they would automatically vote to impose death where a defendant has been found guilty of murder, failing to ask potential jurors whether they could consider mitigating evidence, failing to ask potential jurors whether they could follow the proper standard for the burden of proof, and failing to ask potential jurors whether they could reach an independent decision rather than simply vote with the majority. Moreover, counsel failed to object to the qualification of several jurors who gave disqualifying responses to the questions counsel did ask.
- 3) Counsel failed to seek proper instructions from the trial court. In particular, counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in

this case. Counsel further failed to seek an instruction stating the specific elements of the crime named in the burglary charge.

- 4) Counsel failed to adequately investigate and present evidence in support of all potential defenses in the guilt-or-innocence phase. Counsel's failures include, but are not limited to, failing to adequately investigate and present evidence concerning the possibility that the victim's husband, Allen Southern, may have had some direct or indirect involvement in her death. Further, counsel failed to retain a private investigator to assist in the investigation of the case. Moreover, counsel failed to investigate, develop and present all available evidence in support of the defenses they did advance, e.g., that Applicant entered the Southern residence with the intent to commit suicide and Mr. Southern's possible involvement in the death of his wife.

10(b): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.

11(b): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. Counsel failed to retain a mitigation specialist or social history investigator to conduct a mitigation investigation and develop an adequate social history.
- 2) Counsel failed to retain an expert in Fetal Alcohol Spectrum Disorder, although they knew that Applicant's birth mother drank alcohol during her pregnancy. Counsel further failed to obtain Applicant's medical, school, and other records and his birth mother's medical and other records to document that Applicant suffers from a Fetal Alcohol Spectrum Disorder.
- 3) Counsel failed retain the services of an expert in adaptability to prison. Counsel further failed to present any evidence concerning Applicant's adaptability to prison or his lack of violent or aggressive history during prior incarcerations.
- 4) Counsel failed to object to the State's inflammatory, irrelevant and improper statements in closing argument. Counsel's failures include, but are not limited to, failing to object to the State's suggestion that the jury should impose death for the victim of the unrelated criminal sexual conduct conviction, failing to object to the State's argument that the mitigating evidence had to have a nexus to the crime to

be considered by the jury, and failing to object to the State's argument that the State was speaking on behalf of the victim in the case.

- 5) Counsel failed to object to the trial court's improper instruction to the jury that the jurors could not give life as an act of mercy.

10(c): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the appellate phase of his trial.

11(c): Supporting facts: Counsel's performance on direct appeal was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Southerland v. State*, 524 S.E.2d 833 (S.C. 1999). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Appellate Counsel failed to assert that it was error for the trial court to deny Applicant's motion to suppress inflammatory photographs of the victim of a prior crime.
- 2) Appellate Counsel failed to assert that it was error for the trial court to deny Applicant's motion to suppress materials introduced by the State as "child pornography."
- 3) Appellate Counsel failed to assert that the trial judge erred in allowing the prosecution to amend the indictment after the jury had been charged.

10(d): Applicant's conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

11(d): Supporting facts: Several errors at trial violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

- 1) The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006). Such evidence included, but is not limited to, evidence that the State's witness, Jerry Johnson and Danny Edwards, former inmates who testified against Applicant, were improperly influenced to testify or received undisclosed benefits for doing so.

- 2) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).
- 3) Applicant's death sentence was based, at least in part, upon an invalid prior conviction or convictions. *Johnson v. Mississippi*, 486 U.S. 578 (1988).
- 4) Applicant's death sentence was obtained, at least in part, as a result of the State's inflammatory, irrelevant and improper statements in closing argument. Such statements included, but are not limited to, the State's suggestion that the jury should impose death for the victim of the unrelated criminal sexual conduct conviction, the State's argument that the mitigating evidence had to have a nexus to the crime to be considered by the jury, and the State's argument that the State was speaking on behalf of the victim in the case.
- 5) Applicant's death sentence violates the Eight and Fourteenth Amendments to the United States Constitution because death by lethal injection constitutes cruel and unusual punishment.
- 10(e): Applicant's death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.**
- 11(e): Supporting facts:** A number of errors occurred at Applicant's trial that violated the Eighth, Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:
- 1) Applicant's death sentence was obtained, at least in part, as a result of the trial court's erroneous instruction to the jury that the jurors could not give life as an act of mercy.
- 2) Applicant's death sentence was obtained, at least in part, as a result of extraneous influence upon Juror Henry Viquez who was inappropriately threatened and pressured by other jurors to vote for death. Moreover, Mr. Viquez was told by other jurors that if the jury could not reach a unanimous decision on the appropriate penalty, Applicant would receive an entirely new trial for both the guilt-or-innocence phase and the penalty phase.
12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari.
13. Applicant has also filed an application for post-conviction relief in the Spartanburg County Court of Common Pleas concerning a prior conviction for criminal sexual conduct. That application is currently pending.

14. The grounds set forth in (10) have not previously been presented to this or any other court, state or federal.

15. Not applicable.

16. These grounds rely on facts beyond those set forth in the record that was before previous courts.

17. Applicant was represented by counsel during trial and appeal.

18. Counsel:

a. Name and address of each attorney who represented appellant:

i. Trent N. Pruett, Esquire
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ii. Mitch "Sam" Slade, Jr., Esquire
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iii. Joseph L. Savitz III
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b. Proceedings at which each attorney represented appellant:

i. Trial counsel
ii. Trial counsel
iii. Appellate counsel

19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully Submitted,

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By: Emily C. Paavola
COUNSEL FOR APPLICANT

May 1, 2007

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

JONATHAN KYLE BINNEY)

Applicant,)

v.)

JON OZMINT, Director, South Carolina)

Department of Corrections, and)

HENRY MCMASTER, Attorney General,)

State of South Carolina)

Respondents.)

IN THE COURT OF COMMON PLEAS

Case No.: 06-CP-11-223

CERTIFICATE OF SERVICE:
AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

The undersigned certifies that a copy of the foregoing Amended Application For Post-Conviction Relief was served by first class United States mail, postage prepaid, this 1st day of May, 2007, upon the following:

William Edgar Salter, III
Senior Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Emily C. Paavola / s/s
Emily C. Paavola

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

JONATHAN KYLE BINNEY)

Applicant,)

v.)

JON OZMINT, Director, South Carolina)

Department of Corrections, and)

HENRY MCMASTER, Attorney General,)

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IN THE COURT OF COMMON PLEAS

Case No.: 06-CP-11-223

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

1. Place of detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Sentencing court: Cherokee County Court of General Sessions.
3. Not applicable.
4. Indictment number(s) upon which and offenses for which sentence was imposed:
 - a. Burglary: 2000-GS-11-525
 - b. Murder: 2000-GS-11-526
5. Date upon which sentence was imposed and terms of the sentence:
 - a. Sentenced on November 14, 2002
 - i. First-degree burglary: Life imprisonment
 - ii. Murder: Death by electrocution or lethal injection
6. A finding of guilty was made after a plea of not guilty.
7. Applicant appealed from judgment of conviction and imposition of sentence.
8. Appeals:
 - a. Courts to which applicant appealed:
 - i. The South Carolina Supreme Court
 - ii. The United States Supreme Court

b. Result in each court to which appellant appealed:

- i. Convictions and sentences were affirmed.
- ii. Petition for Writ of Certiorari denied.

c. Date of each such result:

- i. Convictions and sentences affirmed on January 10, 2005.
- ii. Petition for Writ of Certiorari denied on October 3, 2005.

d. Citations of written opinion or orders entered pursuant to such results:

- i. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005).
- ii. *Binney v. South Carolina*, 126 S.Ct. 115 (2005).

9. Not applicable.

10. & 11.

GROUND FOR RELIEF WITH SUPPORTING FACTS

10(a): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

11(a): Supporting facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to conduct an adequate voir dire. Counsel's failures include, but are not limited to, failing to obtain the assistance of a jury selection expert, failing to ask potential jurors whether they would automatically vote to impose death where a defendant has been found guilty of murder, failing to ask potential jurors whether they could consider mitigating evidence, failing to ask potential jurors whether they could follow the proper standard for the burden of proof, and failing to ask potential jurors whether they could reach an independent decision rather than simply vote with the majority. Moreover, counsel failed to object to the qualification of several jurors who gave disqualifying responses to the questions counsel did ask.
- 2) Counsel failed to seek proper instructions from the trial court. In particular, counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case. Counsel further failed to seek an instruction stating the specific elements of the crime named in the burglary charge.

- 3) Counsel failed to adequately investigate and present evidence in support of all potential defenses in the guilt-or-innocence phase. Counsel's failures include failing to adequately investigate and present evidence concerning the possibility that the victim's husband, Allen Southern, may have had some direct or indirect involvement in her death. Specifically, counsel failed to investigate and develop the theory that Mr. Southern was intentionally or grossly negligent in assisting the victim after her injury and thereby contributed to her death. Further, counsel failed to retain a private investigator to assist in the investigation of the case. Moreover, counsel failed to investigate, develop and present all available evidence, including expert evidence from a forensic pathologist and/or suicidologist or other appropriate expert, in support of the defenses they did advance, e.g., that Applicant entered the Southern residence with the intent to commit suicide and Mr. Southern's possible involvement in the death of his wife.
- 4) Counsel failed to ensure that jurors did not see Applicant in prison clothes.
- 5) Counsel failed to ensure that jurors did not see Applicant in restraints.

10(b): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.

11(b): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. Counsel failed to retain a mitigation specialist or social history investigator to conduct a mitigation investigation and develop an adequate social history.
- 2) Counsel failed to retain an expert in suicide to support their theory that Applicant had entered the Southern residence with the intent to commit suicide.
- 3) Counsel failed to retain an expert in Fetal Alcohol Spectrum Disorder, although they knew that Applicant's birth mother drank alcohol during her pregnancy. Counsel further failed to obtain Applicant's medical, school, and other records and his birth mother's medical and other records to document that Applicant suffers from a Fetal Alcohol Spectrum Disorder.

- 4) Counsel failed retain the services of an expert in adaptability to prison. Counsel further failed to present any evidence concerning Applicant's adaptability to prison or his lack of violent or aggressive history during prior incarcerations.
- 5) Counsel failed to object to the State's inflammatory, irrelevant and improper statements in closing argument. Counsel's failures include, but are not limited to, failing to object to the State's suggestion that the jury should impose death for the victim of the unrelated criminal sexual conduct conviction, failing to object to the State's argument that the mitigating evidence had to have a nexus to the crime to be considered by the jury, and failing to object to the State's argument that the State was speaking on behalf of the victim in the case.
- 6) Counsel failed to object to the trial court's improper instruction to the jury that the jurors could not give life as an act of mercy.
- 7) Counsel failed to ensure that jurors did not see Applicant in prison clothes.
- 8) Counsel failed to ensure that jurors did not see Applicant in restraints.

10(c): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the appellate phase of his trial.

11(c): Supporting facts: Counsel's performance on direct appeal was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Southerland v. State*, 524 S.E.2d 833 (S.C. 1999). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Appellate Counsel failed to assert that it was error for the trial court to deny Applicant's motion to suppress inflammatory photographs of the victim of a prior crime.
- 2) Appellate Counsel failed to assert that it was error for the trial court to deny Applicant's motion to suppress materials introduced by the State as "child pornography."
- 3) Appellate Counsel failed to assert that the trial judge erred in allowing the prosecution to amend the indictment after the jury had been charged.
- 4) Appellate Counsel failed to challenge the admissibility of Applicant's statements on all viable legal theories including the Sixth Amendment to the United States Constitution.
- 5) Appellate Counsel failed to assert that a sentence of death imposed upon persons with mental illness constitutes cruel and unusual punishment in violation of the

Eighth Amendment to the United States Constitution under *Atkins v. Virginia*, 536 U.S. 304 (2002).

10(d): Applicant's conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

11(d): Supporting facts: Several errors at trial violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

1) The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006). Such evidence included, but is not limited to, evidence that the State's witness, Jerry Johnson and Danny Edwards, former inmates who testified against Applicant, were improperly influenced to testify or received undisclosed benefits for doing so. Additionally, one of the "snitch" witnesses testified falsely regarding his history of cooperation with law enforcement.

2) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

3) Applicant's death sentence was based, at least in part, upon an invalid prior conviction or convictions. *Johnson v. Mississippi*, 486 U.S. 578 (1988).

4) Applicant's death sentence was obtained, at least in part, as a result of the State's inflammatory, irrelevant and improper statements in closing argument. Such statements included, but are not limited to, the State's suggestion that the jury should impose death for the victim of the unrelated criminal sexual conduct conviction, the State's argument that the mitigating evidence had to have a nexus to the crime to be considered by the jury, and the State's argument that the State was speaking on behalf of the victim in the case.

10(e): Applicant's death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

11(e): Supporting facts: A number of errors occurred at Applicant's trial that violated the Eighth, Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

- 1) Applicant's death sentence was obtained, at least in part, as a result of the trial court's erroneous instruction to the jury that the jurors could not give life as an act of mercy.
 - 2) Applicant's death sentence was obtained, at least in part, as a result of extraneous influence upon Juror Henry Visquez who was inappropriately threatened and pressured by other jurors to vote for death. Moreover, Mr. Visquez was told by other jurors that if the jury could not reach a unanimous decision on the appropriate penalty, Applicant would receive an entirely new trial for both the guilt-or-innocence phase and the penalty phase.
 - 3) Applicant's death sentence was obtained, at least in part, as a result of the fact that jurors saw Applicant in prison clothing.
 - 4) Applicant's death sentence was obtained, at least in part, as a result of the fact that jurors saw Applicant in restraints.
12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari.
 13. Applicant has also filed an application for post-conviction relief in the Spartanburg County Court of Common Pleas concerning a prior conviction for criminal sexual conduct. That application is currently pending.
 14. The grounds set forth in (10) have not previously been presented to this or any other court, state or federal.
 15. Not applicable.
 16. These grounds rely on facts beyond those set forth in the record that was before previous courts.
 17. Applicant was represented by counsel during trial and appeal.
 18. Counsel:
 - a. Name and address of each attorney who represented appellant:
 - i. Trent N. Pruett, Esquire
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iii. Joseph L. Savitz III
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(803) 734-1330

b. Proceedings at which each attorney represented appellant:

- i. Trial counsel
- ii. Trial counsel
- iii. Appellate counsel

19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully Submitted,

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By: Emily C. Paavola
COUNSEL FOR APPLICANT

May 21, 2007

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

JONATHAN KYLE BINNEY,)
Applicant,)

v.)

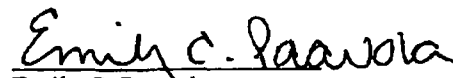
JON OZMINT, Director, South Carolina)
Department of Corrections, and)
HENRY MCMASTER, Attorney General,)
State of South Carolina,)
Respondents.)

IN THE COURT OF COMMON PLEAS
Case No.: 06-CP-11-223

CERTIFICATE OF SERVICE:
AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

The undersigned certifies that a copy of the foregoing Amended Application For Post-
Conviction Relief was served by first class United States mail, postage prepaid, this 21st day of
May, 2007, upon the following:

William Edgar Salter, III
Senior Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Emily C. Paavola

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS

JONATHAN KYLE BINNEY,)
)
APPLICANT,)
)
-VS-)
)
STATE OF SOUTH CAROLINA,)
)
RESPONDENT.)
_____)

2006-CP-11-223

TRANSCRIPT OF RECORD
(VOLUME ONE OF TWO)

MAY 29 - JUNE 1, 2007
GAFFNEY, SOUTH CAROLINA

BEFORE:

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES:

ATTORNEYS FOR APPLICANT:

JOHN H. BLUME, ESQUIRE
SHERI L. JOHNSON, ESQUIRE
EMILY C. PAAVOLA, ESQUIRE

ATTORNEYS FOR RESPONDENT:

WILLIAM E. SALTER, III, ASSISTANT ATTORNEY GENERAL
ANTHONY MABRY, ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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Case No. 00-65-11-525 / 525

Judge J. Derham Cole

Plaintiff State of F.S.C.

Attorney Trey Goudy
Barrie Williamson

Defendant Jonathan Kyle Binney

Attorney Trent Praxett
Mitch Slade

Date of Trial 11-4-02 - 11-14-02

STATE'S Exhibits

*See Exhibits
in Court Room
11-18-02*

No.	Description
1	Handwritten Note of Jonathan Binney - 6-16-00
2	Pre-Interrogation Waiver Form for Jonathan Binney - 6-16-00
3	Voluntary Written Statement of Jonathan Binney
4	Written Note by Jonathan Binney - 6-19-00
5	Statement of Rights Form for Jonathan Binney - 6-19-00
6	Letter written by Jonathan Binney to Allen Southern - 6-19-2000
8	one Bullet casing From Makarov Pistol
17	one spent shell From Pistol
18	One Spent Shell From Pistol
19	Bullet + Piece of Wall paper
20	one Bullet and Bedding
25	one Pair Black Latex size small gloves / 1 Black Flashlight
27	one Cigarette pack / one Lighter - Blue
29	Cigarette Butt
30	Cigarette Butts
31	one Sun Drop Can Containing 2 Cigarette Butts
32	Cigarette Butt
33	Cigarette Butt
34	Suicide Note of Jonathan Binney
35	one Plastic Dildo
36	one Plastic Massengill Disposable Douche Bottle
37	one Tube Monistat 7 Cream with Applicator

Exhibits Received from Michael R. Watts Court Reporter

Date: 11-15-02

*All exhibits checked +
accounted for 5-31-07
Brandy R. Mabee*

Case No. _____ Judge _____

Plaintiff _____ Attorney _____

Defendant _____ Attorney _____

Date of Trial _____

State's Exhibits.

No.	Description
✓ 38	Seven Unused Tissue Papers
✓ 40	one white handle 7-inch Knife - Kamenstog
✓ 41	3 Black Handle Knives
✓ 47	SLED Evidence Bag (DNA)
✓ 48	one Makarov - arsenal - 9x18 Caliber Pistol
✓ 49	one Pistol magazine / Live Rounds
✓ 50	Two Pistol magazines / ~~9 Live Rounds~~ / 8 Live Rounds
✓ 51	Pistol magazine - 8 Live Rounds
✓ 53	one Pistol Round
✓ 58	Latent Prints
✓ 59	SLED Evidence Bag
✓ 60	one Police Scanner with Batteries
✓ 63	Photograph
✓ 64	Photograph
✓ 65	Photograph
✓ 66	Photograph
✓ 67	Photograph
✓ 68	Photograph
✓ 69	Photograph
✓ 70	Photograph
✓ 71	Photograph
✓ 72	Cassette Audio tape / Original Audio Cassette Tape (2)

Exhibits Received from _____ Court Reporter

Date: _____

Case No. _____ Judge _____

Plaintiff _____ Attorney _____

Defendant _____ Attorney _____

Date of Trial _____

State's Exhibits

No.	Description
✓ 73	Photograph
✓ 74	Photograph
✓ 75	Voluntary Statement Form - 6-19-00.
✓ 76	one Pistol Holster / one Pistol Magazine Holder
✓ 77	one Pair Blue Jeans with 1 9x18 Bullet & Casing In Pocket
✓ 78	Photograph
✓ 79	Photograph
✓ 80	Photograph
✓ 81	Photograph
✓ 82	Scaled Drawing of Officer Henson
✓ 83	Scaled Drawing By Officer J. Henson
✓ 84	Scaled Drawing by Officer J. Henson
✓ 85	Scaled Drawing by Officer J. Henson
✓ 86	Photograph
✓ 87	Photograph
✓ 88	Photograph
✓ 89	Photograph
✓ 90	Photograph
✓ 91	Photograph
✓ 92	Photograph
✓ 93	Photograph
✓ 94	Photograph

Exhibits Received from _____ Court Reporter

Date: _____

Case No. _____ Judge _____

Plaintiff _____ Attorney _____

Defendant _____ Attorney _____

Date of Trial _____

Stater Exhibits

No.	Description
✓ 95	Photograph
✓ 96	Photograph
✓ 97	Photograph
✓ 98	Photograph
✓ 99	Photograph
✓ 100	Photograph
✓ 101	Photograph
✓ 102	Photograph
✓ 103	Photograph
✓ 104	Photograph
✓ 105	Bill of Sale For Pistol
✓ 106	Sled Evidence Bag (DNA)
✓ 107	hand-drawn Map By Jonathan Binney - 6-25-00
✓ 108	Coroner's Drawing
✓ 109	Coroner's Drawing
✓ 110	Voluntary Written Statement - Jonathan Binney - 12-8-99
✓ 111	Pre-interrogation Waiver Form - Spartanburg County - 12-8-99
✓ 112	Voluntary Statement of Jonathan Binney - 12-8-99
✓ 113	Voluntary Statement of Jonathan Binney - 12-9-99
✓ 115	Statement of Rights Form for Jonathan Binney - 12-9-99
✓ 116	Voluntary Statement of Jonathan Binney - 12-9-99
✓ 117	Swearing of Truth Statement of Jonathan Binney - 12-9-99

Exhibits Received from _____ Court Reporter

Date: _____

Case No. _____ Judge _____
Plaintiff _____ Attorney _____
Defendant _____ Attorney _____
Date of Trial _____

State's Exhibits

No.	Description
✓ 118	Typed Transcript of Audio Statement of J. Binney - 12-9-99
✓ 119	Cassette Audiotape
✓ 120	Photograph
✓ 121	Photograph
✓ 122	Photograph
✓ 123	1 page of Computer Images
✓ 124	Swedish Erotica Vibrator
✓ 125	Photographs
✓ 126	Photograph
✓ 127	Photograph
✓ 128	Photograph
✓ 129	Photograph
✓ 130	Photograph
✓ 131	Photograph
✓ 132	Certified True Copy of Judgment Entry - 6-10-93
✓ 133	Certified True Copy of Superior Court - N.C.
✓ 134	Indictment - 00-65-42-1033 for G.S.C. 1st degree
✓ 135	Letter From Jonathan Binney - 7-7-00

Exhibits Received from _____ Court Reporter

Date: _____

Case No. _____ Judge _____

Plaintiff _____ Attorney _____

Defendant _____ Attorney _____

Date of Trial _____

Defense Exhibits

No. Description

✓ 1	Witness Interview Form - 6-A-00 (I.D.)
✓ 2	Suicide Note of Jonathan Binney (States 34)
✓ 3	Enlarged Photograph
✓ 4	Enlarged Photograph
✓ 5	Enlarged Photograph
✓ 6	Enlarged Photograph
✓ 7	Enlarged Photograph
✓ 8	Enlarged Photograph
✓ 9	Enlarged Photograph
✓ 10	Enlarged Photograph
✓ 11	Enlarged Photograph
✓ 12	Enlarged Photograph
✓ 13	Enlarged Photograph
✓ 14	Enlarged Photograph
✓ 15	Jail Records From Cherokee County Jail
✓ 16	4 pages of Transcript from officer Steve Reynolds

Exhibits Received from _____ Court Reporter

Date: _____

Date of Trial

Court's Exhibits

No.	Description
1	DEFENSE Memorandum of Law on Bergberg Instruction
2	Jury Note
3	Search Warrant - 2-8-00 (Affidavit)
4	Search Warrant - 12-9-99 (Affidavit)
5	Permission To Search Form - 12-9-99
6	Permission To Search Form - 12-9-99
7	Investigation Report of Officer Lestage - 12-13-99
8	80 pages of Pornographic Computer Images States
9	DEFENSE Memorandum of Law To Suppress Computer Search
10	Certified Copy of Judgment Entry of Plea

Exhibits Received from _____ Court Reporter

Date: _____

1 **THE BAILIFF:** ALL RISE, COME TO ORDER. COURT'S IN
2 SESSION. THE HONORABLE JUDGE MICHAEL BAXLEY PRESIDING.

3 **THE COURT:** THANK YOU. EVERYONE PLEASE BE SEATED.
4 AND, LADIES AND GENTLEMEN, I'M JUDGE BAXLEY. AND WE'RE HERE
5 FOR THE POST CONVICTION RELIEF TRIAL FOR MR. JONATHAN KYLE
6 BINNEY VERSUS THE STATE OF SOUTH CAROLINA.

7 I LOOK FORWARD TO WORKING WITH COUNSEL AND WITH OUR
8 WITNESSES WHO ARE PRESENT. THERE'S SEVERAL THINGS THAT WE
9 WILL STATE FOR THE RECORD. BECAUSE WE'LL BE WORKING
10 TOGETHER THIS WEEK WITHOUT A JURY, PERHAPS WE SHOULD
11 INTRODUCE SOME OF THE INDIVIDUALS WITH WHOM WE WILL BE
12 WORKING.

13 MS. BRANDY McBEE IS OUR CLERK OF COURT HERE IN CHEROKEE
14 COUNTY AND ALWAYS DOES AN EXCELLENT JOB. WE APPRECIATE YOU
15 BEING AVAILABLE FOR THIS AND, IN FACT, HELPING US SCHEDULE
16 THIS MATTER BECAUSE WE DID HAVE SOME DIFFICULTY IN
17 SCHEDULING WITH COUNSEL BUSY AS WELL AS THE COURT'S SCHEDULE
18 AND THIS COURTROOM'S SCHEDULE. AND WE APPRECIATE YOUR
19 ASSISTANCE.

20 MS. SUSAN HUDGINS IS OUR COURT REPORTER WHO WILL BE
21 TAKING THESE PROCEEDINGS THIS WEEK. AND, MS. McBEE, WE HAVE
22 SOME BAILIFFS AND SOME SECURITY OFFICERS. IF YOU WOULD
23 INTRODUCE YOUR BAILIFF CREW, WE'LL LET SECURITY OFFICERS
24 INTRODUCE THEMSELVES.

25 **MADAME CLERK:** YES, YOUR HONOR. OVER HERE WE HAVE

1 CHIEF BAILIFF WAYNE ELLIS. IN THE BACK WE HAVE BAILIFF MAX
2 GEE, WHO WORKS THE BACK DOOR. OUTSIDE OUR BACK DOOR IS
3 BAILIFF FRANCIS WILKINS. AND OVER HERE TO MY RIGHT IS
4 BAILIFF NANCY BOWLING.

5 AND OFFICERS WE HAVE IN THE COURTROOM IS SERGEANT
6 PITTMAN GRUBB. AND BEHIND HIM IS OFFICER KEN BROOME. AND
7 OUR DETENTION OFFICER IS OFFICER RAY HIGGIN.

8 THE COURT: THANK YOU. WELCOME, LADIES AND GENTLEMEN.
9 WE'RE LOOKING FORWARD TO WORKING WITH YOU THIS WEEK. AND
10 WE'LL LET THE ATTORNEYS, IF THEY WOULD, ALSO INTRODUCE
11 THEMSELVES FOR THE RECORD. WE'LL START WITH THE STATE.
12 AND, MR. SALTER, GO AHEAD.

13 MR. SALTER: YES, SIR. MY NAME IS ED SALTER, S-A-L-T-
14 E-R. I'M THE SENIOR ASSISTANT ATTORNEY GENERAL FOR
15 RESPONDENT.

16 MR. MABRY: I AM ANTHONY MABRY, M-A-B-R-Y. AND I'M
17 ASSISTANT ATTORNEY GENERAL.

18 THE COURT: THANK YOU. AND NOW TO THE APPLICANT'S
19 CASE.

20 MR. BLUME: YES. I'M JOHN BLUME, B-L-U-M-E, SINCE, I
21 GUESS, WE'RE SPELLING OUR LAST NAMES. AND I RESIDE
22 SOMEWHERE BETWEEN ITHACA, NEW YORK AND COLUMBIA DEPENDING ON
23 THE SEASON OF THE YEAR.

24 THE COURT: VERY GOOD.

25 MS. JOHNSON: SHERI JOHNSON, S-H-E-R-I. AND I RESIDE

1 IN ITHACA, NEW YORK.

2 THE COURT: THANK YOU.

3 MS. PAAVOLA: I'M EMILY PAAVOLA, P-A-A-V-O-L-A. I'M
4 FROM INDIANAPOLIS, INDIANA.

5 THE COURT: ALL RIGHT. COUNSEL, AGAIN, WELCOME TO THE
6 COURTROOM. AND WE LOOK FORWARD TO WORKING WITH YOU. I WANT
7 TO ASK IF THERE ARE ANY MEMBERS OF THE VICTIM'S FAMILY
8 PRESENT, MR. ATTORNEY GENERAL?

9 MR. SALTER: YES, SIR, THERE ARE.

10 THE COURT: ALL RIGHT. LET'S INTRODUCE THOSE
11 INDIVIDUALS WHO MAY BE HERE OR IF THEY WISH TO INTRODUCE
12 THEMSELVES, THEY MAY.

13 MR. SALTER: THE VICTIM'S ADVOCATE, SANDY WOFFORD.

14 THE COURT: ALL RIGHT. IS MS. WOFFORD IN THE
15 COURTROOM? YES, THERE SHE IS. MS. WOFFORD.

16 MS. WOFFORD: WAYNE, TRUDY AND BARBARA ARE THE BROTHER
17 AND SISTER OF JUDY, AND HER HUSBAND.

18 THE COURT: AND PLEASE GIVE US YOUR NAME, SIR.

19 MR. SOUTHERN: ALLAN SOUTHERN.

20 THE COURT: ALL RIGHT, MR. SOUTHERN. THANK YOU.

21 MS. PRICE: AND I'M BARBARA PRICE, TRUDY'S OLDEST
22 SISTER. JUDY'S OLDEST -- AND HER OLDEST SISTER TOO.

23 THE COURT: ALL RIGHT. THANK YOU, MS. PRICE. LADIES
24 AND GENTLEMEN, PLEASE BE SEATED. AND WE WELCOME YOU TO THE
25 COURTROOM.

1 SOUTH CAROLINA'S VICTIM'S BILL OF RIGHTS ACCORDS
2 NUMEROUS RIGHTS TO VICTIMS IN THIS PROCESS. OBVIOUSLY YOU
3 ARE AWARE OF THE RIGHT TO BE PRESENT BECAUSE YOU'RE HERE
4 TODAY. AND WE WELCOME YOU TO THE COURTROOM.

5 I KNOW THIS HAS BEEN A DIFFICULT PROCESS FOR YOU. AND
6 WE APPRECIATE THE FACT THAT YOU HAVE MADE YOUR SCHEDULES
7 AVAILABLE TO BE HERE AND WILL PARTICIPATE TO THE EXTENT THAT
8 THE ATTORNEY GENERAL AND YOU SEE FIT IN THIS PROCESS.

9 AND, OF COURSE, MR. BINNEY IS NOT HERE YET. THERE HAS
10 BEEN A DELAY IN HIS TRANSPORT. WE UNDERSTAND HE IS IN
11 ROUTE, EXPECTED HERE SOMETIME AROUND 1:00. I HAD ASKED
12 COUNSEL THAT WE MIGHT GO AHEAD AND PROCEED WITH ANY
13 PRELIMINARY MATTERS THAT ARE TO BE DETERMINED BY THE COURT
14 AND WAIT UNTIL MR. BINNEY IS HERE FOR THE TRIAL PORTION, THE
15 TESTIMONIAL PORTION OF THE TRIAL TO BEGIN SO THAT HE WOULD
16 NOT MISS ANY OF THE TESTIMONY. NOW IS THERE AN OBJECTION TO
17 THAT FROM THE ATTORNEY GENERAL'S SIDE OF THE CASE?

18 MR. SALTER: NONE, YOUR HONOR.

19 THE COURT: AND FROM THE APPLICANT'S SIDE OF THE CASE?

20 MR. BLUME: NO, YOUR HONOR. THE ONLY CAVEAT TO THAT IS
21 NOT WITH DOING THIS, BUT I JUST THOUGHT I SHOULD PUT IT ON
22 THE RECORD, THAT WE HAD PREVIOUSLY ASKED FOR A STAY OF THIS
23 CASE PENDING THE RESOLUTION OF AN APPEAL TO THE STATE
24 SUPREME COURT REGARDING THE DISCLOSURE OF TRIAL COUNSEL'S
25 FILES. THAT MATTER -- THE COURT DENIED THE MOTION. AND

1 THAT MATTER IS STILL PENDING IN THE STATE SUPREME COURT.

2 SO I DON'T HAVE ANY OBJECTION TO GOING FORWARD WITH
3 THESE PRELIMINARY MATTERS SUBJECT TO MY PREVIOUS OBJECTION
4 THAT I'M NOT -- NOT TO WAIVE THAT, THAT WE STILL BELIEVE
5 THIS MATTER SHOULD BE STAYED PENDING THAT.

6 THE COURT: ALL RIGHT. THANK YOU, MR. BLUME. IT
7 APPEARS TO ME, AND I RECEIVED A COPY OF THE SUPREME COURT
8 FOLDER IN THE MATTER, THAT WHAT THEY BASICALLY DID IS THEY
9 DISMISSED YOUR PETITION, YOUR NOTICE OF APPEAL WITHOUT
10 PREJUDICE MEANING ONCE THE ORDER IN THIS CASE BECOMES FINAL
11 IF THE APPLICANT INTENDS TO APPEAL, THEN THE APPLICANT WOULD
12 HAVE THAT ISSUE TO APPEAL AT THAT TIME. IS THAT YOUR
13 UNDERSTANDING OF THAT STATUS?

14 MR. BLUME: YES, BUT THERE IS A PETITION PENDING, WHICH
15 HAS NOT BEEN RULED ON.

16 THE COURT: I SEE.

17 MR. BLUME: THAT'S WHY -- I UNDERSTAND THE COURT'S
18 RULING. I JUST DON'T WANT ANYTHING IN GOING FORWARD AS TO
19 BE -- TO BE UNDERSTOOD THAT OUR POSITION IS IT SHOULD BE
20 STAYED PENDING THE RESOLUTION OF THAT APPEAL, ---

21 THE COURT: VERY GOOD.

22 MR. BLUME: --- WHICH IS STILL PENDING.

23 THE COURT: AND YOUR POSITION IS NOTED FOR THE RECORD.
24 AND PROBABLY WHAT WE SHOULD DO AT THIS TIME, AND JUST TO
25 MAKE SURE THAT EVERYONE UNDERSTANDS, AT POST CONVICTION

1 RELIEF THE JUDGE ACTS AS THE TRIER OF FACT. THERE'S NO JURY
2 INVOLVED IN POST CONVICTION RELIEF.

3 AND THE QUESTION, AND WE'LL DISCUSS THIS AGAIN WHEN MR.
4 BINNEY, WHEN HE'S HERE, IS WHETHER OR NOT COUNSEL BELOW, THE
5 PERFORMANCE OF COUNSEL BELOW FELL BELOW THE STANDARDS
6 REQUIRED OF PRACTITIONERS PRACTICING CRIMINAL LAW IN SOUTH
7 CAROLINA AND WHETHER IF THEY -- IF SUCH PERFORMANCE DID FALL
8 BELOW THE STANDARD, WHETHER THERE WAS PREJUDICE THAT
9 RESULTED FROM THAT DEVIATION FROM THE STANDARD. THESE ARE
10 THE ISSUES THAT WILL BE TRIED THIS WEEK BEFORE THE COURT.

11 WE DO ANTICIPATE THAT THIS CASE WILL BE CONCLUDED THIS
12 WEEK EVEN THOUGH THIS IS A SHORT WEEK. AND AT THIS TIME I
13 BELIEVE THE APPROPRIATE WAY FOR US TO GO FORWARD WOULD BE TO
14 ENTERTAIN ANY PRELIMINARY MOTIONS OR ISSUES THAT WE NEED TO
15 TAKE UP BEFORE WE BEGIN THE TRIAL OF THE CASE.

16 LET ME, MR. SALTER, BEFORE YOU ARISE, LET ME TELL THOSE
17 -- THERE'S SEVERAL HERE. I SEE FAMILY MEMBERS AND OTHERS
18 WHO ARE HERE AS WITNESSES AND PERHAPS SOME OF MR. BINNEY'S
19 FAMILY MEMBERS. I DIDN'T ASK. ARE THERE FAMILY MEMBERS
20 HERE FOR MR. BINNEY ALSO, MR. BLUME?

21 MR. BLUME: NOT PRESENTLY HERE.

22 THE COURT: ALL RIGHT. VERY GOOD. THERE WAS A MEETING
23 WITH COUNSEL IN THE BACK BEFORE WE CAME OUT TO BEGIN THIS
24 CASE. I WANT YOU TO UNDERSTAND THAT AT NO TIME WHERE WE GO
25 BACK AND MAKE SOME DECISION OR SOMETHING SUBSTANTIVE ABOUT

1 THE CASE TO OCCUR IN A BACK ROOM AND THEN COME IN HERE AND
2 TRY THE CASE. OUR DECISIONS IN THIS CASE WILL BE ON THE
3 RECORD. WHATEVER WE DO WILL BE PRESERVED FOR APPELLATE
4 REVIEW.

5 AND, BUT I WILL TELL YOU THAT WE WENT BACK IN THE BACK.
6 AND THE PURPOSE FOR THAT WAS TO DISCUSS JUST A SCHEDULING OF
7 THE CASE, HOW MANY WITNESSES WE FELT THE APPLICANT WOULD
8 HAVE, HOW MANY WITNESSES THE STATE WOULD HAVE, HOW MUCH TIME
9 WE FELT IT WOULD TAKE TO PUT UP THE WITNESSES, NOT TO RUSH
10 ANYONE, BUT JUST SIMPLY TO KNOW. AND THIS IS WHY I'M ABLE
11 TO TELL YOU THAT IT APPEARS THAT THIS CASE WILL CONCLUDE
12 THIS WEEK.

13 COUNSEL ADVISED ME WITHOUT ANY DISCUSSION OF THE MERITS
14 OR ANY DECISIONS BEING MADE THAT THERE ARE CERTAIN ISSUES
15 THAT ARE PENDING NOW THAT NEED TO BE RESOLVED BEFORE WE GO
16 INTO THE TRIAL OF THE CASE. AND I DO NOT BELIEVE MR. BINNEY
17 WOULD BE PREJUDICED FOR US TO CONSIDER THESE PRELIMINARY
18 ISSUES IN HIS ABSENCE AND, THEREFORE, WE HAVE DETERMINED TO
19 DO THAT.

20 MR. SALTER, YOU AROSE A MOMENT AGO TO CALL THESE ISSUES
21 TO THE COURT'S ATTENTION. I'LL BE GLAD TO HEAR FROM YOU,
22 SIR.

23 MR. SALTER: YES, SIR. BUT BEFORE I EVEN DO THAT, YOUR
24 HONOR, ONE MATTER THAT WE DID NOT DISCUSS IN CHAMBERS, AND I
25 SIMPLY OVERLOOKED IT, I HAVE -- I HAVE A COPY OF THE RECORD

1 ON APPEAL AS WELL AS ALL PLEADINGS, ORDERS AND THE OPINION
2 OF THE SOUTH CAROLINA SUPREME COURT FROM DIRECT APPEAL FOR
3 YOUR HONOR'S CONVENIENCE. IF I COULD PASS THAT UP, YOUR
4 HONOR?

5 THE COURT: ALL RIGHT. ANY OBJECTION TO THAT, MR.
6 BLUME?

7 MR. BLUME: NO, SIR.

8 THE COURT: ALL RIGHT. GO AHEAD, MR. SALTER. THANK
9 YOU.

10 (PAUSE)

11 THE COURT: ALL RIGHT. I DIDN'T ASK, MR. BLUME, DO YOU
12 OR CO-COUNSEL WANT TO LOOK THROUGH THIS BEFORE I PICK IT UP
13 TO MAKE SURE THAT IT'S WHAT IT PURPORTS TO BE?

14 MR. BLUME: NO, YOUR HONOR. I'D RELY ON MR. SALTER'S
15 ABILITY TO ASSERT WHAT IT IS AND ADVISE THE COURT.

16 THE COURT: ALL RIGHT.

17 MR. SALTER: THERE IS SPECIFICALLY THE ATTACHMENTS THAT
18 WERE LISTED IN THE RETURN, THE VARIOUS ATTACHMENTS. I
19 BELIEVE THERE WERE FOURTEEN LISTED IN THE RETURN.

20 THE COURT: ALL RIGHT. VERY GOOD. THANK YOU. GO
21 AHEAD.

22 MR. SALTER: YOUR HONOR, THE FIRST THING I WOULD LIKE
23 TO ADDRESS IS UNDER RULE 15A, THIS LATE IN THE PROCEEDINGS,
24 AMENDMENT OF THE APPLICATION MUST BE DONE WITH THE COURT.
25 MAY 21ST THE APPLICANT SERVED AN AMENDED APPLICATION,

1 PREVIOUSLY SERVED ANOTHER AMENDMENT APPROXIMATELY A WEEK OR
2 SO BEFORE THAT.

3 THE NEW AMENDED -- THE NEW AMENDED APPLICATION RAISES A
4 NUMBER OF GROUNDS THAT WERE NEVER RAISED HERE BEFORE.
5 AGAIN, THIS DOESN'T PROVIDE US WITH ANY OPPORTUNITY TO DO
6 ANY DISCOVERY WITH RESPECT TO THOSE ALLEGATIONS. AND WE'D
7 OBJECT TO -- WE'D OBJECT TO THE AMENDMENTS.

8 I ANTICIPATED AT THIS POINT ONE OF THESE ALLEGATIONS
9 HAD TO DO WITH AN ALLEGATION OF JUROR MISCONDUCT, WHICH IS
10 ANOTHER MATTER THAT WE WANT TO ADDRESS IN A MOMENT. I
11 DIDN'T KNOW WHETHER OR NOT YOUR HONOR WOULD RATHER GO
12 THROUGH IT ONE AT A TIME, EACH PRELIMINARY MATTER, FOR
13 INSTANCE, THE AMENDMENT.

14 AND THEN WE WERE ALSO SERVED WITH SOME DISCOVERY ON
15 FRIDAY. I HAVE ANOTHER OBJECTION WITH RESPECT TO THAT.

16 THE COURT: LET'S TAKE THEM ONE AT A TIME, MR. SALTER,
17 TO AVOID CONFUSION OF THE ISSUES. AND ARE YOU READY FOR MR.
18 BLUME TO REPLY?

19 MR. SALTER: YES, SIR, YOUR HONOR.

20 THE COURT: ALL RIGHT. THEN THERE'S AN OBJECTION TO
21 YOUR APPLICATION, AMEND THE APPLICATION FILED. AND DID YOU
22 SAY MAY 24TH?

23 MR. SALTER: IT WAS DATED THE 21ST, YOUR HONOR.

24 THE COURT: ALL RIGHT. APPLICATION DATED MAY 21. WHAT
25 DO YOU SAY, MR. BLUME?

1 MR. BLUME: WELL, FIRST, IT'S BEEN MY EXPERIENCE IN THE
2 · TWENTY YEARS THAT I'VE DONE CAPITAL POST CONVICTION HEARINGS
3 IN THIS STATE THAT LEAVE TO AMEND IS ALMOST ALWAYS GRANTED,
4 AND NOT KNOWING THAT THERE HAVE BEEN MANY CASES WHICH
5 AMENDMENTS HAVE BEEN MADE AT THE ACTUAL HEARING ITSELF PRIOR
6 TO THE START OF THE EVIDENCE.

7 BUT IN ADDITION TO THAT I CAN SEE MOST OF THE
8 ALLEGATIONS IN THE AMENDED APPLICATION WERE ACTUALLY
9 INTENDED, AND I BELIEVE DID, GIVE THEM EVEN GREATER NOTICE
10 OF WHAT THE SPECIFICITY OF THE PARTICULAR ALLEGATIONS ARE.

11 IF YOU REMEMBER ONE OF THE COMPLAINTS OR ONE OF THE
12 ISSUES THAT WAS RAISED WHEN WE WERE TALKING ABOUT THE FILES
13 WAS THE ALLEGATIONS WERE SO GENERAL THEY COULD COVER ANY
14 POSSIBLE THING THAT COULD POSSIBLY BE RAISED. WE AMENDED
15 THE APPLICATION IN AN ATTEMPT TO SORT OF FOCUS THE INQUIRY
16 TO PROVIDE THEM WITH MORE DETAILED NOTICE ABOUT WHAT THE
17 ACTUAL COMPLAINTS, NOT ONLY REGARDING COUNSEL'S PERFORMANCE,
18 BUT IN REGARD TO OTHER SPECIFIC ALLEGATIONS.

19 SO I DON'T THINK THERE'S GOING TO BE ANY EVIDENCE
20 PRESENTED AT THIS PROCEEDING WHICH COULDN'T HAVE BEEN
21 ANTICIPATED BY EITHER THE PRIOR APPLICATION OR THIS ONE.
22 AND I HAVEN'T HEARD ANY SPECIFIC ISSUES OF PREJUDICE. THE
23 ONE THAT WAS MENTIONED IN THE -- IN CHAMBERS WAS OF HOW
24 INEFFECTIVE -- SEVERAL NEW GROUNDS OF INEFFECTIVE ASSISTANCE
25 OF COUNSEL ON DIRECT APPEAL.

1 THAT'S TRUE, WE DID ADD SEVERAL NEW GROUNDS OF
2 APPELLATE INEFFECTIVENESS WHICH WEREN'T IN THE PRIOR
3 APPLICATION, BUT I ALSO CAN'T SEE ANY POSSIBLE PREJUDICE ON
4 THAT. APPELLATE COUNSEL'S GOING TO BE HERE. HE'S GOING TO
5 BE ASKED ABOUT WHETHER HE HAD OR DIDN'T HAVE ANY STRATEGIC
6 REASON FOR FAILING TO RAISE ONE OR MORE OF THOSE ISSUES. SO
7 I THINK THERE -- THE APPLICATION WAS AMENDED. IT WAS
8 INTENDED TO MAKE IT AS SPECIFIC AS POSSIBLE, TO GIVE THEM AS
9 MUCH NOTICE AS POSSIBLE AS TO WHAT OUR ALLEGATIONS WERE, AND
10 THAT'S WHY WE DID IT.

11 THE COURT: ALL RIGHT. TELL ME WHAT IN HERE
12 SPECIFICALLY PREJUDICES YOU, MR. SALTER.

13 MR. SALTER: WELL, YOUR HONOR, THE PROBLEM I HAVE ISN'T
14 SO MUCH THE ALLEGATIONS THEMSELVES AS IT IS THE FACT THEY'RE
15 DONE AT THIS LATE DATE. AS YOUR HONOR IS WELL AWARE, WE HAD
16 A HEARING IN CONWAY. AND IT WASN'T UNTIL AFTER OUR RETURN
17 TO COLUMBIA FROM THE HEARING IN CONWAY THAT I WAS ABLE TO
18 LOOK AT THE FILE OF THE ORIGINAL TRIAL ATTORNEY, LEAD
19 COUNSEL, MR. PRUETT.

20 I THEREAFTER STARTED GOING THROUGH THAT TRIAL WITH
21 RESPECT TO THE ALLEGATIONS THAT WERE THEN ON THE TABLE. AND
22 THEN AT SOME POINT AFTER THAT I DIDN'T -- I'M NOW FACED WITH
23 THE OTHER WHOLE SERIES OF ALLEGATIONS. AND IT'S SIMPLY --
24 IT'S TRULY JUST A MATTER OF FAIRNESS THAT WE BE TREATED
25 FAIRLY.

1 I DON'T THINK ANY OTHER CIVIL LITIGANT WOULD HAVE THAT
2 TYPE OF SITUATION WHERE WE'RE BASICALLY HAMSTRUNG IN OUR
3 ABILITY TO PREPARE. AND THEN AFTER WE START PREPARING AND
4 WE'RE FOCUSED IN ON THE ALLEGATIONS AT HAND, WE'RE FACING A
5 WHOLE DIFFERENT SET OF ALLEGATIONS IN ADDITION TO THOSE.

6 THE COURT: BUT TELL ME WHAT IS NEW. WHAT'S THE NEW
7 ALLEGATION IN THIS AMENDED COMPLAINT? AND I WILL NOTE THAT
8 IT ACTUALLY WAS CLOCKED IN ON MAY 25TH AT 11:16 AM. WHAT IS
9 IT IN HERE THAT YOU'RE SURPRISED BY?

10 MR. SALTER: AGAIN, YOUR HONOR, AGAIN, I CAN'T HONESTLY
11 SAY THAT I CAN POINT TO ONE SPECIFIC ALLEGATION. THIS IS
12 PREJUDICIAL, THAT'S PREJUDICIAL. I THINK THE WHOLE POINT IS
13 THAT, YOU KNOW, WE'RE -- AT SOME POINT, YOU KNOW, ALL THE
14 AMENDMENTS AND CHANGES IN THE ALLEGATIONS AND EVERYTHING
15 SHIFTING GROUND HAS TO STOP.

16 THE COURT: WELL, I AGREE. BUT WOULD YOU ALSO AGREE
17 THAT IF WE WERE IN TRIAL AND THERE'S AN ALLEGATION OF
18 INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, APPELLATE
19 COUNSEL TAKES THE STAND, MR. BLUME ASKS A QUESTION ABOUT
20 SOME SPECIFIC ISSUE, THAT AT THE END OF THE CASE HE CAN MOVE
21 TO CONFORM HIS PLEADINGS TO THE EVIDENCE THAT'S IN THE
22 RECORD, MEANING THAT THERE REALLY WOULD NOT BE A SURPRISE OR
23 A SHOCK IF SOMETHING SHOULD BE AMENDED AT THIS JUNCTURE?

24 MR. SALTER: I'M HESITANT TO AGREE WITH YOUR HONOR ONLY
25 IN THAT I KNOW THAT IN ARNOLD VERSUS STATE, WHICH WAS A PCR

1 INVOLVING MR. BLUME, THERE WAS AN EFFORT TO AMEND -- TO
2 AMEND THE APPLICATION TO CONFORM TO WHAT THEY -- CONFORMED
3 TO THE EVIDENCE PRESENTED, WHICH IN EFFECT THEY'RE RAISING
4 DIFFERENT GROUNDS. THE COURT -- THE SUPREME COURT RULED
5 THEY COULDN'T DO THAT, THAT THAT WAS INAPPROPRIATE.

6 THE APPELLATE COUNSEL, I DIDN'T MENTION IT IN CHAMBERS,
7 BUT APPELLATE COUNSEL DOESN'T WORRY ME AS MUCH BECAUSE MR.
8 SAVITZ'S TESTIMONY HAS HISTORICALLY BEEN PRETTY MUCH THE
9 SAME IN EVERY CASE. IF HE MISSES SOMETHING THAT'S A GROUND
10 FOR REVERSAL, YOU KNOW, IT'S A GROUND FOR A NEW TRIAL OR A
11 NEW SENTENCING, HE ADMITS IT.

12 BUT MY CONCERN IS MORE JUST IN LINE -- I'M IN A
13 SITUATION WHERE WE WERE HAMSTRUNG IN OUR ABILITY TO PREPARE,
14 WE DIDN'T START TO PREPARE. AND THEN WE'RE NOW JUST FACED
15 WITH A BUNCH OF DIFFERENT ALLEGATIONS. AND IT HAS MORE TO
16 DO WITH THE NEXT MATTER THAT I WISH TO ADDRESS THAN IT DOES
17 THIS.

18 THE COURT: ALL RIGHT. MR. SALTER, OF COURSE, MR.
19 BINNEY IS A DEATH SENTENCE INMATE. AND VICTIMS WHO ARE HERE
20 HAVE HAD AN ULTIMATE SACRIFICE OCCUR IN THEIR LIVES. THIS
21 IS A MATTER OF GREAT GRAVITY. I DON'T WANT TO FORECLOSE
22 SOME ISSUE WHICH MAY BE RELEVANT AND PROBATIVE. I'M GOING
23 TO DENY YOUR MOTION.

24 IF WE'RE TO REFUSE TO ALLOW THE APPLICATION, THE
25 AMENDED APPLICATION, WE WILL PROCEED. IF AT THE END OF THIS

1 CASE YOU BELIEVE YOU HAVE BEEN SOMEHOW PREJUDICED OR BLIND-
2 SIDED BY AN ISSUE THAT HAS COME UP FOR WHICH YOU HAD NO
3 ABILITY TO PREPARE OR A REDUCED ABILITY TO PREPARE, THEN THE
4 COURT WILL CONSIDER LEAVING THE RECORD OPEN FOR YOU TO
5 RESPOND. BUT I WOULD ASK YOU TO CALL THAT TO MY ATTENTION
6 AT THE CLOSE OF THE EVIDENCE.

7 WE'VE ALREADY HAD AN AGREEMENT AMONG OURSELVES THROUGH
8 PREVIOUS TELEPHONE CONFERENCES THAT THERE'S GOING TO BE A
9 REQUEST FOR THE RECORD TO REMAIN OPEN FOR OTHER WITNESSES
10 WHO ARE NOT AVAILABLE THIS WEEK. AND WE'RE GOING TO DO
11 THAT. AND SO I DON'T SEE ANY PREJUDICE TO ALLOW YOU THAT
12 SAME OPPORTUNITY IF YOU FEEL YOU'VE BEEN WOUNDED BY
13 SOMETHING BROUGHT UP HERE, AS YOU SAY, AT THE LAST MINUTE.
14 ALL RIGHT?

15 MR. SALTER: THANK YOU, YOUR HONOR.

16 THE COURT: VERY GOOD. WHAT'S YOUR NEXT ISSUE?

17 MR. SALTER: YOUR HONOR, WE'VE BEEN PROVIDED WITH A
18 GREAT DEAL OF DISCOVERY, MUCH OF WHICH WE DIDN'T RECEIVE
19 UNTIL FRIDAY, THIS PAST FRIDAY, INCLUDING A DRAFT OF A
20 REPORT BY DR. ADLER. THERE'S ALSO A REFERENCE TO AN
21 AFFIDAVIT BY DR. DAVID BACHMAN. DR. BACHMAN'S AFFIDAVIT,
22 WE'VE NEVER SEEN. IT'S RELIED UPON BY THEIR EXPERTS IN
23 FORMULATING THEIR OPINIONS.

24 DR. ADLER'S REPORT IS RELIED UPON BY THEIR EXPERTS IN
25 REACHING THEIR OPINION. AND YET THE DRAFT THAT I WAS

1 PROVIDED WITH YESTERDAY DOESN'T EXPRESS ANY OPINION
2 WHATSOEVER. AND IT'S DATED, I BELIEVE, MAY 11TH, MAY 11TH,
3 2007. DR. BOOKSTEIN, I BELIEVE IS HIS NAME, WE WERE
4 PROVIDED A REPORT BY HIM ON FRIDAY OF THIS PAST WEEK. AND
5 HIS REPORT WAS DATED APRIL 6TH.

6 IT'S CLEAR THEY'VE BEEN SITTING ON ALL OF THIS UNTIL
7 THE VERY END, THE VERY EVE OF TRIAL, AND THEN THEY TURN IT
8 OVER. BUT THEY DON'T BOTHER TO TURN ALL OF IT OVER. AND
9 THAT'S KIND OF THE PROBLEM WE'RE HAVING.

10 THERE IS -- THERE IS NO -- LIKE I SAID, DR. BACHMAN'S
11 AFFIDAVIT IS RELIED UPON BY THEIR EXPERTS. WE'VE NEVER SEEN
12 ANY AFFIDAVIT FROM DR. BACHMAN THAT THEY RELIED UPON. WE'VE
13 NEVER SEEN AN OPINION BY DR. ADLER. WE'D MOVE TO BAR ANY
14 TESTIMONY THAT'S BASED UPON THESE MATTERS THAT WERE NOT
15 DISCLOSED. DR. -- BY THE WAY, DR. ADLER'S NAME WAS NEVER --
16 WAS NEVER LISTED IN RESPONSE TO OUR DISCOVERY REQUEST.
17 NOTHING FURTHER.

18 THE COURT: ALL RIGHT. AND RESPONSE FROM APPLICANT?

19 MR. BLUME: CERTAINLY. WE PROVIDED APPROXIMATELY FOUR
20 THOUSAND PAGES OF DISCOVERY TO THE ATTORNEY GENERAL AT THEIR
21 REQUEST SEVERAL WEEKS AGO. WE'VE TOLD THEM IN OUR RESPONSE
22 TO REQUEST WE HAD THESE DOCUMENTS, COME LOOK AT IT ANYTIME
23 YOU WANT. THEY CALLED AND SAID THEY WANTED TO COME AND SEE
24 THEM. SO INSTEAD OF EVEN MAKING THEM LOOK AT THEM IN OUR
25 OFFICE AND GO THROUGH THEM WE JUST MADE THEM COPIES OF THEM.

1 AND THEY GOT IT. AT THAT TIME WE GAVE THEM EVERYTHING THAT
2 WE BELIEVED WE WERE ENTITLED TO PRODUCE.

3 AFTER THAT SOME ADDITIONAL MATTERS DID COME IN. THE
4 REPORT BY DR. BOOKSTEIN THEY MENTIONED, ONE, WE DID HAVE A
5 DRAFT OF THAT IN APRIL, BUT WE DIDN'T GET THE FINAL DRAFT
6 OUT UNTIL THE DAY, THE FINAL SIGNED VERSION UNTIL THE DAY WE
7 GAVE IT TO THEM. WE DIDN'T HAVE TO HAVE DR. BOOKSTEIN DO A
8 REPORT AT ALL. HE DID ONE. WHEN WE GOT THE SIGNED VERSION,
9 WE PRODUCED IT.

10 DR. ADLER, HE DID SEND A -- WE GOT THE DRAFT FROM HIM.
11 WE PRODUCED THAT. BECAUSE OF THE LATENESS OF THE TIME, WE
12 DIDN'T GET A FINAL VERSION OF IT UNTIL LAST NIGHT. IT'S
13 INCORRECT THAT THEY DIDN'T HAVE HIS NAME. IT'S IN THE
14 RESPONSE THAT I REQUESTED FOR HIS DISCOVERY.

15 IN FACT, IN RESPONSE TO ALL, MOST OF THESE PEOPLE,
16 THESE EXPERTS, WE GAVE THEM THEIR NAMES IN RESPONSE TO
17 INTERROGATORIES. WE GAVE THEM THEIR CONTACT INFORMATION.
18 THEY COULD HAVE CALLED THEM. THEY COULD HAVE DEPOSED THEM.
19 THAT'S THE WAY IT FREQUENTLY WORKS IF THEY WANTED TO, IF
20 THEY HAD QUESTIONS ABOUT WHAT THEIR OPINIONS OR MATTERS WERE
21 IN THIS CASE.

22 YES, WE CONTINUED TO DISCLOSE THINGS AS IT CAME INTO US
23 IN THE LAST, YOU KNOW, IN THE LAST WEEK. I SENT MR. SALTER
24 SOME THINGS OVER THE WEEKEND AS THEY CAME. ONE THING HE
25 INDICATED HE HADN'T PREVIOUSLY BEEN PROVIDED, HE HAD BEEN,

1 BUT I SENT IT AGAIN IN CASE, YOU KNOW, THERE WAS SOME
2 QUESTION ABOUT IT.

3 SO I BELIEVE WE'VE COMPLIED FAITHFULLY WITH ALL OUR
4 DISCOVERY REQUESTS. IT'S INEVITABLE IN THESE MATTERS
5 SOMETIMES THAT THINGS CAN'T COME IN, YOU KNOW, AT THE END OF
6 IT, BUT WE'VE -- I THINK WE'VE FULLY COMPLIED.

7 AS TO THIS BACHMAN AFFIDAVIT ISSUE, WHICH IS REALLY NOT
8 THE SAME QUESTION, BUT I'LL GO AHEAD AND RESPOND TO THAT.
9 NUMBER ONE, DR. BACHMAN IS NOT A WITNESS IN THIS CASE WE
10 HAVE DESIGNATED. WE DON'T INTEND TO CALL HIM AS A WITNESS
11 IN OUR CASE IN CHIEF.

12 NUMBER TWO, THE AFFIDAVIT WHICH THEY REFERRED TO HAS
13 NEVER BEEN SHOWN TO ANYONE, ANY EXPERT THAT WE HAVE. IT'S
14 NOT GERMANE TO ANY OF THE THINGS THAT THEY'RE GOING TO
15 TESTIFY ABOUT. SOME OF THEM DO REFER TO A REPORT THAT HE
16 WROTE, BUT THAT WAS -- HAD TO DO WITH TRIAL COUNSEL, A
17 REPORT THAT WAS PRODUCED BY THE TRIAL COUNSEL IN TRIAL
18 COUNSEL'S FILES.

19 SO THAT AFFIDAVIT, I HAVE NOT PRODUCED. I DON'T THINK
20 I'M UNDER ANY OBLIGATION TO DO SO. HE'S NOT A WITNESS IN
21 OUR -- IN OUR CASE IN CHIEF. IT'S -- I WOULDN'T -- I DON'T
22 EVEN KNOW IF WE WILL INTEND TO USE IT. IT DEPENDS ENTIRELY
23 ON WHAT TRIAL COUNSEL SAYS ABOUT THE ESSENCE OF HIS
24 CONVERSATION WITH DR. BACHMAN. SO -- AND IT HASN'T BEEN
25 RELIED UPON BY ANY MEMBER -- ANY EXPERT OR WITNESS THAT

1 WE'VE CALLED.

2 THE COURT: ALL RIGHT. COUNSEL, LET ME DISCLOSE FOR
3 OUR RECORD, AND I BELIEVE YOU WERE TALKING ABOUT DR. DAVID
4 BACHMAN, WHO IS A NEUROLOGIST FROM CHARLESTON. HE IS A
5 PROFESSOR AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA. I
6 HAVE A BROTHER WHO PRACTICES NEUROLOGY IN SENECA, SOUTH
7 CAROLINA. HE CAME UP THROUGH DR. BACHMAN'S PROGRAM AND WAS
8 ONE OF DR. BACHMAN'S STUDENTS, OF COURSE, ALONG WITH OTHER
9 PROFESSORS WHO TAUGHT THERE IN THE PROGRAM.

10 AND I HAVE, IN MY TIME THAT I WAS A PRACTICING
11 ATTORNEY, HAVE HIRED DR. BACHMAN IN ONE CASE THAT I RECALL
12 AS AN EXPERT ON A BRAIN INJURED INDIVIDUAL TO TALK ABOUT THE
13 NEUROLOGICAL IMPACT OF THAT PARTICULAR BRAIN INJURY. ALL OF
14 THIS HAS BEEN PERHAPS AS LONG AS FIFTEEN YEARS AGO. I HAVE
15 NOT SEEN DR. BACHMAN SINCE THAT TIME, I DON'T BELIEVE. BUT
16 I DISCLOSE THAT BECAUSE OF MY PREVIOUS INVOLVEMENT WITH DR.
17 BACHMAN. AND I ASK, IS THERE AN OBJECTION FROM EITHER SIDE
18 THAT THE COURT GO AHEAD AND ENTERTAIN THIS ISSUE? WHAT SAY
19 YOU, MR. SALTER?

20 MR. SALTER: NO OBJECTION FROM THE STATE.

21 THE COURT: AND, MR. BLUME?

22 MR. BLUME: NO, SIR.

23 THE COURT: ALL RIGHT. I'VE HEARD MR. BLUME SAY, MR.
24 SALTER, THAT APPARENTLY THIS AFFIDAVIT IS IN TRIAL COUNSEL'S
25 FILE. HAVE YOU SEEN THAT DOCUMENT WITHIN TRIAL COUNSEL'S

1 FILE? DID I MISUNDERSTAND?

2 MR. BLUME: YES, YOU DID.

3 THE COURT: I'M SORRY.

4 MR. BLUME: WHAT -- WHAT'S IN TRIAL COUNSEL'S FILE IS A
5 REPORT FROM DR. BACHMAN. AND THAT TO THE EXTENT THAT ANY
6 EXPERT WE HAVE HAS SAID ANYTHING ABOUT DR. BACHMAN, WHAT
7 THEY LOOKED AT WAS THE REPORT, WHICH WAS IN TRIAL COUNSEL'S
8 FILE.

9 THE COURT: OKAY. ALL RIGHT. IN OTHER WORDS, AND
10 AGAIN, I DON'T KNOW WHAT ANY OF THESE DOCUMENTS SAY. SO I'M
11 JUST SPEAKING HERE WITHOUT ANY SPECIFICS. BUT DO YOU FEEL
12 THAT THERE'S SOMETHING THAT HAS BEEN KEPT FROM YOU THAT'S
13 PROBATIVE AND RELEVANT? AND IF SO, HOW SO, AND WHAT IS IT?

14 MR. SALTER: YES, SIR, YOUR HONOR. FIRST OFF, THEY
15 INDICATED THAT DR. ADLER HAD BEEN DISCLOSED OR IN DISCOVERY.
16 WE'VE HAD THEIR RESPONSES TO OUR DISCOVERY REQUESTS, AND
17 HE'S NOWHERE MENTIONED.

18 HOWEVER, WITH RESPECT TO THEIR EXPERTS NOT RELYING UPON
19 AN AFFIDAVIT BY DR. BACHMAN, I WOULD POINT OUT THAT WE HAVE
20 WHAT IS STYLED AN AFFIDAVIT OF NATALIE NOVICK-BROWN, PHD.
21 ON THE THIRD PAGE OF HER AFFIDAVIT SHE STATES, QUOTE, I
22 REVIEWED AFFIDAVITS FROM RUTH MORRIS, JOHN MORRIS, CHRISTY
23 LEMON, AND I REVIEWED REPORTS FROM THE FOLLOWING
24 INDIVIDUALS. AND SHE GOES ON TO LIST DR. BACHMAN.

25 DR. BACHMAN HAD HAD A CONVERSATION WITH MR. MABRY LAST

1 WEEK IN WHICH MR., EXCUSE ME, DR. BACHMAN DISCLOSED TO MR.
2 MABRY THAT HE HAD PROVIDED AN AFFIDAVIT TO COUNSEL FOR THE
3 APPLICANT. AND WE'VE NOT SEEN THAT. WE THINK THAT THEY ARE
4 RELYING UPON IT IN FORMULATING THEIR OPINIONS. AND WE HAVE
5 A RIGHT TO HAVE IT.

6 THE COURT: ANY RESPONSE?

7 MR. BLUME: WELL, IT'S NOT RIGHT. I MEAN, THERE IS A
8 REPORT FROM DR. BACHMAN, WHICH WAS IN TRIAL COUNSEL'S FILE.
9 THAT IS WHAT NOVICK-BROWN HAS SEEN. THERE IS AN AFFIDAVIT
10 FROM DR. BACHMAN, THAT'S TRUE, WHICH I GOT FROM HIM. IT
11 HASN'T BEEN SHOWN TO ANY EXPERTS. I DON'T INTEND TO CALL
12 HIM AS A WITNESS. AND I DON'T INTEND -- HE'S NOT A WITNESS
13 IN THIS CASE WHICH WE HAVE LISTED.

14 IT'S -- CONCEIVABLY HE COULD BE A REPLY WITNESS OR
15 COULD BE RELEVANT TO THAT. BUT THAT'S WHAT IT'S RELEVANT --
16 THAT DOCUMENT HAS NOT BEEN SHOWN TO ANYONE, TO ANY EXPERT
17 THAT WE HAVE.

18 AND SO THAT'S WHY I DIDN'T -- I DIDN'T BELIEVE AND I
19 STILL DON'T BELIEVE THAT IT'S DISCOVERABLE, THAT WE HAVE TO
20 PRODUCE IT IN THAT REGARD. HE'S NOT A WITNESS. IT'S NOT A
21 STATEMENT OF A WITNESS. AND IT'S NOT IN THAT REGARD.

22 THE COURT: ALL RIGHT. MR. ---

23 MR. BLUME: IF YOU ORDER ME TO, I WILL DO IT. I'M JUST
24 TELLING YOU THAT'S WHY I HAVE NOT DISCLOSED IT.

25 THE COURT: VERY GOOD. AND ---

1 MR. BLUME: AND DR. ADLER -- I'M SORRY, YOUR HONOR.

2 THE COURT: LET'S TAKE THAT ONE AT A TIME. LET'S GO
3 AHEAD AND TALK ABOUT DR. BACHMAN. I AM GOING TO REQUIRE YOU
4 TO DISCLOSE THAT FOR THIS REASON; THERE IS APPARENTLY A
5 REPORT THAT IS BASED UPON THE AFFIDAVIT. WHETHER OR NOT
6 THAT REPORT IS AN ACCURATE REPRESENTATION OF THE AFFIDAVIT,
7 I DON'T KNOW.

8 BUT I SEE THAT THE WITNESS, EXPERT WITNESS, RELIED UPON
9 THE REPORT AND THUS COUNSEL FOR THE STATE HAS -- SHOULD HAVE
10 THE OPPORTUNITY TO REVIEW THE AFFIDAVIT ITSELF. SO I'M
11 GOING TO REQUIRE YOU TO PRODUCE THE AFFIDAVIT TO THE STATE
12 FROM DR. BACHMAN. NOW YOU WERE GOING TO SPEAK FURTHER ABOUT
13 DR. ADLER.

14 MR. BLUME: WELL, JUST TO BACK THIS, AND I, YOU KNOW,
15 THE COURT'S RULING WILL BE -- BUT I JUST WANTED TO MAKE
16 CLEAR THERE'S ONE FACTUAL DISTINCTION THAT THE COURT
17 UNDERSTANDS IS THAT THIS AFFIDAVIT FROM DR. BACHMAN HAS NOT
18 BEEN DISCLOSED. NO EXPERT HAS SEEN THAT OR RELIED UPON
19 THAT.

20 THE COURT: RIGHT. THE COURT'S AWARE OF THAT. AND I'M
21 ALSO AWARE THAT YOU'RE SAYING HE'S NOT GOING TO BE A
22 WITNESS. BUT AGAIN, BECAUSE OF THE FACT THAT CLEARLY THIS
23 WENT INTO WHAT I WOULD CALL THE MIX OF THE EVIDENCE, EVEN
24 THOUGH IT'S A REPORT ON THAT AFFIDAVIT, I THINK IT IS
25 APPROPRIATE UNDER THE RULES THAT THE STATE HAVE IT. AND

1 THAT'S THE BASIS FOR MY RULING.

2 AND TELL ME ABOUT DR. ADLER'S ---

3 MR. BLUME: HIS NAME IS PROVIDED IN THE SUPPLEMENTAL
4 DISCOVERY.

5 THE COURT: ALL RIGHT. NOW COUNSEL TELLS ME THAT YOU
6 HAVE THE NAME OF DR. ADLER, MR. SALTER.

7 MR. SALTER: YOUR HONOR, I'M UNABLE TO FIND HIS NAME
8 MENTIONED ANYWHERE.

9 THE COURT: ALL RIGHT. WHAT RELIEF ARE YOU ASKING WITH
10 REGARD TO DR. ADLER?

11 MR. SALTER: WITH RESPECT TO DR. ADLER RIGHT NOW WE'D
12 LIKE TO -- WHAT THEY'VE DONE, YOUR HONOR, THEY'VE PROVIDED A
13 MAY 11, 2007 DRAFT. AND UNDER THE PORTION OF HIS REPORT IS
14 HEADED; OPINION. IT STATES AS FOLLOWS; AS NOTED ABOVE,
15 MR. BINNEY'S. THAT'S IT. AND THEN WE GO DOWN AND THERE'S
16 ANOTHER PARAGRAPH THAT HAS NOTHING TO DO WITH THE OPINION.

17 IT CONCLUDES WITH, I HAVE ATTACHED A COPY OF MY RESUME
18 FOR THE BENEFIT OF THOSE RECEIVING THE REPORT. THANKS FOR
19 PERMITTING ME, DAH, DAH, DAH, DAH, DAH. THERE IS NO
20 OPINION. THERE'S NO OPINION.

21 THE COURT: CAN YOU SHOW ME WHERE THE -- DOES ANYONE
22 HAVE A COPY OF THIS SUPPLEMENTAL DISCOVERY WHICH WOULD HAVE
23 NOTIFIED THE STATE ABOUT DR. ADLER'S EXISTENCE?

24 MS. PAAVOLA: WELL, YOUR HONOR, I DRAFTED THE
25 SUPPLEMENTAL RESPONSES. AND I DO BELIEVE I LISTED DR.

1 ADLER'S NAME. HE DID BECOME INVOLVED AT A LATER STAGE IN
2 THE PROCEEDINGS. AND SO I PUT -- I THOUGHT THAT I PUT THAT
3 IN THE SUPPLEMENTAL RESPONSES. I DON'T HAVE THEM HERE IN
4 FRONT OF ME, BUT I DO BELIEVE THEY'RE IN THAT BOX.

5 THE COURT: ALL RIGHT.

6 MS. PAAVOLA: AND SO I'D BE HAPPY TO SEARCH FOR THEM.

7 THE COURT: WE'LL GIVE YOU AN OPPORTUNITY TO LOOK FOR
8 THEM ---

9 MS. PAAVOLA: IT WAS MY INTENTION TO DISCLOSE DR.
10 ADLER'S NAME AND INFORMATION IN SUPPLEMENTAL RESPONSES WHICH
11 WERE FILED.

12 THE COURT: ALL RIGHT. WE'LL GIVE YOU AN OPPORTUNITY
13 TO LOOK FOR THAT WHILE WE MOVE ON TO OTHER MATTERS. WOULD
14 THAT SUPPLEMENTAL RESPONSE HAVE BEEN FILED WITH THE CLERK OF
15 COURT'S OFFICE OR NOT?

16 MS. PAAVOLA: NO, SIR, IT WAS A DISCOVERY RESPONSE.

17 THE COURT: VERY GOOD. LET'S PUT DR. ADLER ASIDE FOR A
18 MOMENT WHILE YOU LOOK FOR THAT. AND WE'LL COME BACK TO DR.
19 ADLER.

20 AND THEN THERE'S AN ISSUE ABOUT DR. BOOKSTEIN. DID YOU
21 RAISE AN ISSUE ABOUT HIM? I KNOW THAT MR. BLUME SPOKE ABOUT
22 HIS REPORT. WHAT'S YOUR ...

23 MR. SALTER: THIS IS ANOTHER REPORT THEY'VE HAD SINCE
24 APRIL 6TH OF THIS YEAR. AND THEN THEY DID NOT DISCLOSE IT
25 UNTIL FRIDAY -- FRIDAY OF THIS PAST WEEK.

1 THE COURT: ALL RIGHT. AND AGAIN, LOOKING AT THESE
2 THINGS ON A SURPRISE AND PREJUDICE STANDARD, IS THERE
3 SOMETHING IN THE REPORT THAT WOUNDS THE STATE OR YOU BELIEVE
4 YOU'RE NOT ABLE TO RESPOND TO BECAUSE OF THE UNTIMELINESS OF
5 IT?

6 AND, COUNSEL, I'LL TELL YOU WHY I ASK THAT QUESTION.
7 I'M AWARE THAT THERE'S HUNDREDS AND DOZENS OF DOCUMENTS OF
8 PASSING BACK AND FORTH. YOU TAKE THE POSITION THAT YOU'VE
9 BEEN, I'LL USE THE TERM I HEAR, SANDBAGGED, BUT I CAN'T BE
10 CERTAIN OF THAT. WHAT I'M REALLY LOOKING FOR IS, AND I'M
11 NOT ARGUING WITH YOU, I'M JUST SIMPLY SAYING ---

12 MR. SALTER: I UNDERSTAND.

13 THE COURT: --- I'VE COME IN TODAY AND YOU GUYS HAVE
14 BEEN AT THIS FOR MONTHS AND MONTHS. WHAT I'M REALLY LOOKING
15 FOR IS TO SEE WHETHER THERE'S SOMETHING THAT YOU BELIEVE IS
16 -- UNFAIRLY PREJUDICES YOU OR SURPRISES YOU.

17 MR. SALTER: YOUR HONOR, IF I MIGHT LET MR. MABRY
18 RESPOND TO THAT.

19 THE COURT: ALL RIGHT. MR. MABRY.

20 MR. SALTER: HE'S ACTUALLY BEEN MORE FAMILIAR WITH DR.
21 BOOKSTEIN'S REPORT.

22 MR. MABRY: JUDGE, THE WHOLE THING ABOUT DR.
23 BOOKSTEIN'S REPORT IS THEY HAD THE MRI DONE ON HIM BY --
24 IT'S INTERRELATED WITH DR. BACHMAN. BUT THEY HAD AN MRI
25 DONE ON HIM AND THEN SENT IT TO THE UNIVERSITY OF

1 WASHINGTON. AND THEN DR. BOOKSTEIN GIVES TESTIMONY ABOUT
2 WHAT THIS MRI MEANS.

3 WE KNEW NOTHING OF THIS. WE HAD NO IDEA DR. BOOKSTEIN
4 WAS GOING TO TESTIFY IN THIS CASE, WHAT HE WAS GOING --
5 WELL, WE KNEW HE WAS GOING TO TESTIFY. WE DIDN'T KNOW WHAT
6 HE WAS GOING TO TESTIFY TO. AND IT HAD TO DO WITH THIS MRI.
7 AND THEY'VE HAD IT SINCE APRIL THE 6TH.

8 WE WOULDN'T EVEN BE TALKING ABOUT THIS IF THEY HAD
9 PRODUCED IT WHEN THEY HAD IT. BUT THEY -- THEY HOLD ONTO
10 THIS UNTIL THE LAST MINUTE. AND THERE'S ONLY ONE REASON
11 THEY COULD HAVE DONE THAT, IS THEY DON'T WANT -- THEY DON'T
12 WANT US TO KNOW WHAT'S IN IT BECAUSE WE COULD THEN GO BEHIND
13 WHAT'S IN THE REPORT AND UNDERCUT WHAT HIS TESTIMONY WOULD
14 BE.

15 THE COURT: BUT DO YOU HAVE IT TODAY?

16 MR. MABRY: DO WE HAVE HIS REPORT ---

17 THE COURT: THE REPORT?

18 MR. MABRY: --- TODAY? YES, SIR.

19 THE COURT: ALL RIGHT. AND LET ME GO BACK AND ASK YOU,
20 WHAT IS IT IN THE REPORT THAT YOU BELIEVE DAMAGES YOU AND
21 STRIPS YOU OF AN OPPORTUNITY -- WHAT SPECIFIC ISSUE OR POINT
22 WITHIN THE REPORT?

23 MR. MABRY: WELL, WHERE IT CAUSES A SURPRISE AND HARM
24 IS THAT IT'S DUMPED ON US AT THE LAST HOUR WITH OTHER
25 MATERIALS THAT WE HAVE TO STOP WHAT WE'RE DOING IN PREPARING

1 FOR THE TRIAL AND READ THOSE MATERIALS. AND THEN WE HAVE TO
2 TAKE DR. BOOKSTEIN'S REPORT, AND THEN WE HAVE TO GO ON THE
3 INTERNET AND START DOING RESEARCH TO SEE WHETHER HIS
4 OPINIONS ARE EVEN VALID OR NOT.

5 AND THEN WE HAVE TO START TALKING TO OUR OWN EXPERTS,
6 WHICH WE HAVEN'T EVEN HAD AN OPPORTUNITY TO DO YET ABOUT
7 WHETHER ANY OF THIS TESTIMONY THAT HE PROPOSES TO GIVE IS
8 TRUE. AND THEY WAIT AND GIVE IT TO US ON FRIDAY SO WE DON'T
9 HAVE TIME TO DO THAT INVESTIGATION.

10 THE COURT: VERY GOOD. AND, MR. BLUME, TELL ME AGAIN
11 HOW IT CAME TO BE THAT IT WAS JUST ON FRIDAY DELIVERED.

12 MR. BLUME: OKAY. WE HAD A DRAFT REPORT FROM MR.
13 BOOKSTEIN. I DID NOT PRODUCE THAT. I DIDN'T BELIEVE -- AT
14 THAT POINT IT WAS STILL A DRAFT. I REALIZED THAT IT WAS A
15 DRAFT LAST WEEK. I ASKED MS. PAAVOLA TO GO AHEAD AND GET IT
16 -- WE NEEDED A SIGNED VERSION BECAUSE WE NEEDED TO PRODUCE
17 IT SINCE WE HAD IT. I GOT IT, AND I SENT IT TO THEM
18 IMMEDIATELY UPON IT.

19 BUT I WILL SAY OTHER THINGS ABOUT THAT. WE DIDN'T HAVE
20 -- WE COULD HAVE TOLD HIM NOT TO PRODUCE A REPORT AT ALL AND
21 JUST CALLED HIM, YOU KNOW, AT THE HEARING. BUT WE DIDN'T DO
22 THAT 'CAUSE IT'S ISSUES WE PRODUCED FOR THEM.

23 NUMBER TWO, THEY'VE HAD HIS NAME AND HIS CONTACT
24 INFORMATION. HE COULD HAVE BEEN DEPOSED. THAT'S, YOU KNOW,
25 OFTEN WHAT HAPPENS IN THESE CASES WHEN IN CIVIL CASES

1 PEOPLE'S NAMES ARE GIVEN. YOU WANT TO KNOW WHAT THEY HAVE
2 TO SAY, YOU'VE GOT HIS CONTACT INFORMATION, YOU DEPOSE HIM
3 OR CONTACT HIM. NONE OF THAT WAS DONE. BUT IN ADDITION,
4 EVEN WITH ALL THAT, HE'S ONE OF THE WITNESSES WHO WAS GOING
5 TO TESTIFY AT A SUBSEQUENT DATE BY DEPOSITION.

6 AND SO EVEN IF THERE WAS SOME ISSUE ABOUT WHETHER WE
7 COMPLIED OR NOT, AND I BELIEVE WE FULLY COMPLIED WITH
8 EVERYTHING WE WERE REQUIRED TO DO, THERE COULDN'T BE -- HIS
9 TESTIMONY IS NOT GOING TO BE TAKEN AT THIS HEARING ANYWAY.

10 THE COURT: ALL RIGHT. MR. SALTER AND MR. MABRY, I'M
11 GOING TO DENY YOUR RELIEF ON THIS. FOR ONE THING, THERE IS
12 GOING TO BE SOME ADDITIONAL TIME TO RESEARCH THIS MATTER AND
13 RESPOND TO IT BECAUSE THE WITNESS WILL BE -- TESTIMONY WILL
14 BE TAKEN LATER.

15 IF, AGAIN, AT THE CONCLUSION OF THIS HEARING YOU
16 BELIEVE THAT THERE IS SOMETHING THAT HAS ARISEN FOR PURPOSES
17 OF THIS TESTIMONIAL SESSION THAT YOU WERE UNFAIRLY SURPRISED
18 BY -- THEN I'LL HEAR FROM YOU AT THE END. I WOULD ASK YOU
19 TO RAISE THAT AT THAT TIME. BUT AT THIS POINT I'M GOING TO
20 DENY YOUR MOTION TO PREVENT DR. BOOKSTEIN'S REPORT OR ANY
21 MENTION OF IT COMING IN IN EVIDENCE.

22 MR. SALTER: THANK YOU, YOUR HONOR.

23 THE COURT: ALL RIGHT. ANYTHING FURTHER?

24 MR. MABRY: YES, YOUR HONOR. I'LL RESPOND ON THE -- WE
25 HAVE A MOTION TO EXCLUDE AN AFFIDAVIT IN THIS CASE.

1 THE COURT: OKAY.

2 MR. MABRY: THAT DEALS WITH JUROR VIQUEZ.

3 THE COURT: ALL RIGHT.

4 MR. MABRY: WE WERE SERVED, I BELIEVE, APPROXIMATELY
5 TWO TO THREE WEEKS AGO WITH AN AFFIDAVIT FROM JUROR VIQUEZ.
6 HE ALLEGES CERTAIN ALLEGED MISCONDUCT. AND AT FIRST I WOULD
7 POINT OUT TO THE COURT THAT HIS PURPORTED AFFIDAVIT WAS NOT
8 WITNESSED BY ANYONE NOR WAS IT NOTARIZED. BUT WE WERE
9 SERVED WITH IT AND WE WERE TOLD HE WAS LEAVING THE COUNTRY
10 SHORTLY, IF WE WANTED TO DEPOSE HIM WE WOULD HAVE TO GO
11 AHEAD AND DO IT FAIRLY QUICKLY, WHICH WE DID.

12 THE COURT: AND HOW DO YOU SPELL HIS NAME, COUNSEL?

13 MR. MABRY: I'M SORRY, YOUR HONOR. IT'S HENRY VIQUEZ,
14 V-I-Q-U-E-Z.

15 THE COURT: AND DO YOU HAVE ANY KNOWLEDGE OF WHAT --
16 HIS PRESENT WHEREABOUTS TODAY?

17 MR. MABRY: MEXICO CITY.

18 THE COURT: ARE YOU CERTAIN OF THAT?

19 MR. MABRY: THAT'S WHAT HE TESTIFIED TO, YOUR HONOR.

20 THE COURT: ALL RIGHT. OKAY. GO AHEAD.

21 MR. MABRY: HE -- MR. VIQUEZ HAS DUAL CITIZENSHIP FROM
22 COSTA RICA, BUT HE WAS HERE. AND HE'S AN AMERICAN CITIZEN
23 AS WELL. HE SERVED ON THIS JURY AND THEN PROVIDED THIS
24 AFFIDAVIT TO COUNSEL FOR MR. BINNEY AND THEN LEFT THE
25 COUNTRY SHORTLY AFTER WE TOOK HIS DEPOSITION.

1 THE COURT: OKAY.

2 MR. MABRY: IN THE AFFIDAVIT, YOUR HONOR, HE ALLEGES
3 CERTAIN THINGS ABOUT WHAT OCCURRED IN THE GUILT PHASE AND
4 ALSO WHAT OCCURRED IN THE PENALTY PHASE IN DELIBERATIONS.
5 ALL OF THE THINGS THAT HE ALLEGES THAT OCCURRED ARE WHAT OUR
6 SUPREME COURT AND COURT OF APPEALS HAVE TERMED INTERNAL
7 MISCONDUCT OF THE JURY, NOTHING EXTERNAL, NO COMMUNICATION
8 FROM A BAILIFF OR A FAMILY MEMBER OR SOME KIND OF EXTRANEOUS
9 INFLUENCE COMING INTO THE JURY. IT'S ALL INTERNAL. AND FOR
10 THAT REASON WE'D MOVE TO STRIKE THE AFFIDAVIT. IT SHOULD
11 NOT EVEN BE CONSIDERED BY THE COURT.

12 THERE'S ONLY ONE EXCEPTION THAT OUR COURT HAS CARVED
13 OUT TO ALLOW JUROR TESTIMONY. AND THAT WAS STATE VERSUS
14 HUNTER, A CASE THAT WAS TRIED IN SPARTANBURG COUNTY. I
15 ACTUALLY TRIED THE CASE MYSELF IN WHICH A JUROR ALLEGED
16 THERE WAS SOME RACIAL MISCONDUCT INSIDE THE JURY.

17 JUROR VIQUEZ TALKS IN HIS AFFIDAVIT ABOUT THE FACT THAT
18 THE JURORS CALLED HIM NAMES AND HE FELT LIKE HE WAS SINGLED
19 OUT BECAUSE HE WAS LATIN AMERICAN. HOWEVER, HE DOES NOT IN
20 HIS AFFIDAVIT SAY THAT ANY JUROR CALLED HIM A RACIAL SLUR OR
21 ANY KIND OF RACIAL NAME. HE SIMPLY SAYS THAT ONE OF THE
22 JURORS SAID SOMETHING LIKE, WHY DON'T YOU GO BACK TO YOUR
23 OWN COUNTRY? WELL, THAT COULD BE APPLICABLE TO ANYONE WITH
24 DUAL CITIZENSHIP, ANYONE WHO HAS BEEN A FORMER CITIZEN OF
25 ANOTHER COUNTRY, SAY, GREAT BRITAIN, OR CANADA, OR

1 AUSTRALIA, OR ANY SOUTH AMERICAN COUNTRY OR ANY EUROPEAN
2 COUNTRY.

3 IN FACT, WHEN WE TOOK HIS DEPOSITION I ASKED HIM, WELL,
4 TELL ME WHAT NAMES THEY CALLED YOU. HE SAID, I DO NOT
5 REMEMBER WHAT NAMES THEY CALLED ME. AND HE COULD NOT GIVE
6 US A NAME THAT THEY CALLED HIM.

7 BUT FURTHERMORE, IF THE COURT DOES DECIDE TO CONSIDER
8 THE AFFIDAVIT, WE SUBMIT THAT THE CASES DO NOT ALLOW THE
9 COURT TO CONSIDER THIS BECAUSE THERE IS NO RACIAL -- USE OF
10 A RACIAL TERM OR RACIAL MISCONDUCT, THEREFORE, THE COURT
11 CAN'T CONSIDER THE AFFIDAVIT. BUT EVEN IF THE COURT DOES,
12 THE COURT CAN CONSIDER THE DEPOSITION TESTIMONY OF MR.
13 VIQUEZ, WHICH WE'LL BE GLAD TO SUPPLY TO THE COURT.

14 AND I WILL PUT ON THE RECORD THAT WHEN WE TOOK HIS
15 DEPOSITION I READ HIM THE STATUTE REGARDING DEATH PENALTY
16 JURORS AND WHAT -- THAT THEY DO NOT HAVE TO TALK TO US, DO
17 NOT HAVE TO TALK ABOUT THE VERDICT. HE FREELY AGREED TO
18 TALK ABOUT THE VERDICT AND THE DELIBERATIONS. BUT WHAT HE
19 TESTIFIED TO IN HIS DEPOSITION WAS THAT ULTIMATELY HE MADE
20 UP HIS MIND TO VOTE FOR THE DEATH PENALTY NOT BECAUSE OF
21 ANYTHING THAT ANY OTHER JUROR SAID, BUT HE DECIDED BECAUSE
22 HE FELT ONE HUNDRED PERCENT THAT THAT WAS THE RIGHT THING TO
23 DO.

24 SO IF YOU LOOK AT THE -- IF YOU LOOK AT HIS DEPOSITION
25 TESTIMONY IN TOTO, FROM BEGINNING TO END, YOU WILL SEE THAT

1 ANY ALLEGATION HE MADE ABOUT ANY, QUOTE, MISCONDUCT, IS NOT
2 WHAT CAUSED HIM TO VOTE FOR THE DEATH PENALTY IN THIS CASE.

3 THE COURT: AND ---

4 MR. MABRY: I'M SORRY, VERY BRIEFLY, IF I CAN JUST ONE

5 ---

6 THE COURT: AND WHILE YOU'RE TALKING WOULD YOU KINDLY
7 HAND UP THE AFFIDAVIT SO I CAN JUST LOOK AT THE FORM OF THAT
8 AFFIDAVIT, ---

9 MR. MABRY: YES, SIR.

10 THE COURT: --- NOT THE MERIT, BUT THE FORM OF IT.

11 MR. MABRY: YES, SIR.

12 THE COURT: ALL RIGHT. GO AHEAD, MR. MABRY. YES, SIR,
13 I'M LISTENING.

14 MR. MABRY: YES, YOUR HONOR. I'M SORRY. AND FINALLY,
15 YOUR HONOR, HE TESTIFIED IN HIS DEPOSITION THAT THERE WERE
16 FOUR PARAGRAPHS IN THAT AFFIDAVIT THAT WERE NOT CORRECT.
17 YOU WILL -- IF YOU DECIDE TO LOOK AT HIS DEPOSITION YOU WILL
18 SEE THAT HE SAYS THAT ALL OF THE -- EVERYTHING IN THAT
19 AFFIDAVIT ABOUT THE GUILT PHASE AND THE DELIBERATIONS IS
20 JUST NOT TRUE. HE WAS NOT THE LAST JUROR TO HOLD OUT IN THE
21 GUILT PHASE. AND THEY ALL AGREED, THEY ALL AGREED BECAUSE
22 IT WAS THE RIGHT THING TO DO AND HE STILL AGREES WITH THE
23 FINDING OF GUILT ON BURGLARY AND MURDER IN THIS CASE.

24 AND HE ALSO SAYS THAT IN PARAGRAPH FOUR, I MEAN, I'M
25 SORRY, NOT PARAGRAPH FOUR, BUT I BELIEVE THE FIRST PARAGRAPH

1 ABOUT THE PENALTY PHASE DELIBERATIONS HE SAYS THAT THAT IS
2 NOT CORRECT AND IT WAS NOT ELEVEN TO ONE IMMEDIATELY. IN
3 FACT, THERE WAS SOME DIVISION ABOUT THE DEATH PENALTY AND IT
4 TOOK OVER THE COURSE OF TWO DAYS UNTIL IT GOT TO THE POINT
5 WHERE IT WAS ELEVEN FOR DEATH AND HE WAS THE LAST JUROR. SO
6 THAT PART OF THE AFFIDAVIT IS NOT CORRECT.

7 THE COURT: ALL RIGHT. THE COURT HAS NOT LOOKED AT ANY
8 OF THE SPECIFIC PARAGRAPHS IN THE AFFIDAVIT. I MERELY
9 LOOKED AT THE SIGNATURE BLOCK AND TO SEE THAT IT WAS --
10 WHETHER IT WAS NOTARIZED. IT IS NOT NOTARIZED. MR. BLUME,
11 DO YOU HAVE A RESPONSE?

12 MR. BLUME: SURE. AGAIN, IN SOME WAYS WE'RE BEING
13 CRITICIZED FOR PROVIDING TOO MUCH INFORMATION. MR. VIQUEZ,
14 AFTER HIS JURY SERVICE IN THIS CASE, HE MOVED TO COSTA RICA,
15 WHICH IS WHERE HE IS FROM. WE HAD -- WE'VE TRIED TO CONTACT
16 HIM, EVEN INTERVIEWED HIM BEFOREHAND. AND HE PROVIDED
17 ROUGHLY THE INFORMATION THAT WAS IN THE AFFIDAVIT.

18 SO WE HAD BEEN RESEARCHING HOW WE WERE GOING TO GET THE
19 TESTIMONY OF A WITNESS WHO WAS IN COSTA RICA. AND THE
20 CONTACT -- IN THE COURSE OF THAT WE CONTACTED AND FOUND OUT
21 HE WAS GOING TO BE IN THE UNITED STATES AND IN CHEROKEE
22 COUNTY FOR A PERIOD OF TIME SELLING THE HOUSE AND HOME THAT
23 HE OWNED HERE.

24 SO WE ASKED IF WE COULD MEET WITH HIM WHEN HE WAS HERE
25 BECAUSE HE WAS ONLY GOING TO BE HERE FOR A FEW WEEKS. HE

1 SAID, YES, AND WENT AND MET WITH HIM, CONFIRMED THE
2 INFORMATION THAT WE THOUGHT TO BE ACCURATE, DRAFTED AN
3 AFFIDAVIT FROM HIM ASSUMING HE WAS NOT GOING TO BE HERE AT
4 THE TIME OF THE HEARING, WENT AND GOT HIM TO SIGN THE
5 AFFIDAVIT, FOUND OUT HOW LONG HE WAS GOING TO BE IN THE
6 COUNTRY, GOT HIS CONTACT INFORMATION.

7 I SENT THE AFFIDAVIT TO MR. SALTER AND SAID, LOOK, THIS
8 IS THIS PERSON'S AFFIDAVIT. HE'S NOT GOING TO BE PRESENT AT
9 THE TIME OF THE HEARING. THIS IS WHAT WE INTEND TO
10 INTRODUCE. AFFIDAVITS ARE ROUTINELY INTRODUCED IN POST
11 CONVICTION CASES, IN CAPITAL POST CONVICTION CASES. BUT,
12 YOU KNOW, I THINK SINCE HE'S GOING TO BE OUT OF THE COUNTRY
13 YOU OUGHT TO HAVE AN OPPORTUNITY TO DEPOSE HIM IF YOU WANT.
14 AND SO THEY TOOK ADVANTAGE OF THAT OPPORTUNITY, AND THEY
15 DEPOSED HIM BECAUSE HE'S -- BASICALLY HE'S NO LONGER, YOU
16 KNOW, IN THE COUNTRY.

17 AND CERTAINLY WE DON'T HAVE ANY OBJECTION TO THE
18 DEPOSITION BEING CONSIDERED. WE WOULD MOVE TO INTRODUCE IT
19 OURSELVES AS PART OF THE TOTALITY OF THE CIRCUMSTANCES. IN
20 THE DEPOSITION HE DOES CORRECT TWO PARAGRAPHS, PARTS SIX AND
21 SEVEN. BUT THAT WAS WHY WE SHOULD DEPOSE HIM, YOU KNOW, TO
22 GO OVER THIS TO MAKE SURE THAT YOU'VE BEEN ABLE TO TEST
23 THIS.

24 SO, I MEAN, THERE WAS CERTAINLY NOTHING IMPROPER ABOUT
25 THE WAY THE AFFIDAVIT WAS TAKEN. WE PROVIDED IT TO THEM.

1 WE GAVE THEM THE OPPORTUNITY TO QUESTION HIM UNDER OATH.

2 AND THEY WERE GIVEN THAT OPPORTUNITY.

3 THERE'S NO REQUIREMENT THAT AFFIDAVITS BE NOTARIZED IN
4 SOUTH CAROLINA. IT'S JUST THAT THEY BE DONE UNDER PENALTY
5 OF PERJURY, WHICH IS HOW IT WAS DONE.

6 BUT THE OTHER ISSUES ABOUT WHAT'S ADMISSIBLE, THAT
7 REALLY GOES TO SORT OF THE SUBSTANCE OF THE ALLEGATIONS, NOT
8 THE ADMISSIBILITY. AND THAT'S THE EVIDENTIARY ISSUE UNDER
9 RULE 606 IN THE SUBSEQUENT DECISIONS.

10 SO, I MEAN, THAT REALLY -- I DON'T KNOW WHETHER WE WANT
11 TO DEBATE OR ADDRESS THAT NOW, BUT I WILL SAY THE RACE AND
12 NATIONAL ORIGIN, IT CLEARLY IS -- ARE BOTH SUSPECT CLASSES
13 UNDER THE SUPREME COURT DECISIONS. AND HE DOES RECOUNT
14 BEING CALLED NAMES, BEING PRESSURED AND BEING MOVED, PUSHED
15 ON THIS BECAUSE HE WAS NOT A UNITED STATES CITIZEN, THINGS
16 LIKE, GO BACK TO YOUR OWN COUNTRY AND CALLED HIM NAMES.

17 AND THEN IN ADDITION TO THAT HE RELATES THAT HE WAS
18 PERSUADED TO VOTE FOR DEATH BECAUSE HE WAS TOLD BY ANOTHER
19 JUROR THAT IF HE DIDN'T VOTE FOR DEATH AND IF THE JURY
20 DIDN'T AGREE UNANIMOUSLY THAT MR. BINNEY WOULD GET AN ENTIRE
21 NEW TRIAL AS OPPOSED TO, YOU KNOW, THE JURY -- AND SO HE
22 VOTED FOR DEATH. AND AS HE EMPHASIZED IN HIS DEPOSITION, HE
23 CAN'T SAY EXACTLY WHY NOT, BUT CERTAINLY THE IMPACT -- THERE
24 WAS AN IMPACT ON HIM, THAT HE THOUGHT THAT MR. BINNEY WOULD
25 GET AN ENTIRE NEW TRIAL IF THE JURY COULDN'T AGREE. AND

1 THAT'S THE SUBSTANCE OF IT.

2 BUT THAT SEEMS TO BE -- THAT'S, YOU KNOW, AN ISSUE
3 WHICH CAN BE PARAGED OUT BY THE COURT AFTER BRIEFING, YOU
4 KNOW, IN ARGUMENT ABOUT 606 AND ITS APPLICATION. BUT AS FAR
5 AS THE ADMISSIBILITY OF THE AFFIDAVIT AND THE DEPOSITION
6 ITSELF, I THINK THEY'RE CLEARLY ADMISSIBLE. AND WE'VE
7 PROVIDED IT GIVING THE OPPORTUNITY TO CROSS EXAMINE AND
8 QUESTION MR. VIQUEZ.

9 THE COURT: ALL RIGHT. IN REPLY, MR. MABRY?

10 MR. MABRY: WELL, YES, SIR, YOUR HONOR. FIRST OF ALL,
11 IT'S DISINGENUOUS OF MR. BLUME TO SAY THE REASON WE TOOK
12 THIS DEPOSITION WAS TO FLESH ALL THIS OUT. HE WASN'T GOING
13 TO TAKE ANY DEPOSITION. HE WAS GOING TO SUBMIT THIS
14 AFFIDAVIT. AFTER WE TOOK HIS DEPOSITION THE JUROR ADMITTED
15 THERE'S FOUR PARAGRAPHS IN THE AFFIDAVIT THAT ARE NOT
16 CORRECT, THREE ABOUT THE GUILT PHASE DELIBERATIONS AND ONE
17 ABOUT THE PENALTY PHASE.

18 AND FINALLY, AS I SAID TO THE COURT, IF THE COURT DOES
19 -- FIRST OF ALL, LOOKING AT THE FACE OF THE AFFIDAVIT THERE
20 ARE NO ALLEGATIONS OF RACIAL MISCONDUCT. HE SIMPLY SAYS HE
21 WAS CALLED SOME NAMES AND SAID, WHY DON'T YOU GO BACK TO
22 YOUR OWN COUNTRY IF YOU'RE NOT GOING TO VOTE FOR THE DEATH
23 PENALTY.

24 AND THERE ARE CASES IN SOUTH CAROLINA UNDER 606(B)
25 WHERE THE COURT SAYS THAT ALONE IS SOMETHING THAT COULD BE

1 -- COULD BE NEUTRAL AND NOT BE A RACIAL REFERENCE. AND IT
2 COULD BE IN THIS CASE. HE COULD HAVE BEEN FROM ANY COUNTRY
3 IN THE WORLD AND THE JUROR SAID THAT.

4 THEN ON THE FACE OF IT THE AFFIDAVIT DOES NOT HAVE TO
5 BE CONSIDERED. BUT EVEN IF THE COURT DOES CONSIDER THAT,
6 EVEN IF THE COURT DOES CONSIDER THAT, JUROR VIQUEZ'S
7 DEPOSITION TESTIMONY IS CLEAR THAT THAT IS NOT WHY HE VOTED
8 FOR THE DEATH PENALTY.

9 AND THE FACT THAT, AS MR. BLUME WAS DISCUSSING WITH THE
10 COURT, THE FACT THAT ANOTHER JUROR TOLD HIM THAT IF THIS --
11 IF WE DON'T REACH A VERDICT IN THE PENALTY PHASE WE HAVE TO
12 RETRY THE WHOLE CASE, OUR CASE LAW IS CLEAR FROM THE COURT
13 OF APPEALS AND THE SUPREME COURT, THAT WOULD BE INTERNAL
14 MISCONDUCT OF ANOTHER JUROR. AND YOU CANNOT USE ONE JUROR'S
15 TESTIMONY TO OVERTURN A VERDICT WHERE THE ONLY -- WHERE THE
16 ISSUE IS SOLELY INTERNAL MISCONDUCT.

17 THE COURT: AND, COUNSEL, WHAT'S YOUR RESPONSE TO MR.
18 BLUME'S POSITION THAT AN AFFIDAVIT THAT IS NOT NOTARIZED,
19 JUST GIVEN UNDER PENALTY OF PERJURY, IS APPROPRIATE EVIDENCE
20 IN THESE PROCEEDINGS?

21 MR. MABRY: WELL, MY POSITION IS THAT IS NOT
22 APPROPRIATE, YOUR HONOR.

23 THE COURT: ALL RIGHT. JUST A MOMENT THEN, LADIES AND
24 GENTLEMEN.

25 (PAUSE)

1 THE COURT: ALL RIGHT. FIRST OF ALL, WITH REGARD TO
2 THE AFFIDAVIT, AGAIN, I'VE REVIEWED THE FORM. THIS
3 AFFIDAVIT IS NOT APPROPRIATE EVIDENCE IN A TRIAL OF THIS
4 NATURE. FIRST OF ALL, ALTHOUGH SIGNED, IT IS NOT NOTARIZED.
5 IT DOES NOT SAY IT'S UNDER PENALTY OF PERJURY. IT SIMPLY
6 SAYS THAT, THE FIRST LINE IS HENRY VIQUEZ, BEING FIRST DULY
7 SWORN UPON HIS OATH NOW DEPOSES AND SAYS, BUT THERE'S NO
8 EVIDENCE OTHER THAN -- OF BEING SWORN UNDER OATH BECAUSE
9 THERE'S NOT A NOTARY BLOCK.

10 SO THAT -- THIS WOULD NOT BE SOMETHING THAT THE STATE
11 OR EITHER PARTY COULD CROSS EXAMINE OR FURTHER EXAMINE OR
12 REALLY INVESTIGATE. AND I JUST SIMPLY DO NOT FIND THAT THAT
13 IS COMPETENT EVIDENCE. AND THE COURT WOULD NOT ALLOW IT.
14 NOW WE'LL MARK THIS AS A COURT'S EXHIBIT SO THAT THERE WILL
15 BE REVIEW. NOW THAT LEADS US TO THE QUESTION OF THE
16 DEPOSITION. IF THE AFFIDAVIT'S NOT IN WHAT'S YOUR POSITION
17 -- DO YOU OPPOSE THE DEPOSITION BEING IN EVIDENCE ALSO, ---

18 MR. MABRY: YES, SIR, YOUR HONOR.

19 THE COURT: --- MR. MABRY?

20 MR. MABRY: I DON'T THINK IT'S PROPER TO CONSIDER, BUT
21 IT SHOULD -- I THINK IT SHOULD BE MARKED AS AN EXHIBIT TO GO
22 WITH THE AFFIDAVIT AS YOU RULED.

23 THE COURT: ALL RIGHT. MR. BLUME, I WOULD ASK YOU OR
24 YOUR CO-COUNSEL TO RESPOND TO THE INTERNAL VERSUS EXTERNAL
25 MISCONDUCT AND ANY OTHER RESPONSE YOU MAY HAVE AS TO WHAT

1 WOULD MAKE THAT DEPOSITION APPROPRIATE EVIDENCE IN THIS
2 PROCEEDING.

3 MR. BLUME: OKAY. WELL, FIRST, I WOULD -- I DO WANT TO
4 RESPOND BRIEFLY TO YOUR FIRST POINT. THE PCR STATUTE SAYS
5 SWORN AFFIDAVITS CAN BE ADMITTED. THIS AFFIDAVIT SAYS BRING
6 DULY SWORN ON HIS OATH. THE CASE LAW DRAWS A DISTINCTION
7 BETWEEN NOTARIZED AND SWORN IN THIS STATE. SO I THINK THE
8 AFFIDAVIT IS COMPETENT. ALSO ----

9 THE COURT: DO YOU HAVE A -- DO YOU HAVE A CASE THAT
10 STANDS FOR THAT PRECEDENT? I AM NOT AWARE OF THAT. MY
11 UNDERSTANDING HAS ALWAYS BEEN THAT IF IT'S SWORN EVEN IF THE
12 WORDS SAY DULY SWORN THAT IT'S SWORN BEFORE AN OFFICER WHO'S
13 AUTHORIZED TO TAKE THAT OATH, AND THAT WOULD BE A NOTARY,
14 WHO WOULD SO NOTE ON THE DOCUMENT ITSELF.

15 MR. BLUME: THE CASES WHICH WE'VE RELIED UPON IN THIS
16 DRAW THE DISTINCTION BETWEEN NOTARIZED AND SWORN IS BAUGHMAN
17 VERSUS AT&T, WHICH IS 410 SE 2ND 537, RECOGNIZING THE STAKES
18 BETWEEN A NOTARIZED STATEMENT AND A SWORN STATEMENT. AND SO
19 -- BUT IN ADDITION TO THAT IN HIS DEPOSITION WHERE HE WAS
20 UNDER OATH HE SAID, YES, THAT'S MY AFFIDAVIT, YOU KNOW, IT
21 WAS INTRODUCED, HE SAID, THAT'S IT, THOSE ARE MY WORDS, I
22 SIGNED THAT AFFIDAVIT.

23 THE COURT: BUT DID HE NOT ALSO REPUDIATE PART OF THIS
24 SWORN OATH IN THE DEPOSITION?

25 MR. BLUME: HE DID SAY THAT SOME OF THE PARAGRAPHS

1 WEREN'T RIGHT. BUT, I MEAN, HE SAID THAT THIS IS MY
2 AFFIDAVIT, I SIGNED IT, I UNDERSTOOD WHAT THE DEAL WAS WHEN
3 I DID IT. SO I THINK IT'S ADMISSIBLE ON THAT BASIS. I
4 THINK -- I'M NOT TAKING THE POSITION THAT THE AFFIDAVIT --
5 THAT'S THE ONLY THING THAT'S ADMISSIBLE AND THE DEPOSITION
6 ISN'T. I THINK THE DEPOSITION IS ADMISSIBLE TOO.

7 THE COURT: ALL RIGHT.

8 MR. BLUME: YOU KNOW, IT SHOULD BE. ON THE TWO ISSUES,
9 I WOULD NOTE AGAIN, THAT THE SUPREME COURT DOESN'T DRAW A
10 DISTINCTION BETWEEN NATIONAL ORIGIN AND RACE. IT IS -- AND
11 THIS IS, I THINK, CLEARLY THE ONLY FAIR READING AS HE'S
12 TALKING ABOUT PRESSURE DUE TO HIS NATIONAL ORIGIN, HIS NON-
13 AMERICAN STATUS.

14 AND I DO THINK ON THE OTHER ISSUE, YES, IT WAS
15 INFORMATION THAT CAME FROM ANOTHER JUROR, BUT IT WAS -- I
16 BELIEVE IT WAS IN THIS CASE BETWEEN INTERNAL AND EXTERNAL
17 INFLUENCE IS VERY THIN GIVEN THE FACT THAT HE WAS
18 SPECIFICALLY GIVEN ERRONEOUS INFORMATION ABOUT THE
19 CONSEQUENCES OF THE JURY'S FAILURE TO AGREE.

20 THE COURT: ALL RIGHT.

21 MR. BLUME: AND I THINK THAT'S A MATTER WHICH REALLY
22 SHOULD BE -- IT'S NOT NECESSARILY THAT SHOULD GO TO
23 ADMISSIBILITY, BUT IT'S AN ISSUE WHICH REALLY CAN BE BRIEFED
24 OUT IN THE SUBSEQUENT STAGES OF THIS.

25 THE COURT: ALL RIGHT. COUNSEL, I AM -- WE WILL MARK