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**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

Feb 14 2023
S.C. SUPREME COURT

Certiorari to the Berkeley County Court of Common Pleas

**Jennifer B. McCoy
Circuit Court Judge**

**Berkeley County Case No. 2018-CP-08-02576
Supreme Court Case No. 2023-000213**

Gary Fraley #364802..... Applicant/Petitioner,

v.

The State of South Carolina.....Respondent.

**APPENDIX
(VOLUME III)
(PCR COURT RECORD)
(989-1419)**

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

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LEAH GUERRY
CLERK OF COURT
BERKELEY COUNTY, SC

Gary Fraley #364802,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2018-CP-08-02576

ORDER DENYING APPLICANTS
MOTION TO ALTER OR AMEND

Applicant Gary Fraley filed a Motion to Alter or Amend on October 24,
2022. Upon careful consideration, this Court hereby DENIES Applicant's Motion.

IT IS SO ORDERED!


The Honorable Jennifer B. McCoy

January 12, 2023
Charleston, South Carolina

CERTIFIED TRUE COPIES OF RECORD IN THIS COUNTY

DATE

17 JAN 2023

CLERK OF COURT

C.P. & G.S.

BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Gary Fraley, SCDC #364802,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-02576

ORDER OF DISMISSAL

FILED
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CLERK OF COURT
BERKELEY COUNTY, SC

Handwritten signature and initials.

This matter comes before this Court by way of post-conviction relief action commenced by Applicant Gary Fraley on December 28, 2018. An evidentiary hearing into the matter convened before the undersigned on December 6, 2021, at the Berkeley County Courthouse. Applicant was present and represented by Jason S. Luck and James K. Falk, Esquires. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing, as did Applicant's ex-wife, Julie Fraley and Applicant's daughter, Alta Fraley. Applicant's trial counsel, Melisa W. Gay, and Assistant Solicitor Anne M. Williams also testified.

This Court had before it a copy of the Berkeley County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; the records from Applicant's direct appeal, including the trial transcript; and the pleadings and records in this post-conviction relief action. After hearing the testimony and evidence presented at the post-conviction relief hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of trial counsel are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

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CC: JASON LUCK; AG

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. On August 5, 2014, law enforcement officers with the Goose Creek Police Department arrested Applicant following a criminal rampage that included the oral, vaginal, and anal rape of an eleven-year-old girl and an armed standoff with law enforcement at Royal Lanes bowling alley. During its October, November, and December 2014 terms, the Berkeley County Grand Jury indicted Applicant for attempted murder; two counts of possession of a weapon during the commission of a violent crime; unlawful conduct toward a child; third-degree criminal sexual conduct with a minor; three counts of second-degree criminal sexual conduct with a minor; and two counts of kidnapping. On July 13, 2015, Applicant proceeded to a jury trial before the Honorable Kristi Lea Harrington. On July 17, 2015, the jury convicted Applicant as indicted. The trial court sentenced Applicant to: thirty years' imprisonment for attempted murder; five years' imprisonment for each count of possession of a weapon during the commission of a violent crime; ten years' imprisonment for unlawful conduct toward a child; fifteen years' imprisonment for third-degree criminal sexual conduct with a minor; twenty years' imprisonment for one count of second-degree criminal sexual conduct with a minor; thirty years' imprisonment for two counts of second-degree criminal sexual conduct with a minor; and thirty years' imprisonment for the kidnapping charge related to victim Tsafos with a finding that the offense was not sexual in nature, to be served consecutive to all other sentences; and thirty years' imprisonment for the kidnapping of Victim to run consecutively to all other sentences.

On July 23, 2015, the trial court reconvened to clarify its sentences and amend various scrivener's errors on the sentencing sheets. The trial court clarified its aggregate sentence was

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ninety years' imprisonment, with the controlling sentence being thirty years' imprisonment for the kidnapping of Victim, followed by a consecutive sentence of thirty years' imprisonment for the attempted murder of Tsafos, followed by a consecutive sentence of thirty years' imprisonment for the kidnapping of Tsafos. The trial court further clarified all other sentences were to be served concurrently to the sentence of thirty years' imprisonment for the kidnapping of Tsafos.

Subsequently, Applicant filed a timely notice of appeal. John Harrison Strom, Esquire, of the Office of Appellate Defense perfected the appeal. In Applicant's appeal, he raised the following issues:

- I. The trial court reversibly erred by refusing to instruct the jury on the verdict form of not guilty by reason of insanity where (A) the court erroneously believed that the defense must prove to the court by a preponderance of the evidence that [Applicant] was legally insane before the defense was entitled to a jury instruction on the affirmative defense and (B) where there was evidence that [Applicant] was legally insane at the time of the offenses were committed, entitling him to the not guilty by reason of insanity verdict form and
- II. The trial court reversibly erred by refusing to instruct the jury on the three lesser-included offenses of attempted murder, where the court wrongly concluded that there was no evidence that [Applicant] had committed any of the lesser included offenses where [Applicant] had testified that he had intended to commit suicide and where the victim had testified that the gun appeared to have simply "went off" while [Applicant] was pointing it at the floor.

The South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion on July 26, 2017. State v. Fraley, Op. No. 2017-UP-305 (S.C. Ct. App. filed July 26, 2017). The remittitur was returned to the circuit court on August 11, 2017.

On December 28, 2018, Applicant, through counsel, filed an application for post-conviction relief. Through its return, filed on April 23, 2019, the State moved to summarily dismiss the application as it was filed after the statute of limitations had expired. A hearing on the State's motion to dismiss was convened before the Honorable Judge Perry H. Gravely on December 11,

2020, via Webex. Judge Gravely denied the State's motion to dismiss and ordered an evidentiary hearing be set in this matter. This hearing followed.

II. Facts Adduced at Trial

On the afternoon of August 5, 2014, Applicant went to his neighbor's house to see if the neighbor's fourteen-year-old daughter could come to a surprise party for his daughter at the local bowling alley. (R. 188). The neighbor's fourteen-year-old daughter Applicant desired was not home, but her brother told Applicant his eleven-year-old sister ("Victim") was home and could possibly attend the party. (R. 189). Victim's brother went to ask his mother's permission for Victim to attend the party and she came to talk with Applicant. (R. 189, 193). Victim's mother had known Applicant for over three years and interacted with him frequently around the neighborhood and at the bus stop, as both had daughters around the same age. (R. 192). Applicant and Victim's mother discussed the party and Applicant showed Victim's mother fossil modeling kits he had for the children to play with at the party. (R. 193-94). Victim's mother called her ex-husband, who was scheduled for visitation with Victim and her siblings that evening, to see if he would permit Victim to attend the birthday party. (R. 193-94). Victim's father gave his permission for Victim to attend the party and agreed to pick up Victim from Applicant's home after the party at 5:30 p.m. (R. 194). Victim left with Applicant in Applicant's vehicle. (R. 194, R. 206).

After leaving Victim's house, Applicant drove to a nearby Publix grocery store. (R. 206). Applicant left Victim waiting in his parked car and went inside the store. (R. 206). Once inside, Applicant quickly went through the store, picking up a bottle of cherry flavored NyQuil cold medicine, a bottle of Johnson & Johnson baby oil, and a six-pack of Natural Light Beer. (R. 469-72, 477-80). Applicant purchased these items and return to the car. (R. 206, 471-72).

Applicant then drove Victim to the EconoLodge motel on North Goose Creek Boulevard. (R. 206, 473). Applicant, who had been checked into Room 125 of the motel since August 3, 2014, told Victim he was staying at the motel rather than his house because his house was without power. (R. 206, 474). Applicant used his key to access his room and went inside with Victim. (R. 206-07). Once inside, Applicant threatened Victim with a handgun and told her not to "test" him. (R. 213-14). Applicant demanded Victim's iPod and attempted to remove the battery with a pocketknife. (R. 207). Applicant then commanded Victim take a shower, claiming she needed to remove all bacteria before she touched any fossils at the party. (R. 207-08). While Victim showered, Applicant brought Victim a white plastic cup filled with NyQuil and instructed her to drink it so she would not catch a cold from the other children at the party. (R. 208). Victim drank the NyQuil as instructed. (R. 208). Applicant then brought Victim an alcoholic beverage and demanded she drink it. (R. 208). Victim took a sip of the beverage but poured the remaining beverage down the shower drain once Applicant left the bathroom. (R. 208). Victim finished showering and, per Applicant's instructions, did not put her clothing back on but instead came into the room wearing only her towel and underwear. (R. 209).

Applicant was waiting for Victim on the bed and directed her to sit on his lap. (R. 209). Applicant told Victim his wife was cheating on him and he was going to rape Victim to get back at his wife. (R. 209-10). Applicant then removed Victim's underwear and rubbed something on her vagina. (R. 210). He thrust his penis into Victim's mouth and forced her to perform fellatio on him. (R. 211). During the fellatio, Applicant instructed Victim to "go deeper" and pushed her head and mouth farther down on his penis. (R. 210-11).

Next, Applicant mounted Victim while she was on her back and forced her legs apart. (R. 211). Applicant penetrated Victim's vagina with his penis, causing her to scream and cry. (R. 211-

12). In response, Applicant removed his penis from her vagina. (R. 211-12). He let Victim use the bathroom before forcing her back onto the bed. (R. 212). Once she returned to the bed, Applicant anally penetrated Victim. (R. 212). Victim again screamed and cried. (R. 214). As a result of Applicant's sodomy, Victim defecated on the bed. (R. 212). Following his oral, vaginal, and anal assault of Victim, Applicant turned on the television and put on the animated cartoon SpongeBob SquarePants. (R. 214). Applicant told Victim he would most likely go to jail for raping her. (R. 468).

Applicant confided in Victim that he was going to kill "Steve," the man with whom his wife was having an affair. (R. 214-15). Applicant and Victim then left the motel and Applicant drove to the Royal Lanes bowling alley in Goose Creek, striking a car in the motel parking lot on the way. (R. 215, 344-50). Once they arrived at Royal Lanes, Applicant left Victim in the car and instructed her to wait in the car for ten minutes before getting out. (R. 215).

Applicant entered Royal Lanes through the alley's front doors and went directly to the pro-shop. (R. 276-68). Applicant was well-known at Royal Lanes because his wife, Deonna, was the alley manager. (R. 237-39, 262, 267-68, 275). Applicant had recently been placed on trespass notice and was prohibited from entering the alley based on his disruptive and aggressive behavior towards Deonna and others, including alley owner Steve Tsafos. (R. 267-69, 277). Applicant had been accusing Deonna and Tsafos of having an extramarital affair and sending threatening text messages and Facebook postings about the alleged affair.¹ (R. 244, 251-52, 260, 293, 303).

¹ In response to Applicant's increasingly threatening behavior, which included sending intimidating text messages and Facebook postings, peering into Tsafos's windows at night, keying Tsafos's car, slashing Tsafos's tires, and making a purchase at a gun retailer, Deonna filed a police report with the Goose Creek Police department earlier that day. (R. 248-52, 279-81).

Applicant left the alley briefly, then reentered and looked around before eventually barricading himself in Tsafos's office along with Tsafos. (R. 268-70).

Once inside Tsafos's office, Applicant pointed his gun at Tsafos, who was seated at his desk, called Tsafos a dead man, and prevented Tsafos from leaving the office. (R. 281, 283-84). Applicant demanded answers from Tsafos and referenced the purported affair with Deonna and his inability to pay his bills. (R. 283-87). Tsafos feared for his life and thought Applicant was going to kill him. (R. 284-87, 288). Tsafos attempted to leave the office, but was blocked by Applicant, who still had the gun pointed directly at him. (R. 285-88). Applicant told Tsafos he should be afraid and shot the gun at Tsafos. (R. 286). Tsafos thought the bullet hit him, and then realized the projectile struck the floor. (R. 286). In the fracas that followed, Tsafos fled the office. (R. 287-88, 320).

While Applicant held Tsafos against his will, the Goose Creek Police Department SWAT team had surrounded the bowling alley with a concentration of officers around Tsafos's office. (R. 315-17). Goose Creek Police Department Captain David Aarons, commander of the SWAT Team, negotiated with Applicant for nearly an hour and a half before Applicant was apprehended. (R. 314, 319-32). Throughout negotiations, Applicant lay on the floor of Tsafos's office and conversed with Captain Aarons. (R. 321-28). Applicant repeatedly pled with Captain Aarons not to be shot. (R. 321-30). Applicant asked for and received a cup of red wine and was permitted to smoke a cigarette. (R. 326-31). Applicant called Captain Aarons by his first name, told Aarons that he was doing a good job, but that it would not end well because Applicant had no reason to live. (R. 329). As Applicant neared the end of his cigarette and wine, Captain Aarons made the decision to disarm and apprehend Applicant. (R. 330). After Captain Aarons secured the weapon, other officers with

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the SWAT team rushed the office and subdued Applicant with the use of tasers. (R. 331-32, 339-40). Officers placed Applicant under arrest and secured him with handcuffs. (R. 340).

Law enforcement escorted Applicant to a police cruiser and called for medical treatment. (R. 351-52, 356). EMT John Lee and Paramedic Paul Clendenning from the Goose Creek Fire Department responded to the bowling alley based on a dispatch call of a possible shooting and use of a taser on a suspect. (R. 351-52). When they arrived, Lee and Clendenning inspected Applicant for possible taser probes and did not find any. (R. 352, 356). Additionally, Lee and Clendenning examined Applicant and reported he was devoid of any injuries or health problems. (R. 352, 356). Lee noted Applicant was "kind of playful, jovial," but otherwise lucid, rational, reasonable, and aware of what was happening. (R.352). Clendenning similarly reported Applicant was lucid, aware, and reasonable. (R. 356).

While the standoff ensued inside the bowling alley, Victim left Applicant's vehicle and sought assistance from a woman nearby, Vanessa Gilchrist. (R. 215, 264-65). Gilchrist, who worked as a cook at Royal Lanes, was sitting outside the bowling alley following her shift when Victim approached her. (R. 262-65). Victim was very jittery and was physically shaking, and Gilchrist sensed something had happened to her. (R. 265). Victim asked to use Gilchrist's phone and used a piece of paper with phone numbers to try to call her parents. (R. 215-16, 265). Victim's dad answered, spoke with Victim, and told her to wait inside the alley and he would be there soon. (R. 216, 224, 265). Concerned for Victim, Gilchrist told Victim to wait with her until her father arrived. (R. 265). Shortly thereafter, a crowd of people came running out of the bowling alley and into the parking lot. (R. 266). In the chaos, Gilchrist lost sight of Victim. (R. 266).

When Victim's father arrived at the bowling alley minutes later, the parking lot was swarming with law enforcement. (R. 216, 224-25). He found Victim and decided to take her and

the rest of the children with him to Dairy Queen at the nearby mall. (R. 225-26). When Victim got into the car, she appeared upset, exclaimed she never wanted to attend another birthday party, and stated she needed to talk to her father alone. (R. 226). Once they arrived at the mall, Victim and her father talked privately and she disclosed Applicant raped her. (R. 226). Victim's father noted she was extremely hot, her face was flushed, and she was in shock. (R. 227). He called Victim's mother, informed her of the rape, and asked her to meet them as soon as possible. (R. 195, 227). He next called law enforcement and reported the rape. (R. 227-28). Victim's mother and the police arrived on the scene and all agreed Victim needed to be taken to a hospital with specialized sexual assault care immediately. (R. 195-96, 227).

Victim's mother and father took her to the emergency room at the Medical University of South Carolina. (R. 196-97, 227). Upon arriving, Victim was examined and treated by Karen Drozd, a specially trained sexual assault nurse examiner. (R. 381-83). Drozd completed a full body examination of Victim, including the use of a Wood's light to illuminate fluids on the body. (R. 383-84). Drozd also collected swabs for later analysis, drew blood for toxicology and disease screening, and took photographs to evidence Victim's injuries. (R. 383-84). Drozd further documented Victim's injuries in a report, which included oozing blood, deep lacerations, and two fissures on her anus. (R. 389-91). Medical care providers also tested for Human Immunodeficiency Virus (HIV) and gave her powerful HIV medication that potentially had long-lasting implications should she be infected with the virus later. (R. 391-92). Drozd also completed a sexual assault kit on Victim. (R. 391-36).

Victim's medical records and injury documentation was also reviewed by Dr. Kendra Ham, a pediatrician and child abuse expert from MUSC. (R. 404-11). Dr. Ham noted Victim has a deep laceration to her posterior fourchette at the six o'clock position, and lacerations or fissures to her

anus at the eleven o'clock position and the six o'clock position. (R. 409-10). She also found oozing blood emanating from the posterior fourchette laceration. (R. 410).

Prior to trial, the various specimens collected from Victim were analyzed and examined. Tracy McKinnon, a forensic toxicologist with the South Carolina Law Enforcement Division (SLED) tested Victim's blood samples. (R. 398-403). McKinnon identified Doxylamine, Methorphan, Methorphanam, and Acetaminophen in Victim's blood, all which were either ingredients or byproducts of NyQuil. (R. 402-03). Dr. Daniel Demers, who was admitted as an expert in DNA analysis, tested various swabs and other items collected in the case. (R. 411-36). Dr. Demers detected blood on Victim's underwear, vaginal swabs taken from Victim, rectal swabs taken from Victim, and Applicant's underwear. (R. 414). He also detected semen on one of the pillowcases removed from Applicant's room at the EconoLodge, Victim's underwear, Applicant's underwear, and various swabs taken from Victim. (R. 414). Dr. Demers detected Victim's DNA on the NyQuil dosage cup and could not exclude Applicant as a contributor to DNA found on the NyQuil bottle. (R. 419-20). Dr. Demers detected Applicant's DNA on the handgun taken from Applicant at the bowling alley and could not exclude Victim as a contributor to a DNA mixture also found on the weapon. (R. 422). Dr. Demers detected a mixture of DNA from both Applicant and Victim on one of the pillowcases. (R. 423-28). He also detected Applicant's DNA on semen found on Victim's underwear, as well as swabs collected from Victim's vagina and anus during the sexual assault examination. (R. 431-33).

Law enforcement took Applicant's cellular phone into custody following his arrest. (R. 441-42). A search of the phone revealed Applicant had been sending threatening messages to Tsafos and the bowling alley's Facebook page. (R. 441-42). Additionally, a review of Applicant's

internet history on the phone showed he searched for Tsafos, private investigators, and GPS tracking devices prior to his criminal rampage. (R. 477).

Applicant was indicted for attempted murder, two counts of possession of a weapon during the commission of a violent crime, unlawful conduct toward a child, third-degree criminal sexual conduct with a minor, three counts of second-degree criminal sexual conduct with a minor, and two counts of kidnapping. Prior to trial and in anticipation of an insanity defense, the court ordered Applicant to undergo evaluations by the South Carolina Department of Mental Health (SCDMH) to determine his competency to stand trial pursuant to S.C. Code Ann. § 44-23-410 and his criminal responsibility and capacity to conform pursuant to S.C. Code Ann. § 17-24-10. (R. 22-33, 129-176, R. 837, 847). Both evaluations were completed by Dr. Anna Gomez, a forensic psychiatrist at the Medical University of South Carolina. (R. 22-33, 129-76, R. 837, 847). Dr. Gomez met with Applicant three times for his criminal responsibility and capacity to conform evaluation: February 9, 2015, February 17, 2015, and May 13, 2015. (R. 133, R. 847).² Dr. Gomez concluded to a reasonable degree of medical certainty that Applicant was criminally responsible and had the capacity to conform his conduct to the requirements of the law. (R. 129-76, R. 847).

Applicant proceeded to a jury trial on July 13, 2015. At the outset of trial, the court held a competency hearing, at which Dr. Gomez testified to a reasonable degree of medical certainty that Applicant was competent to stand trial. (R. 22-33, R. 847). The court then held hearings on Applicant's statements to law enforcement, including the voluntariness of the statement and the State's motion in limine to prevent the defense from using the statements in its case in chief. (R.

² Dr. Gomez met with Applicant on January 9, 2015, to conduct his competency to stand trial evaluation and determined Applicant was competent to stand trial, evidenced in her written report and testimony at trial. (R. 22-33, R. 837).

34-89). The trial court ruled the statements were voluntarily given but granted the State's motion in limine. (R. 34-142). Next, defense counsel moved in limine to prevent the State from delving into Applicant's prior bad acts, including his hit and run car accident while leaving the EconoLodge to go to the bowling alley, his comments to others about his wife having an affair, Applicant's various Facebook postings, his purchase of ammunition, and his repeated attempts to obtain access to other young girls who lived nearby. (R. 90-101). The State filed a pre-trial brief addressing this anticipated motion and also placed arguments on the record opposing defense counsel's motion, including that all acts were relevant to the case and necessary to counter Applicant's anticipated insanity defense. (R. 90-101, 815-36). The trial court denied Applicant's motion in limine. (R. 90-101).

At trial, defense counsel focused on Applicant's mental state leading up to and on August 5, 2014, in furtherance of his claims of insanity. During the State's case, Dr. Gomez testified as to her evaluations of Applicant and her conclusion to a reasonable degree of medical certainty that Applicant was criminally responsible and had the capacity to conform his conduct to the requirement of the law. (R. 129-76, R. 847). Dr. Gomez testified she consulted with a pharmacist on the possible psychiatric side effects of Vivitrol, an injectable medication prescribed to addicts to curb the euphoric effects of alcohol and opiates, as Applicant complained his behavior was a result of receiving a Vivitrol injection in June. (R. 135-38, 148-51). Dr. Gomez testified there are no known psychiatric side effects to Vivitrol and it is highly unlikely his behavior was a result of the injection. (R. 135-38, 148-51). Dr. Gomez further testified Vivitrol is typically out of the bloodstream or only remains in a very low level after twenty-eight days, making it very unlikely any of the medication was still in his system six weeks later on August 5, 2014. (R. 135-38). Dr. Gomez testified in her expert opinion Applicant was not insane at the time of his crime spree. (R.

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138-40). She testified Applicant is alcohol dependent and has been diagnosed as depressive disorder recurrent. (R. 138-40). She testified Applicant told her he had been diagnosed with Post-Traumatic Stress Disorder (PTSD), but she found no evidence of this in any of his military or medical records. (R. 138-40). She also noted numerous witnesses described Applicant's behavior during this time period as normal. (R. 129-76).

The State also presented various neighbors of Applicant, who testified regarding his efforts to gain access to other young girls in the neighborhood in the days leading up to violent sexual assault of Victim. (R. 177-90). Kimberly Tompkins, a neighbor of Applicant and Victim, testified Applicant repeatedly tried to persuade her fourteen-year-old daughter to help with his daughter's schoolwork or come to a surprise birthday party in early August 2014, both in person and by voice message, and offered her money. (R. 177-83). She testified Applicant's demeanor was normal, other than his repetitive insistence he take her daughter to the party. (R. 182). Victim's brother and mother also testified Applicant's behavior was normal on August 5, 2014, when he inquired about Victim's older sister coming to the party and eventually took Victim instead. (R. 187-94).

Applicant's estranged wife, Deonna, also testified during trial. (R. 237-261). She testified Applicant repeatedly accused her of having affairs throughout their marriage, including with her boss Tsafos. (R. 237-244, 259-61). She testified her marriage with Applicant was volatile and Applicant often came to the bowling alley to confront her or her co-workers. (R. 238-40). Tsafos wrote her a letter, stressing the bowling alley needed to remain professional and banning Applicant from entering the premises. (R. 239-40). She testified she moved out of the marital home in June of 2014 while Applicant was at a rehabilitation facility in North Carolina receiving treatment for his alcoholism. (R. 240-41, 245). She testified Applicant had been in treatment for his drinking several times and described his heavy drinking throughout their marriage. (R. 244-47). She

testified Applicant buried empty alcohol bottles in the backyard and hid them under his daughter's mattress. (R. 244-47). She testified Applicant had numerous health problems and she began to accompany him to his medical appointments because the things he was telling her did not make sense, including that fuel exposure to his skin caused his ailments. (R. 245-46). Deonna testified every single doctor told her Applicant's health issues were solely related to his alcohol abuse, not military service as Applicant claimed. (R. 245-46). Deonna testified despite Applicant's heavy drinking, he was able to function and would help his daughter with her homework and behave "like a normal person." (R. 247).

Deonna testified she went to the police station around noon on the day of the incident after becoming alarmed upon noticing Applicant made a purchase at a gun store nearby and was heading back to the area. (R. 247-49). She also received a call from Applicant's mother that he had stolen her gun and she intended to file a police report. (R. 248-49). Deonna also recalled various alarming Facebook messages from Applicant. (R. 250-52). She testified she had filed police reports before concerning Applicant. (R. 251). Deonna testified after she filed her police report, she went to work at the bowling alley. (R. 253-54). She testified she had no interaction with Applicant until he showed up at the bowling alley after five p.m. (R. 253-54).

Applicant testified in his own defense and presented a nonsensical, disjointed and self-serving account of the weeks leading up to his August 5, 2014, crime spree. Applicant testified in the summer of 2014, he had a substance abuse problem and was drinking to help him sleep at night. (R. 766). He testified he also had a myriad of other health issues, including gastrointestinal problems prevalent since childhood, liver issues that caused his "brain to malfunction," and a "heart virus." (R. 492-96). Applicant testified he had been diagnosed with PTSD by the VA and a

private psychiatrist had challenged Dr. Gomez's prior testimony that she found no record of Applicant having PTSD. (R. 495).

Applicant testified he tried to quit drinking in March of 2014 and eventually entered an inpatient treatment program in Wilmington, North Carolina. (R. 495-98). Applicant testified he stayed at this rehabilitation center for twenty-five days and was discharged on June 23, 2014. (R. 498-99). Applicant testified prior to his discharge, he received an injection of Vivitrol and was told it would last a month. (R. 499-502). Applicant claimed the injection gave him horrid side effects. (R. 501). After leaving Wilmington, Applicant testified he drove back to the Goose Creek area before eventually returning to Wilmington and begging the rehabilitation center to re-admit him. (R. 501-08). Applicant testified he was experiencing stomach pain so severe that he could not eat and eventually had to be hospitalized in Wilmington. (R. 507-13).

After being discharged, Applicant stayed at a friend's home in the Wilmington area for a few days. (R. 513-14). While at the friend's house, Applicant testified he received a call from his wife's friend informing him Deonna was having an affair with Tsafos. (R. 514). Applicant then left his friend's house and drove to his mother's house in Pennsylvania. (R. 514-15). Applicant claimed he forgot how to read a map or drive a car, making his drive to Pennsylvania all the more arduous. (R. 515-18). Applicant also claimed he was still unable to eat. (R. 517).

Once he arrived at his mother's house, Applicant testified he was so severely ill that he laid on the floor for days. (R. 518-19). Applicant testified he began drinking wine to help him sleep at his mother's insistence. (R. 520). He testified he was throwing up blood and still unable to eat, so his mother took him to the emergency room. (R. 521). Applicant testified he was "emaciated." (R. 521, 525). Applicant claimed to have no clear memory and that he was only able to remember things as "a picture here or there." (R. 522). Applicant testified he refused psychiatric treatment at

the hospital and was discharged into his mother's care. (R. 525-26, 528-29). Applicant testified he stayed at his mother's house for a few days before eventually leaving to drive back to Goose Creek. (R. 530-32). Applicant claimed his mother packed the gun into his bag unbeknownst to him, but later recanted this assertion and said he did not want to blame his mother for his procurement of the firearm. (R. 532-33, 573-74).

Applicant testified it took him four or five days to drive back to South Carolina and he could not eat during the trip. (R. 533-34). He testified when he arrived in Goose Creek, Deonna had moved out of their marital home and was living with Tsafos. (R. 537). He claimed the electricity had been turned off, so he checked into the EconoLodge motel. (R. 537, 540). Applicant testified he waited around at the motel for his electricity to be turned back on. (R. 541-42). Applicant testified he does not recall what happened after that and most of his memory is based on his reading of discovery materials for the case. (R. 542-46). He testified he did not recall sexually assaulting Victim and only recalled telling Tsafos he wanted to kill himself. (R. 545-63). Applicant never denied threatening Tsafos, pointing a loaded firearm at him, or shooting Tsafos. Applicant testified the Vivitrol shot caused him to commit his crimes. (R. 586-87).

Applicant also called Robert Bennett to testify on his behalf. Bennett, who received a pharmacy degree in 1980 and a Ph.D. in pharmaceutical sciences in 1990, was allowed to testify as an expert in pharmacology and toxicology over the State's objections.³ (R. 623-41). Bennett testified he reviewed Applicant's case and medical records to determine if his body was experiencing any toxic effects at the time of his crime spree. (R. 642-44). Bennett discussed the

³ During *voir dire* on his qualifications, Bennett admitted he has not kept his licensures up to date, had not taken any required continuing educational requirement since 1999, and had been served a cease-and-desist letter from the State Board of Pharmacy requesting he stop referring to himself as a pharmacist. (R. 628-34, R. 866).

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possible effects on the brain and other organs from gastrointestinal issues and the various other ailments Applicant asserted he suffered. (R. 643-59). Despite testifying Applicant appeared to be malnourished based on his review, he conceded Applicant's medical records repeatedly referenced that he was well-nourished. (R. 664-67). Bennett reiterated he was basing his opinion on Applicant's self-assessment that he had not eaten in weeks and was malnourished, which Bennett opined would significantly affect internal organs and cognitive functioning. (R. 678-79).

In rebuttal, the State called Dr. Todd Magro, a medical doctor who specializes in adult psychiatry and addiction psychiatry. (R. 685-87). Dr. Magro routinely prescribes Vivitrol and was qualified as an expert in psychiatry, medicine, addiction psychiatry, and addiction medicine. (R. 686-88). Dr. Magro reviewed Applicant's medical records, including laboratory results, and concluded Applicant was "[a]t most . . . mildly dehydrated . . . one time[,] [b]ut certainly not starving." (R. 688). Dr. Magro testified there was absolutely nothing in Applicant's medical records to suggest that he was malnourished. (R. 688). Dr. Magro testified that based on his professional experience, there is no connection between gastrointestinal issues and psychosis. (R. 689-90). He further testified there is nothing in Applicant's records that led him to believe Applicant was psychotic at any period of time. (R. 684, 698). Dr. Magro testified Vivitrol does not cause psychosis, memory loss, or any psychiatric or cognitive problems based on his vast experience with the medicine. (R. 691-94). Dr. Magro testified that based on his review of Applicant's medical records, Applicant's primary medical problem was alcohol dependency. (R. 694-95).

Following the close of all testimony, the court asked both parties for any requests to charge. (R. 700). Defense counsel requested an instruction on involuntary intoxication based on Applicant's Vivitrol injection approximately six weeks prior to the crime spree. (R. 700-01).

Defense counsel also requested jury instructions on not guilty by reason of insanity and guilty but mentally ill. (R. 701-13). Defense counsel theorized that the Vivitrol injection caused Applicant's psychosis and instead argued Applicant's "physical state at the time of the incident caused the psychoses," including malnourishment, gastrointestinal, blood, and liver problems. (R. 703-06). The State argued against an instruction of not guilty by reason of insanity, citing a dearth of testimony that Applicant did not know the difference between moral or legal right from wrong. (R. 708-11). Following argument from both parties, the court ruled it would not charge the jury on not guilty by reason of insanity, stating:

There has been no evidence in the record that at the time the crime was allegedly committed that because of that mental disease or defect that you are alleging there -- the testimony has always been that the defendant did know the alleged crime in each of the indictments was morally or legally wrong. So I will not be charging insanity, the insanity defense. Note your exception to my ruling.

(R. 712). However, the court ruled it would instruct the jury on guilty but mentally ill as requested by defense counsel. (R. 712-13).

Defense counsel then requested jury instructions on the lesser included offenses of attempted murder, including assault and battery of a high and aggravated nature, assault and battery in the first degree, and assault and battery in the third degree. (R. 713-14). In support of this request, defense counsel argued Applicant did not have the requisite intent for attempted murder. (R. 714). The State objected, arguing a lack of evidence in the record to show any lesser included offense of attempted murder occurred. (R. 714). The court ruled it would not charge any lesser included offenses of attempted murder, stating:

I must charge the law applicable as to the facts as presented. I will not be charging any lesser included's. We discussed this last evening. I do not -- there has been nothing -- the testimony has not changed since last evening, and there is nothing that would indicate

that factually the lesser included's is appropriate. The testimony has been and even your own client's testimony was that when he came out of his fog, the white light, that he had the gun in his hand. So based upon that I will be charging -- I will not be charging any lesser included's.

(R. 714-15).

Following closing argument from both parties, the trial court charged the jury on the law and instructed the jury to begin deliberations. (R. 763-83). The jury deliberated for forty-seven minutes before convicting Applicant on all counts as indicted. (R. 783-85).

III. Issues Before This Court

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. Ineffective Assistance of Counsel;
2. "I was not competent at the time of my trial";
3. "Please see my August 7 2018 deposition transcript, attached as exhibit A"; and
4. "Please see Exhibit A and Exhibit B which is a true and correct copy of a letter from Rebecca A Plummer McCardle, LMSW".

Pursuant to Rule 71.1, SCRCP, on February 4, 2019, Applicant, through PCR counsel, filed a Supplement/ Amendment to Application for Post-Conviction Relief to include the following allegations:

1. I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(1). In addition to the ineffective assistance identified in Exhibit A to my Application and at hearing, I specifically believe that my trial attorney, Melisa Gay, was ineffective for failing to pursue a defense of (and a jury instruction for) involuntary intoxication based on the side effects of Vivitrol. See State v. Shands, Op. No. 5569 (S.C Ct. App. dated June 13, 2018) (Shearouse Adv.Sh. No. 24 at 69) (example of involuntary intoxication jury instruction). One of the side effects of Vivitrol is inability to sleep, and I suffered from this side effect after the Wilmington Treatment Center administered the Vivitrol shot in June of 2014. The sleep deprivation caused by this shot, possibly combined with interactions with my other medications, led to my unusual, bizarre, and psychotic behavior leading up to August 5, 2014. During this period of time, and particularly during the times of my alleged crimes, I

did not understand what I was doing (to the extent I can even remember), and even if I did understand what I was doing I did not understand it was legally or morally wrong.

- a. Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed Aug. 26, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480792> (last visited January 3, 2019) and <https://ctrack.sccourts.org/public/document/view.do?documentID=480795> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- b. Supplemental Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed August 31, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480799> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- c. Vivitrol Medication Guide, FDA (Rev. July 2013) available at <https://www.fda.gov/downloads/Drugs/DrugSafety/UCM206669.pdf> (last visited January 4, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- d. Flavie Waters, et al., Severe Sleep Deprivation Causes Hallucinations and a Gradual Progression Toward Psychosis With Increasing Time Awake, 9 Frontiers in Psychiatry 303 (July 10, 2018) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6048360/pdf/fpsy-09-00303.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- e. Nadine Petrovsky, et al., Sleep Deprivation Disrupts Prepulse Inhibition and Induces Psychosis-Like Symptoms in Healthy Humans, 34 The Journal of Neuroscience 9134 (July 2, 2014) available at <http://www.jneurosci.org/content/jneuro/34/27/9134.full.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- f. Stanley Coren, Sleep Deprivation, Psychosis and Mental Efficiency, 15 Psychiatric Times (March 1, 1998) available at http://www.mpsaz.org/rmhs/staff/rjrios/psychii/psychcal/files/sleep_deprivation_article_questions.pdf (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- g. Louis Jolyon West, et al., The Psychosis of Sleep Deprivation, 96 Proceedings of the New York Academy of Sciences 66 (Jan. 1962) available at <https://nyaspubs.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1749-6632.1962.tb50101.x> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- h. Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of the attached documents from State v. Gay, 2018A1010200733, which are attached as Exhibit A. See also In re Gay, 375 S.C. 418, 653 S.E.2d 272 (2007); In re Gay, No. 2018-000237 (S.C. Sup. Ct. Order dated March 21, 2018).

On August 23, 2020, Applicant, through PCR counsel, filed a Second Supplement to Application for Post-Conviction Relief to his application to include the following allegation:

1. "Petitioner hereby files the attached excerpts of the May 25, 2018, deposition of Len Allen (pages 1-3, 30, 50-53, Ex. 1) as a supplement to his Application for Post-Conviction Relief.

Pursuant to Rule 71.1, SCRCP, on March 12, 2021, Applicant, through PCR counsel, filed another amendment to his post-conviction relief application to include the following allegations:

1. Trial counsel failed to call Rebecca A. Plummer to testify on my behalf;
2. Trial counsel failed to call Alta Fraley to testify on my behalf;
3. Trial counsel failed to object to hearsay testimony uttered at p. 191 lines 14 through p. 192 l. 11. This testimony went beyond the scope of expert testimony permitted under SCRE 703;
4. Trial counsel failed to make a contemporaneous objection to Kimberly Tompkins' testimony (pp. 232-238) regarding an incident occurring on the Saturday before the events for which Applicant was charged. Trial counsel argued in limine that the conduct was impermissible 404B evidence. However, by failing to make a contemporaneous objection, trial counsel did not preserve the issue for appellate review;
5. Trial counsel failed to object to hearsay testimony from witness Ruth at p. 250 lines 10-13; p. 251 lines 7-8;
6. Trial counsel failed to object to hearsay testimony from witness Chad at p. 281 lines 12-14; and lines 19-22;
7. Trial counsel failed to object to hearsay testimony of the victim that went beyond "time and place" exceptions set forth in SCRE 801(d)(D) p. 468 lines 11-13; 21-24; and p. 470 lines 8-16;
8. Trial counsel failed to object under SCRE 404(B) to unrelated "bad acts" testimony uttered at p. 569 lines 11-12. 404B testimony should have objected; and
9. Trial counsel failed to object to the State's vouching for its witnesses at p. 837 lines 12-15; 842 and lines 8-9.

At Applicant's evidentiary hearing, he proceeded forward on allegations 2-9 of the amended application filed on March 12, 2021. To the extent the allegations set forth in Applicant's original application and amended applications can be construed as separate grounds for relief from the grounds stated at the PCR hearing, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

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IV. Relevant Testimony From Evidentiary Hearing

Applicant's Ex-Wife Julie Fraley's Testimony

Applicant's ex-wife, Julie Fraley (Julie), testified on Applicant's behalf at the evidentiary hearing. Julie testified she and Applicant were married in 1999 and divorced in 2006. Julie testified she had one child with Applicant – Alta Fraley. Julie testified she had sole custody of Alta after the divorce; Applicant had visitation. Julie testified that from 2014-2016, Alta, age 12-14, lived with her in West Ashley. Julie testified her relationship with Applicant remained polite following their divorce, specifically stating her and Applicant remained on speaking terms and communicated regarding Alta's welfare.

When questioned regarding Applicant's trial counsel (Melisa Gay), Julie stated she was unfamiliar with Applicant's trial counsel. Julie opined that following Applicant's arrest, no one, including Applicant's trial counsel, reached out to her to inform her about or discuss Applicant's case with her. Julie stated she had to look up information regarding Applicant's trial and arrest on her own. Julie additionally testified Applicant's wife at the time of his arrest, Deonna, would inform her what was going on with Applicant's case. Julie testified she gave a statement to the Berkeley County Sheriff's department at some point in time; Julie testified the statement contained her contact information. Julie testified that if someone had contacted her and requested to speak with Alta, she would have allowed them to do so.

On cross-examination, Julie testified she only became aware that Melisa Gay was Applicant's trial counsel following Applicant's trial. When asked what benefit she believed Applicant would have received should Applicant's counsel have reached out to her, Julie testified she did not know. Julie further testified she could not determine whether it would have been good or bad for Alta to be involved in her father's trial – noting, Alta was twelve years old at the time.

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Applicant's Daughter Alta Fraley's Testimony

Applicant's daughter, Alta Fraley, also testified at Applicant's evidentiary hearing. Alta testified she lived with her mother, Julie Fraley, from 2014 to 2016. Alta testified she had a cell phone during that time and in August 2019, delivered photographs of text messages from that phone to PCR Counsel Jason Luck's office. (*see* Applicant's Exhibit #1). Alta testified the text messages as seen in Exhibit #1 were communications between her and Applicant prior to Applicant's arrest. Regarding Alta's communications with Applicant, she stated she attempted to keep in contact with Applicant through both phone calls and texts.

Alta testified that during conversations with her father throughout 2013 and 2014, Applicant spoke to her about strange matters. Specifically, Alta testified Applicant had told her on different occasions he had been struck by lightning; text her to tell her he had seen bigfoot; and told her he had throat cancer and would only live a week. Prior to 2014, Alta testified she and Applicant had discussed hunting for bigfoot. However, Alta stated Applicant had not previously indicated seeing bigfoot. When questioned whether this conversation or joke about bigfoot was ongoing between herself and Applicant, Alta testified they watched bigfoot shows together and talked about camping and finding bigfoot.

Alta testified Applicant's texting style had changed during this period as well. Alta stated Applicant had begun adding spaces and punctuation in odd places. Alta further testified she believed Applicant errantly text her believing her to be Deonna (Applicant's ex-wife) at some point. Alta testified she told her mother about Applicant's strange behavior and the strange texts she was receiving; however, her mother, Applicant's ex-wife, did not do anything.

When asked if she knew where Applicant was prior to when he began sending these texts to her, Alta testified he was probably in Pennsylvania. Alta elaborated, testifying Applicant had

gone to his mother's house in Pennsylvania prior to the strange texts. Alta testified that based on her experience and knowledge of her father she did not believe he was in his right mind. However, Alta further testified that following the trial, she was not able to speak with Applicant again until she was eighteen years old.

Alta testified she did not know or speak with Applicant's trial counsel Melisa Gay and testified she remembers asking her mother whether she needed to testify at Applicant's trial. Alta stated that if trial counsel would have requested to speak to her, she would have. Alta additionally testified she believed she had the wherewithal at the age of thirteen to effectively testify on Applicant's behalf. Specifically, Alta testified she knew there was something wrong with Applicant at the time of the incident and opined again Applicant did not have the presence of mind to have committed these crimes. Alta further tried to analyze and explain why Applicant's texts and the way he responded showed he did not know what he was doing.

Trial Counsel Melisa Gay's Testimony

Applicant next called trial counsel, Melisa Gay (Counsel), as a witness. Counsel testified she has been practicing criminal law for thirty-one years and was retained to represent Applicant in this matter. Counsel testified Applicant was an alcoholic who had received out-of-state treatment for his alcoholism prior to the incident. Regarding the incident, Counsel testified Applicant created a ruse – a child's birthday party – to lure one of his neighbor's daughters out of her house. Counsel testified Applicant took Victim to an EconoLodge; Counsel further testified there is video evidence of Victim leaving the EconoLodge with wet hair, supporting Victim's contention Applicant made her shower after he raped her. Counsel testified evidence supported the State's case Applicant then took Victim to the bowling alley where his ex-wife worked and where he was eventually apprehended. Counsel testified there was plenty of evidence to support the

State's case and she believed the State had enough evidence to convict Applicant. Due to the strength of the State's evidence, Counsel testified Applicant's theory of defense heavily relied on Applicant's mental state.

Regarding Applicant's mental state, Counsel stated Applicant believed a medicine he had taken to treat his alcoholism, Vivitrol, "sent him off the deep end". Counsel testified Applicant insisted he had not been given the accurate side effects of his alcoholism treatment and had experienced psychosis because of the treatment. Because of Applicant's assertions regarding his mental health, Counsel stated she had a mental health evaluation performed pursuant to *Blair*⁴ and *M'Naghten*⁵. Counsel testified Applicant was sent to the state hospital for mental health evaluations.

Counsel testified she spoke with Applicant's mother about his mental health as well as spoke with Applicant about pleading not guilty by reason of insanity. Counsel testified Applicant met with mental health professionals on three separate occasions and was found competent to stand trial. Additionally, Counsel testified she discussed Applicant's case with Dr. Robert Bennett. Dr. Bennett testified on Applicant's behalf at trial regarding the possible effects Applicant's gastrointestinal issues and other self-assessed ailments could have on Applicant's brain. Counsel stated Dr. Bennett testified that because Applicant had stopped eating, the malnutrition deteriorated his mental abilities. Counsel stated she argued during closing arguments Applicant had lost his ability to normally function when he could not eat.

Regarding Applicant's allegation trial counsel was ineffective for failing to call Alta Fraley to testify, Counsel testified she did not believe Alta, nor Applicant's ex-wife, Julie Fraley's,

⁴ *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

⁵ *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

testimony would have been helpful to Applicant's defense. Counsel testified she spoke mostly with Applicant's mother prior to trial. Counsel testified it was her belief that Applicant and his ex-wife Julie were not on speaking terms. Counsel testified she believed Applicant did not want to burden his at-the-time thirteen-year-old daughter with his case. Additionally, Counsel testified Alta's age deterred her from discussing the case with her. Counsel stated that discussing the matter with Alta at the age she is today would have been more beneficial; however, Counsel re-iterated Alta's age at the time of the trial was a large factor in her decision not to call on Alta to testify. Counsel further testified she was unaware of the text messages between Applicant and Alta prior to this evidentiary hearing.

Regarding Applicant's allegation Counsel failed to object to hearsay testimony from Dr. Anna Gomez that Applicant asserts went beyond the scope of expert testimony permitted under SCRE 703, Counsel testified she did not see a need to object because Dr. Gomez was describing what she did in order to prepare for the evaluation of Applicant. Counsel stated Dr. Gomez, an expert in the field of forensic psychiatry, performed the evaluation of Applicant for his assertion of an insanity defense. Counsel further testified she made a hearsay objection prior to Dr. Gomez's testimony on Vivitrol that was overruled by the trial court. Counsel testified she did not object to the testimony Dr. Gomez gave regarding the Vivitrol drug as Counsel believed Dr. Gomez was giving her opinion on the pharmacists about Vivitrol.

When asked whether Applicant wished to proceed to trial, Counsel testified he did. Counsel testified it would have been beneficial to Applicant's case if she could have found a witness to testify the Vivitrol drug affected Applicant negatively or led to psychosis. However, it was fully Applicant's decision to proceed to trial.

Regarding Applicant's allegation she did not object to testimony from multiple witnesses including Kimberly Tompkins, Ruth Vick, and Chad Vick, Counsel testified she did not believe there was a reason to contemporaneously object to testimony as she had renewed all motions at the close of testimony. Regarding Counsel's failure to object to testimony from Victim's mother, Counsel testified Victim's mother, Ruth Vick, was a first reporter and believed Ms. Vick was therefore able to testify to what she had reported regarding Victim's statements about the rape under 801(d), SCRE. Counsel further testified Victim's father, Chad Vick, also testified, positing she felt she should have objected to his testimony as it bolstered the testimony of Victim. Regarding Applicant's allegation Counsel failed to object to testimony from Karen Drozd that went beyond "time and place", Counsel testified she did not object. Counsel reasoned Ms. Drozd's testimony was admissible because Ms. Drozd was describing her examination of the patient (Victim) and was therefore admissible pursuant to the medical diagnosis exception to hearsay.

Finally, regarding Applicant's allegation Counsel was ineffective for failing to object to statements made during closing which Applicant alleged improperly vouched for the State's witnesses, Counsel testified she did not object to the closing argument as a trial strategy. Counsel further testified it is not her practice to object during closing; Counsel further testified she believes the trial judge corrects any overstepping by the State when the court instructs the jury that closings are not to be viewed as testimony and rather as argument.

Applicant Gary Fraley's Testimony

Applicant briefly testified on his own behalf at the evidentiary hearing. When questioned whether he requested Counsel contact his daughter, Alta Fraley, Applicant testified he had. Specifically, Applicant testified he asked Counsel to reach out to Alta around the same time his house was being sold. Applicant did not remember if this request to Counsel was made prior to or

following his competency evaluation.

Solicitor Anne Williams' Testimony

The State called Solicitor Anne Williams (Williams) as a witness. Williams testified she has been practicing law since 1998 and was first chair for the State in this matter. Upon request, Williams gave a brief recitation of the State's evidence in this case, averring Victim in this matter was the eleven-year-old daughter of Applicant's neighbor who Applicant lured out of her home under false pretenses. Williams testified State's evidence showed Applicant drugged Victim and anally, orally, and vaginally raped Victim. Williams further stated Applicant made Victim shower to destroy evidence of the rape following the assault. After Applicant raped Victim, Williams stated evidence showed Applicant took Victim to the bowling alley where his ex-wife worked and left her in his car while he went inside. Williams further testified that after entering the bowling alley, Applicant took a person hostage and was eventually arrested by police. Regarding Victim, Williams testified Victim found a phone and called her parents to pick her up from the bowling alley. Williams testified she could not recall any specific plea negotiations but would have expected a similarly situated Applicant to have pled to the charges as there was a large amount of evidence against him.

Williams testified there were medical records in discovery regarding both Applicant and Victim. When questioned whether evidence existed to support Applicant had been acting abnormally prior to the incident, Williams testified that despite Applicant having a history of medical problems, there was nothing substantial to support an insanity defense. Williams additionally testified that due to Applicant's voluminous medical records, Applicant could not show his medical issues legally excused his behavior.

Williams was also questioned regarding Applicant's allegation trial counsel failed to object to hearsay testimony from Dr. Anna Gomez that allegedly went beyond the scope of allowed expert testimony. Williams testified that due to the amount of information asked during trial and in the record regarding the drug Vivitrol, she believed Dr. Gomez's testimony was Gomez's attempt to fully respond and her professional due diligence.

Williams was further questioned regarding Applicant's allegation trial counsel failed to object to hearsay testimony that went beyond time and place exceptions as set forth in SCRE 801(d)(D). Williams testified that time and place is not the only hearsay exception, further stating she did not believe the testimony referenced in Applicant's application and testified to by Karen Drozd objectionable. Specifically, when asked why she pursued the line of questioning she had regarding ejaculation and penetration, Williams testified she did so to lay a foundation as the Ms. Drozd's testimony was admissible under the medical diagnosis exception.

V. Standard of Review

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to

collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant

making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. “The burden of rebutting this presumption ‘rests squarely on the defendant,’ and ‘[i]t should go without saying that the absence of evidence cannot overcome [i]t.’” *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, “even if there is reason to think that counsel’s conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that *no competent lawyer would have chosen*.” *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[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.” *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578,

592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 (“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). “Defense lawyers have ‘limited’ time and resources, and so must choose from among ‘countless’ strategic options.” *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). “Such decisions are particularly difficult because certain tactics carry the risk of ‘harm[ing] the defense’ by undermining credibility with the jury or distracting from more important issues.” *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel’s actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*’s deferential standard.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective

assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

VI. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments made by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised and finds each to be without merit. Therefore, pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Allegation Counsel was Ineffective for Failing to Call Alta Fraley to Testify

Applicant claims Counsel was ineffective for failing to call his daughter Alta Fraley to testify on his behalf at trial. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the

witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

“In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may

corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial). Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court finds Counsel was not deficient in her decision not to call Applicant's daughter, Alta Fraley, to testify at Applicant's trial. Specifically, this Court finds Counsel credibly testified she did not believe Alta's, nor Julie's, Applicant's ex-wife, testimony would have been helpful to Applicant's defense. Counsel testified it was her understanding and belief at the time of trial that Applicant and Applicant's ex-wife, who had custody of Applicant's minor daughter Alta, were not on speaking terms. Counsel further testified Alta's age at the time of trial deterred her from discussing the matter with Alta and was a large factor in her decision not to call on Alta to testify. Additionally, Counsel testified she was unaware of the text messages sent between Applicant and Alta. This Court finds Applicant has failed to establish deficiency in Counsel's failure to call Applicant's minor daughter to testify. This Court finds Counsel's decision not to call Alta based on her age was not unreasonable based on the facts of this case. Furthermore, this Court finds Counsel's failure to call Applicant's daughter as a witness was not prejudicial. As such, Applicant has failed to show any deficiency in Counsel's performance and any resulting prejudice. Accordingly, this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to Hearsay Testimony
that Went Beyond the Scope of Expert Testimony***

Applicant alleges Counsel was ineffective in failing to object to alleged hearsay testimony by Dr. Anna Gomez which Applicant contends went beyond the scope of expert testimony as permitted under SCRE 703. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." Rule 703, SCRE. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Id.* Additionally, "[t]o the extent . . . relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." Rule 803(18), SCRE. As noted previously, "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith*, 386 S.C. at 567, 689 S.E.2d at 632 (citing *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517).

Applicant alleges Counsel was ineffective for failing to object to the following testimony:

A: And so what the pharmacist explained to me was that when somebody received a Vivitrol injection the blood levels really reach their maximum in about two or three days and then they kind of reach this plateau of sorts, and then 14 days after the initial injection they continue to come down, come down, and come done; such that by the end of the day you have very low levels in your blood. That is why is it dosed about every 28 days.

She also explained that the Vivitrol itself doesn't change the effects of alcohol. Like if you drink you can still be drunk and have blackouts. So you may not feel that euphoria, that feel good from the alcohol; but everything else is still going to be a possibility.

And then lastly I asked her about, you know, side effects that affect the mind due to this medication, and she said that she was not aware of any psychiatric side effects to include memory loss, loss of awareness of one's actions or confusion as a result of using Vivitrol.

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In addition, just the timeline, i.e. having received the medicine six weeks earlier being in fact overdue for the next dose if you are going to receive that treatment it just really didn't make any sense to her.

(R. 136-137).

Solicitor Williams thereafter asked:

Q. And made this inquiry because Mr. Fraley was telling you that the Vivitrol was making him behave that way during the time of the crimes; is that correct?

A. Yes, that was the strong insinuation.

Q. Okay. Now in order to do your report you have to figure out whether whatever you evaluate for Mr. Fraley meets the legal standard of insanity; is that correct?

A: Yes.

(R. 137).

Prior to the above-referenced testimony, Dr. Gomez explained she met with Applicant three different times – February 9th, February 17th, and May 13th, 2015 – in response to the court ordering an evaluation of Applicant for his assertion of an insanity defense. (R. 133). Dr. Gomez testified that prior to her examination of Applicant and to form her opinion, she reviewed a variety of legal records, medical records, and police interviews. (R. 133-134). In addition to the records and interviews reviewed, Dr. Gomez testified she received additional information from Applicant. (R. 134). Dr. Gomez testified that based on the information received from Applicant, she spoke with a pharmacist. (R. 135). Dr. Gomez testified she spoke with the pharmacist because:

[M]r. Fraley was making the contention that he had received a medication while being in Wilmington Treatment Center at the end of June that had a variety of effect on his mental abilities, and that was really not consistent with my knowledge of that medicine and what I found myself looking at the information available from the manufacturers of that medicine.

And so in order to be as thorough as I could be with that, you know, piece of information, I went ahead and contacted a pharmacist who specializes in medications related to mental health and has – she has certification in that – to get

her opinion on the medicine and its effects given the issues that were arises in this situation.

(R. 135).

At the evidentiary hearing, Counsel testified she made a hearsay objection prior to Dr. Gomez's testimony on Vivitrol. Counsel's objection was overruled by the trial court. Counsel further testified that she did believe an objection was necessary as Dr. Gomez was describing her preparation in her evaluation of Applicant and Applicant's contention the Vivitrol drug was cause for an insanity defense.

The Court finds no ineffectiveness on the part of Counsel. The record provides that Dr. Gomez's testimony was not based upon speculation, but rather was based upon a combination of data from her vast experience and prior knowledge, upon which she was entitled to rely as an expert witness. Additionally, this Court finds the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

This Court finds the record reflect that when Dr. Gomez was questioned on cross-examination regarding whether she contacted the pharmacist because she "didn't feel as if [she] had enough information in [her] own repertoire, Dr. Gomez stated:

I did not contact her because I didn't have enough information in my repertoire. I contacted her because this is her specific area of expertise and I thought it would be doing a good job if I did that. I did not have to contact her. (R. 147).

Therefore, this Court finds Applicant's contention that Dr. Gomez's testimony was objectionable as hearsay is baseless, and Counsel was not deficient for failing to advance that argument. Second, Counsel explored the same subject matter on cross-examination and did so in an evident effort to discredit Dr. Gomez. Applicant offers no compelling argument as to precisely how the inclusion harmed him, or how but for their exclusion the outcome at trial would have been

different. Therefore, the Court finds Applicant cannot show prejudice. Accordingly, the Court finds no ineffectiveness on the part of Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object and
Preserve an Issue for Appellate Review***

Applicant asserts Counsel was ineffective for failing to make a contemporaneous objection to witness Kimberly Tompkins' testimony regarding an incident occurring on the Saturday before the incident occurring on Tuesday for which Applicant was charged. The Court finds these allegations are without merit.

Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); *see also id.* at 380, 811 S.E.2d at 804 (“[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court’s finding If so, an appellate court would necessarily have affirmed the trial court’s [ruling]”).

Similarly, “[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence.” *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” *Id.*; *see Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d

1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Trial counsel testified she did not object to the introduction of Ms. Tompkins testimony as she had already moved in limine to limit any testimony discussing Applicant's prior bad acts. Specifically, during pretrial motions, Counsel argued to exclude testimony on Applicant's prior attempts to coerce another neighbor's child out of her home three days prior to the incident. (R. 91-92). Counsel further argued Applicant was not charged with the event in question and therefore any testimony elicited regarding Applicant's prior attempt was extremely prejudicial to Applicant's case. (R. 92). In response to Applicant's motion, the State argued *res gestae*, argued that Applicant had asserted an insanity defense and therefore the testimony was relevant, and argued Counsel planned to present evidence dating back to the June prior to the incident in support of his insanity defense. (R. 92-94). Thereafter, the trial court denied Applicant's motion in limine and found the testimony relevant and admissible. (R. 101).

This Court finds Applicant failed to meet his burden of proving that Counsel's failure to object to Ms. Tompkins' testimony was deficient. Though counsel did not contemporaneously object to the testimony of Ms. Tompkins, Counsel argued in limine to limit the testimony and the trial court denied Applicant's motion. Additionally, barring any alleged deficiency, this Court finds Applicant has failed to show prejudice. Specifically, this Court finds any objection Counsel would have made to Ms. Tompkins testimony would not have changed the outcome of his trial. This Court further finds evidence exists in the record to support the trial court's finding denying Applicant's motion in limine and finds an appellate court would have necessarily affirmed the trial court's ruling should Counsel have objected. As Applicant has produced no probative evidence

towards meeting his burden as to either prong of *Strickland*, accordingly his demand for relief by way of this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to
Hearsay Testimony from Witness Ruth Vick***

Applicant alleges Counsel was ineffective for failing to object to the following testimony from Victim's mother, Ruth Vick, at trial: "He said he was at the Northwoods and that he had taken [victim] outside and talked to her while the other children were inside of the food court, and then he said [victim] had been raped and get there as soon as we could". (R. 195). Applicant additionally alleges Counsel was ineffective for failing to object when Victim's mother testified: "[Victim] told me that there was no birthday party, that she had been taken to the EconoLodge and raped". (R. 196).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Trial counsel may be deficient for failing to object to hearsay testimony without a valid trial strategy. *Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018). However, trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. *Id.* 423 S.C. at 246, 814 S.E.2d at 493.

Additionally, a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident[.]" Rule 801(d)(1)(D), SCRE. Under the rule, "corroborative testimony cannot include 'details or particulars' regarding the assault." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629,

632 (2010); *see also, e.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) (holding a pediatrician's testimony of a minor victim's disclosure that his father watched pornography with them and made the victims fellate him was impermissible hearsay which did not fall under the medical diagnosis exception); *Huggler v. State*, 360 S.C. 627, 602 S.E.2d 753 (2004) (holding written statements provided by children victims to police which detailed sexual acts that they engaged in with the defendant constituted impermissible hearsay, and that trial counsel's failure to object constituted deficient performance, but that the defendant was not prejudiced because the evidence was overwhelming); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (holding testimony by four witnesses recounting a minor victim's disclosure of the identity of her abuser constituted impermissible hearsay, and that trial counsel's failure to object constituted ineffective assistance); *State v. Whisonant*, 335 S.C. 148, 154-55, 515 S.E.2d 768, 771 (Ct. App. 1999) (holding stepmother's testimony to be hearsay where she recounted in graphic detail the nature of the abuse disclosed to her by the victim).

"Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (citing *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)); *see also Thompson v. State*, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (recognizing the concurrence and dissent in *Jennings* collectively overruled *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994) "and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error"). In considering whether improperly admitted testimony was harmless and whether an Applicant was prejudiced under *Strickland*, the Court must "consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object." *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492-93.

This Court finds Counsel testified she did not believe this testimony was objectionable and believed Victim's mother, as a first reporter, was permitted to testify to the above-referenced statements. This Court finds Ms. Vick testified to out-of-court statements made by Mr. Vick which were hearsay and inadmissible. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. *See State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). While Counsel may have been deficient for failing to object to the hearsay testimony, Applicant has failed to meet his burden of proving how this failure to object prejudiced him. Whether the objection to this instance of hearsay testimony would have changed the outcome of the trial is mere speculation. *See Clark*, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice). Moreover, this Court in considering the strength of the State's case apart from the inadmissible statements finds this admitted testimony was harmless and Applicant was not prejudiced by Counsel's failure to object. Accordingly, this allegation must be **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to
Hearsay Testimony from Witness Chad Vick***

Additionally, Applicant alleges Counsel was ineffective for failing to object to Victim's father, Chad Vick's, testimony. Chad testified to the following at trial: "And she told me she hope she's not pregnant. And I said what do you mean. And she was like I was raped." (R. 226). Mr. Vick additionally testified, "And I asked her I was like what do you mean you were raped, you know. And she is like Dad I was raped. She is like there was no birthday, I was taken to the hotel EconoLodge. She said, "And Gary raped me"." (R. 226).

As defined above, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule

801(c), SCRE. This Court finds Counsel testified she believes she should have objected to the above-referenced testimony from Chad Vick. Based on the case law *supra*, Mr. Vick testified to out-of-court statements made by Victim which were hearsay and inadmissible. Additionally, as mentioned above, hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. *See State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). While Counsel may have been deficient for failing to object to the hearsay testimony, Applicant has failed to meet his burden of proving how this failure to object prejudiced him. Therefore, whether the objection to this instance of hearsay testimony would have changed the outcome of the trial is mere speculation. *See Clark*, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice). Therefore, this Court, in considering the strength of the State's case apart from the inadmissible statements finds this admitted testimony was harmless and Applicant was not prejudiced by Counsel's failure to object. Accordingly, this allegation must be **DENIED**.

Allegation Counsel was Ineffective for Failing to Object to Hearsay Testimony that Went Beyond "Time and Place" Exceptions in SCRE 801(d)(D)

Applicant alleges Counsel failed to object to hearsay testimony of Victim that went beyond the "time and place" exception set forth in 801(d)(D). Specifically, Applicant alleges Counsel failed to object to the three separate instances of testimony from Karen Drozd including the following exchange between the solicitor and Ms. Drozd:

Q: Okay. And was she able to tell you if ejaculation had occurred?

A: She was not aware of that. (R. 385).

Prior to the above question and response, the solicitor inquired whether it would be important for medical treatment and diagnosis of the patient to know when a sexual assault occurred and whether ejaculation and/or penetration. (R. 384). Ms. Drozd responded affirmatively to all inquiries from the State.

Applicant further alleges Counsel was ineffective for failing to object to the following questioning during direct examination between the solicitor and Ms. Drozd:

Q: And did she tell you if penetration occurred?

A: Yes.

Q: And where did she say that penetration occurred?

A: Mouth, vagina, and anus. (R. 468).

Ms. Drozd testified following this colloquy that determining whether penetration occurred and determining where penetration occurred were both necessary in her decision regarding the type of exam to be performed on Victim. Applicant further alleges Counsel was ineffective for failing to object to the following:

A: She told me she had NyQuil and alcohol.

Q: Okay. And did she say she took those voluntarily or they were given to her?

A: They were given to her. Forced.

Q: Okay.

A: She told me forced. (R. 470).

Hearsay is not admissible unless it is pursuant to an exception provided by the South Carolina Rules of Evidence or other means. Rule 802, SCRE. For example, “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are admissible pursuant to the trial court’s discretion. Rule 803(4), SCRE. As explained by the Supreme Court of South Carolina, “[A]fter recent trauma, these types of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment.” *State v. Simmons*, 423 S.C. 552, 564, 816 S.E.2d 566, 572 (2018); also *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997)

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("[A] statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim.")

The challenged statements qualify as and fall under the exception for statements made for the purpose of a medical diagnosis. This Court finds Victim's statements to Drozd about the rape were essential to her medical evaluation, diagnosis, and treatment. Therefore, Counsel was not deficient for failing to object to any of the above testimony of Ms. Drozd. Furthermore, this Court finds Victim testified to same. Specifically, this Court finds Applicant was not prejudiced by the testimony as it was duplicative and would not have changed the result of the trial should Counsel have objected. Accordingly, this allegation must be **DENIED**.

Allegation Counsel was Ineffective for Failing to Object to State's Vouching of Its Witnesses

Lastly, Applicant alleges Counsel was ineffective for failing to object to the following statements made by the solicitor: "When you think about Ruth Vick and Chad Vick what kind of people are these? These are people who are respectful, they have good jobs, they take care of their family." and "He said I know I am going to jail because this is rape. He knew what the law was. He chose to not conform his behavior (R. 745, 750)". Applicant argues these remarks by the State vouched for the State's witnesses and prejudiced him in that he was denied a fair trial.

This Court finds Counsel was not ineffective for failing to object to the State's remarks during closing arguments. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *State v. Mouzon*, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), *aff'd*, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing *Herring v. New York*, 422 U.S. 853

(1975)). “A solicitor’s closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” *Id.* at 609–10, 602 S.E.2d at 744. “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* This Court finds Applicant cannot demonstrate he did not receive a fair trial because of these remarks. Furthermore, Counsel testified she did not object to the Solicitor’s comments during closing arguments because it is not her practice. Counsel further testified she believed that any overstepping by the solicitor was cured by the trial court’s instruction to the jury regarding closing arguments – they are not to be considered evidence. Therefore, this Court finds Counsel was not ineffective in not objecting to the State’s remarks during closing argument and Applicant has failed to meet the burden imposed upon him. Accordingly, Applicant’s claims pertaining to Counsel’s failure to object during closing arguments are **DENIED**.

VII. Conclusion

Based on the evidence presented at the PCR hearing and a thorough review of the record before this Court, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

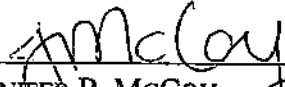
This Court notifies Applicant that he must file and serve a notice of appeal within thirty

days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203 SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 14th day of October, 2022.



JENNIFER B. MCCOY
Presiding Circuit Court Judge
Ninth Judicial Circuit

Charleston, South Carolina

BM/49

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY 2022 OCT 25 PM 2: 25 NINTH JUDICIAL CIRCUIT

Gary Fraley (# 364802),

Applicant,

vs.

The State of South Carolina,

Respondent.

LEAH GUERRA DUFFREE
CLERK OF COURT
BERKELEY COUNTY, SC

No 2018-CP-08-2576

Motion to Alter or Amend

Applicant, pursuant to Rule 59(e), SCRPC, moves this Court alter or amend its October 19, 2022, order ("Order"), as follows:

I. The findings regarding Alta Fraley are controlled by errors of law and fact.

1. The Court's findings as to Alta Fraley (Order pp. 34-36) are wholly unsupported by the law and evidence and will not withstand appellate scrutiny. In particular, the finding that "...Counsel's decision not to call Alta based on her age was not unreasonable based on the facts of this case..." (Order p. 36) is unsupported by the law and the facts. A child's age does not automatically disqualify him or her from being competent to testify. *State v. Green*, 267 S.C. 599, 603, 230 S.E.2d 618 (1976) ("There is no fixed age which an individual must attain in order to be competent to testify as a witness."). Alta Fraley turned fourteen¹ during trial; the alleged victim was twelve years old and she was permitted to testify, without objection, at trial. (R 203).² It should be axiomatic that a thirteen-to-fourteen-year-old, who was imminently capable of operating her mobile phone without adult supervision, would also be able to authenticate the contents of her own mobile phone. Part of Alta Fraley's testimony was precisely this – authentication of the images of and messages on her phone. (Exhibit A – 12/06/2021 Hrg. Trans 14:1-33:24).

2. The contents of Alta Fraley's phone are a remarkable window into the workings, or lack thereof, of Gary Fraley's mind at the time he performed the acts underlying his crimes. (Alta

¹ Alta Fraley's birthday is July 16 (R 242), and the trial took place July 13-17 (R 1).

² If Alta Fraley's age truly disqualified her from testifying, it was substantial, prejudicial error for Applicant's trial counsel to fail to object to the alleged victim's testimony.

cc:
S.W.
J.S.L.



Fraley Aff.³ Ex. A [images of phone, showing texts]). Applicant was prejudiced by being unable to present this evidence, which was the type of “collateral information” that the State’s expert witness Dr. Ana Gomez claims was “important” to determine if someone is “actively psychotic”. (R 162, 170-171). This “collateral information” becomes even more probative (and the prejudice compounded) if considered with the testimony Alta Fraley presented explaining and interpreting the phone messages.

3. It is the responsibility of trial counsel to interview and evaluate potential witnesses, as this Court correctly found in the Order: “At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).” (Order p. 34). It is uncontroverted trial counsel did not interview of Alta Fraley. It is uncontroverted trial counsel did not even attempt to contact Alta Fraley or her mother Julie Fraley. It is uncontroverted that trial counsel had access to Julie Fraley’s contact information via her statement to the Berkeley County Sheriff’s Department. (Ex. A 10:6-17).

4. Strategic choices made after a less than complete investigation are only reasonable if reasonable professional judgment supports the limits on the investigation. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (holding counsel’s investigation as to mitigation evidence was inadequate and incomplete). Trial counsel’s failure to even attempt to interview Alta Fraley fails to meet the standard this Court recognized in *Ard*, and this Court does not explain how this failure nonetheless meets a standard of reasonable professional judgment.

5. The contents of Alta Fraley’s phone were also critically relevant rebuttal evidence; the State argued Applicant’s sanity based on voice messages Applicant had left Kimberly Tompkins. (R 181-183, 748). The Order does not address the application of Alta Fraley’s testimony to this evidence.

³ On March 25, 2021, the State stipulated to the admission of this affidavit into evidence, and this stipulation was filed of record.

6. Applicant's trial counsel also recognized the significance of Alta Fraley's testimony:

MS. GAY: And just to flip ahead. The text messages and things that Alta [Fraley] had testified to [at the December 6, 2021 hearing], I wasn't aware of any of that. That's [sic] arguably could've, should've been part of something that was given to this expert [State's expert Dr. Ana Gomez] to talk about in her opinion. To create an opinion about whether it was reason of [sic] insanity or guilty but mentally ill and I – I didn't know any of that.

(Ex. A 37:22-38:3; see also 48:6-8).

7. The trial court refused to charge the jury on a not guilty by reason of insanity (NGRI) verdict, holding "there has been absolutely no testimony that indicates the defendant did not know the alleged crime was morally or legally wrong." (R 702). Alta Fraley's testimony would have provided the evidence necessary to justify a NGRI charge; the failure of the jury to be able to consider such a verdict has prejudiced the Applicant.

8. The Court's findings as to Alta Fraley (Order pp. 34-36) also lack specific findings supporting its conclusions, in violation of *Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836 (2018) (PCR court must make specific findings as to prejudice, citing multiple cases) and S.C. Code § 17-27-80 (specific findings necessary). In particular, this Court holds the failure to call Alta Fraley was not prejudicial without making specific findings as to Alta Fraley's testimony and the specific contents of her mobile phone.

9. The Court's findings as to Alta Fraley (Order pp. 34-36) also lack any analysis as to Alta Fraley's testimony for mitigation in sentencing. "The United States Supreme Court has held that counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance." *Simpson v. Moore*, 367 S.C. 587, 605, 627 S.E.2d 701 (2006) (citing *Wiggins v. Smith*, 539 U.S. 510, 511, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

10. The testimony of Alta Fraley would have been invaluable in support of an insanity/intoxication defense (which was lost due to lack of evidence), or as mitigation evidence in sentencing. Even if her testimony at age fourteen would have been less than persuasive, the texts on her phone represent objective evidence of insanity that speak for themselves. This missing evidence undermines confidence in the outcome of Applicant's trial; prejudice exists and a new trial is required. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

II. The Order does not address trial counsel's failure to present defenses based on a reaction to the drug Vivitrol.

11. In considering a PCR application, a court may consider “affidavits, depositions, oral testimony or other evidence” in deciding the application. S.C. Code § 17-27-80; *see also Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) (“A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting.”). At hearing, Applicant’s counsel requested this Court consider evidence filed of record attached to Applicant’s original application and its supplements under S.C. Code § 17-27-80 and Rule 201, SCRE. (Ex. A 68:25-69:22). The State did not object to this request.

12. Applicant has been adamant that at some point after he received his Vivitrol shot until the alleged crimes on August 5, 2014, Applicant experienced what can only be described as a psychotic break. (e.g. Ex. A 35:18-36:8; R 60-61, 137, 148-151, 579-580; Order pp. 19-20 [quoting 02/04/2019 supplement to PCR app.]; 12/28/2018 PCR app, Ex. A pp. 83-84.)

13. Applicant received his Vivitrol shot in June of 2014. (R. 135-38, 148-51). Subsequent to Applicant’s Vivitrol shot, he developed an inability to sleep. (R 144, 159, 162, 473, 492, 520, 522, 854, 858, 862). Applicant usually drank wine to put himself to sleep and was generally functional while drinking, but Vivitrol prevented the soporific effect of wine and left him unable to sleep. (R 247, 520, 573, 619-621, 842). The following authority, referenced in Applicant’s January 31, 2019, supplement to the PCR application and not considered by this Court, establishes Vivitrol can cause sleep disturbances: Vivitrol Medication Guide, FDA (Rev. July 2013) *available at* <https://www.fda.gov/downloads/Drugs/DrugSafety/UCM206669.pdf> (last visited January 4, 2019).⁴

14. The following authorities, referenced in Applicant’s January 31, 2019, supplement to his PCR application and not considered by this Court, support the uncontroversial proposition that sleep deprivation can cause psychosis: Flavie Waters, et al., *Severe Sleep Deprivation Causes Hallucinations and a Gradual Progression Toward Psychosis With Increasing Time Awake*, 9 *Frontiers in Psychiatry* 303 (July 10, 2018) *available at*

⁴ Applicant suffered from several other side effects of Vivitrol recognized by the FDA: nausea (R 148, 519, 522, 564), headache (R 510, 564), dizziness (R 148), vomiting (R 519, 617, 680), and decreased appetite (R 519).

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6048360/pdf/fpsyt-09-00303.pdf> (last visited January 8, 2019); Nadine Petrovsky, et al., *Sleep Deprivation Disrupts Prepulse Inhibition and Induces Psychosis-Like Symptoms in Healthy Humans*, 34 The Journal of Neuroscience 9134 (July 2, 2014) available at <http://www.jneurosci.org/content/jneuro/34/27/9134.full.pdf> (last visited January 8, 2019); Stanley Coren, Sleep Deprivation, *Psychosis and Mental Efficiency*, 15 Psychiatric Times (March 1, 1998) available at http://www.mpsaz.org/rmhs/staff/rjrios/psychii/psychcal/files/sleep_deprivation_article__questions.pdf (last visited January 8, 2019); Louis Jolyon West, et al., *The Psychosis of Sleep Deprivation*, 96 Proceedings of the New York Academy of Sciences 66 (Jan. 1962) available at <https://nyaspubs.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1749-6632.1962.tb50101.x> (last visited January 8, 2019).

15. The testimony of Alta Fraley would have established that in the weeks preceding August 5, 2014, Applicant told Alta Fraley he was dying of throat cancer, he had been struck by lightning, and that he had seen “Bigfoot”. (Aff. of Alta Fraley; Ex. A 14:1-27:5). It also would have established Applicant believed he was texting his wife at some times. (Ex. A 20:9-19). The last delusional texts from Applicant were sent a mere five days before the alleged crimes.⁵ (Aff. of Alta Fraley Ex. A p. 9). These communications were proved by Alta Fraley’s sworn testimony and the texts on her mobile phone, which were presented at the PCR hearing. *See State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997) (At trial, “[t]he law to be charged is determined from the facts presented.”).

16. The undated letter of Rebecca A. Plummer McCardle, LMSW (Exhibit B to PCR application and not considered by this Court), also provides support for Applicant’s theory that he suffered psychosis from his Vivitrol shot.

17. The May 25, 2018, Deposition Transcript of Len Allen (attached to the April 16, 2020 second supplement to PCR application and not considered by this Court), provides a third party’s perspective of trial counsel’s failure to pursue a defense based on Vivitrol insanity/intoxication: “Mary was at your trial, reported to me daily what was said. I was in rehab at the time. She said

⁵ These texts would also instruct the trial court to re-evaluate other evidence of psychosis (from Applicant and others) it disregarded at trial. (See R 156, 159-161, 273, 523, 525, 542, 551, 557, 861).

that they didn't go into great detail about medications, which unfortunately sucks for you. I guess you can appeal it if you need to." (Len Allen depo. trans. 52:1-5).

18. In spite of the overwhelming evidence of the merit of Vivitrol-based defenses, Applicant's trial counsel withdrew any defenses based on Vivitrol. (R 703, 706). At the PCR hearing, Applicant's trial counsel acknowledged this error:

[MS. GAY:] As I said, those text messages [of Alta Fraley], I didn't know about them. And so, I didn't know to give them to the psychologist - to the psychiatrist. Um - - but **is this where I get to just tell you what I think I might have done wrong?**

MR. [FALK]: Absolutely.

MS. GAY: Haha. Okay. So, Mr. Fraley presented as a person who said that he had taken some medicine and it had caused him to go off the deep end. So, I did research and I tried to see if I could find anywhere, anybody in the country that would substantiate that. I do believe now there's maybe more research associated with what he's talking about.

MS. WEIDAUER: Objection. This is not relevant to any of applicant's allegations.

THE COURT: It's not relevant to - - to counsel?

MS. WEIDAUER: In general. But none of this is the allegations that he has laid out. - -

THE COURT: I'll overrule. Go ahead with your answer.

MS. GAY: So, I tried to find somebody to say what it was that Mr. Fraley was talking about to substantiate it. And I was able to get -- I contacted somebody who I believe had his - uh - knowledge and was qualified in toxicology. And, Dr. Bennett. And so, Mr. Fraley had been admitted to the Emergency Room at the time of his arrest. And based on some things that were difficult, the records, the medical records from the Emergency Room visit didn't come in until right before the trial started.

(Ex. A 48:6-49:9; see also 49:10-51:21 [more commentary on this defense]) (emphasis added).

19. The State also acknowledged the error and prejudice of this strategy, noting the abandonment of this defense occurred "[p]erplexingly" and "[s]urprisingly" in its September 8, 2016, brief on direct appeal. (Resp. Brief pp. 17, 21).⁶

⁶ In its August 31, 2022, proposed order (which is by and large copied from the Statement of Facts in its September 8, 2016 brief in the direct appeal), the State drops this language and now implies that Applicant did submit a Vivitrol defense; Exhibit F illustrates this change. The State, which prevailed on

20. The psychosis Applicant suffered after his Vivitrol shot was Applicant's primary defense to the charges against him, until his trial counsel abandoned it. The Order does not explain how this was a valid strategic decision, Applicant's trial counsel admitted in hearing it had no valid basis, and (until now) even the State recognized this was a critical error. Prejudice exists, and a new trial is necessary.

III. The preparation of the Order violated Applicant's State and Federal rights.

21. The procedure followed by this Court in obtaining the Order denied Applicant an opportunity to have his PCR claims adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See* S.C. Art. I, § 8. Specifically, the Court did not provide the State with specific findings for denying Applicant's claims other than delegating the responsibility of drafting an order of dismissal.

22. The Court adopted the State's adversarial Order of Dismissal despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for providing or omitting findings of fact and/or denying the issue presented. *See generally Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80...the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").

23. The Order's conclusion (pp. 48-49), which was drafted by the State⁷ and adopted without revision, endeavors to explain Applicant's appellate rights while omitting any explanation of issue preservation and the need for a Rule 59(e), SCRCR, motion. These instructions are misleading and incomplete. Had Applicant followed the directives of the Conclusion, multiple meritorious issues contained in this motion would be unpreserved for appellate review.

direct appeal by, *inter alia*, arguing Applicant abandoned his Vivitrol defense, is estopped from changing its position now. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997) (judicial estoppel precludes party from adopting position in conflict with one earlier taken in same or related litigation). The State's September 8, 2016, brief can be downloaded here (and Applicant asks this Court to take judicial notice of it): <https://ctrack.sccourts.org/public/document/view.do?documentID=482161>

⁷ The State's proposed order is attached to this motion as Exhibit E.

24. Not only does the State's submission of misadvice in the proposed order objectively violate Applicant's Due Process, if this misadvice was submitted intentionally it would also constitute prosecutorial misconduct. *See e.g. Berger v. United States*, 295 U.S. 78, 84 (1935).

25. The State's counsel has cited her workload, and IT issues, as causes of the delay in the proposed order in this case. (See Motion to Strike & supplements). The workload described by the State's counsel in her emails to this Court is an unacceptable burden to lay at the feet of a newly-minted attorney, and it is only exacerbated by her lack of IT support. (See 07/12/2022, 07/20/2022, 07/29/2022, and 08/30/2022 emails attached to Motion to Strike and its supplements). Applicant is entitled to a hearing to explore and develop the facts underlying these matters, as the delays they caused violate his Due Process rights.

IV. This Court has not ruled on Applicant's motion to strike.

26. The Order does not decide the merits of Applicant July 11, 2022, motion to strike (Exhibit B), its August 8, 2022, supplement (Exhibit C), and its September 1, 2022, second supplement (Exhibit D). Applicant is entitled to a hearing to explore the legal and factual issues this motion presents.

V. The Order's findings regarding trial counsel's failure to object to the hearsay testimony of State's expert (pp. 37-40) are controlled by errors of law and fact.

27. Hearsay can be admitted under 703 when it is used to formulate expert opinion, but Dr. Gomez's testimony did not establish this information was used to formulate her opinion. Instead, Dr. Gomez presented patent hearsay testimony as to the opinion of another, non-testifying pharmacist. (R 136-137). The mere fact that an expert relies on inadmissible evidence does not make the evidence admissible. *See e.g. State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (Rule 703, SCRE, "does not...make hearsay automatically admissible simply because it was relied upon by the expert."); *see also Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (stating Rule 703 "does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion").

28. Fraley's trial counsel admitted she did not object to Dr. Gomez's hearsay testimony, admitted it was hearsay, and admitted she should have objected to it. (Ex. A 37:3-16, 38:16-18).

29. The prejudice of this inadmissible hearsay cannot be overstated. As set forth in earlier arguments, psychosis arising of Vivitrol was Applicant's primary defense to the heinous charges against him. Further, according to the State's trial counsel, Fraley's vivitrol argument "was going to be an issue." (Ex. A 75:25; see also R 94). Dr. Gomez's hearsay testimony was necessary to neutralize this argument:

MS. WEIDAUER: And [Dr. Gomez] had to go into that vivitrol analysis because that was Mr. Fraley's allegation, was that what made?

MS. WILLIAMS: Right. Correct. Exactly.

(Ex. A 76:11-14). A new trial is necessary.

30. This section of the order also lacks specificity in its findings, violating *Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836 (2018) (PCR court must make specific findings as to prejudice, citing multiple cases) and S.C. Code § 17-27-80 (specific findings necessary).

VI. The Order's findings regarding trial counsel's failure to object to the prior bad acts testimony of Kimberly Tompkins (pp. 40-42) are controlled by errors of law and fact.

31. In its findings regarding the failure to object to "prior bad acts" testimony of witness Kimberly Tompkins (Order pp. 40-42), this Court acknowledges that this testimony was the subject of a motion *in limine* and further acknowledges Fraley's trial counsel did not renew her objection contemporaneously with the trial testimony, and she acknowledged that she should have. (Ex. A 39:11-40:6).

32. The incredibly prejudicial nature of "prior bad acts" testimony in sex crimes is evident in the scrutiny Rule 404(b), SCRE, is given by our appellate courts in this context. *See e.g. State v. Perry*, 430 S.C. 24, 35-36, 842 S.E.2d 654 (2020).

33. This Court finds Tompkins' testimony "would not have changed the outcome of [Applicant's] trial." (Order p. 41). However, this "prior bad acts" testimony was significant enough to the State that it made a point to mention it in its closing, painting the Applicant as a predator who attempted to abduct another young girl. (R 748). Tompkins' improper testimony undermines confidence in the outcome of Applicant's trial; prejudice exists and a new trial is required. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

34. This section of the order also lacks specificity in its findings, violating *Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836 (2018) (PCR court must make specific findings as to prejudice, citing multiple cases) and S.C. Code § 17-27-80 (specific findings necessary).

VII. The Order’s findings regarding trial counsel’s failure to object to the hearsay testimony of Ruth Vick (pp. 42-44) are controlled by errors of law and fact.

35. In its findings regarding the failure to object to hearsay testimony of witness Ruth Vick (Order pp. 42-44), this Court found this testimony was deficient, but not prejudicial. This is reversible error. The wrongfully admitted hearsay testimony was that the alleged victim was raped, and that she was raped at an EconoLodge. (R 195, 196; Order p. 42). The alleged victim provided testimony as to these facts. “[I]mproper corroboration testimony that is merely cumulative to the victim’s testimony cannot be harmless.” *Vail v. State*, 402 S.C. 77, 90, 738 S.E.2d 503 (Ct. App. 2013) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). Accordingly, prejudice must be presumed.

36. This Court also cited the “strength of the State’s case” as a basis for a finding of no prejudice. (Order p. 44). This finding does not meet the standard of *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

37. This section of the order also lacks specificity in its findings, violating *Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836 (2018) (PCR court must make specific findings as to prejudice, citing multiple cases) and S.C. Code § 17-27-80 (specific findings necessary).

VIII. The Order’s findings regarding trial counsel’s failure to object to the hearsay testimony of Chad Vick (pp. 45-46) are controlled by errors of law and fact.

38. In its findings regarding the failure to object to hearsay testimony of witness Chad Vick (Order pp. 45-46), this Court erroneously failed to find prejudice for the exact same grounds as the testimony of Ruth Vick.

39. This Court also cited the “strength of the State’s case” as a basis for a finding of no prejudice. (Order p. 45). This finding does not meet the standard of *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

40. This section of the order also lacks specificity in its findings, violating *Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836 (2018) (PCR court must make specific findings as to prejudice, citing multiple cases) and S.C. Code § 17-27-80 (specific findings necessary).

IX. Failure to object to State’s vouching for its witnesses in its closing

41. In its findings regarding counsel’s failure to object to vouching during the State’s closing (Order pp. 47-48), this Court found no prejudice to Applicant. However, “‘improper corroboration testimony that is merely cumulative to the victim’s testimony cannot be harmless.’” *Vail v. State*, 402 S.C. 77, 90, 738 S.E.2d 503 (Ct. App. 2013) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)).

42. This section of the order also lacks specificity in its findings, violating *Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836 (2018) (PCR court must make specific findings as to prejudice, citing multiple cases) and S.C. Code § 17-27-80 (specific findings necessary).

X. The Order’s Procedural History omits continuances

43. This matter was called to hearing no less than six times during its lifespan. Hearings set for November 22, 2019, and January 24, 2020 were both continued for Fraley’s counsel’s appellate brief deadlines, wedding, and father-in-law’s hospice care and funeral. Counsel for Fraley was not notified of the December 11, 2020, hearing before Judge Gravely on the State’s motion to dismiss, but Counsel was able to appear last-minute via WebEx. The March 25, 2021, hearing was continued due to trial counsel’s inability to appear. The September 10, 2021, hearing was also continued. The Order should be amended to reflect these facts, which will be relevant to both appellate review of the Order and potential Federal habeas corpus relief.

XI. The Order does not address other evidence presented to the Court

44. In considering a PCR application, a court may consider “affidavits, depositions, oral testimony or other evidence” in deciding the application. S.C. Code § 17-27-80; *see also Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) (“A trial judge’s role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting.”). At hearing, Applicant’s counsel requested this Court consider evidence filed of record attached to Applicant’s original application and its supplements under S.C. Code § 17-27-80 and Rule 201, SCRE. (Ex. A 68:25-69:22). The State did not object to this request.

45. This Court does not explicitly consider the August 28, 2019 Affidavit of Alta Fraley and the November 8, 2021, Affidavit of Julie Fraley, which corroborate their live testimony.

46. This Court does not consider the records from *State v. Gay*, 2018A1010200733, attached to Applicant's January 31, 2019, supplement to his PCR application. When this Court evaluates the veracity of Applicant's trial counsel's testimony in this matter, it must consider her arrest for obstruction of justice and subsequent plea to unlawful communication and discipline from the South Carolina Supreme Court. *See In re Gay*, 427 S.C. 195, 830 S.E.2d 21 (2019); Rule 509, SCRE.

47. This Court does not explicitly consider the August 7, 2018, Deposition Transcript of the Applicant (Exhibit A to PCR application), which provides support for Applicant's ineffectiveness arguments, and particularly his Vivitrol insanity/intoxication defense: 8:1-11, 15:12-16:4, 40:16-43:24, 56:8-57:18, 83:22-84:7, 100:10-101:3, 104:5-105:15.

XII. The Order does not address ineffective assistance of counsel at sentencing.

48. At the PCR hearing, Fraley's PCR counsel pursued an argument for ineffective assistance of counsel regarding trial counsel's performance at sentencing. (Ex. A 52:18-53:22); the Order does not address this argument.

49. At sentencing, Fraley's trial counsel made no mention of Vivitrol (once Applicant's chief defense), and only mentions Alta Fraley in passing. (R 808-809). Incomplete pursuit of mitigation evidence constitutes ineffective assistance of counsel. *See e.g. Von Dohlen, supra; Council, supra*. Trial counsel's only explanation for this anemic presentation during sentencing was: "it was a horrible day." (Ex. A 53:25). This is not a valid strategy; a new trial is necessary.

XIII. In the alternative, the cumulative effect of the above errors warrants a new trial.

50. Fraley's counsel argued the doctrine of cumulative error at hearing (Ex. A 69:24-70:3, 88:1-16); the Order does not address this argument. When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). The errors set forth in the Order and this motion represent such a scenario; this Court should grant PCR relief on the ground of their cumulative error.

Conclusion

The motion should be granted and Applicant should be granted a new trial.

Dated: 10/24/2022



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Attorney⁸ for Applicant

⁸ Attorney James Falk's involvement with this case was limited to representing the Applicant at the PCR hearing.

Exhibit A

Transcript of December 6, 2021 PCR Hearing
(NOTE: court reporter did not provide exhibits)

Please see bates 1294-1383

Exhibit B

- July 11, 2022 Motion to Strike (for the State's failure to prosecute)
- July 7 ,2022 email from Judge McCoy's law clerk requesting a proposed order
- June 2, 2022 email from SCAG promising proposed order "as soon as possible"
- June 2, 2022 email from Jason Luck re: no proposed order
- March 11, 2022 email from SCAG providing March 10, 2022 email from Judge McCoy's law clerk denying application and requesting proposed order from SCAG in 30 days

Please see bates 1122-1127

Exhibit C

- August 8, 2022 Supplement to Motion to Strike (for the State's failure to prosecute)
- July 29, 2022 email from SCAG claiming the purported proposed order file was "corrupted"
- July 28, 2022 email from Judge McCoy noting she cannot open the purported proposed order
- July 28, 2022 email from SCAG purportedly providing proposed order
- July 20, 2022 email from SCAG requesting extension for proposed order
- July 12, 2022 email from SCAG promising proposed order by July 19, 2022
- July 7, 2022 email from Judge McCoy's law clerk requesting a proposed order
- June 2, 2022 email from SCAG promising proposed order "as soon as possible"
- June 2, 2022 email from Jason Luck re: no proposed order
- March 11, 2022 email from SCAG providing March 10, 2022 email from Judge McCoy's law clerk denying application and requesting proposed order from SCAG in 30 days

Please see bates 1115-1121

Exhibit D

- August 31, 2022 Supplement to Motion to Strike (for the State's failure to prosecute)
- August 31, 2022 email from SCAG to Judge McCoy providing proposed order
- August 31, 2022 email from SCAG to Judge McCoy promising proposed order "around lunch"
- August 30, 2022 email from SCAG to Judge McCoy promising proposed order "tonight"

Please see bates 1112-1114

Exhibit E

Proposed Order submitted by SCAG on August 31, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Gary Fraley, SCDC #364802,	)	Case No.: 2018-CP-08-02576
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before this Court by way of post-conviction relief action commenced by Applicant Gary Fraley on December 28, 2018. An evidentiary hearing into the matter convened before the undersigned on December 6, 2021, at the Berkeley County Courthouse. Applicant was present and represented by Jason S. Luck and James K. Falk, Esquires. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing, as did Applicant's ex-wife, Julie Fraley and Applicant's daughter, Alta Fraley. Applicant's trial counsel, Melisa W. Gay and Assistant Solicitor Anne M. Williams also testified.

This Court had before it a copy of the Berkeley County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; the records from Applicant's direct appeal, including the trial transcript; and the pleadings and records in this post-conviction relief action. After hearing the testimony and evidence presented at the post-conviction relief hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of trial counsel are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. On August 5, 2014, law enforcement officers with the Goose Creek Police Department arrested Applicant following a criminal rampage that included the oral, vaginal, and anal rape of an eleven-year-old girl and an armed standoff with law enforcement at Royal Lanes bowling alley. During its October, November, and December 2014 terms, the Berkeley County Grand Jury indicted Applicant for attempted murder; two counts of possession of a weapon during the commission of a violent crime; unlawful conduct toward a child; third-degree criminal sexual conduct with a minor; three counts of second-degree criminal sexual conduct with a minor; and two counts of kidnapping. On July 13, 2015, Applicant proceeded to a jury trial before the Honorable Kristi Lea Harrington. On July 17, 2015, the jury convicted Applicant as indicted. The trial court sentenced Applicant to: thirty years' imprisonment for attempted murder; five years' imprisonment for each count of possession of a weapon during the commission of a violent crime; ten years' imprisonment for unlawful conduct toward a child; fifteen years' imprisonment for third-degree criminal sexual conduct with a minor; twenty years' imprisonment for one count of second-degree criminal sexual conduct with a minor; thirty years' imprisonment for two counts of second-degree criminal sexual conduct with a minor; and thirty years' imprisonment for the kidnapping charge related to victim Tsafos with a finding that the offense was not sexual in nature, to be served consecutive to all other sentences; and thirty years' imprisonment for the kidnapping of Victim to run consecutively to all other sentences.

On July 23, 2015, the trial court reconvened to clarify its sentences and amend various scrivener's errors on the sentencing sheets. The trial court clarified its aggregate sentence was

ninety years' imprisonment, with the controlling sentence being thirty years' imprisonment for the kidnapping of Victim, followed by a consecutive sentence of thirty years' imprisonment for the attempted murder of Tsafos, followed by a consecutive sentence of thirty years' imprisonment for the kidnapping of Tsafos. The trial court further clarified all other sentences were to be served concurrently to the sentence of thirty years' imprisonment for the kidnapping of Tsafos.

Subsequently, Applicant filed a timely notice of appeal. John Harrison Strom, Esquire, of the Office of Appellate Defense perfected the appeal. In Applicant's appeal, he raised the following issues:

- I. The trial court reversibly erred by refusing to instruct the jury on the verdict form of not guilty by reason of insanity where (A) the court erroneously believed that the defense must prove to the court by a preponderance of the evidence that [Applicant] was legally insane before the defense was entitled to a jury instruction on the affirmative defense and (B) where there was evidence that [Applicant] was legally insane at the time of the offenses were committed, entitling him to the not guilty by reason of insanity verdict form and
- II. The trial court reversibly erred by refusing to instruct the jury on the three lesser-included offenses of attempted murder, where the court wrongly concluded that there was no evidence that [Applicant] had committed any of the lesser included offenses where [Applicant] had testified that he had intended to commit suicide and where the victim had testified that the gun appeared to have simply "went off" while [Applicant] was pointing it at the floor.

The South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion on July 26, 2017. State v. Fraley, Op. No. 2017-UP-305 (S.C. Ct. App. filed July 26, 2017). The remittitur was returned to the circuit court on August 11, 2017.

On December 28, 2018, Applicant, through counsel, filed an application for post-conviction relief. Through its return, filed on April 23, 2019, the State moved to summarily dismiss the application as it was filed after the statute of limitations had expired. A hearing on the State's motion to dismiss was convened before the Honorable Judge Perry H. Gravely on December 11,

2020, via Webex. Judge Gravely denied the State's motion to dismiss and ordered an evidentiary hearing be set in this matter. This hearing followed.

II. Facts Adduced at Trial

On the afternoon of August 5, 2014, Applicant went to his neighbor's house to see if the neighbor's fourteen-year-old daughter could come to a surprise party for his daughter at the local bowling alley. (R. 188). The neighbor's fourteen-year-old daughter Applicant desired was not home, but her brother told Applicant his eleven-year-old sister ("Victim") was home and could possibly attend the party. (R. 189). Victim's brother went to ask his mother's permission for Victim to attend the party and she came to talk with Applicant. (R. 189, 193). Victim's mother had known Applicant for over three years and interacted with him frequently around the neighborhood and at the bus stop, as both had daughters around the same age. (R. 192). Applicant and Victim's mother discussed the party and Applicant showed Victim's mother fossil modeling kits he had for the children to play with at the party. (R. 193-94). Victim's mother called her ex-husband, who was scheduled for visitation with Victim and her siblings that evening, to see if he would permit Victim to attend the birthday party. (R. 193-94). Victim's father gave his permission for Victim to attend the party and agreed to pick up Victim from Applicant's home after the party at 5:30 p.m. (R. 194). Victim left with Applicant in Applicant's vehicle. (R. 194, R. 206).

After leaving Victim's house, Applicant drove to a nearby Publix grocery store. (R. 206). Applicant left Victim waiting in his parked car and went inside the store. (R. 206). Once inside, Applicant quickly went through the store, picking up a bottle of cherry flavored NyQuil cold medicine, a bottle of Johnson & Johnson baby oil, and a six-pack of Natural Light Beer. (R. 469-72, 477-80). Applicant purchased these items and return to the car. (R. 206, 471-72).

Applicant then drove Victim to the EconoLodge motel on North Goose Creek Boulevard. (R. 206, 473). Applicant, who had been checked into Room 125 of the motel since August 3, 2014, told Victim he was staying at the motel rather than his house because his house was without power. (R. 206, 474). Applicant used his key to access his room and went inside with Victim. (R. 206-07). Once inside, Applicant threatened Victim with a handgun and told her not to “test” him. (R. 213-14). Applicant demanded Victim’s iPod and attempted to remove the battery with a pocketknife. (R. 207). Applicant then commanded Victim take a shower, claiming she needed to remove all bacteria before she touched any fossils at the party. (R. 207-08). While Victim showered, Applicant brought Victim a white plastic cup filled with NyQuil and instructed her to drink it so she would not catch a cold from the other children at the party. (R. 208). Victim drank the NyQuil as instructed. (R. 208). Applicant then brought Victim an alcoholic beverage and demanded she drink it. (R. 208). Victim took a sip of the beverage but poured the remaining beverage down the shower drain once Applicant left the bathroom. (R. 208). Victim finished showering and, per Applicant’s instructions, did not put her clothing back on but instead came into the room wearing only her towel and underwear. (R. 209).

Applicant was waiting for Victim on the bed and directed her to sit on his lap. (R. 209). Applicant told Victim his wife was cheating on him and he was going to rape Victim to get back at his wife. (R. 209-10). Applicant then removed Victim’s underwear and rubbed something on her vagina. (R. 210). He thrust his penis into Victim’s mouth and forced her to perform fellatio on him. (R. 211). During the fellatio, Applicant instructed Victim to “go deeper” and pushed her head and mouth farther down on his penis. (R. 210-11).

Next, Applicant mounted Victim while she was on her back and forced her legs apart. (R. 211). Applicant penetrated Victim’s vagina with his penis, causing her to scream and cry. (R. 211-

12). In response, Applicant removed his penis from her vagina. (R. 211-12). He let Victim use the bathroom before forcing her back onto the bed. (R. 212). Once she returned to the bed, Applicant anally penetrated Victim. (R. 212). Victim again screamed and cried. (R. 214). As a result of Applicant's sodomy, Victim defecated on the bed. (R. 212). Following his oral, vaginal, and anal assault of Victim, Applicant turned on the television and put on the animated cartoon SpongeBob SquarePants. (R. 214). Applicant told Victim he would most likely go to jail for raping her. (R. 468).

Applicant confided in Victim that he was going to kill "Steve," the man with whom his wife was having an affair. (R. 214-15). Applicant and Victim then left the motel and Applicant drove to the Royal Lanes bowling alley in Goose Creek, striking a car in the motel parking lot on the way. (R. 215, 344-50). Once they arrived at Royal Lanes, Applicant left Victim in the car and instructed her to wait in the car for ten minutes before getting out. (R. 215).

Applicant entered Royal Lanes through the alley's front doors and went directly to the pro-shop. (R. 276-68). Applicant was well-known at Royal Lanes because his wife, Deonna, was the alley manager. (R. 237-39, 262, 267-68, 275). Applicant had recently been placed on trespass notice and was prohibited from entering the alley based on his disruptive and aggressive behavior towards Deonna and others, including alley owner Steve Tsafos. (R. 267-69, 277). Applicant had been accusing Deonna and Tsafos of having an extramarital affair and sending threatening text messages and Facebook postings about the alleged affair.¹ (R. 244, 251-52, 260, 293, 303).

¹ In response to Applicant's increasingly threatening behavior, which included sending intimidating text messages and Facebook postings, peering into Tsafos's windows at night, keying Tsafos's car, slashing Tsafos's tires, and making a purchase at a gun retailer, Deonna filed a police report with the Goose Creek Police department earlier that day. (R. 248-52, 279-81).

Applicant left the alley briefly, then reentered and looked around before eventually barricading himself in Tsafos's office along with Tsafos. (R. 268-70).

Once inside Tsafos's office, Applicant pointed his gun at Tsafos, who was seated at his desk, called Tsafos a dead man, and prevented Tsafos from leaving the office. (R. 281, 283-84). Applicant demanded answers from Tsafos and referenced the purported affair with Deonna and his inability to pay his bills. (R. 283-87). Tsafos feared for his life and thought Applicant was going to kill him. (R. 284-87, 288). Tsafos attempted to leave the office, but was blocked by Applicant, who still had the gun pointed directly at him. (R. 285-88). Applicant told Tsafos he should be afraid and shot the gun at Tsafos. (R. 286). Tsafos thought the bullet hit him, and then realized the projectile struck the floor. (R. 286). In the fracas that followed, Tsafos fled the office. (R. 287-88, 320).

While Applicant held Tsafos against his will, the Goose Creek Police Department SWAT team had surrounded the bowling alley with a concentration of officers around Tsafos's office. (R. 315-17). Goose Creek Police Department Captain David Aarons, commander of the SWAT Team, negotiated with Applicant for nearly an hour and a half before Applicant was apprehended. (R. 314, 319-32). Throughout negotiations, Applicant lay on the floor of Tsafos's office and conversed with Captain Aarons. (R. 321-28). Applicant repeatedly pled with Captain Aarons not to be shot. (R. 321-30). Applicant asked for and received a cup of red wine and was permitted to smoke a cigarette. (R. 326-31). Applicant called Captain Aarons by his first name, told Aarons that he was doing a good job, but that it would not end well because Applicant had no reason to live. (R. 329). As Applicant neared the end of his cigarette and wine, Captain Aarons made the decision to disarm and apprehend Applicant. (R. 330). After Captain Aarons secured the weapon, other officers with

the SWAT team rushed the office and subdued Applicant with the use of tasers. (R. 331-32, 339-40). Officers placed Applicant under arrest and secured him with handcuffs. (R. 340).

Law enforcement escorted Applicant to a police cruiser and called for medical treatment. (R. 351-52, 356). EMT John Lee and Paramedic Paul Clendenning from the Goose Creek Fire Department responded to the bowling alley based on a dispatch call of a possible shooting and use of a taser on a suspect. (R. 351-52). When they arrived, Lee and Clendenning inspected Applicant for possible taser probes and did not find any. (R. 352, 356). Additionally, Lee and Clendenning examined Applicant and reported he was devoid of any injuries or health problems. (R. 352, 356). Lee noted Applicant was “kind of playful, jovial,” but otherwise lucid, rational, reasonable, and aware of what was happening. (R.352). Clendenning similarly reported Applicant was lucid, aware, and reasonable. (R. 356).

While the standoff ensued inside the bowling alley, Victim left Applicant’s vehicle and sought assistance from a woman nearby, Vanessa Gilchrist. (R. 215, 264-65). Gilchrist, who worked as a cook at Royal Lanes, was sitting outside the bowling alley following her shift when Victim approached her. (R. 262-65). Victim was very jittery and was physically shaking, and Gilchrist sensed something had happened to her. (R. 265). Victim asked to use Gilchrist’s phone and used a piece of paper with phone numbers to try to call her parents. (R. 215-16, 265). Victim’s dad answered, spoke with Victim, and told her to wait inside the alley and he would be there soon. (R. 216, 224, 265). Concerned for Victim, Gilchrist told Victim to wait with her until her father arrived. (R. 265). Shortly thereafter, a crowd of people came running out of the bowling alley and into the parking lot. (R. 266). In the chaos, Gilchrist lost sight of Victim. (R. 266).

When Victim’s father arrived at the bowling alley minutes later, the parking lot was swarming with law enforcement. (R. 216, 224-25). He found Victim and decided to take her and

the rest of the children with him to Dairy Queen at the nearby mall. (R. 225-26). When Victim got into the car, she appeared upset, exclaimed she never wanted to attend another birthday party, and stated she needed to talk to her father alone. (R. 226). Once they arrived at the mall, Victim and her father talked privately and she disclosed Applicant raped her. (R. 226). Victim's father noted she was extremely hot, her face was flushed, and she was in shock. (R. 227). He called Victim's mother, informed her of the rape, and asked her to meet them as soon as possible. (R. 195, 227). He next called law enforcement and reported the rape. (R. 227-28). Victim's mother and the police arrived on the scene and all agreed Victim needed to be taken to a hospital with specialized sexual assault care immediately. (R. 195-96, 227).

Victim's mother and father took her to the emergency room at the Medical University of South Carolina. (R. 196-97, 227). Upon arriving, Victim was examined and treated by Karen Drozd, a specially trained sexual assault nurse examiner. (R. 381-83). Drozd completed a full body examination of Victim, including the use of a Wood's light to illuminate fluids on the body. (R. 383-84). Drozd also collected swabs for later analysis, drew blood for toxicology and disease screening, and took photographs to evidence Victim's injuries. (R. 383-84). Drozd further documented Victim's injuries in a report, which included oozing blood, deep lacerations, and two fissures on her anus. (R. 389-91). Medical care providers also tested for Human Immunodeficiency Virus (HIV) and gave her powerful HIV medication that potentially had long-lasting implications should she been infected with the virus later. (R. 391-92). Drozd also completed a sexual assault kit on Victim. (R. 391-36).

Victim's medical records and injury documentation was also reviewed by Dr. Kendra Ham, a pediatrician and child abuse expert from MUSC. (R. 404-11). Dr. Ham noted Victim has a deep laceration to her posterior fourchette at the six o'clock position, and lacerations or fissures to her

anus at the eleven o'clock position and the six o'clock position. (R. 409-10). She also found oozing blood emanating from the posterior fourchette laceration. (R. 410).

Prior to trial, the various specimens collected from Victim were analyzed and examined. Tracy McKinnon, a forensic toxicologist with the South Carolina Law Enforcement Division (SLED) tested Victim's blood samples. (R. 398-403). McKinnon identified Doxylamine, Methorphan, Methorphanam, and Acetaminophen in Victim's blood, all which were either ingredients or byproducts of NyQuil. (R. 402-03). Dr. Daniel Demers, who was admitted as an expert in DNA analysis, tested various swabs and other items collected in the case. (R. 411-36). Dr. Demers detected blood on Victim's underwear, vaginal swabs taken from Victim, rectal swabs taken from Victim, and Applicant's underwear. (R. 414). He also detected semen on one of the pillowcases removed from Applicant's room at the EconoLodge, Victim's underwear, Applicant's underwear, and various swabs taken from Victim. (R. 414). Dr. Demers detected Victim's DNA on the NyQuil dosage cup and could not exclude Applicant as a contributor to DNA found on the NyQuil bottle. (R. 419-20). Dr. Demers detected Applicant's DNA on the handgun taken from Applicant at the bowling alley and could not exclude Victim as a contributor to a DNA mixture also found on the weapon. (R. 422). Dr. Demers detected a mixture of DNA from both Applicant and Victim on one of the pillowcases. (R. 423-28). He also detected Applicant's DNA on semen found on Victim's underwear, as well as swabs collected from Victim's vagina and anus during the sexual assault examination. (R. 431-33).

Law enforcement took Applicant's cellular phone into custody following his arrest. (R. 441-42). A search of the phone revealed Applicant had been sending threatening messages to Tsafos and the bowling alley's Facebook page. (R. 441-42). Additionally, a review of Applicant's

internet history on the phone showed he searched for Tsafos, private investigators, and GPS tracking devices prior to his criminal rampage. (R. 477).

Applicant was indicted for attempted murder, two counts of possession of a weapon during the commission of a violent crime, unlawful conduct toward a child, third-degree criminal sexual conduct with a minor, three counts of second-degree criminal sexual conduct with a minor, and two counts of kidnapping. Prior to trial and in anticipation of an insanity defense, the court ordered Applicant to undergo evaluations by the South Carolina Department of Mental Health (SCDMH) to determine his competency to stand trial pursuant to S.C. Code Ann. § 44-23-410 and his criminal responsibility and capacity to conform pursuant to S.C. Code Ann. § 17-24-10. (R. 22-33, 129-176, R. 837, 847). Both evaluations were completed by Dr. Anna Gomez, a forensic psychiatrist at the Medical University of South Carolina. (R. 22-33, 129-76, R. 837, 847). Dr. Gomez met with Applicant three times for his criminal responsibility and capacity to conform evaluation: February 9, 2015, February 17, 2015, and May 13, 2015. (R. 133, R. 847).² Dr. Gomez concluded to a reasonable degree of medical certainty that Applicant was criminally responsible and had the capacity to conform his conduct to the requirements of the law. (R. 129-76, R. 847).

Applicant proceeded to a jury trial on July 13, 2015. At the outset of trial, the court held a competency hearing, at which Dr. Gomez testified to a reasonable degree of medical certainty that Applicant was competent to stand trial. (R. 22-33, R. 847). The court then held hearings on Applicant's statements to law enforcement, including the voluntariness of the statement and the State's motion in limine to prevent the defense from using the statements in its case in chief. (R.

² Dr. Gomez met with Applicant on January 9, 2015, to conduct his competency to stand trial evaluation and determined Applicant was competent to stand trial, evidenced in her written report and testimony at trial. (R. 22-33, R. 837).

34-89). The trial court ruled the statements were voluntarily given but granted the State's motion in limine. (R. 34-142). Next, defense counsel moved in limine to prevent the State from delving into Applicant's prior bad acts, including his hit and run car accident while leaving the EconoLodge to go to the bowling alley, his comments to others about his wife having an affair, Applicant's various Facebook postings, his purchase of ammunition, and his repeated attempts to obtain access to other young girls who lived nearby. (R. 90-101). The State filed a pre-trial brief addressing this anticipated motion and also placed arguments on the record opposing defense counsel's motion, including that all acts were relevant to the case and necessary to counter Applicant's anticipated insanity defense. (R. 90-101, 815-36). The trial court denied Applicant's motion in limine. (R. 90-101).

At trial, defense counsel focused on Applicant's mental state leading up to and on August 5, 2014, in furtherance of his claims of insanity. During the State's case, Dr. Gomez testified as to her evaluations of Applicant and her conclusion to a reasonable degree of medical certainty that Applicant was criminally responsible and had the capacity to conform his conduct to the requirement of the law. (R. 129-76, R. 847). Dr. Gomez testified she consulted with a pharmacist on the possible psychiatric side effects of Vivitrol, an injectable medication prescribed to addicts to curb the euphoric effects of alcohol and opiates, as Applicant complained his behavior was a result of receiving a Vivitrol injection in June. (R. 135-38, 148-51). Dr. Gomez testified there are no known psychiatric side effects to Vivitrol and it is highly unlikely his behavior was a result of the injection. (R. 135-38, 148-51). Dr. Gomez further testified Vivitrol is typically out of the bloodstream or only remains in a very low level after twenty-eight days, making it very unlikely any of the medication was still in his system six weeks later on August 5, 2014. (R. 135-38). Dr. Gomez testified in her expert opinion Applicant was not insane at the time of his crime spree. (R.

138-40). She testified Applicant is alcohol dependent and has been diagnosed as depressive disorder recurrent. (R. 138-40). She testified Applicant told her he had been diagnosed with Post-Traumatic Stress Disorder (PTSD), but she found no evidence of this in any of his military or medical records. (R. 138-40). She also noted numerous witnesses described Applicant's behavior during this time period as normal. (R. 129-76).

The State also presented various neighbors of Applicant, who testified regarding his efforts to gain access to other young girls in the neighborhood in the days leading up to violent sexual assault of Victim. (R. 177-90). Kimberly Tompkins, a neighbor of Applicant and Victim, testified Applicant repeatedly tried to persuade her fourteen-year-old daughter to help with his daughter's schoolwork or come to a surprise birthday party in early August 2014, both in person and by voice message, and offered her money. (R. 177-83). She testified Applicant's demeanor was normal, other than his repetitive insistence he take her daughter to the party. (R. 182). Victim's brother and mother also testified Applicant's behavior was normal on August 5, 2014, when he inquired about Victim's older sister coming to the party and eventually took Victim instead. (R. 187-94).

Applicant's estranged wife, Deonna, also testified during trial. (R. 237-261). She testified Applicant repeatedly accused her of having affairs throughout their marriage, including with her boss Tsafos. (R. 237-244, 259-61). She testified her marriage with Applicant was volatile and Applicant often came to the bowling alley to confront her or her co-workers. (R. 238-40). Tsafos wrote her a letter, stressing the bowling alley needed to remain professional and banning Applicant from entering the premises. (R. 239-40). She testified she moved out of the marital home in June of 2014 while Applicant was at a rehabilitation facility in North Carolina receiving treatment for his alcoholism. (R. 240-41, 245). She testified Applicant had been in treatment for his drinking several times and described his heavy drinking throughout their marriage. (R. 244-47). She

testified Applicant buried empty alcohol bottles in the backyard and hid them under his daughter's mattress. (R. 244-47). She testified Applicant had numerous health problems and she began to accompany him to his medical appointments because the things he was telling her did not make sense, including that fuel exposure to his skin caused his ailments. (R. 245-46). Deonna testified every single doctor told her Applicant's health issues were solely related to his alcohol abuse, not military service as Applicant claimed. (R. 245-46). Deonna testified despite Applicant's heavy drinking, he was able to function and would help his daughter with her homework and behave "like a normal person." (R. 247).

Deonna testified she went to the police station around noon on the day of the incident after becoming alarmed upon noticing Applicant made a purchase at a gun store nearby and was heading back to the area. (R. 247-49). She also received a call from Applicant's mother that he had stolen her gun and she intended to file a police report. (R. 248-49). Deonna also recalled various alarming Facebook messages from Applicant. (R. 250-52). She testified she had filed police reports before concerning Applicant. (R. 251). Deonna testified after she filed her police report, she went to work at the bowling alley. (R. 253-54). She testified she had no interaction with Applicant until he showed up at the bowling alley after five p.m. (R. 253-54).

Applicant testified in his own defense and presented a nonsensical, disjointed and self-serving account of the weeks leading up to his August 5, 2014, crime spree. Applicant testified in the summer of 2014, he had a substance abuse problem and was drinking to help him sleep at night. (R. 766). He testified he also had a myriad of other health issues, including gastrointestinal problems prevalent since childhood, liver issues that caused his "brain to malfunction," and a "heart virus." (R. 492-96). Applicant testified he had been diagnosed with PTSD by the VA and a

private psychiatrist had challenged Dr. Gomez's prior testimony that she found no record of Applicant having PTSD. (R. 495).

Applicant testified he tried to quit drinking in March of 2014 and eventually entered an inpatient treatment program in Wilmington, North Carolina. (R. 495-98). Applicant testified he stayed at this rehabilitation center for twenty-five days and was discharged on June 23, 2014. (R. 498-99). Applicant testified prior to his discharge, he received an injection of Vivitrol and was told it would last a month. (R. 499-502). Applicant claimed the injection gave him horrid side effects. (R. 501). After leaving Wilmington, Applicant testified he drove back to the Goose Creek area before eventually returning to Wilmington and begging the rehabilitation center to re-admit him. (R. 501-08). Applicant testified he was experiencing stomach pain so severe that he could not eat and eventually had to be hospitalized in Wilmington. (R. 507-13).

After being discharged, Applicant stayed at a friend's home in the Wilmington area for a few days. (R. 513-14). While at the friend's house, Applicant testified he received a call from his wife's friend informing him Deonna was having an affair with Tsafos. (R. 514). Applicant then left his friend's house and drove to his mother's house in Pennsylvania. (R. 514-15). Applicant claimed he forgot how to read a map or drive a car, making his drive to Pennsylvania all the more arduous. (R. 515-18). Applicant also claimed he was still unable to eat. (R. 517).

Once he arrived at his mother's house, Applicant testified he was so severely ill that he laid on the floor for days. (R. 518-19). Applicant testified he began drinking wine to help him sleep at his mother's insistence. (R. 520). He testified he was throwing up blood and still unable to eat, so his mother took him to the emergency room. (R. 521). Applicant testified he was "emaciated." (R. 521, 525). Applicant claimed to have no clear memory and that he was only able to remember things as "a picture here or there." (R. 522). Applicant testified he refused psychiatric treatment at

the hospital and was discharged into his mother's care. (R. 525-26, 528-29). Applicant testified he stayed at his mother's house for a few days before eventually leaving to drive back to Goose Creek. (R. 530-32). Applicant claimed his mother packed the gun into his bag unbeknownst to him, but later recanted this assertion and said he did not want to blame his mother for his procurement of the firearm. (R. 532-33, 573-74).

Applicant testified it took him four or five days to drive back to South Carolina and he could not eat during the trip. (R. 533-34). He testified when he arrived in Goose Creek, Deonna had moved out of their marital home and was living with Tsafos. (R. 537). He claimed the electricity had been turned off, so he checked into the EconoLodge motel. (R. 537, 540). Applicant testified he waited around at the motel for his electricity to be turned back on. (R. 541-42). Applicant testified he does not recall what happened after that and most of his memory is based on his reading of discovery materials for the case. (R. 542-46). He testified he did not recall sexually assaulting Victim and only recalled telling Tsafos he wanted to kill himself. (R. 545-63). Applicant never denied threatening Tsafos, pointing a loaded firearm at him, or shooting Tsafos. Applicant testified the Vivitrol shot caused him to commit his crimes. (R. 586-87).

Applicant also called Robert Bennett to testify on his behalf. Bennett, who received a pharmacy degree in 1980 and a Ph.D. in pharmaceutical sciences in 1990, was allowed to testify as an expert in pharmacology and toxicology over the State's objections.³ (R. 623-41). Bennett testified he reviewed Applicant's case and medical records to determine if his body was experiencing any toxic effects at the time of his crime spree. (R. 642-44). Bennett discussed the

³ During *voir dire* on his qualifications, Bennett admitted he has not kept his licensures up to date, had not taken any required continuing educational requirement since 1999, and had been served a cease-and-desist letter from the State Board of Pharmacy requesting he stop referring to himself as a pharmacist. (R. 628-34, R. 866).

possible effects on the brain and other organs from gastrointestinal issues and the various other ailments Applicant asserted he suffered. (R. 643-59). Despite testifying Applicant appeared to be malnourished based on his review, he conceded Applicant's medical records repeatedly referenced that he was well-nourished. (R. 664-67). Bennett reiterated he was basing his opinion on Applicant's self-assessment that he had not eaten in weeks and was malnourished, which Bennett opined would significantly affect internal organs and cognitive functioning. (R. 678-79).

In rebuttal, the State called Dr. Todd Magro, a medical doctor who specializes in adult psychiatry and addiction psychiatry. (R. 685-87). Dr. Magro routinely prescribes Vivitrol and was qualified as an expert in psychiatry, medicine, addiction psychiatry, and addiction medicine. (R. 686-88). Dr. Magro reviewed Applicant's medical records, including laboratory results, and concluded Applicant was "[a]t most . . . mildly dehydrated . . . one time[,] [b]ut certainly not starving." (R. 688). Dr. Magro testified there was absolutely nothing in Applicant's medical records to suggest that he was malnourished. (R. 688). Dr. Magro testified that based on his professional experience, there is no connection between gastrointestinal issues and psychosis. (R. 689-90). He further testified there is nothing in Applicant's records that led him to believe Applicant was psychotic at any period of time. (R. 684, 698). Dr. Magro testified Vivitrol does not cause psychosis, memory loss, or any psychiatric or cognitive problems based on his vast experience with the medicine. (R. 691-94). Dr. Magro testified that based on his review of Applicant's medical records, Applicant's primary medical problem was alcohol dependency. (R. 694-95).

Following the close of all testimony, the court asked both parties for any requests to charge. (R. 700). Defense counsel requested an instruction on involuntary intoxication based on Applicant's Vivitrol injection approximately six weeks prior to the crime spree. (R. 700-01).

Defense counsel also requested jury instructions on not guilty by reason of insanity and guilty but mentally ill. (R. 701-13). Defense counsel theorized that the Vivitrol injection caused Applicant's psychosis and instead argued Applicant's "physical state at the time of the incident caused the psychoses," including malnourishment, gastrointestinal, blood, and liver problems. (R. 703-06). The State argued against an instruction of not guilty by reason of insanity, citing a dearth of testimony that Applicant did not know the difference between moral or legal right from wrong. (R. 708-11). Following argument from both parties, the court ruled it would not charge the jury on not guilty by reason of insanity, stating:

There has been no evidence in the record that at the time the crime was allegedly committed that because of that mental disease or defect that you are alleging there – the testimony has always been that the defendant did know the alleged crime in each of the indictments was morally or legally wrong. So I will not be charging insanity, the insanity defense. Note your exception to my ruling.

(R. 712). However, the court ruled it would instruct the jury on guilty but mentally ill as requested by defense counsel. (R. 712-13).

Defense counsel then requested jury instructions on the lesser included offenses of attempted murder, including assault and battery of a high and aggravated nature, assault and battery in the first degree, and assault and battery in the third degree. (R. 713-14). In support of this request, defense counsel argued Applicant did not have the requisite intent for attempted murder. (R. 714). The State objected, arguing a lack of evidence in the record to show any lesser included offense of attempted murder occurred. (R. 714). The court ruled it would not charge any lesser included offenses of attempted murder, stating:

I must charge the law applicable as to the facts as presented. I will not be charging any lesser included's. We discussed this last evening. I do not -- there has been nothing -- the testimony has not changed since last evening, and there is nothing that would indicate

that factually the lesser included's is appropriate. The testimony has been and even your own client's testimony was that when he came out of his fog, the white light, that he had the gun in his hand. So based upon that I will be charging -- I will not be charging any lesser included's.

(R. 714-15).

Following closing argument from both parties, the trial court charged the jury on the law and instructed the jury to begin deliberations. (R. 763-83). The jury deliberated for forty-seven minutes before convicting Applicant on all counts as indicted. (R. 783-85).

III. Issues Before This Court

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. Ineffective Assistance of Counsel;
2. "I was not competent at the time of my trial";
3. "Please see my August 7 2018 deposition transcript, attached as exhibit A"; and
4. "Please see Exhibit A and Exhibit B which is a true and correct copy of a letter from Rebecca A Plummer McCardle, LMSW".

Pursuant to Rule 71.1, SCRCP, on February 4, 2019, Applicant, through PCR counsel, filed a Supplement/ Amendment to Application for Post-Conviction Relief to include the following allegations:

1. I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(1). In addition to the ineffective assistance identified in Exhibit A to my Application and at hearing, I specifically believe that my trial attorney, Melisa Gay, was ineffective for failing to pursue a defense of (and a jury instruction for) involuntary intoxication based on the side effects of Vivitrol. See State v. Shands, Op. No. 5569 (S.C Ct. App. dated June 13, 2018) (Shearouse Adv.Sh. No. 24 at 69) (example of involuntary intoxication jury instruction). One of the side effects of Vivitrol is inability to sleep, and I suffered from this side effect after the Wilmington Treatment Center administered the Vivitrol shot in June of 2014. The sleep deprivation caused by this shot, possibly combined with interactions with my other medications, led to my unusual, bizarre, and psychotic behavior leading up to August 5, 2014. During this period of time, and particularly during the times of my alleged crimes, I

did not understand what I was doing (to the extent I can even remember), and even if I did understand what I was doing I did not understand it was legally or morally wrong.

- a. Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed Aug. 26, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480792> (last visited January 3, 2019) and <https://ctrack.sccourts.org/public/document/view.do?documentID=480795> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- b. Supplemental Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed August 31, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480799> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- c. Vivitrol Medication Guide, FDA (Rev. July 2013) available at <https://www.fda.gov/downloads/Drugs/DrugSafety/UCM206669.pdf> (last visited January 4, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- d. Flavie Waters, et al., Severe Sleep Deprivation Causes Hallucinations and a Gradual Progression Toward Psychosis With Increasing Time Awake, 9 Frontiers in Psychiatry 303 (July 10, 2018) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6048360/pdf/fpsy-09-00303.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- e. Nadine Petrovsky, et al., Sleep Deprivation Disrupts Prepulse Inhibition and Induces Psychosis-Like Symptoms in Healthy Humans, 34 The Journal of Neuroscience 9134 (July 2, 2014) available at <http://www.jneurosci.org/content/jneuro/34/27/9134.full.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- f. Stanley Coren, Sleep Deprivation, Psychosis and Mental Efficiency, 15 Psychiatric Times (March 1, 1998) available at http://www.mpsaz.org/rmhs/staff/rjrrios/psychii/psychcal/files/sleep_deprivation_article_questions.pdf (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- g. Louis Jolyon West, et al., The Psychosis of Sleep Deprivation, 96 Proceedings of the New York Academy of Sciences 66 (Jan. 1962) available at <https://nyaspubs.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1749-6632.1962.tb50101.x> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- h. Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of the attached documents from State v. Gay, 2018A1010200733, which are attached as Exhibit A. See also In re Gay, 375 S.C. 418, 653 S.E.2d 272 (2007); In re Gay, No. 2018-000237 (S.C. Sup. Ct. Order dated March 21, 2018).

On August 23, 2020, Applicant, through PCR counsel, filed a Second Supplement to Application for Post-Conviction Relief to his application to include the following allegation:

1. “Petitioner hereby files the attached excerpts of the May 25, 2018, deposition of Len Allen (pages 1-3, 30, 50-53, Ex. 1) as a supplement to his Application for Post-Conviction Relief.

Pursuant to Rule 71.1, SCRCP, on March 12, 2021, Applicant, through PCR counsel, filed another amendment to his post-conviction relief application to include the following allegations:

1. Trial counsel failed to call Rebecca A. Plummer to testify on my behalf;
2. Trial counsel failed to call Alta Fraley to testify on my behalf;
3. Trial counsel failed to object to hearsay testimony uttered at p. 191 lines 14 through p. 192 l. 11. This testimony went beyond the scope of expert testimony permitted under SCRE 703;
4. Trial counsel failed to make a contemporaneous objection to Kimberly Tompkins’ testimony (pp. 232-238) regarding an incident occurring on the Saturday before the events for which Applicant was charged. Trial counsel argued in limine that the conduct was impermissible 404B evidence. However, by failing to make a contemporaneous objection, trial counsel did not preserve the issue for appellate review;
5. Trial counsel failed to object to hearsay testimony from witness Ruth at p. 250 lines 10-13; p. 251 lines 7-8;
6. Trial counsel failed to object to hearsay testimony from witness Chad at p. 281 lines 12-14; and lines 19-22;
7. Trial counsel failed to object to hearsay testimony of the victim that went beyond “time and place” exceptions set forth in SCRE 801(d)(D) p. 468 lines 11-13; 21-24; and p. 470 lines 8-16;
8. Trial counsel failed to object under SCRE 404(B) to unrelated “bad acts” testimony uttered at p. 569 lines 11-12. 404B testimony should have objected; and
9. Trial counsel failed to object to the State’s vouching for its witnesses at p. 837 lines 12-15; 842 and lines 8-9.

At Applicant’s evidentiary hearing, he proceeded forward on allegations 2-9 of the amended application filed on March 12, 2021. To the extent the allegations set forth in Applicant’s original application and amended applications can be construed as separate grounds for relief from the grounds stated at the PCR hearing, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

IV. Relevant Testimony From Evidentiary Hearing

Applicant's Ex-Wife Julie Fraley's Testimony

Applicant's ex-wife, Julie Fraley (Julie), testified on Applicant's behalf at the evidentiary hearing. Julie testified she and Applicant were married in 1999 and divorced in 2006. Julie testified she had one child with Applicant – Alta Fraley. Julie testified she had sole custody of Alta after the divorce; Applicant had visitation. Julie testified that from 2014-2016, Alta, age 12-14, lived with her in West Ashley. Julie testified her relationship with Applicant remained polite following their divorce, specifically stating her and Applicant remained on speaking terms and communicated regarding Alta's welfare.

When questioned regarding Applicant's trial counsel (Melisa Gay), Julie stated she was unfamiliar with Applicant's trial counsel. Julie opined that following Applicant's arrest, no one, including Applicant's trial counsel, reached out to her to inform her about or discuss Applicant's case with her. Julie stated she had to look up information regarding Applicant's trial and arrest on her own. Julie additionally testified Applicant's wife at the time of his arrest, Deonna, would inform her what was going on with Applicant's case. Julie testified she gave a statement to the Berkeley County Sherriff's department at some point in time; Julie testified the statement contained her contact information. Julie testified that if someone had contacted her and requested to speak with Alta, she would have allowed them to do so.

On cross-examination, Julie testified she only became aware that Melisa Gay was Applicant's trial counsel following Applicant's trial. When asked what benefit she believed Applicant would have received should Applicant's counsel have reached out to her, Julie testified she did not know. Julie further testified she could determine whether it would have been good or bad for Alta to be involved in her father's trial – noting, Alta was twelve years old at the time.

Applicant's Daughter Alta Fraley's Testimony

Applicant's daughter, Alta Fraley, also testified at Applicant's evidentiary hearing. Alta testified she lived with her mother, Julie Fraley, from 2014 to 2016. Alta testified she had a cell phone during that time and in August 2019, delivered photographs of text messages from that phone to PCR Counsel Jason Luck's office. (see Applicant's Exhibit #1). Alta testified the text messages as seen in Exhibit #1 were communications between her and Applicant prior to Applicant's arrest. Regarding Alta's communications with Applicant, she stated she attempted to keep in contact with Applicant through both phone calls and texts.

Alta testified that during conversations with her father throughout 2013 and 2014, Applicant spoke to her about strange matters. Specifically, Alta testified Applicant had told her on different occasions he had been struck by lightning; text her to tell her he had seen bigfoot; and told her he had throat cancer and would only live a week. Prior to 2014, Alta testified she and Applicant had discussed hunting for bigfoot. However, Alta stated Applicant had not previously indicated seeing bigfoot. When questioned whether this conversation or joke about bigfoot was ongoing between herself and Applicant, Alta testified they watched bigfoot shows together and talked about camping and finding bigfoot.

Alta testified Applicant's texting style had changed during this period as well. Alta stated Applicant had begun adding spaces and punctuation in odd places. Alta further testified she believed Applicant errantly text her believing her to be Deonna (Applicant's ex-wife) at some point. Alta testified she told her mother about Applicant's strange behavior and the strange texts she was receiving; however, her mother, Applicant's ex-wife, did not do anything.

When asked if she knew where Applicant was prior to when he began sending these texts to her, Alta testified he was probably in Pennsylvania. Alta elaborated, testifying Applicant had

gone to his mother's house in Pennsylvania prior to the strange texts. Alta testified that based on her experience and knowledge of her father she did not believe he was in his right mind. However, Alta further testified that following the trial, she was not able to speak with Applicant again until she was eighteen years old.

Alta testified she did not know or speak with Applicant's trial counsel Melisa Gay and testified she remembers asking her mother whether she needed to testify at Applicant's trial. Alta stated that if trial counsel would have requested to speak to her, she would have. Alta additionally testified she believed she had the wherewithal at the age of thirteen to effectively testify on Applicant's behalf. Specifically, Alta testified she knew there was something wrong with Applicant at the time of the incident and opined again Applicant did not have the presence of mind to have committed these crimes. Alta further tried to analyze and explain why Applicant's texts and the way he responded showed he did not know what he was doing.

Trial Counsel Melisa Gay's Testimony

Applicant next called trial counsel, Melisa Gay (Counsel), as a witness. Counsel testified she has been practicing criminal law for thirty-one years and was retained to represent Applicant in this matter. Counsel testified Applicant was an alcoholic who had received out-of-state treatment for his alcoholism prior to the incident. Regarding the incident, Counsel testified Applicant created a ruse – a child's birthday party – to lure one of his neighbor's daughters out of her house. Counsel testified Applicant took Victim to an EconoLodge; Counsel further testified there is video evidence of Victim leaving the EconoLodge with wet hair, supporting Victim's contention Applicant made her shower after he raped her. Counsel testified evidence supported the State's case Applicant then took Victim to the bowling alley where his ex-wife worked and where he was eventually apprehended. Counsel testified there was plenty of evidence to support the

State's case and she believed the State had enough evidence to convict Applicant. Due to the strength of the State's evidence, Counsel testified Applicant's theory of defense heavily relied on Applicant's mental state.

Regarding Applicant's mental state, Counsel stated Applicant believed a medicine he had taken to treat his alcoholism, Vivitrol, "sent him off the deep end". Counsel testified Applicant insisted he had not been given the accurate side effects of his alcoholism treatment and had experienced psychosis because of the treatment. Because of Applicant's assertions regarding his mental health, Counsel stated she had a mental health evaluation performed pursuant to *Blair*⁴ and *M'Naghten*⁵. Counsel testified Applicant was sent to the state hospital for mental health evaluations.

Counsel testified she spoke with Applicant's mother about his mental health as well as spoke with Applicant about pleading not guilty by reason of insanity. Counsel testified Applicant met with mental health professionals on three separate occasions and was found competent to stand trial. Additionally, Counsel testified she discussed Applicant's case with Dr. Robert Bennett. Dr. Bennett testified on Applicant's behalf at trial regarding the possible effects Applicant's gastrointestinal issues and other self-assessed ailments could have on Applicant's brain. Counsel stated Dr. Bennett testified that because Applicant had stopped eating, the malnutrition deteriorated his mental abilities. Counsel stated she argued during closing arguments Applicant had lost his ability to normal function when he could not eat.

Regarding Applicant's allegation trial counsel was ineffective for failing to call Alta Fraley to testify, Counsel testified she did not believe Alta, nor Applicant's ex-wife, Julie Fraley's,

⁴ *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

⁵ *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

testimony would have been helpful to Applicant's defense. Counsel testified she spoke mostly with Applicant's mother prior to trial. Counsel testified it was her belief that Applicant and his Julie were not on speaking terms. Counsel testified she believed Applicant did not want to burden his at-the-time thirteen-year-old daughter with his case. Additionally, Counsel testified Alta's age deterred her from discussing the case with her. Counsel stated that discussing the matter with Alta at the age she is today would have been more beneficial; however, Counsel re-iterated Alta's age at the time of the trial was a large factor in her decision not to call on Alta to testify. Counsel further testified she was unaware of the text messages between Applicant and Alta prior to this evidentiary hearing.

Regarding Applicant's allegation Counsel failed to object to hearsay testimony from Dr. Anna Gomez that Applicant asserts went beyond the scope of expert testimony permitted under SCRE 703, Counsel testified she did not see a need to object because Dr. Gomez was describing what she did in order to prepare for the evaluation of Applicant. Counsel stated Dr. Gomez, an expert in the field of forensic psychiatry, performed the evaluation of Applicant for his assertion of an insanity defense. Counsel further testified she made a hearsay objection prior to Dr. Gomez's testimony on Vivitrol that was overruled by the trial court. Counsel testified she did not object to the testimony Dr. Gomez gave regarding the Vivitrol drug as Counsel believed Dr. Gomez was giving her opinion on the pharmacists about Vivitrol.

When asked whether Applicant wished to proceed to trial, Counsel testified he did. Counsel testified it would have been beneficial to Applicant's case if she could have found a witness to testify the Vivitrol drug affected Applicant negatively or led to psychosis. However, it was fully Applicant's decision to proceed to trial.

Regarding Applicant's allegation she did not object to testimony from multiple witnesses including Kimberly Tompkins, Ruth Vick, and Chad Vick, Counsel testified she did not believe there was a reason to contemporaneously object to testimony as she had renewed all motions at the close of testimony. Regarding Counsel's failure to object to testimony from Victim's mother, Counsel testified Victim's mother, Ruth Vick, was a first reporter and believed Ms. Vick was therefore able to testify to what she had reported regarding Victim's statements about the rape under 801(d), SCRE. Counsel further testified Victim's father, Chad Vick, also testified, positing she felt she should have objected to his testimony as it bolstered the testimony of Victim. Regarding Applicant's allegation Counsel failed to object to testimony from Karen Drozd that went beyond "time and place", Counsel testified she did not object. Counsel reasoned Ms. Drozd's testimony was admissible because Ms. Drozd was describing her examination of the patient (Victim) and was therefore admissible pursuant to the medical diagnosis exception to hearsay.

Finally, regarding Applicant's allegation Counsel was ineffective for failing to object to statements made during closing which Applicant alleged improperly vouched for the State's witnesses, Counsel testified she did not object to the closing argument as a trial strategy. Counsel further testified it is not her practice to object during closing; Counsel further testified she believes the trial judge corrects any overstepping by the State when the court instructs the jury that closings are not to be viewed as testimony and rather as argument.

Applicant Gary Fraley's Testimony

Applicant briefly testified on his own behalf at the evidentiary hearing. When questioned whether he requested Counsel contact his daughter, Alta Fraley, Applicant testified he had. Specifically, Applicant testified he asked Counsel to reach out to Alta around the same time his house was being sold. Applicant did not remember if this request to Counsel was made prior to or

following his competency evaluation.

Solicitor Anne Williams' Testimony

The State called Solicitor Anne Williams (Williams) as a witness. Williams testified she has been practicing law since 1998 and was first chair for the State in this matter. Upon request, Williams gave a brief recitation of the State's evidence in this case, averring Victim in this matter was the eleven-year-old daughter of Applicant's neighbor who Applicant lured out of her home under false pretenses. Williams testified State's evidence showed Applicant drugged Victim and anally, orally, and vaginally raped Victim. Williams further stated Applicant made Victim shower to destroy evidence of the rape following the assault. After Applicant raped Victim, Williams stated evidence showed Applicant took Victim to the bowling alley where his ex-wife worked and left her in his car while he went inside. Williams further testified that after entering the bowling alley, Applicant took a person hostage and was eventually arrested by police. Regarding Victim, Williams testified Victim found a phone and called her parents to pick her up from the bowling alley. Williams testified she could not recall any specific plea negotiations but would have expected a similarly situated Applicant to have pled to the charges as there was a large amount of evidence against him.

Williams testified there were medical records in discovery regarding both Applicant and Victim. When questioned whether evidence existed to support Applicant had been acting abnormally prior to the incident, Williams testified that despite Applicant having a history of medical problems, there was nothing substantial to support an insanity defense. Williams additionally testified that due to Applicant's voluminous medical records, Applicant could not show his medical issues legally excused his behavior.

Williams was also questioned regarding Applicant's allegation trial counsel failed to object to hearsay testimony from Dr. Anna Gomez that allegedly went beyond the scope of allowed expert testimony. Williams testified that due to the amount of information asked during trial and in the record regarding the drug Vivitrol, she believed Dr. Gomez's testimony was Gomez's attempt to fully respond and her professional due diligence.

Williams was further questioned regarding Applicant's allegation trial counsel failed to object to hearsay testimony that went beyond time and place exceptions as set forth in SCRE 801(d)(D). Williams testified that time and place is not the only hearsay exception, further stating she did not believe the testimony referenced in Applicant's application and testified to by Karen Drozd objectionable. Specifically, when asked why she pursued the line of questioning she had regarding ejaculation and penetration, Williams testified she did so to lay a foundation as the Ms. Drozd's testimony was admissible under the medical diagnosis exception.

V. Standard of Review

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to

collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant

making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. “The burden of rebutting this presumption ‘rests squarely on the defendant,’ and ‘[i]t should go without saying that the absence of evidence cannot overcome [i]t.’” *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, “even if there is reason to think that counsel’s conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that *no competent lawyer would have chosen*.” *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[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.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578,

592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 (“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). “Defense lawyers have ‘limited’ time and resources, and so must choose from among ‘countless’ strategic options.” *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). “Such decisions are particularly difficult because certain tactics carry the risk of ‘harm[ing] the defense’ by undermining credibility with the jury or distracting from more important issues.” *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel’s actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*’s deferential standard.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a

reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”).

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient “to show [counsel’s] errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective

assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

VI. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments made by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised and finds each to be without merit. Therefore, pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Allegation Counsel was Ineffective for Failing to Call Alta Fraley to Testify

Applicant claims Counsel was ineffective for failing to call his daughter Alta Fraley to testify on his behalf at trial. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the

witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

“In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may

corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial). Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court finds Counsel was not deficient in her decision not to call Applicant's daughter, Alta Fraley, to testify at Applicant's trial. Specifically, this Court finds Counsel credibly testified she did not believe Alta's, nor Julie, Applicant's ex-wife's testimony would have been helpful to Applicant's defense. Counsel testified it was her understanding and belief at the time of trial that Applicant and Applicant's ex-wife, who had custody of Applicant's minor daughter Alta, were not on speaking terms. Counsel further testified Alta's age at the time of trial deterred her from discussing the matter with Alta and was a large factor in her decision not to call on Alta to testify. Additionally, Counsel testified she was unaware of the text messages sent between Applicant and Alta. This Court finds Applicant has failed to establish deficiency in Counsel's failure to call Applicant's minor daughter to testify. This Court finds Counsel's decision not to call Alta based on her age was not unreasonable based on the facts of this case. Furthermore, this Court finds Counsel's failure to call Applicant's daughter as a witness was not prejudicial. As such, Applicant has failed to show any deficiency in Counsel's performance and any resulting prejudice. Accordingly, this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to Hearsay Testimony
that Went Beyond the Scope of Expert Testimony***

Applicant alleges Counsel was ineffective in failing to object to alleged hearsay testimony by Dr. Anna Gomez which Applicant contends went beyond the scope of expert testimony as permitted under SCRE 703. “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.” Rule 703, SCRE. “If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” *Id.* Additionally, “[t]o the extent . . . relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.” Rule 803(18), SCRE. As noted previously, “when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith*, 386 S.C. at 567, 689 S.E.2d at 632 (citing *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517).

Applicant alleges Counsel was ineffective for failing to object to the following testimony:

A: And so what the pharmacist explained to me was that when somebody received a Vivitrol injection the blood levels really reach their maximum in about two or three days and then they kind of reach this plateau of sorts, and then 14 days after the initial injection they continue to come down, come down, and come done; such that by the end of the day you have very low levels in your blood. That is why is it dosed about every 28 days.

She also explained that the Vivitrol itself doesn’t change the effects of alcohol. Like if you drink you can still be drunk and have blackouts. So you may not feel that euphoria, that feel good from the alcohol; but everything else is still going to be a possibility.

And then lastly I asked her about, you know, side effects that affect the mind due to this medication, and she said that she was not aware of any psychiatric side effects to include memory loss, loss of awareness of one’s actions or confusion as a result of using Vivitrol.

In addition, just the timeline, i.e. having received the medicine six weeks earlier being in fact overdue for the next dose if you are going to receive that treatment it just really didn't make any sense to her.

(R. 136-137).

Solicitor Williams thereafter asked:

Q. And made this inquiry because Mr. Fraley was telling you that the Vivitrol was making him behave that way during the time of the crimes; is that correct?

A. Yes, that was the strong insinuation.

Q. Okay. Now in order to do your report you have to figure out whether whatever you evaluate for Mr. Fraley meets the legal standard of insanity; is that correct?

A: Yes.

(R. 137).

Prior to the above-referenced testimony, Dr. Gomez explained she met with Applicant three different times – February 9th, February 17th, and May 13th, 2015 – in response to the court ordering an evaluation of Applicant for his assertion of an insanity defense. (R. 133). Dr. Gomez testified that prior to her examination of Applicant and to form her opinion, she reviewed a variety of legal records, medical records, and police interviews. (R. 133-134). In addition to the records and interviews reviewed, Dr. Gomez testified she received additional information from Applicant. (R. 134). Dr. Gomez testified that based on the information received from Applicant, she spoke with a pharmacist. (R. 135). Dr. Gomez testified she spoke with the pharmacist because:

[M]r. Fraley was making the contention that he had received a medication while being in Wilmington Treatment Center at the end of June that had a variety of effect on his mental abilities, and that was really not consistent with my knowledge of that medicine and what I found myself looking at the information available from the manufacturers of that medicine.

And so in order to be as thorough as I could be with that, you know, piece of information, I went ahead and contacted a pharmacist who specializes in medications related to mental health and has – she has certification in that – to get

her opinion on the medicine and its effects given the issues that were arises in this situation.

(R. 135).

At the evidentiary hearing, Counsel testified she made a hearsay objection prior to Dr. Gomez's testimony on Vivitrol. Counsel's objection was overruled by the trial court. Counsel further testified that she did believe an objection was necessary as Dr. Gomez was describing her preparation in her evaluation of Applicant and Applicant's contention the Vivitrol drug was cause for an insanity defense.

The Court finds no ineffectiveness on the part of Counsel. The record provides that Dr. Gomez's testimony was not based upon speculation, but rather was based upon a combination of data from her vast experience and prior knowledge, upon which she was entitled to rely as an expert witness. Additionally, this Court finds the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

This Court finds the record reflect that when Dr. Gomez was questioned on cross-examination regarding whether she contacted the pharmacist because she "didn't feel as if [she] had enough information in [her] own repertoire, Dr. Gomez stated:

I did not contact her because I didn't have enough information in my repertoire. I contacted her because this is her specific area of expertise and I thought it would be doing a good job if I did that. I did not have to contact her. (R. 147).

Therefore, this Court finds Applicant's contention that Dr. Gomez's testimony was objectionable as hearsay is baseless, and Counsel was not deficient for failing to advance that argument. Second, Counsel explored the same subject matter on cross-examination and did so in an evident effort to discredit Dr. Gomez. Applicant offers no compelling argument as to precisely how the inclusion harmed him, or how but for their exclusion the outcome at trial would have been

different. Therefore, the Court finds Applicant cannot show prejudice. Accordingly, the Court finds no ineffectiveness on the part of Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object and
Preserve an Issue for Appellate Review***

Applicant asserts Counsel was ineffective for failing to make a contemporaneous objection to witness Kimberly Tompkins' testimony regarding an incident occurring on the Saturday before the incident occurring on Tuesday for which Applicant was charged. The Court finds these allegations are without merit.

Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); *see also id.* at 380, 811 S.E.2d at 804 (“[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court’s finding If so, an appellate court would necessarily have affirmed the trial court’s [ruling]”).

Similarly, “[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence.” *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” *Id.*; *see Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d

1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Trial counsel testified she did not object to the introduction of Ms. Tompkins testimony as she had already moved in limine to limit any testimony discussing Applicant's prior bad acts. Specifically, during pretrial motions, Counsel argued to exclude testimony on Applicant's prior attempts to coerce another neighbor's child out of her home three days prior to the incident. (R. 91-92). Counsel further argued Applicant was not charged with the event in question and therefore any testimony elicited regarding Applicant's prior attempt was extremely prejudicial to Applicant's case. (R. 92). In response to Applicant's motion, the State argued *res gestae*, argued that Applicant had asserted an insanity defense and therefore the testimony was relevant, and argued Counsel planned to present evidence dating back to the June prior to the incident in support of his insanity defense. (R. 92-94). Thereafter, the trial court denied Applicant's motion in limine and found the testimony relevant and admissible. (R. 101).

This Court finds Applicant failed to meet his burden of proving that Counsel's failure to object to Ms. Tompkins' testimony was deficient. Though counsel did not contemporaneously object to the testimony of Ms. Tompkins, Counsel argued in limine to limit the testimony and the trial court denied Applicant's motion. Additionally, barring any alleged deficiency, this Court finds Applicant has failed to show prejudice. Specifically, this Court finds any objection Counsel would have made to Ms. Tompkins testimony would not have changed the outcome of his trial. This Court further finds evidence exists in the record to support the trial court's finding denying Applicant's motion in limine and finds an appellate court would have necessarily affirmed the trial court's ruling should Counsel have objected. As Applicant has produced no probative evidence

towards meeting his burden as to either prong of *Strickland*, accordingly his demand for relief by way of this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to
Hearsay Testimony from Witness Ruth Vick***

Applicant alleges Counsel was ineffective for failing to object to the following testimony from Victim's mother, Ruth Vick, at trial: "He said he was at the Northwoods and that he had taken [victim] outside and talked to her while the other children were inside of the food court, and then he said [victim] had been raped and get there as soon as we could". (R. 195). Applicant additionally alleges Counsel was ineffective for failing to object when Victim's mother testified: "[Victim] told me that there was no birthday party, that she had been taken to the EconoLodge and raped". (R. 196).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Trial counsel may be deficient for failing to object to hearsay testimony without a valid trial strategy. *Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018). However, trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. *Id.* 423 S.C. at 246, 814 S.E.2d at 493.

Additionally, a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident[.]" Rule 801(d)(1)(D), SCRE. Under the rule, "corroborative testimony cannot include 'details or particulars' regarding the assault." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629,

632 (2010); *see also, e.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) (holding a pediatrician’s testimony of a minor victim’s disclosure that his father watched pornography with them and made the victims fellate him was impermissible hearsay which did not fall under the medical diagnosis exception); *Huggler v. State*, 360 S.C. 627, 602 S.E.2d 753 (2004) (holding written statements provided by children victims to police which detailed sexual acts that they engaged in with the defendant constituted impermissible hearsay, and that trial counsel’s failure to object constituted deficient performance, but that the defendant was not prejudiced because the evidence was overwhelming); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (holding testimony by four witnesses recounting a minor victim’s disclosure of the identity of her abuser constituted impermissible hearsay, and that trial counsel’s failure to object constituted ineffective assistance); *State v. Whisonant*, 335 S.C. 148, 154-55, 515 S.E.2d 768, 771 (Ct. App. 1999) (holding stepmother’s testimony to be hearsay where she recounted in graphic detail the nature of the abuse disclosed to her by the victim).

“Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.” *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (citing *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)); *see also Thompson v. State*, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (recognizing the concurrence and dissent in *Jennings* collectively overruled *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994) “and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error”). In considering whether improperly admitted testimony was harmless and whether an Applicant was prejudiced under *Strickland*, the Court must “consider the strength of the State’s case apart from the inadmissible evidence to which trial counsel deficiently failed to object.” *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492-93.

This Court finds Counsel testified she did not believe this testimony was objectionable and believed Victim's mother, as a first reporter, was permitted to testify to the above-referenced statements. This Court finds Ms. Vick testified to out-of-court statements made by Mr. Vick which were hearsay and inadmissible. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. *See State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). While Counsel may have been deficient for failing to object to the hearsay testimony, Applicant has failed to meet his burden of proving how this failure to object prejudiced him. Whether the objection to this instance of hearsay testimony would have changed the outcome of the trial is mere speculation. *See Clark*, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice). Moreover, this Court in considering the strength of the State's case apart from the inadmissible statements finds this admitted testimony was harmless and Applicant was not prejudiced by Counsel's failure to object. Accordingly, this allegation must be **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to
Hearsay Testimony from Witness Chad Vick***

Additionally, Applicant alleges Counsel was ineffective for failing to object to Victim's father, Chad Vick's, testimony. Chad testified to the following at trial: "And she told me she hope she's not pregnant. And I said what do you mean. And she was like I was raped." (R. 226). Mr. Vick additionally testified, "And I asked her I was like what do you mean you were raped, you know. And she is like Dad I was raped. She is like there was no birthday, I was taken to the hotel EconoLodge. She said, "And Gary raped me"." (R. 226).

As defined above, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule

801(c), SCRE. This Court finds Counsel testified she believes she should have objected to the above-referenced testimony from Chad Vick. Based on the case law *supra*, Mr. Vick testified to out-of-court statements made by Victim which were hearsay and inadmissible. Additionally, as mentioned above, hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. *See State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). While Counsel may have been deficient for failing to object to the hearsay testimony, Applicant has failed to meet his burden of proving how this failure to object prejudiced him. Therefore, whether the objection to this instance of hearsay testimony would have changed the outcome of the trial is mere speculation. *See Clark*, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice). Therefore, this Court, in considering the strength of the State's case apart from the inadmissible statements finds this admitted testimony was harmless and Applicant was not prejudiced by Counsel's failure to object. Accordingly, this allegation must be **DENIED**.

Allegation Counsel was Ineffective for Failing to Object to Hearsay Testimony that Went Beyond "Time and Place" Exceptions in SCRE 801(d)(D)

Applicant alleges Counsel failed to object to hearsay testimony of Victim that went beyond the "time and place" exception set forth in 801(d)(D). Specifically, Applicant alleges Counsel failed to object to the three separate instances of testimony from Karen Drozd including the following exchange between the solicitor and Ms. Drozd:

Q: Okay. And was she able to tell you if ejaculation had occurred?

A: She was not aware of that. (R. 385).

Prior to the above question and response, the solicitor inquired whether it would be important for medical treatment and diagnosis of the patient to know when a sexual assault occurred and whether ejaculation and/or penetration. (R. 384). Ms. Drozd responded affirmatively to all inquiries from the State.

Applicant further alleges Counsel was ineffective for failing to object to the following questioning during direct examination between the solicitor and Ms. Drozd:

Q: And did she tell you if penetration occurred?

A: Yes.

Q: And where did she say that penetration occurred?

A: Mouth, vagina, and anus. (R. 468).

Ms. Drozd testified following this colloquy that determining whether penetration occurred and determining where penetration occurred were both necessary in her decision regarding the type of exam to be performed on Victim. Applicant further alleges Counsel was ineffective for failing to object to the following:

A: She told me she had NyQuil and alcohol.

Q: Okay. And did she say she took those voluntarily or they were given to her?

A: They were given to her. Forced.

Q: Okay.

A: She told me forced. (R. 470).

Hearsay is not admissible unless it is pursuant to an exception provided by the South Carolina Rules of Evidence or other means. Rule 802, SCRE. For example, “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are admissible pursuant to the trial court’s discretion. Rule 803(4), SCRE. As explained by the Supreme Court of South Carolina, “[A]fter recent trauma, these types of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment.” *State v. Simmons*, 423 S.C. 552, 564, 816 S.E.2d 566, 572 (2018); *also State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997)

("[A] statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim.")

The challenged statements qualify as and fall under the exception for statements made for the purpose of a medical diagnosis. This Court finds Victim's statements to Drozd about the rape were essential to her medical evaluation, diagnosis, and treatment. Therefore, Counsel was not deficient for failing to object to any of the above testimony of Ms. Drozd. Furthermore, this Court finds Victim testified to same. Specifically, this Court finds Applicant was not prejudiced by the testimony as it was duplicative and would not have changed the result of the trial should Counsel have objected. Accordingly, this allegation must be **DENIED**.

Allegation Counsel was Ineffective for Failing to Object to State's Vouching of Its Witnesses

Lastly, Applicant alleges Counsel was ineffective for failing to object to the following statements made by the solicitor: "When you think about Ruth Vick and Chad Vick what kind of people are these? These are people who are respectful, they have good jobs, they take care of their family." and "He said I know I am going to jail because this is rape. He knew what the law was. He chose to not conform his behavior (R. 745, 750). Applicant argues these remarks by the State vouched for the State's witnesses and prejudiced him in that he was denied a fair trial.

This Court finds Counsel was not ineffective for failing to object to the State's remarks during closing arguments. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *State v. Mouzon*, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), *aff'd*, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing *Herring v. New York*, 422 U.S. 853

(1975)). “A solicitor’s closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” *Id.* at 609–10, 602 S.E.2d at 744. “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* This Court finds Applicant cannot demonstrate he did not receive a fair trial because of these remarks. Furthermore, Counsel testified she did not object to the Solicitor’s comments during closing arguments because it is not her practice. Counsel further testified she believed that any overstepping by the solicitor was cured by the trial court’s instruction to the jury regarding closing arguments – they are not to be considered evidence. Therefore, this Court finds Counsel was not ineffective in not objecting to the State’s remarks during closing argument and Applicant has failed to meet the burden imposed upon him. Accordingly, Applicant’s claims pertaining to Counsel’s failure to object during closing arguments are **DENIED**.

VII. Conclusion

Based on the evidence presented at the PCR hearing and a thorough review of the record before this Court, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty

days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203 SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this ____ day of _____, 2022.

JENNIFER B. MCCOY
Presiding Circuit Court Judge
Ninth Judicial Circuit

_____, South Carolina

Exhibit F

Comparison of factual recitation in State's September 8, 2016 brief
in direct appeal and August 31, 2022 proposed order

Final Brief of the State (Respondent) in Applicant's direct appeal (p. 17). (Sept. 8, 2016)

Defense counsel also requested jury instructions on not guilty by reason of insanity and guilty but mentally ill. (R. 701-13). Perplexingly, defense counsel abandoned her earlier case theory that the Vivitrol injection caused Appellant's psychosis and instead argued Appellant's "physical state at the time of the incident caused the psychoses," including malnourishment, gastrointestinal, blood, and liver problems. (R. 703-06). The State argued against an instruction of not guilty by reason of insanity, citing a dearth of testimony that Appellant did not know the difference between moral or legal right from wrong. (R. 708-11). Following argument from both parties, the court ruled it would not charge the jury on not guilty by reason of insanity, stating:

Proposed Order of the State (August 31, 2022) / Order of the Court (October 17, 2022)

Defense counsel also requested jury instructions on not guilty by reason of insanity and guilty but mentally ill. (R. 701-13). Defense counsel theorized that the Vivitrol injection caused Applicant's psychosis and instead argued Applicant's "physical state at the time of the incident caused the psychoses," including malnourishment, gastrointestinal, blood, and liver problems. (R. 703-06). The State argued against an instruction of not guilty by reason of insanity, citing a dearth of testimony that Applicant did not know the difference between moral or legal right from wrong. (R. 708-11). Following argument from both parties, the court ruled it would not charge the jury on not guilty by reason of insanity, stating:

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Second Supplement to Motion to Strike

Petitioner supplements his Motion to Strike for Failure to Prosecute with the attached emails (Exhibit C and Exhibit D).

Dated: 08/31/2022



Jason Scott Luck (#73676)
P.O. Box 47
Bennettsville, SC 29512
843.479.6863 (o)
843.479.7222 (f)
jason@luck.law
Attorney for Plaintiff

Certificate of Service

I, the undersigned, certify that on the date set forth below, a copy of the supplement to the motion to strike was placed in the United States Mail, First Class, postage prepaid, addressed to the following:

SCAG
ATTN: Samantha Weidauer, Esq.
P.O. Box 11549
Columbia, SC 29211

Dated: 09/01/2022



Jason Scott Luck
P.O. Box 47
Bennettsville, SC 29512

Subject: RE: Gary Fraley | proposed Order of Dismissal | PCR Case No.: 2018-CP-08-02576
Date: Wednesday, August 31, 2022 at 9:36:01 AM Eastern Daylight Time
From: Sammie Weidauer
To: Jason Luck, McCoy, Jennifer B.
CC: McCoy, Jennifer B. Secretary (Brooke Slade), McCoy, Jennifer B. Law Clerk (Victoria Tuten), jfalklaw@gmail.com
Attachments: image001.png

Judge McCoy & Jason,
I am out of the office this morning but will send this proposed Order around lunch today!

SAMANTHA WEIDAUER, Assistant Attorney General
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-9603
P.O. Box 11549 | Columbia, SC 29211
scag.gov



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From: Sammie Weidauer <sammieweidauer@scag.gov>
Sent: Tuesday, August 30, 2022 1:12 PM
To: Jason Luck <jason@luck.law>; McCoy, Jennifer B. <jmccoyj@sccourts.org>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; jfalklaw@gmail.com
Subject: Re: Gary Fraley | proposed Order of Dismissal | PCR Case No.: 2018-CP-08-02576

Judge McCoy and Jason,
I am currently working on finishing this proposed Order as it was corrupted in my last submission. I had court yesterday, I have a full term of court next week, I've had 2 appellate filings due in the past two weeks, and have had Covid this month. I will submit tonight.
Sammie Weidauer

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Subject: Gary Fraley | proposed Order of Dismissal | PCR Case No.: 2018-CP-08-02576
Date: Wednesday, August 31, 2022 at 4:05:54 PM Eastern Daylight Time
From: Sammie Weidauer
To: McCoy, Jennifer B., Jason Luck, jfalklaw@gmail.com
CC: jmccoysc@sccourts.org, jmccoyle@sccourts.org
Attachments: image001.png, Fraley, Gary - proposed OOD (03089910xD2C78).DOCX

Judge McCoy,

Please find the proposed Order of Dismissal for Gary Fraley's PCR matter. I have attached the proposed order in editable, word format and cc'd opposing counsel on this email.

If Your Honor would prefer a hard copy by US mail, please let me know and I will send one to your chambers. Additionally, please let me know if Your Honor would like any edits or changes made to the order or if I can provide anything additional at this time.

SAMANTHA WEIDAUER, Assistant Attorney General
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-9603
P.O. Box 11549 | Columbia, SC 29211
scag.gov



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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY 2022 AUG 10 PM 3: 26 NINTH JUDICIAL CIRCUIT

Gary Fraley,

LEAN GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

No 2018-CP-08-2576

Petitioner,

vs.

Supplement to Motion to Strike

The State of South Carolina,

Respondent.

Petitioner supplements his Motion to Strike for Failure to Prosecute with the attached emails (Exhibit A and Exhibit B). As of the date of this document at noon, the State has not yet presented a proposed order.

Dated: 08/08/2022


Jason Scott Luck (#73676)
P.O. Box 47
Bennettsville, SC 29512
843.479.6863 (o)
843.479.7222 (f)
jason@luck.law
Attorney for Plaintiff

Certificate of Service

I, the undersigned, certify that on the date set forth below, a copy of the supplement to the motion to strike was placed in the United States Mail, First Class, postage prepaid, addressed to the following:

SCAG
ATTN: Samantha Weidauer, Esq.
P.O. Box 11549
Columbia, SC 29211

Dated: 08/08/2022


Jason Scott Luck
P.O. Box 47
Bennettsville, SC 29512

Subject: Re: 2018CP0802576-Gary Fraley v. State
Date: Wednesday, July 20, 2022 at 6:47:46 AM Eastern Daylight Time
From: Sammie Weidauer
To: McCoy, Jennifer B. Secretary (Brooke Slade), Jason Luck, McCoy, Jennifer B. Law Clerk (Victoria Tuten), Lauren Mims, James Falk
Attachments: image001.png, image002.png

Brooke,

I am reaching out to request a short extension to submit this Order denying PCR relief. I have a 14th Circuit term of court this week in Beaufort before the Judge Curtis I have been preparing for and am in the middle of. Additionally, as I mentioned, I had a Brief of Respondent due Monday to the Court of Appeals that took more time than anticipated. Therefore, I would request an extension to submit this proposed order until Monday, July 25, 2022. This request is not meant for delay but necessitated by my current heavy workload.

Please let me know if this request for an extension is acceptable.

Samantha Weidauer

From: Sammie Weidauer <sammieweidauer@scag.gov>
Sent: Tuesday, July 12, 2022 8:40 AM
To: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>; Jason Luck <jason@luck.law>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; Lauren Mims <laurenmims@scag.gov>; James Falk <jfalklaw@gmail.com>
Subject: RE: 2018CP0802576-Gary Fraley v. State

Brooke,

I apologize for the tardiness of my response. I was out of office all last week sick. I am currently prepping for a term in the 14th Circuit next week and have a Brief due to the Court of Appeals next Monday. If acceptable to Judge McCoy, I will have this OOD completed by next Tuesday.

SAMANTHA WEIDAUER, Assistant Attorney General
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-9603
P.O. Box 11549 | Columbia, SC 29211
scag.gov



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From: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Sent: Thursday, July 7, 2022 11:03 AM



To: Sammie Weidauer <sammieweidauer@scag.gov>; Jason Luck <jason@luck.law>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; Lauren Mims <laurenmims@scag.gov>; James Falk <jfalklaw@gmail.com>
Subject: RE: 2018CP0802576-Gary Fraley v. State

Good morning,

I am following up again on the below email. Please update Judge McCoy as soon as possible.

Brooke S. Slade

Administrative Assistant
The Honorable Jennifer B. McCoy
100 Broad Street, Suite 348
Charleston, SC 29401
Phone: (843) 958-5066
Fax: (843) 958-5067

From: Sammie Weidauer <sammieweidauer@scag.gov>

Sent: Thursday, June 2, 2022 12:37 PM

To: Jason Luck <jason@luck.law>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; Lauren Mims <laurenmims@scag.gov>; James Falk <jfalklaw@gmail.com>

Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>

Subject: RE: 2018CP0802576-Gary Fraley v. State

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Thank you for bringing my attention to this matter. I will draft a proposed Order and get to Judge McCoy as soon possible.

Please let me know if anything additional is needed from the State at this time.

SAMANTHA WEIDAUER, Assistant Attorney General
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-9603
P.O. Box 11549 | Columbia, SC 29211
scag.gov



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From: Jason Luck <jason@luck.law>

Sent: Thursday, June 2, 2022 12:33 PM

To: Sammie Weidauer <sammieweidauer@scag.gov>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; Lauren Mims <laurenmims@scag.gov>; James Falk <jfalklaw@gmail.com>

Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>

Subject: Re: 2018CP0802576-Gary Fraley v. State

All:

I do not see where the SCAG has prepared an order denying PCR relief in this matter, and it looks like a proposed order was due April 10, 2022 (see emails below).

If Judge McCoy has changed her mind, I am more than happy to prepare an order *granting* PCR relief. I can have it to the judge in 72 hours or less.

Jason Scott Luck
Attorney at Law
P.O. Box 47 (107 S. Parsonage St.)
Bennettsville, SC 29512
843.479.6863 (o)
843.479.7222 (f)

From: Sammie Weidauer <sammieweidauer@scag.gov>
Date: Friday, March 11, 2022 at 8:47 AM
To: McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>, Lauren Mims <laurenmims@scag.gov>, Jason Luck <jason@luck.law>, James Falk <jfalklaw@gmail.com>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Subject: RE: 2018CP0802576-Gary Fraley v. State

Victoria,
I have cc'd the email addresses I have for both Jason and Jim. I will let you know if anything bounces back.

SAMANTHA WEIDAUER, Assistant Attorney General
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-9603
P.O. Box 11549 | Columbia, SC 29211
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From: McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>
Sent: Thursday, March 10, 2022 3:20 PM
To: Lauren Mims <laurenmims@scag.gov>; Jason Luck <jluck@garrettlawsc.com>; Sammie Weidauer <sammieweidauer@scag.gov>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Subject: RE: 2018CP0802576-Gary Fraley v. State

All,

Sorry for the second email. I received an email saying Mr. Luck's email account rejected my email. Ms. Mims & Ms. Weidauer, can you please confirm his email address and/or reply all and include him and any other necessary parties.

Thanks,

Victoria I. Tuten

Law Clerk to the Honorable Jennifer B. McCoy
Chief Administrative Judge of Common Pleas, 9th Judicial Circuit
100 Broad Street, Suite 348
Charleston, SC 29401
jmccoyle@sccourts.org

From: McCoy, Jennifer B. Law Clerk (Victoria Tuten)

Sent: Thursday, March 10, 2022 3:17 PM

To: 'Lauren Mims' <laurenmims@scag.gov>; 'Jason Luck' <jluck@garrettlawsc.com>; 'Sammie Weidauer' <sammieweidauer@scag.gov>

Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>

Subject: 2018CP0802576-Gary Fraley v. State

Good afternoon,

Judge McCoy has denied Mr. Fraley's motion for post-conviction relief. Ms. Mims & Ms. Weidauer, please submit a formal proposed order within 30 days from the date of this email.

Best,

Victoria I. Tuten

Law Clerk to the Honorable Jennifer B. McCoy
Chief Administrative Judge of Common Pleas, 9th Judicial Circuit
100 Broad Street, Suite 348
Charleston, SC 29401
jmccoyle@sccourts.org

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**Subject:** RE: Gary Fraley | proposed Order of Dismissal | PCR Case No.: 2018-CP-08-02576  
**Date:** Friday, July 29, 2022 at 8:29:03 AM Eastern Daylight Time  
**From:** Sammie Weidauer  
**To:** McCoy, Jennifer B.  
**CC:** McCoy, Jennifer B. Secretary (Brooke Slade), McCoy, Jennifer B. Law Clerk (Victoria Tuten), jfalklaw@gmail.com, Jason Luck

**Attachments:** image001.png

Judge McCoy,

Your email was flagged as possible spam and sent to my quarantine folder. I saw your email this morning stating you had trouble opening the attachment. I'm not sure how the document became corrupted, but I am also having trouble opening on my end and receiving a message that the document is now "unreadable".

I was able to recover the majority of the document from prior word saves, but not the complete proposed Order. I will see if our IT department can help, if not I will redraft the sections that I could not recover and submit ASAP.

**SAMANTHA WEIDAUER**, Assistant Attorney General  
South Carolina Attorney General's Office  
Post-Conviction Relief | Office 803-734-9603  
P.O. Box 11549 | Columbia, SC 29211  
[scag.gov](http://scag.gov)



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**From:** McCoy, Jennifer B. <jmccoyj@sccourts.org>  
**Sent:** Thursday, July 28, 2022 10:59 AM  
**To:** Sammie Weidauer <sammieweidauer@scag.gov>  
**Cc:** McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; jfalklaw@gmail.com; Jason Luck <jason@luck.law>  
**Subject:** RE: Gary Fraley | proposed Order of Dismissal | PCR Case No.: 2018-CP-08-02576

I cannot open the attachment. It says it has "unreadable content". Please correct and try again.

Jennifer B. McCoy  
Circuit Judge, At-Large Seat 9  
100 Broad Street, Suite 348  
Charleston, SC 29401  
(843) 958-5066 (office)



**From:** Sammie Weidauer <sammieweidauer@scag.gov>  
**Sent:** Thursday, July 28, 2022 8:52 AM  
**To:** McCoy, Jennifer B. <jmccoyj@sccourts.org>  
**Cc:** McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; jfalklaw@gmail.com; Jason Luck <jason@luck.law>  
**Subject:** [WARNING: UNSCANNABLE EXTRACTION FAILED]Gary Fraley | proposed Order of Dismissal | PCR Case No.: 2018-CP-08-02576

\*\*\* **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Judge McCoy,  
Please find the proposed Order of Dismissal for Gary Fraley's PCR matter. I have attached the proposed order in editable, word format and cc'd opposing counsel on this email.

If Your Honor would prefer a hard copy by US mail, please let me know and I will send one to your chambers. Additionally, please let me know if Your Honor would like any edits or changes made to the order or if I can provide anything additional at this time.

**SAMANTHA WEIDAUER**, Assistant Attorney General  
South Carolina Attorney General's Office  
Post-Conviction Relief | Office 803-734-9603  
P.O. Box 11549 | Columbia, SC 29211  
[scag.gov](http://scag.gov)



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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

FILED
2022 JUL 13 PM 2:50
LEAH GUERRY
CLERK OF COURT
BERKELEY COUNTY, SC

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Motion to Strike

Petitioner moves to strike the Respondent's answer for its failure to prosecute and enter a default judgment for the Petitioner. Petitioner would show the following in support of his motion:

1. This matter was heard on December 6, 2021. On March 10, 2022, Judge Jennifer McCoy denied Petitioner's application and requested the South Carolina Attorney General's office (SCAG) prepare an order in 30 days. Exhibit A p. 3.
2. SCAG did not prepare an order in 30 days and did not request an extension, and on June 2, 2022, counsel for the Petitioner reminded the SCAG of its responsibility. Exhibit A p. 2.
3. Though claiming an order would be prepared "as soon as possible" (Exhibit B), SCAG did not prepare an order after this reminder, and on July 7, 2022, Judge McCoy's office requested an update. Exhibit A p. 1.
4. As of the date of this motion, SCAG has not presented Judge McCoy with the order she requested on March 10, 2022.
5. The South Carolina Constitution provides for speedy civil remedies. *See* S.C. Const. Art. I Sec. 9 ("All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.").
6. South Carolina's post-conviction relief statute takes the place of a common law petition for a writ of *habeas corpus*. S.C. Code § 17-27-20(B). As its statutory replacement, a PCR application must be held to the same standards. The Great Writ was intended to provide a "swift and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1963) (quotation marks omitted), *overruled on other grounds by Keeney*

Motion to Strike

- 1 of 3 -
1122

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v. *Tamayo-Reyes*, 504 U.S. 1 (1992); see also *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973) (habeas corpus claims should receive “a swift, flexible, and summary determination.”).

7. The United States Constitution also guarantees Due Process of law, which can be violated when the State oversteps the bounds of propriety and fairness. See, e.g., *Berger v. United States*, 295 U.S. 78, 84 (1935).
8. SCAG’s failure to prosecute this matter has violated the law of paragraphs 5-7 and has prejudiced Petitioner by lengthening his wrongful detention and delaying his ability to seek review by the South Carolina Supreme Court.
9. Further, the substantial number of delays in this proceeding have “so infected the trial with unfairness” as to result in a violation of Petitioner’s due process rights. See *Darden v. Wainwright*, 477 U.S. 168, 180-81 (1986).
10. This Court possesses the inherent power to control its dockets and manage its affairs, including the ability to strike pleadings. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 211-212, 493 S.E.2d 826, 832 (1997). Because the Petitioner proved his case on the merits at the December 6, 2021, hearing in this matter, this Court may enter default judgment against the State. See Rule 55(e), SCRCP (“No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof...unless the claimant establishes his claim to relief by evidence satisfactory to the Court.”). Accordingly, this Court is empowered to, and must, strike the State’s answer in this matter and enter a default judgment for Petitioner.
11. No consultation is necessary for this motion under Rule 11, SCRCP.

Dated: 07/11/2022


Jason Scott Luck (#73676)
P.O. Box 47
Bennettsville, SC 29512
843.479.6863 (o)
843.479.7222 (f)
jason@luck.law
Attorney¹ for Plaintiff

¹ Attorney James Falk’s role in this case was limited to representation at PCR hearing and not in any post-trial motions, including this motion. Petitioner would ask he be relieved as counsel.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

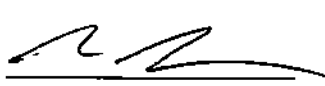
No 2018-CP-08-2576

Certificate of Service

I, the undersigned, certify that on the date set forth below, a copy of the motion to strike was placed in the United States Mail, First Class, postage prepaid, addressed to the following:

SCAG
ATTN: Samantha Weidauer, Esq.
P.O. Box 11549
Columbia, SC 29211

Dated: 07/11/2022


Jason Scott Luck
P.O. Box 47
Bennettsville, SC 29512
843.479.6863 (o)
843.479.7222 (f)


LEAH GUERRY DORN
CLERK OF COURT
BERKELEY COUNTY, SC

2022 JUL 13 PM 2:50

FILED

Subject: RE: 2018CP0802576-Gary Fraley v. State
Date: Thursday, July 7, 2022 at 11:02:55 AM Eastern Daylight Time
From: McCoy, Jennifer B. Secretary (Brooke Slade)
To: Sammie Weidauer, Jason Luck, McCoy, Jennifer B. Law Clerk (Victoria Tuten), Lauren Mims, James Falk
Attachments: image001.png, image002.png

Good morning,

I am following up again on the below email. Please update Judge McCoy as soon as possible.

Brooke S. Slade

Administrative Assistant
The Honorable Jennifer B. McCoy
100 Broad Street, Suite 348
Charleston, SC 29401
Phone: (843) 958-5066
Fax: (843) 958-5067

From: Sammie Weidauer <sammieweidauer@scag.gov>
Sent: Thursday, June 2, 2022 12:37 PM
To: Jason Luck <jason@luck.law>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; Lauren Mims <laurenmims@scag.gov>; James Falk <jfalklaw@gmail.com>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Subject: RE: 2018CP0802576-Gary Fraley v. State

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Thank you for bringing my attention to this matter. I will draft a proposed Order and get to Judge McCoy as soon possible.

Please let me know if anything additional is needed from the State at this time.

SAMANTHA WEIDAUER, Assistant Attorney General
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-9603
P.O. Box 11549 | Columbia, SC 29211
scag.gov



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From: Jason Luck <jason@luck.law>

EXHIBIT
A

Sent: Thursday, June 2, 2022 12:33 PM

To: Sammie Weidauer <sammieweidauer@scag.gov>; McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>; Lauren Mims <laurenmims@scag.gov>; James Falk <jfalklaw@gmail.com>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Subject: Re: 2018CP0802576-Gary Fraley v. State

All:

I do not see where the SCAG has prepared an order denying PCR relief in this matter, and it looks like a proposed order was due April 10, 2022 (see emails below).

If Judge McCoy has changed her mind, I am more than happy to prepare an order *granting* PCR relief. I can have it to the judge in 72 hours or less.

Jason Scott Luck
Attorney at Law
P.O. Box 47 (107 S. Parsonage St.)
Bennettsville, SC 29512
843.479.6863 (o)
843.479.7222 (f)

From: Sammie Weidauer <sammieweidauer@scag.gov>
Date: Friday, March 11, 2022 at 8:47 AM
To: McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>, Lauren Mims <laurenmims@scag.gov>, Jason Luck <jason@luck.law>, James Falk <jfalklaw@gmail.com>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Subject: RE: 2018CP0802576-Gary Fraley v. State

Victoria,
I have cc'd the email addresses I have for both Jason and Jim. I will let you know if anything bounces back.

SAMANTHA WEIDAUER, Assistant Attorney General
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-9603
P.O. Box 11549 | Columbia, SC 29211
scag.gov



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From: McCoy, Jennifer B. Law Clerk (Victoria Tuten) <jmccoyle@sccourts.org>
Sent: Thursday, March 10, 2022 3:20 PM

To: Lauren Mims <laurenmims@scag.gov>; Jason Luck <jluck@garrettlawsc.com>; Sammie Weidauer <sammieweidauer@scag.gov>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Subject: RE: 2018CP0802576-Gary Fraley v. State

All,

Sorry for the second email. I received an email saying Mr. Luck's email account rejected my email. Ms. Mims & Ms. Weidauer, can you please confirm his email address and/or reply all and include him and any other necessary parties.

Thanks,

Victoria I. Tuten

Law Clerk to the Honorable Jennifer B. McCoy
Chief Administrative Judge of Common Pleas, 9th Judicial Circuit
100 Broad Street, Suite 348
Charleston, SC 29401
jmccoyle@sccourts.org

From: McCoy, Jennifer B. Law Clerk (Victoria Tuten)
Sent: Thursday, March 10, 2022 3:17 PM
To: 'Lauren Mims' <laurenmims@scag.gov>; 'Jason Luck' <jluck@garrettlawsc.com>; 'Sammie Weidauer' <sammieweidauer@scag.gov>
Cc: McCoy, Jennifer B. Secretary (Brooke Slade) <jmccoysc@sccourts.org>
Subject: 2018CP0802576-Gary Fraley v. State

Good afternoon,

Judge McCoy has denied Mr. Fraley's motion for post-conviction relief. Ms. Mims & Ms. Weidauer, please submit a formal proposed order within 30 days from the date of this email.

Best,

Victoria I. Tuten

Law Clerk to the Honorable Jennifer B. McCoy
Chief Administrative Judge of Common Pleas, 9th Judicial Circuit
100 Broad Street, Suite 348
Charleston, SC 29401
jmccoyle@sccourts.org

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Affidavit of Julie Fraley

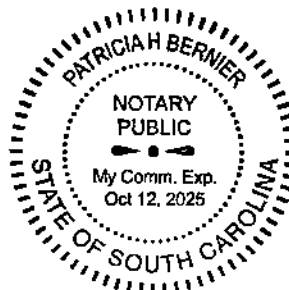
1. My name is Julie Fraley. I am over eighteen years old and competent to execute this affidavit, which, though prepared for me, is made based upon my own personal knowledge and recollection.
2. I have not reviewed any of the filings in Gary Fraley's PCR action prior to executing this affidavit.
3. I am Gary Fraley's ex-wife; we were divorced in Nov 27 2001. We remained in contact after our divorce.
4. Gary and I had one daughter: Alta Fraley.
5. Alta lived with me after Gary Fraley was arrested on August 5, 2014.
6. I am familiar with Melissa Gay, Gary Fraley's criminal defense lawyer.
7. Ms. Gay did not contact me prior to Gary Fraley's August 13-17, 2015, trial.
8. Had Ms. Gay contacted me prior to Gary Fraley's August 13-17, 2015, trial, I would have told her about Alta's communications with Gary Fraley prior to the events of August 5, 2014. I would have also allowed Ms. Gay to speak with Alta and examine Alta's cell phone.

Further affiant sayeth naught.

Julie Fraley  
Julie Fraley

SWORN TO AND SUBSCRIBED BEFORE ME  
this 8th Day of November, 2021

[Signature] (SEAL)  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission Expires:



LEAH GUERRY TURNER  
CLERK OF COURT  
BERKELEY COUNTY, SC  
2021 NOV 18 PM 12:21

[Signature]  
FILED

cc: JSL

Affidavit of Julie Fraley

- 1 of 1 -

1128

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Stipulation

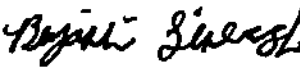
The undersigned stipulate to the admissibility of the attached exhibits.

  
By: Jason Luck 3/25/21  
date

Jason Scott Luck  
Attorney at Law  
P.O. Box 47 (107 S. Parsonage St.)  
Bennettsville, SC 29512  
843.479.6863 (o)  
843.479.7222 (f)

James Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402  
(843) 606 6007 office  
(843) 557 8786 mobile

Attorneys for Petitioner

  
Benjamin Limbaugh 3/25/21  
date

Benjamin Limbaugh  
SCAG  
Rembert C. Dennis Building  
1000 Assembly St.  
Columbia, SC 29201  
803.734.4124 (o)

Attorney for Respondent

cc:  
Email  
A.G. Falk  
J.S. Luck  
James Falk  
M.H. Jones  
3/25/2021

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Affidavit of Alta Fraley

LEAH CUNNINGHAM  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

18 AUG 29 PM 12:11

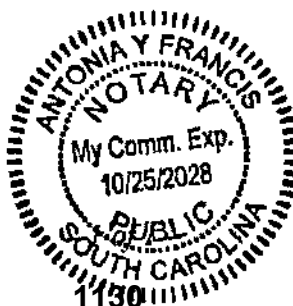
FILED

1. My name is Alta Fraley. I am eighteen years old and competent to execute this affidavit, which, though prepared for me, is made based upon my own personal knowledge and recollection.
2. I have not reviewed any of the filings in my father's PCR action prior to executing this affidavit.
3. I am Gary Fraley's daughter, and I lived with him until he left in the spring/summer of 2014 for rehab in Wilmington, North Carolina.
4. I have known my father my entire life and I have always had a close relationship with him. Prior to his incarceration, he and I would regularly exchange calls and voicemails.
5. I specifically remember the spring/summer of 2014, when my father left the house to attend rehab in North Carolina.
6. After my father's visit to rehab, his calls and texts to me became strange and incoherent. I specifically remember calls where my father claimed: (a) he was dying of throat cancer and only had months to live, (b) he had been struck by lightning, and (c) he had seen "Bigfoot." Many of these calls were made at hours of the day and night unusual for him.
7. I have attached to this affidavit as Exhibit A photographs of text messages my father sent me on my mobile phone. These photographs are true and correct images of the texts on my phone, and the dates of these texts are accurate (the date and time underneath the images are the date and time the individual photograph was taken by my father's attorney, Jason Luck).
8. Pages eight and nine of Exhibit A contain texts where my father claims he saw "Bigfoot" on July 31, 2014, just five days before he allegedly committed the acts he was arrested for.
9. Based on my father's conduct and communications with me during the summer of 2014, I believe my father lost touch with reality after his visit to rehab. I also believe that he did not know what he allegedly did on August 5, 2014, was legally or morally wrong, or that he even knew what he was doing that day.
10. My father's criminal defense attorney (Melisa Gay) never contacted me to discuss my potential testimony, which would have been consistent with the statements I have set forth in this affidavit.

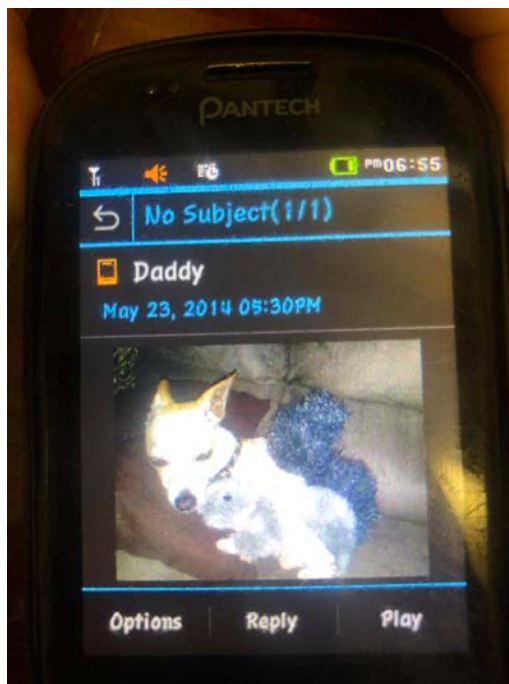
*Alta Fraley*  
Alta Fraley

SWORN TO AND SUBSCRIBED BEFORE ME  
this 18<sup>th</sup> Day of August, 2019

*[Signature]* (SEAL)  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission Expires: 10/25/2028

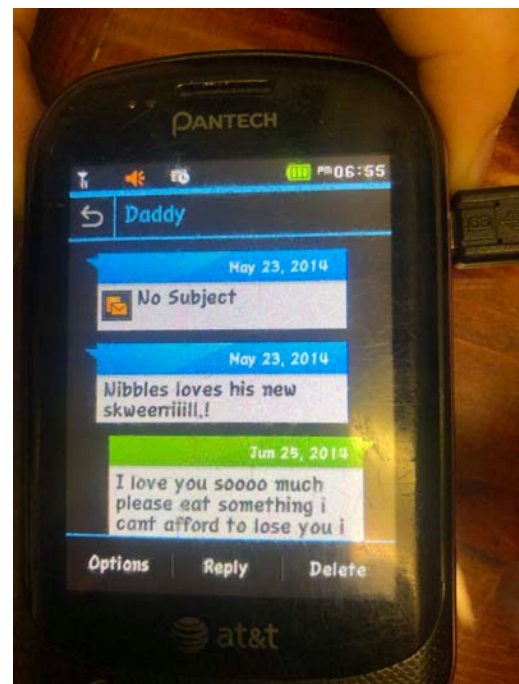


Exhibit



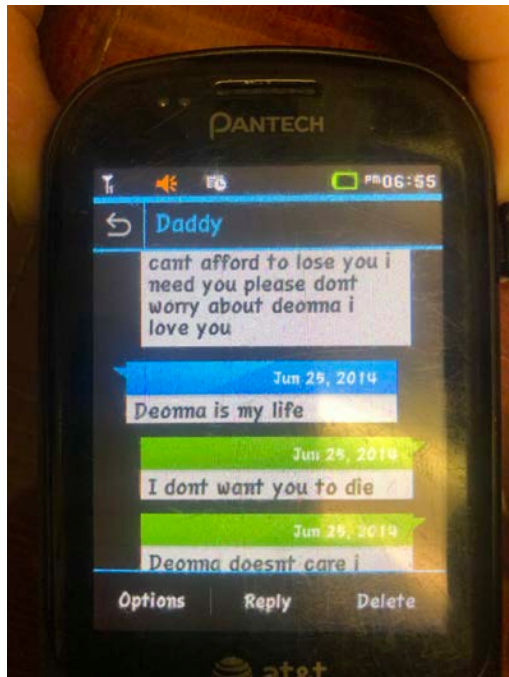
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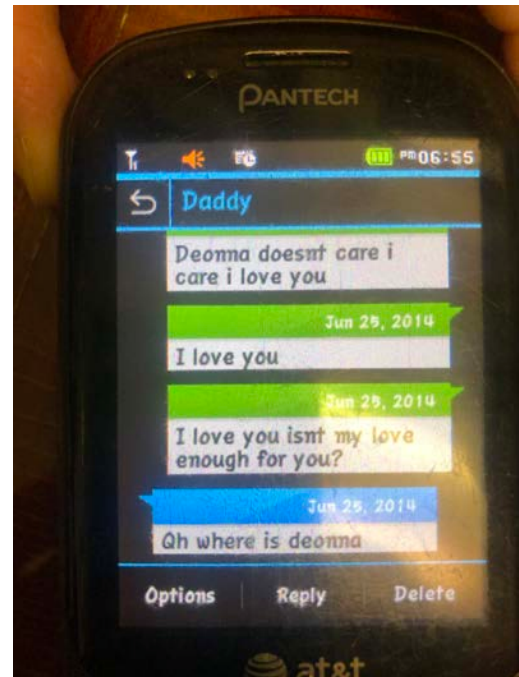
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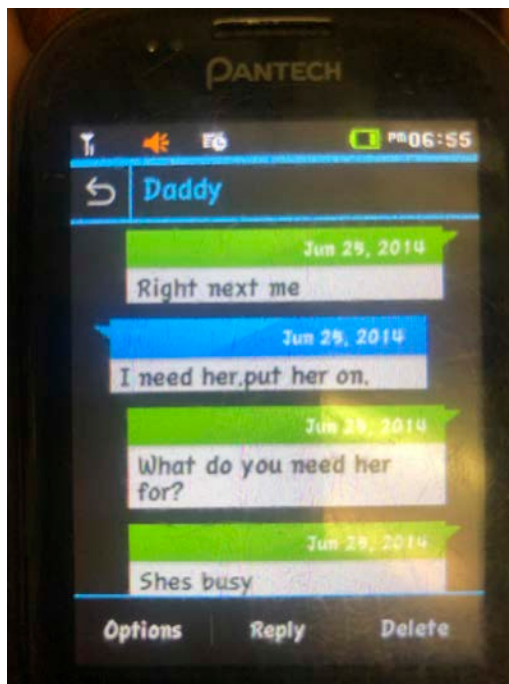
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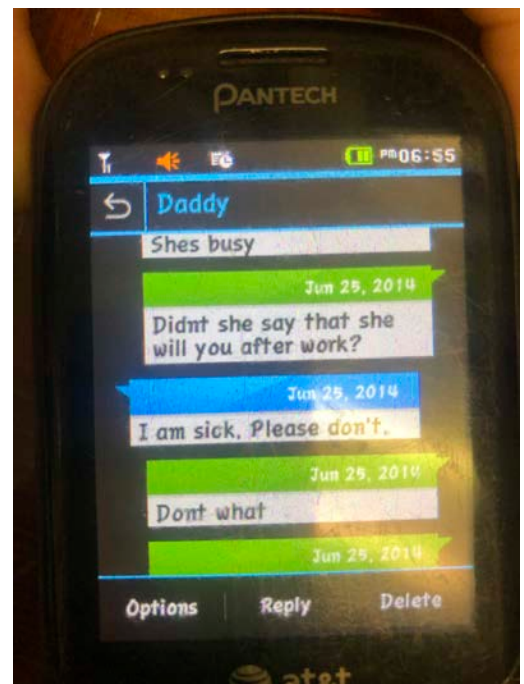
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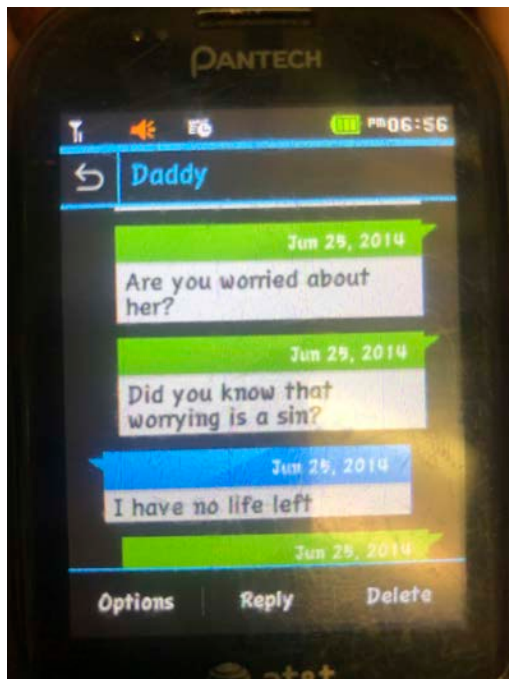
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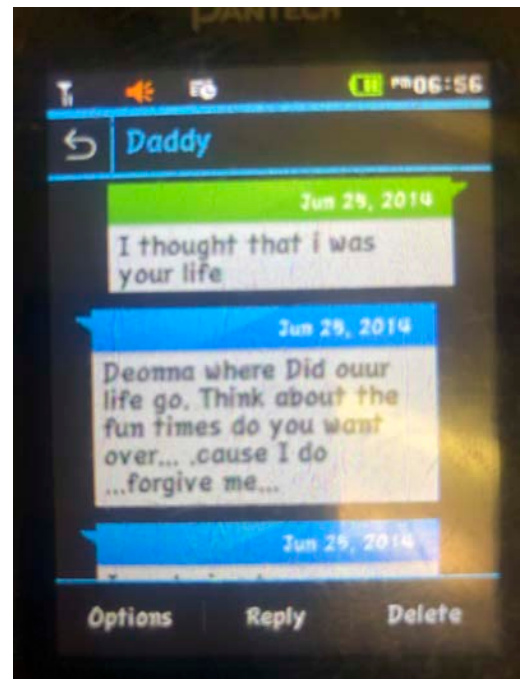
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August 26, 2019 at 12:31:41 PM

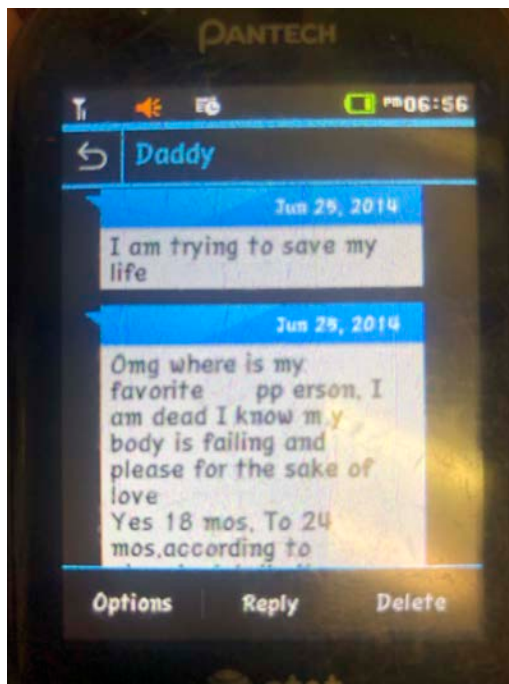
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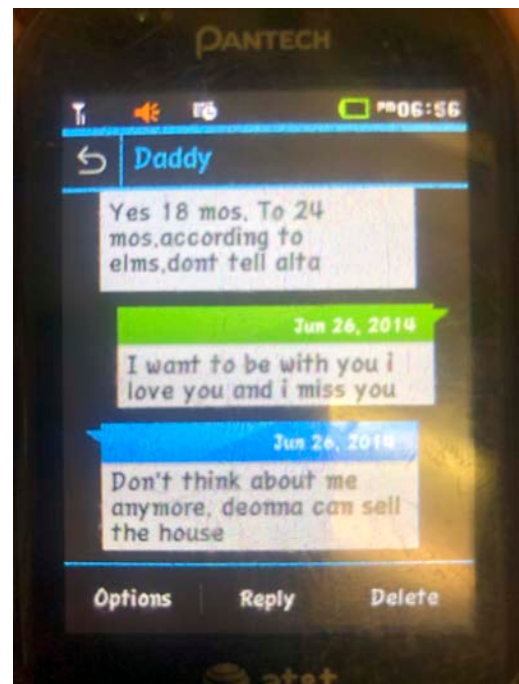
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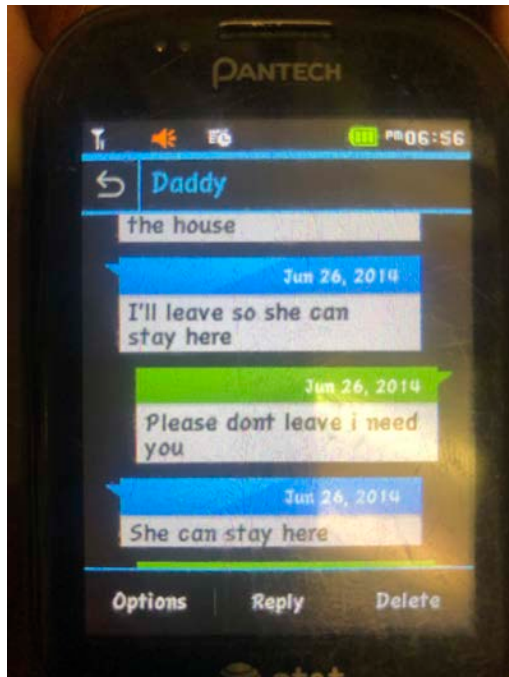
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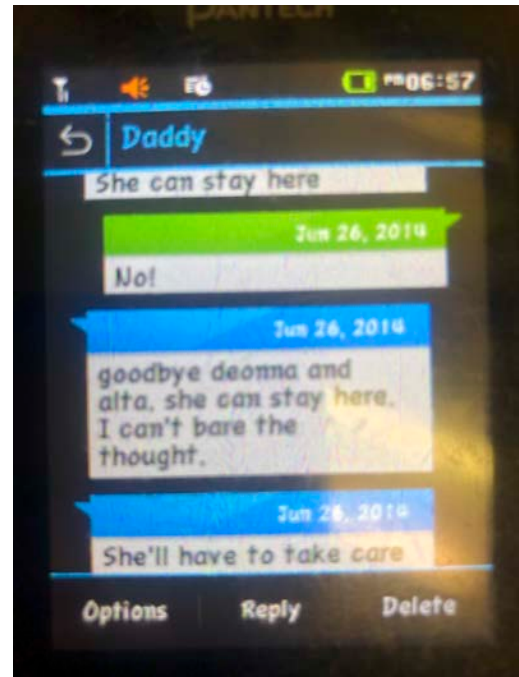
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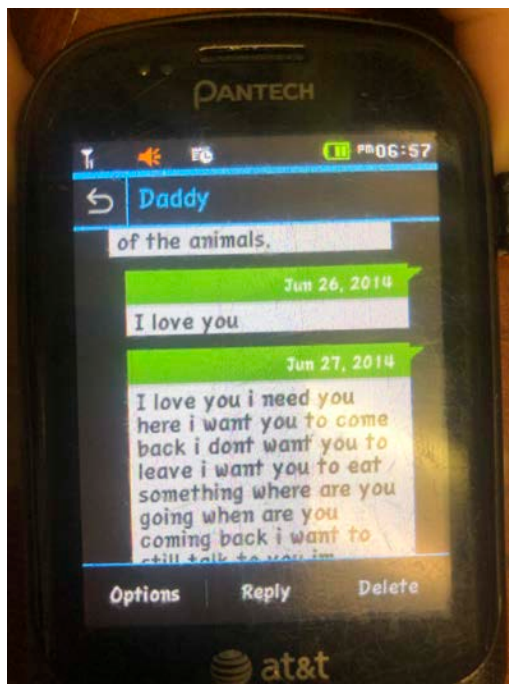
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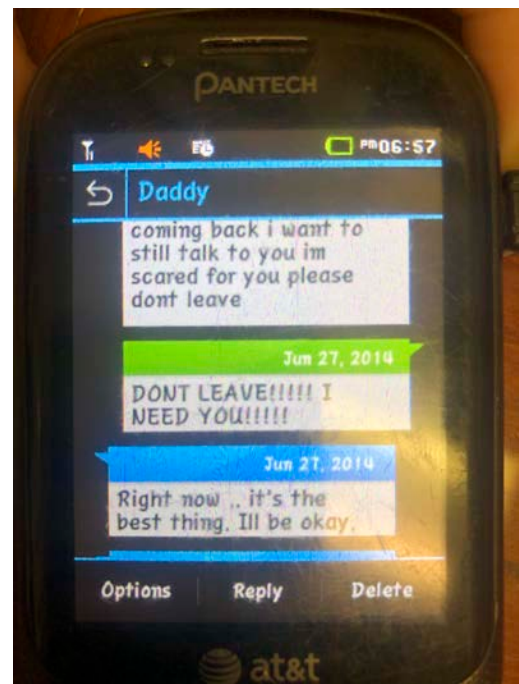
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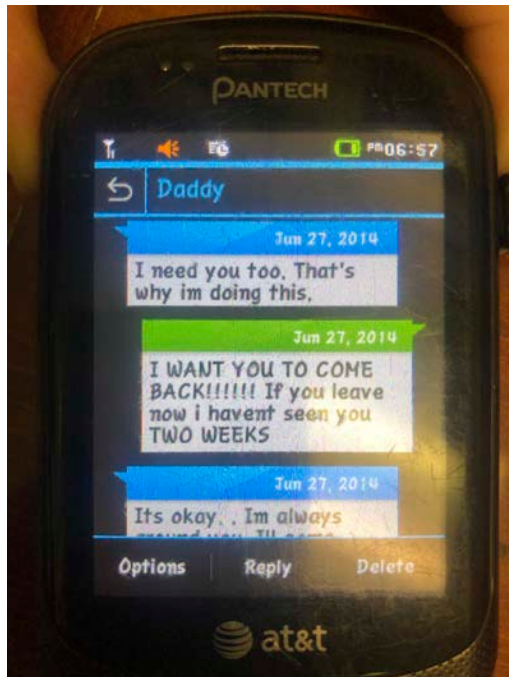
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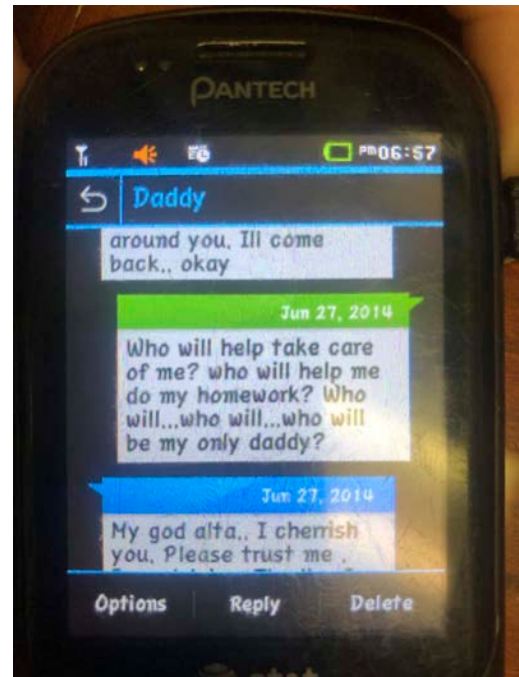
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August 26, 2019 at 12:33:20 PM

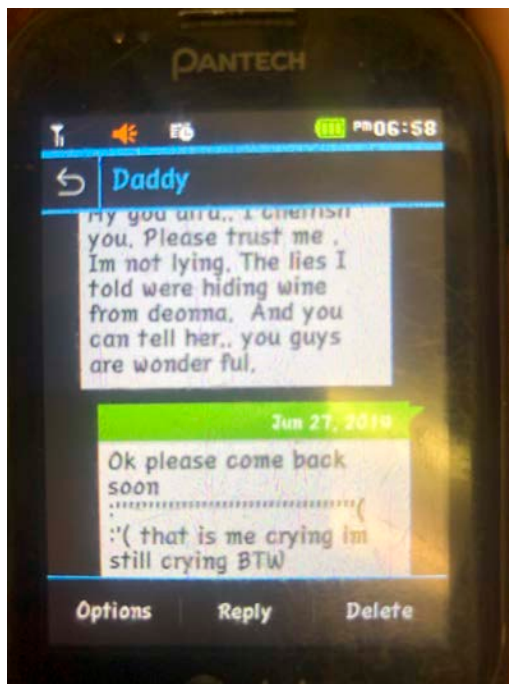
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August 26, 2019 at 12:33:27 PM

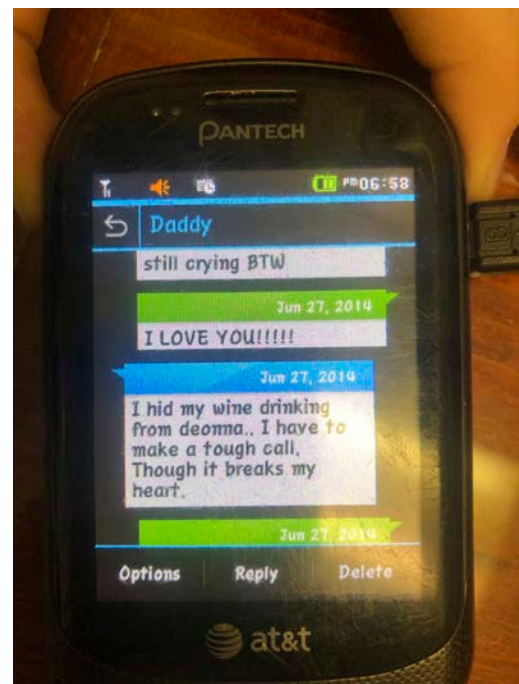
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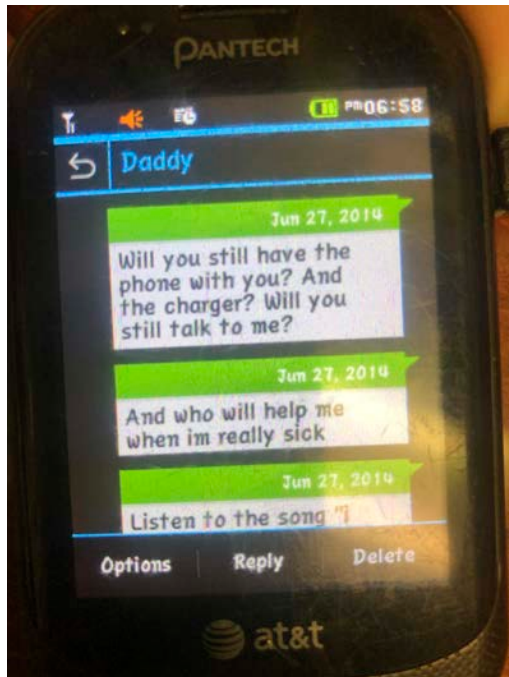
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August 26, 2019 at 12:33:45 PM

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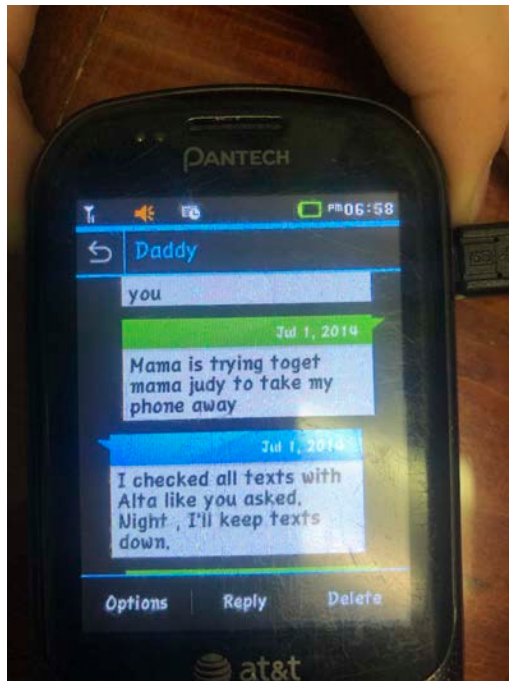
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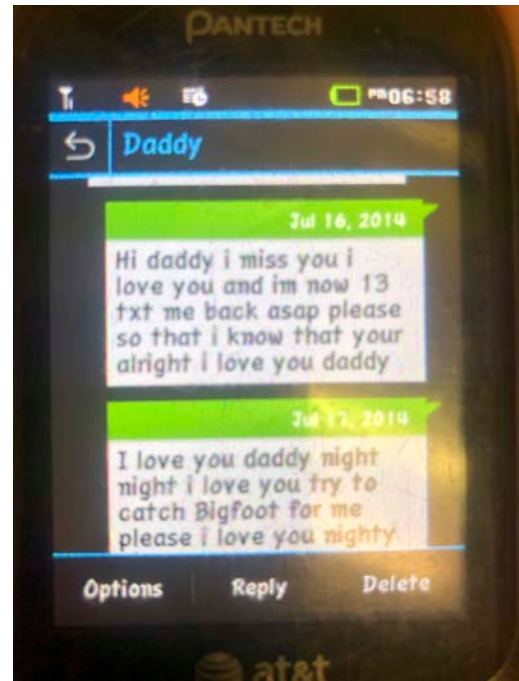
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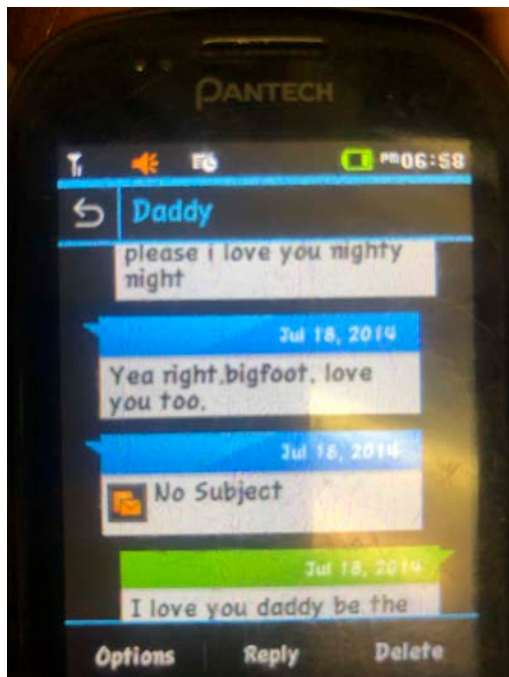
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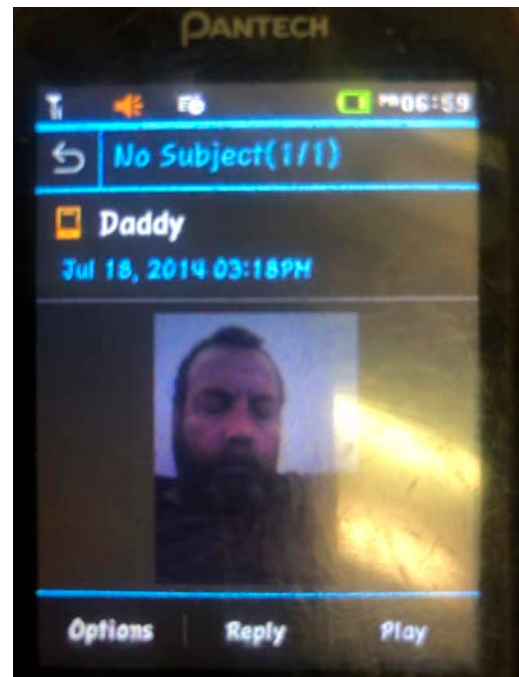
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August 26, 2019 at 12:34:33 PM

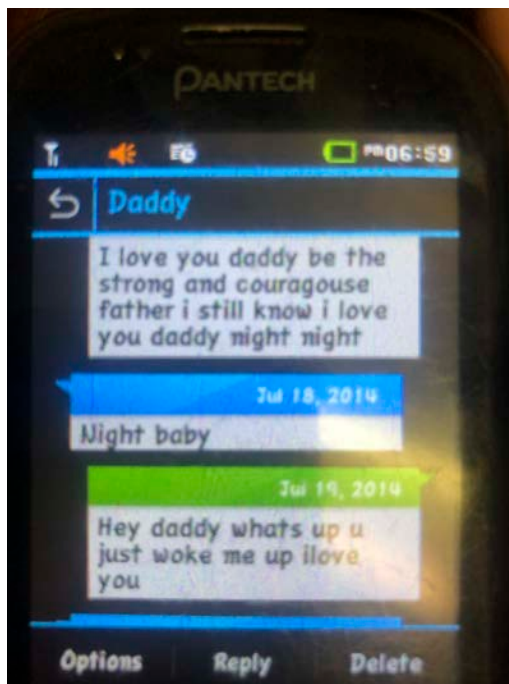
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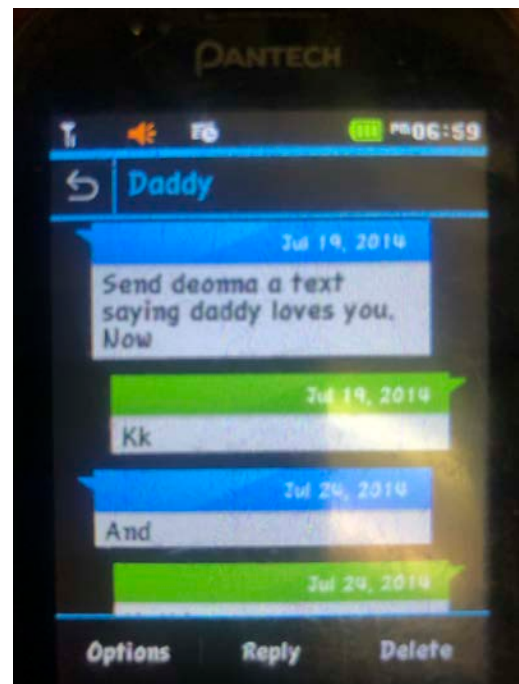
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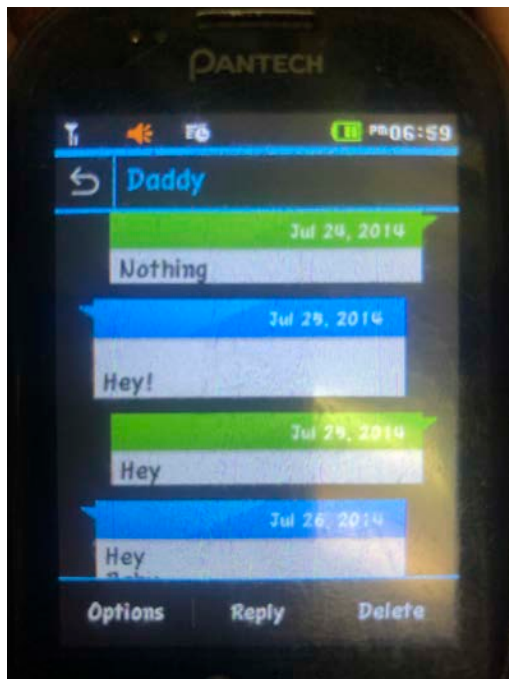




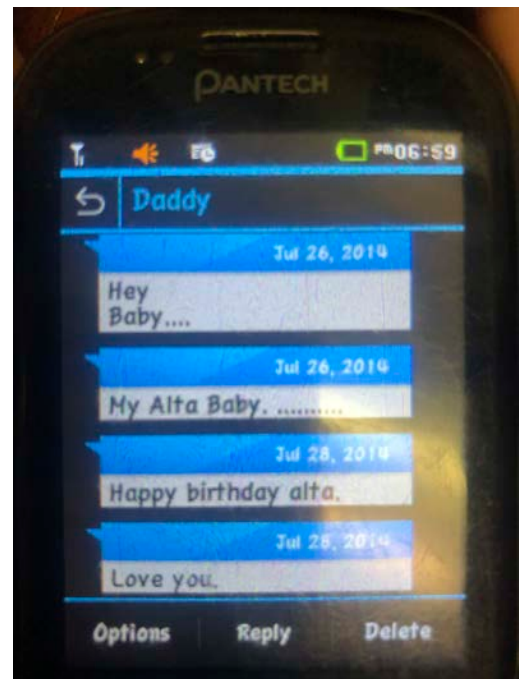
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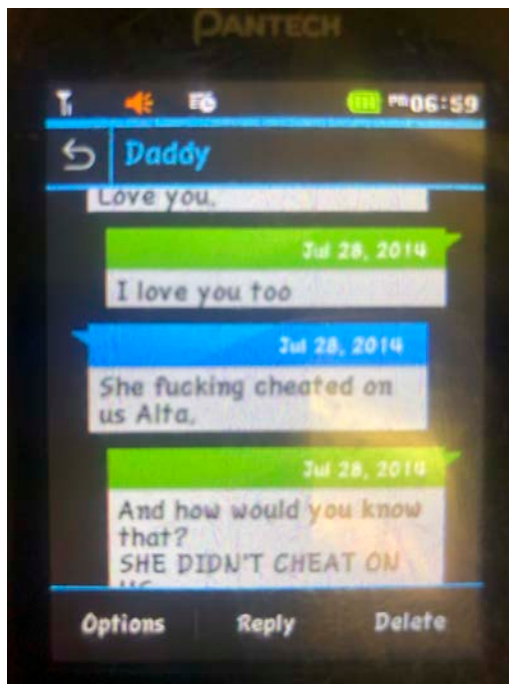
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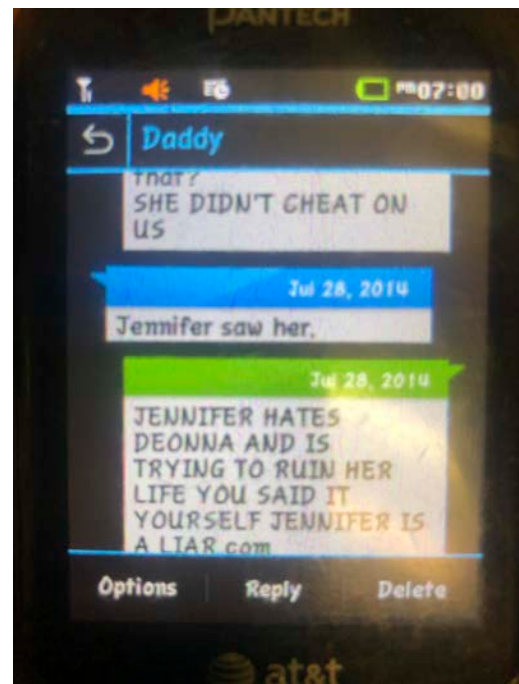


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August 26, 2019 at 12:35:23 PM

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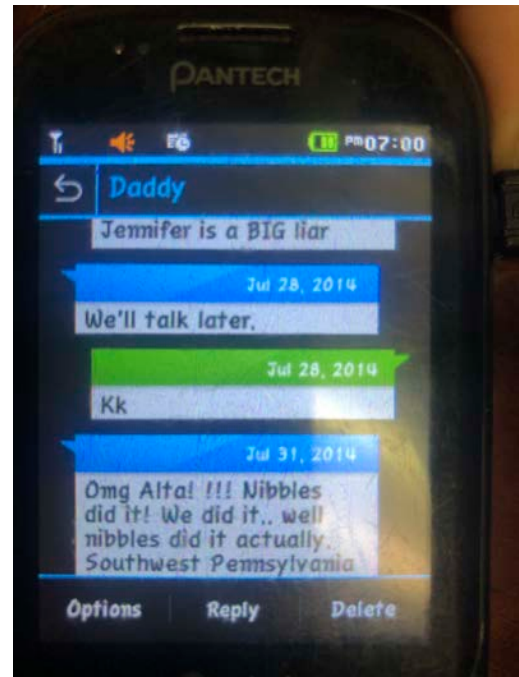
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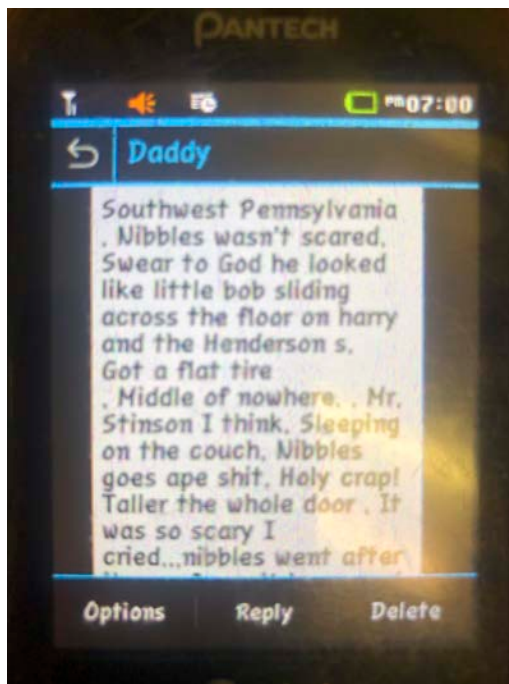
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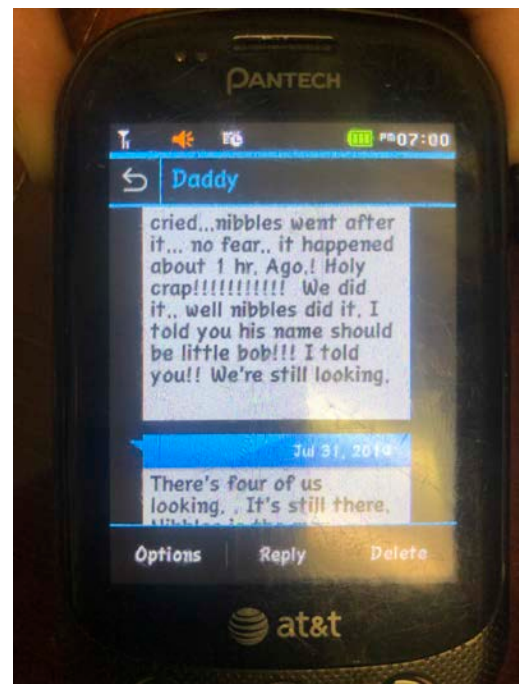
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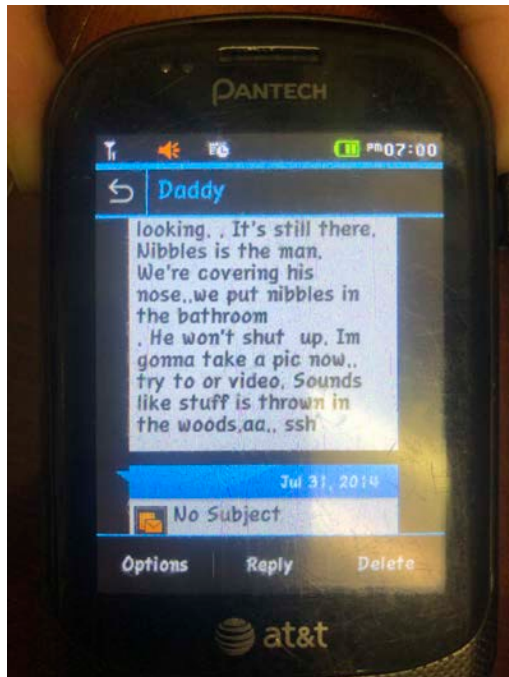
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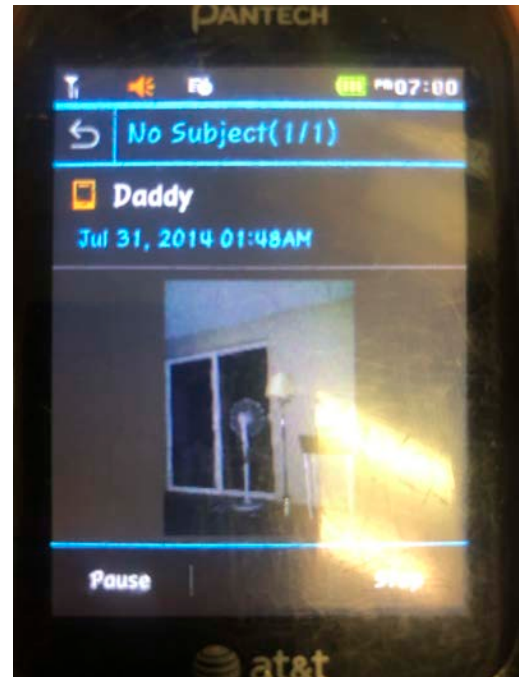
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August 26, 2019 at 12:36:18 PM

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August 26, 2019 at 12:36:27 PM

IMG\_3400.HEIC



STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )  
Gary Fraley 364802 )  
Applicant )  
Vs. )  
State of South Carolina )  
Respondent,)

COURT OF COMMON PLEAS  
FOR THE 9TH JUDICIAL CIRCUIT  
2018-CP-08-2576  
AMENDED PCR

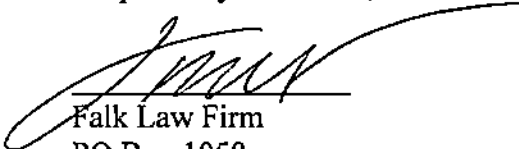
FILED  
21 MAR 12 PM 12:18  
LEAH GUERRY DUPREE  
CLERK OF COURT  
BERKELEY COUNTY, SC

PCR Applicant Gary Fraley by counsel amends his PCR application filed December 28, 2018 to include the following specific allegation of ineffective assistance of counsel.

1. Trial counsel failed to call Rebecca A Plummer to testify on my behalf.
2. Trial counsel failed to call Alta Fraley to testify on my behalf.
3. Trial counsel failed to object to hearsay testimony uttered at p. 191 lines 14 through p. 192 lines 11. This testimony went beyond the scope of expert testimony permitted under SCRE 703.
4. Trial counsel failed make a contemporaneous objection to Kimberly Tompkins' testimony (pp. 232 – 238) regarding an incident occurring on the Saturday before the events for which Applicant was charged. Trial counsel argued in limine that the conduct was impermissible 404B evidence. However by failing to make a contemporaneous objection, trial counsel did not preserve the issue for appellate review
5. Trial counsel failed to object to hearsay testimony from witness Ruth at : p. 250 lines 10-13; p. 251 lines 7-8;
6. Trial counsel failed to object to hearsay testimony from witness Chad at P. 281 lines 12-14; and lines 19-22.
7. Trial counsel failed to object to hearsay testimony of the victim that went beyond "time and place" exceptions set forth in SCRE 801(d) (D). p 468 lines 11-11-13; 21-24; and p. 470 lines 8- 16.
8. Trial counsel failed to object under SCRE 404(B) to unrelated "bad acts" testimony uttered at p. 569 lines 11-12. 404B testimony should have objected.
9. Trial counsel failed to object to the State's vouching for its witnesses at p. 837 lines 12-15; 842 and lines 8-9.

CC: Jalk  
9-30  
3/12/2021

Respectfully submitted,

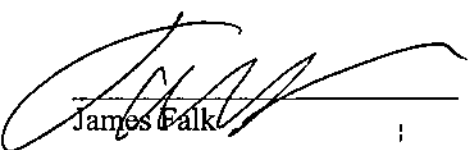


Falk Law Firm  
PO Box 1058  
Charleston, SC 29402  
(843) 606 6007  
jfalklaw@gmail.com

Jason Scott Luck  
Attorney at Law  
P.O. Box 47 (107 S. Parsonage St.)  
Bennettsville, SC 29512  
843.479.6863 (o)  
jason@luck.law

Certificate of service

A copy of the above was emailed to Benjamin Limbaugh at BLimbaugh@scag.gov and mailed to same at PO Box 11549, Columbia, SC 29211-1549 this March 10, 2021



James Falk

LEAH GUERRY DUPREE  
CLERK OF COURT  
BERKELEY COUNTY, SC

21 MAR 12 PM 12:19

FILED

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Second Supplement to Application for Post-Conviction Relief

FILED

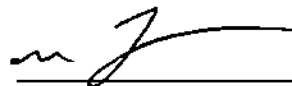
APR 23 2020

LEAH GUERRY DUROSSE  
CLERK OF COURSE  
BERKELEY COUNTY, SC

SPW

Petitioner hereby files the attached excerpts of the May 25, 2018, deposition of Len Allen (pages 1-3, 30, 50-53, Ex. 1) as a supplement to his Application for Post-Conviction Relief.

Date: 04/16/2020



Jason Scott Luck (SC Bar # 73676)  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)  
Attorney for Gary Fraley

### CERTIFICATE OF SERVICE

I certify that the Second Supplement to Application for Post-Conviction Relief was placed in the U.S. Mail, first class, postage-prepaid on the date below to the following address(es):

Office of the Attorney General  
Attn: Benjamin H. Limbaugh  
Post Conviction Relief Section  
P.O. Box 11549  
Columbia, SC 29211-1549

Date: 04/16/2020

  
Jason Scott Luck



1                   IN THE COURT OF COMMON PLEAS  
2                   FOR THE STATE OF SOUTH CAROLINA  
3                   BERKELEY COUNTY  
4                   VIDEO DEPOSITION OF LEN ALLEN  
5           Gary Fraley,  
6                   Plaintiff,  
7  
8           vs.       CASE NO. 2017-CP-08-2663  
9  
10          Universal North America  
11          Insurance Company,  
12                  Defendant.

---

9  
10       DEPONENT:       LEN ALLEN  
11  
12       DATE:           MAY 25, 2018  
13  
14       TIME:           1:00 PM  
15  
16       LOCATION:         HILL FINKLEA DETENTION CENTER  
17                         MONCKS CORNER, SOUTH CAROLINA  
18  
19       REPORTED BY:    ANNE BOULEY MEYER, RPR  
20                         CLARK & ASSOCIATES, INC.  
21                         P.O. Box 73129  
22                         Charleston, SC 29415  
23                         843-762-6294  
24                         WWW.CLARK-ASSOCIATES.COM  
25                         Office@clark-associates.com

1 A P P E A R A N C E S

2

3 ON BEHALF OF PLAINTIFF:

4

GARRETT LAW OFFICES  
5 BY: JASON LUCK  
1075 E. Montague Ave  
6 North Charleston, SC 29405-4825  
jluck@garrettlawSC.com

7

8 ON BEHALF OF DEFENDANT:

8

9

CLAWSON and STAUBES, LLC  
10 BY: CHRISTOPHER W. NICKELS  
126 Seven Farms Drive, Suite 200  
Charleston, SC 29492-8144  
11 chris@cslaw.com

12 ALSO PRESENT:

13

MATTHEW STARLING, VIDEOGRAPHER  
CLARK & ASSOCIATES

14

GRACE CHANDLER

15

16

17

18

19

20

21

22

23

24

25

|    |                               |    |
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1 I remember I had called that girl and I wanted my  
2 clothes. And she said she had gotten everything  
3 out of there, don't worry, you're fine; and then  
4 I got out, and she just blew me off. I never  
5 heard from her or saw that girl again.

6 Q. When's the last time you talked with  
7 Gary?

8 A. I wrote him a letter.

9 Yeah, probably that one right there.  
10 That was probably it.

11 Q. That's the last time you've had any  
12 contact?

13 A. That's the last time I had any contact.  
14 He never contacted me back.

15 Q. All right.

16 THE DEPONENT: Can I see that  
17 letter?

18 MR. NICKELS: Yeah. Would you like  
19 to keep a copy?

20 THE DEPONENT: Uh-hum.

21

22 EXAMINATION

23 BY MR. NICKELS:

24 Q. Okay. The clocks, do you think that  
25 those made it to Gary's daughter or are they with

1 to show the documentation of what was in the  
2 house when I got there for Gary.

3 Q. And those pictures --

4 A. Long gone. Way -- that's like 25, 30  
5 cell phones ago.

6 Q. Okay.

7 A. I wish I had that phone.

8 Q. The letter, which you have a copy of,  
9 we'll make it an exhibit to your deposition.

10 (Exhibit No. 1) was marked for  
11 identification.)

12 Q. Was this just a letter between fiends?  
13 Or was there a specific purpose?

14 A. I haven't read it, but I'm sure it was a  
15 friendship letter, yeah. I haven't -- I don't  
16 have my glasses with me. Do you have any  
17 readers? Anybody have a pair of readers?

18 Q. I could have used those this morning as  
19 well. I could read -- I'll read it off, and I'll  
20 just read it in. I says: Gary, I wanted to tell  
21 you I'm still here for you, even though you are  
22 mad at me. I still stand by the fact I have made  
23 some bad decisions about who I had living at your  
24 home. I didn't have anything to do with any of  
25 your stuff getting gone.

1           Mary was at your trial, reported to me  
2   daily what was said. I was in rehab at the time.  
3   She said that they didn't go in great detail  
4   about medications, which unfortunately sucks for  
5   you. I guess you can appeal it if you need to.

6           I can't believe they gave you all that  
7   time. Brian Lee has called me countless times,  
8   and I just blow him off. He wanted a  
9   cheeseburger and a cigarette, I guess. And he's  
10   not on my -- kind of a list, put it that way.

11          Well, you are in the big leagues now.  
12   Don't trust anyone. I hope you're safe and with  
13   some decent people. Considering where you are,  
14   it's probably hard to find them.

15          As you can see, you like a Harvard grad  
16   compare -- oh -- you're like a Harvard grad  
17   compared to the people around, and I'm praying  
18   for you daily. I know it's hard to forgive me,  
19   but please try. I really love you, buddy. I  
20   hope you can find peace with God. It's the only  
21   way to do your time.

22          Please write me when you can. I am  
23   doing well out here. I am about to do my own  
24   thing with my own company soon. I am tired of  
25   making someone else money. Mary says hello, and

1 she loves you always. She is the sweetest woman

2 I know. Only wants the best for everyone.

3 You are not alone, Gary. I want you to

4 please write me. If there is anything I can do

5 for you, please let me know. God will see you

6 through. Please keep me in your prayers. Keep

7 your head up, buddy. I love you and hope you are

8 well as can be. Let me know if you need

9 anything. Your friend, Len Allen.

10 Do you know if you ever got a responsive

11 letter?

12 A. I don't think I did, no. No. I never

13 did.

14 Q. Is it your sense that this is the last,

15 sort of, correspondence?

16 A. That was the last correspondence to him.

17 I don't think I really got -- ever got anything

18 back from him.

19 Q. Do you think your phone ever rang since

20 you wrote this letter?

21 A. No. I -- that was 25 numbers ago. I

22 know that Mary and Gary are still in somewhat

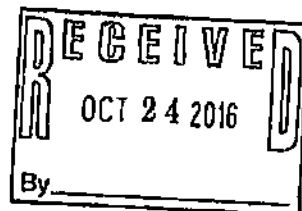
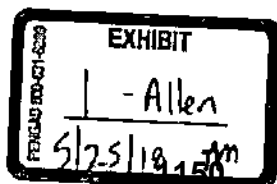
23 contact I think.

24 Q. Okay.

25 A. Corresponding through mail or -- I'm not

# TRUST IN THE WORD!

Gary wanted to tell you I am still  
here for you even though you are mad  
at me. I still stand by the fact  
I had made some last decisions about  
if I had living at your house, I  
didn't have anything to do with any of  
your stuff getting gone. Mary was at  
your trust reporting to me daily what  
she said. I was in rehab at the  
time. She said that they didn't go in  
great detail about medications, which  
unfortunately sucks for you. I guess  
you can appeal if you need to. I  
can't believe they gave you all that  
time. Brian Lee has called me countless  
times and I just blow him off. He  
wanted a cheeseburger and a cigarette  
figure. His not on my Christmas  
card list put it that way. Well you  
are in the Big League now. Don't  
trust anyone. I hope your wife and  
with some decent people, considering  
where you are it's probably hard to  
find them. As you can see you are  
like a Harvard grad ~~and~~ compared  
to the people around you. I am praying  
for you daily. I know it's hard to  
forgive me but please try. I really  
love you buddy. I hope you can

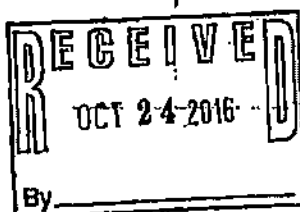




find peace with God. Is the only way  
to do your turn. Please write me when  
you can. I am doing well out here.  
I am about to do my own thing  
with my own company soon. I am  
tired of making someone else money.  
Mary says hello and she loves you  
always. She is the sweetest woman  
I know. Only wants the best for  
everyone. You are not alone Gary.  
I want you to please write me. If  
there is anything I can do for you  
Please let me know. God will see  
you through. Please keep me in your  
prayers. Keep your head up buddy.  
I love you and hope you are  
well as can be. Let me know  
if you need anything.

Yours friend,

Sen Alb



STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

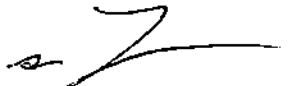
Motion for Discovery

**FILED**  
APR - 8 2020  
CASE NO.  
LEAH GUERRY DUFREE  
CLERK OF COURT  
BERKELEY COUNTY, SC

Petitioner moves, pursuant to S.C. Code § 17-27-150, for leave to serve a subpoena duces tecum on, and notice the deposition of, Rebecca Plummer McCardle, who authored the statement attached to the PCR Application as Exhibit B. Upon information and belief, Ms. McCardle is currently employed by the Lancaster County School System. Obtaining the documents that formed the basis of McCardle's opinions, and taking her deposition, will allow Ms. McCardle's testimony to be used at the final hearing of this matter without forcing her to travel from her residence in Camden, which is a "hotspot" of the COVID-19 outbreak.

Petitioner's attorneys attempted to consult with Respondent's attorney regarding this motion, but were unable to do so.

Dated: 04/03/2020

  
Jason Scott Luck (SC Bar # 73676)  
jluck@garrettlawsc.com  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)  
**Attorneys for Gary Fraley**

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

**Motion for Continuance**

Petitioner moves to continue the final hearing in this matter, currently set for January 24, 2020 (upon information and belief, now rescheduled to January 22, 2020). Petitioner's lead attorney, Jason Luck, has been attending to the treatment and hospice care of his (now) father-in-law from December 24, 2019 to January 13, 2020; planning and attending his own wedding on December 29, 2019; and handling the funeral arrangements of his father-in-law, which will take place in the coming week. Due to these events, Petitioner's attorney requires additional time to prepare for hearing.

Due to the exigency of the matter, Petitioner's attorney has not consulted with the State's attorney regarding this relief.

Dated: 01/13/2020

By: Jason Scott Luck

Jason Scott Luck (SC Bar # 73676)  
jluck@garrettlawsc.com  
Ryan A. Love (SC Bar # 103456)  
rlove@garrettlawsc.com  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)  
**Attorneys for Gary Fraley**

FILED  
20 JAN 15 PM 4:30  
CLERK OF COURT  
BERKELEY COUNTY, SC

Handwritten signature/initials.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Motion for Continuance

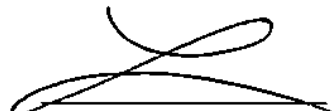
FILED  
19 NOV - 8 PM 1:00  
CLERK OF COURT  
BERKELEY COUNTY, SC

FILED  
19 NOV - 8 PM 1:00  
CLERK OF COURT  
BERKELEY COUNTY, SC

Petitioner moves to continue the final hearing in this matter, currently set for November 22, 2019. Petitioner's attorney, who is currently preparing submissions for the Fourth Circuit Court of Appeals<sup>1</sup> and the United States Supreme Court<sup>2</sup> and requires additional time to prepare and to evaluate a new issue relevant to relief.

Petitioner's attorney has consulted with the State's attorney in this matter, and the State's attorney consents.

Dated: 11/05/19

  
By: Jason Scott Luck

Jason Scott Luck (SC Bar # 73676)  
jluck@garrettlawsc.com  
Ryan A. Love (SC Bar # 103456)  
rlove@garrettlawsc.com  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)  
Attorneys for Gary Fraley

<sup>1</sup> *George Sink, P.A. Injury Lawyers v. George Sink, Jr., et al.*, 19-1960

<sup>2</sup> *Al Cannon v. Broderick Seay*, 19-311

**From:** Benjamin Limbaugh [BLimbaugh@scag.gov](mailto:BLimbaugh@scag.gov)  
**Subject:** RE: Fraley v. State 2018-CP-08-2576 - continuance request  
**Date:** November 6, 2019 at 9:23 AM  
**To:** Young, Roger Law Clerk ([Lyndsay Luthringer](mailto:Lyndsay Luthringer)) [ryounglc@sccourts.org](mailto:ryounglc@sccourts.org), Jason Luck [jluck@garrettlawsc.com](mailto:jluck@garrettlawsc.com)



Ms. Luthringer,

I consent to Mr. Luck's continuance request.

Thank you,  
Ben



**Benjamin Limbaugh**  
**A.A.G.**  
**Post-Conviction Relief**  
**Section**

**S.C. Attorney General's**  
**Office**  
Rembert C. Dennis  
Building  
1000 Assembly St.  
Columbia, SC 29201  
(803)-734-4124  
[blimbaugh@scag.gov](mailto:blimbaugh@scag.gov)

---

**From:** Young, Roger Law Clerk ([Lyndsay Luthringer](mailto:Lyndsay Luthringer)) <[ryounglc@sccourts.org](mailto:ryounglc@sccourts.org)>  
**Sent:** Wednesday, November 6, 2019 9:22 AM  
**To:** Jason Luck <[jluck@garrettlawsc.com](mailto:jluck@garrettlawsc.com)>  
**Cc:** Benjamin Limbaugh <[BLimbaugh@scag.gov](mailto:BLimbaugh@scag.gov)>  
**Subject:** RE: Fraley v. State 2018-CP-08-2576 - continuance request

Mr. Luck,

So long as it is consented to, Judge Young approves the continuance request.

Thank you.

**Lyndsay Luthringer**  
Law Clerk to The Honorable Roger M. Young, Sr.  
100 Broad Street

100 Broad Street  
Charleston, South Carolina 29401  
Office: (843) 958-2015  
Email: [RYounglc@sccourts.org](mailto:RYounglc@sccourts.org)

---

**From:** Jason Luck <[jluck@garrettlawsc.com](mailto:jluck@garrettlawsc.com)>  
**Sent:** Wednesday, November 6, 2019 9:21 AM  
**To:** Young, Roger Secretary (Robyn R. Hills) <[ryoungsc@sccourts.org](mailto:ryoungsc@sccourts.org)>  
**Cc:** [BLimbaugh@scag.gov](mailto:BLimbaugh@scag.gov); Young, Roger Law Clerk (Lyndsay Luthringer) <[ryounglc@sccourts.org](mailto:ryounglc@sccourts.org)>  
**Subject:** Fraley v. State 2018-CP-08-2576 - continuance request

\*\*\* **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Judge Young,

Please find attached a motion for continuance. It will be served today via U.S. Mail.

Jason Scott Luck  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)

On Nov 5, 2019, at 5:12 PM, Benjamin Limbaugh <[BLimbaugh@scag.gov](mailto:BLimbaugh@scag.gov)> wrote:

Jason,

My apologies, just got back to Columbia after court today. Yes, I will consent to the continuance.

Thank you,  
Ben

---

**From:** Jason Luck <[jluck@garrettlawsc.com](mailto:jluck@garrettlawsc.com)>  
**Sent:** Tuesday, November 5, 2019 11:11:29 AM  
**To:** Benjamin Limbaugh  
**Subject:** Fraley v. State 2018-CP-08-2576 - continuance request

Ben,

Will file the attached motion tomorrow morning. Would you consent?

Jason Scott Luck  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

Gary Fraley,) No 2018-CP-08-2576
Petitioner,)
vs.)

The State of South Carolina,)
Respondent.)

Return to Respondent's Motion to Dismiss

Petitioner Gary Fraley submits the following return to Respondent's Motion to Dismiss¹:

Relevant Background

Petitioner filed a *pro se* PCR application on July 24, 2018 that was returned due to a scrivener's error.² The Clerk's notification to Petitioner was attached to Petitioner's December 28, 2018, application as Exhibit C, and is attached to this Return. Petitioner filed a corrected application on December 28, 2018, where he asserted the following legal grounds in support of vacating his conviction:

- (a) I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(1)
- (b) There exist material facts, not previously presented and heard, that require vacation of my conviction in the interest of justice. See S.C. Code § 17-27-20(A)(4)
- (c) I was not competent at the time of my trial. See S.C. Code § 17-27-20(A)(6)

(December 28, 2018 Application, p. 3).

¹ If this Court has issued the proposed Conditional Order of Dismissal, please allow this Return to serve as Petitioner's response to that order.

² The Clerk also rejected the application for an alleged failure to provide the original petition. This ground is perplexing, as Petitioner did submit the original application to the Clerk.

On January 31, 2019, Petitioner amended ground (a) as follows:

(a) I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(1). In addition to the ineffective assistance identified in Exhibit A to my Application and at hearing, I specifically believe that my trial attorney, Melisa Gay, was ineffective for failing to pursue a defense of (and a jury instruction for) involuntary intoxication based on the side effects of Vivitrol. See State v. Shands, Op. No. 5569 (S.C. Ct. App. dated June 13, 2018) (Shearouse Adv.Sh. No. 24 at 69) (example of involuntary intoxication jury instruction). One of the side effects of Vivitrol is inability to sleep, and I suffered from this side effect after the Wilmington Treatment Center administered the Vivitrol shot in June of 2014. The sleep deprivation caused by this shot, possibly combined with interactions with my other medications, led to my unusual, bizarre, and psychotic behavior leading up to August 5, 2014. During this period of time, and particularly during the times of my alleged crimes, I did not understand what I was doing (to the extent I can even remember), and even if I did understand what I was doing I did not understand it was legally or morally wrong.

(Supplement to Application, p. 1). Petitioner's December 28, 2018 application cites Petitioner's deposition transcript and a letter from Rebecca A. Plummer McCardle, LMSW, as providing facts supporting his arguments, and his January 31, 2019, supplement includes additional support, including the Record on Appeal of Petitioner's appeal, several scholarly articles, and information about the arrest of Petitioner's trial counsel for obstruction of justice.

Argument

Respondent argues that Petitioner has not timely filed his PCR application. Petitioner agrees that any a PCR application under S.C. Code § 17-27-20(A)(1) is subject to a one year statute of limitations. However, Petitioner's PCR application arrived at the Berkeley County Clerk of Court on July 24, 2018. While the Clerk of Court returned the application due to alleged technical errors,³ it was nonetheless timely submitted. See S.C. Code § 17-27-70(a) ("In considering the application, the court shall take account of substance, regardless of defects of

³ Petitioner disputes that the pleading was defective, as none of the reasons offered by the Clerk of Court would render the application improper under S.C. Code § 17-27-45.

form.”); Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978) (courts must hold *pro se* pleadings to a less stringent standard).

Even if Petitioner’s good-faith attempt to file an application that met the requirements of S.C. Code § 17-27-45 does not constitute “filing” under Section 17-27-45, the limitations period is nonetheless subject to equitable tolling. See Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017). Petition has actively pursued his PCR remedy, despite having filed an allegedly defective pleading; equitable tolling is appropriate. See Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990) (“We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period...”).⁴ Equitable tolling is particularly relevant in scenarios where any delay was due to an error by court staff (as has happened in this case). See e.g. Knight v. Schofield, 292 F.3d 709 (11th Cir.2002); Hollins v. Dep’t of Corrs., 191 F.3d 1324 (11th Cir.1999),

Further, a PCR application under S.C. Code § 17-27-20(A)(4) is subject to a one year statute of limitations from the “date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.” S.C. Code § 17-27-45(C). Petitioner’s trial counsel was arrested for obstruction of justice on February 13, 2018. (Exhibit A to Supplement). State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018) was not decided until June 13, 2018. Any application relying on these facts would be timely filed by February 13, 2019 and June 13, 2019, respectively.

Finally, any application under S.C. Code § 17-27-20(A)(6) based on the incapacity of the accused will be tolled during his period of incapacity. See Ferguson v. State, 382 S.C. 615, 677

⁴ Petitioner would also note that whether Respondent’s motion is based on Rule 12 or Rule 56, all facts are to be construed in a light most favorable to Petitioner. See e.g. Holy Loch Dist. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998); Rakestraw v. SCDOT, 323 S.C. 227, 473 S.E.2d 890 (Ct. App. 1996).

S.E.2d 600 (2009).

Conclusion

For the foregoing argument, and any presented at hearing, Petitioner asks this Court to deny Respondent's Motion to Dismiss.

Dated: 04/17/2019


By: Jason Scott Luck
Jason Scott Luck (SC Bar # 73676)
Ryan A. Love (SC Bar # 103456)
Garrett Law Offices, LLC
1075 E. Montague Ave.
North Charleston, SC 29405
843.554.5515 (phone)
843.747.3198 (telefax)
Attorneys for Gary Fraley

Certificate of Service
2018-CP-08-2576

I certify that the **Return to Respondent's Motion to Dismiss** was placed in the U.S.

Mail, first class, postage-prepaid on the date below to the following address(es):

Office of the Attorney General
ATTN: Benjamin Limbaugh, Esq.
P.O. Box 11549
Columbia, SC 29211-1549

Leah Guerry Dupree
Clerk of Court of Berkeley County
P.O. Box 219
Moncks Corner, SC 29461-0219

Date: 04/17/2019


~~Jason Scott Luck~~

FILED
19 APR 23 AM 9:10
CLERK OF COURT
BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Gary Fraley, #364802
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-2576

RETURN AND MOTION TO DISMISS

The State (Respondent), making its Return to the application for post-conviction relief (PCR) filed by Gary Fraley ("Applicant") on December 28, 2018, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. In October 2014, the Berkeley County Grand Jury indicted Applicant for kidnapping (2014-GS-08-1509), attempted murder (2014-GS-08-1508), unlawful conduct toward a child (2014-GS-08-1507), kidnapping (2014-GS-08-1505), and possession of a weapon during the commission of a crime (2014-GS-08-1506). Applicant was subsequently indicted in November 2014 for three counts of criminal sexual conduct with a minor, second degree (2014-GS-08-1511; 2014-GS-08-1684; 2014-GS-08-1685) and in December 2014 for possession of a weapon during the commission of a crime (2014-GS-08-1934), criminal sexual conduct with a minor, third degree (2014-GS-08-1874). On August 17, 2015, a jury trial was commenced in the Berkeley County Court of General Sessions with the Honorable Kristi Harrington, circuit court judge, presiding. Melisa Gay, Esquire represented Applicant. Assistant Solicitor Anne Williams, Esquire represented the State. Thereafter, at the conclusion of trial, the jury convicted Applicant as indicted. Following the verdict, the trial judge

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CLERK OF COURT
BERKELEY COUNTY, SC

sentenced Applicant to imprisonment for concurrent terms of 30 years for each count of kidnapping and attempted murder, 5 years for each count of possession of a weapon during the commission of a violent crime, 15 years for each count of criminal sexual conduct with a minor, third degree, 20 years for each count of criminal sexual conduct with a minor, second degree, and 10 years for unlawful conduct toward a child.

Applicant filed a timely notice of appeal. John Harrison Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on July 26, 2017. State v. Fraley, Op. No. 2017-UP-305 (S.C. Ct. App. filed July 26, 2017). The remittitur was returned to the circuit court on August 11, 2017.

II.

In his first and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Ineffective Assistance of Counsel
2. "I was not competent at the time of my trial"
3. "Please see my August 7 2018 deposition transcript, attached as exhibit A"
4. "Please see Exhibit A and Exhibit B which is a true and correct copy of a letter from Rebecca A Plummer McCardle, LMSW"

Subsequently, Applicant filed an amendment to his post-conviction relief application in which he alleged new grounds of:

1. I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(I). In addition to the ineffective assistance identified in Exhibit A to my Application and at hearing, I specifically believe that my trial attorney, Melisa Gay, was ineffective for failing to pursue a defense of (and a jury instruction for) involuntary intoxication based on the side effects of Vivitrol. See State v. Shands, Op. No. 5569 (S.C Ct. App. dated June 13, 2018) (Shearouse Adv.Sh. No. 24 at 69) (example of involuntary intoxication jury instruction). One of the side effects of Vivitrol is inability to sleep, and I suffered from this side effect after the Wilmington Treatment Center administered the Vivitrol shot in June of 2014. The sleep deprivation caused by this shot, possibly combined with interactions with my other medications, led to my unusual, bizarre, and psychotic behavior leading up to August 5, 2014. During this period of time, and particularly during the times of my alleged crimes, I

did not understand what I was doing (to the extent I can even remember), and even if I did understand what I was doing I did not understand it was legally or morally wrong.

2. Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed Aug. 26, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480792> (last visited January 3, 2019)
3. and <https://ctrack.sccourts.org/public/document/view.do?documentID=480795> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
4. Supplemental Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed August 31, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480799> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
5. Vivitrol Medication Guide, FDA (Rev. July 2013) available at <https://www.fda.gov/downloads/Drugs/DrugSafety/UCM206669.pdf> (last visited January 4, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
6. Flavie Waters, et al., Severe Sleep Deprivation Causes Hallucinations and a Gradual Progression Toward Psychosis With Increasing Time Awake, 9 Frontiers in Psychiatry 303 (July 10, 2018) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6048360/pdf/fpsy-09-00303.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
7. Nadine Petrovsky, et al., Sleep Deprivation Disrupts Prepulse Inhibition and Induces Psychosis-Like Symptoms in Healthy Humans, 34 The Journal of Neuroscience 9134 (July 2, 2014) available at <http://www.jneurosci.org/content/jneuro/34/27/9134.full.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
8. Stanley Coren, Sleep Deprivation, Psychosis and Mental Efficiency, 15 Psychiatric Times (March 1, 1998) available at http://www.mpsaz.org/rmhs/staff/rjrios/psychii/psychcal/files/sleep_deprivation_article_questions.pdf (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
9. Louis Jolyon West, et al., The Psychosis of Sleep Deprivation, 96 Proceedings of the New York Academy of Sciences 66 (Jan. 1962) available at <https://nyaspubs.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1749-6632.1962.tb50101.x> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
10. Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of the attached documents from State v. Gav. 2018A1010200733, which are attached as Exhibit A. See also In re Gav. 375 S.C. 418, 653 S.E.2d 272 (2007); In re Gav, No. 2018-000237 (S.C. Sup. Ct. Order dated March 21, 2018).

Attached to this Return and incorporated by reference are the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's records from the South

Carolina Department of Corrections, the trial transcript, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits that this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted on August 17, 2015. The remitter from the direct appeal was issued on July 26, 2017. The application was therefore due on July 27, 2018. This application was filed on December 28, 2018, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General

By: *Benjamin Limbaugh*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

April 11, 2019

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Supplement/Amendment to Application for
Post-Conviction Relief

19 FEB -4 PM 12:30
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

Paragraph 10(a) is amended as follows:

- (a) I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(1). In addition to the ineffective assistance identified in Exhibit A to my Application and at hearing, I specifically believe that my trial attorney, Melisa Gay, was ineffective for failing to pursue a defense of (and a jury instruction for) involuntary intoxication based on the side effects of Vivitrol. See State v. Shands, Op. No. 5569 (S.C Ct. App. dated June 13, 2018) (Shearouse Adv.Sh. No. 24 at 69) (example of involuntary intoxication jury instruction). One of the side effects of Vivitrol is inability to sleep, and I suffered from this side effect after the Wilmington Treatment Center administered the Vivitrol shot in June of 2014. The sleep deprivation caused by this shot, possibly combined with interactions with my other medications, led to my unusual, bizarre, and psychotic behavior leading up to August 5, 2014. During this period of time, and particularly during the times of my alleged crimes, I did not understand what I was doing (to the extent I can even remember), and even if I did understand what I was doing I did not understand it was legally or morally wrong.

G.C.F.

[Handwritten signature]

Paragraph 11 is supplemented as follows:

- (d) Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed Aug. 26, 2016) *available at* <https://ctrack.sccourts.org/public/document/view.do?documentID=480792> (last visited January 3, 2019) and <https://ctrack.sccourts.org/public/document/view.do?documentID=480795> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- (e) Supplemental Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed August 31, 2016) *available at* <https://ctrack.sccourts.org/public/document/view.do?documentID=480799> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- (f) Vivitrol Medication Guide, FDA (Rev. July 2013) *available at* <https://www.fda.gov/downloads/Drugs/DrugSafety/UCM206669.pdf> (last visited January 4, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- (g) Flavie Waters, et al., *Severe Sleep Deprivation Causes Hallucinations and a Gradual Progression Toward Psychosis With Increasing Time Awake*, 9 Frontiers in Psychiatry 303 (July 10, 2018) *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6048360/pdf/fpsy-09-00303.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- (h) Nadine Petrovsky, et al., *Sleep Deprivation Disrupts Prepulse Inhibition and Induces Psychosis-Like Symptoms in Healthy Humans*, 34 The Journal of Neuroscience 9134 (July 2, 2014) *available at* <http://www.jneurosci.org/content/jneuro/34/27/9134.full.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- (i) Stanley Coren, *Sleep Deprivation, Psychosis and Mental Efficiency*, 15 Psychiatric Times (March 1, 1998) *available at* http://www.mpsaz.org/rmhs/staff/rjrios/psychii/psychcal/files/sleep_deprivation_article__que

G.C.F.

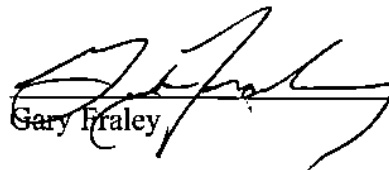
stions.pdf (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.

- (j) Louis Jolyon West, et al., *The Psychosis of Sleep Deprivation*, 96 Proceedings of the New York Academy of Sciences 66 (Jan. 1962) available at <https://nyaspubs.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1749-6632.1962.tb50101.x> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- (k) Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of the attached documents from State v. Gay, 2018A1010200733, which are attached as Exhibit A. See also In re Gay, 375 S.C. 418, 653 S.E.2d 272 (2007); In re Gay, No. 2018-000237 (S.C. Sup. Ct. Order dated March 21, 2018).

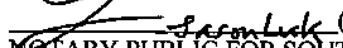
STATE OF SOUTH CAROLINA)
)
COUNTY OF LEE)
_____)

Verification

I, Gary Fraley, being duly sworn, depose and say that I have subscribed to the foregoing; that I know the contents thereof; and that the matters and allegations therein set forth are true.


Gary Fraley

SWORN TO AND SUBSCRIBED BEFORE ME
this 31st Day of Jan, 2019

 (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 12/7/2026

FILED
19 FEB -4 PM 3:07
LEAH GUERRY CUPPREE
CLERK OF COURT
BERNELEY COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gary Fraley,

Petitioner,

vs.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

No 2018-CP-08-2576

Certificate of Service

LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

19 FEB -4 PM 12:30

FILED

I certify that the Supplement/Amendment to Application for Post-Conviction Relief was placed in the U.S. Mail, first class, postage-prepaid on the date below to the following address(es):

Office of the Attorney General
Post Conviction Relief Section
P.O. Box 11549
Columbia, SC 29211-1549

Leah Guerry Dupree
Clerk of Court of Berkeley County
P.O. Box 219
Moncks Corner, SC 29461-0219

Date:

2/1/19

By: Jason Scott Luck

Jason Scott Luck (SC Bar # 73676)
jluck@garrettlawsc.com
Ryan A. Love (SC Bar # 103456)
rlove@garrettlawsc.com
Garrett Law Offices, LLC
1075 E. Montague Ave.
North Charleston, SC 29405
843.554.5515 (phone)
843.747.3198 (telefax)
Attorneys for Gary Fraley

WITNESSES

A. Blake-State Law Enforcement Division

ARREST WARRANT NUMBER

2018A1010200733

ACTION OF GRAND JURY

TRUE BILL

Jennifer Lucas
Foreperson of Grand Jury

Date: AUG 07 2018

VERDICT

Foreperson of Petit Jury

Date:

Docket Number 2018-GS-10-04532

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

August Term

THE STATE

vs.

Melisa White Gay

DEFENDANT

Indictment for

Obstruction of Justice

17-25-0030
Misdemeanor
CDR Code 0118

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury

Defendant **FILED**

I, 8/13/2018 12:48:14 PM
herby ~~appear~~ *ARMSTRONG* proper person
and plead guilty to the within indictment or
to ~~CLERK OF COURT~~

Defendant

Witness:

C.C.C. Pls. And G.S.

EXHIBIT
A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

)
)
)

IN THE COURT OF GENERAL SESSIONS

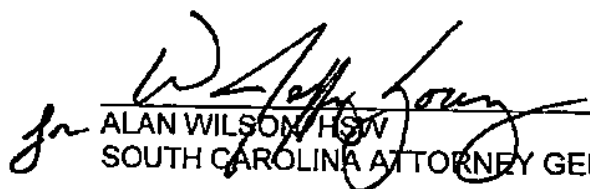
INDICTMENT

At a Court of General Sessions, convened on August 21/18 the Grand Jurors of Charleston County present upon their oath:

Obstruction of Justice

On or about December 13, 2017, the Defendant, Melisa Gay, did in Charleston County, commit the crime of Obstructing Justice in that the Defendant, intentionally performed an act which prevents, obstructs, impedes or hinders the administration of justice, in violation of §17-25-0030, Code of Laws of South Carolina, (1976, as amended).

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


ALAN WILSON HSW
SOUTH CAROLINA ATTORNEY GENERAL

ARREST WARRANT

2018A1010200733

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

THE STATE
against

Melisa White Gay

Address:

Phone: (000)000-0000

SSN: P

Sex: F Race: W Height: 5 6 Weight: 135

DL State: SC DL #: 00000000

DOB: Agency ORI #: SCLED0000

Prosecuting Agency: State Law Enforcement Division

Prosecuting Officer: Alexander Blake - 0395

Offense: Obstructing / Obstructing justice

Offense Code: 0118

Code/Ordinance Sec: C/L, 17-25-0030

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant

on

Melisa Gay
2/13/2018A. Blake
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 318

Personally appeared before me the affiant Alexander Blake

being duly sworn deposes and says that defendant Melisa White Gay

did within this county and state on or about 12/13/2017

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Charleston)

in the following particulars:

DESCRIPTION OF OFFENSE: Obstructing / Obstructing justice

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Affiant's Address P. O. Box 21398

Columbia, SC 29221-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 12/13/2017

defendant Melisa White Gay

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Charleston

) as set forth below:

DESCRIPTION OF OFFENSE: Obstructing / Obstructing justice

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me

on 2/7/2018

James Benjamin Gosnell Jr.
Judge Code: 5904

Judge's Address 3831 Leeds Avenue, Ste 100

North Charleston, SC 29405-

Judge's Telephone (843)745-2390

Issuing Court

☒ Magistrate☐ Municipal☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

Judge
on 2.13.18
Type and Amount: \$20,000 PL
Name of Surety:

PRELIMINARY HEARING held by

Judge
on
Defendant Attorney:
Decision:

DISPOSITION before

Judge
on
by
(indicate jury trial, bench trial, plea, nol. pros., etc.)
Disposition:
Sentence:

JURORS

WITNESSES

Name:
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CODEFENDANTS



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CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WARRANT AFFIDAVIT

DEFENDANT: NAME: Melisa White Gay

DOB: [REDACTED] RACE: BLACK SEX: Female SSN: [REDACTED]

HEIGHT: 507 WEIGHT: 200 HAIR: GRY EYES: BRN DL: [REDACTED]

ADDRESS: [REDACTED]

Personally appeared before me the affiant, S/A Alexander Blake, whom being duly sworn and says that defendant: Melisa White Gay did within this County and State on December 13, 2017, violate the criminal laws of the State of South Carolina in the following particulars:

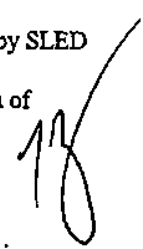
DESCRIPTION OF OFFENSE: Obstruction of Justice

CODE SECTION: Common Law

PROBABLE CAUSE:

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On December 13, 2017, at 3841 Bridgeview Drive, North Charleston, Charleston County, South Carolina, the defendant, Melisa White GAY (DOB: [REDACTED]) did violate the common law of South Carolina, namely, Obstruction of Justice. On the above date and location, agents of SLED arrested Dwayne WALKER for trafficking cocaine and PWID marijuana. GAY responded to the above location as the attorney of WALKER. While with WALKER, away from agents, GAY placed a phone call to the girlfriend of WALKER, Dametrice POOLER. GAY told POOLER to remove US currency and paperwork from the residence which is shared by WALKER and POOLER. GAY further told POOLER to take the money to an associate of WALKER's, FNU LNU a/k/a -- "B". Agents with SLED overheard the conversation between GAY and POOLER while present with POOLER at POOLER's residence. GAY admitted to S/A Blake that she placed the phone call to POOLER. GAY further indicated to S/A Blake she knew the act was illegal. GAY did intentionally attempt to interfere and impede the administration of justice by SLED against WALKER by intentionally contacting POOLER and requesting her to remove evidence vital to the investigation of WALKER.



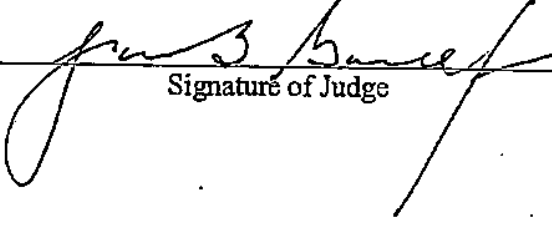
SLED CASE NUMBER: 78-17-0246

Sworn to and Subscribed before me

7 day of feby, 2018


Affiant

S/A Alexander Blake


Signature of Judge

) Agency: SC Law Enforcement Division

) Address: 4400 Broad River Road, Columbia, SC
29210

) Phone: 803-542-5663

FORM 5

STATE OF SOUTH CAROLINA)
)
 County of Berkeley)
)
Gary Fraley (#00364802))
 Full name and prison number (if any) of Applicant)
)
 v.)
)
 State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS

20 18 -CP-08-2576

APPLICATION FOR
 POST-CONVICTION RELIEF

INSTRUCTIONS -- READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institute, 990 Wisacky Hwy, Bishopville, SC 29010
2. Name and location of Court which imposed sentence Berkeley County Court of General Sessions
300 California Dr # B, Moncks Corner, SC 29461
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 2014-GS-08-01505; 2014-GS-08-01506; 2014-GS-08-01507; 2014-GS-08-01508;
2014-GS-08-01509; 2014-GS-08-01511; 2014-GS-08-01684; 2014-GS-08-01685;
 (b) 2014-GS-08-01874; 2014-GS-08-01934

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 2018 DEC 28 PM 3:30
 MARY P. BROWN
 CLERK OF COURTS
 BERKELEY COUNTY, SC

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 17, 2015
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Yes.
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed.
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. July 26, 2017
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed July 26, 2017)
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(1)
- (b) There exist material facts, not previously presented and heard, that require vacation of my conviction in the interest of justice. See S.C. Code § 17-27-20(A)(4)
- (c) I was not competent at the time of my trial. See S.C. Code § 17-27-20(A)(6)
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Please see my August 7, 2018 deposition transcript, attached as Exhibit A.
- (b) Please see Exhibit A and Exhibit B, which is a true and correct copy of a letter from Rebecca A. Plummer McCardle, LMSW.
- (c) Please see Exhibits A & B.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. On July 24, 2018 I filed an Application for PCR with the same grounds for relief with the Berkeley County Court of Common Pleas. The Berkeley County Clerk of Court rejected the filing due to a scrivener's error. A true and correct copy of the letter I received from the Berkeley County Clerk of Court is attached as Exhibit C to this Application.
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Please see my response to (a).
- ii. _____
- iii. _____
- iv. _____

- (c) the disposition thereof:
- i. Please see my response to (a). _____
 - ii. _____
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
- i. Please see my response to (a). _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Please see my response to (a). _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
Please see my response to 13(a). _____

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
- i. Please see my response to 13(a). _____
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
- i. Please see my response to 13(a). _____
 - ii. _____
 - iii. _____

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

- (a) Please see my response to 13(a).
(b) _____
(c) _____

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

- (a) your arraignment and plea? Yes.
(b) your trial, if any? Yes.
(c) your sentencing? Yes.
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

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

- (a) the name and address of each attorney who represented you:
i. Trial attorney: Melissa Gay, 1031 Chuck Dawley Blvd., Mt. Pleasant, SC 29464
Ms. Gay is currently suspended from the practice of law.
ii. See In re Gay, No. 2018-000237 (S.C. Sup. Ct. Order dated March 21, 2018)
Appellate attorney: John Strom, SCCID, 1330 Lady St, Columbia, SC 29201
iii. PCR attorney: Jason Scott Luck, Garrett Law Offices, LLC, 1075 E. Montague Ave.
North Charleston, SC 29405
(b) the proceedings at which each such attorney represented you:
i. Please see my response to 18(a).
ii. _____
iii. _____

19. State clearly the relief you seek in filing this application:

I ask that my convictions be vacated and that I be given a new trial.

During the pendency of this action, I ask for the processes of discovery available under the South Carolina Rules of Civil Procedure. See S.C. Code § 17-27-150

I also ask for reimbursement of my attorneys' fees and costs.

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA)

County of Lee)

VERIFICATION

I, Gary Fraley, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Gary Fraley
Gary Fraley

SWORN to and subscribed before me this 28
day of December, 2018.

Ryan Jones (L.S.)
Notary Public

My Commission Expires: 7/3/28

FILED
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2018 DEC 28 PM 3:30

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF BERKELEY CASE NO. 2017-CP-08-2663
GARY FRALEY,
Plaintiff,
vs.
UNIVERSAL NORTH AMERICA INSURANCE COMPANY,
Defendant.

VIDEO DEPOSITION GARY CURTIS FRALEY
OF:
DATE: August 7, 2018
TIME: 10:00 a.m.
LOCATION: Lee Correctional Institution
 990 Wisacky Highway
 Bishopville, SC
TAKEN BY: Counsel for the Defendant
REPORTED BY: JASON W. TOURO, COURT REPORTER

EXHIBIT
A

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR PLAINTIFF

3 GARY FRALEY:

4 GARRETT LAW OFFICES

5 BY: JASON SCOTT LUCK

6 1075 E Montague Avenue

7 North Charleston, SC 29405-4825

8 (843) 554-5515

9 jluck@garrettlawsc.com

10

11 ATTORNEYS FOR DEFENDANT

12 UNIVERSAL NORTH AMERICA INSURANCE

13 COMPANY:

14

15 CLAWSON AND STAUBES, LLC

16 BY: CHRISTOPHER W. NICKELS

17 126 Seven Farms Drive

18 Suite 200

19 Charleston, SC 29492-8144

20 (843) 577-2026

21 chris@cslaw.com

22

23 ALSO PRESENT:

24 Christopher Mills, Legal Videographer

25

26

27

28

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1	I N D E X		
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3	WITNESS/EXAMINATION		
4	GARY FRALEY	5	18
5	BY MR. NICKELS	5	20
6	CERTIFICATE OF REPORTER	110	1
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8	REQUESTED INFORMATION INDEX		
9	(No Information Requested)		
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11	E X H I B I T S		
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14	Attorney For Finance of		
15	Gary Curtis Fraley	38	4
16	DFT. EXH B, Handwritten Inventory		
17	Of Gary Fraley	67	5
18	DFT. EXH C, Gary Fraley		
19	Handwritten Claim #1501SC24000082	78	23
20	DFT. EXH D, Copy of Policy Number		
21	CSVH0000014620 Gary Fraley	80	13
22	DFT. EXH E, Reservation of Rights		
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1 VIDEOGRAPHER: We are now on the
2 record. Today's date is August the 7th, 2018. It
3 is approximately 10:00 a.m.

4 This is the video deposition of Gary
5 Fraley. The location is Lee Correctional
6 Institution in Bishopville, South Carolina.

7 This deposition is taken in the matter
8 of Gary Fraley vs. Universal NA Insurance Company,
9 et al. Case number 2017-CP-08-2663.

10 Would counsel please introduce
11 themselves for the record.

12 MR. LUCK: Jason Luck, counsel for
13 Gary Fraley.

14 MR. NICKELS: Chris Nickels on behalf
15 of Universal North America.

16 VIDEOGRAPHER: Would the court reporter
17 please swear in the witness.

18 GARY CURTIS FRALEY
19 being first duly sworn, testified as follows:

20 EXAMINATION

21 BY MR. NICKELS:

22 Q. Sir, my name is Chris Nickels. I'm an
23 attorney based in the Charleston area in private
24 practice with a law firm called Clawson and
25 Staubes. Do you understand that?

1 A. Yes sir.

2 Q. The purpose of today's meeting is to
3 take what we call a discovery deposition. You've
4 been placed under oath. Do you understand that?

5 A. Yes, sir.

6 Q. I'll start by asking a lot of
7 questions. Your attorney may or may not ask
8 questions. It depends on how he assesses things.

9 If your attorney makes an objection,
10 wait for his instructions as to what to do. Can we
11 agree to that?

12 A. Yes, sir.

13 Q. Please state your full name for me.

14 A. Gary Curtis Fraley.

15 Q. And what is your date of birth, sir?

16 A. 5, August '66.

17 Q. And that makes you how old as we sit
18 here today?

19 A. 52.

20 Q. And where are we?

21 A. Lee Correctional.

22 Q. And why are you here?

23 A. I had some problems with a
24 personal -- the way I see it, I had problems with
25 some medication; and I ended up committing crimes I

1 wasn't aware of. And I ended up being
2 incarcerated.

3 Q. Did you have a jury trial in Berkeley
4 County as a result of the accusations?

5 A. Yes, sir.

6 Q. Did you testify in that trial?

7 A. Yes, sir.

8 Q. You gave an account of things from your
9 perspective on that matter?

10 A. I wasn't allowed -- well, to a point,
11 yes. I was kind of handcuffed with my --

12 Q. Literally or figuratively?

13 A. -- well, figuratively.

14 Q. Okay. And why were you handcuffed?

15 A. My last attorney did not do a very good
16 job. She didn't understand my case. She didn't.

17 Q. Have you brought claims of ineffective
18 assistance?

19 A. Yes.

20 Q. Are those pending, or have those
21 been --

22 A. No, they are pending.

23 Q. Are you represented by yourself or by
24 someone else?

25 A. I just filed a PCR.

1 **Q. Did you not also file an appeal from**
2 **your convictions as well?**

3 **A. Yes. But even that was, according to**
4 **the things I was reading on, was illegally done.**
5 **Also, that the proceedings, that they didn't give**
6 **ample time. They didn't instruct me properly, and**
7 **he didn't even get back with me or review anything**
8 **with me. So I had ineffective counsel on my appeal**
9 **also, my direct appeal.**

10 **Q. Is that part of your PCR as well?**

11 **A. Yes, sir.**

12 **Q. On August 5th, 2014 were you arrested?**

13 **A. August, 5th --**

14 **Q. 2014.**

15 **A. That's four years ago, yes, sir.**

16 **Q. Almost four years to the day.**

17 **A. Yes, sir.**

18 **Q. Do you know what day it is? I'm**
19 **serious. What day is today?**

20 **A. Today is the 7th, two days after my**
21 **birthday.**

22 **Q. And are you single or married?**

23 **A. I was married at the time. Yes, I am**
24 **single now.**

25 **Q. How many times have you been married,**

1 **sir?**

2 A. I've been married three separate times.

3 Q. Okay. And who were you married to at
4 the time -- well, in August of 2014 when you were
5 arrested?

6 A. I was married to Deonna.

7 Q. And did she carry the same last name as
8 you?

9 A. Yes. Fraley, yes.

10 Q. And how long had the two of you been
11 married, approximately?

12 A. Probably three years.

13 Q. How did y'all meet?

14 A. She came up to me at a Super Bowl
15 Sunday and asked me if I wanted to, you know, go
16 home with her. She had known me and seen that I
17 was -- she was obviously husband shopping or
18 something shopping. And people were pointing her
19 in my direction because I was a single guy and I
20 didn't go out much. She's only seen me having a
21 meal or a snack at a local place near my home, my
22 apartment. And that's how she met me. She
23 confronted me, came up to me.

24 That's how I found out she was kind
25 of -- I didn't look like this. I'm a little bit

1 overweight, so. I was more respectable type of
2 feel.

3 Q. Your first date she spent the night?

4 A. No. She didn't come to my place. I
5 wouldn't allow her to come. I wouldn't allow
6 anybody to come to my place because I was
7 concerned. I was a single dad. I was concerned
8 about my daughter's welfare and the things in my
9 house. And I was just being overly cautious.

10 One of my rules were that I didn't
11 allow anybody around my dwellings unless I knew
12 them at least 90 days.

13 Q. Okay. So she was introduced to you by
14 Ms. Anita?

15 A. No. Suzy.

16 Q. She did not introduce you?

17 A. No. She's somebody from a long, long,
18 many years ago. I known them. I did a lot of
19 singing with her mom and whatnot. She promoted her
20 bar, and so I did some singing with them and helped
21 them out with, you know, the presentations they
22 would do for military members and stuff.

23 So Suzy had nothing to do with me
24 meeting Deonna. Deonna was -- she was on shaky
25 ground herself. She was on a third mortgage on her

1 house. She had five men living in her dwellings
2 with her in her house. And I found a lot of stuff
3 about her after the fact that, you know -- just
4 about her and her demeanor as I was growing to know
5 her.

6 We lived together for, I guess, about a
7 year before I decided to marry her. But that was a
8 huge mistake. She's a terrible person.

9 Q. Do you think she's an honest person?

10 MR. LUCK: Object to the form.

11 THE WITNESS: No.

12 BY MR. NICKELS:

13 Q. Okay. You seem to not hesitate?

14 A. No.

15 Q. Can you explain that?

16 A. She -- I saw the way she was treating
17 the people. She was jumping from job to job. And
18 I noticed a lot while we were dating. She was
19 saying that -- she was saying that, hey, would you
20 stand over here because I think this woman over
21 here seems to think that I was sleeping with her
22 husband or her boyfriend or something, and I'm kind
23 of afraid that they are going to gang up on me.

24 So I kind of like played bodyguard for
25 her for the first few months of knowing her not

1 thinking all this was true. In time I started
2 realizing her mannerisms and the way she voiced her
3 things. And then when I did notice that I started
4 to notice her -- you know how you can see
5 somebody's body language when they tell a fib?
6 Well, me now that I'm living with her, I know when
7 she's fibbing; and I know when she's -- you know
8 what I'm saying?

9 Certain things that she would say that
10 were true or not true. And then I would notice the
11 way she speaks like you would your kid or your
12 loved one or spouse. You get to know them and you
13 get to understand their mannerisms. And when I
14 started noticing that, I started becoming a little
15 weary in her, of how she acted and whatnot.

16 I figured I was probably going to be a
17 single dad again. And I didn't think marriage was
18 going to last very long at all.

19 Q. She had actually moved out of your
20 residence at the time of your arrest in August of
21 2014. Do you agree with that?

22 A. She moved out prior to that.

23 Q. Yes. She was out before you were
24 arrested; is that correct?

25 A. Okay. This is -- if I may.

1 Q. Can you say yes or no and then you can
2 explain your answer?

3 A. Okay. Yes.

4 Q. So yes, she was out.

5 A. Yes.

6 Q. But now please explain your answer.

7 A. I did not mean to digress. But --

8 Q. We may be doing some of that today.

9 A. Okay. What happened was, there was a
10 period where I ended up taking a shot from a
11 doctor. And this was -- I've never done drugs. So
12 I had no idea the affect of medication to this
13 point. When I was being told by her best friend
14 that she was actually cheating on me, that she saw
15 all this stuff happening. And she had moved
16 in -- at that time I was wandering somewhere along
17 the eastern coast. I was stuck in North Carolina
18 for days. I was going in and out of consciousness.
19 I was hitting hospitals. I had hit Pennsylvania
20 eventually.

21 Q. That's your home state?

22 A. That's where my mother was living.
23 Now, my mother has dementia. She passed away just
24 recently from it. Well, she couldn't really care
25 for me, not even herself. So her sister would

1 bring her food once and a while. But anyways,
2 what was happening was while I was there, you're
3 flipping in and out of coherency. You don't know
4 what's coming. You don't know what's being said.
5 You're trying to grasp for the truth. And you
6 study real hard when you get that coherent moment
7 before you slow down and don't know where you're at
8 again. I forget how many times. It was the most
9 pain I've ever felt in my life.

10 But my mother said -- and she read
11 something and I'll never forget this. I remembered
12 it today. She said, when she read it on Facebook,
13 Deonna being married to me. The picture on
14 Facebook with her mom and dad congratulating,
15 thanking their daughter's new boyfriend Steve for
16 the best dinner they had in Charleston.

17 There's a picture of all of them on
18 there. And my mother said, isn't that your wife?
19 I said, yes. She goes -- and this is while she's
20 dementia. I've never seen a more classless thing
21 in my life. My mother was a saint. And she said
22 that. Even with her little bit of coherency, she
23 had remembered that.

24 So yes, she moved out. Yes, Steve was
25 her boyfriend. Yes, prior to that, I caught them

1 in the hotel room together. Prior to that or after
2 that, her best friend verified that when they went
3 to Florida together, took my daughter as a cover.
4 My daughter was a cover for their affair.

5 Now I'm fighting all these emotions,
6 this pain. And I'm not -- I can't make headway of
7 what's going on. I can't. I don't understand
8 what's happening. First off, you don't remember
9 that you're taking medication before because
10 there's nobody there with you to remind you of
11 what's happening.

12 I began hemorrhaging in my stomach and
13 started throwing up blood. I think I was
14 hospitalized for almost a week. My body was
15 failing. The next thing that was going to happen
16 was my mind was going to fail. It was designed to
17 work on my mind.

18 The one thing I did not do that I found
19 out while I was at Lee, here. And I've had it this
20 year. They did not give me the medicine to find
21 out if I was allergic to it first. The signs that
22 all my medical records show, I was allergic to the
23 shot. I had facial swelling. My body
24 was -- everything that my medical records show in
25 the Vivitrol website was damaged.

1 Now my brain was failing. I was trying
2 my darndest to stay coherent when I could. And it
3 was hard. And I didn't understand what was
4 happening.

5 Q. Let me go back in time a little bit.
6 Where were you born and raised?

7 A. I was a military brat. So I was born
8 in Fort Gordon, Georgia. I was raised wherever the
9 military would take me.

10 Q. Where did you graduate high school?

11 A. Meade County.

12 Q. In what state is that?

13 A. In Kentucky. Outside Fort Knox.

14 Q. And after you graduated high school,
15 did you become employed or go to college or what?

16 A. I started going to like a -- one of the
17 subcollege's of the University of Kentucky. I
18 found it difficult to try and pay my way through
19 college because I had a washing dishes job at
20 Golden Corral. And going to college, I found that
21 difficult especially with the way my dad had me
22 doing things around the house.

23 I transferred to Pennsylvania to live
24 with my relatives there. I was going to live in
25 Pennsylvania for a year to get grants to finish up

1 my college at -- I believe it was Penn State that
2 was going to accept everything and switch my
3 credits over.

4 Right before that year was up, I just
5 couldn't wait any longer. I was itching to get
6 things going in my life. So with a little bit of
7 college, I ended up joining the military.

8 Q. What branch?

9 A. Air Force, sir.

10 Q. What year did you join?

11 A. March '86.

12 Q. When were you discharged?

13 A. That's iffy. Because I was on
14 something called a TDRL list, Temporary Duty
15 Retirement List. The first time I was discharged
16 was after ten years and that was in March,
17 April -- April or May of '96. And then --

18 Q. During the first ten years, were you
19 court-martialed?

20 A. I was brought up on court-martial
21 charges with I believe it was a lady that -- she
22 was --

23 Q. Underage?

24 A. No, no. She was only like a year or
25 two younger than me. I met her at a place. We

1 were throwing darts. My wife and I were very
2 young.

3 Q. Would this have been the first wife?

4 A. My first wife, yeah. Very young.

5 Q. And what was the allegation of the lady
6 who you met while you were playing darts?

7 A. After ten months of dating her and
8 having sex with her almost every day being the
9 young man that I was and me having troubles with my
10 wife on the outs, my first wife, when I told her I
11 wanted to get back with my wife, she was angered.

12 Q. Right. And she accused you of what?

13 A. She told her parents that we weren't
14 seeing this how it went. Told her parents that we
15 weren't seeing each other anymore, not that I left
16 her, but that I raped her. Now, this is what
17 happened.

18 Q. Were you in the states or overseas?

19 A. No, I was here.

20 Q. Okay. What area, Charleston?

21 A. Yeah, Charleston. So this is what
22 happened. I guess her dad is friends with my
23 commander in some ways. So I'm believing this as
24 far as what I was being told through the attorney.
25 Now, the commander said, he said, do you know

1 Shelly? And I said, yeah, my ex-girlfriend. And I
2 said, I decided to get back with my wife. He said,
3 well, she's saying that you raped her.

4 I said, you crazy; there ain't no way.
5 He goes -- and then he read me my rights. So I was
6 like, okay. Well, I got to find out what's going
7 on here. So I talked to Shelly again. We ended up
8 going back out together. We ended up seeing each
9 other again, end up having sex.

10 So the case, she wouldn't drop it. It
11 wasn't her that was against it; it was the United
12 States Military. The military picked it up. I was
13 telling her, you need to tell them the truth; you
14 need to tell them what you did. She said, it's out
15 of her hands.

16 Q. So what did the military do?

17 A. The military ended up going through the
18 trial. They found out I was acquitted. And they
19 said, well, you were having sex with her again. I
20 said, yeah, we were seeing each other again because
21 I was trying to find out, you know, why she was
22 doing what she was doing, and I asked her to come
23 forward.

24 Her statement in court was that we had
25 an argument. Our argument was that I leaving

1 because my wife just had my first child. I was
2 trying to go back with my first wife. And Shelly
3 did not like that. Throughout the years, Shelly
4 has emailed me. She has written me Christmas
5 cards. She has apologized for what she has done
6 through the years.

7 Q. Was she also enlisted?

8 A. No.

9 Q. She was a civilian?

10 A. She was a civilian.

11 Q. She working on base?

12 A. No. She had ties -- she had ties from
13 having friends on base.

14 Q. Okay. What's her last name?

15 A. Her name was Willbanks but now it's
16 Urlick.

17 Q. Is she married?

18 A. Yeah. She married one of my friends
19 actually in the military. So yes, she has done all
20 that in the past years.

21 Q. Were there any other court-martials
22 during that time?

23 A. No. I was straight up military. I got
24 awards. I got a lot of humanitarian awards. I got
25 a lot of good conduct medals. Everything was

1 straight A's with me. I had that one hiccup.

2 Q. Was your discharge honorable, general,
3 or something else?

4 A. No, it was honorable. After that I was
5 hired into the military under the ART Program and
6 it was in '96.

7 Q. What was your MRS in the military?

8 A. I was a jet engine specialist.

9 Q. Is that a mechanic?

10 A. Mechanic. And then ended up being an
11 instructor.

12 Q. Okay. How much time and service do you
13 have according to your, I guess, is it an EV214?

14 A. Yeah. I can't remember because what
15 happened is when we get hired into doing what I was
16 doing, you had to accumulate some more active duty
17 time. I can't remember the roundabout years.

18 Q. Do you pull a pension?

19 A. Yes. I retired from the military and
20 from civil service. Because I'm retired civil
21 service also. I had to work hard many hours.

22 Q. Was that pension still payable even
23 though you are incarcerated?

24 A. No. Part of it is. Part of it is.
25 But right now something got screwed up, and I need

1 some legal help to find out where my money's going.

2 Q. When you were arrested in August 2014,
3 were you employed?

4 A. No, sir.

5 Q. Why not?

6 A. I had total retired. I was a
7 stay-at-home dad. I took care of my daughter.

8 Q. How many kids do you have?

9 A. I have an older daughter that teaches
10 in Virginia.

11 Q. Is that from wife number one?

12 A. Wife number one. This one here is from
13 wife number two. And she was in the military, and
14 we were together many years. But we were apart
15 because of the military being called back and
16 forth, back and forth. I'd get deployed, then
17 she'd get deployed.

18 Q. Is her name Julie?

19 A. Yes.

20 Q. What's Julie's last name?

21 A. Her last name is Fraley right now.

22 Q. Do you know what her name was before it
23 was Fraley?

24 A. Julie Michelle Nash.

25 Q. Is she in the Charleston area?

1 A. Yes.

2 Q. Is your daughter --

3 A. With her.

4 Q. -- your second daughter, your youngest
5 daughter with her?

6 A. Yes, with her. Yes, sir.

7 Q. And just how old is your youngest
8 daughter?

9 A. My youngest daughter just turned 17 in
10 July. And she also is grade A. She just got her
11 academic scholar recommendation or whatever you
12 call it award.

13 Q. Did she have to change her name?

14 A. Who?

15 Q. Your daughter. Does she have your last
16 name?

17 A. No. They all have my last name. Megan
18 and Alta. Alta is my youngest.

19 Q. Alta?

20 A. A-l-t-a.

21 Q. That means tall or high in Spanish?

22 A. Yes. Ironically with me working on
23 planes. She was born at the time of 7:47.

24 Q. And is that high school age?

25 A. She is getting ready to start and be a

1 senior, sir.

2 Q. West Ash or somewhere else?

3 A. No. Well, I know they have a
4 Charleston address. So I don't know.

5 Q. Not sure which school?

6 A. No.

7 Q. Do you get to see her?

8 A. I don't get to see her. What it is is,
9 I think because of everything that's happened,
10 she's got to wait until she's 18 to come see me.
11 But yeah, we are on kiosk. She writes me on the
12 kiosk. She writes me letters. She was my best
13 friend. It was me and her until...

14 Q. So in August of 2014, you were married
15 to Deonna?

16 A. Yes, sir.

17 Q. But she had moved out. Do you know
18 where she was living at the time?

19 A. With Steve.

20 Q. And is Steve the bowling alley manager
21 owner guy?

22 A. Yes, sir.

23 Q. What's his last name?

24 A. Tsafos.

25 Q. Okay. And they were living together.

1 **How long had they been living together?**

2 A. I can't tell you how long they were
3 living together. I know, this is why in 2014, June
4 23rd that shot was giving to me. And two to
5 three days after that things start -- I can't
6 remember somebody else's story. And I can barely
7 remember my own case.

8 Q. Was the shot supposed to help with
9 addiction issues?

10 A. Right. When I went to -- what I did
11 was I found out -- when I found out she was
12 cheating on me. I went to a hotel room where she
13 said she was at. Steve always bragged that that
14 was his hotel room. So I picked her up there one
15 day because she pretended to be mad at me.

16 And there's sex towels all over the
17 floor. I'm telling you, popcorn. Steve throws
18 popcorn everywhere when he eats. I even said that
19 in his establishment, who's going to pick up after
20 you? There it is all over the place. And I said,
21 let's go, and I took her home. And though I
22 digress. What was that question.

23 Q. Just was kind of wondering how long she
24 had been out of the house.

25 A. So from there to -- I don't understand

1 how long she was out of the house. But I knew from
2 then on I had to go to Wilmington Treatment Center.

3 Q. Did you say Wilmington, like
4 Wilmington, North Carolina?

5 A. Yes, sir.

6 Q. I was just making sure.

7 A. The Wilmington Treatment Center was
8 there. I had my PCM recommend that I went through
9 the Wilmington Treatment Center because I knew I
10 was going to be a single dad. I was upset that I
11 had assumed this, and I couldn't believe what I was
12 seeing. So I put it out of my mind. I said, you
13 know what, let's just get all my ducks in order.

14 I was a stay-at-home drunk. Drunk.
15 But I'm telling you the truth. A bottle and a half
16 of wine is enough for my body to not feel the best
17 even though I didn't appear to be drunk to anybody.
18 You know, that's what I did. I stayed at home. I
19 did the chores. I cut the grass. Took care of my
20 kids -- my daughter, and that's what I did.

21 But the thing was, is when I wanted to
22 do this that I went to Wilmington Treatment Center,
23 they treated me for PTSD and started giving me
24 hypnosis. They set up my medicine because I had
25 some, I guess, my irregular bowels or what I had.

1 What do they call it? Ulcerative colitis they were
2 dealing with at the time. And my heartburn and
3 plus they wanted to make sure my depression
4 medicine was set right because of the PTSD. I was
5 having a lot of sleep issues.

6 So what happened was when I got there
7 and I did all that, the day I left they gave me
8 that shot. They said, it takes two to three days
9 to seep in. I'm telling you, that's about what it
10 took. Because I might have remembered that first
11 or second day, then everything else is all the way
12 up till -- in and out for months. But it was real
13 bad the first two to three months.

14 Q. Where were you living when you weren't
15 in Wilmington? When you were in the Charleston
16 area, where did you live?

17 A. I lived in Goose Creek.

18 Q. Okay. What was the address?

19 A. See those are one of the -- I'm sorry
20 to say this. That's one of the things I can't
21 remember right now.

22 Q. All right.

23 A. I just don't know why. I just... if
24 you tell me the address, I'll probably remember it.

25 Q. How about this one. When you married

1 Deonna, where did the two of you live at first?

2 A. I lived in the apartments off of
3 Greenridge Road.

4 Q. And did that change over time? Did you
5 and Deonna move into a different apartment or home
6 or something else?

7 A. No. What happened was is, she ended up
8 moving out of her house with the triple mortgage in
9 with me, and I had to break that rule because she
10 was --

11 Q. The 90-day rule?

12 A. She was making a scene. She had
13 followed me over to my doorstep, and I wouldn't let
14 her in. And this was probably after two months.
15 And she was crying and banging on my door. And I
16 said, I got neighbors. I said, I still got to
17 stick to my rule, you know, and you know my rule.
18 But she insisted she come. She ended up working
19 her way into my life.

20 Q. And y'all lived in an apartment
21 together?

22 A. It was my apartment.

23 Q. And so who lived there with you? Was
24 your daughter --

25 A. My daughter. My youngest daughter

1 Alta. But she wasn't there when Deonna did that.
2 On the weekend, Alta's biological mother would come
3 pick her up.

4 Q. Julie?

5 A. Julie. I would take -- there was a
6 Christian school. I'd take Alta every morning to
7 Christian school during the week. And I had her at
8 least one weekend out of the month.

9 Q. Did Julie work?

10 A. Julie at the time was still in the
11 military. She was on her way out the door because
12 she was getting close to retiring also. I was
13 older than her in the military so I retired before
14 she did.

15 Then Julie as she was working, I took
16 care of Alta and took her to Northwoods Academy
17 every day. You know where Northwoods is at, I
18 guess.

19 Q. So did you, and your daughter, and
20 Deonna move out of the apartment and into a home at
21 some point?

22 A. Into the home. Off Balbriggan.
23 Balbriggan, yeah.

24 Q. Is that a home you purchased, rented,
25 or what?

1 A. I got my VA loan. I used my VA loan
2 for that.

3 Q. Right. And VA loan means how
4 much -- you don't have to put much down on the home
5 or...

6 A. It was a low percentage. It's somewhat
7 of a guaranteed loan.

8 Q. And when you bought that home, were you
9 employed?

10 A. I was going to start working at Boeing.
11 But when they started asking for overtime, and I
12 didn't need overtime. I was drawing two pensions.
13 I was, like, well, no. I changed my mind
14 on -- I've already -- when you've worked as many
15 years as I did in the military, you're already like
16 90 percent disabled. You don't feel like working
17 overtime anymore.

18 Q. When you were getting the two pensions,
19 how much was that monthly coming to you?

20 A. I don't know. 20. It wasn't much but
21 it was okay. 24.

22 Q. Less than 3,000?

23 A. Oh, yeah.

24 Q. About 2,500 bucks between the two?

25 A. A little bit less maybe. Maybe 24ish.

1 Q. Okay. Did you have any other sources
2 of income at that time with you and Deonna?

3 A. No. Other than her work.

4 Q. She worked at the bowling alley?

5 A. No, not then. She was -- I even
6 brought this up to her. I said, I have never seen
7 somebody get fired from so many jobs in my life.
8 You've had seven jobs in a year and a half.

9 Q. What did you know about her background?
10 You did marry her. I assume you got to know her.

11 A. A little bit. Not as good as I wanted
12 to.

13 Q. Okay.

14 A. Her -- she had said that she used to go
15 to strip bars with her old boss which concerned me.
16 But now that she had a female boss, I wasn't too
17 concerned about that when she had a different job.
18 So I was like, okay. Then she said, she used to
19 catch her husband in the hotels. Come to find out
20 it was the other way around.

21 Q. What are some of the places she worked
22 at when the two of you were together and things
23 were okay between you?

24 A. Okay.

25 Q. Were they ever okay?

1 A. I tell you what, the first thing I
2 remember is I told her right off the bat, I said,
3 if you're doing drugs, I can't be around you
4 because I don't want them around me or my daughter.
5 I take this back. I worked -- when we first
6 met -- that's when we first met though. I had a
7 secondary job towing C-17. I was in charge of
8 towing aircraft on the flight line. So that was
9 right before I tried Boeing out, and then I called
10 it quits for retirement. And that was 2012.

11 Q. Got you. All right. And one more
12 time.

13 A. I'm sorry.

14 Q. When did you first lay eyes on
15 Deonna Fraley? Where were you when you saw that
16 woman?

17 A. When she came up to me.

18 Q. But where were you?

19 A. It was on Greenridge Road. It was a
20 bar and grill called Wings. And I'd go there, you
21 know. They had --

22 Q. Didn't Suzy or Suzy's mother have a bar
23 or grill?

24 A. This is separate. It's totally
25 separate. She had something -- she owns a

1 bowling -- not a bowling alley, a golf course.

2 Q. Okay.

3 A. A little nine hole where you got to
4 play it twice.

5 Q. But would you hang out there at Suzy's
6 mother's place?

7 A. Only when I was doing a show.

8 Q. And the show was singing?

9 A. Singing or we were rehearsing. And
10 that was rare. I only did a couple of shows.

11 Q. Let's talk about Suzy Hylton,
12 H-y-l-t-o-n?

13 A. Okay.

14 Q. By the way, she's giving testimony in
15 this case.

16 A. Yes.

17 Q. Your ex-spouse is giving testimony.
18 And so is Lynn Allen.

19 A. Yeah. I don't even remember what the
20 guy looks like. But I don't want to --

21 Q. Okay. Well, we'll get to that.

22 A. Okay.

23 Q. Trust in the word.

24 A. Yeah, right.

25 Q. Tell me how you came to -- and I'm

1. going to call her Ms. Hylton.

2 A. Suzy, that's fine.

3 Q. Suzy. How did you learn who this lady
4 was, and how did you begin to have a business or
5 relationship?

6 A. I don't know. I just, I knew Suzy from
7 a long time ago. They had karaoke and stuff. And
8 when I was first having issues with my first wife,
9 and I just wanted to get out of the house, that was
10 one of the places I would go. And they had a bar
11 and grill a long time ago. This is like early
12 '90s.

13 Q. In Hannahan?

14 A. No.

15 Q. Where was it?

16 A. No, this was on Dorchester Road by the
17 base. The Dorchester gate. It's called Lee's.
18 Crazy though.

19 Q. So you would go and have some beers at
20 Lee's?

21 A. Yeah. But I -- you know, obviously I
22 lived on base. I'm only going to have a beer, eat
23 something and get of the house and sing a song and
24 go back home.

25 Q. How did that come to meeting Suzy

1 **Hylton?**

2 A. She was a bartender there, and her
3 mother owned the business. And I was friends with
4 her husband, and their kids played with Megan later
5 on in life. You know, they were a little bit older
6 than Megan.

7 Q. Did you come to have a business
8 relationship of any kind with Suzy?

9 A. With Suzy? I don't know of any
10 business we ever had.

11 Q. Well, she said she was the listing
12 agent for the house?

13 A. Well, that.

14 Q. Well, that's a --

15 A. Okay. Well, I don't know.

16 Q. She has your power of attorney to
17 handle --

18 A. I'm thinking business as in business.
19 This just happened while I'm in jail. Yeah,
20 because she was a friend of mine. She was
21 concerned, you know, about what had happened. But
22 her mom -- her mom even said that when I first came
23 back from Pennsylvania, which I don't remember
24 running into her mom.

25 Her mom said that I look crazy; I

1 didn't look right. Something was wrong with me. I
2 wasn't talking right. I wasn't looking right. I
3 wasn't acting right. So she obviously was
4 concerned. But I've known her for years and years.
5 Like I said, she was just like a sister. She was
6 almost like family to me. We've known each other
7 so long.

8 Q. Does she still have a power of attorney
9 for you?

10 A. Yes.

11 Q. Okay. And that is something that you
12 and she worked out together?

13 A. Yes, sir.

14 Q. All right. And what does that from
15 your perspective allow her to do?

16 A. Well --

17 MR. LUCK: Object to the form.

18 THE WITNESS: It allows her hopefully
19 to -- she was to sell the house. I've asked her
20 many times to do things for me. She couldn't find
21 me an attorney. She couldn't find me anything. If
22 it took more than five minutes on the computer,
23 honestly she'd let me know. So all she could do is
24 transfer a few bucks to me.

25 Q. Take a look at that document right

1 there. That's been given to me during the course
2 of this litigation. Hopefully you'll recognize it.

3 A. Is this the one I signed when we were
4 at --

5 Q. Okay. I was hoping you'd tell me what
6 it was.

7 A. I remember her and her mother coming to
8 do the power of attorney because her mother was
9 a -- what do you call it? A notary.

10 Q. Okay.

11 A. So I don't remember the paperwork to do
12 the power of attorney stuff unless this is it,
13 then.

14 Q. How about at least the last page, can
15 you identify something that might resemble your
16 handwriting?

17 A. Yeah. That is my signature, sure.

18 Q. What's the date on that?

19 A. 5, November.

20 Q. 2014?

21 A. Yes, sir.

22 Q. Okay, good. And where were you on
23 5, November 2014?

24 A. I was in jail.

25 Q. BCDC?

1 A. Berkeley County yes, sir.

2 Q. Detention Center. And so you gave --
3 and we'll make that Exhibit A.

4 (DFT. EXH. A, Durable Power of Attorney
5 For Finance of Gary Curtis Fraley, was marked for
6 identification.)

7 BY MR. NICKELS:

8 Q. You gave power of attorney to Suzy
9 Hylton for what reason?

10 A. I was trying to -- I was trying to --
11 at that time I was trying to make sure what was
12 happening. There was a quite a variety of things.
13 I didn't want anything stolen out of my house.
14 Deonna was on the loose, and my bank was empty.
15 She was stealing the house payments before it was
16 paid into. So I'm like, well, I can't afford an
17 attorney. I was trying to when I was there. I was
18 trying to get an attorney, but I didn't know why I
19 was trying to get an attorney. I still didn't have
20 an attorney to tell me what was happening.

21 Q. Okay.

22 A. I was going in front of some judges,
23 and they were asking for pleas. And I was by
24 myself. And I was standing there, and I remember
25 going, I don't understand why I'm here first off.

1 Q. Let me interrupt you there, then.

2 A. Okay.

3 Q. So on August 5th, 2014, can you
4 acknowledge the Goose Creek Police Department
5 arrested you? Do you know that?

6 A. I don't remember the day but obviously.

7 Q. Okay. You had a jury trial about it.

8 A. Well, yeah. I mean, I'm asking do you
9 want me to tell you -- to try to remember that day?
10 Or do you want me to tell you do I remember? Yeah,
11 I mean, I had trial about it.

12 Q. Okay. You were arrested and convicted
13 by a jury in 47 minutes. Do you know that?

14 A. Yes, I know now.

15 Q. Okay. You were arrested for attempted
16 murder?

17 A. Uh-huh.

18 Q. And convicted of attempted murder,
19 true?

20 A. Yes, sir.

21 Q. Two counts of a possession of a weapon
22 during commission of a violent crime.

23 A. Yes, sir.

24 Q. Third degree criminal sexual conduct
25 with a minor.

1 A. Yes, sir.

2 Q. Three counts of second degree sexual
3 conduct with a minor.

4 A. Yes, sir.

5 Q. Two counts of kidnapping.

6 A. I understand all of these charges. I
7 just did a PCR, and it's terrible.

8 Q. A jury convicted you of oral, vaginal,
9 and anal rape of an 11-year-old girl. Do you
10 understand that?

11 A. I didn't know that until this year.

12 Q. You were involved in an armed standoff
13 with police.

14 A. I didn't think it was possible until
15 this year.

16 Q. What do you mean by that?

17 A. When Dr. Justice told me -- when I told
18 him what I was feeling about this shot, I asked
19 him, I said, is it possible that theses things
20 really happened? And he said, yes. What you were
21 telling me about the shot is true because he gives
22 the shot out.

23 And the best way to try to tell him
24 what happened was I don't know what's going on.
25 And I didn't know that. You don't remember things.

1 It's like when somebody asks you about a bad dream,
2 and you try to tell them that you can't remember
3 your bad dream. Things disappear. That's what the
4 shot does. I was trying to tell him what was
5 happening, and I didn't even think that the child
6 part was true. But he told me it was possible.

7 When I told him about how I felt, how
8 the dream thing was -- then -- and now I have to be
9 in trouble for something I didn't even remember and
10 it's not fair. It's not fair for a lot of people.

11 My daughter's my best friend. And to
12 think I hurt somebody else's kid is hard to deal
13 with. And especially when you're going for help.
14 And the doctor does this, and they won't listen to
15 you. You got medical proof because you weren't
16 given a chance to show that.

17 Just like I wasn't given a chance until
18 trial to show that Shelly was lying. But she was.
19 And a lot of people are going to say, but he had a
20 rape charge. Go talk to Shelly. She apologized.
21 I'm telling you. The cover of the book looks
22 terrible. But once you read the book, it's a
23 different story.

24 Q. Let me ask you this. The state says
25 that prior to the trial in anticipation of certain

1 defenses that you were ordered and did undergo
2 evaluations by South Carolina Department of Mental
3 Health?

4 A. After the shot had wore off.

5 Q. But that's true?

6 A. Months after the shot had wore off.

7 Q. And that the forensic psychiatrist at
8 the medical ward met with you and then subsequently
9 concluded and testified that you had the capacity
10 to conform your conduct to the requirements of the
11 law. Fancy way of saying that you were not insane.

12 MR. LUCK: Object to the form.

13 THE WITNESS: She's wrong. She did not
14 have the medical background on this medicine, and
15 that was noted in court also.

16 BY MR. NICKELS:

17 Q. But you were there -- they had a
18 competency hearing --

19 A. After the shot had worn off, sir. You
20 get me on that shot again, and you can see what it
21 does to me. It's terrible. I'm obviously -- what
22 do you call it -- allergic to it.

23 Q. Do you know -- just so we have it out
24 there, you mentioned the shot. Do you know the
25 name of the medicine?

1 A. I think what they were dodging in the
2 trial was they were saying Vivitrol. But the
3 active ingredient is Naltrexone. It's what gets
4 mixed with it.

5 Q. Were you provided that medicine as an
6 injectable medication?

7 A. Yes, sir.

8 Q. Because you were an addict?

9 A. No.

10 MR. LUCK: Object to the form.

11 BY MR. NICKELS:

12 Q. To curb the affect of alcohol on you?

13 A. I was addicted. I was a wino. If you
14 want to put it that way, yes. I was addicted to
15 that.

16 Q. So to reset this, on August 5th, 2014
17 when you were arrested, you had a home in Goose
18 Creek. Your wife had already moved out of the home
19 when she was developing a relationship with Steve?

20 A. Yes.

21 Q. You were under the influence of the
22 Vivitrol and totally out of it, basically, is what
23 you are saying?

24 A. Yes, sir. In more ways than one.

25 Q. But then you were arrested, and you

1 were placed in jail pending trial at the Berkeley
2 County Detention Center?

3 A. Yes, sir.

4 Q. And was it that early on that you met
5 Mr. Allen, Lynn Allen?

6 A. I don't know or recall when I met
7 Mr. Allen. I know -- I got moved. When I first
8 kind of came to; I was in one cell; and there were
9 paper bags all over the floor. So I guess they had
10 me isolated or something. And then when they had
11 moved me, I don't know when they had moved me. I
12 don't have time references for you, in other words,
13 after this.

14 I stopped -- I think when I started to
15 remember Mr. Allen, he started screaming about
16 Jacob Phillips that is in here. You guys have seen
17 him on TV. Where those three guys in the room last
18 year, in Kirkland. Well, he's here now.

19 Well, he started screaming, he's doing
20 it; he's really doing it. And he was pointing to
21 the showers in an open bay. And I got up. And
22 this is in October. And that's when I start
23 remembering this one thing. And then when he's
24 pointing at the showers and I'm seeing what I
25 remember is Lynn screaming, I had run to the

1 showers. And he was killing -- Jacob Phillips was
2 killing somebody else in the shower.

3 Jacob's a big guy. Jacob's about 260,
4 6'4. He was in the Navy. I had to stand on Jacob.
5 I had to incite some sort of pain to get him to
6 release his grip. I picked up on his arm. They
7 pulled Marty out from underneath me. And I held
8 Jacob Phillips back from killing somebody. But he
9 killed three more people later. That's when I
10 started -- that day is when I remember that that
11 was -- like I said, that was Lynn Allen screaming
12 that day. He's doing it; he's really doing it.
13 And then running to the buzzer to get officers when
14 I ran into the shower to stop the murder.

15 Now, how he introduced himself to me, I
16 don't remember how he worked his way into what he
17 was doing. I remember him saying he needed a place
18 to stay, and I needed my house not to go in
19 shambles if he could cut the grass and just take
20 care of things until I got out.

21 Cause first off at this point -- and I
22 believe this is in October, okay. Because that's
23 when I remember Jacob Phillips. It was close to
24 Halloween or something. It felt eerie about the
25 whole thing. Now, I said -- sometime after that he

1 said, he needed a place because he was getting out.

2 And I said, just take care of -- don't
3 let nobody take nothing out of my house, do not.
4 Don't let Deonna take nothing out of the house;
5 that stuff is mine. Because right now I still
6 don't have an attorney. I still don't understand
7 why I'm in jail.

8 Q. Okay.

9 A. All I know is I was trying to
10 get -- I'm sorry, attain money, get money that
11 Deonna was already stealing. They would not get me
12 an attorney because they said I had assets. Well,
13 I have no assets when Deonna was stealing my money.
14 I've got the receipts for that. She did this.

15 Q. Tell me how that works. So you're in
16 jail. And presumably just before you were in jail,
17 you would have been getting money from your
18 pensions?

19 A. Yes. I was still getting my money
20 then.

21 Q. Okay.

22 A. Because I wasn't convicted of anything
23 except prison.

24 Q. All right. And then, you know, there
25 is a mortgage payment and there's bills?

1 A. Sure.

2 Q. So Deonna had access to your bank
3 accounts or --

4 A. Yes.

5 Q. -- your credit cards or what?

6 A. I didn't have any credit cards.

7 Q. All right. She had bank accounts?

8 A. My bank accounts. She had her own bank
9 account which I was not a part of. But she was a
10 part of my bank account because she would take and
11 write one check for my car payment. And that way
12 she -- you know, I didn't think she was going to be
13 deviant in any way while I was in jail.

14 Q. How did she get to your money?

15 A. She took it out on the first before
16 my -- she took my money -- my house payments out
17 prior to -- she was trying to make my house go into
18 whatever you call it. I'm losing my words. So I
19 said, Suzy, she's stealing my money. I said, I
20 have to find an attorney, but I have no money. I
21 thought I had money in the bank. And she goes, no.
22 So she goes back and she looks, and she had been
23 taking all my money out prior to.

24 So what I had to do was save enough
25 money to catch up on my house payments after Suzy

1 took over because Deonna was stealing my money. My
2 house payment money that was sure paid to you guys.
3 I did not want to default on that. I was trying to
4 be responsible. First off, I'm still trying to
5 figure out why I'm in jail. I'm thinking I'm
6 getting out because I have no clue of what's
7 happening. So I said, just catch up on the house
8 payments. I said, we'll worry about this later.

9 Well, by this time I'm
10 getting -- there's people you can make phone calls
11 in jail. So now I think it's in January, somebody
12 there was a black guy. I can't remember his name.
13 He had a colostomy bag. And he looked at me and he
14 said he was just talking to Lynn Allen on the
15 phone. He said, if I was you, I'd be worried about
16 your house. I said, what are you talking about?

17 So I was trying to call Lynn that he
18 left me a number. No answer, no answer, no answer.
19 Next thing I know, somebody's telling or Suzy's
20 saying that my house is being robbed. Or somebody
21 saying my house is being robbed.

22 So I called Suzy. I said, Suzy, the
23 people in jail here are telling me my house is
24 being robbed. So she had called the police
25 department. The police department shows up and

1 they said, we can't touch it because it's been
2 subleased. I said, what are you talking about
3 subleased? I never even leased it in the first
4 place. I said, stop the people from stealing the
5 stuff out of my house. Those are my belongings.

6 Q. Okay.

7 A. That's what I told Suzy.

8 Q. Can we back up for one second?

9 A. Yes. And it angers me. My stuff was
10 stolen. This it four or five generations of stuff
11 that I'm supposed to give my kids.

12 Q. So Mr. Allen was -- we met him. We
13 deposed him. Video, the whole thing.

14 A. Really.

15 Q. Yes. We met him at Berkeley County
16 Detention Center about a month and a half ago.

17 A. He's in jail again?

18 Q. He was at that time.

19 A. Drugs I bet.

20 Q. He says that he met you in the medical
21 ward of the Berkeley County Detention Center. Do
22 you agree with that?

23 A. Yeah. Because that's like I said,
24 that's where we were at when Jacob was trying to
25 kill Marty.

1 Q. Okay. Mr. Allen was also placed under
2 oath, all right? This is what he testified, that
3 he reached an agreement with you because he was
4 getting out, and you needed money for
5 other -- different reasons. One was to hire a
6 private attorney as opposed to a defender. Do you
7 agree that there was a discussion with him about
8 him moving into your house?

9 MR. LUCK: Object to the form.

10 You have to answer.

11 THE WITNESS: He said from my
12 remembering, he said he needed a place to stay,
13 that he was going to keep up -- make sure nobody
14 stole my stuff, and he was going to cut my grass.

15 BY MR. NICKELS:

16 Q. All right.

17 A. And that he was going to turn my
18 electricity back on.

19 Q. All right. Mr. Allen states that he
20 had a jailhouse lease, witness and signed, and paid
21 you \$400 a month through the kiosk.

22 MR. LUCK: Object to the form.

23 THE WITNESS: If you look at my kiosk,
24 if you look at my bank account, if you look at
25 Suzy's bank account, I can guarantee you the man

1 never paid me one red cent. He fibbed.

2 BY MR. NICKELS:

3 Q. All right. He may have fibbed.

4 But during -- and I will tell you we've
5 collected the incident reports that cops are going
6 by your property while you were in jail?

7 A. Uh-huh.

8 Q. And it's documented in the police
9 reports otherwise that he did show officers a piece
10 of paper. They literally wrote down the names of
11 the guys who witnessed it.

12 A. And.

13 Q. That he called a lease. Now whether he
14 paid on that, that's a different question.

15 Question: Did you and Mr. Allen come
16 to a written arrangement so that he could get the
17 electricity turned back on, cut the grass, and was
18 he supposed to pay somebody to do that? I need a
19 yes or a no and you can explain.

20 MR. LUCK: Object to the form.

21 MR. NICKELS: He doesn't like the
22 question because it's really bad. It's a good
23 question if he objects.

24 MR. LUCK: Object to the form.

25 THE WITNESS: I don't recall. I don't

1 recall a lot of things about Lynn Allen. Like I
2 said, you show me a lineup, and I might be able to
3 pick him out. As far as signing something, Suzy
4 said that I might have signed something. But I
5 don't remember. And to be more fair, I made sure
6 that I did not talk to Suzy about this and I have
7 not called her or anything until this was over
8 with. So me and her were -- whatever she
9 remembered was what she remembered, and whatever I
10 remember was what I remember.

11 BY MR. NICKELS:

12 Q. All right. Mr. Allen --

13 A. I didn't want to be coerced by what she
14 remembered.

15 Q. All right. Mr. Allen testified that
16 his sister is a leasing agent and that she wrote
17 the lease, sent it to him, and it was signed by you
18 and him and witnessed by two detention officers.
19 Does this help to refresh your memory at all?

20 A. No.

21 Q. Now, are you absolutely denying that,
22 or are you saying I don't remember that?

23 A. I don't remember it.

24 Q. Okay. He claimed that he was there at
25 your house to do certain things. I guess cut the

1 **grass and something about --**

2 A. Making sure nobody took anything out of
3 my house.

4 Q. Right.

5 A. Julie -- Deonna was robbing me. When
6 she was stealing out of my -- and then I started
7 thinking about, well, all of that property in my
8 house is mine. I accumulated that property.

9 Q. Okay. He talked a lot about clocks.
10 Some sort of -- what is it, cuckoo clocks?

11 A. Right. I come to find out later on
12 that my daughter had ended up getting the cuckoo
13 clocks somehow. He had given them to my daughter,
14 or I don't who he gave them to. Suzy, I don't
15 know.

16 Everything that happened out there I'm
17 still finding out. So whatever information you
18 have for me is news to me at this point.

19 Q. Mr. Allen claims that he fulfilled his
20 promises to you and that he believes the reason he
21 was kicked out of your house was not because of the
22 rent but because the house was being sold.

23 A. No.

24 Q. Mr. Allen says the only two people that
25 you trust are Suzy Hylton and him?

1 A. No.

2 MR. LUCK: Object to the form.

3 BY MR. NICKELS:

4 Q. Mr. Allen said he had a set of keys to
5 the house.

6 MR. LUCK: Object to the form.

7 THE WITNESS: I'm sorry?

8 MR. LUCK: I'm sorry. I had to object.

9 BY MR. NICKELS:

10 Q. If you were planning on him to cut the
11 lawn, how was he going to --

12 A. I think Suzy had to give him the keys
13 to the house. That's what I was getting ready to
14 say. I mean, how else would he have the keys? I
15 mean...

16 Q. Well, there was also a box on the front
17 door that he was given the code to.

18 A. I don't know. Like I said, I wasn't
19 there. I'm clueless. Everything that happened, I
20 can only tell you my side of what I -- inside the
21 jailhouse.

22 Q. The good part about discovery
23 deposition is it doesn't have to be admissible. I
24 just want to hear these stories.

25 He claims that Deonna came by several

1 times to take things from the property. Does that
2 sound like that jibes with your ex-wife's --

3 MR. LUCK: Object to the form.

4 THE WITNESS: That sound like something
5 that jives with what Suzy had told me. And I
6 told -- I was trying to reiterate, do not let
7 anything out of my house. This stuff belongs to
8 me. I paid for it. This belonged to me prior to
9 Deonna.

10 BY MR. NICKELS:

11 Q. Did you have a coin collection in your
12 attic?

13 A. I had a lot of coins in my attic. I
14 had a lot of coins downstairs in my library area
15 too.

16 Q. Mr. Allen testified that Deonna came
17 in, went into the attic and took a coin collection
18 claiming, though, that she was just there to get a
19 Christmas tree.

20 MR. LUCK: Object to the form.

21 BY MR. NICKELS:

22 Q. Do you know anything about that?

23 A. No. Those are my coins. You know how
24 I got that coin collection started?

25 Q. No, I don't.

1 A. Julie's father passed away. So that
2 was given to me by Julie. It was not Deonna's. So
3 yeah, I mean, if it's stolen, then Deonna stole my
4 coin collection too.

5 Q. Who became your defense attorney for
6 the criminal trial?

7 A. A lady named Melissa Gay.

8 Q. And were you introduced to Ms. Gay by a
9 woman named Mary Odeneal, O-D-E-N-E-A-L, who was
10 Mr. Allen's friend who lived on the Isle of Palms?

11 A. No. I got Ms. Gay's number off of
12 there was another guy at the medical ward. And
13 this was -- this has got to be around Christmastime
14 or something, and I got it from him. And I think
15 that's -- it was from inhouse jail that I got
16 Melissa Gay because I didn't have anything. My
17 uncle even mailed me a letter that had a bunch of
18 people on it, but I don't know if Ms. Gay was on
19 that or not.

20 I know that I got it from a gentleman,
21 and I can't remember his name. He's a very tall
22 black guy. And that's when I remember Ms. Gay.
23 Somewhere around Christmastime I was thinking, all
24 right, it's Christmastime; I got an attorney. I
25 think. I hope. I haven't met her yet that I

1 recall. So when I contacted her or something like
2 that.

3 I'm telling you from my side of things
4 that's how it went. And I probably have
5 documentation to prove when Ms. Gay was my
6 attorney. Ms. Gay did a lousy job. Ms. Gay would
7 not let me answer a lot of things into the case.

8 She goes, I don't want to even hear
9 about their affair. I said, why not; it's part of
10 the case. I don't want to hear about it. I said,
11 ma'am, I don't understand why I'm in jail first
12 off. You need to at least brief me on why I'm
13 here. And she was trying to tell me, and I didn't
14 believe her. I didn't believe her because that's
15 not me.

16 And she gave me -- this gentleman here
17 has given me more face time than she has. And I
18 have all these charges.

19 Is there a way I can get some water?

20 MR. NICKELS: Let's take a break.

21 VIDEOGRAPHER: Off the record at 11:05.

22 (Off-the-record conference.)

23 VIDEOGRAPHER: On the record at 11:12.

24 BY MR. NICKELS:

25 Q. All right. While you were at Berkeley

1 County Detention Center and Mr. Allen had been let
2 out for whatever reason, did you know that Mr.
3 Allen was staying at your home in Goose Creek, yes
4 or no? And you can explain if you have to.

5 A. Yes. But I didn't know to what extent
6 whether he was spending nights there or whether or
7 not he was living with other people that he knew.

8 Q. Okay. Before Mr. Allen left the
9 Berkeley County Detention Center, what agreement
10 had you reached with him regarding your home? What
11 can you testify to that you remember coming to an
12 agreement about?

13 A. Yes, sir. That he made sure that
14 Deonna didn't take anything out of the house. You
15 know, he said he was going to turn the electricity
16 on. I didn't want nothing bad to happen to
17 the -- you know, you got electricity that goes out,
18 things break or whatever.

19 He said he was going to do that because
20 I asked him if he needed money to turn the
21 electricity on, and I remember that. He said he
22 got it. And then I said, make sure my yard is kept
23 tidy, and I said -- because I made yard of the
24 month there a couple of times, you know, and I
25 tried to make sure my yard looks nice.

1 Q. Okay. So anything else because I'm
2 going to go back through these?

3 A. Yes, sir. Making sure. Yeah, I didn't
4 want nobody else staying there. I didn't want
5 nobody in my house. I did not want anybody in my
6 house.

7 Q. Okay. So I've written down four
8 things, four major responsibilities that you
9 thought he would handle. Let's see if you agree.
10 Keep Deonna away particularly from stealing your
11 stuff?

12 A. Yes.

13 Q. Get the electricity turned on?

14 A. He said he was going to do it. He
15 offered to do that.

16 Q. Okay. Cut the grass?

17 A. My yard work.

18 Q. And he could stay there, but no one
19 else could stay there?

20 A. I didn't want anybody staying at my
21 house. I didn't know if he was going to be staying
22 there overnight, like I said.

23 Q. Well, let me ask you this. What's his
24 incentive to do all these things?

25 A. Okay.

1 Q. He's going to pay to turn on your
2 electricity, but he's not going to stay there?

3 A. No. The reason I'm saying what I'm
4 saying, sir, if you would.

5 Q. Yeah. Come on.

6 A. Is he knew people, and he was like the
7 Mary lady. She had sent me books or something
8 while I was in jail too.

9 What was her name?

10 Q. The Isle of Palms lady? Mary Odeneal.

11 A. Oh, I mispronounced her name. She had
12 sent me like a couple of books or something while I
13 was in jail to pass the reading or whatnot. And I
14 talked to her on the phone. And I guess she had
15 because Lynn had let me talk to her. I didn't know
16 if he was living with her. I didn't understand
17 their relationship. He said he had sexual
18 relations with her or he might be with her when he
19 gets out. So I didn't know to the extent of what
20 Lynn was going to be doing at my house.

21 In my mind, I don't think he's living
22 there. I'm thinking he's just taking care of
23 things -- you see what I'm saying -- because of
24 Mary and the relationship he had with her.

25 So I'm thinking, well, okay, that's

1 perfect, you know. He's just going to cut the
2 grass and make sure things are tidy and make sure
3 to keep the doors locked. And I guess Deonna --

4 Q. And what was his --

5 A. Can I ask this question? When did she
6 steal -- when did she steal or take the coins out
7 of my house?

8 Q. I'll do the best that I can, because he
9 testified that she claimed that she was there to
10 get a Christmas tree. Let's assume for the sake of
11 argument it was sometime before Christmas of
12 probably the year 2014 because by 2015 --

13 A. And you know why I thought I shouldn't
14 have married her? I remember this, because the
15 very first Christmas I was with her my daughter
16 decorated that tree. She turned it over in a
17 drunken rage. And I said, man, I wonder if I
18 should marry this lady at all.

19 Q. What do you believe since you --

20 A. That's what I remember about this
21 Christmas tree.

22 Q. Since your testimony under oath is that
23 you don't recall whether there was a lease that was
24 witnessed by two other folks -- not denying it,
25 just can't recall it -- what do you believe was the

1 **incentive for Lynn to do anything at your house if**
2 **you weren't going to let him live there?**

3 MR. LUCK: Object to the form.

4 THE WITNESS: I thought he was going to
5 get back on his feet. I'm sorry?

6 MR. LUCK: I'm still objecting. Just
7 keep talking.

8 MR. NICKELS: Like we said, for good
9 questions he objects.

10 MR. LUCK: Object to that.

11 THE WITNESS: From what I'm recalling
12 out of Mr. Allen, I probably had some talking's
13 with him where I had confidence in him where he
14 didn't seem to be the guy to dupe me over or sucker
15 me into something.

16 But according to Suzy, even she in her
17 own words said he was a smooth talker, that she
18 didn't trust him. And I went, well, that's 20/20
19 now. My house has already been robbed.

20 BY MR. NICKELS:

21 Q. Suzy Hylton was deposed for a long
22 time.

23 A. Okay.

24 Q. And she testified that she knew because
25 she had been there that Mr. Allen was staying at

1 **your house?**

2 MR. LUCK: Object to the form.

3 THE WITNESS: Okay.

4 BY MR. NICKELS:

5 Q. And she said that she was in touch with
6 you, too, from time to time because she was trying
7 to sell your house for you.

8 MR. LUCK: Object to the form.

9 BY MR. NICKELS:

10 Q. So does any of this ring a bell?

11 A. As far as what Suzy knows, her and I
12 don't talk a lot about things other than what was
13 pertinent for me at the time. What was pertinent
14 for me at the time was, okay, I made up all my
15 house payments.

16 Q. Did Suzy, your real estate agent, who
17 said she had her sign in your yard --

18 A. Okay.

19 Q. -- ever mention to you, oh, by the way,
20 I'm selling your house, just so you know Mr. Allen
21 and maybe even some other people are living in it
22 or words to that effect?

23 MR. LUCK: Object to the form.

24 THE WITNESS: I don't remember a lot of
25 that stuff. I really don't. I don't understand.

1 I know Suzy was trying to sell my house because I
2 needed to get money to get an attorney, all right?
3 I had an attorney on the cuff that I haven't paid
4 yet.

5 BY MR. NICKELS:

6 Q. Was that the one that you mentioned?

7 A. That one, right. Yes, sir.

8 Now, I know I was trying to find an
9 attorney. I had to do what I had to do. What was
10 happening behind the scenes I'm clueless about. I
11 don't remember a lot of things because everything
12 that was happening to me at this point. I'm only
13 focused on remembering what I'm supposed to be
14 remembering and getting things done what I was
15 supposed to get done.

16 What I was supposed to get done at this
17 point was, I know I didn't want anything out of my
18 house. I have assets. If there's anything, I want
19 Julie to come pick up all the stuff because that
20 belongs -- excuse me.

21 Q. Yes, sir.

22 A. To Alta. Now, I don't understand the
23 severity of my case yet because I still haven't had
24 an attorney. I'm being told what's going on.

25 Now, whatever Suzy is doing, I'm not --

1 she's not going to tell me everything. And as much
2 as I try to talk to Suzy, I don't -- even if she
3 did tell me something, my mind was focused on the
4 seriousness of what I'm dealing with at this time.

5 Q. Turns out you were sentenced to
6 90 years; is that right?

7 A. Yeah.

8 Q. Do you get out of here or do you die in
9 prison if you don't get an appeal? You're in for
10 life, correct?

11 A. That's terrible.

12 Q. Is that true, though?

13 A. I think it's narrowed down to 76. But
14 that's life.

15 Q. Okay. So if you're appealed, whatever,
16 PTR or whatever you're doing fails, you're looking
17 to be in prison for the rest of your natural life;
18 do you understand that?

19 A. I understand that. But I
20 have -- there's -- you know, it's between me and
21 god. God knows that I know I don't remember what
22 happened. And I don't think god is going to sit
23 there and let this happen -- happen the way it is
24 happening right now.

25 Q. Okay.

1 A. He knows what that shot had done, and
2 he knows my heart so...

3 Q. After your arrest, do you have
4 knowledge that Deonna, Suzy, Julie your ex, and
5 your daughter Alta all went to your house to,
6 quote, take anything they wanted, close quote?

7 MR. LUCK: Object to the form.

8 BY MR. NICKELS:

9 Q. That is an exact quote from your third
10 wife's deposition. So object to the form; that's
11 what she said.

12 A. There is a couple of things I remember
13 with letters from my daughter and I and Julie. All
14 I got was -- and Suzy, all they got was Alta's
15 room, and I think Suzy said the cuckoo clocks.
16 That was it. I did not mention that Alta's room
17 was stolen.

18 I know I had a whole house full of
19 stuff that was stolen because when Suzy came back
20 and she told me my whole house was stolen, I know
21 what was in my house. I put my house together.
22 Piece by piece I put every room of that house
23 together.

24 Why, because it was my stuff. And I
25 had it with me for years. Unless some of it was

1 new, like, the TVs and the furniture and certain
2 design art pieces or whatnot.

3 Q. Actually we'll mark this as the next
4 exhibit. I thinks it's B.

5 (DFT. EXH. B, Handwritten Inventory of
6 Gary Fraley, was marked for identification.)

7 THE WITNESS: I had a couple of typos
8 on there too.

9 BY MR. NICKELS:

10 Q. A few typos. Is that your handwriting?

11 A. Yes. It is, sir.

12 Q. And is that your inventory, if you
13 will, of things that you believe were stolen from
14 your home?

15 A. These are things I know that I had that
16 are probably now missing and stolen out of my home.
17 Yes, sir. And I know according to Julie. Julie
18 would not lie to me. You know why? Because Julie
19 believes in me. She knows me. She helps me in
20 here. She helps me. She sends me packages.

21 Q. Is she remarried?

22 A. No. She's a good lady. She knows my
23 heart. She understands me. She understands what's
24 going on is probably true because I gave her all
25 the information. I gave her the stuff that the

1 court was failed to look at.

2 So she knows that some of this, if not
3 all of this, was part of her life too. I had a lot
4 of stuff that was like family heirlooms where I
5 brought back from overseas. So yes, she
6 understands that this is my stuff. We shared a lot
7 of these things together.

8 During our divorce, she ended up
9 getting the houses in North Carolina. I ended up
10 with some of the contents -- the contents of our
11 house. So yeah. I had -- one thing I screwed up
12 and I put on here, I don't know why I say
13 grandmother clock, it's grandmother {sic} clock. I
14 was just noticing that.

15 Q. Where did you write Exhibit B out and
16 why?

17 A. This -- he asked me, my attorney
18 Mr. Luck or Attorney Luck. He asked me if I would
19 just make a list of the things I believe was
20 probably stolen out of my house.

21 Q. Okay. All right. So --

22 A. Knowing what the cuckoo clocks -- come
23 to find out later Julie had the cuckoo clocks.
24 Other than that, the only thing that Alta had was
25 her room. Everything else, this is my stuff.

1 Q. When did you write Exhibit B?

2 A. I don't know.

3 Q. Were you here?

4 A. Yes, eight, nine months ago.

5 Q. All right. So before you authored
6 Exhibit B, what list of stolen items did you write
7 down and produce to anyone, an insurance company,
8 another person, or anybody before you wrote out
9 Exhibit B?

10 A. I didn't do anything because I was
11 asking Suzy to help me.

12 Q. Okay.

13 A. But Suzy failed. Suzy couldn't tell me
14 anything.

15 Q. Let me get my legal questions out.

16 A. Yes, sir.

17 Q. For Exhibit B which is I'll just say a
18 list of your stuff that you think was stolen -- the
19 cuckoo clocks look like they may not have
20 been -- but otherwise you think your stuff was
21 stolen and that's what's on Exhibit B, right?

22 A. Yes, sir.

23 Q. Where are any receipts for the purchase
24 of any of those items on Exhibit B? A single
25 receipt.

1 A. I had plenty of things in my house.
2 Guess what? Filing cabinets, no, are gone.

3 Q. All right. How about a video inventory
4 of the contents of your house, can you produce one
5 for me through your attorney?

6 A. Through my attorney. I had plenty of
7 video and pictures that were on Facebook. Now, I
8 don't know maybe Deonna because of her wily
9 ways -- she is quite the person on the computer.
10 She eliminated a lot of things to make their
11 situation look better. I had a lot of pictures.
12 I'm talking I had inside and outside pictures all
13 the time on my house on Facebook, on the internet.

14 Q. Who's account?

15 A. Mine and Julie's.

16 Q. Does that account still exist?

17 A. Not only Julie's, but Deonna's.

18 Q. Okay.

19 A. Because whether it would be the
20 birthday party, you can see this stuff, these
21 things in my house. You can see my living room.
22 You can see the entertainment centers. I've taken
23 pictures and sent them to my relatives. They've
24 gotten stuff and it's all over the place. I was
25 proud of it. I was proud of my home.

1 Q. So are there any video -- did you ever
2 take a video inventory for insurance purposes?
3 Some people walk through their homes and, you know,
4 they show their possessions.

5 A. Yeah, I had a tape that I went through
6 my house. It's gone. It's been gone. When I
7 first moved in there, I had gone with my
8 little -- was it Super 8 High Video thing. And I
9 was showing it to --

10 Q. Okay. Super 8, you're dating yourself.

11 A. I know. It was a Super 8.

12 Q. And the Facebook pictures were not to
13 document the inventory of the house, they just
14 happened to have people and stuff in the
15 background. Maybe it was your daughter and in the
16 background maybe you could see a bookcase or
17 something like that. Am I close?

18 A. No. It would be like -- not just that.
19 It would be Christmastime. You could see things
20 happening. The whole house would be there. You
21 could see these things. I remember, you know, the
22 little floating shark things and whatnot? It was
23 at Toys"R"Us. It's a big balloon and you could fly
24 it through your house because my ceilings were kind
25 of high.

1 And it would go up and down and you
2 would fly it room to room. So I took my phone and
3 I walked room to room while Alta was flying it and
4 you could see room to room, you know, what we were
5 doing. So you could see pretty much contents as
6 she was flying through the house. I put it on
7 Facebook for all the relatives to see.

8 Q. You would agree in the principle that
9 if somebody makes an insurance claim for something
10 stolen, that the person making the claim should
11 have to have some proof that they own the items
12 that they claim was stolen. Do you agree with that
13 as a principle?

14 A. As a principle. I understand the
15 policy behind it. Yes, sir.

16 Q. It would be --

17 A. I understand your questioning, yes.

18 Q. Okay. And the principle is, like, can
19 you -- often people ask things like do you have a
20 receipt? Do you have a credit card statement?
21 Other proofs to show, let's say, Exhibit B items
22 were yours in your possession.

23 A. Okay.

24 Q. And what I've been produced is
25 Exhibit B written whenever. And the fact that I

1 might be /able to go to your Facebook page and see
2 stuff in the background, do you have anything else?

3 A. My stuff was stolen. I mean, there was
4 a filing cabinet, sir. There was a filing cabinet.
5 And Deonna had placed, she had organized all the
6 stuff. And she had placed all my receipts in the
7 filing cabinet under whatever, receipts for
8 everything that I had.

9 There was a lot of stuff now that I
10 didn't have receipts for like my father's tools. I
11 had some of his tools which kind of doubled up what
12 I had also because in order from my father passing
13 away, my mother was lacking on funds. So I bought
14 stuff that belonged to my father so my mother could
15 make it and have some money. So that's another way
16 I accumulated tools.

17 Like the table saw and one of the belt
18 sanders and maybe a couple of extra drills and
19 stuff like that. Other than that, I mean, there's
20 stuff that I bought from my mother that she no
21 longer needed because she was downsizing. She was
22 single now. My father passed away. And I
23 accumulated it that way. So I don't have receipts
24 like that. I paid with cash.

25 Now, my mom she just passed away in

1 May. It's while we were locked down. So that's
2 what it was.

3 Q. Do you have any brothers or sisters?

4 A. I have a sister by marriage.

5 Q. That would be a sister-in-law?

6 A. No, it's not a sister-in-law. You know
7 how the Brady Bunch was where they got together and
8 they both adopted this half of the family, boys and
9 girls?

10 Q. I think they call that a blended
11 family.

12 A. Okay. And my sister is -- she's
13 Indian. So her farther was Indian, American
14 Indian. So we have no blood relation, but we grew
15 up together when we were kids.

16 Q. Okay.

17 A. So I consider her my sister. My dad
18 adopted her, and my mother adopted us. I didn't
19 know my dad until I was four when I met him when he
20 came back from Vietnam.

21 Q. What relative knows where you're at,
22 what you're doing, and what's going on in your
23 life?

24 A. I've tried to talk to my relatives. We
25 weren't close because of the distance we had.

1 There is relatives that live up next to all the
2 relatives in Pennsylvania that stay and are
3 accustom to one another. Other than that, I
4 mean...

5 Q. What personal relationships do you
6 have? Are you still -- for instance, Ms. Hylton is
7 a friend?

8 A. Yes, sir.

9 Q. Who else?

10 A. My daughter Alta and Julie my second
11 wife. I've been talking to my mom's sister Brenda.
12 I'm on talking terms with Charlene. My aunts.

13 Q. Are you on talking terms with Deonna?

14 A. I don't want to be near that lady. I
15 want to stay away from her. No, and I don't even
16 want to talk to her. She used my daughter.

17 Q. How?

18 A. I was asking my daughter quite a few
19 times, I said, Alta -- because I would go to her
20 work. You know, me and Alta would go to where she
21 worked at the bowling alley. That's when she was
22 working with Steve. And I would get -- let's say,
23 you know, this gentleman would be me, I'm Deonna,
24 and you're Steve. (Indicating)

25 Okay. So you're me, and I'm Deonna.

1 Wouldn't say a word to me. Talk to Steve the whole
2 time when we're sitting there. I'd go to visit her
3 at lunch or something. And I'd be waiting for her
4 going, Deonna, she'd go and she'd turn and ignore
5 me. Over and over and over. Like she was being
6 faithful to Steve, and I started seeing that. You
7 know what I'm saying? Getting towards him and
8 focusing all her energies on him and ignoring me.
9 So I started noticing that more and more.

10 Say that question again? I started to
11 digress. I lose my train of thought. You said?

12 Q. I was asking about Deonna, whether you
13 had a relationship with her or not at this time?

14 A. No.

15 Q. And you said that she used your
16 daughter, and I asked you. And you answered --

17 A. Yeah. So when I was noticing that I
18 started -- I said, and Alta being 10, 11, and 12
19 during the time we were together. Deonna would
20 say, well, I'm going to take Alta with me. And I'm
21 going, well, where are you going? And Alta said,
22 well, I don't know. And she goes, well, we're
23 stopping by work for a little bit.

24 So I stop by the work, and she'd get
25 Alta busy doing something or they would be bowling.

1 And Alta would come back and she'd go, I don't know
2 where she went. I said, what do you mean you don't
3 know where she went?

4 And I'm like, well, what's going on?
5 Well, I had to stop and do things. I was busy in
6 the office, and I had to run across the street and
7 meet with the people at the hotel and stuff like
8 that.

9 And then there was another time where
10 it was supposed to be mother daughter night, and
11 they were bowling and whatnot. I'm going in there,
12 and I'm looking up at the scoreboard. My
13 daughter's been sitting here, skipped bowler,
14 skipped bowler, skipped bowler. So there's like a
15 whole game that Deonna's missed, and she's on her
16 second or third game waiting on Deonna. And I'm
17 waiting on Deonna, and I'm looking around for her.
18 She's on her way back from the hotel across the
19 street.

20 I'm going, where were you? She goes, I
21 had to drop some flyers off. That's her excuse
22 every time. I had to drop flyers off over there.
23 Dropped some paperwork off. So I went, okay. So
24 then Deonna would take Alta and say, I'm going to
25 take Alta with me. So then, where are you guys

1 going? We are going to go get some ice cream.
2 Okay. Alta would come back and she'd go on the way
3 out the door because Alta was noticing something
4 fishy too once in a while back then. And she'd go
5 like this to me, you know. (Indicating)

6 I'm like, okay. Whatever. What's
7 going on? Where does she disappear to? She'd take
8 her to -- where is that? The old -- it's an ice
9 cream place. Ye Ole Fashioned Ice Cream or
10 something. And then she'd drop her off, and Alta
11 would get an ice cream and she would disappear.
12 And then Alta would come back and she'd go, I don't
13 know where she went. She left me at the ice cream
14 place.

15 I'm like -- and I'm questioning Deonna,
16 I said, what's going on? Why are you dropping her
17 off? I thought she was going with you? Why are
18 you dropping her off somewhere and then taking off
19 somewhere else? That's not being with her. She's
20 too little. And that's when I started figuring out
21 things were happening.

22 Q. Let's mark this with the letter C.

23 (DFT. EXH. C, Gary Fraley Handwritten
24 Claim # 1501SC24000082, was marked for
25 identification.)

1 BY MR. NICKELS:

2 Q. I'm going to hand you -- I think it's a
3 letter you wrote. Can you identify it for us and
4 see if you can remember writing it. See if you
5 recognize the handwriting. Is that your
6 handwriting?

7 A. Yes. I'm trying to remember what I
8 said here.

9 Q. So Exhibit C.

10 A. Let's see what I wrote. I don't think
11 all the appliances were taken. I think all she
12 said was the refrigerator was taken. So I only
13 listed what Suzy said.

14 Q. Who bought your house?

15 A. I did.

16 Q. Who did you sell it to?

17 A. I don't know. Suzy did all that.

18 Q. How much equity? Meaning when the
19 mortgage got paid off, was there --

20 A. Well, it got split with Deonna.

21 Q. Deonna said that you tried to not split
22 it with her; is that true?

23 A. I think I split with Deonna, and half
24 of mine went to Ms. Gay.

25 Q. Okay. She said -- Deonna said she had

1 **hired counsel to help get her half of the house**
2 **money because Suzy was trying to keep it from her.**

3 A. Whatever Suzy was doing she was doing.
4 I don't know.

5 Q. Okay. And so the money, you didn't
6 receive it either or to your now ex-wife or to your
7 then lawyer?

8 A. Yeah, I didn't put any in my pocket.

9 Q. Do you still owe your lawyer?

10 A. No.

11 Q. Do you owe anybody? Do you have debts?

12 A. I have one debt. I think it's to -- is
13 it Military Star Card or whatever? I think that's
14 where some of the money is going right now.

15 Q. Do you have any restitution to the
16 victim of your crimes?

17 A. No, I have no debts.

18 Q. Have you ever had an insurance claim
19 before this one?

20 A. I hit something on the road. You mean
21 car insurance? Yeah, a couple of times. Little
22 fender benders or something like that, brakes.

23 Q. Insurance is a contract. Do you
24 understand that?

25 A. Yes, sir.

1 Q. And that there's -- a contract has
2 obligations for both sides usually to a contract.
3 Do you understand that?

4 A. Yes, sir.

5 Q. And your position is that your stuff
6 was stolen and that you have insurance and that the
7 insurance company should pay to whatever the limits
8 are of its contract with you, correct?

9 A. Yes, sir.

10 Q. And on the other hand, the insurance
11 company has -- and I'll just show it to you. We'll
12 make this Exhibit D.

13 (DFT. EXH. D, Copy of Policy Number
14 CSVH0000014620 Gary Fraley, was marked for
15 identification.)

16 BY MR. NICKELS:

17 Q. That's your homeowner's policy. It's
18 your insurance contract. Have you ever read it?

19 A. Is this the same thing you sent me,
20 sir?

21 MR. LUCK: I can't talk to you.

22 THE WITNESS: Oh, I didn't know that.
23 I've read parts of this.

24 BY MR. NICKELS:

25 Q. All right. And the important part

1 being you understand the basic concept. The
2 contract usually has obligations, probably both
3 sides of the contract. You as the homeowner has an
4 obligation; the insurance company has an
5 obligation. Do you agree with that?

6 A. Yes, sir.

7 Q. Especially when you are making a claim?

8 A. Yes, sir.

9 Q. All right. What do you understand to
10 be your obligations? You said that your stuff is
11 stolen?

12 A. Yes.

13 Q. That's fine. What do you understand to
14 be your obligations?

15 MR. LUCK: Object to form.

16 THE WITNESS: I believe my obligations
17 have been met.

18 BY MR. NICKELS:

19 Q. What do you believe they are? I didn't
20 ask you if you met them. What do you think you
21 have an obligation to do?

22 MR. LUCK: Object to the form.

23 THE WITNESS: That the most -- at the
24 best opportune time if -- whatever I had going on,
25 I try to get with you in -- so I can receive my

1 losses. I mean, these were my things. I mean, I
2 paid insurance with good faith that if anything
3 ever happened to me in my life, if something
4 happened to my material things, that they would be
5 compensated for because I am paying the insurance
6 company to make sure that I am taken care of in
7 case something happens. And I believe that I met
8 those obligations.

9 BY MR. NICKELS:

10 Q. And your obligation, how did you meet
11 it? By Exhibit B, earlier eight months ago?

12 A. I didn't have an opportunity.

13 Q. You didn't have time?

14 A. I had no guidance. I had no idea what
15 to do. I had nothing. Nobody was telling me
16 anything. As many times as I was asking Suzy for
17 help, she failed me. She couldn't find me an
18 attorney. I had to literally, like I was telling
19 you with Ms. Gay, I had to look and look and look
20 and call and call and call and keep getting turned
21 down just because I was in jail.

22 But people don't understand. I was
23 given a shot. I didn't do these things
24 voluntarily. Whatever happened in this scenario
25 happened because my mind mistriggered on an opioid

1 that I've never even taken before.

2 And when you look at the Vivitrol
3 website, about 50 percent of the people have it.
4 And that's what I'm trying to get a point across.
5 50 percent in my age group have psychosis disorder
6 from this shot. I didn't know that until I'm in
7 jail.

8 So it's not like I'm doing this
9 voluntarily. I'm trying to save what's rightfully
10 mine. Should be like you should pay it up because
11 in good honesty, I went to go get help. And the
12 treatment failed me.

13 Q. Are you Gary Fraley?

14 A. Yes, sir.

15 Q. Were you at the Hill-Finklea Detention
16 Center in Moncks Corner?

17 A. Yes, sir.

18 Q. And did the insurance company write you
19 a letter in January of 2015 in request that you
20 perform some obligations pursuant to the contract
21 we just talked about?

22 MR. LUCK: Object to the form.

23 BY MR. NICKELS:

24 Q. And you might use little arrows to
25 point me to them?

1 A. I don't recall this. I don't recall
2 this. I really don't. I've gotten things through
3 Suzy when I kept asking Suzy time and time and time
4 again, you have to find me an attorney.

5 Q. So --

6 A. But she failed me. I was not trying
7 to -- I was not trying to purposely -- I had no
8 personal way. It was like I had no personal
9 attorney. I had no way of trying to find. You
10 realize when we are back here we are limited to
11 what we are allowed to have.

12 I can't find out whether there is a
13 head on a nail. It's that bad. I'm trying to find
14 information. I don't know what's going on half the
15 time. And the only way you can find anything
16 that's going on in prison is what they call
17 inmate.com. That's through other prisoners.
18 That's the only way.

19 And that was the only way I found out
20 my house was being robbed from another person in
21 jail. They were going to screw me over and then
22 walk out and leave my house and these things that I
23 work for. It's not my fault that the shot
24 backfired. I'm trying to do everything right. And
25 what's rightfully mine was -- in my eyes and in

1 what I believe is to be right and truthful, I'm
2 trying to do my best to tell you such.

3 Now, I can tell you this. Lynn Allen
4 is a liar. Suzy will tell you Lynn Allen is a
5 liar. She said he's the silver-tongued devil.
6 He's a smooth talker, and I did not know that until
7 Suzy told me that. Then I was showing concern.
8 Next thing I know, my house is robbed.

9 And he's in jail again. He was in
10 there claiming to be some sort of a bible thumper,
11 like, he was reading the bible and reading the
12 bible every day. No, he couldn't tell you one
13 thing about the bible other than he knows how to
14 tear a page out of it to light a cigarette.

15 Q. We'll mark that one.

16 (DFT. EXH. E, Reservation of Rights
17 claim from Universal North America, was marked for
18 identification.)

19 (DFT. EXH. F, Universal North America
20 Insurance Company Claim #1501SC24000082 Andrea
21 Kamat, was marked for identification.)

22 BY MR. NICKELS:

23 Q. I'm just going to hand you a collection
24 of papers.

25 A. After this can I go to --

1 Q. We'll make this collectively F because
2 I think I know what the answer is.

3 So, sir, this is going to be a
4 collection of letters I'm going to hand to you here
5 to Summerville all from the Insurance Company
6 asking you to do things and to fill out forms, et
7 cetera.

8 Can you acknowledge that some of them
9 were sent certified mail and the receipts were
10 returned as being at least delivered to the
11 facility? Can you acknowledge this afternoon
12 having received a single letter from the insurance
13 company Universal requesting you to provide an
14 inventory, to sign for proof of loss, to give an
15 account, a history, anything?

16 MR. LUCK: Object to the form.

17 BY MR. NICKELS:

18 Q. I'm just asking in 2016. Will you
19 acknowledge that?

20 MR. LUCK: Same objection.

21 THE WITNESS: I don't remember anything
22 that has to do with having to fill out paperwork
23 for this. I remember getting with you and, I
24 think, writing the letter that all my stuff was
25 stolen. And I didn't know what to do at that

1 point. Nobody was doing nothing to help me. So I
2 didn't understand what it was.

3 I had no attorney. I had nothing to
4 help me out. I'm going to tell you this, it took a
5 year for a letter to get from here to my door while
6 I'm here. One year. Other people complain about
7 that all the time. We're talking pertinent
8 information, things from lawyers and stuff that are
9 six, seven months late; and it seems like they do
10 it on purpose?

11 I'm telling you. I wish I could tell
12 you more than what I'm telling you. But if I have
13 gotten this stuff, it might have been -- and I
14 don't recall it. I had so much going on at that
15 point. I don't even think this was on the top of
16 my list even if I did see it. Honestly.

17 BY MR. NICKELS:

18 Q. All right. Did we want to take a break
19 for a minute?

20 A. Yes, sir.

21 VIDEOGRAPHER: Off the record at 11:52.

22 (Off-the-record conference.)

23 VIDEOGRAPHER: On the record at 11:57.

24 BY MR. NICKELS:

25 Q. Sir, how were you notified that things

1 **had gone missing from your home while you were in**
2 **jail and subsequently incarcerated?**

3 A. The guy in jail -- I think his nickname
4 was Blackjack or something -- was friends with
5 Lynn. He had talked to him on the phone, and he
6 was the one that had the colostomy bag because we
7 were in medical. And he said he wouldn't trust
8 Lynn, that he thinks something's going on. He
9 thinks my house is being robbed. So that was when
10 he was talking to Lynn. This is before Lynn even
11 left the house.

12 So then when I was getting word of
13 that, I had called Suzy because it was much easier
14 to get through on jail phones than it is here. So
15 I called Suzy, and then she -- I don't know if she
16 went there or a sheriff went there or what. But
17 she told me from when she noticing my house prior,
18 Alta's room was the only thing missing, that my
19 whole house was missing.

20 Q. Okay. Do you agree that you asked Suzy
21 Hylton to sell your house and to manage your
22 financial affairs while you were incarcerated?

23 MR. LUCK: Object to the form.

24 THE WITNESS: I don't understand. What
25 are you trying to say?

1 BY MR. NICKELS:

2 Q. I'll reread the question. Can you
3 affirm or agree that you asked Suzy Hylton to sell
4 the home and to manage your financial affairs while
5 you were incarcerated?

6 MR. LUCK: Same objection.

7 THE WITNESS: I agreed that -- I mean,
8 there was no other way. When she sold the house, I
9 was supposed to get the equity to get the attorney,
10 which I did.

11 BY MR. NICKELS:

12 Q. I'll put it to you a different way.
13 When you -- earlier you looked through an exhibit
14 that was a power of attorney in favor of Suzy
15 Hylton from you. What was the purpose of you
16 giving her the power of attorney?

17 A. To stop Deonna from stealing my money
18 so I could get an attorney.

19 Q. And how was she going to stop Deonna
20 from doing that?

21 A. Because what she did was she went to
22 the bank and told them that Deonna was not -- we
23 were separated, and Deonna was taking money out of
24 my account. And it showed where Deonna was taking
25 money out of my account, and she shouldn't have

1 been. She took thousands, like \$10,000 out of my
2 account that I had built up. And some of that even
3 more so for the house that I was supposed to make
4 house payments on.

5 So she took all of that. So I believe
6 -- now, let's go back a little bit. When you said
7 something about Suzy not wanting to pay Deonna the
8 money. And I'm thinking that might have been
9 because she knew that Deonna already owed me a
10 bunch of money for the house, that she had stole
11 all that money prior to that. And she was probably
12 wanting restitution for that. That's the only
13 thing that's right now triggering for me. Does
14 that make sense?

15 Q. Ms. Hylton testified that after getting
16 the power of attorney from you that she went to the
17 home, your home.

18 A. Uh-huh. Yes, sir.

19 Q. This is quoting her now. She collected
20 personal belongings of yours and stored them in her
21 garage for Julie, your second wife, to come and
22 retrieve?

23 MR. LUCK: Object to the form.

24 THE WITNESS: I think she's talking
25 about there was like certain papers and whatnot.

1 Like retirement, I had my medals and ribbons and
2 stuff. But she said there was only like a box or
3 something. That's the only thing she ever told me,
4 that Julie had to pick up one box. And I never
5 knew when they were going to come over because I
6 kept wanting to talk to Alta on the phone.

7 And she said, well, when Alta gets over
8 here, call me at such and such a time. Well,
9 Julie's schedule being all screwed up as it was
10 never made over to Suzy's when Suzy said it's time
11 to call.

12 So I called, and no, she didn't come
13 today; try tomorrow. And I never got to match up
14 with when Julie came and picked up this one box of
15 items out of my whole household of things?

16 BY MR. NICKELS:

17 Q. Isn't it true that you told
18 Mrs. Hylton -- Ms. Hylton that you would let
19 someone move in named Lynn Allen? You told her
20 that?

21 A. Move in?

22 Q. Move in. Her words. That was a quote.

23 A. I would not say those were my words. I
24 would say Lynn was there to make sure things were
25 taken care of. But I didn't say he was anything

1 other than somebody supposedly as a friend taking
2 care of things for me while I was in jail.

3 Like I said, he talked high of Mary,
4 and I thought that was his significant other
5 because Mary was sending him money and giving him
6 books and all kinds of stuff. I mean, I thought
7 that's what his thing was. Odeneal or Odenall
8 {sic}?

9 Q. When you agreed to have Ms. Hylton list
10 and sell your home, was she also going to receive
11 the customary realtor fee for doing that for you?

12 A. I don't know what fees she took out for
13 herself. I really don't.

14 Q. How often since she had the listing on
15 your home and her sign in your yard did she visit
16 the house during the time period?

17 A. I have no clue.

18 Q. What workers did she bring in to help
19 prepare the house for sale?

20 A. I think she talked about painters.

21 Q. Do you know who they are?

22 A. No. Everything was out of the house by
23 then. She said all she did was paint the house.

24 Q. And when, before Mr. Allen moved in or
25 after?

1 A. This was after. This was like months
2 after the house had been robbed.

3 Q. And the painters, you would have paid
4 for those, correct? She did not pay for them?

5 A. I don't know how she did it.

6 Q. Okay. She paid for presumably because
7 she had the power of attorney and could write
8 checks in your bank account?

9 A. I don't know. She might have. I don't
10 know if she had checks, a debit card or what. I
11 don't know the specifics of how she was running my
12 money other than sending me money for canteen and
13 putting money in the books for me to use for my
14 telephone. That was it.

15 Q. Did she provide you with a copy of the
16 real estate file?

17 A. No. No, sir.

18 Q. Did you ask her to contact the
19 insurance company on your behalf at any time?

20 A. I asked her to, I think -- well, I
21 wrote a letter and I wasn't hearing anything. I
22 asked her to help find me an attorney.

23 Q. For what we're doing today? To
24 pressure the insurance company? Or was it for the
25 criminal stuff or something else?

1 A. For the criminal stuff. And then later
2 on after I've done gone through all the jail and
3 the trial and everything, I need to focus back on
4 okay my house is robbed. All right, let's see what
5 we can do about this.

6 I asked her because when I wrote a
7 letter to you guys, I think I had just got the
8 letter back, when was that? In '16 or something,
9 2016, there was a letter sent to me. I still have
10 the one letter I have in my folder in my room. But
11 I think it's 2016. I have that letter.

12 And that's when I went, whoa, you guys
13 are saying you're not going to pay. I don't see
14 how that's right. And that's when I said, Suzy,
15 try to find me an attorney for this too, which to
16 no avail. She didn't do anything.

17 So from behind prison doors, I'm
18 scratching and clawing and trying to call everybody
19 I could call. Either for them not to answer the
20 phone because you have to accept the one minute
21 free call for an attorney. And then some attorneys
22 said, no, they don't handle that case. Or, no,
23 they're not going to handle it because I'm in
24 prison. Or, no, it's out of their jurisdiction.
25 Or -- and they were -- like, they always had an

1 excuse. And it wasn't until, you know, I happened
2 on this gentleman here that I ended up with an
3 attorney. He said he would accept.

4 Q. Did you ask Mr. Allen to liquidate some
5 of your stuff so you could have money raised so
6 that you could pay an attorney, yes or no?

7 A. I didn't want anything taken out or
8 liquidated.

9 Q. So that's a no?

10 A. No, sir.

11 Q. If Mr. Allen testified to that, he
12 would be either untruthful, or his memory's going
13 to be --

14 A. Well, are you -- well, you tell me what
15 he said, because I don't know. He should have said
16 no.

17 Q. Mr. Allen talked about \$400 a month.
18 Does number mean anything to you? Did you ever
19 have a conversation with him about paying some sort
20 of rent to you?

21 A. He never paid me -- no, sir. I don't
22 recall him ever deciding to pay me or did I say pay
23 me. He was there to take care of my house and that
24 means drop in, cut my grass, make sure everything
25 was fine. He said he was turning the electricity

1 on. Like I said, I thought Mary was his
2 significant other, and I thought he was to live
3 with her.

4 Q. What was his incentive to do that stuff
5 at your house?

6 A. I thought he was getting back up on his
7 feet. I thought he was going to be --

8 Q. What was his incentive to do that at
9 your house?

10 A. I don't know. He was supposedly a holy
11 roller when I met him. He was trying to do the
12 right thing. He said he thought -- I mean -- look,
13 he gave me his bible. I still have it. It's got
14 his handwriting on it. He was portraying himself
15 to be something that he wasn't. He wormed his way
16 into my house.

17 He saw an opportunity, I believe, and
18 he took it. What, there is nobody in your house?
19 Oh, sure, I'll watch your house for you. Next
20 thing you know everything is being robbed.

21 Q. How often did you speak or have cell
22 phone -- call his cell phone, Mr. Allen?

23 A. I never called. I called him when I
24 was in jail and that was it. And that was 2015 I
25 think was the last time.

1 Q. When did you go to prison?

2 A. '14.

3 Q. When was your trial? '14 were the
4 crimes.

5 A. Yeah, I think it was like December or
6 January it might have been because he wasn't there
7 but, what, a month or two or three. I don't know.

8 Q. Under oath you testified that you
9 contacted him very regularly on his cell phone
10 about the property?

11 MR. LUCK: Object to the form.

12 BY MR. NICKELS:

13 Q. Did you?

14 A. Only when he was there did I call him.
15 I don't know what regularly would be. I mean,
16 once -- every once in a while. But when that one
17 guy told me my house was being robbed, I
18 intensively tried to call him, tried to find out
19 what was going on. Like I said, to no avail. I
20 didn't get any information. All I heard was he was
21 arrested later. Suzy told me that, I believe.

22 Q. Were you ever explained either by Suzy,
23 Deonna, or anybody else about the incident where
24 the police demanded to see the lease; he produced a
25 piece of paper, and the police left after?

1 MR. LUCK: Object to the form.

2 THE WITNESS: No.

3 BY MR. NICKELS:

4 Q. Did you hear about that after the fact?

5 A. No. They said -- Suzy had said
6 something about Deonna said, oh, they are robbing
7 the house. Then she said, well, F him anyways. He
8 don't deserve none of his stuff anyways. That's
9 what Suzy said Deonna said.

10 Now, what Suzy said about the lease,
11 she said something about a sublease. And I went,
12 what is a sublease? Don't you have to have a lease
13 to have a sublease, and don't I have to be informed
14 about this? So -- and there was no such thing.
15 There was no such thing.

16 I never heard of such a thing. And
17 that was the way of getting -- they probably
18 concocted something to get the cops to leave them
19 alone. They had to have.

20 Q. And who was they?

21 A. Lynn. Lynn should be held responsible.
22 Lynn should be in jail for this.

23 Q. Have you ever been provided or gone
24 over the police -- I'll just call them the police
25 reports -- the incident reports regarding your

1 **former home?**

2 A. No, sir. I have not seen them. Suzy
3 said that -- I don't know if I'm using the term
4 right -- crack heads or whatever had moved into my
5 home. That just sickens me. That the police had
6 to break doors and she had to fix doors. That's
7 all that Suzy told me. I said, Suzy, I don't want
8 to know anything else. She said, your whole house
9 is gone. It's missing. Everything is gone.

10 And I said, I don't want to hear
11 anything else. I don't. I'm too distraught about
12 it. I cannot believe -- and I've told people this.
13 And as bad as this seems like there's something on
14 the other end of this for other people. I'm not
15 going to judge my or throw my case out there, this
16 criminal case out in front of you right now other
17 than, I mean, something happened to me with that
18 shot and they know it.

19 I mean, the doctors know it. I've got
20 people here, the medical staff here that have
21 looked at the information, and they believe -- they
22 have written letters on my behalf also saying, yes,
23 this Vivitrol is a dangerous study. It's a -- it
24 will do that to you. If you have an allergic
25 reaction, there is a multitude of things that can

1 happen to you. And poor judgment, strike that up
2 to being a poor judge of Lynn. But, man, I had a
3 hard time even figuring out why I was even in jail.

4 Q. Did you know that on November 28th,
5 2014 multiple officers were dispatched and arrived
6 at your home?

7 A. No. No, sir.

8 Q. Did you know that your at the time
9 wife -- I guess soon to be ex-wife -- also showed
10 up at the home at that time?

11 A. No, sir.

12 Q. That Suzy Hylton arrived at the home at
13 that same time?

14 A. No, sir. I don't remember. I remember
15 Suzy one time telling me that my whole house was
16 stolen.

17 Q. That Mr. Lynn Allen was summoned and
18 produced to the police officers a handwritten
19 document leasing the property from you to him for
20 \$400 a month dated August 29th, 2014? Do you have
21 any knowledge of that document?

22 A. No, sir.

23 Q. That it was signed by witnesses Thomas
24 Gooch and Devon Lopez? Do you know who they are?

25 A. I remember Gooch.

1 Q. Who is Gooch?

2 A. Gooch was a big guy.

3 Q. A correction officer?

4 A. Yes, sir.

5 Q. Okay. Do you remember Lopez?

6 A. No. Gooch was kind of like Lynn's
7 friend anyways. They were kind of like buddied up
8 in jail all the time.

9 Q. He wears the badge as a correction
10 officer?

11 A. Yeah. But they were kind of like
12 buddies.

13 Q. Are you saying -- so -- they're
14 buddies. What does that mean?

15 A. I'm just saying they're buddies. They
16 knew each other on the street too.

17 Q. So you remember Gooch. You cannot
18 recall Mr. Devon Lopez?

19 A. No. The only reason Gooch stands out
20 is because he was a real big, tall white guy.
21 That's the only reason he was distinctive. And I
22 know he is good friends with Lynn.

23 Q. When did your divorce become final from
24 Deonna?

25 A. I'm trying to remember. I don't

1 remember if I was at RNE in Kirkland when that
2 happened or not. I would imagine it was. I don't
3 remember. It was...

4 Q. Did you have an attorney to help with
5 that process?

6 A. No, sir.

7 Q. Did she?

8 A. Yes, sir.

9 Q. Who was her attorney?

10 A. I don't recall the guy's name. I
11 really don't. I got stuff in the room from him if
12 you want me to get that.

13 Q. That's all right. What arrangement is
14 out there relative to your daughter who is still a
15 minor?

16 A. Yes.

17 Q. Do you have a support obligation of
18 some kind even though you are incarcerated?

19 A. I don't have any kind of monetary
20 support because I have no money right now coming in
21 other than when I sell some pictures or something
22 through Hobbycraft. I have a Hobbycraft license.

23 I send her stuff all the time. I have
24 written 12 books just for her, over a thousand
25 pages. I mean, I try to be a dad while I'm in

1 here. And like I said, me and her were best
2 friends. She misses me just as much as I miss her.
3 I think I miss her more because I'm in here. Just
4 more feelings.

5 Q. What, if anything, can you do or have
6 you done for the minor victim of your crimes?

7 A. I plan -- my plan is to get the truth
8 out about this shot. My plan is also -- and it's a
9 plan -- is to sue the people that gave me the shot
10 and/or the Vivitrol people because -- or the doctor
11 or whatnot because they did not give me any
12 information about the shot or didn't even give me
13 the stuff to show that I was allergic to it.

14 I don't care about any money as long as
15 it gets to the victim's family. I'm happy about
16 that. That would be my plan. That would be
17 vindication, you know, for saying, hey, look, I
18 told you so. I'm telling you this is what that
19 shot does. And I'm the number that's on their
20 website. I am one of the numbers.

21 Q. If you were successful in obtaining
22 money from the pharmaceutical company or whatever,
23 you'd like for that to go to the victim? I guess
24 she's probably 14 now.

25 A. At this point I would have to be able

1 to get out and prove my case first before I can do
2 that. When I prove my case -- and I believe I can
3 with legal help; I have to take one step at a
4 time -- and then I can have everybody vindicated if
5 I go and look at what this shot does.

6 It's not just on the website. This is
7 actually what happened. Look at my medical
8 records. Read everything that happened. I'm
9 telling the god's honest truth. I'll take a lie
10 detector test. I'll do whatever it takes to prove
11 this.

12 And I can prove it if just given the
13 chance. Ms. Gay did not give me that chance. And
14 I don't know if I'm allowed to say this or not, but
15 I believe that Ms. Gay was probably paid off.

16 MR. NICKELS: All right. Let's take a
17 break for just a second. I think I may be
18 concluded.

19 VIDEOGRAPHER: Off the record at 12:23
20 p.m.

21 (Off-the-record conference.)

22 VIDEOGRAPHER: On the record at 12:24.

23 BY MR. NICKELS:

24 Q. The home itself, who had access to the
25 home on the date that you were arrested? You

1 **and --**

2 A. I'm sorry.

3 Q. Yeah. Who had keys to the house at the
4 time you were arrested?

5 A. At the time I was arrested? I guess
6 that would just be me and Deonna. I think so. I
7 mean, I had keys. Deonna had keys. I don't think
8 anybody else had keys, so...

9 Q. Would Ms. Hylton have changed locks
10 after your arrest for any reason?

11 A. I don't know if she did or Lynn did.
12 Something tells me Lynn did.

13 Q. What tells you that?

14 A. I think I'm recalling what Suzy was
15 telling me. I'm thinking. I'm not sure because
16 I'm just thinking. I'm not sure. It's -- if I was
17 going to say 52 to 48 percent I would think
18 that -- I somehow hear Suzy saying that.

19 Q. And you say robbery, at the time of the
20 alleged thefts of your stuff, neither you nor
21 Deonna were living at the home; is that correct?

22 MR. LUCK: Object to the form.

23 BY MR. NICKELS:

24 Q. During the time of the alleged thefts,
25 neither you nor Deonna were living at the home; is

1 **that correct?**

2 MR. LUCK: Same objection.

3 THE WITNESS: Obviously I wasn't. I
4 was in jail.

5 BY MR. NICKELS:

6 Q. Right.

7 A. And Deonna was living with Steve, the
8 millionaire.

9 Q. Is that who she ended up with?

10 A. I don't know. I don't even want to
11 know.

12 Q. Okay. To your knowledge, was the home
13 vacant at the time the stuff was taken, or was Lynn
14 there? Or was Lynn and some of these people there?

15 A. I don't know. I don't understand all
16 the intricacies behind the scene stuff because I'm
17 still learning. I'm learning about things to this
18 day. I'm still learning about my shot to this day.

19 Q. Okay.

20 A. Four or five months ago, I find out
21 about that. I could believe that the shot was
22 possible.

23 Q. What things were in the home that were
24 clearly Deonna's and not yours?

25 A. I don't know if she had taken -- the

1 only thing that she moved in there was the bedroom
2 set and -- basically the master bedroom set. Other
3 than that, everything was mine. But I don't know
4 if she got that stuff out of there or not. That's
5 why I reported it being stolen because I had no
6 clue.

7 And Suzy, I don't believe Suzy told me
8 either. Suzy was -- she was very -- she's hard to
9 deal with because she said she's busy. And I feel
10 because of the nature of some of my crimes she
11 feels reluctant to help me as much as she has
12 because she told me that some of her friends don't
13 even -- why are you helping him? Getting that kind
14 of response. Even Suzy told me that her friends
15 tell her that. And she said, because he has nobody
16 else. Everybody vacated him; they won't listen to
17 him.

18 And that's what happens to prisoners in
19 here. There's a lot of prisoners in here that are
20 innocent. Their families drop them, and it's a
21 terrible thing.

22 Q. Do you know the name of, say, a
23 next-door neighbor from your old home?

24 A. Tom was on the -- like, if you're
25 facing my house, Tom would be on the right. I

1 can't remember the lady on the left, her -- but I
2 talked to her a lot. She heard -- the lady on the
3 left, she heard me on the back porch quite a few
4 times, I remember, about Deonna smoking pot in the
5 house.

6 And I remember I didn't want her, and
7 she heard me arguing with her a lot about that.
8 And I said, were we that loud? And she goes, yeah,
9 I heard you all the way over here. I said, I don't
10 want her around my daughter.

11 Q. I'm good. Thank you.

12 MR. LUCK: No questions.

13 VIDEOGRAPHER: This concludes the video
14 deposition. The time is 12:31, and we are off the
15 record.

16 (The witness, after having been advised
17 of his right to read and sign this transcript,
18 waives that right.)

19 (The video deposition was concluded at
20 12:31 p.m.)

21

22

23

24

25

Camden Consulting
Rebecca A. Plummer McCardle, LMSW
476 Truesdale Road
Camden, South Carolina 29020
803.899.9511

EXHIBIT
B

To Whom It May Concern:

I am writing on behalf of Mr. Gary Fraley, my client who is currently incarcerated at Lee Correctional Institution. I met Mr. Fraley in late February of 2017 as I began helping him with his PTSD treatment and counseling (I have included a copy of the DSM-5 diagnostics for PTSD). During the past few months, I have done extensive research on the situation which led to Mr. Fraley's incarceration by SCDC.

Mr. Fraley developed PTSD as a result of his military and civilian service. This is expected due to the fast-paced, violent nature of military service. He was diagnosed 15 years ago by Department of Defense doctors in approximately 2002. His treatment by the VA followed. Initially, his PTSD presented as primarily hypervigilance, exaggerated startle response, and depression. Unfortunately, the medications and limited therapies provided by the VA and other civilian doctors were not successful. As a consequence of continued symptoms, Mr. Fraley used alcohol on a limited basis. He does not appear to have had an alcohol abuse problem in the clinical sense. However, he was encouraged to seek alcohol treatment by Ms. Deonna Castro, his former wife. He chose to go to Wilmington Treatment Center in Wilmington, North Carolina. At the end of his 25-day stay (June 23, 2014), he received an injection of Vivitrol (naltrexone). This medication takes approximately 72 hours for the full effects.

Here is where things are peculiar and complicated. Mr. Fraley was prescribed multiple medications to include SSRI antidepressants and benzodiazepines. Since he was previously adherent with his medications, it is likely he would have continued to take these medications. A little chemistry... naltrexone blocks dopamine and opioids, the neurotransmitters responsible for all pleasure, including pain relief and intoxication. Furthermore, the benzodiazepines reduced the level of norepinephrine which is also responsible for alertness, concentration, and joy. This complete denial of natural pain and mood mediation impacted his mental functioning to the point of psychosis. (I have attached a copy of the DSM-5 diagnostics for psychosis.) In a nutshell, the injection resulted in his inability to know what he was doing or to know right from wrong. There are multiple studies and documented cases where the blockage of natural opioids, dopamine, and norepinephrine causes extreme mental illness. I have attached some case studies which illustrate similar cases and on-going research.

Given my research into this medication and its impact on the chemistry of the brain, I believe Mr. Fraley was in a mental state wherein he could not differentiate right from wrong, was unaware of the consequences of his actions and consequently, cannot fully remember the events which occurred from June 25, 2014 to approximately the beginning of November of 2014. His travels throughout North Carolina and trip to Pennsylvania and his random wanderings evidence his mental state. Furthermore, the medical records of his hospitalizations during this time reinforce this clinical picture.

If you have questions, please contact me.

Sincerely,

Rebecca A. Plummer McCardle, LMSW
Rebecca A. Plummer McCardle, LMSW



EXHIBIT
C

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY

POST OFFICE BOX 219
MONCK'S CORNER, SOUTH CAROLINA 29461-0219
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[Handwritten signature]

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF BERKELEY 9th JUDICIAL CIRCUIT

3

4

5 GARY FRALEY,

6 vs.

CASE NO. 2018-CP-08-02576

7 STATE OF SOUTH CAROLINA,

TRANSCRIPT OF HEARING

8 Defendant.

9

10 TRIAL BEFORE:

THE HONORABLE JENNIFER MCCOY

11 DATE:

DECEMBER 6, 2021

12 REPORTED BY:

KYMBERLEE M. WILLIAMS, CSR/RPR

13

14 APPEARANCES:

15

16 Attorney for the State

17 SAMANTHA WEIDAUER Esq.
18 Assistant Attorney General
19 State of South Carolina Office of the Attorney General
 1000 Assembly Street
 Columbia, South Carolina 29201

20

Attorney for the Defendant

21

22 Jason Scott Luck, Esq.
23 State of South Carolina
 P.O. Box 47
 Bennettsville, South Carolina 29512

24

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* * *

THE COURT: Thank you. Please be seated. All right, the next matter is Gary Fraley vs the State of South Carolina. Is that correct?

THE CLERK: Yes ma'am.

THE COURT: All right. I'll ask the attorneys to please state their names for the record and who they represent. Start with the State.

the State: Samantha Weidauer from the Attorney Generals office.

THE COURT: All right.

MR. FAULK: James Faulk, co-counsel for Mr. Fraley.

THE COURT: Okay.

MR. LUCK: Jason Luck, co-counsel for Mr. Fraley.

THE COURT: All right. And Mr. Fraley, welcome.

MR. FRALEY: Yes, ma'am.

THE COURT: All right. Uh. Let's see. We have -- uh - everybody here that we need. Is that correct? Attorney General?

MS. WEIDAUER: Yes. Your Honor.

THE COURT: Feel free to speak on up. I'm going to be looking at you to - when I ask a lot of these questions.

All right, the State ready to proceed?

MS. WEIDAUER Yes, your Honor.

1 THE COURT: Defense ready to proceed?

2 MR. FAULK: Yes, your Honor.

3 THE COURT: All right. Um. Mr. Faulk, happy to
4 hear from you. Or Mr. Luck, whoever would like to --

5 MS. WEIDAUER: Would your Honor like a brief
6 procedural history?

7 THE COURT: I'm - I have the packet, yeah, I'm
8 happy if you want to put that on the record. You can go ahead
9 and do that now and then they can get started.

10 MS. WEIDAUER: Okay.

11 THE COURT: Sure.

12 MS. WEIDAUER: In October, 2014, the Berkeley
13 County Grand Jury indicted applicant for kidnapping, attempted
14 murder, unlawful conduct toward a child, another count of
15 kidnapping, and possession of a weapon during the commission of
16 a crime. Applicant was subsequently indicted in 2014 - in
17 November 2014 for three counts of criminal sexual conduct with
18 a minor second degree.

19 And in December 2014 for possession of a weapon
20 during the commission of a crime, criminal sexual conduct with
21 a minor third degree.

22 On August 17, 2015, a jury trial commenced in
23 Berkeley County with the Honorable Christy Harrington
24 presiding. Melissa Gay represented applicant assistant
25 Solicitor Ann Williams represented the State.

1 Thereafter, at the conclusions of trial, the jury
2 convicted applicant as indicted.

3 Following the verdict, the trial judge sentenced
4 applicant to imprisonment for a concurrent terms of thirty
5 years for each kidnapping charge and attempted murder charge.
6 He received five years for each count of a weapon; fifteen
7 years for each count of criminal sexual conduct with a minor,
8 third degree; and twenty years for each count of criminal
9 sexual conduct with a minor, second degree.

10 Applicant timely filed a notice of appeal. John
11 Strom of the office of Indigent Defense perfected the appeal.
12 The South Carolina Court of Appeals affirmed applicant's
13 conviction on July 2016 - 26th, 2017. The remitter was returned
14 on August 11, 2016-2017, and this post-conviction matter relief
15 follows.

16 THE COURT: Okay. Thank you so much.

17 MR FAULK: Your Honor, if we could just - a little
18 explanation. Jason was retained out of this case. He asked me
19 to help him so, I mean, Jason - Mr. Luck would really be more
20 lead counsel in this case.

21 THE COURT: Okay.

22 MR. FAULK: And this might be a little irregular as
23 far as normal court proceeding, but Jason was focusing on
24 really the first three issues that were raised in the PCR
25 hearing as far --

1 THE COURT: Right.

2 MR. FAULK: And as far as issues relating to the
3 INGRID defense evidence established by Mrs. Gay. I was the
4 person who raised the other six or so issues that on that
5 amended PCR.

6 So, we are kind of contemplating splitting these
7 witnesses. So it's going to be kind of awkward.

8 THE COURT: That's fine with me. However you want
9 to proceed is fine with me, as long as it's okay with Mr.
10 Fraley.

11 All right, Mr. Fraley, you have two attorneys
12 today. You understand that?

13 MR. FRALEY: Yes ma'am.

14 THE COURT: You okay with them making the decision
15 on who should handle which witnesses and that sort of thing?

16 MR. FRALEY: Yes ma'am.

17 THE COURT: All right.

18 Okay, Mr. Luck, happy to hear from you. Call your
19 first witness.

20 MR. LUCK: Thank you, Your Honor. We would call
21 Julie Fraley.

22 THE COURT: Mrs. Fraley, have a seat up here and
23 the clerk will swear you in.

24 MS. FRALEY: Yes ma'am.

25 JULIE MICHELLE FRALEY,

1 being first duly sworn testified as follows:

2 * * *

3 EXAMINATION BY MR. LUCK

4 * * *

5 MR. LUCK: Good morning, Ms. Fraley.

6 MS. FRALEY: Good morning.

7 MR. LUCK: Could you explain to The Court your
8 relationship with Gary Fraley?

9 MS. FRALEY: I am his ex-wife.

10 MR. LUCK: Okay. When were you married?

11 MR. LUCK: When were you divorced?

12 MS. FRALEY: 2006.

13 MR. LUCK: Do you - Did you have any children?

14 MS. FRALEY: One.

15 MR. LUCK: And who is that child?

16 MS. FRALEY: Alta Fraley.

17 MR. LUCK: Is Alta Fraley in this courtroom
18 today?

19 MS. FRALEY: Yes, sir.

20 MR. LUCK: Is she - can you point her out for me?

21 MS. FRALEY: Alta Fraley is on the back row.

22 MR. LUCK: All right. Thank you.

23 So, after your divorce with Mr. Fraley, who had
24 custody of Alta?

25 MS. FRALEY: I did.

1 MR. LUCK: Okay. Sole custody? Shared custody?
2 MS. FRALEY: Sole custody.
3 MR. LUCK: Okay.
4 MS. FRALEY: Gary had rights. He still had rights
5 as the father.
6 MR. LUCK: Visitation?
7 MS. FRALEY: Visitation.
8 MR. LUCK: Okay. So in 2014 to 2015 to 2016, what
9 was - - where did you live?
10 MS. FRALEY: 775 Bunk House Drive in Charleston.
11 West Ashley.
12 MR. LUCK: Okay. And all of three of those years,
13 you lived there?
14 MS. FRALEY: Yes, sir.
15 MR. LUCK: Okay. During that period of time, did
16 you have a phone number? A cell phone?
17 MS. FRALEY: I did.
18 MR. LUCK: Was it the same number all three
19 years?
20 MS. FRALEY: Yes. Probably. Yes.
21 MR. LUCK: During this period of time --
22 2014-2016 did Alto Fraley live with you?
23 MS. FRALEY: Yes.
24 MR. LUCK: Okay. How old was Alta in 2014?
25 MS. FRALEY: Twelve?

1 MR. LUCK: 2015?

2 MS. FRALEY: Uh - 13.

3 MR. LUCK: 14 in 2016?

4 MS. FRALEY: 14, so in 2015, she was 16.

5 MR. LUCK: How would you characterize

6 your relationship with Gary after your divorce?

7 MS. FRALEY: Uh, we were on speaking terms. It was

8 all polite. There was no argument or -- we worked together.

9 We communicated with each other about Alta's welfare.

10 MR. LUCK: Okay. Now, are you familiar with Mr.

11 Fraley's criminal defense lawyer?

12 MS. FRALEY: No. I don't know who that is.

13 MR. LUCK: Why is that?

14 MS. FRALEY: Nobody talked to me about any of his

15 things that were going on. I got everything from -- I had to

16 look everything up online.

17 MR. LUCK: Do you - well - regarding the trial -

18 MS. FRALEY: -- The trial, the arrest. People give

19 me information. His other ex-wife gave me information.

20 MR. LUCK: Okay. When I say the trial, I'm

21 talking about the charges that led to the August 13-17, 2015

22 trial. Is that correct?

23 MS. FRALEY: Yes, sir.

24 MR. LUCK: Did I hear you correctly? Did you say

25 that - did Mrs. Gay ever contact you?

1 MS. FRALEY: No one. No one contacted me. No. She
2 did not.

3 MR. LUCK: Did anyone claim to be defending Gary
4 Fraley ever contact you?

5 MS. FRALEY: Not at all. Nothing.

6 MR. LUCK: Okay. Did you give a statement to the
7 Berkeley County Sheriff's Department?

8 MS. FRALEY: Yes, sir.

9 MR. LUCK: Okay. And in that statement, did you
10 give your address and your phone number?

11 MS. FRALEY: I filled it out properly. However
12 they wanted me to fill it out.

13 MR. LUCK: Okay.

14 MS. FRALEY: They had my contact information.

15 MR. LUCK: Okay. And anybody who had a copy of
16 that statement would have your contact information too?

17 MS. FRALEY: Correct.

18 MR. LUCK: If someone had contacted you in 2014,
19 2015, 2016 and ask you to speak with Alta regarding Gary
20 Fraley's defense, would you have allowed them to do that?

21 MS. FRALEY: Yes.

22 MR. LUCK: If Mrs. Gay would've contacted you,
23 would you have allowed her to speak with Alta Fraley?

24 MS. FRALEY: Of course.

25 MR. LUCK: Okay. Uh - I guess one minor issue I

1 have if Court will permit, may I approach her with an
2 affidavit?

3 THE COURT: Sure.

4 MR. LUCK: There's an affidavit that has been
5 filed of record with The Court and so I don't think it needs
6 necessarily to be made an exhibit but I just wanted you to -
7 Ms. Fraley, please look at that and confirm.

8 This is a document entitled Affidavit of Julie
9 Fraley. It's dated November 8, 2021.

10 Ms. Fraley, is that your affidavit?

11 MS. FRALEY: It is.

12 MR. LUCK: All right. Is that the affidavit
13 containing your testimony today as well?

14 MS. FRALEY: Yes, sir.

15 MR. LUCK: All right. No further questions, Your
16 Honor.

17 THE COURT: All right.

18 * * *

19 CROSS-EXAMINATION

20 ***

21 MS. WEIDAUER: So you have that affidavit that
22 you're holding. Will you tell me what number six says?

23 MS. FRALEY: I am familiar with Melissa Gay -
24 Melissa Gay, Gary Fraley's criminal defense lawyer.

25 MS. WEIDAUER: And am I correct that you just

1 testified that you did not know who Gary's defense attorney
2 was?

3 MS. FRALEY: Yes ma'am. That was at the point of
4 his - when his proceedings were happening.

5 MS. WEIDAUER: But that wasn't the question that Mr.
6 Luck asked you, right?

7 He just asked you whether you were aware of who his
8 defense counsel was, correct?

9 MS. FRALEY: I thought we were talking about --

10 MS. WEIDAUER: A specific date?

11 MS. FRALEY: Yes ma'am.

12 MS. WEIDAUER: Okay. All right. So you are aware
13 who she is?

14 MS. FRALEY: After everything was already
15 processed.

16 MS. WEIDAUER: Okay.

17 MS. FRALEY: Yes.

18 MS. WEIDAUER: What do you believe would've
19 benefited Gary having Alta talk to Mrs. Gay? Or Counsel Gay.

20 MS. FRALEY: That's a good question. I didn't
21 analyze any of that. It's not on me to try to analyze.

22 I just control my behavior and Alta's. I was
23 responsible for her, so everything in my household is to be
24 done -- properly done the way I see that it is done.

25 Things that are done in court systems, I expect to

1 be done properly according to that --

2 MS. WEIDAUER: Okay.

3 MS. FRALEY: Those processes --

4 MS. WEIDAUER: Okay. And going off that, at that

5 time Alta was 12.

6 MS. FRALEY: Yes.

7 MS. WEIDAUER: And you thought that it would be

8 good for her to go testify in court?

9 MS. FRALEY: I do not say good or bad.

10 MS. WEIDAUER: Okay.

11 MS. FRALEY: I'm not analyzing those outcomes.

12 MS. WEIDAUER: For your daughter, specifically. Not

13 for Gary.

14 MS. FRALEY: Correct.

15 MS. WEIDAUER: Okay.

16 MS. FRALEY: Yes.

17 MS. WEIDAUER: Nothing further, Your Honor.

18 THE COURT: Okay. Any following questions?

19 MR. LUCK: Nothing further, Your Honor.

20 THE COURT: Okay. Thank you very much. You can

21 step down now back into the gallery. Thank you very much.

22 MS. FRALEY: Yes ma'am.

23 THE COURT: You can call your next witness.

24 MR. LUCK: We will call Alta Fraley.

25 THE COURT: All right.

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ALTA FRALEY,
being first duly sworn testified as follows:

* * *

DIRECT EXAMINATION

* * *

MR. LUCK: Good morning, Ms. Fraley.

MS. FRALEY: Morning.

MR. LUCK: Could you - you were just here, and
you heard your mother testify, correct?

MS. FRALEY: Yes.

MR. LUCK: Could you for the record lay out what
is your relationship with Mr. Gary Fraley?

MS. FRALEY: I'm his daughter.

MR. LUCK: Okay. Are you his only daughter?

MS. FRALEY: No.

MR. LUCK: Are you the only child that lives with
Julie Fraley?

MS. FRALEY: Yes.

MR. LUCK: Okay. So, in 2014, 2015, 2016,
where were you living?

MS. FRALEY: My mother's house during that
time.

MR. LUCK: When you say mother, you mean
Julie Fraley?

MS. FRALEY: Yes.

1 MR. LUCK: Okay. So. During that period of
2 time in 2014, 2016, did you have a cell phone?

3 MS. FRALEY: I did.

4 MR. LUCK: Okay. DO you still have that cell
5 phone?

6 MS. FRALEY: I do not.

7 MR. LUCK: Who has that cell phone now?

8 MS. FRALEY: You do.

9 MR. LUCK: Thank you.

10 Do you remember coming to my office back in August
11 of 2019?

12 MS. FRALEY: Yes, sir.

13 MR. LUCK: Do you remember some photographs
14 being taken of your phone and text messages?

15 MS. FRALEY: Yes, sir. I do.

16 MR. LUCK: Okay. If I were to show you some
17 photographs, would you be able to identify those photographs
18 and tell me if they are, in fact, photographs of your phone?

19 MS. FRALEY: Yes, sir.

20 MR. LUCK: So, may I approach, Your Honor?

21 THE COURT: Yes.

22 MR LUCK: Ms. Fraley, I am handing you a
23 document that has been marked as the pictures Exhibit Number 1.
24 Please take a moment to - uh - flip through that. And tell me
25 when you're done looking at it.

1 MS. FRALEY: Yes, sir. I remember these.
2 MR. LUCK: Okay. So what have I handed you?
3 MS. FRALEY: They are old text messages
4 between me and my father. Right before everything went down.
5 MR. LUCK: Those are photographs. Are they
6 not?
7 MS. FRALEY: Uh - yes. They are.
8 MR. LUCK: Okay. Tell me are these
9 photographs true and accurate images of your cell phone and
10 text that it contained?
11 MS. FRALEY: Yes, sir.
12 MR. LUCK: Have they been altered in any
13 way?
14 MS. FRALEY: No sir.
15 MR. LUCK: Okay. Your honor, first of all,
16 I'd like to ask to move that into evidence as Petitioner's one.
17 THE COURT: All right. Any objections to the
18 photos of the phones being admitted into evidence?
19 MS. WEIDAUER: No objection.
20 THE COURT: All right. Without objection,
21 they'll be marked collectively as Defense one or Petition's
22 one.
23 MR. LUCK: And your Honor, I have a copy,
24 also a colored copy, handed up to you that you can look at.
25 THE COURT: Great. That'd be great. Thank

1 you.

2 (Petitioner's Exhibit 1 was marked and entered
3 into evidence.)

4 MR. LUCK: Now during this period of time,
5 you say before things went down. What are you referring to?

6 MS. FRALEY: Whenever I found out about his
7 arrest.

8 MR. LUCK: Okay. And the crimes he was
9 alleged of - alleged to have committed in 2004?

10 MS. FRALEY: 2004?

11 MR. LUCK: I'm sorry. 2014.

12 MS. FRALEY: 2014, Yes. I would like to say I
13 was 13 at the time. I just turned 13 in July and then whenever
14 he was arrested, I was still 13 in August.

15 MR. LUCK: Okay. That's good to know. Okay.
16 So during this period of time when you were 13 and prior to his
17 arrest, did you keep in contact with your father?

18 MS. FRALEY: I tried to at least.

19 MR. LUCK: Okay. And how did you keep in
20 contact with him?

21 MS. FRALEY: Through my phone, text messages,
22 calling. Sometimes he would call my grandparents because I was
23 staying with them and my mother at the time when we found
24 everything out on that day.

25 MR. LUCK: Okay. But prior to that day, you said

1 he would call you on your cell phone?

2 MS. FRALEY: Yes, sir.

3 MR. LUCK: Would he call you on other
4 phones?

5 MS. FRALEY: I don't think so. I think the
6 only other time was when he called the house phone at my
7 grandparents.

8 MR. LUCK: Okay. Uh - In 2014 - 2013,
9 approximately, how many times a day did you speak with your
10 father?

11 MS. FRALEY: It varied. We didn't really speak
12 very much throughout the day, but it got a lot more active at
13 night. He would call me and then tell me that he got struck by
14 lightning, and I was very worried about him.

15 I didn't know what to do. Honestly, I should've
16 call the cops because he was telling me that he saw Big Foot.
17 He left Nibbles, my dog outside one time. He was dying of
18 throat cancer in a week. I was actually very worried for his
19 safety.

20 MR. LUCK: Before those calls - before those calls,
21 did you speak with your father regularly?

22 MS. FRALEY: Yes.

23 MR. LUCK: Did he ever talk about seeing Big
24 Foot in calls prior to?

25 MS. FRALEY: No. But we would talk about going

1 to go hunt for him.

2 MR. LUCK: Okay. But before that, did he
3 talk about seeing Big Foot?

4 MS. FRALEY: We never actually, like, talked
5 about like witnessing something like Big Foot.

6 MR. LUCK: So we are looking at here some texts
7 from a period of time.

8 Would you tell me what's the date of the very first
9 message that you see there?

10 MS. FRALEY: August 20 -- oh wait. There it is.
11 May 23, 2014.

12 MR. LUCK: And the very last message, what date
13 was that?

14 MS. FRALEY: July 31, 2014

15 MR. LUCK: Okay.

16 So when you talked a minute ago about Mr. Fraley
17 telling you that he had seen Big Foot, he'd been struck by
18 lightning, and was dying of throat cancer, was that all taking
19 place during this time frame of these text messages?

20 MS. FRALEY: Yes.

21 MR. LUCK: Okay. And this was unusual
22 behavior for him?

23 MS. FRALEY: Absolutely.

24 MR. LUCK: Did he seem out of sorts,
25 agitated?

1 MS. FRALEY: Yes. Agitated in a way. His
2 messaging, how he worded his messaging and text messages were a
3 little off. He would add different spaces, periods. Say weird
4 thing likes Goodbye to you too. He just seemed completely off.
5 Like he wasn't there.

6 MR. LUCK: And this is behavior different from
7 before, let's say, May 23, 2014?

8 MS. FRALEY: Way before that.

9 MR. LUCK: Okay. Do you see any examples of
10 some of this off behavior you mentioned in these texts?

11 MS. FRALEY: Let me see if I can find it. If
12 we go to the message, I think on the second page, in the bottom
13 right corner, he said "Deonna where did our life go". He put
14 two u's in that. "Think about the fun times. I do...forgive me..."
15 and he says "I'm trying to save my life."

16 And then he says "Omg. where is my favorite person"
17 Like none of it makes any sense to me at all and he thought I
18 was Deonna at some point, and that's why he sent that to me I
19 guess.

20 MR. LUCK: Okay.

21 THE COURT: I'm sorry. Who is Deonna?

22 MS. FRALEY: Um - my former stepmom. I'm
23 sorry.

24 THE COURT: No. No. That's fine. I just
25 wondered.

1 MS. FRALEY: The lady that he married after he
2 divorced my mother.

3 THE COURT: Okay. Thank you, Mr. Luck.

4 COURT REPORTER: Could you please spell Deonna
5 for me?

6 MS. FRALEY: D-E-O-N-N-A.

7 COURT REPORTER: Thank you.

8 MR. LUCK: So. Based on what you - did you
9 have any telephone conversations with him -

10 MS. FRALEY: Yes, we did.

11 MR. LUCK: During this period of time -

12 MS. FRALEY: During this period, yes. I
13 remember one time he was telling me "oh I have -

14 MS. WEIDAUER: Objection, hearsay.

15 THE COURT: I'll allow it. Go ahead. She can
16 - she can - you can go ahead and finish your answer.

17 MS. FRALEY: Um - he would tell me "oh, I have
18 throat cancer. I'm only going to be alive for a week." He told
19 me like the name of the cancer. It's like whenever - lining in
20 the cartilage or something. But I was worried.

21 Then I told my mother. I'm pretty sure I told my
22 mother several things about what he was telling me because I
23 was very worried about him because I didn't know what else to
24 do.

25 MR. LUCK: Did Gary Fraley have cancer?

1 MS. FRALEY: Not that I'm aware of. No.

2 MR. LUCK: Do you know if he saw Big Foot?

3 MS. FRALEY: Uh-uh.

4 MR. LUCK: Is that a no?

5 MS. FRALEY: I don't think so. No sir.

6 MR. LUCK: Do you know if he has been struck

7 by lightning?

8 MS. FRALEY: No sir.

9 MR. LUCK: Do you know where Mr. Fraley was

10 before he began sending you these texts?

11 MS. FRALEY: I think he was in Pennsylvania.

12 Before he left, he gave me a weird call and he said "I'm going

13 to have to go for a little bit and he couldn't take me with

14 him. I begged him because him and I were -we had very close

15 daddy/daughter relationship. And I was crying because I didn't

16 think that I would ever see him again. And he said that he was

17 going up to Grandma Tina's house, which is his mother's house.

18 He stayed there and then during that time that's

19 whenever he was telling me he saw Big Foot. He got struck by

20 lightning. All those crazy events.

21 MR. LUCK: This last text that you - let's see

22 here it's page 9 of the exhibit that I handed you.

23 MS. FRALEY: Yes.

24 MR. LUCK: What is that photograph?

25 MS. FRALEY: Um - That is - I can't remember

1 exactly where that was at. I don't know if that was at my
2 grandmother's, his mother's house, or if it was some strange
3 persons house. Because he did tell me that a man brought him
4 with Nibbles. Nibbles was with him too, our dog, and he was
5 staying there for I guess a night or so and he sent me a
6 picture because he wanted me to see if I could see if there was
7 Big Foot out there.

8 Because in prior texts, he was talking about how
9 Nibbles ran after the door and was barking uncontrollably
10 because he thought he saw Big Foot and he was like "oh, I think
11 there's something out there." You know?

12 And he said "we put Nibbles in the bathroom. He
13 won't shut up. I'm going to take a pic now".

14 MR. LUCK: Was your father joking at this point?

15 MS. FRALEY: I don't think so. No.

16 MR. LUCK: Now, the date on that last
17 photograph was what?

18 MS. FRALEY: July 31, 2014.

19 MR. LUCK: And so. Five days later, you
20 believed - first of all, do you believe that your father was in
21 his right mind when he was communicating with you during this
22 period in time?

23 MS. FRALEY: No. Absolutely not.

24 MR. LUCK: And that's based on -

25 MS. FRALEY: My experiences and what I've

1 known him - how I've known him throughout my years of living.

2 MR. LUCK: Do you believe that he was still

3 in this same state of mind five, six days later after that last

4 message?

5 MS. FRALEY: UM - I don't know because I

6 wasn't in contact with him during that.

7 MR. LUCK: He just disappeared?

8 MS. FRALEY: Pretty much. I wasn't able to

9 actually talk to him verbally until I was 18. Before that - -

10 um- - well he was incarcerated. It was through letters.

11 MR. LUCK: Do you think that Mr. Fraley was

12 knew the difference between right and wrong on August 5, 2014?

13 MS. FRALEY: No sir.

14 MR. LUCK: Do you think he knew what was

15 legally or morally right and wrong at that time?

16 MS. WEIDAUER: Objection. She's not - uh.

17 THE COURT: We will get to that - uh - get to

18 that at cross-examination. I'll allow her to answer.

19 MS. WEIDAUER: Thank you.

20 MS. FRALEY: Can you restate the question?

21 THE COURT: State the question again.

22 MR. LUCK: Do you think that he knew what

23 was legally and morally right and wrong on August 5, 2014.

24 MS. FRALEY: No sir.

25 MR. LUCK: And why is that?

1 MS. FRALEY: Um- - Because I know my father
2 and I feel like at some point, he would've displayed some kind
3 of evidence towards me. Um - - since I was his - um - his child
4 and a little girl and he isn't done anything like that towards
5 me. He's never touched me. He's never said anything - um -
6 inappropriate to me. He was my father figure. And he was there
7 to protect me.

8 MR. LUCK: No further questions, thank you.
9 Well, I guess one more. I did - one more important question.

10 Have you ever spoken with Melissa Gay?

11 MS. FRALEY: No sir.

12 MR. LUCK: Do you know who Melissa Gay is?

13 MS. FRALEY: I do now.

14 MR. LUCK: And who is she?

15 MS. FRALEY: The lady sitting in the second
16 row.

17 MR. LUCK: And what was her role with your
18 father?

19 MS. FRALEY: I think that she was his lawyer
20 at the time.

21 MR. LUCK: Okay.

22 MS. FRALEY: I never talked to her. Never met
23 her. No one talked to me about anything. I even asked my mother
24 when everything went down am I going to have to testify against
25 him or for him? And she said no, no one's going to talk to you.

1 So no one talked to me about it.

2 MR. LUCK: Would you have spoken with Mrs.

3 Gay or investigators?

4 MS. FRALEY: Yes. I would've.

5 MR. LUCK: Even though you were -

6 MS. FRALEY: 13?

7 MR. LUCK: 13 at the time.

8 MS. FRALEY: I wouldn't care.

9 MR. LUCK: Okay. Do you feel like you were

10 capable of that?

11 MS. FRALEY: Of course.

12 MR. LUCK: Okay. I - uh - just because I'd

13 like to go ahead and get this identified. If you don't mind,

14 Your Honor, I'll approach.

15 THE COURT: Sure.

16 MR. LUCK: This again - I won't get this

17 marked as an exhibit because it's already part of the record.

18 But uh - there's - I'm handing you a document that says that

19 it's the Affidavit of Alta Fraley.

20 Take a moment to review that and confirm with me,

21 is that indeed your affidavit?

22 MS. FRALEY: Yes.

23 MR. LUCK: Is that the affidavit you

24 executed at my office?

25 MS. FRALEY: Yes, sir.

1 MR. LUCK: All right. Just wanted to make
2 sure about that. That - that affidavit has had exhibits
3 connect-- attached to it. Were those exhibits the photographs
4 that we've just looked at?

5 MS. FRALEY: Uh - - yes.

6 MR. LUCK: Okay. Now, I don't have any
7 further questions.

8 THE COURT: Okay. All right. Now to hear from
9 the State.

10 * * *

11 CROSS-EXAMINATION BY MS. WEIDAUER

12 * * *

13 MS. WEIDAUER: Good morning, Ms. Fraley.

14 MS. FRALEY: Good morning.

15 MS. WEIDAUER: So we talked a lot about the text
16 messages.

17 MS. FRALEY: Yes.

18 MS. WEIDAUER: You appeared to have had a pretty
19 good presence of mind at 13.

20 MS. FRALEY: Yes.

21 MS. WEIDAUER: Yes. You believe so. Can you
22 confirm what you said before. I believe that you mentioned
23 that, you know, you believed your father's presence of mind was
24 off or his text messages were different.

25 MS. FRALEY: Yes.

1 MS. WEIDAUER: And you recognized that at that
2 time. That's not upon reflecting back?

3 MS. FRALEY: No.

4 MS. WEIDAUER: Looking through these text
5 messages.

6 MS. FRALEY: No. Absolutely not. I knew
7 something was off through his text messages. How he was wording
8 things. The times that he would call me at night.
9 I mean, the very last message. It was at 1:48 a.m.
10 He's usually asleep

11 MS. WEIDAUER: So who did you mention that to at
12 that time?

13 MS. FRALEY: My mother.

14 MS. WEIDAUER: Your mother?

15 MS. FRALEY: Yes.

16 MS. WEIDAUER: Okay. And what did you mother do
17 about it?

18 MS. FRALEY: She didn't do anything, as far as
19 I'm aware.

20 MS. WEIDAUER: Okay. And you were 13 at that
21 time?

22 MS. FRALEY: Yes ma'am.

23 MS. WEIDAUER: Okay.

24 MS. FRALEY: 12, 13. I turned 13 July 16.

25 MS. WEIDAUER: You also mentioned that this was

1 a different way of texting than he had been texting before
2 this.

3 MS. FRALEY: Yes.

4 MS. WEIDAUER: Do you know, is it simply because
5 there are spelling errors or there's spaces? That's kind of
6 what you mentioned before.

7 MS. FRALEY: He was mistaking me for Deonna.
8 The wife after my mother.

9 MS. WEIDAUER: Have you ever accidentally texted
10 somebody that wasn't the person you intended to text?

11 MS. FRALEY: Not really. No.

12 MS. WEIDAUER: Are you aware that that happens
13 often?

14 MS. FRALEY: I'm aware. Yes.

15 MS. WEIDAUER: Okay.

16 MS. FRALEY: But he would've figured that out
17 in the long paragraphs that he would send me. Because during
18 this time he believed that Deonna was having an affair with her
19 boss, at the time. And he was directing that towards me in text
20 messages.

21 MS. WEIDAUER: And despite you believing that he
22 didn't have a right set - - presence of mind, you still believe
23 he should've figured that out in his text messages?

24 MS. FRALEY: Can you restate that please?

25 MS. WEIDAUER: I believe that you are

1 contradicting yourself. You're trying to say that he didn't
2 have good presence of mind but that you also think that he
3 should've been able to know who he is texting and -

4 MS. FRALEY: No. I never said that. No - -

5 MS. WEIDAUER: Okay. Can you --

6 MS. FRALEY: What I'm saying is he didn't have
7 presence of mind. He did not understand who he was texting.
8 Otherwise, he would've immediately responded and said sorry
9 that was for Deonna, not you.

10 MS. WEIDAUER: Can you turn to page 6?

11 MS. FRALEY: Yes.

12 MS. WEIDAUER: Okay. So go ahead and read that
13 text message chain on the top right.

14 MS. FRALEY: "Hi Daddy. I miss you. I love you
15 and I'm now 13. Text me back ASAP please so that I know that
16 you're all right. I love you, Daddy"

17 MS. WEIDAUER: Go ahead and read the next text.

18 MS. FRALEY: "I love you, daddy. Night night.
19 I love you. Try to catch Big Foot for me. I love you. Nighty
20 night."

21 MS. WEIDAUER: Okay. And the next text after
22 that on the bottom left.

23 MS. FRALEY: Then says "Yeah. Right. Big Foot.
24 Love you too." And then he sends the picture which is the very
25 last one.

1 MS. WEIDAUER: So from my standpoint, this
2 would seem like it's an ongoing joke between the two of you.

3 MS. FRALEY: Oh. Yeah. We loved learning about
4 Big Foot. Like throughout my entire life of living with him. We
5 would watch Big Foot videos on the T.V. while eating dinner. We
6 would talk about like going camping and trying to go hunt for
7 him and stuff like that.

8 And he's never really told me. He's never - uh -
9 explained to me he's had that he has had an experience.
10 Otherwise, he would've told me that before all of this has
11 happened.

12 MS. WEIDAUER: So. You at 13 jump straight to
13 he's off the deep end because he says he saw Big Foot. Not - -

14 MS. FRALEY: Not just because - -

15 MS. WEIDAUER: Not that he's playing a joke with
16 his 13 year old daughter.

17 MS. FRALEY: Not just -

18 MS. WEIDAUER: He's just, you know, kidding -

19 MS. FRALEY: Not just because he was playing.
20 Not just because he saw Big Foot. He told he got struck by
21 lightning and he told me that he had a week -

22 MS. WEIDAUER: But specifically with the Big
23 Foot thing. That might be him just elbowing you. Him just
24 kidding you.

25 MS. FRALEY: No. Otherwise - - no. Because him

1 saying "yeah. Right." Where was it again?

2 THE COURT: Page 6.

3 MS. WEIDAUER: Page 6.

4 MS. FRALEY: Him saying "yeah. Right. Big
5 Foot. Love you too". That is so mundane. He doesn't talk to me
6 like that. He usually tells me "all right. Yeah. I'll try to
7 catch Big Foot for you." He'll try to play along with the joke.

8 Instead, he's just like "Yeah. Right. Big Foot.
9 Love you too". That's not my father. That wasn't my father.
10 That wasn't my father then.

11 MS. WEIDAUER: So actually, him playing along
12 with the joke was more his personality?

13 MS. FRALEY: Would be his personality. Yes.

14 MS. WEIDAUER: So him maybe saying he saw, would
15 be more his personality.

16 MS. FRALEY: Maybe. But I don't believe that
17 he actually saw anything. Otherwise, he would've gone outside
18 if he saw Big Foot in that very last picture. He would've gone
19 outside and ran after him and would've done anything his power
20 to try and catch him. But he didn't.

21 He stayed there and he showed me a blurry picture
22 with a fan and a lamp and a sliding glass door in pitch black
23 night.

24 MS. WEIDAUER: So him being eccentric and you
25 feel like he was a little eccentric and that, you know, he

1 would've chased Big Foot down?

2 MS. FRALEY: Oh. Yeah.

3 MS. WEIDAUER: So some of his eccentricities can
4 be explained just by his personality?

5 MS. FRALEY: In a sense. I don't - -

6 MS. WEIDAUER: Can you point to me in this text
7 chain where he said he got struck by lightning or was that a
8 verbal conversation?

9 MS. FRALEY: I think that one was verbal. But,
10 I don't know if that was in here. He did say " I am dead. I
11 know my body is failing and please for the sake of love -- yes.
12 18 months and 24 months according to Elms? don't tell Alta.
13 He was texting that to, I assume, was Deonna but
14 he meant to send it to Deonna but he sent it to me.

15 MS. WEIDAUER: And this is just all your 13 year
16 old inferences?

17 MS. FRALEY: If you want to say it like that,
18 yes.

19 MS. WEIDAUER: Okay. No further questions, Your
20 Honor.

21 THE COURT: All right. Any redirect?

22 MR. LUCK: Nothing further, Your Honor.

23 THE COURT: All right. You can step down.
24 Thank you ma'am.

25 MS. FRALEY: What do you want me to do with

1 the papers?

2 THE COURT: You can just leave - - hand them to
3 this lady right here. Thank you so much.

4 MS. FRALEY: Thank you.

5 THE COURT: Any other witnesses?

6 MR. FAULK: Your Honor, at this time, we call
7 Melissa Gay to the stand.

8 THE COURT: Okay.

9 MELISSA GAY,
10 being first duly sworn testified as follows:

11 * * *

12 DIRECT EXAMINATION

13 * * *

14 MR. FAULK: So I'm going to -- let me ask you
15 about the testimony from Doctor Anna Gomez. She was the State's
16 expert in this case?

17 MS. GAY: Okay. All right.

18 MR. FAULK: Could you look at page 191 on the
19 transcript?

20 MS. GAY: All right. This is slightly difficult.

21 MR. FAULK: Did they give you ---

22 MS. GAY: Do you know the page of this
23 record is?

24 MS. WEIDAUER: The stamp is 137.

25 MS. GAY: Okay. So part of the problem is this

1 is the second one not the third one.

2 All right. Yes, sir.

3 MS. GAY: Now this doesn't - - well okay. 137 is
4 not where it starts.

5 MR. FAULK: No. But if so, does that show that
6 that's a testimony of Anna Gomez?

7 MS. GAY: Yes.

8 MR. FAULK: Okay. And then on, which would be
9 page 191.

10 MS. GAY: Okay.

11 It says 190. Yeah. 191. Yeah

12 MR. FAULK: Okay. So on line above 14 on page
13 191. There's a testimony that she had a conversation with a
14 pharmacist.

15 MS. GAY: Yes.

16 MR. FAULK: Can you just - - how did the
17 vivitrol - - why was that relevant in this case?

18 MS. GAY: Okay. So. Mr. Fraley was arrested and
19 Mr. Fraley told me that he - - okay. So Mr. Fraley's history
20 is that he was an alcoholic and he had done something to, gone
21 somewhere, got some medical treatment to try to control his
22 alcoholism.

23 One of the things that he did - that was done to
24 him during this period of time was he was given injections of
25 vivitrol. It's a medication. So part of the big picture. What's

1 going on is that -- I believe that Mr. Fraley believes that he
2 wasn't advised of some side effects of vivitrol. And one of the
3 side effects in his mind of vivitrol was psychosis. Basically.

4 So his defense as he is - - as we went forward
5 about facts of the case was that he believed that he had gone
6 he had lost his ability to understand the difference between
7 right and wrong and such. Because of this injection or this
8 medication that was he was taking, vivitrol.

9 So, I followed up and had - - we - - Ms. Williams
10 and I had him evaluated both for McBlair and McNaughten? And -
11 um - Doctor Gomez was the doctor from the Department of Mental
12 Health or and/or the State that the person who did these
13 evaluations.

14 So she is during this period of time testifying
15 about her report and her findings.

16 MR. FAULK: Okay.

17 MS. GAY: And it does say - cause I read
18 ahead - that I - um - she said on line 14 that the pharmacy
19 explained to me that when someone receives vivitrol injection -
20 duh duh duh- and I did not object to the heresy at that point
21 that possibly could've been heresy because she was testifying
22 to what someone else told her.

23 MR. FAULK: Let me just - - just to be fair.
24 Which is 190 of the transcript. Page 24 line 24.

25 MS. GAY: So here it says what was your

1 opinion about the ability of the drugs he's claiming. I
2 objected at that stage. Page - line 22, 23, 24, and 25.

3 MR. FAULK: So I just wasn't sure. We were
4 trying to - if there would be an argument that was a continuing
5 objection to this but - so you did not object to this heresy
6 testimony from the expert?

7 MS. GAY: I did not object to the heresy
8 testimony from the Pharmacist.

9 MR. FAULK: From the pharmacist that was
10 coming in to the expert.

11 MS. GAY: Correct. And it was part of her
12 testimony about her report. And arguably, I - I guess it was
13 her discussion about how she came to her opinion and whether
14 she did that or not. Spoke to a pharmacist on the, you know, to
15 get her opinion at the time she testified to it, it was - I did
16 not object to her referring to someone else's comments.

17 MR. FAULK: Okay. And of course, under Rule
18 703, experts can rely on heresy testimony based in their
19 reports. Is that correct?

20 MS. GAY: They rely on all kinds of things.

21 MR. FAULK: They rely on all kinds of things.

22 MS. GAY: And just to flip ahead. The text
23 messages and things that Alta had testified to, I wasn't aware
24 of any of that. That's arguably could've, should've been part
25 of something that was given to this expert to talk about in her

1 opinion. To create an opinion about whether it was reason of
2 insanity or guilty but mentally ill and I - I didn't know any
3 of that.

4 MR. FAULK: Okay. Uh - let me just go back
5 here. But you're aware that there's case law in South Carolina
6 that one expert can't sort of boot strap another experts
7 testimony?

8 MS. GAY: Did you say they can or they can't?

9 MR. FAULK: They cannot.

10 MS. GAY: Well, yeah. They cannot. I mean - I
11 think that- um - they certainly if she is going to rely on
12 somebody else's opinions, then that should've been revealed to
13 me. And it certainly wasn't revealed to me as part of the
14 report. It was when she was testifying but it was not in the
15 report that way. I don't recall.

16 MR. FAULK: But you would agree that this heresy
17 testimony should've been objected to?

18 MS. GAY: Okay. Yes, sir.

19 MR. FAULK: All right. Now, I'm going to try
20 and take you back to - - I'm sure this isn't covered in your -
21 what you have there. So I'm going to bring you a copy of the
22 transcript.

23 MS. GAY: Okay.

24 MR. FAULK: And

25 MS. GAY: Do you know what page it was?

1 MR. FAULK: 144 and 145. This is your
2 pretrial motions.

3 MS. GAY: Okay.

4 MR. FAULK: So I'm guessing that was put in
5 the -

6 MS. GAY: Yes, sir. Yes, sir.

7 MR. FAULK: They are there?

8 MS. GAY: We're at the prior bad acts
9 motion. Yes.

10 Mr. FAULK: Yes. Okay. So Kimberly Thompkins.
11 You were expecting her to have some testimony about an incident
12 between Mr. Fraley and another juvenile. Is that correct?

13 MS. GAY: Yes.

14 MR. FAULK: And so that's why you moved in
15 ??? to have it excluded. Is that correct?

16 MS. GAY: Yes.

17 MR. FAULK: Okay. And ultimately I guess this
18 is testimony regarding minor number 7. So then she then
19 testified in court - and this is pages 232 through 238. And -
20 and. Not sure of the word I want to use there but she is
21 basically testifying to this whole incident with the person I
22 believed was identified as minor number 7.

23 MS. GAY: Yes sir. And I didn't object to
24 them. I would imagine is just a failure on my part to do it.

25 MR. FAULK: Okay. Thank you.

1 MS. GAY: That wasn't strategic. I just
2 probably wasn't - sometimes things get out of your control of
3 what's going on. But I do recall and I spoke with the Attorney
4 General's about this. Later on I did renew all my motions but I
5 - I apparently didn't contemporaneously object to this
6 testimony.

7 MR. FAULK: This is more heresy testimony
8 that I just wanted you to just really identify. It's on page
9 251 on the transcript. And this is testimony from someone who
10 was described as Ms. Ruth that was redacted so I assume that's
11 the victim's mother.

12 MS. GAY: This - uh- it does appear to be
13 the victim's mother.

14 MR. FAULK: And so, this is - so on line 7
15 and 8 - this is I guess the victim talking to the mother? So
16 when that line says "she told me that there was no birthday
17 party and that she had been taken to the Econo Lodge and
18 raped".

19 MS. GAY: That's in the transcript. Yes,
20 sir.

21 MR. FAULK: Yeah. Okay. And so the she there
22 is -

23 MS. GAY: The victim.

24 MR. FAULK: Talking to the victim.

25 MS. GAY: Yes.

1 With child cases, the - it is my understanding
2 and belief that the rules of heresy are different and that they
3 can - um - the first reporters are entitled to testify to them
4 telling them what happened. I - this would've been her mother
5 and her father who she is telling what happened. I mean, there
6 might have been some duplicity in testimony of both relatives
7 saying that. But for sure, I do believe her mother was the
8 first person who talked to her.

9 MR. FAULK: Because I think that rule, if we
10 are talking about 801d-1 - whatever it is. Says that you can
11 have some testimony from like a first responder type but it has
12 to be limited to time and place. Isn't that correct? Is that
13 what you're referring to?

14 MS. GAY: Um - That would be what I was
15 referring to and that's why I didn't object so if that's wrong,
16 I didn't object. I may not have understood that concept of time
17 and place it happened. She does say she was at the Econo Lodge.

18 MR. FAULK: The Econo Lodge.

19 MS. GAY: --And she was raped. So that
20 seems to me to be - to satisfy time and place. They had just
21 gotten the girl out of the hotel room when, you know, -- they
22 just had gotten with the girl. Um-right after she was actually
23 taken -

24 MR. FAULK: Okay.

25 MS. GAY: I guess the first responders or

1 police officers had gotten with her. So it appears - I don't -
2 I just didn't object, Mr. Faulk and if I'm supposed to, I am
3 sorry. But there was a reason I didn't and it might have been
4 wrong but that is why I didn't. And then I guess her father
5 later says some things to and maybe I should've objected then
6 because the mom had already testified to it. That all is
7 related to that same problem with, you know, heresy being a
8 little squishy in that area.

9 MR. FAULK: So I just want to be clear.
10 There's always whether or not an opinion what the rules provide
11 or as far as trial strategies so if you didn't object to the
12 Econo Lodge where I was raped, is it your testimony that that's
13 because you thought it was permissible?

14 MS. GAY: Yes.

15 MR. FAULK: Okay. Not necessarily a trial
16 strategy.

17 MS. GAY: No, definitely not a trial
18 strategy.

19 MR. FAULK: And then, I'm moving on to page
20 281 where you've got starting on lines 12 through 14 and then
21 picking up - uh - 19 through 22.

22 MS. GAY: Yeah. That would be similar type
23 stuff that she's talking to her mother about what happened
24 right there in the beginning. But that does - that certainly
25 appears the part about her saying "I hope I'm not pregnant". Um

1 - and - that would be beyond the scope of time and place for
2 sure.

3 MR. FAULK: Okay.

4 MS. GAY: And I didn't object to that.

5 MR. FAULK: And just for clarity, this is
6 actually from Chad blank. So that must be from dad.

7 MS. GAY: And I ultimately may should have
8 objected to everything he said based on the fact that the
9 mother was the one who was testifying before that.

10 MR. FAULK: Okay.

11 MS. GAY: I don't think they can bolster
12 the child's testimony or version by having multiple witnesses.
13 I probably didn't handle that correctly.

14 MR. FAULK: Thank you. Uh - then I want to
15 move on to Karen Drowes?? Testimony which is the next line.
16 It's on page 468.

17 MS. GAY: 468. Is that in here?

18 MR. FAULK: It's going to be ---

19 MS. GAY: This one I have starts at 600
20 something. So let me look. 468. It's--- so--- here.

21 MR. FAULK: I can actually hand you these.

22 MS. GAY: Um, I think I got it. It says a
23 hotel in Goose Creek Econo Lodge. That's line 10. Is that the
24 same page?

25 MR. FAULK: Yeah. Yeah. Yeah.

1 MS. GAY: Yes.

2 MR. FAULK: So probably that might be - so
3 those lines 4 through 10 might be kind of the time and place
4 where she is saying that afternoon and that at the Econo Lodge.
5 But then, if you look at lines 21 through 24 and did she tell
6 you if penetration occurred and there's a response says yes and
7 where did she say that the penetration occurred and she says
8 mouth, vagina, and anus. So that's -

9 MS. GAY: In my - okay, if you're asking me
10 why I didn't object to that, I - that's in - I could be wrong
11 but as part of the medical examination of the patient and
12 testimony about her examination -

13 MR. FAULK: Okay.

14 MS. GAY: So - um - yes I do realize that
15 that's beyond the scope of time and place but there was no
16 strategy to that. If I was -

17 MR. FAULK: Okay.

18 MS. GAY: Supposed to object, I didn't
19 object but - um - but in my thoughts, it would've been that she
20 was just describing her medical examination of the patient.

21 MR. FAULK: Fair enough.

22 MS. GAY: So, as I said, if that's supposed
23 to be something I was supposed to object to for limiting the
24 scope of her testimony, I didn't do that.

25 MR. FAULK: All right. Then if we move to

1 page 470 lines 8 through 13.

2 MS. GAY: Same thing.

3 MR. FAULK: She told me that she- - alright
4 so - - so it's -- you're thinking - - in your answers, your
5 response is the same. - -

6 MS. GAY: Yes. They are -

7 MR. FAULK: Okay.

8 MS. GAY: That they are doing a medical
9 examination of her and it's pursuant to her medical
10 examination. Their discussing with her the things that occurred
11 to her. For instance, it says she said that she had Nyquil and
12 alcohol. Um - - and they were force - - forcibly given to her.
13 Things like that that that would be in my opinion was part of
14 her physical examination. But if I was supposed to object, I
15 did not.

16 MR. FAULK: Okay. Um - - then I just really
17 had one other point. I think. If we go to 837. Line 12 through
18 15 - - uh - - 12 through 14.

19 MS. GAY: Okay. Who's this person close - -

20 MR. FAULK: This is the closing argument.
21 This is actually ???- -

22 MS. GAY: Right. I spoke with the Attorney
23 General about this. I traditionally don't object as I - I
24 guess you could call it as a strategy to closing argument
25 because it's already been told or is going to be told by the

1 Judge that it's - - it's just the summation and it's not
2 necessarily, it doesn't have evidentiary value and um - - so I
3 didn't object. If that's what you wanted me to say. I didn't
4 object and if I should've, I'm sorry. But, most of the time,
5 the Judge sort of corrects whatever overextensions that
6 somebody may say by saying "well that's just the closing
7 summation. That's not evidence." Um - - I don't - - I can't
8 remember specifically what - - what it was I told you were
9 concerned about. What lines are these?

10 MR. FAULK: Uh - - 12 through 14.

11 MS. GAY: When you think about Ruth Vick
12 and Chad Vick that kind of people are these people that are
13 respectful. They have good judgement to take care of their
14 family. That - - that is definitely - what did you call it in
15 yours?

16 MR. FAULK: Vouching?

17 MS. GAY: Yes. Vouching for the testimony
18 of a witness and making it say that they are good people and
19 they should believe them. But, as I said, sort of as a personal
20 strategy, I don't generally object during a closing argument.
21 Most of the time, it just gets a little beyond in both defense
22 and State if - - you know? If the lines get a little blurred on
23 what people say. But, I didn't object.

24 MR. FAULK: Um - - one moment, please. All
25 right - - so um - - did Mr. Fraley ever talk to you about his

1 daughter, Alta?

2 MS. GAY: Um - - Okay. So, the person who
3 is really my contact person for Mr. Fraley was his mother. Was
4 an elderly woman.

5 MR. FAULK: Okay.

6 MS. GAY: And so, she certainly wasn't
7 anybody who was going to come and be a part of the trial. Uh -
8 - likely because of the age of Mr. Fraley's daughter - - um - -
9 she was not somebody that I went looking for to talk to. I knew
10 - - he had a very good friend and that friend - - gosh, I can't
11 remember the name right now. Um - - you remember what's the
12 name of the woman who was in that transcript?

13 MS. GAY: Excuse me. I'd like to know her
14 name, if I could?

15 MR. FAULK: Mary O'Neal?

16 MS. GAY: No. Suzie. Suzie Hilton - -

17 MR. FAULK: Suzie Hilton.

18 MS. GAY: Suzie Hilton was really - - she
19 was really - - she was a realtor and she was helping him sell
20 his house and some things and she was really my contact. And
21 so, it was my belief and I could be wrong but I believe that
22 Mr. Fraley and his ex-wife were not really talking to each
23 other very much during this period of time. And so, it would
24 not - - it was not something that I thought of to go talk to
25 his 13 year old daughter. I had talked to his mother and I

1 vaguely remember possibly that his mother had also talked to
2 the - - to the psychiatric people because she had provided lots
3 of information about how Mr. Fraley was - - um - - you know - -
4 didn't seem to be connected to reality during that period of
5 time.

6 As I said, those text messages, I didn't know about
7 them. And so, I didn't know to give them to the psychologist -
8 - to the psychiatrist. Um - - but is this where I get to just
9 tell you what I think I might have done wrong?

10 MR. FAULK: Absolutely.

11 MS: GAY: Haha. Okay. So, Mr. Fraley
12 presented as a person who said that he had taken some medicine
13 and it had caused him to go off the deep end. So, I did
14 research and I tried to see if I could find anywhere, anybody
15 in the country that would substantiate that. I do believe now
16 there's maybe more research associated with what he's talking
17 about.

18 MS. WEIDAUER: Objection. This is not relevant
19 to any of applicant's allegations.

20 THE COURT: It's not relevant to - - to
21 counsel?

22 MS. WEIDAUER: In general. But none of this is
23 the allegations that he has laid out. - -

24 THE COURT: I'll overrule. Go ahead with your
25 answer.

1 MS. GAY: So, I tried to find somebody to
2 say what it was that Mr. Fraley was talking about to
3 substantiate it. And I was able to get -- I contacted somebody
4 who I believe had his - uh - knowledge and was qualified in
5 toxicology. And, Dr. Bennett. And so, Mr. Fraley had been
6 admitted to the Emergency Room at the time of his arrest. And
7 based on some things that were difficult, the records, the
8 medical records from the Emergency Room visit didn't come in
9 until right before the trial started.

10 So, I sent them to Mr - - Dr. Bennett and Dr.
11 Bennett like - - two day - - on the Tuesday of my trial
12 starting on Monday, called me up and told me - - you know - -
13 this mans physiology was sort of showing as psychotic. His
14 physiology at the time that - - um - - this was happening. And
15 he was going to testify the next day. So, if you want to read
16 it and talk about what happened in Dr. Bennett's testimony and
17 how that went and the closing argument, it became apparent to
18 me at that time which was a little late, that I probably
19 should've contacted an internist. Because Mr. Fraley had
20 stopped eating and his - - the different time periods that
21 she's talking about and what was indicative and his medical
22 history was that he had put himself, I believe, this is my
23 personal opinion and I was his attorney trying to help him, had
24 made him starving. And the starving had deteriorated his mental
25 functioning. And at the time of my closing argument, I argued

1 there's something called a gut brain connection. And so, I
2 argued that that's really what was going on but I did not have
3 time to - in my professional opinion- I did not have time to
4 get the correct medical expert to substantiate that. So I do
5 believe that in those ER records that I got right there at the
6 end, that he and Mr. - - Dr. Bennett reviewed them but he
7 didn't tell me what he thought of them over the weekend or
8 whatever. He told me what he thought of them while the trial
9 was going. And um - - so, what he was able to testify about was
10 just, you know, what was the drug, possible side effects.
11 Things like that but how it connected, I could never really get
12 a good connection to that drugs effect in Mr. Fraley.

13 MS. GAY: What I did get was a man who was
14 completely emaciated, who had all I can say is his - - when you
15 looked at his medical reports, his glucose was low, hemoglobin
16 was low. All these things were low, low, low, low. Like
17 somebody who was basically had come - had were starving.

18 And so, the information that I was able to - and Mr
19 - Dr. Bennett was sharing with me, which he really couldn't
20 testify to because it wasn't really - - we tried to get that
21 out. Um - - is that when somebody doesn't eat, and he had
22 reasons why he couldn't eat.

23 I guess that may have had effect on the medicine or
24 what was going on. I don't think he was intentionally choosing
25 not to eat. I think at some point, he just lost all ability to

1 function. And was traveling around and seeing his mother and
2 sending crazy texts and things like that. But, what was really
3 happening is he was deteriorating and then he - all this
4 happened and he gets arrested and then the medical picture of
5 him in my professional opinion needed an internist to say why
6 he would've not been making sense.

7 So, I understand Mr. Fraley's desire to want to say
8 it had to do with this medicine. Maybe that kind of started
9 this roll. But, my belief as the trial went on, was that he had
10 a significant medical problem. And then there's that whole
11 problem about how to - what - we don't have temporary insanity
12 in the State of South Carolina.

13 So then I had to try to figure out how to put that
14 into a closing argument that made the jury realize that he
15 wasn't making enough sense to be sane. And that was hard. And -
16 um - you know, in terms of the - the uh - guilty but mentally
17 ill versus not guilty by reason of insanity - - isn't it not
18 guilty but mentally ill verdict? No.

19 MS. GAY: No, they didn't do that, either?
20 That's- - I just kept trying to argue for something that was
21 related to mental health defense.

22 MR. FAULK: Would this have been an issue to
23 have - to - to be brought up at the sentencing part?

24 MS. GAY: What? I did bring it up.

25 MR. FAULK: Okay.

1 MS. GAY: You talk - which one? The medical
2 stuff?

3 MR. FAULK: The medical stuff.

4 MS. GAY: Well, I argued it in my closing
5 argument.

6 MR. FAULK: Okay.

7 MS. GAY: And so, when, you know, I argued
8 it at my closing argument that, you know, when you're stomach
9 is so messed up, that you doesn't - - that you're brain is no
10 longer working. But, I wasn't a doctor. You know --

11 MR. FAULK: Right.

12 MS. GAY: I just had come up with one at from
13 viewing medical records and talking to Mr. Bennett during the
14 trial. And so and now, I think, I mean, just the other day in
15 my news feed I saw an article about similar stuff. I think
16 there's a lot more research being done about peoples digestive
17 tracts really messing with your head.

18 MR. FAULK: But its - just when we - so is
19 your testimony that your arguments and closing argument
20 regarding this possible mental health issue to mitigate the
21 severity of -

22 MS. GAY: Yes.

23 MR. FAULK: The severity of misconduct? Did
24 you consider reiterating that to Judge Harrington, before she
25 sentenced him?

1 MS. GAY: So, everything that I was saying,
2 it was a combination. I told this to Attorney General. Now we
3 were there at 8:15 and we left at 7:00. We had a 30 minute
4 break for lunch. You know, everything that was going in the
5 trial was not very user friendly for the people that were doing
6 it. And so, by the time he got - - jury verdict happened and
7 we got sentencing, I was pretty much believed that Judge
8 Harrington was very aware of what I believed were the
9 consequences of - of how this happened and why it happened.

10 I mean, but, you know, I mean if I didn't repeat
11 myself at the time of, I would - - if if - -honestly, it's sort
12 of my practice say "You're Honor, we've been here this whole
13 week. We've seen - - this is what's going on, you know, this is
14 who the man is. This is how this happened". Mr. Fraley was a
15 perfectly normal person before this charge.

16 He didn't have a history of violence. He was
17 somebody who - - everything that - - all of the behavior that
18 he was charged with was completely aberrant for his lifestyle.
19 Um - and I - - I believe that I had thoroughly explained to
20 Judge Harrington that this was - you know - not - - as much as
21 you try to argue it that it was not an intentional act.

22 But, then again, you know, it was a horrible day.

23 MR. FAULK: One moment, Your Honor.

24 THE COURT: Yes.

25 MR. FAULK: No further questions.

1 THE COURT: All right. the States witness.
2 MS. WEIDAUER: Good morning, Ms. Gay.
3 MS. GAY: Hey. How are you?
4 MS. WEIDAUER: Good.
5 MS. GAY: Is there any water that I could -
6 MS. WEIDAUER: Yeah.
7 MS. GAY: --Maybe have.
8 THE COURT: Uh - well, I say that. Well,
9 there's a thing up here. Pitcher, we can pour you one.
10 MS. GAY: I think the Court Reporter is going to
11 do it.
12 THE COURT: Oh.
13 MS. GAY: Thank you, very much.
14 THE COURT REPORTER: Yes ma'am.
15 MS. WEIDAUER: So, first, some foundational
16 questions. How long have you been practicing law?
17 MS. GAY: Since 1991, But for a small little
18 cent, yeah, basically 32 years.
19 MS. WEIDAUER: Okay. And how much of that has
20 been criminal law, would you say?
21 MS. GAY: All of it.
22 MS. WEIDAUER: Okay.
23 MS. GAY: Some other stuff as well. But,
24 I've done criminal since the very beginning.
25 MS. WEIDAUER: Okay. In this case, were you

1 appointed or retained.

2 MS. GAY: I was retained.

3 MS. WEIDAUER: And about how long before trial
4 were you retained?

5 MS. GAY: From the beginning of time. I
6 mean, Suzie contacted me and - - um - - hired me. And I
7 represented him throughout everything that happened after that.

8 MS. WEIDAUER: And Suzie - -

9 MS. GAY: There was no other attorney
10 before me. Suzie Hilton was a realtor, and she was friends with
11 Mr. Fraley and she was selling his house for him. So, I was
12 retained and then she sold his house. Then, that's when I was
13 paid. But - um - so - um - but she - - I got contacted pretty
14 early. I don't think he had any other attorney.

15 MS. WEIDAUER: Okay. Do you recall how these
16 charged arose? How applicant was arrested?

17 MS. GAY: Yeah.

18 MS. WEIDAUER: So can you give me a run down of
19 your understanding of the facts of the case? And what you were
20 up against at the trial?

21 MS. GAY: Mr. Fraley was out of state. He had
22 all these problems going on medically. He came - - he was from
23 this area and he came into this area and there was some
24 information that he decided to - - he was upset that his - - at
25 that time wife was not only allegedly but was in fact, having

1 an affair with the owner of the Goose Creek bowling alley. Who
2 became one of the victims in this case.

3 And so he went on he created an invitation - - a
4 paper thing - - saying that there was going to be a birthday
5 party for his daughter and he went to a neighbor of the
6 neighborhood - - the neighbors house to ask for a girl to - -
7 young girl to come with him to the bowling alley. I believe
8 that Mr. Fraley was concocting a suicide plan.

9 And some of these things are called, you know,
10 death by police or something, you know, in hopes that the
11 police will kill you as you do something crazy. And then they
12 just come in and shoot you.

13 And I ultimately think that's probably - - in him -
14 - what little bit of rational mind he had that was kind of what
15 he was trying to plan. So, he gets - - he goes to this house
16 and he says, you know, can your daughter - - a young boy
17 answers the phone - - I mean answers the door and said- -

18 MS. WEIDAUER: Did he go to the house before
19 that though?

20 MS. GAY: I think he may have gone to
21 another house or something. I think that's in the testimony. So
22 then, he goes to this house and the - - one of the girls that
23 lived there- - one of the children that lived there was a
24 friend of his child's. And she was maybe the same age or
25 somewhere close.

1 She went - - he then went to the door and said can
2 Suzie Q, you know, whatever he name is, come with me? And the
3 young man said no she's not home but my other sister is. The
4 younger sister, the victim.

5 So, he gets her in the car and then he takes her to
6 the Econo Lodge and there was video of - - I can't remember if
7 it was both times - - but there was definitely videos of the
8 little girl coming out of the Econo Lodge with wet hair and -
9 um - - so they get in the car and go to the bowling alley and
10 he goes into - -

11 MS. WEIDAUER: Sorry to interrupt you, but why
12 was her hair wet? What transpired at the Econo Lodge - -

13 MS. GAY: Well the allegation was that he got
14 convicted of having sex with her and raping her - - you know -
15 - during that period of time while he had her in the Econo
16 Lodge. And giving her alcohol and you know, she was very young,
17 obviously.

18 And so, then they - - he took - - they went to the
19 bowling alley, where he went in and he started the shooting the
20 place. He went in and I think he confronted the man who he knew
21 to be having an affair or thought at that time but I think it
22 was real - - was having an affair with his wife and mayhem
23 ensued and you know - and then the police came and as I said I
24 think that Mr. Fraley's plot was probably to have the police
25 kill him.

1 And then -- but that didn't happen. They arrested
2 him and then the young girl was, you know, given back to her
3 mother and father and then the guy - - that's what happened.

4 MS. WEIDAUER: Okay. And, upon meeting with Mr.
5 Fraley, those were the facts of the case as he presented them
6 to you too and what - -

7 MS. GAY: Well that's what the paperwork said. I
8 don't know that he was making a lot of sense at that time.

9 MS. WEIDAUER: Okay - -

10 MS. GAY: In terms of all of it - -

11 MS. WEIDAUER: So, if he wasn't making sense,
12 what did you do to create a defense strategy for him?

13 MS. GAY: Well, we sent him off to the
14 State hospital with - uh - you know, with the information - -
15 or - - I guess not the State hospital, MUSC Forensics or
16 wherever we did it.

17 MS. WEIDAUER: Yes.

18 MS. GAY: We got evaluation set up. We - -
19 um - - I talked to his mother to confirm that, you know, he was
20 in outer space. From what her thoughts were, she had lots to
21 say about that. And -- so, I can't - - I don't have the report
22 in front of me and I can't remember exactly who they talked to
23 or what was happening. But there was definitely, on my part, an
24 attempt to try and get him a not guilty by reason of insanity.
25 Um - - ultimately by the time the trial started, he was pretty

1 sane to me. In terms of his action, that day.

2 He was making sense that day. So then as I said, we
3 don't have temporary insanity so then it had to be, well is
4 this something that was more organic basically. And that's when
5 I - - you know - - basically said in my final motions, No, I
6 think this is an organic response to him having been - -
7 because Judge Harrington was trying to make me say "is this
8 permanent?" or - - and I said "permanent, in the sense that it
9 affected his body and then, you know, his body would've maybe
10 gotten better.

11 But because we were trying to figure out how to get
12 the defense before the jury get the charge. And so --

13 MS. WEIDAUER: And that was your defense. Do you
14 remember how many times he met with a doctor at MUSC?

15 MS. GAY: If you have the report, they
16 would say it. I don't remember that.

17 MS. WEIDAUER: So - -

18 MS. GAY: I say, I don't know.

19 MS. WEIDAUER: So, I have the - -

20 MS. GAY: Probably one.

21 MS. WEIDAUER: I have the brief of respondent
22 that says that he met with Dr. Gomez three times for criminal
23 responsibility and capacity to concur evaluations. Does that
24 sound right?

25 MS. GAY: Yes ma'am.

1 MS. WEIDAUER: Okay. And though that was your
2 defense, at trial, was he helping you you know - - decide what
3 to ask and asking questions and coherent and seemingly
4 understanding what was going on?

5 MS. GAY: It was my professional opinion
6 that by the time of trial, he could understand what was going
7 on enough to help me. Yeah

8 MS. WEIDAUER: Okay.

9 MS. GAY: I mean - - my arguments about his
10 mental health issues were more at the time of and not during
11 the trial. I think there was maybe some discussion that he was
12 - - he should've been evaluated before right around the time of
13 the trial but - - there - - I didn't see the need to do that.

14 But if I needed to do that and I didn't, I didn't
15 do that.

16 MS. WEIDAUER: Before the trial, did he indicate
17 that he understood what he was charged with?

18 MS. GAY: I think he understood what he was
19 charged with but when he - - let's just say came out of the
20 fog, he was appalled at his own behavior.

21 MS. WEIDAUER: But he ultimately was found
22 competent to stand trial and found that he did have the
23 capacity to conform misconduct.

24 MS. GAY: We went through all of those
25 qualifications and I believe that the Judge found that it was -

1 - you know- - we were going forward.

2 MS. WEIDAUER: Okay. When discussing Alta and
3 Julie Fraley, can you tell me any discussions that you had
4 regarding them and their possible testimony at witnesses at his
5 trial?

6 MS. GAY: Well - - I - - I don't really
7 remember believing that he and his ex-wife were on really good
8 terms. So, it - - the idea of me calling her up to talk to the
9 13 year old daughter was not something that was in my mind. So,
10 if that was - - if I was remised for not doing that, that
11 apparently I could've gotten some good information better - -
12 you know - - more substantiating the fact that I thought he was
13 in left field right before this happened. But I just don't
14 recall thinking that would've been helpful.

15 And, I- I just don't - - see, I didn't know
16 anything about those text messages because I hadn't talked to
17 either of those people.

18 MS. WEIDAUER: Yes.

19 MS. GAY: I did talk to the grandmother a
20 lot. And so- - um - -

21 MS. WEIDAUER: And Gary never brought them up as
22 somebody who you may want to contact because they may have
23 information that would support his position?

24 MS. GAY: Okay. This is going to be my
25 opinion, having nothing to do with what Mr. Fraley said. I

1 think Mr. Fraley, in my opinion, probably didn't want to burden
2 his 13 year old daughter with what was going on. And my opinion
3 was that it was not something that I was supposed to go dig
4 into to try to get information from her.

5 Now, I could remember that incorrectly. But, as I
6 said earlier, her age would have - - would have deterred me
7 from going to talk to her. That would've just been my path. But
8 then again - - you know - - the grandmother wasn't telling me
9 you need to talk to her because she has helpful information.
10 That's not what I was hearing. But, I don't remember
11 everything.

12 MS. WEIDAUER: So in your opinion, him calling
13 his daughter today may be due to the fact that she is over 18
14 now. And - -

15 MS. GAY: I mean, that's possible but- -
16 you know - - she seems throughout his proceedings, she seems to
17 have provided information - - um - - and statements and
18 affidavits and things. I just - - she was really young and I
19 just - - um - - I think my mind, I might have believed that I
20 already had enough to prove that he was, you know, acting of
21 not there. But I - - it certainly could've and should've maybe
22 been done and the information that she is providing could have
23 affected the doctor - - given the doctor more of ability to
24 determine that he was - uh- incapable of making the right
25 choices at the time.

1 MS. WEIDAUER: And over the course of your
2 preparation, did you develop an opinion regarding the States -
3 um - burden of proof and how difficult that would be.

4 MS. GAY: There was a lot of evidence that
5 supported what had happened.

6 MS. WEIDAUER: Yes.

7 MS. GAY: My defense was all about his
8 mental state. The fact about whether he had done what they said
9 he did, there wasn't a whole lot to dispute over. I mean - -
10 they had information that established that. Um - - and as I
11 said, this I just my opinion. I think that Mr. Fraley saw this
12 as some kind of end day and um - - you know - - in the long
13 run, he was not - - he didn't shoot himself, the police didn't
14 shoot him but um - - it all seemed to be geared toward some
15 type of final moment of and their going to shoot me or I'm
16 going to shoot myself.

17 MS. WEIDAUER: So if it was geared towards that,
18 once he was arrested, he wasn't shot, he's going to trial or
19 pleading out. He wanted to go to trial full force. That was his
20 decision. He never wanted to plea or were there plea
21 negotiations along the way?

22 MS. GAY: I'm sure there's plea
23 negotiations. This is Charleston, Berkeley County. They always
24 give us something to talk about. But, the, Mr. Fraley thought
25 that he had - his mind had been affected by this drug and that

1 his conduct was a result of some type of aberrant mental health
2 problem. The --

3 The problem was is it just the law just doesn't
4 necessarily follow what it is that he said. If I had been able
5 to find a witness, which I could not find, I tried, that said
6 that this medicine caused psychosis then - uh- you know - maybe
7 we could've found that person and had them testify. I could not
8 find that person. I did try and I could not find. And, when I
9 spoke to Dr. Bennett, who has his own set of problems, he as a
10 person who's very familiar with drugs and you know, the effect,
11 chemical effect, on the mind - - did not give that to me.

12 MS. WEIDAUER: Okay. So, I think I asked - -
13 kind of asked before. It was Mr. Fraley's decision to proceed
14 to trial?

15 MS. GAY: Yes.

16 MS. WEIDAUER: Okay. And despite possible
17 witnesses, you know, now in retrospect may have been able to
18 find, may not have been able to find at the time, he still had
19 that mounting amount of evidence that he had to overcome.

20 MS. GAY: There was a lot of evidence.

21 MS. WEIDAUER: Okay. Can I get a course
22 indulgence - - one moment.

23 THE COURT: Yes.

24 MS. WEIDAUER: I just want to touch base on,
25 specifically these allegations - - um - - before we close. We

1 talked about Alta. Um - - I just want to confirm. There are two
2 allegations regarding failure to object, regarding vouching in
3 closing. Um - - you said that there was a strategy. You don't
4 traditionally object to the State's closing argument, correct?

5 MS. GAY: I don't, usually.

6 MS. WEIDAUER: Okay.

7 MS. GAY: I usually - - most of it just the
8 jury is - only half listening to what those people are saying
9 usually. So when the Judge comes in and says this just their
10 opinions and this is, you know, the evidence, most - - It's my
11 - - I just think it's kind of throws it off if you object in
12 the middle of a closing argument. But I might should've - -

13 MS. WEIDAUER: And. Can you turn to page 190 for
14 me. I just want to clarify

15 MR. FAULK: Transcript page?

16 MS. WEIDAUER: Transcript page, Yes, sir.

17 MS. GAY: The big numbers?

18 MS. WEIDAUER: Little numbers. 130 - -

19 MS. GAY: Little numbers.

20 MS. WEIDAUER: 135 is the right number.

21 MS. GAY: Okay. Uh- - direct examination by
22 Ms. Williams of Dr. Anna Gomez.

23 MS. WEIDAUER: Yes ma'am. So Mr. Faulk touched
24 base on this a little bit. Um - - from my analysis, it seems
25 like on lines 22 and 23, the question reads "And what was her

1 opinion about the ability of the drugs he was claiming?" You
2 did make an objection to that.

3 MS. GAY: Yes.

4 MS. WEIDAUER: As heresy.

5 MS. GAY: Yes.

6 MS. WEIDAUER: K. The Court overrules your
7 objection on the next page. So was it your understanding as Ms.
8 Gomez continued all the way through 192 that that was a
9 continuation of that answer after you'd objected? So part of --

10 MS. GAY: Does this go into that part where
11 she talks about the pharmacist telling her?

12 MS. WEIDAUER: Yes.

13 MS. GAY: Um - - so I testified earlier
14 that my understanding of this whole pharmacist explaining it to
15 her was just part of her attempts to get an opinion as to
16 whether or not this medicine was anything that could cause
17 these issues. And so, it - - I didn't see - - I personally
18 didn't see the need to object though I might should've. Um - -
19 Because it just appeared that she was just describing what she
20 did in response to being asked to evaluate Mr. Fraley.

21 MS. WEIDAUER: Okay - -

22 MS. GAY: Like more of a procedural thing.
23 You know - - I, I did this, I did this. I gathered this
24 information. I gathered that information. As opposed to a
25 specific. Honestly, with Judge Harrington, I don't know if she

1 would've found it was hearsay. I mean, you know, because what
2 heresy actually is.

3 MS. WEIDAUER: Okay. All right. No further
4 questions, Your Honor.

5 THE COURT: Okay. Any redirect?

6 MR. FAULK: No, Your Honor.

7 THE COURT: All right. Any objection to the
8 witness being excused for the remainder of the proceeding?

9 MS. WEIDAUER: No, Your Honor.

10 MS. GAY: Thank you.

11 THE COURT: Thank you. Ms. Gay, you're free
12 to leave.

13 MS. GAY: All right. Thanks.

14 THE COURT: Mr. Luck, is there any other
15 witnessed that you would like to call at this time

16 MR. LUCK: Yes, Your Honor. We will call
17 Gary Fraley.

18 MS. WEIDAUER: Okay. Stand up on the witness
19 stand ??? swear you in before you sit down. Come on up this
20 way. There you go.

21 CLERK OF COURT: DO you solemnly swear or affirm
22 that the testimony you will give will be the truth, the whole
23 truth and nothing but the truth so help you God?

24 MR. FRALEY: Yes ma'am.

25 CLERK OF COURT: Okay. You may be seated. State

1 your full name for the record.

2 MR. FRALEY: Gary Fraley. F-R-A-L-E-Y.

3 ?????????

4 MR. LUCK: Okay, Mr. Fraley. I am here to

5 ask you really only one question. Did you tell - - this- - your

6 attorney Ms. Gay to contact Alta Fraley?

7 MR. FRALEY: Yes.

8 MR. LUCK: And do you know when you did

9 that?

10 MR. FRALEY: Um - - I think it was somewhere

11 around the time that my house was being sold. And I said, it's

12 important you need to talk to my daughter because she would

13 know.

14 MR. LUCK: Okay. So this was prior to you

15 being evaluated by Dr. Gomez?

16 MR. FRALEY: I don't remember a lot. I don't

17 remember that part.

18 MR. LUCK: Okay. No further questions. Thank

19 you.

20 MS. WEIDAUER: No questions, Your Honor.

21 THE COURT: Okay. You can have a seat back at

22 your counsels table, Mr. Fraley. Thank you. All right. Anymore

23 witnesses?

24 MR. FAULK: No, Your Honor.

25 MR. LUCK: No, Your Honor. I would just for

1 the record, you know how I love to prepare records - - uh- -
2 just in case this happens to go on appeal. I do want to at
3 least note on the record that there are several sworn
4 statements attached to or that are already filed of record in
5 this matter attached to the December 28, 2018 application.
6 There's some matters attached to the January 31, 2019
7 supplement asking for judicial notice. Alta Fraley's affidavit
8 actually been stipulated as admissible earlier in this matter
9 but nonetheless that's now part of the record. There's a April
10 16, 2022 supplement to the application that includes deposition
11 excerpts which we discussed a little of the - uh- the drug
12 issue and then finally, Julie Fraley's affidavit. All filed of
13 record. The PCR statute allows this court to consider
14 affidavits, depositions, oral testimony or other evidence as it
15 chooses it to.

16 And that could be State also makes it clear that
17 affidavits are appropriately considered. I just wanted to make
18 sure that I had on the record that I had requested this court
19 consider all of those matters. Either, under Section 17 27 80
20 or under Rule 22 01.

21 A trial judges role in a bench trial is to admit
22 all evidence and then evaluate it in a non-jury setting. So,
23 with that and also, one further argument just with all of the-
24 - all that has been discussed here today, we'd also present a
25 cumulative error argument here in that if these arguments are

1 not individually - uh- prejudicial enough to warrant reversal
2 then together considered in the aggregate, they do show that
3 there was an unfairness in the trial mechanism.

4 And I think with that, that's all I needed to get
5 on the record, Your Honor.

6 THE COURT: All right. Okay.

7 MR. LUCK: Unless Mr. Faulk had something
8 that he wanted to add.

9 MR. FAULK: Just - -

10 MS. WEIDAUER: We have a witness to call too
11 whenever we are ready for closings.

12 MR. FAULK: I guess this is more really in
13 closing. But, with respect to whenever there's a case where
14 there's a error that wasn't properly preserved, I think it's
15 always difficult in these PCR cases that you have to bring in
16 ??? counsel and trial counsel. I mean, in PR position, I know
17 it's - the State-sort of eluded to it in her cross examination
18 of Ms. White. With the testimony about the pharmacist
19 testimony, the problem is not that it's heresy because it is
20 possibly hearsay and it is possibly hearsay that's admissible
21 through 703.

22 And if there's - the specific grounds would be here
23 that the testimony that was coming in went beyond the scope of
24 what is permissible under 703.

25 THE COURT: So. Yeah. I understood that to be

1 the - -

2 MR. FAULK: Okay.

3 THOR COURT: -- the general just of what you

4 were you saying.

5 MR. FAULK: Okay. Thank you.

6 THE COURT: Yes. All right. Any witnesses

7 from the State?

8 MS. WEIDAUER: Yes, Your Honor. We'd like to

9 call Anne Williams.

10 ANNE WILLIAMS,

11 being first duly sworn testified as follows:

12 * * *

13 DIRECT EXAMINATION

14 * * *

15 THE COURT: All right. Mrs. Williams, come on

16 down.

17 CLERK OF COURT: Do you solemnly swear that the

18 testimony you give will be the truth, the whole truth, nothing

19 but the truth so help you God?

20 MS. WILLIAMS: I do.

21 CLERK OF COURT: Thank you. You may be seated.

22 MS. WILLIAMS: Thank you.

23 CLERK OF COURT: State your full name for the

24 record.

25 MS. WILLIAMS: My name is Anne Williams.

1 COURT REPORTER: Is it Ann with - -
2 MS. WILLIAMS: An "e". Yes, thank you.
3 MS. WEIDAUER: Good morning, Ms. Williams.
4 MS. WILLIAMS: Good morning.
5 MS. WEIDAUER: How long have you been practicing
6 law?
7 MS. WILLIAMS: Uh - since 1998. So, y'all are
8 going to have to do the math. I think it's - -
9 MS. WEIDAUER: 23 years?
10 MS. WILLIAMS: 23 years. Yes. Yes ma'am.
11 MS. WEIDAUER: Okay. Um - - and you were first
12 chair solicitor on this matter, correct?
13 MS. WILLIAMS: I was.
14 MS. WEIDAUER: Okay. Can you kind of give a
15 recitation of the facts that the State had- - um- - in this
16 case?
17 MS. WILLIAMS: Yes. So in this case, we had - -
18 a neighbor that was known to the parents of an 11 year old girl
19 because they used to see him at the bus stop. They knew who he
20 was. They knew him by sight. They knew him by name. They had
21 conversed with him in the past. They had been to neighborhood
22 gatherings together.
23 They testified and told the police that he came to
24 their house. He created a rouse to get their child out of the
25 house. Tried to get the older daughter first but when she was

1 unavailable, settled for the 11 year old because the brother of
2 both of these girls told him that she was the only one home. He
3 even brought a little game he had created to the mother of that
4 child and told her that it was like a craft.

5 Like he had some rocks and some paints, that this
6 was a craft that they were going to be doing at the party. And
7 then he took the child to a hotel. We never really figured out
8 how she played into whatever plan he had at the bowling alley
9 or why he did that. But, brutally raped her.

10 I think our medical expert testified that it was
11 some of the worst damage she had ever seen physically on a rape
12 victim. Anally, orally, and vaginally. We had DNA evidence - -
13 Semen collected at the scene from the body of the child. We had
14 his finger prints and DNA on a NyQuil bottle where he drugged
15 her. He forced her to take a shower afterwards. Trying to
16 destroy evidence. Which also I think maybe played into the
17 fact that he knew exactly what he was doing. He then drove the
18 child to the bowling alley and just left her in the car.

19 At a public place where she didn't really have any
20 adults that she knew there. She then finally found somebody in
21 the parking lot to call her parents and made some statements to
22 her parents while she was still under the excitement of the
23 event. He then went into the bowling alley with a weapon to try
24 to kill or hurt a man that he thought at the time was having an
25 affair with his wife.

1 And then, there was a hostage situation, where he
2 was coaxed out of the bowling alley and there was some
3 important recording of him talking to an officer as he was
4 coming out of the bowling alley that also kind of went against
5 this notion that he didn't know what was going on. After he was
6 arrested, lisa Gay pushed really hard for him to be evaluated,
7 which we saw clearly was necessary. And there was voluminous
8 amounts of medical records for the - for Mr. Fraley, where he
9 had been in and out of different emergency rooms and spoken to
10 doctors, which were taken into account by the person that
11 evaluated whether or not he was insane or mentally ill or
12 competent.

13 MS. WEIDAUER: Okay. As far as Alta Fraley, I
14 don't think you were here earlier, Mr. Fraley's daughter,
15 previously testified that he was acting erratic prior to this
16 incident and they claim that it was just that couple six weeks
17 after he had taken this drug, Vivitrol.

18 Was your understanding through the testimony that
19 it had been longer than that? Um - maybe through his ex-wife's
20 testimony or do you remember anything concerning his - -

21 MS. WILLIAMS: You know, I don't remember how
22 long he had been behaving erratically. But whatever was - -
23 whatever problem he was experiencing; he was able to pull off a
24 pretty good rouse with the neighbor. I mean, he was behaving
25 pretty normally that day or they would've never let him have

1 their child. Um - - so I mean - - I - - my memory was that he
2 had a very long history of problems. And they weren't
3 necessarily enough for him to be considered legally insane.

4 But there were so many - - the medical records were
5 huge. It took so long for them to go through the medical
6 records. To his attorney's credit, she was trying to find some
7 legal basis for an insanity verdict or some kind of competency
8 issue because there were so many medical records.

9 I mean the stack was like this high. I remember
10 talking to the jury about it a little bit. But, I don't
11 remember it being a temporary thing. I remember him having some
12 ongoing problems. They just weren't problems that would legally
13 excuse his behavior.

14 MS. WEIDAUER: Okay. We touched on this a couple
15 times. Dr. Anna Gomez, believed you were or cross or direct
16 examination she was saying what the pharmacist had explained to
17 her about this vivitrol drug. Kind of - - we've kind of eluded
18 to multiple times under Rule 703.

19 Possibly that would be considered hearsay. Do you
20 remember that part of the trial and necessarily what you were
21 trying to get out of her? Had you had previously conversations
22 with her?

23 MS. WILLIAMS: Right. So she had spoken to - -
24 because there was so much information about this vivitrol and
25 we knew that it was going to be an issue. She was trying to do

1 her due diligence and look into it. And I know that she had
2 spoken to another doctor or pharmacist about it, just to make
3 sure that she based her opinion on as much information as
4 possible. I think what I was trying to get her to do was to
5 give us her opinion, which she might have based on a
6 conversation with a pharmacist.

7 I didn't intend for her to then repeat what the
8 pharmacist said. But, I'm not so sure it would matter because
9 she was basing her opinion on the conversations that she had
10 with another expert.

11 MS. WEIDAUER: Right. And she had to go into
12 that vivitrol analysis because that was Mr. Fraley's
13 allegation, was that that's what made him do it?

14 MS. WILLIAMS: Right. Correct. Exactly.

15 MS. WEIDAUER: Okay. We also touch a little bit
16 about time and place exceptions. in 801d.

17 So I'd like The Court's indulgence for one moment
18 while I turn to those pages. That allegation refers to line of
19 questioning where we are talking about was she able to tell you
20 if ejaculation had occurred. Answer is she is not aware of
21 that. Did she tell if penetration occurred? Yes. Where did she
22 say that penetration occurred? Mouth, vagina, anus. So why
23 would you have gone down that line of questioning?

24 MS. WILLIAMS: Was it with the medical person?

25 MS. WEIDAUER: Yes.

1 MS. WILLIAMS: Okay.

2 MS. WEIDAUER: It was with Karen Drosed? And
3 she's a MUSC physician, child abuse pediatrics.

4 MS. WILLIAMS: Okay. Time and place is not the
5 only hearsay exception. And we often get experts to testify for
6 medical diagnosis. And specifically with sexual assault, the
7 person they see first, the sexual assault nurse examiner is
8 almost like the front line.

9 And they sort of deal with what they have to deal
10 with. Which is, making sure that this person is okay and
11 collecting evidence. After that, they then have to figure out
12 the next step in treatment. Does this person need a ct scan of
13 their neck? Where they strangled? Does this person need Plan B?
14 Because there was ejaculation and they could be pregnant. Does
15 this person need some medication for STD because there was
16 ejaculation? So they have to ask all those questions for
17 medical diagnosis so that they can figure out what to do in
18 terms of treatment.

19 And I can't call it up this second but that would
20 be the hearsay exception that she was testifying under and we
21 usually lay a foundation by asking her before hand. You know -
22 - what kinds of information do you need to collect in order to
23 properly diagnose someone or treat them?

24 MS. WEIDAUER: So a question like would it be
25 important to know if ejaculation occurred. Yes. Penetration?

1 Yes. Those kind of questions --

2 MS. WILLIAMS: Right.

3 MS. WEIDAUER: -- are reflected in the
4 transcript.

5 MS. WILLIAMS: Okay.

6 MS. WEIDAUER: Is that foundation that you
7 would've laid?

8 MS. WILLIAMS: Yes. That's the foundation that
9 we would lay so that they could then tell what information they
10 had to collect in order to diagnose and treat the patient. And
11 those are pretty standard. That's a pretty standard exception
12 for sexual assault cases and for child abuse cases and even
13 just regular trauma cases.

14 MS. WEIDAUER: Last couple of questions I want
15 to ask you. Did you ever offer Mr. Fraley any sort of plea or
16 go into plea negotiations with Ms. Gay? If you recall?

17 MS. WILLIAMS: We - we did have plea
18 negotiations. I cannot recall the specific ones. I mean, I'm
19 just going on my practice. We always try to find some
20 resolution for a case. I don't remember what they were for this
21 one.

22 MS. WEIDAUER: And in this specific case, the
23 amount of evidence that you had, would you expect a similarly
24 situated applicant to have pled because of the mounting
25 evidence that was against him?

1 MS. WILLIAMS: Yes. And I - I know that Ms. Gay
2 told us at some point that it would be her preference that he
3 pleas so that they can gather mitigation but that he wanted a
4 trial.

5 MS. WEIDAUER: Okay.

6 MS. WILLIAMS: It's not a case that any defense
7 attorney would want to go to trial on. There's just a mountain
8 of evidence. We never get this kind of evidence.

9 MS. WEIDAUER: Please answer any questions Mr.
10 Faulk has you - - has for you.

11 MR. FAULK: So when the question was she told
12 me that she had NyQuil and alcohol. How is that part of the - -
13 how is that relevant for the diagnosis?

14 MS. WILILAMS: Well, I think you would want to
15 know especially in an 11 year old child if they had consumed
16 alcohol or any kind of drug. I mean, you'd want to know to -to
17 know whether they had too much or you know they may need
18 treatment- -

19 MR. FAULK: That all might be relevant but
20 why do we have to have it come in through hearsay testimony?
21 Doesn't the expert that could do an examination - - they could
22 find out whether or not she had - - they could do a blood test.

23 MS. WILLIAMS: Can you give me the context? Like
24 what is the- -

25 MR. FAULK: Yeah. It is - it is - uh -

1 MS. WILLIAMS: Can I maybe see it?
2 MR. FAULK: Yeah. Absolutely.
3 MS. WILLIAMS: Who is the witness?
4 MS. WILLIAMS: Okay.
5 MR. FAULK: Uh- it's the 470.
6 MS. WEIDAUER: 470
7 MR. FAULK: Uh - transcript page.
8 MS. WILLIAMS: So I'm asking her would it be
9 important to determine whether or not the child was given any
10 drugs or alcohol. Yes. She told me she had NyQuil and alcohol.
11 Um - so then we're talking about the examination and whether
12 she was able to - are they just on the table or just in the
13 stirrups? So I'm sorry what does the ---
14 MR. FAULK: So the drugs and alcohol, was she
15 being treated for drug and alcohol poisoning?
16 MS. WILLIAMS: I think the history of a patient,
17 you would always want to know if a minor child was given drugs
18 or alcohol. Or if any patient is - - has been - - has ingested
19 anything. I mean- - that would be for any emergency room visit.
20 MR. FAULK: All relevant for purpose of the
21 evaluation. But why this - - why do you have to get the hearsay
22 testimony and the girl said I had NyQuil?
23 MS. WILLIAMS: I guess she could've answered
24 that she had NyQuil and alcohol. Rather than saying she told me
25 she had NyQuil and alcohol.

1 But I think it's - - I want to make I'm responsive
2 to your question.

3 MR. FAULK: I want to apologize. We are just
4 arguing here, I think.

5 THE COURT: Yes.

6 MR. FAULK: But it's my same point with the
7 expert and she's saying yes it was anus, vagina, and mouth. The
8 expert can testify that he did the examination and I found a,
9 b, and c. That's the purpose of the medical evaluation. Not to
10 bring in this testimony. The girl said she was penetrated in
11 her mouth, anus, and vagina. I mean. I don't know how that's
12 relevant for the purpose of her diagnosis. That the jury needs
13 to hear that. I mean. Kid comes in who has allegedly been
14 violated - -

15 THE COURT: Well, I think you're arguing now
16 so ?? any more questions.

17 MR. FAULK: I'm sorry. I am arguing. No
18 further questions.

19 THE COURT: Okay. Any other redirect?

20 MS. WEIDAUER: No redirect.

21 THE COURT: Okay. All right. Any objections
22 for Ms. Williams to be excused for the remainder of the
23 proceeding?

24 MS. WEIDAUER: No, Your Honor.

25 MR. FAULK: No, Your Honor.

1 THE COURT: All right. Thank you, Ms.
2 Williams. You are free to leave.

3 MS. WILLIAMS: Thank you.

4 THE COURT: All right. Does the State have
5 anymore witnesses that it wishes to call?

6 MS. WEIDAUER: No ma'am.

7 THE COURT: Okay. If I could hear arguments
8 at this time from both sides.

9 MR. FAULK: Your honor, you heard my client
10 testify- - you heard Mr. Fraley testify that he told her to
11 talk to his daughter and um - - certainly the daughter had
12 relevant information. And he said that it was about the time
13 that the house was being sold, which I believe was, according
14 to the facts in this case. And so in the beginning of the
15 representation prior to the evaluation; that the daughter had
16 relevant information that could've played a role in the whole
17 mental opinion that was being reached and we think that was
18 ineffective assistance of counsel for not having followed up
19 with the daughter so that she could've gotten the contact
20 information from her.

21 We heard the mother say that had she talked then
22 she would've spoken to her. moving on to the again my concerns
23 about the testimony from this pharmacist who she had talked to.
24 I think that certainly goes beyond - beyond the scope of what's
25 permissible under Rule 703.

1 I think this particular prejudicial hear because
2 the testimony or the one of the theories of the facts was this
3 Vivitrol played a role in his conduct. the fact that his
4 hearsay testimony came in and really wasn't able to be
5 challenged.

6 And so to dispute that role, I think that became
7 highly prejudicial. I think that it would be out opinion that
8 you know, there was a motion at ??? about the testimony from
9 Kimberly Thompkins. This was victim number 7. This is the part
10 with the ??? kind of dinosaur egg thing. I think it was
11 important enough to the trial counsel to move and to try and
12 get it excluded but without preserving that objection going
13 forward, um - - you know - - it's - - it's not preserved for
14 appeal, whether or not Judge Harrington made the right call on
15 ??? You know, it's not impermissible for the bad act evidence.

16 So we think again would be highly prejudicial. I
17 believe that trial counsel testified that she thought the
18 testimony from the mother who I believe is Ruth and the father,
19 Chad, would all be permissible under kind of a time and place
20 exception or under some kind of - - she had some notion that
21 there's some generalize exception as to whether or not that
22 type of hearsay from the daughter would be permissible.

23 Certainly, that is not the same type of permit - -
24 certainly I think the only hearsay exception that would apply
25 is actually saying that it's non-hearsay in 801. And that's the

1 time and place and - - but certainly that testimony from the
2 mother and from the father certainly does not fit under 804,
3 which is I think the -- I think that's the rule for the
4 Statement. - -

5 THE COURT: Oh.

6 MR. FAULK: But statements by treating
7 physicians.

8 THE COURT: Oh okay.

9 MR. FAULK: Yeah, I mean, I don't think any
10 of that testimony from Chad or Ruth could've fit under that - -
11 uh - - exception and that again I have - - I don't think that
12 all of that testimony that came in from the same examiner
13 would've been - - I don't think that - - the same examiner is
14 really providing treatment at that time.

15 I'm not sure that that is appropriate for the
16 exception to apply in that situation and certainly the way that
17 the testimony came in, whether or not, it clearly was hearsay.
18 That the - that the examiner couldn't testify that I - we
19 treated her for a, b, and c then we would have no exception to
20 it. We examined her anus. We examined all this. We found this.
21 That's all what could've come in. But instead, they heard the
22 testimony from the girl saying that I was penetrated in those
23 areas. Uh - I - - I certainly think there has been some recent
24 case law as far as concerns that the court of appeals has where
25 the State is vouching for their testimony of their witnesses.

1 I Just don't have it right at the tip of my hand.
2 But I can - - but there is some real concern when the State is
3 saying that. You need to believe these people and that's what
4 I've - uh - had concern with that vouching testimony in the
5 closing argument.

6 THE COURT: It was - - it was in the closing
7 argument?

8 MR. FAULK: It was in the closing.

9 THE COURT: So it's not testimony.

10 MR. FAULK: No - - she's - - no, it's the
11 States - -

12 THE COURT: It's an argument.

13 MR. FAULK: saying this is why you should
14 believe these people.

15 THE COURT: Yes.

16 MR. FAULK: These are good people.

17 THE COURT: Yes.

18 MR. FAULK: And- - you know - - the trial
19 counsels argument well that I can't. I - I usually just don't
20 do that. I think it's covered up, otherwise. I'm not sure The
21 Court - - I'm not sure the jury would've necessarily heard that
22 part of the argument but if the judge specifically said made
23 some type of character of instruction on the spot about that
24 vouching - -

25 THE COURT: Yes. Okay.

1 MS. WEIDAUER: I'm just going to respond to Mr.
2 Faulk's last line there. That's probably more of an appellate
3 question, whether the trial court erred in not making an
4 incurred of instruction and not a PCR matter.

5 Overall though - - um - - applicant bears the
6 burden of proving the allegations of the evidence so mere
7 allegations of the sense of counsel are not sufficient to
8 warrant granting relief. To obtain reversal, applicant must
9 prove that their attorney's performance fell below an objective
10 standard to reasonableness and under problem number 2, that the
11 deficient performance prejudice the defense to the decree that
12 it deprived the defendant of a fair trial.

13 The Strickland standard does not guarantee perfect
14 representation just that a reasonable competent attorney would
15 have made similar decisions. Additionally, it's not enough to
16 show that errors had some conceivable effect on the outcome.

17 Counsel's errors must be so serious as to deprive
18 the defendant of a fair trial. We would argue that a couple of
19 these objections would definitely fall under that, specifically
20 the little one liner on page 569 related to bad acts.

21 I don't think that you can possibly find prejudice
22 prone with that - that it so severely - - I think it's like
23 three words deprived him of a fair trial.

24 Additionally, witness testimony from Ruth and Chad
25 Vick, the minor testified herself in this same testimony. That

1 it probably was duplicative and maybe counsel should've
2 objected at the time. But I don't believe it makes the
3 prejudice prong.

4 We've went over time and place ad nauseam. I don't
5 know if I need to close on that anymore. I think I'll save us
6 the trouble. Let's see. I'd also like to note that when
7 applicant seeks relief for trial counsels failure to call
8 witnesses - - um - - The Courts analysis and analysis by the
9 ??? Court is focused on strategic considerations. Balancing the
10 potential benefits of calling a witness against identifiable
11 risks.

12 So, Alta Fraley, she would've been a factor. She
13 would've been 13. I mean, she was 18 here today and was still
14 very emotional. I would expect those emotions would've been
15 heightened at the time that you're 13 and your dad is, you
16 know, being charged with these types of crimes.

17 So we think that's a reasonable decision. Not to
18 have called her. Especially when Ms. Gay noted that there were
19 a couple of other witnesses that she probably would've called
20 before the daughter.

21 Additionally, trial counsel's repeatedly required
22 during trial to make split second decisions on many subjects,
23 including whether to object to testimony. There are many
24 reasons why they can choose not to make that objection. Even
25 there if there is a good argument for exclusion.

1 When counsels deficiently so pervasive as to render
2 particularized prejudice inquiry unnecessary. So that's what he
3 was talking about before. There has to be such evidence that
4 counsel was so ineffective that we don't even need the
5 prejudice prong.

6 Then, a defendant may be relieved of his burden to
7 show prejudice. Whether several errors, which are independently
8 found not to be prejudicial, may cumulatively warrant relief is
9 an unsettled question in South Carolina. So that's it. We just
10 don't have that cumulative error standard that that's speaking
11 to. Yeah. I think that that in summation possibly, you know
12 there are hearsay questions that were mushy, I think, is what
13 Ms. Gay called them.

14 But we just don't believe that with the facts and
15 the trial transcript and resting on the record that we can find
16 prejudice. Thank you, Your Honor.

17 MR. FAULK: One minor point - - uh - -
18 regarding her - - uh - - attorney generals comments about the
19 vouching and whether or not it's an appeal issue. It's not an
20 appeal issue unless you object. So there was no curative
21 instruction from the judge because - -

22 THE COURT: So it's failure to object.

23 MR. FAULK: And so it's a failure to object.

24 THE COURT: Yes. Right.

25 MR. FAULK: And so, like - - I was trying to

1 make the point as, trial counsel saying I don't like to do
2 that. I don't like to do that.

3 My point was had she objected that should could've
4 asked the judge at that time to make a statement - -

5 THE COURT: Yes.

6 MR. FAULK: - - would've possibly had more
7 impact. Thank you.

8 THE COURT: Thank you. All right. Well, I'll
9 see- - I'll review this record - - this is a late view record.
10 It's already over 2000 pages. I mean - - so that's that. I'll
11 review what to do and I will notify your offices what proposed
12 order is needed. Okay. Thank y'all very much.

13 MS. WEIDAUER: Thank you, Your Honor.

14 THE COURT: You're free to leave.

15 MR. LUCK: Thank you, Your Honor.

16 MR. FAULK: Thank you, Your Honor.

17 MS. FRALEY: Your Honor, could I please hug my
18 dad for the first time - - -

19 THE COURT: I don't control that. That man
20 right there does.

21

22 (At 10:22 a.m. the proceedings were concluded.)

23 * * *

24 END OF TRANSCRIPT

25 CERTIFICATE OF REPORTER

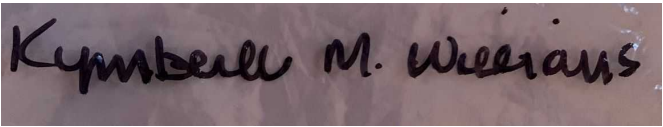
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I, KYMBERLEE M. WILLIAMS, Registered Professional Reporter, do hereby certify that the foregoing transcript is a true, accurate, and complete record of the matter held in the Court of General Sessions for the Ninth Judicial Circuit in the State of South Carolina.

I further certify that I am neither related to, nor counsel for, any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 31st day of August, 2022 at Beaufort County, South Carolina.

A rectangular box containing a handwritten signature in black ink that reads "Kymberlee M. Williams".

Kymberlee M. Williams, CSR/RPR
Official Circuit Court Reporter III
State of South Carolina
Fourteenth Judicial Circuit
kwilliams@sccourts.org

MEDICATION GUIDE

VIVITROL® (viv-i-trol) **(naltrexone for extended-release injectable suspension)**

Read this Medication Guide before you start receiving VIVITROL injections and each time you receive an injection. There may be new information. This information does not take the place of talking to your healthcare provider about your medical condition or your treatment.

What is the most important information I should know about VIVITROL?

VIVITROL can cause serious side effects, including:

1. Risk of opioid overdose.

You can accidentally overdose in two ways.

- VIVITROL blocks the effects of opioids, such as heroin or opioid pain medicines. **Do not** take large amounts of opioids, including opioid-containing medicines, such as heroin or prescription pain pills, to try to overcome the opioid-blocking effects of VIVITROL. This can lead to serious injury, coma, or death.
- After you receive a dose of VIVITROL, its blocking effect slowly decreases and completely goes away over time. If you have used opioid street drugs or opioid-containing medicines in the past, using opioids in amounts that you used before treatment with VIVITROL can lead to overdose and death. You may also be more sensitive to the effects of **lower** amounts of opioids:
 - o after you have gone through detoxification
 - o when your next VIVITROL dose is due
 - o if you miss a dose of VIVITROL
 - o after you stop VIVITROL treatment

It is important that you tell your family and the people closest to you of this increased sensitivity to opioids and the risk of overdose.

You or someone close to you should get emergency medical help right away if you:

- have trouble breathing
- become very drowsy with slowed breathing
- have slow, shallow breathing (little chest movement with breathing)
- feel faint, very dizzy, confused, or have unusual symptoms

2. Severe reactions at the site of the injection (injection site reactions).

Some people on VIVITROL have had severe injection site reactions, including tissue death (necrosis). Some of these injection site reactions have required surgery. Call your healthcare provider right away if you notice any of the following at any of your injection sites:

- intense pain
- the area feels hard
- large area of swelling
- lumps
- blisters
- an open wound
- a dark scab

Tell your healthcare provider about any reaction at an injection site that concerns you, gets worse over time, or does not get better by two weeks after the injection.

3. Sudden opioid withdrawal.

Anyone who receives a VIVITROL injection must not use any type of opioid (must be opioid-free) including street drugs, prescription pain medicines, cough, cold, or diarrhea medicines that contain opioids, or opioid dependence treatments, buprenorphine or methadone, **for at least 7 to 14 days** before starting VIVITROL. Using opioids in the 7 to 14 days before you start receiving VIVITROL may cause you to suddenly have symptoms of opioid withdrawal when you get the VIVITROL injection. **Sudden opioid withdrawal can be severe, and you may need to go to the hospital.**

You must be opioid-free before receiving VIVITROL unless your healthcare provider decides that you don't need to go through detox first. Instead, your doctor may decide to give your VIVITROL injection in a medical facility that can treat you for sudden opioid withdrawal.

4. Liver damage or hepatitis. Naltrexone, the active ingredient in VIVITROL, can cause liver damage or hepatitis.

Tell your healthcare provider if you have any of the following symptoms of liver problems during treatment with VIVITROL:

- stomach area pain lasting more than a few days
- dark urine
- yellowing of the whites of your eyes
- tiredness

Your healthcare provider may need to stop treating you with VIVITROL if you get signs or symptoms of a serious liver problem.

What is VIVITROL?

VIVITROL is a prescription injectable medicine used to:

- treat alcohol dependence. You should stop drinking before starting VIVITROL.
- prevent relapse to opioid dependence, **after** opioid detoxification.

This means that if you take opioids or opioid-containing medicines, you must stop taking them before you start receiving VIVITROL. **See “What is the most important information I should know about VIVITROL?”**

To be effective, treatment with VIVITROL must be used with other alcohol or drug recovery programs such as counseling. VIVITROL may not work for everyone.

It is not known if VIVITROL is safe and effective in children.

Who should not receive VIVITROL?

Do not receive VIVITROL if you:

- are using or have a physical dependence on opioid-containing medicines or opioid street drugs. **See “What is the most important information I should know about VIVITROL?”**

To see whether you have a physical dependence on opioid-containing medicines or opioid street drugs, your healthcare provider may give you a small injection of a medicine called naloxone. This is called a naloxone challenge test. **If you get symptoms of opioid withdrawal after the naloxone challenge test, do not start treatment with VIVITROL at that time.** Your healthcare provider may repeat the test after you have stopped using opioids to see whether it is safe to start VIVITROL.

- are having opioid withdrawal symptoms. Opioid withdrawal symptoms may happen when you have been taking opioid-containing medicines or opioid street drugs regularly and then stop.

Symptoms of opioid withdrawal may include: anxiety, sleeplessness, yawning, fever, sweating, teary eyes, runny nose, goose bumps, shakiness, hot or cold flushes, muscle aches, muscle twitches, restlessness, nausea and vomiting, diarrhea, or stomach cramps. **See “What is the most important information I should know about VIVITROL?”** Tell your healthcare provider if you have any of these symptoms before taking VIVITROL.

- are allergic to naltrexone or any of the ingredients in VIVITROL or the liquid used to mix VIVITROL (diluent). See the end of this Medication Guide for a complete list of ingredients in VIVITROL and the diluent.

What should I tell my healthcare provider before receiving VIVITROL?

Before you receive VIVITROL, tell your healthcare provider if you:

- have liver problems
- use or abuse street (illegal) drugs
- have hemophilia or other bleeding problems
- have kidney problems
- have any other medical conditions
- are pregnant or plan to become pregnant. It is not known if VIVITROL will harm your unborn baby.
- are breastfeeding. It is not known if VIVITROL passes into your milk, and if it can harm your baby. Naltrexone, the active ingredient in VIVITROL, is the same active ingredient in tablets taken by mouth that contain naltrexone. Naltrexone from tablets passes into breast milk. Talk to your healthcare provider about whether you will breastfeed or take VIVITROL. You should not do both.

Tell your healthcare provider about all the medicines you take, including prescription and non-prescription medicines, vitamins, and herbal supplements.

Especially tell your healthcare provider if you take any opioid-containing medicines for pain, cough or colds, or diarrhea. **See “What is the most important information I should know about VIVITROL?”**

If you are being treated for alcohol dependence but also use or are addicted to opioid-containing medicines or opioid street drugs, it is important that you tell your healthcare provider before starting VIVITROL to avoid having sudden opioid withdrawal symptoms when you start VIVITROL treatment.

Know the medicines you take. Keep a list of them to show your healthcare provider and pharmacist when you get a new medicine.

How will I receive VIVITROL?

- VIVITROL is injected by a healthcare provider, about 1 time each month.
- VIVITROL is given as an injection into a muscle in your buttocks using a special needle that comes with VIVITROL.
- After VIVITROL is injected, it lasts for a month and it cannot be removed from the body.
- If you miss your appointment for your VIVITROL injection, schedule another appointment as soon as possible. **See “What is the most important information I should know about VIVITROL?”**
- Whenever you need medical treatment, be sure to tell the treating healthcare provider that you are receiving VIVITROL injections and mention when you got your last dose. This is important because VIVITROL can also block the effects of opioid-containing medicines that might be prescribed for you for pain, cough or colds, or diarrhea.
- Carry written information with you at all times to alert healthcare providers that you are taking VIVITROL, so that they can treat you properly in an emergency. Ask your healthcare provider how you can get a wallet card to carry with you.

What should I avoid while receiving VIVITROL?

Do not drive a car, operate machinery, or do other dangerous activities until you know how VIVITROL affects you. VIVITROL may make you feel dizzy and sleepy. **See “What are the possible side effects of VIVITROL?”**

What are the possible side effects of VIVITROL?

VIVITROL can cause serious side effects, including:

- **See “What is the most important information I should know about VIVITROL?”**

- **Depressed mood.** Sometimes this leads to suicide, or suicidal thoughts, and suicidal behavior. Tell your family members and people closest to you that you are taking VIVITROL.

You, a family member, or the people closest to you should call your healthcare provider right away if you become depressed or have any of the following symptoms of depression, especially if they are new, worse, or worry you:

- You feel sad or have crying spells.
 - You are no longer interested in seeing your friends or doing things you used to enjoy.
 - You are sleeping a lot more **or** a lot less than usual.
 - You feel hopeless or helpless.
 - You are more irritable, angry, or aggressive than usual.
 - You are more or less hungry than usual or notice a big change in your body weight.
 - You have trouble paying attention.
 - You feel tired or sleepy all the time.
 - You have thoughts about hurting yourself or ending your life.
- **Pneumonia.** Some people receiving VIVITROL treatment have had a certain type of pneumonia that is caused by an allergic reaction. If this happens to you, you may need to be treated in the hospital. Tell your healthcare provider right away if you have any of these symptoms during treatment with VIVITROL:
 - shortness of breath or wheezing
 - coughing that does not go away
- **Serious allergic reactions.** Serious allergic reactions can happen during or soon after an injection of VIVITROL. Tell your healthcare provider or get medical help right away if you have any of these symptoms of a serious allergic reaction.
 - skin rash
 - swelling of your face, eyes, mouth, or tongue
 - trouble breathing or wheezing
 - chest pain
 - feeling dizzy or faint

Common side effects of VIVITROL may include:

- nausea. Nausea may happen after your first VIVITROL injection and usually improves within a few days. Nausea is less likely with future injections of VIVITROL.
- sleepiness
- headache
- dizziness
- vomiting
- decreased appetite
- painful joints

- muscle cramps
- cold symptoms
- trouble sleeping
- toothache

Tell your healthcare provider if you have any side effect that bothers you or that does not go away.

These are not all the side effects of VIVITROL. For more information, ask your healthcare provider or pharmacist.

Call your doctor for medical advice about side effects. You may report side effects to FDA at 1-800-FDA-1088.

General information about VIVITROL

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Severe Sleep Deprivation Causes Hallucinations and a Gradual Progression Toward Psychosis With Increasing Time Awake

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Background: Going without sleep for long periods of time can produce a range of experiences, including perceptual distortions and hallucinations. Many questions, however, remain unanswered regarding the types of symptoms which are most reliably elicited, the time of symptom onset, and whether symptoms worsen over time toward psychotic decompensation. Since sleep deprivation exceeding 48 h is considered unethical today, an examination of historical studies with extreme sleep-loss duration is needed to obtain information about what happens during prolonged sleep loss.

Methods: A systematic-review approach was used to identify experimental and observational studies of sleep deprivation in healthy people which describe the effects of prolonged sleep loss on psychopathological symptoms, without any date restriction.

Results: A total of 476 articles were identified. Of these, 21 were eligible for inclusion. Duration of sleep loss ranged between 24 h and 11 nights (total 760 participants; average 72–92 h without sleep). All studies except one reported perceptual changes, including visual distortions (i.e., metamorphopsias), illusions, somatosensory changes and, in some cases, frank hallucinations. The visual modality was the most consistently affected (in 90% of the studies), followed by the somatosensory (52%) and auditory (33%) modalities. Symptoms rapidly developed after one night without sleep, progressing in an almost fixed time-dependent way. Perceptual distortions, anxiety, irritability, depersonalization, and temporal disorientation started within 24–48 h of sleep loss, followed by complex hallucinations and disordered thinking after 48–90 h, and delusions after 72 h, after which time the clinical picture resembled that of acute psychosis or toxic delirium. By the third day without sleep, hallucinations in all three sensory modalities were reported. A period of normal sleep served to resolve psychotic symptoms in many—although not all—cases.

Conclusions: Psychotic symptoms develop with increasing time awake, from simple visual/somatosensory misperceptions to hallucinations and delusions, ending in a condition resembling acute psychosis. These experiences are likely to resolve after a period of sleep, although more information is required to identify factors which can contribute to the prevention of persistent symptoms.

Keywords: sleep restriction, homeostatis, hallucination, delusion, illusion, distortion, metamorphopsia, misperception

INTRODUCTION

Studies are reporting that we, as a society, are sleeping less and less (1). This is concerning, given evidence of the negative impact of sleep loss on health and wellbeing (2). Long periods without sleep are associated with cognitive difficulties, and can produce psychological symptoms ranging from mood changes to psychotic experiences such as hallucinations (3, 4). Given that chronic sleep difficulties affect approximately 10–30% of the population, and that for some people, sleeplessness is an occupational hazard (5, 6), it is important to better understand the psychopathological effects of sleep deprivation, and what happens with increasing time awake. This paper presents an examination of psychopathological experiences reported by healthy individuals who participated in sleep-deprivation studies ranging in duration from 24 h up to 11 days. We were particularly interested in the phenomenological description of perceptual distortions and hallucinations, and the changes that occur with progressive sleep loss.

The interaction between sleep loss and psychotic symptoms has long been known. Historical texts speak of the erstwhile practice of torturing those accused of witchcraft by depriving them of sleep, and of the psychotic states that inevitably ensued (7).

There is also an extensive clinical literature describing the link between sleep deprivation and acute psychotic states. Studies in schizophrenia and bipolar disorder show that sleep problems are among the most prominent correlates of positive symptoms—such as auditory hallucinations and delusions—and illness severity. Studies also show that many psychotic episodes are preceded, if not precipitated, by prolonged insomnia (8–12). Insomnia is a well-known clinical stressor, and it is indeed considered a prodromal symptom of psychosis (13, 14). Finally, clinical studies have observed the dynamic relationship that exists between sleep and symptoms, with reductions in sleep duration being directly followed by increases in psychotic symptom severity with a time lag of approximately 1 day (8, 15–17).

Perceptual distortions and hallucinations after a period of sleep loss have also been reported in individuals with no history of psychiatric illness. These sleep-loss phenomena offer the opportunity to study the continuum of perception in healthy humans from the point of view of a normally occurring stressor (18). One common approach to the subject of sleep loss involves epidemiological studies conducted in the general population. These show that sleep problems correlate with an increased frequency of psychotic disturbances such as hallucinations and

delusional beliefs [e.g., (19–22)]. For instance, Sheaves et al. (21), $N = 15,983$] showed that sleep difficulties in a general-population sample were associated with a 2- to 4-fold increase in hallucination frequency. Another large study involving 45 countries demonstrated that sleep problems increase the odds of at least one psychotic symptom by 1.45 (19).

One limitation of epidemiological studies is that they are not designed to chart causal inferences, or observe subtle symptom changes which occur as a direct function of time spent awake. Moreover, epidemiological studies are not suited for capturing detailed information about symptom phenomenology. For example, it is not clear which sensory modality is most commonly affected when hallucinations arise in the context of sleep deprivation, and which other psychotic symptoms are reported. Is the symptom profile more similar to schizophrenia-spectrum disorders (with its predominance of auditory hallucinations, distorted thinking and delusions), or to hallucinations in individuals with eye disease or neurodegenerative disorders (in whom visual hallucinations are more common)?

Prospectively assessing symptom changes after sleep loss is not an easy task, as it requires detailed monitoring of time spent awake and repeated tracking of mental changes over time. Therefore, sleep-deprivation studies are ideally suited for examining the dynamic effects of sleep loss on symptoms. In sleep-deprivation studies, participants are kept continuously awake for prolonged periods of time [e.g., (3, 23)]. It is a powerful methodological tool to examine whether sleep loss is causally related to mental changes. It allows for full control over sleep duration as an independent variable, and provides optimal conditions to examine the dose-dependent relationships that might exist between the duration of time awake and symptoms.

Few studies of the impact of sleep loss on psychological symptoms have been conducted in the past 20 years [e.g., (3, 23–26)]. These studies show that going without sleep for one or two nights can induce powerful perceptual changes, but they have not been able to extend the experiments past 2 days without sleep. Extreme sleep-deprivation studies (i.e., more than two nights without sleep) were popular in the first half of the twentieth century, but are no longer conducted because they are considered unethical, and in most countries are prohibited by law. Since they cannot be performed anymore, we need to revisit early historical studies to obtain information about what happens after very prolonged sleep loss.

The present study therefore aims to describe and appraise published studies on the effects of sleep deprivation on psychopathological symptoms in healthy volunteers, without any

date restriction. Using a systematic-review approach to identify relevant studies, the questions we asked were as follows:

1. Is there a causal relationship between sleep loss and perceptual distortions and/or hallucinations?
2. What sensory modality is the most commonly affected?
3. What other symptoms are elicited after sleep deprivation?
4. Do symptoms evolve as a function of increasing time spent awake?
5. Do symptoms spontaneously resolve after a period of normal sleep?

METHODS

Search Strategy

We used a systematic-review approach to identify experimental and observational studies which reported on the impact of prolonged sleep loss on psychopathological symptoms. A systematic search was carried out in Embase (which includes Medline titles) without any date restriction. The date of the last search was May, 2018. Search terms were (sleep depriv* OR sleep restrict*) AND (psychopath* OR percept* OR sens* OR hallucinat* OR psychos* OR psychot* OR symptom*).

Inclusion/Exclusion Criteria

Included were experimental studies, observational studies, and case reports, written in English, which provided (i) original data involving healthy individuals, with (ii) a sleep-deprivation or sleep-restriction design, with (iii) measurement or assessment of symptoms, and with (iv) experimenter supervision. Excluded were studies involving psychiatric populations, involuntary

participants, treatment studies, drugs, reviews, and meta-analyses. Moreover, all studies that lacked symptom assessments or reports were excluded.

Data Analysis

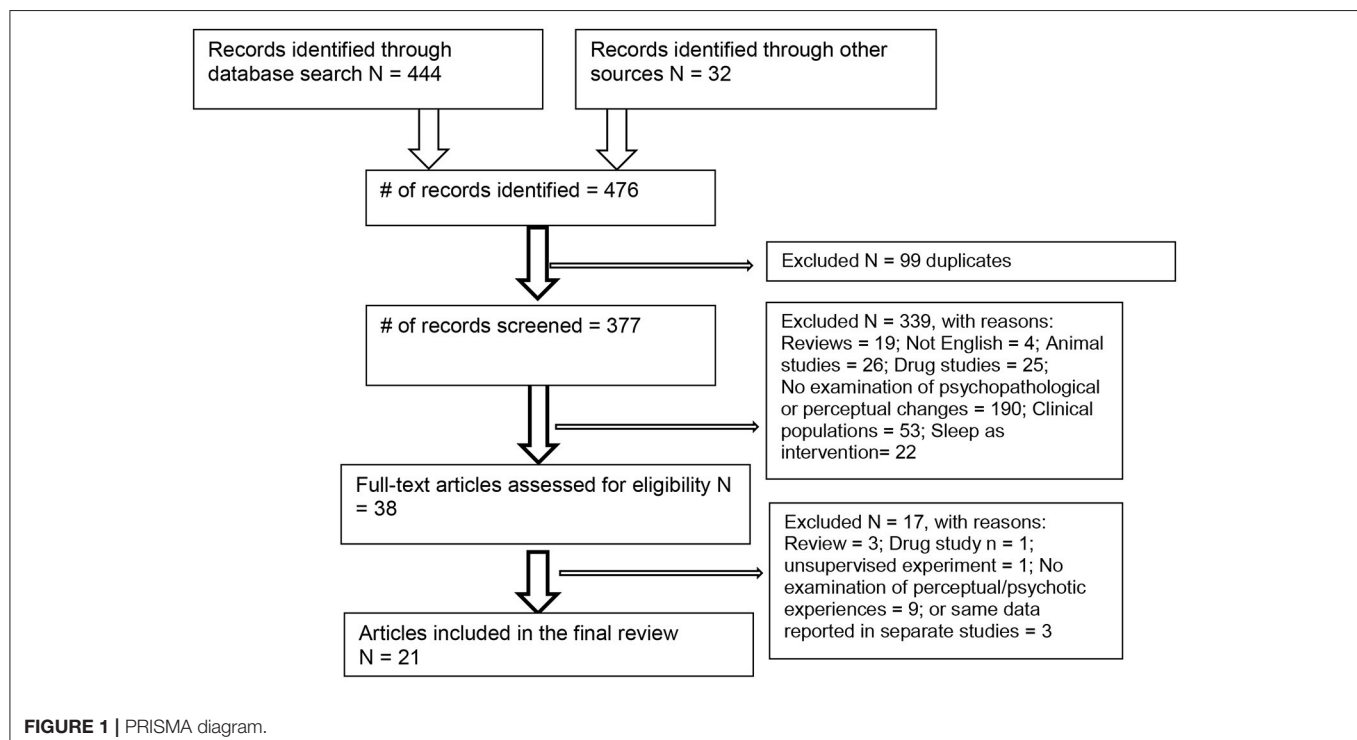
All eligible papers were analyzed, and the following variables were extracted: year of publication, type of experimental setting, number of participants, demographic data, duration of sleep deprivation or restriction, perceptual changes and other psychological changes. An initial examination of participants' reports revealed a range of phenomena, classified and defined as follows (27):

- i) *Hallucination*: when perceptions lacked a corresponding stimulus in the external world (i.e., new perceptual creations),
- ii) *Illusion*: when perceptions were based on a real stimulus, but were either misperceived or misinterpreted,
- iii) *Distortion*: when perceptions were based on a real stimulus, but displayed changes in the intensity, quality or form of the perceived object or scene (e.g., seeing things as larger or smaller than they actually are). When such distortions occurred in the visual modality, they were referred to as *metamorphopsias*.

RESULTS

Study Selection

Figure 1 shows that the search yielded 444 articles, as well as 32 from historical sources and cross-referencing (total $N = 476$). After removal of duplicates, 377 papers remained to be examined



for suitability, leaving 38 papers which were downloaded. A further 17 articles were removed (reasons given in **Figure 1**), leaving 21 articles which met the full criteria, reporting on 760 participants.

Design and Participant Description

Participants comprised volunteers recruited from the general community, the military, and universities, as well as medical interns (**Table 1**). Most were male (88.8%, gender not provided for 16 participants). The mean age was 36.5 years, with a range of 17–46 years (excluding six studies without age data).

A standard procedure involved participants being kept to a laboratory or other defined area, reading, watching TV, talking or playing board or card games. A team of researchers, working in shifts, attended closely to these participants, preventing them from dozing off or napping. When participants appeared drowsy, they were made to walk or engage in gentle physical activity. Validated questionnaires ($n = 9$), clinical interviews ($n = 3$), participant log records, and/or experimenter observations (cumulative sum $n = 18$) were completed at regular intervals to capture the presence of symptoms (**Table 1**). Fifteen studies were conducted in hospital conditions, with the detailing of neurological or psychological assessments. Three studies were conducted at a radio studio, and another one in the participant's home (**Table 1**).

Across the 21 articles, the duration of sleep deprivation ranged from 24 h (one night) to 264 h (11 nights). The most common duration was three or four nights without sleep (72–96 h, in 45% of the studies). The duration of sleep deprivation was usually predetermined, except for four studies in which the participants were asked to stay awake as long as they could (18, 28–30).

In two studies, very brief episodes of intermittent sleep had been allowed (28, 31). In the study involving medical interns (31), participants slept for 2 h during a 32-h period (i.e., 6% of the total duration of sleep loss). Katz and Landis' participant slept for 4 h (i.e., 2% of the total period).

Is There a Causal Relationship Between Sleep Loss and Perceptual Distortions and/or Hallucinations?

Table 1 provides an overview of experiences reported during the experiments. Perceptual distortions and hallucinations were reliably elicited by a majority of participants in all studies except one (20/21 studies, 95%). In larger samples (where percentages are more meaningful), percentages of positive responses ranged between 11% [(32), $N = 350$], 43% [(25), $N = 32$], 46% [(30), $N = 26$], 60% [(18), $N = 10$] and 100% [(33), $N = 20$; (34), $N = 27$]. The only study which failed to register any changes in perception involved medical interns who were allowed a brief sleep period of 4 h (31).

What Sensory Modality Is the Most Commonly Affected?

The visual modality was the most commonly affected by sleep loss, as reported in all studies except one. Somatosensory changes

were the second most common experience (reported in half of all the studies), followed by the auditory modality (a third of the studies) (see Appendix in Supplementary Material for descriptions) (**Figure 2B**). Symptoms included the following, in descending order of frequency:

Visual experiences (19 studies), which included a spectrum of symptoms, ranging from visual distortions, illusions, and hallucinations (Appendix A in Supplementary Material). These included visual *distortions* (*metamorphopsias*) (13 studies), referring to distortions of size (e.g., the room appearing larger), movement (e.g., stationary objects would appear to move), color (e.g., the floor becoming darker), contours (e.g., the forms of objects would lose their sharp angles), or duplications. These distortions were experienced intermittently, and elicited behavioral reactions ranging from surprise to irritation. *Visual illusions* (13 studies) comprised the transformation of common items (e.g., a switch, a fire alarm, a jacket) into other inanimate, but recognizable objects (e.g., a doll, a rock), or sometimes into animals or persons. Finally, 12 studies reported *visual hallucinations* which were generally transient and fleeting in nature, and most often of the simple type (e.g., indefinable substances growing from the floor) or the geometric type. Complex visual hallucinations (fully formed images) were reported in five studies, and involved the sudden appearance of animals, people or objects which were not really there. Some participants saw only halves of these hallucinated objects ("splitting") (35, 36). In 10 studies, participants reported all three types of visual misperception (distortions, illusions, and hallucinations).

Somatosensory experiences, reported in 11 studies (Appendix B in Supplementary Material). These were bodily distortions (e.g., involving changes to the size of one's own body), as well as illusory sensations of movement (e.g., acceleration). There were also tactile hallucinations (e.g., the sensation of being touched), and temperature hallucinations (feeling heat or cold) (Appendix B in Supplementary Material). These changes were initially brief in nature, but they became increasingly persistent over time (and described as "creepy"), and acted upon with vigorous behavioral reactions.

Auditory experiences, reported in seven studies (Appendix C in Supplementary Material). Auditory distortions, described in all of these seven studies (Appendix C in Supplementary Material) were brief in duration, and included the mislocation of externally generated sounds, as well as changes in the quality of voices and other sounds (37). Participants also experienced hearing voices in the midst of other environmental sounds ("functional hallucinations") (35), verbal auditory hallucinations of a simple type without affective content [e.g., a voice calling the participant's name in (34)], and nonverbal auditory hallucinations (e.g., dogs barking).

There were also reports of multimodal (i.e., compound or fused) hallucinations comprising two or more sensory modalities (28, 30). In four studies, hallucinations were "shared" and accepted as real by different participants (30, 35, 38, 39), two of which involved the collective hallucination of an "imaginary hat" (in (30), by 20% of 26 participants; and in (39), by all 12 participants).

TABLE 1 | List of studies included in the review and summary of key findings.

Citation	N	Setting (participant description)	Duration without sleep	Hallucinations and other perceptual changes				Other psychopathological changes				
				% of participants positive findings	With Visual	Auditory	Somatosensory	Delusions	Disordered thoughts	Time distortions	Dissociation	Mood
(26)	207	Sleep laboratory (military)*	24 h	Not reported	✓	✓	✓					✓
(25) ^a	32	Sleep laboratory (students)*	24 h	43%	✓	✓	✓		✓	✓		✓
(31)	14	Hospital (medical interns)*	32 h (6% sleep)	Nil					✓		✓	✓
(18)	10	Laboratory (N/S)	48 h (<i>n</i> = 2); 72 h (<i>n</i> = 8)	60%	✓							
(3)	25	Laboratory (military personnel)*	56 h	Not reported			✓	✓				
(36)	3	Laboratory (staff/students)	60 h	100%	✓	✓	✓	✓	✓			
(29)	6	Laboratory (community)	64 h–115 h (2.5–4.7 days)	Nil	✓	✓	✓		✓		✓	✓
(37)	7	Hospital (medical students)*	72 h (3 days)	100%	✓	✓	✓		✓	✓	✓	✓
(33)	20	Talkathon (community)*	88 h	100%	✓		✓			✓	✓	
(45)	3	N/S (community)	90 h	33%	✓				✓			
(35)	6	Laboratory (medical students)	96 h (4 days)	100%	✓	✓		✓	✓			
(30)	26	Research ward (military)*	98 h	46%	✓		✓		✓	✓	✓	✓
(34)	27	N/S (students) [§]	100 h	100%	✓	✓	✓	✓	✓	✓		✓
(32)	350	Military camp (military) [§]	112 h	11%	✓	✓		✓				✓
(48)	4	Research ward (students)*	120 h (5 days)	100%	✓		✓		✓		✓	✓
(39)	12	Hospital (N/S) [§]	123 h	"Some"	✓	✓		✓	✓		✓	✓
(41)	1	Radio marathon (community) [§]	168 h (7 days)	<i>N</i> = 1 (yes)	✓	✓		✓	✓	✓		✓
(42)	4	Research ward (students)*	205 h (8 days)	100%	✓							✓
(28)	1	Home (community) [§]	231 h (9 days, 2% sleep)	<i>N</i> = 1 (yes)	✓							✓
(40)	1	Radio marathon (community) [§]	252 h (10 days)	<i>N</i> = 1 (yes)	✓							✓
(46)	1	Laboratory (community) [§]	264 h (11 days)	<i>N</i> = 1 (yes)	✓							✓

*Study using questionnaires or symptom rating scales; [§] Study using mental health interviews or self-reports.

^aPetrovsky et al. (23) and Meyhöfer et al. (25) report on the same participants and only the former is reviewed here.

What Other Symptoms Are Elicited After Sleep Deprivation?

A range of other symptoms were reported, as follows (see **Figure 2**):

Mood changes (16 studies, 76%), which included aggression, anger, hostility, apathy, anxiety, and depression (9, 23, 26, 28–31, 34, 37, 38, 40–44).

Disordered thoughts, confusion, and bizarre behavior (14 studies, 66%), with studies commonly reporting confusion, difficulties with attention and concentration, fragmented thinking, and nonsensical speech. Participants described that their thoughts had become jumbled, and reported difficulties forming thoughts, finding words, and composing sentences (28, 31, 35–38). Memory loss was also a common feature, with participants forgetting names (34, 35, 37, 39, 41, 45). Motor incoordination, unsteadiness, and ataxia, comparable to intoxication behavior, were also reported.

Dissociation and depersonalization (11 studies, 52%), with participants experiencing a feeling of being separated from others, and estrangement (31, 33, 34, 37–39, 41). One participant reported, “I feel as if I’m not really all there. I am discontinuous. I feel discontinuous” (31). Another said, “I thought perhaps I might be somebody else, so I asked my buddies and they said I was just myself” (30). The sensations of splitting, being detached, and observing one’s own body from a distance were also reported by some (39). These feelings of distance persisted until the end of the experiment (33).

Delusions (nine studies, 42%) (Appendix D in Supplementary Material) involved a range of classic delusional themes typically seen in schizophrenia-spectrum disorders, including primary delusions (44), delusions of control (36), persecution or paranoia (3, 28, 35, 39, 41), delusions of jealousy (41), delusions of grandeur (41, 43), and delusions of reduplication (40, 41). One participant “felt responsible for the Egyptian-Israeli conflict, and that a female secret agent in Florida was trying to get him to

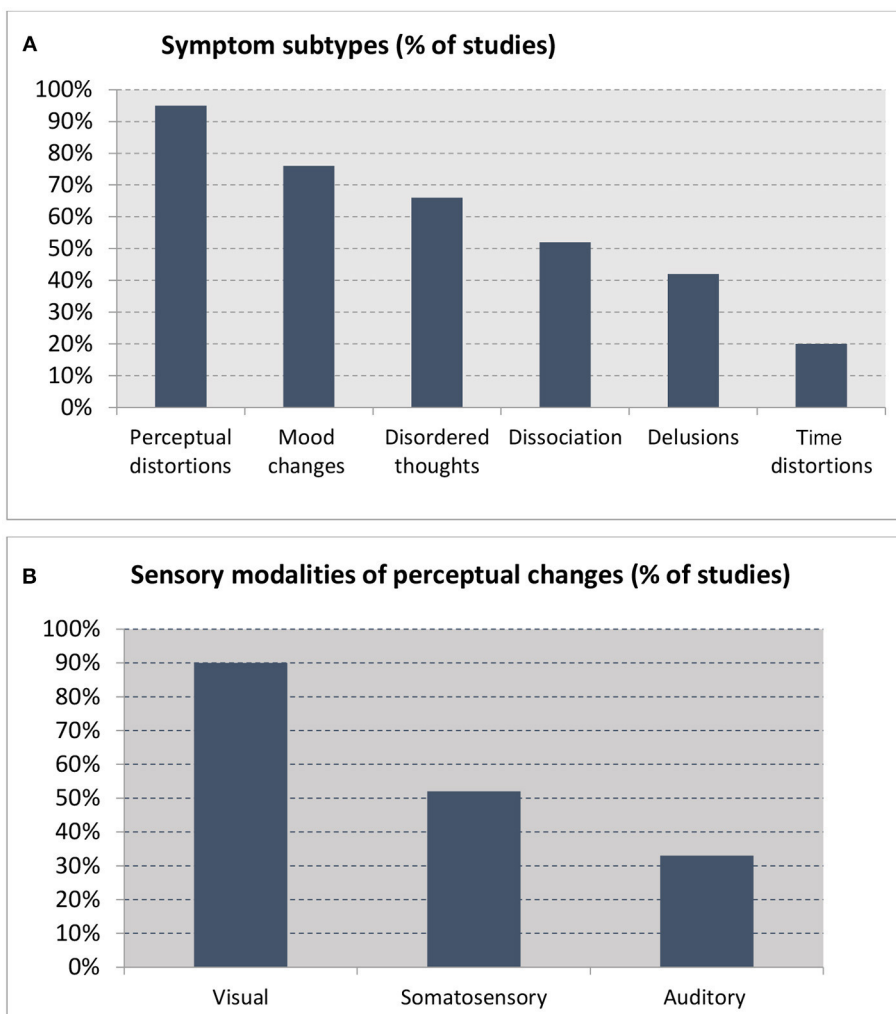


FIGURE 2 | Percentage of studies reporting on **(A)** symptom subtypes (out of 21 studies) and **(B)** sensory modalities reported in studies reporting perceptual changes ($n = 19$).

return to the Suez Canal" (41), and another imagined himself to be "on secret missions for the president" (32). Another "had the conviction that his fellow participants were plotting to kill him and were going to stab him in the back with a pen knife" (39). One participant (44) asserted that an article in the newspaper was "a sign that aliens wanted to take him to another world to create a new order."

Distortions in the sense of time (four studies, 20%): Participants reported that time was a "hodgepodge" and "seemed to pass slowly" (30, 33, 37). As time without sleep increased, errors in time judgement occurred more frequently, and gross temporal disorientation was reported (30, 37).

Do Symptoms Evolve or Change Over Time as a Function of Increasing Time Spent Awake?

We examined the time course of symptom development with increasing duration of sleep loss. The time at which symptoms were first elicited was extracted from each study. The results showed similar reports regarding the progression of symptoms with increasing time spent awake (Figures 3, 4). A number of observations can be made:

- Perceptual changes rarely make an appearance before 24 h have elapsed. Only after a whole night without sleep do these experiences start making an appearance (Figure 3A). After 48 h of sleep deprivation, perceptual distortions and hallucinations are reliably elicited (87.5% cumulative percentage of studies).
- Perceptual changes start with blurred vision and diplopia, with the visual complaint progressing gradually from distortions to illusions, and finally hallucinations (Figure 4, (18, 25, 26, 28–30, 32–38, 42, 45–47)).
- Misperceptions in different sensory modalities have different onset times. After one night without sleep, the progression starts with visual distortions (depth, size, and shape), and changes in the sense of body (18, 23, 25, 26, 33, 37), followed by visual illusions and simple hallucinations (30–48 h) (18, 28, 33, 35, 36, 42, 45, 46). After 50 h without sleep, there is a progression toward complex visual hallucinations, auditory hallucinations, and multimodal hallucinations (28–30, 32, 34–37, 42, 48) (Figure 4). These continue to increase gradually in complexity, severity, and persistence over time.
- Appraisals also undergo some changes. Initially, participants tend to question the veracity of the deceptive perceptual phenomena. With the passing of time and persistence of symptoms, there is a gradual acceptance that these events might be real, which precedes the appearance of full-blown delusional explanations.
- Disordered thoughts start to manifest by the second day, followed by delusions by the third day (Figure 4). These disturbances gradually but consistently increase in frequency over time, until the fifth day (sometimes called the "turning point"), characterized by a sudden deterioration of participants' mental health and the demonstration of acute psychotic symptoms with persistent hallucinations, delusions,

and aggression (28, 29, 32, 35–37, 39, 40, 48). By that stage, delusions are elaborated and firmly held (35, 39).

- A host of other changes also occur progressively, beginning with depersonalization, dissociation, and temporal disorientation, beginning after 24–48 h of sleep loss, which increase in frequency over time (28, 33, 36, 38, 42).
- Mood changes include signs of anxiety and irritability within 24 h (23, 25, 26, 30, 31, 37), followed by depression, apathy alternating with euphoria, anger, and hostility within 45 h without sleep (28, 29, 32, 34, 37–42, 46).

Do Symptoms Spontaneously Resolve After a Period of Normal Sleep?

The resolution of symptoms after a period of normal sleep was examined in 11 studies. Participants required approximately 50% of the total time they had been awake to recover from the deprivation period [e.g., 50 h of sleep to recover from 100 h of sleep deprivation; (34)].

Seven studies ($n = 169$ participants) reported full recovery after being allowed to sleep (32, 34, 35, 37, 38, 42, 45). One study described that the participant was "quite normal" after the first night of recovery (35), and another that some participants required several days with normal sleep to fully recover (34).

The other five studies described ongoing problems in some (but not all) participants, such as confusion, negative affect, mania, and delusional ideation, for days or even weeks after the experiments had been completed [(28, 33, 39, 41) $N = 12$; (36), $N = 3$]. It should be noted that two of the studies included a participant with a documented history of mental health problems (both $N = 1$) (28, 41).

DISCUSSION

This study reviewed sleep-deprivation experiments where duration of sleep loss ranged from one to 11 nights (24–264 h) ($n = 735$). The findings showed a remarkably broad range of perceptual anomalies and other symptom experiences. The visual modality was the most prominently affected, but other symptoms included bodily sensations, mood changes, disordered thoughts, dissociation, delusions, and temporal disorientation. Importantly, symptoms appeared in a time-dependent way, and rapidly progressed with increasing time awake. Various studies suggested that symptoms largely resolve after recovery sleep, although some participants showed ongoing effects days or even weeks after the study had ended. We address the findings in turn, before speculating about the biological processes which might be involved.

The Impact of Sleep Deprivation on Perceptual Distortions, Hallucinations and Other Symptoms

Perceptual distortions and hallucinations were reliably elicited in 20 out of 21 studies reviewed here. These findings support the results of population studies which show that sleep loss is tightly linked with hallucinations [e.g., (19, 21, 22)], but also

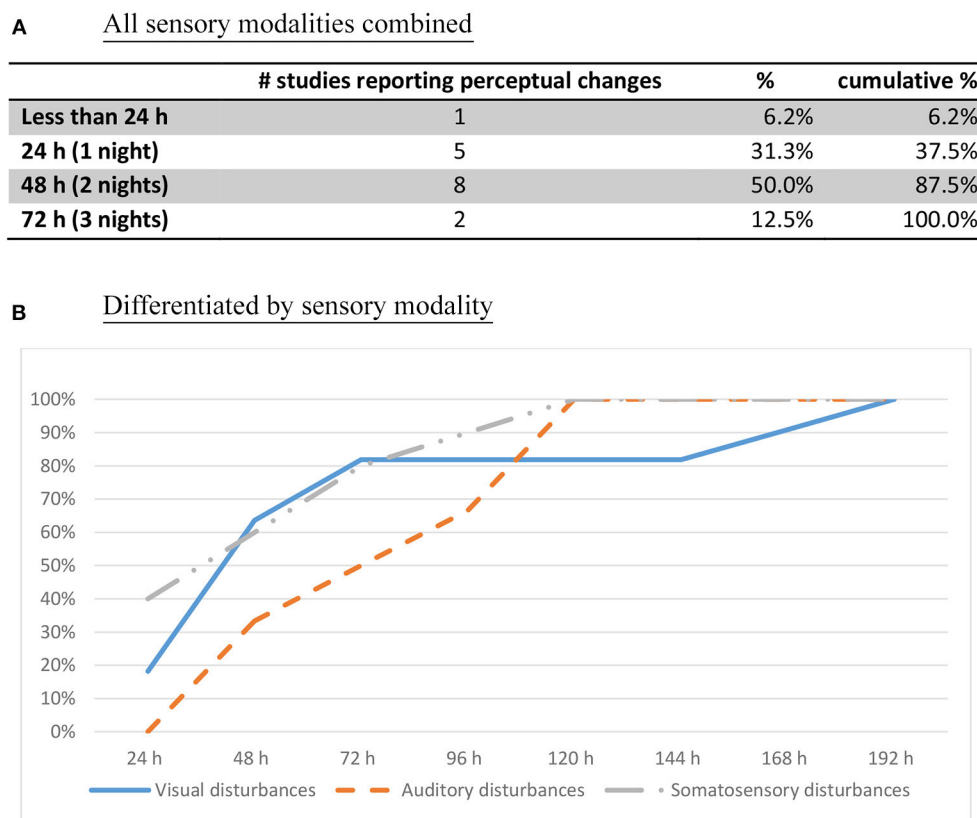


FIGURE 3 | First onset of perceptual changes (cumulative percentage of studies reporting the time of perceptual change, $n = 16$). **(A)** All sensory modalities combined. **(B)** Differentiated by sensory modality.

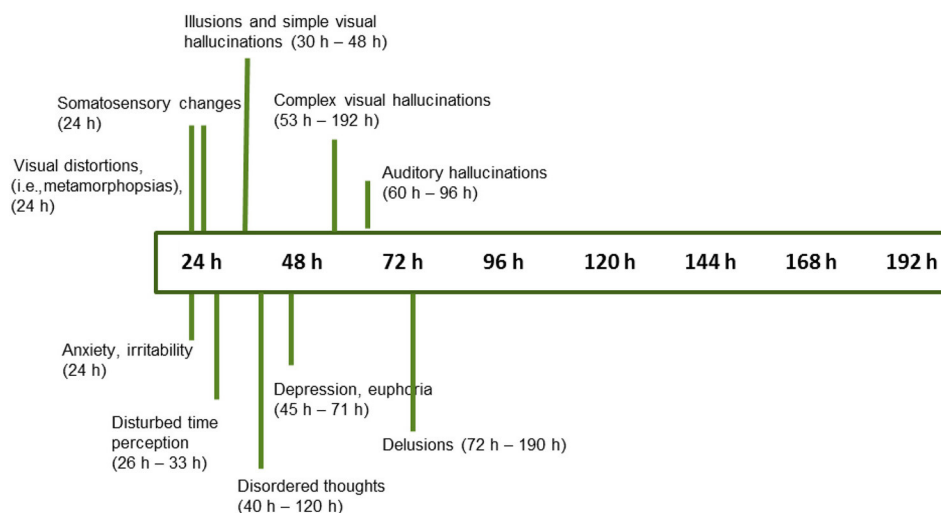


FIGURE 4 | Progression of symptom onset as a function of wakefulness duration, with time range at which symptoms were first reported ($n = 18$ studies, see text for references).

demonstrate that hallucinations can be a direct consequence of chronic sleep deprivation.

Detailed examination of the symptoms described revealed that the visual modality was the most prominently and

consistently affected (reported in 90% of the studies), followed by the somatosensory and auditory modalities (52 and 33%, respectively). Symptoms included a spectrum of phenomena ranging from visual distortions (color, size, depth, and distance),

illusions (misidentification of common objects or sounds), and finally hallucinations (simple, complex and compound), which developed in a time-dependent way. In most cases, these perceptual phenomena were experienced as vivid and real, and hardly amenable to volitional control.

All studies reviewed here had a total-sleep-deprivation design, except for two, where intermittent sleep had been allowed (akin to a sleep-restriction design). It is interesting that the one study which failed to report perceptual changes involved one such design, where a brief sleep period had been allowed in medical interns working a 32-h work shift (<6% of the total duration of sleep loss). A number of reasons may have contributed to a lack of symptoms in that group, including the short period of sleep which may have served to reduce the impact of sleep loss on brain functions; an attentional focus on tasks of high importance which may have acted to maintain perceptual stability [e.g., (49)]; or a negative response bias because of the risk to be perceived as unprofessional or unfit for duty.

Other experiences reported after sleep loss included mood changes (76%), disordered thoughts and memory loss (66%), dissociation and depersonalization (52%), delusions (40%), and distortions in the sense of time (20%). These symptoms were largely inconstant, and came in waves. These findings suggest that the effects of sleep deprivation can be pervasive and wide-ranging in affecting all areas of thought and functioning, and are in line with previous findings demonstrating that prolonged sleep loss adversely affects cognitive functions including attention, concentration and memory (50–52), negative mood (including depression), fear, and tension (53, 54).

Symptoms Evolve Toward Psychosis With Increasing Time Spent Awake

One of the most intriguing findings was the evolution of symptoms over time, together with the order in which they appeared, which was remarkably similar amongst studies. There were no or few changes in the first 24 h, and still rather mild perceptual anomalies accompanied by anxiety and irritability after the first night without sleep. After 48 h, marked psychological symptoms and perceptual disorders were described.

The perceptual changes seemed follow a more or less fixed development from distortions to illusions, and finally hallucinations, beginning with the visual modality, followed by somatosensory changes, and finally changes in the auditory modality. By the third day without sleep, all three sensory modalities were affected. Appraisals also changed over time, from a questioning stance to full acceptance as symptoms persisted over time.

The final effects to appear were psychotic symptoms such as thought disorder, and delusions. After 5 days, a clinical picture resembling that of acute psychosis or toxic delirium appeared. The finding that sleep deprivation can apparently produce symptoms of acute psychosis in healthy individuals adds to the evidence linking sleep and psychosis. In support, various studies show that prolonged sleep loss is both a precursor and precipitant to psychosis (8, 10–12).

Resolution of Symptoms After Restorative Sleep

After a return to normal sleep, the great majority of studies reported complete recovery without any further complications or symptoms (82%). In Tyler's (43) study of sleep deprivation in 350 male army recruits (112 h without sleep), no residual mental health problems were reported in any of the participants. In five studies, individual participants continued to exhibit residual symptoms (e.g., confusion, negative mood, delusional beliefs) for days or even weeks after the experiment. Pre-existing mental health conditions were cited as a likely cause. The two participants in the studies by Brauchi and West (41) and Katz and Landis (28) subsequently revealed a documented history of mental illness. A limitation of all studies includes varied follow-up periods (ranging between 1 day and 6 months after the experiment), and that follow-up assessments did not include detailed psychological assessments. Overall, there is insufficient data to determine the optimal duration of recovery sleep, and to understand the factors that better assist people with their return to normal baseline.

Individual differences in the resilience to the effects of sleep deprivation support the vulnerability-stress model, according to which some individuals with a prior vulnerability are at risk of developing mental health issues after exposure to a stressor (55). Individuals with a psychiatric illness are also at a greater risk of relapse after a period of stress, with sleep deprivation being a reliable stressor capable of eliciting rapid decompensation (56). Hypothesized mechanisms involve the hypothalamo-pituitary-adrenal (HPA) axis, and elevated cortisol levels (57), along with pro-inflammatory cytokines (58), which act to increase reactivity to stress. Interestingly, these biological markers have also been implicated in some sleep-deprivation studies (59–61), although a link to outcomes remains to be shown.

Similarities and Differences With Psychiatric Disorders and Other Conditions

This study shows that going without sleep for 2 days can produce some powerful hallucinatory experiences which can be mistaken for veridical perceptions, and over which participants have little control. An examination of the phenomenological features of these experiences reveals a very unique profile which has not been documented before, nor readily observed in other conditions or disorders.

In the early stages of sleep deprivation (2–3 days), visual phenomena are more similar to visual percepts reported in eye disease (e.g., Charles Bonnet syndrome) and Parkinson's disease (PD) than to psychotic disorders such as schizophrenia. Similar to eye disease and PD, individuals report simple percepts (flashes, lights, dots) and complex visual hallucinations where the contents are affectively neutral and rarely perceived as frightening. Unlike these conditions however, sleep deprivation features a range of somatic and tactile sensations, as well as metamorphopsias and other phenomena which are considered rare, such as the sudden appearance and disappearance of only halves of objects

(“splitting”), multisensory (“fused”) hallucinations, and collective (“shared”) hallucinations, which differentiates them from other conditions.

After 3 or 4 days, and with increasing time awake, some instances of auditory hallucination were reported. While some features are reminiscent of psychosis (mistaken for veridical perceptions and interpreted as symbolic), these were isolated and rare events, lacking the complexity and language sophistication of the voices described by individuals diagnosed with schizophrenia. The accompanying symptoms of thought disorder and delusion, however, resembled those observed in psychosis, although it is not clear whether these were persistent, or instead sporadic and intermittent.

We also wondered whether participants might actually have experienced hypnagogia or perhaps even dream-intrusion phenomena, given the resemblance to percepts often reported during the transition from wake to sleep (hypnagogic hallucinations) and sleep to wake (hypnopompic hallucinations). Some symptoms during sleep deprivation are indeed supportive of a continuation of dream sequences (28, 30, 33, 35, 37, 39, 42). As remarked about one participant, *“Soon afterwards, he kissed the EEG paper. When asked about this, he said he must have been dreaming about his girlfriend”* (35). Nonetheless, there are also important differences. Dreams tend to follow a narrative structure and the dreamer is immersed as the protagonist (62, 63), which is a feature which appears to be lacking in most sleep-deprivation experiences. Moreover, typical hypnagogic phenomena include light flashes, “faces in the dark,” and ruminations or continuations of previous conversations (64–66) which are unlike those experienced during sleep deprivation. Finally, participants themselves also judged their visual and other perceptual experiences to be distinct from dreams, so it would seem unlikely that they consisted entirely of hypnagogia or dream phenomena.

Hypotheses Regarding the Brain Processes Involved

The gradual development of symptoms starting with blurred vision and diplopia, progressing to visual distortions and illusions, and finally hallucinations in multiple sensory modalities, points to a gradually weakening perceptual system. Initially, the visual network appears gradually compromised, with—subsequently—similar effects in the somatosensory and auditory modalities and cognitive domains.

Symptoms starting with visual problems perhaps speak to an early involvement of the occipital cortex. In support, neuroimaging studies describe the visual-sensory and visual-attention areas as the first domains to be affected by sleep deprivation. These have been shown to cause disturbances in the quality of perceptual representations (49, 67, 68). In addition, migraine auras, which produce metamorphopsias of the type reported here (69), also show visual distortions from cortical spreading mechanisms starting in the occipital cortex moving toward prefrontal areas of the brain (70). It is worth noting that the proposal of a gradual change in brain

processes in a posterior-anterior direction stands in contrast to neurophysiological findings, which have observed the direction of neuronal activity during pre-sleep and early sleep-deprivation periods as starting in anterior areas before spreading to posterior ones (71, 72). The lack of correlations between neuroimaging signals and basic electrophysiological functions, however, is not uncommon (73), since these methods of investigation provide different levels of explanation, as well as different temporal and spatial resolutions.

The psychopathological symptoms elicited by sleep deprivation are in line with studies demonstrating the severe effects of sleep loss on cortical and subcortical functions, health, and functioning (2, 72). The process may involve a destabilization of central functions causing profound changes in brain functions in a dose-dependent manner (74, 75). Although the exact mechanisms of extreme sleep deprivation are still in need of further elucidation, the involvement of perception areas is undisputed, as is the involvement of prefrontal areas. It has been suggested that functions involving the medial frontal cortex and thalamic activations falter with increased duration of sleep loss, causing mental “lapses” and reductions in alertness (2, 76). Such lapses may impact on perceptions because the brain increasingly focuses inwards, and is becoming less constrained by input from the external environment. Through such changes in signal-to-noise ratio, and decreases in error monitoring and error detection (77), the key mechanisms which are traditionally deemed to support hallucinatory activity are enabled (78, 79).

Neurotransmitter Action

The underlying biological mechanism for these perceptual changes may be neuronal instability (80) or a related defect in neural transmission. Because of the prominent impact of sleep deprivation on visual processes, we may speculate on the role of cholinergic (ACh) transmission because of its role in the visual sensory modality. In the absence of external perceptual signals, the cholinergic system has the potential to spontaneously produce excitatory signals to the sensory areas, along with changes in signal-to-noise ratio during information processing (81, 82), which are two key mechanisms implicated in hypnagogia and dreams and which would support the involvement of occipito-frontal acetylcholine depletion mechanisms. Furthermore, displays of myasthenia-like weakness of voluntary muscles during sleep deprivation, including an inability to raise the eyelids, have been linked to cholinergic depletion (83).

The symptoms’ similarities with psychosis may also hint at the involvement of dopaminergic, noradrenergic, and serotonergic processes (84). Support for a role of dopamine comes from animal studies, which show that sleep deprivation produces a state of supersensitivity of post-synaptic dopamine receptors (85, 86). While direct evidence for dopamine involvement in sleep deprivation in humans is lacking, ACh and nicotinic receptors (both with links with occipital cortex) (87) are key mediators of dopamine (88), with a synaptic balance existing between ACh and dopamine in the striatum, and nicotinic receptors located on dopamine nerve terminals (89). Furthermore, the involvement

of noradrenaline, serotonin, and ACh plays an important role in sleep and wake processes (90, 98).

Another candidate mechanism for the mediation of perceptual and other mental symptoms in sleep deprivation is central chromatolysis, an intracellular degenerative process due to fatigue and stress, which is characterized by a dissolution of Nissl bodies. Chromatolysis is not only a robust intracellular effect of fatigue and stress, it is considered one of the three known principal mechanisms of cell death (91). Neurons which are selectively vulnerable to damage are found in the cerebral cortex in regions responsible for sensory perception and executive functions. In animal studies, ischemic events produce cell changes in these regions in the temporal range of 24–72 h, which is the window during which the build-up to full-blown sleep deprivation effects takes place (92). Additional support for the chromatolysis hypothesis comes from the symptoms of pellagra, a disorder characterized by central chromatolysis. Pellagra is a nutritional disorder with niacin deficiency constituting the central mechanism (93, 94). In addition to classical symptoms of dermatitis, diarrhea, and dementia, the mental health symptoms can be mistaken for schizophrenia (95), and are similar to those in prolonged sleep loss. Similarly, prolonged sleep deprivation in rats and other animals can cause skin lesions characteristic of pellagra (96, 97).

Limitations

Several limitations apply to the current study. First, the entire analysis was retrospective in nature. Moreover, as current ethical guidelines prevent replication studies of prolonged sleep duration, new reference material cannot be collected. Secondly, methodological limitations of the original studies included broad variations between study protocols, and a lack of systematic utilization of validated scales, which may have contributed to inconsistencies in symptoms being reported. However, log books and experimenter notes revealed mental events previously unrecorded (e.g., metamorphopsias)—which might have remained unexposed if quantitative measurements had been used. In addition, despite these variations in protocols, the results were surprisingly consistent in showing perceptual and other mental changes in a fixed temporal order. Thirdly, our interpretation of the findings may well have been confounded by comorbid stress, a major confounder in studies such as these. Because of that, existing models discussed above are in need of further elaboration in the context of all the neurobiological consequences of sleep loss, which are manifold, complex, and still only partially understood.

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CONCLUSIONS

Our examination of 21 studies involving sleep deprivation of 24 h to 11 days shows that sleep loss can be a direct cause of prominent hallucinations and other misperceptions, as well as mood changes, distorted thinking, delusions, depersonalization, and time distortions. These symptoms start to appear after 24 h without sleep, and undergo increases in intensity and frequency until sudden deterioration by the fifth day, characterized by acute psychosis. Insufficient evidence exists regarding the period of sleep needed to make a full recovery, and about the factors which are responsible for ongoing mental health problems some weeks after the completion of the experiment.

AUTHOR CONTRIBUTIONS

FW contributed to the conception and design of the work, and to the acquisition, analysis, and interpretation of data for the work, drafted and revised the work, gave final approval for the final version to be published, and agreed to be accountable for all aspects of the work in ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved. VC contributed to the acquisition, analysis, and interpretation of data for the work, revised the work, gave final approval for the final version to be published, and agreed to be accountable for all aspects of the work in ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved. AA contributed to the acquisition, analysis, and interpretation of data for the work, revised the work, gave final approval for the final version to be published, and agreed to be accountable for all aspects of the work in ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved. JDB contributed to the conception and design of the work, and to the interpretation of data for the work, drafted and revised the work, gave final approval for the final version to be published, and agreed to be accountable for all aspects of the work in ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved.

SUPPLEMENTARY MATERIAL

The Supplementary Material for this article can be found online at: <https://www.frontiersin.org/articles/10.3389/fpsy.2018.00303/full#supplementary-material>

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Sleep Deprivation Disrupts Prepulse Inhibition and Induces Psychosis-Like Symptoms in Healthy Humans

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Translational biomarkers, such as prepulse inhibition (PPI) of the acoustic startle response, are playing an increasingly important role in the development of antipsychotic drugs for schizophrenia and related conditions. However, attempts to reliably induce a PPI deficit by psychotomimetic drugs have not been successful, leaving an unmet need for a cross-species psychosis model sensitive to this widely studied surrogate treatment target. Sleep deprivation (SD) might be such a model as it has previously been shown to induce PPI deficits in rats, which could be selectively prevented with antipsychotic but not anxiolytic or antidepressant compounds. Here, in a first proof-of-concept study we tested whether SD induces a deficit in PPI and an increase in psychosis-like symptoms in healthy humans. In two counterbalanced sessions, acoustic PPI and self-reported psychosis-like symptoms (Psychotomimetic States Inventory) were measured in 24 healthy human volunteers after a normal night's sleep and after a night of total SD. SD decreased PPI ($p = 0.001$) without affecting the magnitude or habituation of the startle response (all $p > 0.13$). SD also induced perceptual distortions, cognitive disorganization, and anhedonia (all $p < 0.02$). Thus, extending previous rodent work, we conclude that SD, in combination with the PPI biomarker, might be a promising translational surrogate model for psychosis as this method represents a possibility to partially and reversibly mimic the pathogenesis of psychotic states.

Key words: model system; prepulse inhibition; schizophrenia; sensorimotor gating; sleep deprivation; startle

Introduction

Prepulse inhibition (PPI) refers to a reduction of response to a strong stimulus (pulse) if this is preceded with short stimulus onset asynchrony (SOA) by a weak stimulus (prepulse; Graham, 1975). PPI provides a simple operational measure of sensorimotor gating, serving to prevent the interruption of ongoing perceptual and early sensory analysis (Braff and Geyer, 1990), shows high test–retest reliability (Cadenhead et al., 1999; Ludewig et al., 2002a) and is amenable to cross-species comparisons (Swerdlow et al., 1994).

PPI is reliably reduced in schizophrenia (Braff et al., 1978, 2001a; Kumari et al., 2000, 2007b; Ludewig et al., 2003; Swerdlow et al., 2006, 2014), the prodrome of schizophrenia (Quednow et al., 2008), schizotypal personality disorder (Cadenhead et al., 2002), psychosis-prone healthy individuals (Swerdlow et al., 1995; Kumari et al., 1997, 2008), and unaffected relatives of

schizophrenia patients (Cadenhead et al., 2000; Kumari et al., 2005). Corticostriato-pallido-thalamic circuitry modulates PPI in the rat (Swerdlow et al., 2001) and these neural substrates are implicated in the pathophysiology of schizophrenia and the therapeutic actions of antipsychotics (Geyer et al., 2001). These regions are also found active in functional imaging studies of healthy humans and show deficient activation in schizophrenia (Kumari et al., 2003, 2007a), making PPI a valuable biomarker to probe the pathophysiology and treatment of schizophrenia. PPI is often used to investigate the effects of putative antipsychotic compounds in animal research (Geyer et al., 2001). In healthy human volunteers, however, treatment efficacy, which should take the form of deficit correction, may not be determined meaningfully unless deficits are first induced by some pharmacological or experimental means (Kumari and Sharma, 2002).

In rats, sleep deprivation (SD) reduces PPI (Frau et al., 2008; Liu et al., 2011) and this reduction can be selectively reversed by antipsychotic (but not anxiolytic or antidepressant) drugs (Frau et al., 2008). To our knowledge, there are no studies on the effects of SD on PPI in humans. Here, we aim to fill this gap in the literature. If the PPI-decreasing effect of SD can be replicated in humans, the SD paradigm could prove a powerful model system of psychosis with strong clinical relevance.

Of relevance, sleep disturbance is a well documented symptom of schizophrenia and hallucinatory disorders (Benca et al., 1992). The severity of sleep disturbance is associated with the severity of psychotic symptoms and is reduced by antipsychotic

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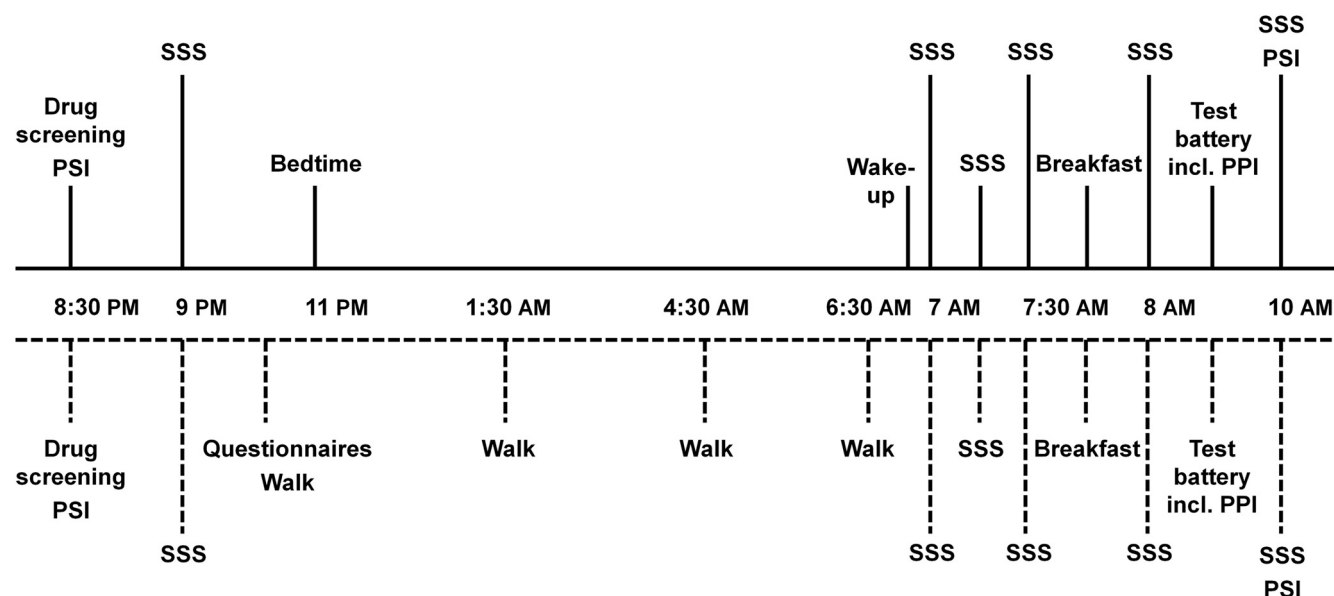


Figure 1. Timeline of the testing sessions. Solid line, normal night condition; dashed line, SD condition; Incl., including.

treatments in schizophrenia (Monti and Monti, 2004). Severe insomnia is often seen during exacerbations of schizophrenia, and may precede the appearance of other symptoms (Monti and Monti, 2004). Insomnia is associated with paranoia even in the general population (Freeman et al., 2009). Furthermore, the SD method, if shown to work as a psychosis model, would provide a feasible method as SD-induced behavioral disturbances are fully reversible following restorative sleep (Ratcliff and Van Dongen, 2009).

Therefore, in this proof-of-concept study, we investigated the effects of 24 h SD on PPI in a sample of healthy human volunteers. We hypothesized to find SD-induced PPI deficits and a concurrent increase in psychosis-like symptoms.

Materials and Methods

Participants. Healthy male and female volunteers (aged 18–40 years) were recruited via flyers and circular e-mails from the student population at the University of Bonn. After initial contact, potential participants were invited to a telephone screening in which the exclusion criteria were addressed: Pittsburgh Sleep Quality Index >5 (Backhaus et al., 2002), regular time of going to bed later than 1:00 A.M., any sleep disorder, irregular sleep–wake rhythm, shift-working, current consumption of any drugs or medication (other than contraceptive pill or vitamins), verbal IQ <85 estimated with a standardized German vocabulary test (Lehrl, 1989), diagnosis of a psychiatric disorder assessed with the Mini International Neuropsychiatric Interview (Lecrubier et al., 1997), Beck Depression Inventory >18 (Kühner et al., 2007), diagnosis of a neurological disorder, hearing impairments, visual impairment other than glasses or contact lenses, regular nicotine consumption, and body mass index >25. The study was approved by the ethics committee of the Department of Psychology, University of Bonn, and participants provided written informed consent before inclusion. Participants were compensated with either class credits or €80.

Procedure. The study used a counterbalanced within-subjects design with each participant being tested on PPI and some other tasks starting ~8:00 A.M. after a night of normal sleep or after a night of total SD. Testing sessions were scheduled 1 week apart. Procedures in both testing sessions are depicted in Figure 1.

Both testing sessions started in the evening at 8:30 P.M. with a urine drug screening test (nal von minden) and the completion of the Psychotomimetic States Inventory (PSI; Mason et al., 2008). No positive drug tests were obtained at any point in the study. The PSI measures psychosis-like states and includes subscales of delusional thinking, per-

Table 1. Demographic information

	All participants (<i>N</i> = 24)
Age	24.1 (3.5)
Verbal IQ	98.9 (9.6)
<i>N</i> (male:female)	16:8

Data represent means (standard deviations) unless otherwise specified.

Table 2. Psychophysiological parameters

	Normal night	Sleep deprivation
Startle amplitude over pulse-alone trials		
Block 1	508.74 (259.42)	564.86 (366.25)
Block 2	339.96 (209.30)	367.87 (346.77)
Block 3	268.00 (170.85)	275.76 (293.92)
Block 4	199.85 (139.61)	217.44 (193.26)
Block 5	236.29 (164.58)	216.61 (172.92)
Percentage early habituation	31.94 (31.82)	35.93 (37.43)
Percentage total habituation	50.92 (30.01)	59.11 (20.32)
Habituation coefficient <i>b</i>	−68.50 (46.16)	−84.69 (63.19)
PPI	46.48 (28.24)	26.22 (33.58)

Data represent means (standard deviations) unless otherwise specified. Startle amplitude is depicted in digital units (1 unit = 2.62 μ V). Percentage PPI is the overall mean across prepulse intensities and SOA conditions.

ceptual distortions, cognitive disorganization, anhedonia, mania, and paranoia. At 9:00 P.M. Stanford Sleepiness Scale (SSS; Hoddes et al., 1973) was completed and a learning task was administered.

In the normal night condition, participants subsequently had some free time in which they were allowed to read or watch a movie before they had to go to bed shortly before 11:00 P.M. in a comfortable bed in the sleep laboratory. In the morning, participants were woken up at 6:55 A.M. and bedside assessments of SSS followed at 7:00 and 7:15 A.M. After getting up, another assessment of SSS followed at 7:30 A.M. before a light, standardized breakfast. At 8:00 A.M., SSS was measured again and a test battery (total duration ~90 min) including PPI, oculomotor tasks (pro- and antisaccades, smooth pursuit eye movements), moral dilemmas, working memory, and creativity, was administered. The tests were presented in a pseudorandomized order (starting with either PPI or oculomotor tasks due to restricted access to startle and eye tracking equipment followed by a randomized order of the other tests). Testing always ended with assessment of SSS and the PSI. Participants were dismissed at 10:00 A.M.

In the SD condition, participants had to stay awake during the whole night in the presence of an examiner. In the evening, after completion of SSS and a learning task, they filled in some demographic and personality questionnaires. During the night, participants were allowed to read, watch movies, and play board games with the examiner. Participants had to abstain from eating and drinking except for water. In addition, the examiner took the participants for 15 min walks at 10:30 P.M., 1:30 A.M., 4:30 A.M., and 6:30 A.M. In the morning, the procedures were the same as in the normal night condition with the exception that SSS measurements at 7:00 and 7:15 A.M. were measured sitting upright. At dismissal, participants were reminded not to steer any vehicles or operate heavy machines and to have a good rest at home.

Startle response measurement. An electromyographic (EMG) startle system (Mark II; SR Labs) was used for the delivery of acoustic startle stimuli and the recording and scoring of EMG activity (digital units; 1 unit = $2.62 \mu\text{V}$). Recording and scoring methods followed those in previous articles (Quednow et al., 2006a,b). Each startle session began with a 3 min acclimation period of 70 dB background noise that continued throughout the session. The paradigm used a pulse (a 115 dB white-noise sound pulse, duration of 40 ms) presented either alone or following a prepulse (either a 78 dB, 20 ms white-noise burst or an 85 dB, 20 ms white-noise burst that preceded the pulse by an SOA of 30, 60, or 120 ms). Startle session began with the first block consisting of five pulse-alone (PA) trials. This block was followed by three blocks of 21 trials, which consisted of three trials each of the six prepulse conditions and three PA trials presented in a fixed, pseudorandom order. The paradigm concluded with the last (fifth) block consisting of five more PA trials for a total of 73 trials. The intertrial interval averaged 14 s (range, 9–22 s). The entire session lasted ~21 min. PPI, startle reactivity, and habituation measures were calculated as previously described (Quednow et al., 2006a,b; Petrovsky et al., 2013). Due to habituation across the test session, PA trials from the middle blocks (i.e., blocks 2–4) were taken to calculate PPI (Cadenhead et al., 2000).

Statistical analyses. Statistical analyses were performed using IBM SPSS Statistics 22 (IBM). Data were analyzed with multivariate ANOVA (MANOVA; Λ Wilks lambda, Λ). The significance level was set at $p < 0.05$. P values of *post hoc* tests were Bonferroni-corrected.

Sleepiness (SSS scores) were analyzed with MANOVA with sleep condition (normal night, SD) and time of measurement (9:00 P.M., 7:00 A.M., 7:15 A.M., 7:30 A.M., 8:00 A.M., 10:00 A.M.) as within-subjects factors and order (normal night first, SD first) as a between-subjects factor.

Startle reactivity across blocks was examined with MANOVA on PA amplitude with sleep condition (normal night, SD) and block (1, 2, 3, 4, 5) as within-subjects factors and order (normal night first, SD first) as a between-subjects factor. Initial startle reactivity (amplitude over first 5 PA trials, block 1) and habituation measures (also calculated on PA amplitudes: early habituation, total habituation, and coefficient b) were analyzed with MANOVA with sleep condition (normal night, SD) as within-subjects factor and order (normal night first, SD first) as a between-subjects factor. PPI data were analyzed with MANOVA with sleep condition (normal night, SD), prepulse intensity (78 dB, 85 dB) and SOA (30 ms, 60 ms, 120 ms) as within-subjects factors, and order (normal night first, SD first) as a between-subjects factor.

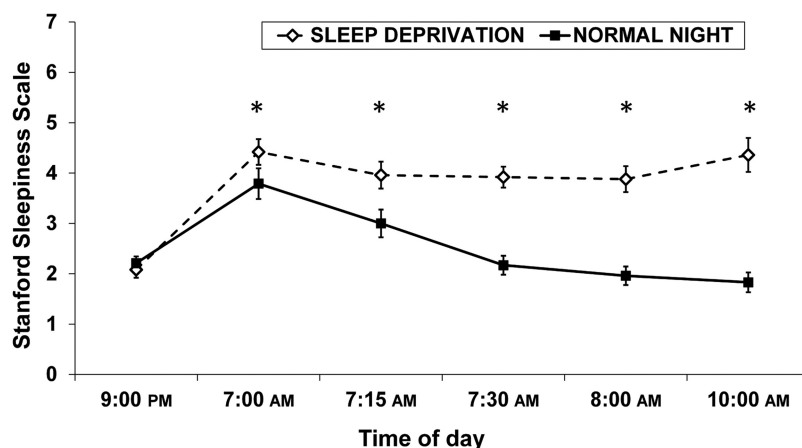


Figure 2. Mean SSS ($\pm$ SEM). Sleepiness ratings did not differ before the intervention ($p = 0.68$). Following SD, sleepiness was significantly elevated (all $p < 0.04$).

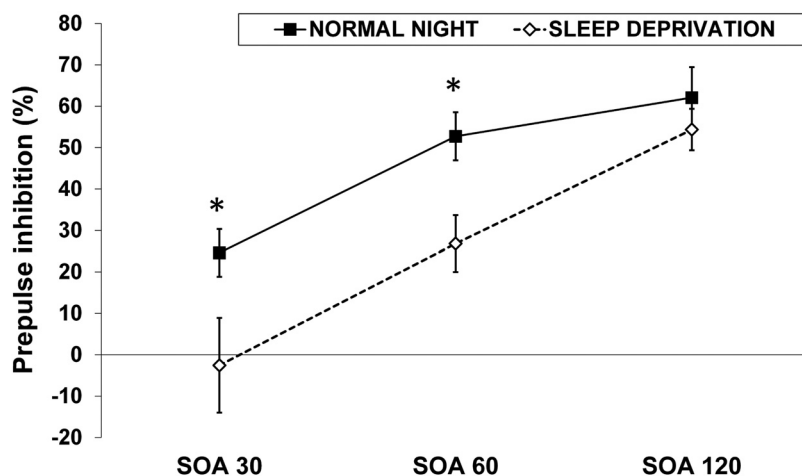


Figure 3. Mean PPI ($\pm$ SEM). SD decreased PPI across all prepulse intervals ($p = 0.001$). SD-induced disruption of PPI was more pronounced for the 30 and 60 ms prepulse intervals than for the 120 ms interval (interaction, $p = 0.004$).

Effects on PSI scores were examined with MANOVA with sleep condition (normal night, SD) and time of measurement (evening, morning) as within-subjects factors and order (normal night first, SD first) as a between-subjects factor.

Partial correlational analyses (Pearson's r) examined the relationships between PPI change scores (i.e., difference scores derived from SD minus normal night) and PSI change scores (SD minus normal night) while controlling for PA amplitude (change score of averaged PA trials from blocks 2–4) and sleepiness (change score of SSS at 8:00 A.M.). To restrict the number of correlations performed, only PSI and PPI scores that showed significant change with SD were examined (i.e., perceptual distortion, cognitive disorganization, and anhedonia with PPI data at the 30 and 60 ms SOAs, each averaged across intensity, hence a total of 6 correlations). Bonferroni-corrected threshold level of significance for correlation coefficients was set at $p = 0.05/6 = 0.008$.

Results

Demographic and psychophysiological data are shown in Tables 1 and 2.

SSS

Participants' sleepiness was significantly higher after SD than after a normal night (Fig. 2). There were main effects of sleep condition ($\Lambda = 0.30$, $F_{(1,22)} = 44.58$, $p < 0.0001$, $\eta_p^2 = 0.70$) and time of measurement ($\Lambda = 0.21$, $F_{(5,18)} = 11.36$, $p < 0.0001$, $\eta_p^2 =$

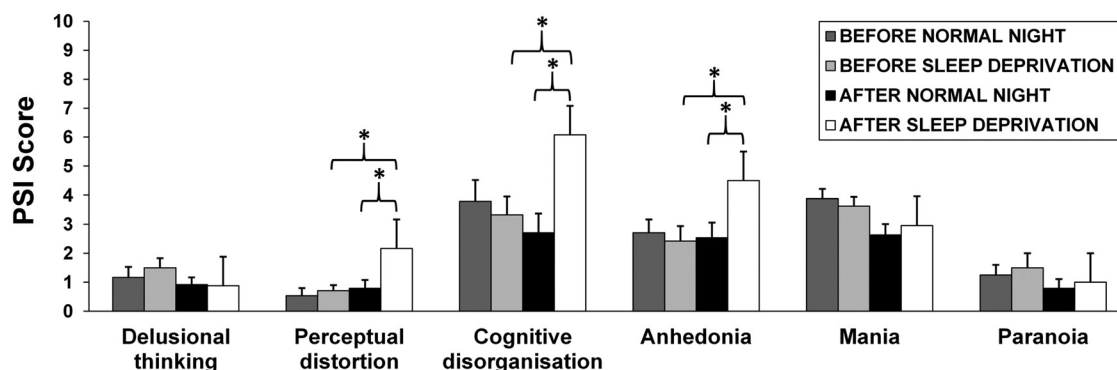


Figure 4. Mean scores (+ SEM) of the PSI. Three of six PSI scores were increased by SD: perceptual distortion, cognitive disorganization, and anhedonia (all $p < 0.02$).

0.79), as well as an interaction of sleep condition $\times$ time of measurement ($\Lambda = 0.25$, $F_{(5,18)} = 8.84$, $p < 0.001$, $\eta_p^2 = 0.75$) on sleepiness. *Post hoc* tests indicated that participants rated their sleepiness during the SD condition significantly higher than during the normal sleep condition for all five time points in the morning (all $p < 0.04$). Sleepiness ratings at 9:00 P.M. from the previous evening did not differ between conditions ($p = 0.68$).

Startle amplitude and habituation

No startle nonresponders were identified in this sample. For PA amplitude (i.e., startle reactivity) over the five blocks, there was a main effect of block ($\Lambda = 0.23$, $F_{(4,19)} = 15.62$, $p < 0.0001$, $\eta_p^2 = 0.77$), indicating startle habituation across blocks. The interaction of sleep condition $\times$ block was not significant ($\Lambda = 0.88$, $F_{(4,19)} = 0.64$, $p = 0.64$, $\eta_p^2 = 0.12$), suggesting equal habituation across blocks in normal night and SD conditions and. There were no further main or interaction effects (all $F < 0.40$, all $p > 0.53$).

Mean amplitude of PA trials from the first block as well as the habituation measures of PA trials (early habituation, total habituation, and coefficient b) did not reveal any main (all $F < 2.01$, all $p > 0.17$) or interaction (all $F < 1.28$, all $p > 0.27$) effects which also indicates no effects of SD on PA amplitudes.

PPI

There was a main effect of SOA ($\Lambda = 0.23$, $F_{(2,21)} = 35.22$, $p < 0.0001$, $\eta_p^2 = 0.77$) reflecting the well known effect of PPI to increase with rising SOA and showing the maximal magnitude at 120 ms (Braff et al., 2001b). The main effect of prepulse intensity did not reach significance ($\Lambda = 0.87$, $F_{(1,22)} = 3.42$, $p = 0.08$, $\eta_p^2 = 0.13$) although illustrating that stronger prepulses (i.e., 85 dB) tended to induce greater levels of PPI than weaker prepulses (i.e., 78 dB; Braff et al., 2001b).

There was a main effect of sleep condition on PPI ($\Lambda = 0.59$, $F_{(1,22)} = 15.54$, $p = 0.001$, $\eta_p^2 = 0.41$) demonstrating a reduction of PPI with SD (Fig. 3). Furthermore, the interaction of sleep condition $\times$ SOA was significant ($\Lambda = 0.59$, $F_{(2,21)} = 7.22$, $p = 0.004$, $\eta_p^2 = 0.41$). Bonferroni-corrected *post hoc* comparisons revealed that the decrement of PPI by SD was formally significant for 30 ms SOA ($p = 0.01$) and 60 ms SOA ($p < 0.0001$), but not for 120 ms SOA ($p = 0.12$).

The interaction of sleep condition $\times$ SOA $\times$ prepulse intensity was not significant ($\Lambda = 0.89$, $F_{(2,21)} = 1.29$, $p = 0.30$, $\eta_p^2 = 0.11$). There was neither a main effect of order ($F = 1.11$, $p = 0.30$), nor any further significant interactions (all $F < 2.29$, all $p > 0.14$).

PSI

PSI scores are depicted in Figure 4. For the subscales perceptual distortion ($\Lambda = 0.72$, $F_{(1,22)} = 8.77$, $p = 0.01$, $\eta_p^2 = 0.28$), cognitive disorganization ($\Lambda = 0.55$, $F_{(1,22)} = 18.16$, $p = 0.0003$, $\eta_p^2 = 0.45$), and anhedonia ($\Lambda = 0.71$, $F_{(1,22)} = 9.14$, $p = 0.01$, $\eta_p^2 = 0.29$), there were interaction effects of sleep condition and time of measurement. *Post hoc* tests, as expected, revealed that PSI scores did not differ between conditions at the evening (baseline) measurements (all $p > 0.16$) but showed increases with SD in morning measurements (perceptual distortion: $p = 0.02$, cognitive disorganization: $p < 0.0001$, anhedonia: $p = 0.003$; Fig. 4). The increase of psychosis-like symptoms after SD was further illustrated by significant *post hoc* comparisons of the morning and evening measurements within the SD condition (perceptual distortion: $p = 0.006$, cognitive disorganization: $p < 0.0001$, anhedonia: $p < 0.0001$; Fig. 4).

Correlations between PPI and PSI change scores

There were no significant correlations between the PPI and PSI change scores (all $r > -0.3$, all $p > 0.05$).

Discussion

This proof-of-concept study investigated whether a night of total SD leads to deficits in PPI and increases in psychosis-like symptoms in healthy human volunteers. PPI was significantly decreased in the SD condition compared with the normal night condition, in agreement with evidence from rodent studies (Frau et al., 2008; Liu et al., 2011). Importantly, no effects of SD were observed for startle reactivity and habituation measures (i.e., no effects of SD for PA amplitudes were observed). Specifically, our pattern of results indicates that the SD-induced reduction of PPI stemmed from larger prepulse–pulse amplitudes rather than from decreased PA amplitudes, indicating true sensorimotor gating deficits following SD. Moreover, effect sizes of the SD-induced disruption of PPI were large, indicating a robust effect. We also replicated basic findings concerning the PPI phenomenon that are in line with previous studies (Braff et al., 2001b): startle reactivity was initially high and showed habituation across blocks, PPI increased with rising SOA with a maximal magnitude of inhibition at 120 ms, and stronger prepulses tended to induce greater levels of PPI.

The present results showed that SD led to an overall disruption of PPI suggesting that SD decreased PPI across all prepulse intervals. This strong main effect indicates that SD might be an alternative method to the approach to pharmacologically induce deficits in PPI in healthy volunteers. For instance, while the glu-

tamatergic NMDA receptor antagonist ketamine demonstrated PPI-disruptive effects in rodents (Braff et al., 2001b), in healthy humans no effect (van Berckel et al., 1998; Duncan et al., 2001) or even PPI-increasing effects of ketamine (Abel et al., 2003) have been observed. Oranje et al. (2002) also found that ketamine alone did not disrupt PPI in healthy humans, although the combination of ketamine and haloperidol led to deficits in PPI. These results on ketamine exemplarily demonstrate that pharmacological findings in animals are not always easily transferable to humans. Thus, although cross-species translational drug studies of PPI remain important, it is of paramount importance to further pursue alternative cross-species models of psychosis such as SD.

Our results also revealed that the SD-induced disruption of PPI was stronger for the 30 and 60 ms prepulse intervals than for the 120 ms interval. These data suggest that acoustic PPI at short prepulse lead times (i.e., SOAs of 30 and 60 ms) might be more strongly affected by SD than PPI with a prepulse lead time of 120 ms which has been shown to be susceptible to attentional modulation (Li et al., 2009). In healthy humans, directing attention to the prepulse signal enhances PPI (Li et al., 2009), whereas attentional modulation of PPI is abnormal in schizophrenia patients (Dawson et al., 1993; Hazlett et al., 1998; for review, see Li et al., 2009) and individuals with schizotypal personality disorder (Hazlett et al., 2003). Inhibition of the acoustic startle reflex at the 60 ms prepulse interval might actually be regulated at the boundary between automatic and attentionally sensitive inhibition (Swerdlow et al., 2006) and this transitional zone between unconscious and consciously accessible processing may also be an epoch of particular vulnerability to disruption (Swerdlow et al., 2006). The 60 ms PPI is also most consistently deficient in schizophrenia (Swerdlow et al., 2006, 2014; Aggernaes et al., 2010) further underlining the susceptibility of this point in time in information processing.

Using the attention-to-prepulse paradigm (Hazlett et al., 2001) or a tactile PPI paradigm (Kumari et al., 2007a), functional magnetic resonance imaging (fMRI) studies in humans revealed that (as in rodents) a frontal-striatal-thalamic (FST) circuitry underlies PPI. In addition, another fMRI study investigating FST circuitry during an attention-to-prepulse paradigm revealed that this neural circuitry is aberrant in schizophrenia-spectrum patients (Hazlett et al., 2008). So far, it is unknown which structures of the FST circuitry underlying PPI are affected by SD; however, it is likely that all FST regions are affected by SD as illustrated by the following molecular imaging studies of SD.

In healthy humans, glucose metabolism of the prefrontal and parietal cortices and of the thalamus decreased at 48 and 72 h SD (Thomas et al., 2003), the same areas that showed decreases at 24 h SD (Thomas et al., 2000). Similarly, 29–34 h SD in healthy humans also decreased glucose metabolism of the frontal cortex, the thalamus, and the striatum (Wu et al., 2006). Furthermore, Volkow et al. (2008) demonstrated that 1 night of SD in healthy humans led to a reduction in D2/D3 receptors in striatum, suggesting increased dopamine release. Given that pharmacologically induced increases in striatal DA, e.g., by administration of amphetamine, are known to disrupt PPI (Geyer et al., 2001; Swerdlow et al., 2008), it is possible that the effects observed here stem from increased striatal DA. However, there is also evidence of cortical neurotransmitter changes following 1 night of SD in healthy humans, e.g., a global increase in mGluR5 binding (Hefti et al., 2013) and in 5-HT_{2A} receptor binding (Elmenhorst et al., 2012). Overall, it is likely that SD induces both cortical and subcortical changes involving multiple neurotransmitter changes, which in combination led to the PPI deficit observed here.

In the present study, SD also induced psychosis-like phenomenology: The PSI subscales of perceptual distortions, cognitive disorganization, and anhedonia showed the expected increases after a night of total SD, whereas delusional thinking, mania, and paranoia did not. Our results regarding these self-reports thus suggest that one night of SD induces subclinical, psychosis-like symptoms in the three key symptom domains of schizophrenia, namely hallucinations, thought disorder, and negative symptoms. These increases were of small-to-moderate magnitude. These findings are in line with data by West et al. (1962) who demonstrated that >100 h (i.e., ~5 d) of continuous insomnia must have passed for true psychotic symptoms, such as hallucinations, to emerge. Interestingly, evidence of delusions and paranoia did not emerge in our sample. Again, earlier studies (Berger and Oswald, 1962; Luby et al., 1962) observed full-blown delusions in healthy individuals after lengthier SD periods (of ~100 h). Finally, we did not find any significant correlations between PSI and PPI change scores. This lack of covariation indicates that SD led to different reaction profiles in different individuals despite overall main effects, suggesting the operation of interindividual factors in the response to the intervention.

There are some limitations of our study that deserve attention. First, some participants had difficulty falling asleep in the unfamiliar bed in the sleep laboratory. Thus, actual sleep duration of a normal night in the laboratory might not have been the same as a normal night's sleep at home. Future studies might want to add a familiarization session in which participants sleep one additional night in the laboratory before the actual sleep testing session. Second, future studies should also assess mood and anxiety before and after SD as anxiety levels might influence startle reactivity and/or PPI (Ludewig et al., 2002b) and as SD is known to lead to affective changes as well (Kahn-Greene et al., 2007). Third, we tested our participants in the morning following SD. Future studies might want to aim for additional, later test sessions as SD-induced deficits might become more pronounced over time.

In conclusion, we demonstrated that SD induced sensorimotor gating deficits and elevated self-reported psychosis-like experiences in healthy humans. Extending previous rodent work, we conclude that SD, in combination with the PPI biomarker, might be a promising translational surrogate model for psychosis as this method represents a possibility to partially and reversibly mimic the pathogenesis of psychotic states.

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Sleep Deprivation, Psychosis and Mental Efficiency

Mar 1, 1998

By Stanley Coren, PhD

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Today, average young adults report sleeping about seven to seven and one-half hours each night. Compare this to sleep patterns in 1910, before the electric lightbulb, the average person slept nine hours each night. This means that today's population sleeps one to two hours less than people did early in the century.

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Today, average young adults report sleeping about seven to seven and one-half hours each night. Compare this to [sleep patterns in 1910](#), before the electric lightbulb, the average person slept nine hours each night. This means that today's population sleeps one to two hours less than people did early in the century (Webb and Agnew, 1975).

Because of the advent of the lightbulb, people sleep 500 hours less each year than they used to. Unfortunately, our current "sleep diet" is significantly less than evolution intended. Most other primates (e.g., apes and monkeys) have a 24-hour sleep and activity cycle that is similar to that of humans who live in cultures where

16 15 14 13 12 11 10 9 8 7 6 5 4 3 2 1

10h

sleep in the mid-afternoon, with a daily sleep total of about 10 hours. Humans seem to naturally need about the same amount of sleep. For instance, when the pressure of work, alarm clocks, social schedules and advanced technology is removed, people tend to sleep longer. Thus, in many less industrialized societies, the total daily sleep time is still around nine to 10 hours as it is for people when they are on unstructured holidays (Coren, 1996a).

Confirmation of these [natural sleep](#) durations comes from Palinkas, Suedfeld and Steel (1995). These researchers spent a summer above the arctic circle where there is continuous light 24 hours a day. All watches, clocks and other timekeeping devices were removed, and only the station's computers tracked the times that the team went to sleep and awakened. Individual researchers did their work, and chose when to sleep or wake according to their "body time." At the end of the experiment, they found that their overall average sleep daily time was 10.3 hours. Every member of the team showed an increase in sleep time, with the shortest logging in at 8.8 hours a day, and the longest almost 12 hours a day. This study, like many others, seems to suggest that our biological need for sleep might be closer to the 10 hours per day that is typical of monkeys and apes living in the wild, than the 7 to 7.5 hours typical of humans in today's high-tech, clock-driven lifestyle.

Psychological researchers have tended to minimize the effects of sleep insufficiency, acknowledging that society may be getting too little sleep, but treating the effects of this sleep deprivation as nothing more significant than an inconvenience which makes people feel a bit tired now and then.

This view is incorrect. Recent research suggests that each day with insufficient sleep increases our sleep debt and, when this sleep debt becomes large enough, noticeable problems appear (Coren, 1996a). These sleep-debt-related problems are most predictable at certain times of the day. This is because the efficiency of our physical and mental functions show cyclic increases and decreases in the form of circadian rhythms. While our major sleep/wakefulness rhythm has a cycle length of roughly 24 hours, there are shorter cycles as well, with the most important of these being a secondary sleep/wakefulness cycle that is around 12 hours.

Because of these cycles, the pressure to fall asleep is greatest in the morning, between 1 and 4 a.m. In addition there is a less pronounced, but still noticeable, increase in sleepiness 12 hours later, between 1 and 4 p.m. It is this afternoon low point that makes you feel sleepy after lunch, not the meal that you may have just eaten. It probably also was the original reason for the afternoon nap or siesta.

People who are operating with a sleep debt are less efficient, and this inefficiency is

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most noticeable when the circadian cycle is at its lowest ebb. Among the common consequences of a large sleep debt are attentional lapses, reduced short-term memory capacity, impaired judgment and the occurrence of "microsleeps."

A microsleep is a short period of time, usually between 10 seconds to a minute in length, in which the brain actually enters a sleep state, regardless of what the person is doing at the time. The affected individual often does not know that this momentary blackout has occurred. The effects of these microsleeps combined with attentional lapses, however, can be dramatic.

There is now evidence that many major disasters have been due to sleep-debt related effects. The evidence shows that these include the oil spill of the Exxon Valdez, the nuclear accidents at Chernobyl and Three Mile Island, and the loss of the space shuttle Challenger (Coren, 1996a).

In fact, our societal sleep debt is so great that simply losing one additional hour of sleep due to the spring shift to daylight savings time can increase traffic accident rates by 7% (Coren, 1996b) and death rates due to all accidents by 6.5% (Coren, 1996c).

When sleep deprivation becomes great enough, the effects mimic those of psychosis. The failure of the scientific world to recognize this is due to some extent to the folklore that has grown up around the sleepless marathon of high school student Randy Gardner in 1964.

To gain an entry into the Guinness Book of World Records, he remained awake for 264 hours (11 days). Summaries of this case usually report that Gardner suffered no hallucinations, no paranoia or other negative mood changes, and that his mental, motor and sensory abilities were quite good throughout the entire episode. This conclusion is so widespread that it has now become a stock "fact" presented in virtually any psychology or psychiatry book that has a chapter on sleep.

This conclusion seems to be based on two items of information. The first was the observation that there were no obvious lasting physical or mental problems encountered by Gardner when he began to sleep again. The second was based upon observations of researcher William Dement (Dement, 1992), who interviewed Gardner on Day 10 of the experiment. He reported that he took Gardner to a restaurant and then played pinball with him, noting that Gardner played the game well and even won. Lt. Cmdr. John J. Ross of the U.S. Navy Medical Neuropsychiatric Research Unit in San Diego, who was called in by Gardner's worried parents to monitor his condition, tells a quite different story (Ross, 1965). Gardner's symptoms that Ross reported included:

- Day 2: Difficulty focusing eyes and signs of astereognosis (difficulty recognizing objects only by touch).
- Day 3: Moodiness, some signs of ataxia (inability to repeat simple tongue twisters).
- Day 4: Irritability and uncooperative attitude, memory lapses and difficulty concentrating. Gardner's first hallucination was that a street sign was a person, followed by a delusional episode in which he imagined that he was a famous black football player.
- Day 5: More hallucinations (e.g., seeing a path extending from the room in front of him down through a quiet forest). These were sometimes described as "hypnagogic reveries" since Gardner recognized, at least after a short while, that the visions were illusionary in nature.
- Day 6: Speech slowing and difficulty naming common objects.
- Day 7 and 8: Irritability, speech slurring and increased memory lapses.
- Day 9: Episodes of fragmented thinking; frequently beginning, but not finishing, his sentences.
- Day 10: Paranoia focused on a radio show host who Gardner felt was trying to make him appear foolish because he was having difficulty remembering some details about his vigil.
- Day 11: Expressionless appearance, speech slurred and without intonation; had to be encouraged to talk to get him to respond at all. His attention span was very short and his mental abilities were diminished. In a serial sevens test, where the respondent starts with the number 100 and proceeds downward by subtracting seven each time, Gardner got back to 65 (only five subtractions) and then stopped. When asked why he had stopped he claimed that he couldn't remember what he was supposed to be doing.

In many respects Gardner's symptoms were similar to those experienced by a New York disk jockey, Peter Tripp, who endured a 200-hour sleepless marathon to raise money for the March of Dimes. During the course of his ordeal his thoughts became increasingly distorted and there were marked periods of irrationality. By the end of four days he could not successfully execute simple tests requiring focused attention. In addition, he began to have hallucinations and distorted visual perceptions. At one point Tripp became quite upset when he thought that the spots on a table were insects. He thought that there were spiders crawling around the booth and even once complained that they had spun cobwebs on his shoes.

He showed the same increasing moodiness and paranoia that Gardner did. On his last day, a neurologist was called to examine Tripp before sending him home. When Tripp looked up at this doctor in his dark, old-fashioned suit, he had the delusion that the doctor was really an undertaker who was about to bury him alive.

Overtaken with fear, he let loose a scream and bolted for the door. Half-dressed, Tripp ran down the hall with doctors and psychologists in pursuit. He could no longer distinguish the difference between reality and nightmare.

This same pattern of mental deterioration that mimicks psychotic symptoms appears in several more systematic studies of sleep deprivation and extreme sleep debt. Thus, prolonged sleep deprivation does lead to the appearance of serious mental symptoms. In addition, even moderate amounts of sleep deprivation can lead to losses in mental efficiency that can threaten public and personal safety.

(According to a 1995 report by the U.S. Department of Transportation, 100,000 sleep-related traffic accidents claim some 1,500 American lives each year. The National Commission on Sleep Disorders Research has reported that sleep-related accidents, and sleep disorders which impact work productivity, cost the American economy between \$100 and \$150 billion each year-Ed.)

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THE PSYCHOSIS OF SLEEP DEPRIVATION

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"One sort of treatment used for those accused of witchcraft (was) the '*tortura insomniae*.' Of all things in brain disease, calm and regular sleep is most beneficial; yet, under this practice, these half-crazed creatures were prevented, night after night and day after day, from sleeping or even resting. In this way temporary delusion became chronic insanity, mild cases became violent, torture and death ensued. . . ." In these words in 1893 Andrew Dickson White¹ (a former president of Cornell University, Ithaca, N.Y., and professor of history there) gave as clear a description of the effects of prolonged sleep deprivation as anyone might give today. To be sure, he was discussing the effects of prolonged wakefulness upon individuals already presumably deranged. However, as recently emphasized by Bliss *et al.*,² in a paper whose title (*Studies of Sleep Deprivation—Relation to Schizophrenia*) justifies the inclusion of the present paper in this symposium, many clinical psychotic episodes are known to be preceded, if not precipitated, by prolonged insomnia.

The nature of the psychiatric disorder that inevitably follows sleep deprivation of sufficient extent can probably be predicted on the basis of a careful personality study or, in the case of an individual with a previous personality disorder, a careful psychiatric history. For example in one case observed by us, a characteristic picture in which dissociative symptoms were prominent was seen clinically after each of several episodes of sleep deprivation many years apart.³ In our most carefully studied case⁴ with no history of psychiatric disorder obtained, many aspects of the eventual psychotic picture were predicted in advance by a general knowledge of the effects of sleep deprivation and an intensive psychiatric examination including the use of projective tests.

The first laboratory observations on sleep deprivation by Patrick and Gilbert⁵ were reported in 1896, just one year prior to the appearance of White's book. Since that time there seems to have been surprisingly little interest in the possibility of carefully exploring the mental changes produced by sleep deprivation as a technique in experimental psychopathology. Nevertheless the psychopathological picture characteristic of prolonged sleep loss is more predictable than that produced by many other recently employed techniques (that is, lysergic acid diethylamide [LSD]-25; sensory isolation) and the potential implications for research on schizophrenia may actually be greater.

It is not the purpose of this brief paper to review the various studies that have contributed to the literature on sleep loss. However a few studies should be noted in which there was emphasis upon the relationship between duration of sleeplessness and intensity of psychopathology. The classical work of Kleitman,⁶ so precise in other areas, gave relatively little attention to the problem of quantification of psychopathology in sleep loss, and Kleitman's account of his own prolonged vigil, while fascinating, is essentially anecdotal. Tyler

and his co-workers studied many aspects of prolonged wakefulness during World War II; but the summary of psychopathological findings did not appear until nearly 10 years later,⁷ and the relationships are not always clear. One of the most interesting accounts has been given by Lehmann and Koranyi^{8a,b} who deprive 6 chronic schizophrenic patients of sleep for 100 hours, and observed exacerbation of illness and regression, with reappearance of acute symptoms that had not been seen in these cases for several years.

Extensive psychological effects of chronic sleep loss were inferred from accounts given by certain returned prisoners of war following the Korean conflict.⁹ In some cases it appeared that reality testing eventually became severely impaired and that false confessions of germ warfare, elicited after many weeks or months of insufficient sleep, may have been extracted from fliers who were actually psychotic at the time the confessions were signed. In these cases rapid recovery following adequate sleep, with reconstitution and reintegration of ego functions including repression, made subsequent study quite difficult. Frequently the victim himself could not account for his behavior, and rationalizations were evolved.

During the past 6 years definitive studies of sleep deprivation have been undertaken by various workers at the Walter Reed Army Institute of Research, Washington, D.C., under the leadership of D. McK. Rioch and H. L. Williams. Unfortunately for the purposes of this monograph, their observations have rarely exceeded 4 days and nights, and there now seems little doubt that 100 to 120 hours usually marks a turning point, after which gross psychotic manifestations become progressive.

The two sleep-marathon contestants observed at Oklahoma City, Okla., in 1957³ both stayed awake seven days and nights. The radio entertainer studied by us in New York, N.Y., during January 1959 remained awake for more than eight days and nights, as have more recent subjects such as the one described by Luby *et al.*¹⁰ The "fifth day turning point" was seen in all these cases, with some biochemical changes¹⁰ and physiological changes^{4,11} apparently corresponding to the shift in the clinical picture.

From the above it should not be inferred that no significant psychological changes take place during the first 100 hours of wakefulness. There are many, particularly in the perceptual sphere, that have been elegantly measured by the Walter Reed group¹² and recently also by others.¹³ The visual hallucinations alone have been the subject of great interest.^{14,15}

The characteristic psychotic reaction that inevitably accompanies prolonged complete sleep deprivation can perhaps best be described in terms of the natural history of its psychopathological development.

Prodrome

A prodrome develops during the first 4 to 5 days without sleep. This is characterized by a progressive burden of drowsiness and brief lapses of awareness ("microsleeps") that last only 2 or 3 sec.* and may be overlooked. These symptoms are always worse during the "down" phase of the diurnal cycle;

* During microsleeps the electroencephalogram shows a burst of large, slow (3 to 5/sec.) waves, suggesting a tiny seizure or fit of sleep.

that is to say, worse during the subject's normal time for sleeping. At first, during the daytime, there is little change except for a decrease of spontaneous movement of the voluntary musculature. The fine movements of hand and eye decrease, with a resulting increase in steadiness of the hand up to 48 to 72 hours, after which a gross tremor begins to appear. The loss of fine movements in the eye results in an increasing tendency to stare, and illusions (especially of movement, more marked in the periphery of vision) begin to appear as the eye—now lacking fine movement—begins to move in a jerkier fashion.

Bodily sensations of various types grow as the prodrome develops. A sense of tightness around the head—the “pressure band” effect—may lead to the feeling that a hat is being worn when it is not. Tingling sensations in the skin, humming or ringing noises in the ears, decreased sensitivity to discrete stimuli, and other sensory disturbances occur.

The progressive decrements in task performance have been well documented by the Walter Reed group. In brief, emergencies are well handled; and highly mechanical, overlearned, semiautomatic performance holds up to a surprising degree. However, tasks falling between these two extremes are more and more poorly performed. Vigilance is greatly reduced, especially during the night.

By day, attention span shortens, intrusive thoughts become more and more prominent, and fleeting hallucinations of two types begin to occur. The first type, perhaps endoptic in origin, is of high-frequency rhythmical movements of actually stationary objects and, then, of patterned forms: grillwork, networks, reticulations, filigrees, laceworks, cobwebs, rippling water, and geometric designs. The second type resembles hypnagogic phenomena, and consists of brief dreamlike experiences in which total situations are perceived and reacted to.

With all of these phenomena, there is a growing sense of fatigue, weariness, drowsiness, disinterest in the outside world, and a tendency to withdraw. Appetite is not increased, but the desire for oral activity and oral sensation becomes more frequent, and caloric intake may increase if not controlled. The prodromal symptoms continue to be worse at night, and the swing of the diurnal cycle becomes more noticeably effective upon behavior.

Psychosis

The psychotic syndrome appears gradually, usually becoming obvious on the fifth night when gross disturbances of reality testing are seen to persist for increasing periods of time. All of the prodromal characteristics become more pronounced. Hallucinatory experiences become more prolonged and vivid, there is less insight into their nature, and meaning is given to them that confirms ideas of reference and a growing paranoid flavor is seen. Facies become elongated and immobile; the brow is furrowed with the effort to hold open drooping lids during drowsy periods of growing intensity; at such times the subject looks for all the world like a patient having a myasthenic crisis (raising an interesting biochemical point of potential study). During periods of greater alertness there is a hollow-eyed, suspicious stare, so typical that we have

dubbed it "the Mindzenti look," after pictures taken of the tragic cardinal at his trial and public confession of being a spy following a presumed period of prolonged interrogation and sleep deprivation.

As the period of sleep deprivation goes on, periods of overt confusion and clouding of consciousness are seen. Disorientation becomes more frequent and prolonged; first for time, then for place, then for person and, finally, for self. Gross delusional thinking, usually paranoid, becomes increasingly prominent. By night the subject gives a picture resembling a case of toxic delirium, with lucid intervals growing fewer and shorter. By day the picture is more like a case of paranoid schizophrenia, perhaps of the reactive type, with a progressively increasing intensity of psychopathology including suspiciousness, emotional lability, and delusions of reference, grandeur, and persecution.

The total impression is of a progressive disorganization of ego structure, modified by the influence of a 24-hour cycle and, also, by other, briefer periodic influences, perhaps in the range of 90 to 120 min. This is particularly noticeable at night, when a series of gross psychotic episodes may be seen to occur, for all the world like dream episodes during sleep, and very likely reflecting the same basic neurobiological periodicity or rhythm that underlies dreaming.

Recovery. The subject, upon finally falling asleep, is likely to sleep from 12 to 15 hours. During this sleep, dreaming occurs very quickly, and surprisingly often. The impression may be engendered that the subject is catching up on his dreams as well as on his sleep, thus reinforcing the concept that the dreams themselves serve a necessary protective function (C. Fisher), rather than that dreams reflect a certain periodic neurophysiological state of affairs. However, we still prefer to hold to the latter view, regarding dreams as perceptually experienced samples of a continuously ongoing information-processing system: the "preconscious stream" in L. S. Kubie's sense.

Although gross signs of psychotic behavior are unlikely after the first sleep of the normal subject recovering from sleep deprivation, performance of a variety of tasks, and other measures, reflects an impairment that may last one week or 10 days, even if undiscerned by the casual observer or the subject himself.

Discussion

Luby *et al.*¹⁶ discuss possible mechanisms accounting for the sleep-deprivation psychosis in terms of alteration in intracellular energy transport activities in the brain. Certainly there can be no doubt that the electroencephalogram and other bioelectric measures reflect a progressive change in neurochemical activity (always subject to the diurnal cycle) in the sleep-deprived brain. We plan to deal elsewhere⁴ with a theoretical model to account for the phenomena. It has been the purpose of this brief paper to re-emphasize the importance of the psychosis of sleep deprivation as a model mental illness of great interest. The importance of greatly extending explorations in this portion of the field of experimental psychopathology must be obvious. The potential applications of the growing body of information regarding sleep deprivation to clinical research in psychiatry should motivate a wider interest in this work, particularly by those concerned with new approaches to the problem of schizophrenia.

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