

VOLUME FOUR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

L. Casey Manning, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

SAMMIE LOUIS STOKES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000635

APPENDIX

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1 SOLICITOR: Up to five years.

2 MR. SIMS: Five, Your Honor.

3 THE COURT: Is that everything now, those
4 two?

5 MR. SIMS: Yes, sir.

6 THE COURT: All right, Mr. Stokes, it is the
7 sentence of the Court on the criminal sexual conduct
8 first degree, sentence is thirty (30) years in the State
9 Department of Corrections, that is a consecutive sentence.

10 Criminal conspiracy, the sentence is five
11 (5) years, that is also consecutive.

12 Anything else I might have overlooked?

13 SOLICITOR: No, sir, Your Honor, I don't believe
14 so.

15 THE COURT: Good luck to you, Mr. Stokes.
16 I thank everybody for their role in this trial. It's
17 been a long week for everyone and I know everybody is
18 tired and ready to rest and get on home.

19 Sheriff, the defendant is remanded to ya'll's
20 custody.

21
22 END OF TRANSCRIPT.
23
24
25

CERTIFICATE

I, the undersigned, Annette T. Mole, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the above captioned case, relative to appeal, in the Court of General Sessions for Orangeburg County, South Carolina, on the 25th day of October, 1999.

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

FEBRUARY 19, 2000

Annette T. Mole
Court Reporter

Annette T. Mole
14th Circuit Court Reporter
P. O. Box 374

STATE OF SOUTH CAROLINA) IN THE
COUNTY OF ORANGEBURG,) COURT OF GENERAL SESSIONS.
FOR THE FIRST JUDICIAL CIRCUIT

STATE OF S.C.,)
PLAINTIFF,)
- VS -) TRANSCRIPT OF RECORD
SAMUEL LOUIS STOKES,) CASE #98-GS-38-1245 TO 1248
CASE #98-GS-38-1249 TO 1251
DEFENDANT.) ORANGEBURG, S.C.
JANUARY 19, 1999

B E F O R E:

HONORABLE M. DUANE SHULER; JUDGE

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

WALTER L. BAILEY, JR., SOLICITOR
ATTORNEY FOR THE STATETHOMAS R. SIMS, ESQUIRE
VIRGIN JOHNSON, JR., ESQUIRE
ATTORNEYS FOR THE DEFENDANT

KATHI ADDISON
OFFICIAL COURT REPORTER
316 HALLSBOROUGH DRIVE
WEST COLUMBIA, S.C. 29170
(803) 957-3969

EXHIBITS

IDPA
E

(THERE WERE NO EXHIBITS MARKED AT THIS HEARING.)

LASER STOCK FORM FMU

THE CORBY GROUP 1-800-255-5040

LASER STOCK FORM FMU

THE CORBY GROUP 1-800-255-5040

1 THE COURT: ALL RIGHT, SIR.

2 MR. BAILEY: YOUR HONOR, THIS IS STATE VS..
3 SAMUEL LOUIS STOKES. IT'S INDICTMENTS
4 98-GS-38-1245 THROUGH 1251; AND MR. JOHNSON
5 AND MR. SIMS REPRESENT MR. STOKES. AND THE
6 STATE AT THIS TIME IS MOVING FOR AN
7 EVALUATION.

8 THE COURT: ALL RIGHT. IS THIS THE DEATH
9 PENALTY CASE?

10 MR. SIMS: YES, SIR, IT IS.

11 THE COURT: FIRST OF ALL LET ME MAKE SURE -- I
12 JUST RECENTLY APPOINTED MR. SIMS, I BELIEVE,
13 AS COUNSEL IN THIS CASE. I ASSUME -- WOULD
14 YOU MIND JUST GIVING ME YOUR QUALIFICATIONS,
15 SIR?

16 MR. SIMS: YES, SIR. YOUR HONOR, I GUESS --
17 WELL, I'LL GO ALL THE WAY BACK. I GRADUATED
18 FROM LAW SCHOOL IN '78; LICENSED TO PRACTICE
19 LAW IN MISSISSIPPI; MOVED TO SOUTH CAROLINA;
20 LICENSED TO PRACTICE IN THE STATE OF SOUTH
21 CAROLINA SINCE 1980. WAS IN THE SOLICITOR'S
22 OFFICE FROM '82 UP UNTIL '93 WHERE I DID MAJOR
23 CRIMINAL PROSECUTIONS AND HAVE DONE AND
24 COMPLETED DEATH PENALTY CASES. AND, AS A
25 MATTER OF FACT, JUST COMPLETED ONE IN

LASER STOCK FORM FNU

THE CORBY GROUP 1-800-255-5040

1 SEPTEMBER OF '98.

2 THE COURT: YOU'VE TRIED HOW MANY DEATH

3 PENALTY CASES?

4 MR. SIMS: AS A PROSECUTOR?

5 THE COURT: YES, SIR.

6 MR. SIMS: I THINK I DID SIX OR SEVEN.

7 THE COURT: AND THEN SEVERAL AS DEFENSE

8 ATTORNEY?

9 MR. SIMS: YES, SIR; AND SEVERAL AS DEFENSE

10 COUNSEL.

11 THE COURT: MR. JOHNSON, TELL ME ABOUT YOUR

12 EXPERIENCE.

13 MR. JOHNSON: YOUR HONOR, I'M VIRGIN JOHNSON.

14 I PRACTICED LAW DOWN IN THE FOURTEENTH

15 JUDICIAL CIRCUIT BEFORE I MARRIED AND CAME T

16 ORANGEBURG. I'VE DONE EXTENSIVE WORK. I'VE

17 WORKED FOR THE -- EVEN BEFORE I WENT TO LAW

18 SCHOOL I WORKED FOR THE SOLICITOR'S OFFICE.

19 LEFT THERE AND WENT TO WORK FOR THE PUBLIC

20 DEFENDER. AND I'VE DONE CRIMINAL WORK ON TO

21 OF CRIMINAL WORK FOR THE LAST TEN YEARS. AS

22 MATTER OF FACT, FOR A LONG TIME MOST OF MY

23 PRACTICE WAS CRIMINAL WORK. THIS IS MY FIRS

24 DEATH PENALTY CASE, BUT I'VE DONE AN EXTENST

25 AMOUNT OF CRIMINAL WORK AND CRIMINAL TRIALS.

1 THE COURT: AND FELONY EXPERIENCE; YOU'VE GOT
2 FIVE YEARS?

3 MR. JOHNSON: YES, SIR; TEN YEARS.

4 THE COURT: WELL, I'M NOT -- I PROBABLY NEED
5 TO LOOK AT THAT RULE, BUT IT MAY BE THAT I'M
6 GOING TO ASK MR. SIMS TO SIT AS LEAD COUNSEL
7 IF YOU'VE GOT THE DEATH PENALTY -- I'M NOT
8 SURE HOW THAT RULE WORKS. I PROBABLY NEED TO
9 LOOK AT IT. I DON'T THINK IT'S GOING TO MAKE
10 ANY DIFFERENCE AS A PRACTICAL MATTER. YOU ALL
11 ARE GOING TO WORK TOGETHER. BUT, I MEAN, I
12 ,DON'T WANT TO VIOLATE ANY RULES.

13 MR. JOHNSON: YOUR HONOR, I WOULD CONSENT,
14 YOUR HONOR; I WOULD CONSENT.

15 THE COURT: MR. SIMS, DO YOU HAVE A PROBLEM?
16 I MEAN, LIKE I SAY, IT'S SIX OF ONE AND A HALF
17 DOZEN -- I KNOW I'M ON SOLID GROUND IF I DO
18 THAT.

19 MR. SIMS: NONE, YOUR HONOR.

20 THE COURT: ALL RIGHT, SIR. WELL, WHY DON'T
21 WE JUST NAME YOU, THEN, AS THE LEAD SIMPLY
22 BECAUSE YOU'VE HAD THAT DEATH PENALTY
23 EXPERIENCE. AND THEN MR. JOHNSON, OF COURSE,
24 CAN -- AND I'M SURE HE WILL -- HELP YOU
25 TREMENDOUSLY. ALL RIGHT, SIR, NOW YOU'RE

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1

ASKING THE SOLICITOR FOR A MENTAL EVALUATION?

2

MR. SIMS: YES, SIR, YOUR HONOR.

3

THE COURT: DO YOU HAVE A PROBLEM WITH THAT,
SIR?

4

5

MR. SIMS: YOUR HONOR, WE HAVE HAD THE

6

OPPORTUNITY TO TALK WITH OUR CLIENT BRIEFLY

7

THIS MORNING AS IT RELATES TO AN EVALUATION.

8

AND HE'S INFORMED US THAT HE WILL NOW CONSENT

9

TO THE EVALUATION. SO WE WILL CONSENT TO THE

10

EVALUATION WITH THE STIPULATIONS THAT WE HAD

11

TALKED ABOUT IN CHAMBERS IN TERMS OF THE USE

12

OF THAT REPORT AND WHAT PART OF THAT REPORT,

13

OF COURSE, MAY BE USED.

14

THE COURT: IN OTHER WORDS, WHAT YOU'RE

15

CONCERNED WITH IS THAT IN THEIR QUESTIONS OF

16

HIM IN THE EVALUATION THEY MAY ASK HIM CERTAIN

17

THINGS THAT HAVE TO DO SPECIFICALLY WITH THE

18

CRIME THAT HE'S CHARGED WITH. AND IF HE GIVES

19

AN ANSWER, YOU ALL ARE AFRAID THAT THE STATE

20

MAY USE THAT AGAINST HIM AT TRIAL AND SO

21

FORTH. AND THAT'S WHAT YOU'RE AFRAID OF?

22

MR. SIMS: YES, SIR.

23

THE COURT: BUT OTHER THAN THAT, YOU DON'T

24

MIND HIM HAVING THE EVALUATION, OBVIOUSLY, FOR

25

YOUR -- FIRST FOR HIS PROTECTION, OBVIOUSLY --

1 AND THEN OF COURSE FOR YOUR OWN. I DON'T HAVE
2 ANY PROBLEM WITH THE EVALUATION. I THINK IT'S
3 ABSOLUTELY NECESSARY REGARDLESS OF WHETHER YOU
4 EVEN THINK HE NEEDS ONE. I STILL THINK IT'S
5 NECESSARY TO HAVE IT WITH THE UNDERSTANDING,
6 OF COURSE, THAT THE STATE WOULD NOT BE ABLE TO
7 USE ANY OF THE INFORMATION GATHERED FROM HIM.
8 IF HE COOPERATES, THEY WILL NOT USE THAT
9 AGAINST HIM AT TRIAL. THE QUESTION, THOUGH,
10 BECOMES -- AND I'M NOT -- ARE YOU ALL PLANNING
11 TO BE THERE WHEN HE'S EXAMINED, ONE OR BOTH OF
12 YOU?

13 MR. SIMS: ONE OR BOTH OF US WILL BE THERE,
14 YOUR HONOR.

15 THE COURT: WELL, I THINK IF YOU ALL ARE
16 THERE, THERE IS NO LIKELIHOOD THAT THERE WILL
17 BE ANY PROBLEM. THE ONLY THING THAT CONCERNS
18 ME SOMETIMES IS THAT EVEN IF THEY ASK A
19 QUESTION AND YOU KNOW THAT HIS ANSWER WOULD
20 NOT BE USED, THE STATE MAY TAKE HIS ANSWER AND
21 GET SOME OTHER INFORMATION. SO THAT'S A
22 PROBLEM THAT YOU RUN INTO. YOU'RE OPENING A
23 DOOR A LITTLE BIT, BUT THEY'VE GOT TO HAVE,
24 AND THEY'RE ENTITLED, TO AN EVALUATION. AND
25 HE NEEDS ONE AND IS ENTITLED TO ONE. IF YOU

1 ALL WILL BE THERE, ONE OR BOTH, THEN I DON'T
2 THINK THAT THERE WILL BE A PROBLEM WITH THAT.
3 MR. SIMS: YOUR HONOR, WHEN YOU MENTION THAT,
4 THERE MAY BE ONE OTHER QUESTION BECAUSE THERE
5 MAY BE SOME CONFLICT WITH WHAT THE DOCTOR
6 WANTS TO ELICIT AND WHAT WE AS LAWYERS SITTING
7 THERE OBSERVING THIS EVALUATION MAY WANT TO
8 ALLOW HIM TO ANSWER.

9 THE COURT: I KNOW. THAT'S WHAT I'M SAYING.
10 YOU'RE GOING TO HAVE TO ADVISE HIM. YOU'RE
11 GOING TO HAVE TO STOP AND ADVISE HIM; AND YOU
12 MAY HAVE TO TELL THE DOCTOR, "YOU KNOW HE'S
13 WILLING TO COOPERATE, BUT I'M NOT WILLING FOR
14 HIM TO ANSWER THIS PARTICULAR QUESTION. IF
15 YOU COULD ASK IT THIS WAY; IF THAT WILL HELP
16 YOU TO ASK IT THAT WAY, I CAN TELL HIM TO
17 ANSWER IT THAT WAY." I MEAN, THAT'S THE THING
18 THAT YOU'RE GOING TO HAVE TO BE THERE FOR.

19 MR. SIMS: YES, SIR.

20 THE COURT: AND THEN I THINK IT WORKS
21 SMOOTHLY. OTHERWISE, YOU'RE JUST SORT OF
22 THROWING HIM OUT THERE, AND HE DOESN'T KNOW.
23 HE WANTS TO COOPERATE ON THE ONE HAND, AND
24 THEN, YOU KNOW, HE DOESN'T. THERE WON'T BE
25 ANY QUESTIONS ASKED, I DON'T THINK, IF YOU ALL

1 WILL GO AND DO THAT FOR HIM.

2 MR. SIMS: THANK YOU.

3 MR. BAILEY: THANK YOU, YOUR HONOR. WE'D LIKE
4 THE RECORD TO REFLECT THAT MR. STOKES IS
5 PRESENT.

6 THE COURT: MR. STOKES IS PRESENT HERE THIS
7 MORNING, AND I UNDERSTAND THAT THEY'VE TALKED
8 TO HIM AHEAD OF TIME. HE'S BEEN HERE IN THIS
9 HEARING.

10 MR. SIMS: YES, SIR.

11 MR. BAILEY: THANK YOU, YOUR HONOR.

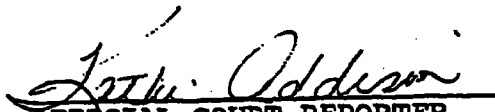
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14 * * *END OF TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, THE UNDERSIGNED KATHI W. ADDISON, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD IN THE TRIAL OF THE CAPTIONED CASE IN THE COURT OF GENERAL SESSIONS IN ORANGEBURG COUNTY, ON THE 19TH DAY OF JANUARY, 1999.

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

FEBRUARY 3, 1999


OFFICIAL COURT REPORTER

MY COMMISSION EXPIRES: 2/23/2008

1 STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

2 COUNTY OF ORANGEBURG

3
4 THE STATE

: TRANSCRIPT OF RECORD

5 -vs-

: October 14, 1999

: St. Matthews, South Carolina

6 SAMUEL LOUIS STOKES

:
: Case Numbers: 98-GS-38-1245,
7 : 98-GS-38-1246, 98-GS-38-1247,
8 : 98-GS-38-1248, 98-GS-38-1249,
: 98-GS-38-1250, 98-GS-38-1251

9
10 B E F O R E:

11 THE HONORABLE PAUL M. BURCH, JUDGE

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

14 WALTER BAILEY, SOLICITOR
15 CHRIS MURPHY, ASST. SOLICITOR
Attorneys for the State

16 THOMAS RAY SIMS, ESQ.
17 VIRGIN JOHNSON, JR., ESQ.
Attorneys for the Defendant

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19 TIMOTHY L. NICHOLAS
20 Circuit Court Reporter

21

22

23

24

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
S-1	Miranda form	3	
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1 THURSDAY, OCTOBER 14, 1999

2 (Miranda form marked as State's Exhibit Number 1
3 For Identification.)

4 (Microcassette marked as State's Exhibit Number 2
5 For Identification.)

6 (Cassette marked as State's Exhibit Number 3 For
7 Identification.)

8 (Transcription report marked as State's Exhibit
9 Number 4 For Identification.)

10 (Handwritten letter marked as State's Exhibit
11 Number 5 For Identification.)

12 (Rights form marked as State's Exhibit Number 6 For
13 Identification.)

14 (Contact Initiation form marked as State's Exhibit
15 Number 7 For Identification.)

16 (Typed letter entitled "Defendant Affidavit" marked
17 as State's Exhibit Number 8 For Identification.)

18 THE COURT: Good morning, everyone. I'm Paul
19 Burch, for those of you who don't know me. I'm assigned to
20 handle The State versus Stokes matter. Thank you,
21 everybody, for adjusting their schedule so we could go
22 ahead and have this motions hearing this morning.

23 All right. We'll go straight to work. The only
24 question I have, before we get into the actual roster of
25 motions, any jury matters you all are aware of that we may

1 take care of?

2 MR. SIMS: Your Honor, there was one question as it
3 relates to the jurors, and that was giving the Clerk the
4 authority to make certain excuses. I have -- my client has
5 signed that. I believe I've shown it to Mr. Bailey, and we
6 need your signature.

7 THE COURT: Okay. I sure appreciate you all doing
8 that.

9 MR. SIMS: We received this morning the rap sheets
10 that the State has run on all the jurors, your Honor, so I
11 believe that would be the only other issue that we would
12 raise as it relates to the jury, that we would have the
13 same information regarding the background, in terms of
14 criminal prosecutions, of any or all the jurors.

15 THE COURT: All right.

16 MR. BAILEY: Your Honor, I hadn't finished going
17 through all -- the jury questionnaires are still coming in,
18 and some of these people, I'm sure Mr. Sims and I can agree
19 on that might have vacation schedules or something, and if
20 we can agree on that, if we can just inform the Clerk, we
21 have no -- no opposition to that juror being released.

22 MR. SIMS: That's fine with me, your Honor. As a
23 matter of fact, in the order that the Court had just
24 signed, it did give the Clerk the opportunity to make that
25 determination. If there were long-standing vacation plans,

1 people had already put down money for those vacations, then
2 they would be excused, and I have explained that to my
3 client, that that is one of the considerations that we had
4 made.

5 THE COURT: All right; very good.

6 MR. SIMS: Your Honor, I don't know how you want to
7 do this. I gave the Court a -- a -- a roster of motions.
8 I don't know whether we want to go through those first or
9 whether we want to do -- I know one of them is the
10 Jackson v. Deno, where we question the admissibility of the
11 statement which was given by my client. We want to do that
12 first and then go to the other motions. I don't know how
13 the Court -- I can do it either way.

14 We can just start with our original motion, which
15 is Number 1, the motion to suppress statement; that is it,
16 the motion to suppress statements that were made out of the
17 presence of counsel. That would be our Motion Number 1
18 that we would raise this morning.

19 THE COURT: Take them as we come to them?
20 Everybody comfortable with that?

21 MR. BAILEY: Yes, sir; that's fine, Judge.

22 MR. SIMS: Your Honor, at this time, that's Number
23 1, Motion Number 1, motion to suppress the statements
24 absent the presence of counsel. There were basically two
25 statements which were given.

1 One was, I believe, right after my client was
2 arrested. There is a tape recording of that that I've had
3 the opportunity to listen to. And another one was a
4 statement that was written by my client that they propose
5 to use in their case as it relates to admission by my
6 client. We would ask the Court to suppress that statement,
7 and we'd ask for the Court to proceed with the
8 Jackson v. Deno hearing at this point.

9 THE COURT: All right.

10 MR. BAILEY: Your Honor, the State would first call
11 Clark Whetstone.

12 (Whereupon, the witness was duly sworn.)

13 THE COURT: All right, sir. You may be seated.

14 MR. BAILEY: Indulge me one second, please.

15 CLARK WHETSTONE, being first
16 duly sworn, testified as follows:

17 DIRECT EXAMINATION BY MR. BAILEY:

18 Q Would you give the Court your full name, please?

19 A Clark Whetstone.

20 Q And you're employed as a detective with Orangeburg
21 County Sheriff's Office?

22 A Yes, sir.

23 Q All right, sir. And calling your attention to May
24 the 28th, were you and several other detectives together at
25 a location in Orangeburg County, [REDACTED]?

1 A Yes, sir.

2 Q All right, sir. And, at that point in time, did
3 you and the other deputies enter the house?

4 A Yes, we did.

5 Q And who was the occupant of the house, or who were
6 you -- what -- what was your -- your reason for being at
7 that address at that particular time?

8 A We had an arrest warrant for Pattie Syphrett.

9 Q Okay. And the address, [REDACTED], was that her
10 address or one of her addresses?

11 A Yes, sir.

12 Q Okay. And based on information given by Ms.
13 Syphrett, did you place anyone under arrest inside the
14 house?

15 A Yes, we did.

16 Q And who was that?

17 A Samuel Louis Stokes.

18 Q Okay. And where was Mr. Stokes when you placed him
19 under arrest?

20 A He was in a rear bedroom.

21 Q Okay. And, for the record, can you point him out?

22 A He's the gentleman sitting at the table in the
23 orange.

24 Q Okay. Now, I want to call your attention to June
25 the 2nd, 1998, at about 10:40 a.m. and ask whether or not

1 you had the occasion to see Samuel Stokes.

2 A Yes, I did.

3 Q And had he been in jail between the time that you
4 were present, when he was arrested, and the time we're
5 talking about now, June the 2nd, 1998?

6 A Yes, sir; he was.

7 Q Okay. And where did you see him?

8 A We brought him over from the detention center to
9 our interview room at the Sheriff's office.

10 Q And can you briefly describe that room as far as
11 the furnishings and how it's laid out?

12 A It's an old dispatch room. We use that for our
13 interview room. It's a -- there's an old radio in there,
14 cabinets along the walls, and there's a table in the middle
15 of the room, with several chairs.

16 Q Okay. And what do you recall Mr. Stokes'
17 appearance and demeanor?

18 A He just -- he seemed to be fine. He was very
19 polite and cordial.

20 Q All right. Who else was present at that time?

21 A Myself, Detective Emory Rush, and Detective Jack
22 Coleman.

23 Q Okay. And would you state whether or not Samuel
24 Stokes was advised of his Miranda rights?

25 A Yes, he was.

- 1 Q And was that done verbally or in writing?
- 2 A Verbally; and we have a written form that we use.
- 3 Q Okay. And I want to hand you a form that's been
- 4 premarked as State's 1 and ask if you can identify that.
- 5 A Yes. This is our form, with my signature on it.
- 6 Q Okay. Your signature's down there as a witness?
- 7 Is that correct?
- 8 A Yes, sir.
- 9 Q Who filled out the writing on the top of that form?
- 10 A Detective Emory Rush.
- 11 Q Okay. Were you present when he did that?
- 12 A Yes, sir.
- 13 Q Okay. And who actually advised Mr. Stokes of his
- 14 Miranda rights, using that form?
- 15 A Detective Rush.
- 16 Q Were you present when he did that?
- 17 A Yes, I was.
- 18 Q Okay. And there's some check marks to the left on
- 19 each one of the rights. Do you recall who checked those
- 20 off?
- 21 A No, I don't.
- 22 Q Okay. Did -- how -- how did Mr. Rush, in your
- 23 presence, go about advising Sammie Stokes of his Miranda
- 24 rights?
- 25 A Each one of these lines are Lines 1 through 5.

1 What he did was he read each line individually and then
2 asked him if he did understand.

3 Q And what was his response?

4 A "Yes."

5 Q Okay. And, after that, did he sign the
6 Acknowledgement of Miranda Rights?

7 A Yes, he did.

8 Q Did you see him sign it?

9 A Yes, I did.

10 Q And, subsequently, was the Waiver of Rights gone
11 over with him?

12 A Yes, it was.

13 Q Okay. And that, again, by Detective Rush?

14 A Yes, sir.

15 Q Okay. And, after that occurred, did Samuel Stokes
16 sign that down there at the bottom?

17 A Yes, he did.

18 Q Okay. And you witnessed both signatures?

19 A Yes, I did.

20 Q Along with Emory Rush?

21 A Yes, sir.

22 Q Did either you, or Mr. Rush, or Mr. Coleman, or
23 anybody else offer any inducements to Mr. Stokes if he
24 would give you a statement?

25 A No.

1 Q Were any threats or coercion brought to bear
2 against him?

3 A No, sir.

4 Q Did he ask for anything he didn't get, like
5 cigarettes, bathroom?

6 A No, sir.

7 Q Something to drink, something to eat?

8 A No, sir.

9 Q Okay. And, subsequently, did he give you a
10 statement?

11 A Yes, he did.

12 Q Okay. And was that statement taped?

13 A Yes, it was.

14 Q Show you what's been marked as State's Exhibit 2,
15 which is an envelope containing a microcassette tape, and
16 ask if that came out of your file earlier today.

17 A Yes, sir.

18 Q All right, sir. Now when you all -- is that a
19 transcript -- is that the tape that you all took from Mr.
20 Stokes of the interview on June 2, 1998?

21 A Yes, sir.

22 Q Okay. And, when you all take someone's taped
23 statement and use the microcassette tape, what's the
24 practice as far as what -- what you do with that
25 microcassette tape?

1 A What we do is we take the microcassette tape and we
2 give it to our clerical staff to have it transcribed.

3 Q Okay. And do you also get the tape transferred by
4 SLED onto a cassette tape?

5 A Correct.

6 Q And what's the reason you do that?

7 A Because a -- a lot -- of course, the attorneys
8 and -- and other people involved don't have the capability
9 of a microcassette, and it makes it easier for -- for
10 everyone to have the information.

11 Q Okay. Let me hand you State's 3 and ask you if
12 this appears to be the same tape transferred onto a
13 cassette tape.

14 A Yes, it is.

15 Q All right, sir. And you stated that a secretary
16 employed by the Sheriff's office had done the -- had
17 transcribed the tape; is that correct?

18 A Yes, sir.

19 Q Okay. I'm going to hand you State's 4, and see if
20 that appears to be the transcript.

21 A Yes, it is.

22 Q Okay. Now there's some initials on the front page
23 here, and that denotes who was there?

24 A Yes, it does.

25 Q For the record, who -- according to that

1 transcript, who was present when the tape was made?

2 A "E. R." denotes Detective Emory Rush; "J. C."
3 denotes Detective Sergeant Jack Coleman; "C. W." denotes
4 Detective Clark Whetstone; and "S. S." denotes Samuel Louis
5 Stokes.

6 Q All right, sir. Have you been over that
7 transcript?

8 A Yes, sir; I have.

9 Q And have you listened to the tape?

10 A Yes, sir; I have.

11 Q And is that transcript an accurate reflection of
12 what's on the actual tape?

13 A Yes, it is.

14 Q Okay. And are both the tape and the transcript
15 accurate representations of the actual interview ---

16 A Yes.

17 Q --- that occurred on June the 2nd, 1998?

18 A Yes, sir.

19 Q And, to the best of your knowledge, did Samuel
20 Louis Stokes give you, and Mr. Rush, Mr. Coleman that taped
21 interview freely and voluntarily, without any coercion,
22 duress ---

23 A Yes, he did.

24 Q --- or influence? Please answer any questions that
25 Mr. Sims may have for you.

1 CROSS EXAMINATION BY MR. SIMS:

2 Q Detective Whetstone, just a few questions for you.
3 Let me ask you this. Prior to coming to that interview
4 room with you and Detective Rush, was -- wasn't the
5 Defendant taken to the Magistrate first?

6 A I don't recall. I know there was an arraignment.
7 I'd have to look on the calendar. I -- he had an
8 arraignment that following week, but I don't remember what
9 day it was.

10 Q But, even before the arraignment time, isn't it
11 true that he was taken over to the Magistrate, Judge Peggy
12 Davis' office, where the warrants were actually served on
13 him?

14 A I don't recall.

15 Q You don't recall?

16 A No, sir.

17 Q Do you have it in your notes anywhere, because
18 that's very important?

19 A No, sir; I do not.

20 Q Okay. Isn't it the practice, though, that when
21 a -- when a person is arrested, that at that time you would
22 take him over to the Magistrate's office for the -- the
23 warrants to be filled out, served on him, and for him to be
24 brought before that Magistrate at that time? Isn't that
25 the usual practice?

1 A It all depends.. Sometimes the warrants are issued
2 and served at the jail, served in the office, served in the
3 Magistrate's office. It -- it just all depends on the
4 situation.

5 Q But if he -- and you've been before Judge Davis
6 before; is that correct?

7 A Yes, sir.

8 Q And isn't it her practice that when a Defendant is
9 brought before her, that she has a little sheet that she
10 uses, and she goes down that sheet with all of the
11 Defendants that are there? Isn't that correct?

12 A Yes, sir.

13 Q On that sheet, there is a statement which notifies
14 the Defendant that he has the right to an attorney, and
15 that if he cannot afford one, one will be appointed to him
16 by the Court; is that correct?

17 A Yes, sir; she does.

18 Q And that's her standard practice.

19 A She has a checklist; yes, sir.

20 Q Okay. When the Defendant exhibits or -- a desire
21 to have an attorney appointed, she gives him a form that he
22 fills out and has to be presented to the Clerk; isn't that
23 correct? A little form that she has which indicates that
24 he wants an attorney.

25 A No, sir; that is not correct.

1 Q Well, what does she give them?

2 A Basically, she gives them a preliminary hearing
3 form, and the hundreds of times I've been in her office
4 during a bond hearing, she asked them if they would like
5 services of a Public Defender, that they can put their name
6 on a list at the jail. They need to contact the C.O., and
7 they will forward that list to the Clerk of Court.

8 Q Okay. That preliminary hearing form, though, that
9 she gives them has the request for an attorney on it, isn't
10 that correct, where they can either fill it out and ask for
11 the Public Defender, or, if they have their own attorney,
12 then they can put their own attorney's name on their form
13 and send it in, isn't that right, to the Clerk?

14 A Yes, sir; that is correct.

15 Q Okay. So you don't know on that day whether or not
16 he had been taken to Judge Davis prior to being brought
17 into the interview room.

18 A No, sir; I do not.

19 Q Okay. When he got to the interview room, you've
20 indicated that you were there, Detective Emory Rush was
21 there, and Detective Jack Washington was there; is that
22 correct?

23 A Jack Coleman.

24 Q Jack Coleman; I'm sorry. Were not the other
25 Defendants there also?

1 A No, sir.

2 Q Ms. Syphrett wasn't there; Norris Martin wasn't
3 there; Faith Lapp was not there.

4 A No, sir.

5 Q They were not there; he was the only one in the
6 room.

7 A Yes, sir.

8 Q Okay. Prior to being brought there to that room at
9 that time, had he not also had conversation or at least
10 been talked to by Detective Barbara Walters?

11 A Not to my knowledge.

12 Q Not to your knowledge.

13 A No, sir.

14 Q Okay. At the end of that first taped conversation,
15 isn't it true that he told all of you that that's all he
16 had to say?

17 A I'll have to review that.

18 Q Okay. If you could ---

19 A I -- I don't see that on -- would you mind pointing
20 that out to me?

21 Q No. I'm asking you -- I was asking you -- I was
22 asking you whether or not you remembered that or
23 whether or not ---

24 A No; I do not.

25 Q --- is that true what he said.

1 A No; I do not ---

2 Q Okay. Would that be on the microcassette? Because
3 we don't have a copy of the microcassette. We've got a
4 copy of the cassette that came back from SLED. Would --
5 would the microcassette -- you said that you've listened to
6 it.

7 A Yes, sir; I have.

8 Q Does the microcassette contain, in the tape that we
9 were given from SLED, contain all of the same information?

10 A Yes, they do.

11 Q Okay. And it was -- and that transcription that
12 you talked about, from the secretary in the Sheriff's
13 office, contains all of the statements that were made
14 during this taped conversation.

15 A Yes, sir.

16 Q Now, after this first conversation, was he
17 transported back over to the -- to the law complex and
18 complex?

19 A Detention center or ---

20 Q Detention center.

21 A When the interview was concluded, he was taken back
22 to the detention center ---

23 Q Okay. Who -- who took him back?

24 A I don't recall.

25 Q Okay. During the course of the conversation that

1 you, and Jack Coleman, and Emory Rush had with him, do you
2 recall conversations as relates to the fact that everybody
3 else was ganging up on him and trying to make him be the
4 bad guy, or trying to make -- blame everything on him?

5 A Not that I recall. The only thing I remember Mr.
6 Stokes saying -- if the Court will beg my indulgence,
7 I'll -- he said if all of them -- all -- if all them
8 motherfuckers were going to go, he -- if he was going to
9 go, all them motherfuckers were going to go with him.

10 Q And that was a response to the conversation that
11 you or Jack -- Jack, or either Emory had with him, that
12 everybody else was -- was turning on him and making him to
13 be the scapegoat.

14 A I don't -- I don't recall that conversation.

15 Q Well, he didn't just volunteer that to you. That
16 had to be in response to a conversation; isn't that
17 correct?

18 A I don't remember the exact words of the
19 conversation; no, sir.

20 Q But the point I'm making to you, that particular
21 point came up as a result of a conversation that was going
22 on in the room with three detectives and my client, when he
23 indicated that "if they're going to tell on me, then I'm
24 going to say -- I'm not going to go down by myself,"
25 basically, to the -- words to the effect that you gave, not

C. 1530

F. EMORY RUSH - DIRECT EXAM BY MR. BAILEY

20

1 using the vulgarity that you used, but, basically, a
2 very -- he had been told that "if everybody else is going
3 to say that I did it, then I'm not going down by myself;
4 I'm going to tell them what actually happened."

5 A I'm not sure what you're really asking me.

6 Q Well, what I'm asking you is this, Detective
7 Whetstone. He just didn't out of the blue sky, without any
8 question, any prompting, or any conversation whatsoever,
9 say that "I'm not going down by myself; I'm just going to
10 tell on everybody else."

11 A I don't recall.

12 Q Now, as it relates to inducements, isn't it true
13 that one if not all of the people there indicated that he
14 needed to help himself out and that he needed to tell
15 everybody -- tell them what was going on, because everybody
16 was making him to be the bad guy?

17 A I don't recall that conversation.

18 MR. SIMS: That's all I have of this witness, your
19 Honor, at this time.

20 MR. BAILEY: No Redirect, your Honor. Call Emory
21 Rush.

22 F. EMORY RUSH, being first
23 duly sworn, testified as follows:

24 DIRECT EXAMINATION BY MR. BAILEY:

25 Q Mr. Rush, please tell the Court what your

1 occupation is.

2 A Okay. My name's Emory Rush, and I'm a detective
3 with the Orangeburg County Sheriff's Office.

4 Q Okay. How many years you been in law enforcement?

5 A Twenty-nine, sir.

6 Q All right, sir. I want to call your attention to
7 June 2, 1998, at about 10:40 a.m., and ask whether or not
8 you were present with Clark Whetstone and the Defendant in
9 this case.

10 A I was, sir.

11 Q Okay. And, for the record, could you point out the
12 Defendant?

13 A In the orange jumpsuit.

14 Q Okay. And what do you recall Mr. Stokes'
15 appearance and demeanor on that morning?

16 A Mr. Stokes appeared to be calm. He was rational.
17 He understood what was going on, what was happening. He
18 apparently had been in the system long enough to realize
19 that he was in that type situation that he -- he was calm
20 about it.

21 Q All right. And would you state whether or not you
22 gave Samuel Stokes, or Sammie Stokes, his Miranda rights?

23 A I did, sir.

24 Q And in front of you there's State's 1, which is a
25 Miranda form that Mr. Whetstone testified about?

1 A Yes, sir.

2 Q Okay. Is that the form you used when you gave
3 Sammie Stokes his Miranda rights?

4 A Yes, sir.

5 Q All right. And would you just go over that form
6 the same way you did it with Sammie Stokes?

7 A Okay, sir. Mr. Stokes was advised that before we
8 asked him any questions, we were going to advise him of his
9 rights, and I read from this form that we used. It says,
10 "Before we ask you any questions, you must understand your
11 rights." It says, "Please initial beside each sentence.

12 "You have the right to remain silent. Anything you
13 say can be used against you in court. You have the right
14 to talk to a lawyer for advice before we ask you any
15 questions and have him with you during questioning.

16 "If you cannot afford a lawyer, one will be
17 appointed for you before any questioning, if you wish. If
18 you decide to answer questions now, without a lawyer
19 present, you'll -- you'll still have the right to stop
20 answering at any time. You also have the right to stop
21 answering at any time until you talk to a lawyer."

22 Q Okay. After you read those rights to him, there's
23 some check marks beside each one of those rights. Who --
24 who checked those off? Do you recall?

25 A Mr. Stokes. I -- I asked him -- well, you know, we

1 told him about initialing each one, but on this form he
2 checked.

3 Q Okay.

4 A And -- and -- and the latter, on the -- that part,
5 says, "I understand my rights," and it's signed "Sammie
6 Stokes."

7 Q Okay. And you witnessed him signing that?

8 A I did, sir.

9 Q Now, after he signed the Acknowledgment of Rights,
10 did either you, or Mr. Whetstone, or anyone else make any
11 threats to him?

12 A No, sir.

13 Q Did you promise him anything if he would talk to
14 you?

15 A No, sir.

16 Q The Waiver of Rights portion down at the bottom;
17 how did you go over that with him?

18 A Okay, sir. Once he signed the -- that he
19 understood his -- his rights, he was told that -- that
20 before he made any statement or answered any questions, I
21 wanted him to sign a waiver, and I read the waiver to him.

22 It says, "I have read the statement of my rights,
23 and I understand what my rights are. I'm willing to make a
24 statement and answer questions. I do not want a lawyer at
25 this time. I understand and know what I'm doing.

1 "No promises or threats have been made to me, and
2 no pressure or coercion of any kind has been used against
3 me." Again, this is signed "Sammie Stokes."

4 Q Okay. And after he signed that waiver, you and Mr.
5 Whetstone witnessed both signatures; is that correct ---

6 A We witnessed the signature; yes, sir.

7 Q And he then proceeded to give you a taped
8 statement?

9 A Yes, sir.

10 Q Okay. Did -- again, did either you or anyone else
11 make any threats or promises to get him to give you the
12 taped statement?

13 A No, sir.

14 Q Did you -- did he ask for anything that he didn't
15 get?

16 A No, sir.

17 Q All right. And during the period of time that that
18 tape was on, to the best of your knowledge, was what he
19 told you all given freely and voluntarily?

20 A It was ---

21 Q Without any promises?

22 A That's right; yes, sir.

23 Q Okay. And you have that transcript of the tape in
24 front of you? Is that correct? In the small envelope?

25 A Oh, the tape ---

1 Q Microcassette?

2 A Yes, sir.

3 Q Just direct your attention to State's 3, which is

4 the cassette tape?

5 A Yes, sir.

6 Q And 4 is the transcript?

7 A Yes, sir.

8 Q Have you been -- have you listened to those tapes?

9 A I have, sir.

10 Q Have you read over the transcript?

11 A Yes, sir.

12 Q And is the tran -- both tapes and the transcript

13 reasonably accurate representations ---

14 A They are ---

15 Q --- of the actual interview that occurred?

16 A Yes, sir.

17 MR. BAILEY: Your Honor, that's all I have of Mr.

18 Rush at this time. I reserve the right to recall him for

19 subsequent events.

20 CROSS EXAMINATION BY MR. SIMS:

21 Q Detective Rush ---

22 A Yes, sir ---

23 Q --- let me ask you some questions.

24 A Okay.

25 Q Who was all in the room?

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F. EMORY RUSH - CROSS EXAM BY MR. SIMS

26

1 A When we first talked with Mr. Stokes, it was Clark
2 Whetstone, Jack, and myself.

3 Q At any time during this conversation, were the
4 other Defendants ever brought in the room or in proximity
5 to where this conversation or this interrogation was going
6 on?

7 A They would not have been in the room when the --
8 when the interrogation was going on. Whether they were in
9 the -- in the building or not, I -- I don't recall, but I
10 know that they were not in the room with Mr. Stokes when we
11 conducted the interview.

12 Q At any time during this taped interview, was the
13 cassette ever turned off?

14 A It may have been.

15 Q And ---

16 A I -- you know, for whatever reason, I -- I mean, I
17 don't know, but it may have been. I'm not saying it was or
18 was not, but it may have been.

19 Q The right -- reading of the rights and the waiver
20 form, would that be -- also be on that cassette tape?

21 A I don't recall without -- without listening, but --
22 but it may be.

23 Q I thought you said you had listened to the tape ---

24 A Yes, but this -- this -- Mr. Sims, this occurred
25 over a year ago, and we've had a lot of cases since then,

1 and I can't remember every little detail, but if -- if we
2 listen to it, it -- it may be on there; I just don't
3 remember.

4 Q And, so, you don't know whether or not the waiver
5 and the reading of his rights is on that tape.

6 A Without listening to it, again, I -- I -- I don't
7 remember.

8 Q Now, when is the last time you listened to it?

9 A Well, Mr. Sims, let me think; over a year ago.

10 Q So you listened to this tape over a year ago.

11 A Well, actually ---

12 Q When did the cassette come back from SLED?

13 A I can't tell you that. Detective Whetstone is
14 the -- is the case custodian, and he'd have to answer that
15 for you. I'm not sure exactly when they got it back from
16 SLED.

17 Q Did you listen to the cassette when it came back
18 from SLED?

19 A I have listened to it.

20 Q And did you have at your -- have with you at that
21 time the -- the microcassette from the original?

22 A I didn't compare them one beside the other, no.

23 Q So, then, you can't say that the cassette that you
24 got from SLED has the same information that the
25 microcassette which was used on June 2nd of '98. You don't

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F. EMORY RUSH - CROSS EXAM BY MR. SIMS

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1 know whether or not they contain the same information.

2 A Mr. Sims, I can't see SLED altering a tape.

3 Q Well, that wasn't my question. My question was you
4 cannot say that, because you didn't have them there to
5 compare.

6 A No, sir. I'll have to sit down and listen to them
7 again.

8 Q Okay.

9 A Yes, sir.

10 Q Now, at any time during the discussion or -- or
11 conversation, didn't the question come up, or didn't it
12 come up, rather, that the other people, the other
13 co-Defendants, Faith Lapp, Pattie Syphrett, and Norris
14 Martin, were going to testify against Sammie Stokes?

15 A It may have.

16 Q And, during that conversation, isn't it also true
17 that he was told at that time that everybody was pointing
18 the finger at him and making him to be the bad guy, and all
19 of the information was pointing towards him?

20 A May have.

21 Q And, as a result of him being told, One, that all
22 the co-Defendants were talking against him, Two, that they
23 were going to testify against him, Three, that he was going
24 to be the one left holding the bag, isn't that the reason
25 that he made this statement that "if they are all going to

1 testify against me," to the effect that "I'm not going to
2 go down by myself"?

3 A That's not what he said.

4 Q In effect. I don't want to go into the vulgarity
5 of what he said ---

6 A No, sir. I won't go into that, but -- but Mr.
7 Stokes was emphatic about the fact that -- that he -- and
8 his words were -- and Mr. Whetstone was fairly accurate.
9 His words, "Well, I know I'm going to fry, and I'm going to
10 take them with me."

11 Q Is that on the tape?

12 A No, sir. That was in the course of our
13 conversation.

14 Q Well, that's what I'm trying -- that -- so, in
15 effect, that what you're saying that -- when was that
16 statement made?

17 A Sometime during the interview or after the
18 interview, after the statement, from what I recall.

19 Q So, then, there are portions of things that went on
20 in interrogation room which are not on the tape.

21 A There may be. And -- and it may be on the tape;
22 I -- I just don't recall, Mr. Sims. It may be; it may not
23 be. I'd have to listen to the tape again to see, but I
24 think that was said after everything was said and done,
25 getting ready to go back to the -- to the jail, and I think

1 that's when that statement came out from him.

2 Q Is the part on there -- on the tape that he -- when
3 he said to you that that's all he had to say, he wasn't
4 saying any more? Was that on the tape, or is that a part
5 that was done after the -- after the tape?

6 A I don't recall.

7 Q Okay. Do you recall whether or not the
8 Defendant -- whether or not Sammie had been taken to Judge
9 Davis' office prior to the interrogation?

10 A I don't remember.

11 Q Do you know when he was taken to Judge Davis'
12 office?

13 A Without -- without the bond form? No, sir; I --
14 not -- not exactly.

15 Q He was served with a warrant; is that correct?

16 A He was.

17 Q You don't know whether he was served with a warrant
18 prior to your -- your interrogation of him or after his
19 interrogation.

20 A I feel like it -- it was probably prior to. I -- I
21 feel confident it was prior to.

22 Q Okay. So that was prior to your talking to him
23 that afternoon on the -- on the 2nd; is that -- that
24 correct? He would have been -- based upon your testimony,
25 then, he would have been served with that warrant, and then

1 you all would have talked to him after that.

2 A Yeah.

3 Q And you, too, are familiar with Judge Davis; isn't
4 that correct?

5 A Yes, sir.

6 Q And you've been before her on numerous
7 occasions ---

8 A Yes, sir.

9 Q --- when you have brought defendants in, and she
10 goes through her checklist.

11 A That's right.

12 Q And, as a part of that checklist, she does, in
13 fact, ask them if they want an attorney or tell them that
14 they have the right to an attorney.

15 A She -- she basically advises them of the same
16 rights that we did.

17 Q Okay.

18 A That's basically what -- what that form is that she
19 has.

20 Q And she also says that "if you want an attorney and
21 you cannot afford an attorney, one will be appointed for
22 you."

23 A Yeah, and ---

24 Q And she has what's called her preliminary hearing
25 form.

1 A That's right.

2 Q And on that preliminary hearing form is a form that
3 she gives them, and she requests -- I mean, they -- if they
4 want to request an attorney, they have to fill it out and
5 submit it so that an attorney can be appointed.

6 A That's right.

7 Q Isn't it true that on the day -- the time that he
8 was -- that Mr. Stokes was brought before Judge Davis, that
9 he, in fact, was given that form? He, in fact, stated to
10 her that he wanted an attorney.

11 A No, sir. She asked him if -- "if you can afford
12 your own attorney"; their reply is "yes" or "no."

13 Q Yeah.

14 A And -- but whether that was done prior to or after,
15 I don't recall.

16 Q But I believe you just said a few moments ago that
17 you're quite sure that it was done prior to your talking
18 to ---

19 A The service of the warrant.

20 Q Yeah; the service of the warrant ---

21 A Not -- not the appearance in the Magistrate's
22 Court; the service of the warrant.

23 Q So you would serve the warrant, talk to him, and
24 then take him to a Magistrate.

25 A Right.

1 Q I believe you had said something a few moments ago
2 that you -- that Mr. Stokes had been in the system long
3 enough to have known what this was all about; isn't that
4 correct?

5 A Uh-huh.

6 Q And so Mr. Stokes would have known that he had the
7 right to ask for -- ask for an attorney; in fact, would
8 probably ask for an attorney.

9 A If he thought he needed one, yes, sir; I feel like
10 he probably would have.

11 MR. SIMS: That's all I have at this time, your
12 Honor.

13 MR. BAILEY: No Redirect, your Honor.

14 WITNESS: Thank you.

15 MR. BAILEY: Call Wanda Fitzgerald.

16 WANDA FITZGERALD, being first
17 duly sworn, testified as follows:

18 DIRECT EXAMINATION BY MR. BAILEY:

19 Q You are Wanda Fitzgerald?

20 A Yes, sir.

21 Q And where are you employed, Ms. Fitzgerald?

22 A At Orangeburg County Sheriff's Office.

23 Q In what capacity?

24 A I'm the secretary for criminal investigations.

25 Q Okay. What's your educational background?

1 A I'm a college graduate from Winthrop University.

2 Q All right. And, prior to working with the
3 Sheriff's office, what -- what did you do?

4 A A schoolteacher.

5 Q And what subject did you teach?

6 A Early childhood education.

7 Q Okay.

8 A Pre-kindergarten.

9 Q All right. And let me hand you a couple of
10 document -- or one document here. This has been testified
11 as being a transcript, State's 4; and ask whether or not
12 you typed that out.

13 A Yes, sir.

14 Q And I want to hand you State's 2, which is a
15 microcassette tape and ask whether or not you typed the
16 transcript from that tape.

17 A Yes, sir.

18 Q Okay. And how did you go about -- just tell the
19 Court how you went about taking the information from that
20 tape and typing the transcript out.

21 A I'm given a microcassette after the statement's
22 taken, and I write it out. First, I listen to it, and I
23 write it out, and then I type the statement.

24 Q Okay. So you write it out in longhand as you
25 listen to the tape?

1 A Sometimes; yes, sir. Sometimes -- it's according
2 if our computer is free or not.

3 Q Okay. All right. Now, after you type the
4 transcript out, what do you do to ensure whether or not
5 it's an accurate representation of what's actually on the
6 tape?

7 A I go back over it, and I probably listen to it
8 three or four times, and then I take it back to the
9 detective, let them listen to it again, and then I do it
10 one more time before I finally turn it in.

11 Q And did you do all that in this case?

12 A Yes, sir.

13 Q Okay. And would you state whether or not the
14 transcript, which I think is State's 4, is an accurate
15 representation of the actual microcassette tape that you
16 were given by the detective?

17 A Yes, sir.

18 MR. BAILEY: Thank you. Please answer any
19 questions that Mr. Sims may have.

20 CROSS EXAMINATION BY MR. SIMS:

21 Q Ms. Fitzgerald, just a few questions. I believe
22 you said your discipline was that of a teacher?

23 A Yeah.

24 Q If I heard you correct.

25 A Yes, sir.

1 Q Okay. So you -- you went to college, and you got a
2 B.A. degree or a B.S. degree in secondary or elementary
3 education?

4 A Yes, sir.

5 Q Okay. So you've had no formal training to be a
6 court stenographer, or a -- a court reporter, or anything
7 of that nature.

8 A No, sir.

9 Q Okay. Has the Sheriff's Department sent you to
10 school anywhere to certify you as a court reporter or a
11 stenographer?

12 A No, sir.

13 Q Okay. So -- and the method that was used is for
14 you to listen to the tape, and at that point just to write
15 down what you hear.

16 A Write it down or type it out as I'm doing it,
17 whichever way I -- I transcribe; yes, sir.

18 Q And this is in addition to all the other things
19 that you're doing at the same time.

20 A Yes, sir.

21 Q Okay. And there are -- do you -- what kind of
22 equipment do you use, other than just listening to the
23 microcassette?

24 A We have a -- the microcassette tape recorder with
25 the headphones and the foot -- foot pedal.

1 June the 8th, 1998, and ask whether or not you had occasion
2 to see the Defendant, Sammie Stokes.

3 A Yes, sir.

4 Q Okay. And what was your purpose in seeing Mr.
5 Stokes? Were you transporting him somewhere?

6 A It was my job to sit in the rear portion of a
7 patrol car and transport Mr. Stokes ---

8 Q Okay.

9 A --- to the courthouse for a bond hearing.

10 Q All right. And where is the -- where was he
11 transported from?

12 A From the Orangeburg-Calhoun Regional Detention
13 Center ---

14 Q Okay. And ---

15 A --- to the Orangeburg courthouse.

16 Q Okay. And you sat in the back seat with him
17 and ---

18 A Yes, sir.

19 Q --- somebody else drove? Is that correct?

20 A Yes, sir.

21 Q All right, sir. And, for the record, could you
22 point out Sammie Stokes?

23 A Yes, sir; the gentleman in the orange.

24 Q Okay. During that trip to the courthouse or -- let
25 me ask you this. Did you also assist in transporting him

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KENNY KINSEY - DIRECT EXAM BY MR. BAILEY

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1 back from the courthouse to the jail?

2 A Yes, sir; I did.

3 Q Okay. And, during that period of time, either
4 going to the jail -- from the jail or back to the jail, did
5 you engage in any conversation with Sammie Stokes?

6 A He -- he made a statement to me ---

7 Q Can you say "he" -- of course ---

8 A Sammie Stokes.

9 Q Okay.

10 A He made a statement to me. I never conversed with
11 him.

12 Q Okay. What did he say to -- to you?

13 A He tried to hand me a package, an envelope, and
14 asked me if I would give that to Emory. That was his exact
15 words.

16 Q And Emory is Emory Rush?

17 A Yes, sir.

18 Q And did you accept the paper at that time?

19 A No, sir; I didn't at first. I -- I told him, "Just
20 hold onto it," and I would speak with Emory and see if it
21 was all right for me to take it.

22 Q Okay. And did you speak to Emory that day?

23 A Yes, sir; I did ---

24 Q Emory Rush? And, based on instructions from Emory
25 Rush that day, what did you do next?

1 A Detective Rush told me, he said, "Go back and get
2 the letter," and I walked from his office back over to the
3 detention center, and he was still up front, and ---

4 Q Okay.

5 A --- I said, "All right. Emory said if you've got
6 something for him, that I can bring it to him."

7 Q Okay. I'm going to hand you State's 5, and see if
8 this appears to be what was given to you. There's also an
9 envelope attached to it.

10 A Yes, sir. That appears to be the same information.

11 Q All right, sir. And, when Mr. Stokes gave that to
12 you, do you recall any particular conversation at that
13 point?

14 A Do you want me to say the whole -- exactly what he
15 told me?

16 Q What -- whatever you recall.

17 A He said, "Tell Emory this contains everything. If
18 I'm going down, I'm taking the other motherfuckers with
19 me."

20 Q Okay. All right. And, when you received that
21 letter from Sammie Stokes, what did you do with it?

22 A I took it directly to Detective Rush.

23 Q Now, at any point in time, either during the visit
24 to the jail to retrieve the letter that he had offered
25 previously, or in the car going to the courthouse, or at

1 the courthouse, or in the car coming back from the
2 courthouse to the jail, did you do anything to try to
3 persuade Stokes to give you that letter?

4 A No, sir.

5 Q Did he give you that letter freely and voluntarily,
6 to the best of your knowledge?

7 A Yes, sir; he did.

8 Q Okay. And you turned that letter over to Emory
9 Rush?

10 A Immediately.

11 Q Immediately? All right, sir. And, as far as how
12 Stokes was acting, his demeanor on that day, did you note
13 anything unusual about him?

14 A He was very polite.

15 Q Okay.

16 A Very.

17 Q Did you make any threats ---

18 A No, sir.

19 Q --- or promises to him? Did anybody else make any
20 threats ---

21 A No, sir.

22 Q --- or promises in your presence?

23 A (Nodded head)

24 Q You're shaking your head. Is that ---

25 A No, sir.

1 MR. BAILEY: Thank you. Please answer any
2 questions Mr. Sims may have.
3 CROSS EXAMINATION BY MR. SIMS:
4 Q Mr. Kinsey, I want to just ask you a few questions.
5 This happened on the way back from the courthouse?
6 A He asked me as soon as we got in the vehicle under
7 the sally port ---
8 Q Uh-huh.
9 A --- en route to the courthouse. Now, once we got
10 to the courthouse is when I had an occasion to speak with
11 Detective Rush and ask him ---
12 Q Um-hmm.
13 A --- if it would be all right for me to retrieve
14 whatever the package was. I could tell it was a letter.
15 He told me yes. Well, we were so busy I didn't have a
16 chance to get it from him or even speak with him about it
17 till I got him back to the jail, and that's when I got the
18 letter back and took it to Detective Rush.
19 Q Now he was brought over to the courthouse to have
20 an attorney appointed for him; is that correct?
21 A Mr. Sims, I can't tell you exactly why. I believe
22 it was a bond hearing.
23 Q It was a bond hearing. There was not at that time
24 an attorney appointed for him?
25 A I can't answer that question, Mr. Sims.

1 Q Uh-huh. And, when he left, and on the way back,
2 you neither gave him any Miranda warnings, any additional
3 Miranda warnings, or anything of that nature, did you?

4 A No, sir. I did not speak with him.

5 Q You did not speak with him. Well, when you went
6 and talked to Detective Rush, Detective Rush at that time
7 did not go back and Mirandize him or anything of that
8 nature, did he?

9 A He could have. I -- I went and grabbed the -- got
10 the letter.

11 Q Okay. And, then, you went to him, and, when you
12 told him to give you the letter, he was sitting up in the
13 front of the complex where they -- where they -- when the
14 prisoners are first brought in, they sit them in the chairs
15 over on the side; is that correct?

16 A Yes, sir.

17 Q And that's where he was at that point; is that
18 correct?

19 A Yes, sir.

20 Q At that time, you did not give him any Miranda
21 warnings.

22 A I told him, I said, "Samuel," I said, "Do you still
23 want me to give something to Emory for you?" And he said,
24 "Yes, please," and he handed it to me.

25 Q And is this the time when he made the statement

1 that you -- a minute -- you made a few moments ago ---

2 A No, sir; no, sir.

3 Q When did he make that statement?

4 A He made that statement the initial time when he
5 tried to hand me the letter, when we were in the back seat
6 of the patrol car. That's when he made the initial
7 statement.

8 Q That he wasn't going down by himself.

9 A Yes, sir.

10 Q He was going to take them with him.

11 A Yes, sir.

12 MR. SIMS: That's all I have.

13 MR. BAILEY: No Redirect, your Honor. I recall
14 Emory Rush. Your Honor, if he could be excused. He was
15 working.

16 THE COURT: Very well.

17 MR. BAILEY: Still under oath.

18 THE COURT: Yes, sir.

19 F. EMORY RUSH, being
20 previously duly sworn, testified further as follows:

21 DIRECT EXAMINATION BY MR. BAILEY:

22 Q Okay. Mr. Rush, on June the 8th, 1998, did you
23 have occasion to see Detective Kenny Kinsey?

24 A Yes, sir; I did.

25 Q All right, sir. Did he give something to you?

1 A He did, sir.

2 Q Okay. I'm calling your attention to that yellow
3 paper there, which has been marked State's Number 5. Is
4 that what Mr. Kinsey gave you?

5 A It is.

6 Q And, prior to that, did you have a conversation
7 with Mr. Kinsey in regard to that letter?

8 A Yes, sir.

9 Q Okay. What do you recall the conversation? What
10 did he tell you?

11 A Deputy Kinsey told me that -- that Stokes had a --
12 a letter he wanted to give to me, and he told me he didn't
13 take it. He didn't know if I wanted him to handle it or
14 not. I asked him, if he would, to go to the detention
15 center and get the letter. I was tied up on something else
16 at the time. And he did, and this is what he brought.

17 Q Okay. And that afternoon, a little after 3:00
18 p.m., did you -- after reading the letter, did you have any
19 contact with Sammie Stokes?

20 A Yes, sir.

21 Q Okay. And where was he interviewed at?

22 A In the interview room at ---

23 Q Okay. The same place you testified previously ---

24 A Yes, sir.

25 Q --- that you all had interviewed him on ---

- 1 A Yes, sir.
- 2 Q --- on the 2nd? Is that correct?
- 3 A Yes, sir.
- 4 Q And who was present during that interview?
- 5 A Clark Whetstone and I.
- 6 Q Okay. And would you state whether or not you gave
- 7 Miranda rights to Mr. Stokes ---
- 8 A Yes, sir.
- 9 Q --- on that occasion?
- 10 A Yes, sir.
- 11 Q Okay. Did you use a form to do that?
- 12 A Yes, sir.
- 13 Q Hand you State's 6 and ask if that's the Miranda
- 14 form you went over with Sammie Stokes on June the 8th,
- 15 1998.
- 16 A Yes, sir; that's it.
- 17 Q And the time up at the top right-hand corner,
- 18 3:15 p.m., date, June the 8th, 1998?
- 19 A Yes, sir.
- 20 Q Is that your handwriting?
- 21 A Yes, sir; it is.
- 22 Q Is that the time that you began to advise him ---
- 23 A Yes, sir.
- 24 Q --- of his Miranda rights?
- 25 A Yes, sir.

1 Q And is that form the same as the form you
2 previously went over?

3 A It's the same form; yes, sir.

4 Q All right. And, just in the interest of moving
5 along here, did you advise him of his rights the same way
6 you had on the previous occasion, June 2, 1998?

7 A Exactly.

8 Q And, when you advised him of his rights, there's
9 some initials on the left-hand side of each one of the five
10 rights? Is that correct?

11 A Yes, sir. And those are Sammie Louis Stokes's
12 initials.

13 Q You saw him sign those ---

14 A Yes, sir.

15 Q --- initial each one of those rights ---

16 A Yes, sir.

17 Q --- as well as sign the understanding of rights?

18 A Yes, sir.

19 Q And you and Mr. Whetstone witnessed that?

20 A We did.

21 Q And did you offer any inducement to get him to --
22 to waive his rights?

23 A No, sir.

24 Q Any promises, threats, anything of that nature?

25 A No, sir.

- 1 Q What was his demeanor?
- 2 A He was in a good mood, very cooperative.
- 3 Q Okay.
- 4 A Calm, polite.
- 5 Q Did he ask for anything that he didn't get?
- 6 A No, sir.
- 7 Q Let me show you a second document, which is marked
- 8 State's 7, and ask if you recognize that one.
- 9 A Yes, sir; I do.
- 10 Q What is that?
- 11 A This is a -- a form that we had typed up and given
- 12 to Sammie to sign, if he would, and Clark and I witnessed
- 13 it. This is sort of a form, a Miranda, that says he
- 14 initiated contact with us.
- 15 Q Just this one paragraph, just for the record,
- 16 read -- read that.
- 17 A The place is the Orangeburg County Sheriff's
- 18 Office, 6/8/98, 3:32 p.m. It says, "I, Sammie Louis
- 19 Stokes, have been advised of my Miranda rights by F. Emory
- 20 Rush of the Orangeburg County Sheriff's Office. I am fully
- 21 aware of what I am doing, and I have initiated contact with
- 22 investigators of the Orangeburg County Sheriff's Office.
- 23 "At this present date and time, I know that I have
- 24 had counsel appointed for me in reference to this case that
- 25 I am about to give a statement for.

1 "I waive to have counsel present with me at this
2 time, and I give this statement freely and voluntarily. No
3 promises or threats have been made to me, and no pressure
4 or coercion of any kind has been used against me." It's
5 signed Sammie Stokes, witnessed, F. Emory Rush and Clark
6 Whetstone.

7 Q Okay. And the time there is shortly after the time
8 on the Miranda form ---

9 A Yes, sir. This is 3:32 p.m.

10 Q Okay. And, again, with respect to that form, did
11 you make any promises or threats, or did Mr. Whetstone make
12 any promises or threats to get Mr. Stokes to sign that
13 form?

14 A No, sir.

15 Q Did he sign that freely and voluntarily?

16 A He did.

17 Q Did you witness it?

18 A Yes, sir; I did.

19 Q Did Mr. Whetstone witness it also ---

20 A Yes, sir; he did.

21 Q Okay. Did you take any kind of a written or taped
22 statement from Mr. Stokes in addition to the letter at that
23 time?

24 A No, sir.

25 Q What did you do, you, and Mr. Whetstone, and Mr.

1 Stokes, what did you do, if anything, in regard to that
2 letter after you had advised Mr. Stokes of his rights and
3 had him waive those rights, and after you went over the
4 form which you ---

5 A We went over the letter.

6 Q Okay. And what was the purpose in going over that
7 letter?

8 A Well, I think just to make sure that this is what
9 he was telling us and we could understand everything he
10 said in here.

11 Q Okay. Did he acknowledge that was his letter?

12 A Oh, yes, sir; yes, sir.

13 Q Okay. And did he acknowledge the letter was
14 written by him in his own handwriting?

15 A Yes, sir; he did.

16 Q Okay. Did you offer any inducement to get him to
17 make that admission to you ---

18 A No, sir.

19 Q --- that that was his letter?

20 A No, sir. He initiated contact with us.

21 Q And he gave that letter to you freely and
22 voluntarily?

23 A To Deputy Kinsey; yes, sir.

24 Q Did you ask him to -- did you ask Sammie Stokes at
25 any point in time to write you out a letter?

1 A No, sir.

2 Q Did anybody else, to your knowledge ---

3 A No, sir.

4 Q --- in law enforcement ask him to write -- write a
5 letter to you?

6 A No, sir.

7 Q That was totally unsolicited by you and anybody
8 else at law enforcement, as far as you know?

9 A That's correct.

10 Q Any -- do you have any reason to believe that that
11 letter was not voluntarily written by Sammie Stokes?

12 A No, sir.

13 Q Did you have any kind of -- in addition to
14 determining that that was his letter and his handwriting,
15 did you have any discussion with Sammie Stokes regarding
16 the letter, that you can recall at this time?

17 A No, sir. I -- just -- like I say, we went over the
18 letter and talked about it, but ---

19 Q Okay.

20 A --- nothing else that I can recall.

21 MR. BAILEY: All right. Mr. Rush, please answer
22 any questions that Mr. Sims might have for you.

23 WITNESS: All right, sir.

24 CROSS EXAMINATION BY MR. SIMS:

25 Q Mr. Rush, just a few questions for you.

1 A Yes, sir.

2 Q Now, it is uncontroverted that at the time that he
3 went back to the jail, he had an attorney appointed for
4 him.

5 A Yes, sir.

6 Q When -- before you received the letter from Deputy
7 Kinsey, you knew that he had an attorney appointed for him.

8 A Yes, sir.

9 Q Because that was the purpose of bringing him over
10 that day for a bond hearing and to have an appointed -- an
11 attorney appointed.

12 A Yes, sir.

13 Q So what he did was he gave you a statement; is that
14 correct?

15 A Yes, sir; he did.

16 Q He gave you a written statement.

17 A Yes, sir.

18 Q But he did not initiate the oral contact between
19 you and him.

20 A Excuse me?

21 Q He did not initiate the face-to-face contact
22 between you and him.

23 A He -- once he gave us this letter, and he indicated
24 he wants -- you know, wanted to talk -- talk to us about
25 it -- you know, we wanted to talk -- well, we wanted to

1 talk to him about it, or maybe a mutual situation, but,
2 anyway, for whatever reason, we got him back over there and
3 talked to him.

4 Q Okay. Well, let me explain it a little clearer to
5 you then ---

6 A Yes, sir. Maybe that's the problem.

7 Q He gave the letter to Deputy Kinsey.

8 A Uh-huh; yes, sir.

9 Q And he gave a written statement to Deputy Kinsey.

10 A Yes, sir.

11 Q You, at some time subsequent to that, sent over to
12 the jail to have him brought over to you.

13 A Yes, sir.

14 Q Okay. So the time that you said that you were
15 busy, and you sent Deputy Kinsey back over to get -- to get
16 the letter, you knew that he had an attorney appointed.
17 The written letter had been given to you.

18 A Yes, sir.

19 Q But the actual face-to-face conversation was
20 initiated by the Sheriff Department to bring him over, with
21 the knowledge that he had an attorney appointed for him,
22 and then you all typed out this form and had him to sign
23 it.

24 A Well, I tell you -- let -- let me explain that, Mr.
25 Sims.

1 Q Well, first, answer my question, and then ---

2 A Well, I -- I want to, but I think I need to
3 explain ---

4 Q Well, you can answer it "yes" or "no" ---

5 MR. BAILEY: Well, he can't answer it "yes" or
6 "no," and I -- I -- it's sort of a convoluted question. I
7 think you ---

8 MR. SIMS: Well, let me just clear it up then.
9 I'll -- I'll un-convolute it then.

10 CROSS EXAMINATION BY MR. SIMS RESUMED:

11 Q My question is this. When you were sent over to
12 get Sammie Stokes to bring him over to talk to him in
13 regards to that letter, One, you knew he had a lawyer.

14 A I knew he had appeared before the Magistrate;
15 that's right; yes, sir.

16 Q He had ---

17 A He had been before the -- been before the
18 Magistrate.

19 Q Okay.

20 A Yes, sir. I knew he had been arraigned; that's
21 right.

22 Q Okay. Then you -- he did not send over to the
23 Sheriff's Department and say, "I want Emory Rush to come
24 over here and get me."

25 A Well, sir, he signed a -- a -- a form stating that

1 he initiated contact with investigators of the Orangeburg
2 County Sheriff's Office.

3 Q After you had sent over for him to be brought from
4 the jail to your office, you had him -- that -- that --
5 that -- that form typed up; is that correct?

6 A Yes, sir, because we did not have a form like this.

7 Q Um-hmm.

8 A And it was -- it's fairly un -- unusual that a
9 person charged with a crime as he was to want to talk to
10 us.

11 Q Um-hmm.

12 A And so we felt, in order to protect his -- to
13 ensure his rights and to cover us, we felt that we needed
14 to -- to have this typed up that he initiated the contact,
15 and that was the purpose for this.

16 Q Okay. But that's not what actually happened, is
17 it?

18 A Sure, it is.

19 Q In terms of the oral conversation between the two
20 of you, the physical going over to the jail and getting him
21 was at your direction.

22 A I'd say that's right; yes, sir.

23 Q Okay. With knowledge that he had a lawyer.

24 A Yes, sir. Well, at -- at least that he had
25 appeared and been arraigned. And I -- I -- whether he had

1 talked with his lawyer at this time or not, I couldn't tell
2 you.

3 Q But you know that one had been appointed.

4 A Yes, sir, but that doesn't preclude him from
5 talking to us.

6 MR. SIMS: That's all I have, your Honor.

7 MR. BAILEY: No Redirect, your Honor. We'd call
8 Clark Whetstone.

9 THE COURT: Still under oath.

10 WITNESS: Yes, sir.

11 CLARK WHETSTONE, being
12 previously duly sworn, testified further as follows:

13 DIRECT EXAMINATION BY MR. BAILEY:

14 Q Mr. Whetstone, we call your attention now to
15 June the 8th, 1998, and ask whether or not you were present
16 with Emory Rush when Sammie Stokes was interviewed in
17 regard to the handwritten letter, which is to your left up
18 in front of you.

19 A Yes, sir.

20 Q All right. And were you present when Mr. Rush went
21 over the Miranda form with Mr. Stokes?

22 A Yes, sir.

23 Q Okay. And did he read that to him as he indicated
24 on the stand?

25 A Yes, he did.

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CLARK WHETSTONE - DIRECT EXAM BY MR. BAILEY

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1 Q Okay. What do you recall Mr. Stokes' demeanor on
2 that occasion?

3 A He seemed to be calm and very cooperative.

4 Q Okay. Did either you or Mr. Rush make any promises
5 or threats to try to induce him to deal with you?

6 A No, sir.

7 Q Okay. Did anybody else, to your knowledge, make
8 any such promises or threats?

9 A No, sir.

10 Q Did you see Mr. Stokes initial each one of the
11 rights after Mr. Rush advised him of those rights?

12 A Yes, I did.

13 Q Did you observe him sign that as a witness?

14 A Yes, I did.

15 Q Okay. And did you observe Mr. Rush go over the
16 acknowledgment of rights?

17 A Yes, I did.

18 Q Okay. And the waiver of those rights?

19 A Yes, sir.

20 Q Okay. And subsequent to that, there's another form
21 that was signed; is that correct? And that's been marked
22 as State's, I believe, 7? Were you present when Mr. Rush
23 went over that with Sammie Stokes?

24 A Yes, I was.

25 Q Okay. Did you observe Mr. Stokes sign that?

- 1 A Yes, I did.
- 2 Q And you witnessed that, and Mr. Rush witnessed it?
- 3 A Yes, sir.
- 4 Q And was that signed by Sammie Stokes freely and
- 5 voluntarily, to the best of your knowledge?
- 6 A Yes, sir.
- 7 Q Any promises, threats given to get him to sign that
- 8 form?
- 9 A No, sir.
- 10 Q Okay. Subsequent to that, would you state whether
- 11 or not you were present when that letter was discussed with
- 12 Sammie Stokes?
- 13 A Yes, I was.
- 14 Q And did he indicate that that was his letter and
- 15 his handwriting?
- 16 A Yes, he did.
- 17 Q To your knowledge, was that letter given to you all
- 18 freely and voluntarily?
- 19 A Yes, sir.
- 20 Q Did anybody ask him, ask Sammie Stokes, to write
- 21 out a letter to you detailing what he said his involvement
- 22 in these crimes were?
- 23 A No, sir.
- 24 Q Okay. Do you recall anything -- this -- this was
- 25 not reduced to writing in any form, was it, the subsequent

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CLARK WHETSTONE - DIRECT EXAM BY MR. BAILEY

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1 interview you had with him?

2 A The latter interview?

3 Q Yeah.

4 A No, sir.

5 Q Okay. And would -- do you recall anything else
6 that occurred during the course of that interview, as far
7 as any statements that he may have made?

8 A Only one statement I recall.

9 Q Okay. And what was that?

10 A He basically -- at one point during the
11 interview -- I remember this very clearly -- he stood up
12 and demonstrated how he stood over Mr. Ferguson as he taped
13 his hands up.

14 Q Okay. All right. And did he do all of that,
15 including the demonstration, freely and voluntarily, to the
16 best of your knowledge?

17 A Yes, sir.

18 MR. BAILEY: Please answer any questions that Mr.
19 Sims may have for you.

20 WITNESS: Yes, sir.

21 MR. SIMS: Your Honor, before we go -- there was an
22 indication of this statement about Mr. Ferguson, and I'd
23 put the Solicitor on notice that we are not going to try
24 this case from the standpoint of bringing in the State's
25 case in chief information about Mr. Ferguson. That's a

1 separate murder and a separate case. I just want to
2 reiterate that on the record at this point.

3 MR. BAILEY: That -- that's correct, your Honor,
4 but we need to talk about it later on, but just for
5 purposes of this hearing ---

6 MR. SIMS: Yeah.

7 CROSS EXAMINATION BY MR. SIMS:

8 Q Just one or two questions; the same questions for
9 you. When you participated in this subsequent hearing or
10 meeting with Sammie Stokes on that afternoon, you were of
11 the knowledge that he had been -- he had gone to court, had
12 a bond hearing, had been arraigned, and had a lawyer
13 appointed for him; is that correct?

14 A That is correct.

15 Q All right. You knew at that time that that
16 statement had been given to Detective Rush, or that letter.

17 A Yes, sir.

18 Q Okay. But the initiation of the actual contact
19 between you, and Emory Rush, and Sammie Stokes was at the
20 instigation of the Sheriff's Department; isn't that right?

21 A It was -- the knowledge that I have of it is that
22 it came from Sergeant Kinsey.

23 Q Now, I'm not talking about the actual letter.

24 A Okay.

25 Q We're not talking about the letter. We're talking

1 about the fact of having Sammie Stokes brought over so that
2 you all could talk to them (sic). This was done by the
3 Orangeburg County Sheriff's Department. You -- either you
4 or Emory Rush, somebody sent over to the jail to have
5 Sammie Stokes brought over.

6 A Yes, sir.

7 Q Okay. And, when he got there, that is when you all
8 decided to have that form that was typed about him
9 initiating contact with you all. That's when you -- the
10 form was done, so he could sign at that point; is that
11 correct?

12 A Yes, sir; that is correct.

13 Q Okay. And then you talked with him about what was
14 the con -- the contents of the letter.

15 A If I may correct you, I think the very first thing
16 we did was at 3:15 we gave him his Miranda rights, and he
17 signed a waiver. Then the second thing we did at 3:32 was
18 have him sign the initial contact waiver.

19 Q And then you talked with him about ---

20 A Yes, sir.

21 Q --- the contents of the letter.

22 A That is when we talked with him about the contents.

23 MR. SIMS: That's all I have, your Honor.

24 REDIRECT EXAMINATION BY MR. BAILEY:

25 Q Briefly on redirect, Mr. Whetstone, based on the

1 conversation you had with Mr. Kinsey, who initiated contact
2 that day, law enforcement or Mr. Stokes?

3 A Mr. Stokes did.

4 MR. BAILEY: Thank you. That's all I have for this
5 witness.

6 THE COURT: Okay.

7 MR. BAILEY: Call -- recall Emory Rush.

8 F. EMORY RUSH, being
9 previously duly sworn, testified further as follows:

10 DIRECT EXAMINATION BY MR. BAILEY:

11 Q Mr. Rush, I want to call your attention now to June
12 the 12th, 1998, and ask whether or not you again saw Sammie
13 Stokes at the detention center.

14 A Yes, sir.

15 Q What room was that in?

16 A There's a -- an interview room in the jail.

17 Q Okay. And between June the 8th and June the 12th,
18 1997 (sic), had the handwritten letter that had been given
19 to you by Mr. Kinsey and gone over, as you previously
20 testified, with Sammie Stokes, been typed out?

21 A Yes, sir; it had.

22 Q Okay. By a secretary at the Sheriff's office ---

23 A Yes, sir.

24 Q Okay. And I'm going to ask whether or not you had
25 that typed letter in your possession when you saw Sammie

1 Stokes on the afternoon of June the 12th. And I'll hand
2 you a copy -- hand you the original typed version of the
3 letter.

4 A Yes, sir.

5 Q Okay.

6 A Yes, sir.

7 Q And what do you recall of Sammie Stokes' appearance
8 and demeanor on the 12th?

9 A Well, his -- his demeanor was pretty consistent
10 with what we had been testified to during the course of the
11 hearing. He -- he -- he was cooperative ---

12 Q Okay.

13 A --- and -- and -- and pretty good spirits.

14 Q Did you Mirandize him again on the 12th?

15 A Yes, sir.

16 Q How did you go about doing that?

17 A At the -- on the Defendant's affidavit that was
18 typed, uh ---

19 Q Okay. Now that thing says "Defendant's affidavit,"
20 but it's actually just somebody had typed a letter out.

21 A Well, that's right; the letter that he had
22 initially given us; yes, sir.

23 Q Okay.

24 A And it has a place -- the -- the date, time, place,
25 Mr. Stokes's age, date of birth, a phone number for a

1 relative, the address that he had called home, and a
2 Miranda -- Miranda rights form typed on this paper.

3 Q Okay. And why did you think it was necessary or
4 desirable to give him his Miranda rights again ---

5 A Well ---

6 Q --- as well?

7 A Yes, sir. We -- we did that. I wanted him to read
8 over this to make sure this was his statement, that we
9 hadn't changed anything, we hadn't made any alterations.
10 And the fact that we had gone to -- to him, I felt that in
11 his best interests, and to protect his rights, to again
12 Mirandize him.

13 Q Okay. And, again, were any promises or threats
14 made to him?

15 A No, sir.

16 Q And did he acknowledge that that was an accurate
17 typed version of the letter that he had given you
18 previously?

19 A Yes, sir.

20 Q And on the last page of that document, maybe the
21 next -- let me see.

22 A I'm sorry.

23 Q Okay. Now, the last page was not on the letter; is
24 that correct?

25 A That's correct ---

1 Q The original handwritten portion of the letter?

2 A Yes, sir; that's correct.

3 Q Okay. And, of course, part of the first page,
4 where the Miranda rights were given, was not on the
5 original letter.

6 A That's correct.

7 Q Is that correct?

8 A That would be.

9 Q Everything else is a copy of the original letter,
10 just typed out?

11 A Yes, sir.

12 Q Okay. For the record, what is -- what is typed in
13 on the last page?

14 A Yes, sir. On Page 12, which is the last statement
15 of this letter, it says, "I declare that the statement made
16 above is freely and voluntarily, without promise" -- I'm
17 sorry. Let me start over.

18 "I declare that the statement above is made freely
19 and voluntarily, without promise of hope, of reward, or
20 leniency, and without fear or threat of physical harm by
21 any person.

22 "I swear or affirm that this statement is the
23 truth, the whole truth, and nothing but the truth, so help
24 me God," and it's signed Sammie Stokes.

25 Q Okay. And did Sammie Stokes have an opportunity to

1 review that letter before he signed it?

2 A Yes, sir.

3 Q And, when he signed it, he made a change, I think,
4 didn't he, down there where his signature is?

5 A Yes, sir. When it was being typed, his nickname
6 was misunderstood by the typist.

7 Q Okay.

8 A And she thought that his name was El Rusty, and, in
9 fact, he called himself El Nasty.

10 Q Okay. Who changed the El Rusty to El Nasty?

11 A I did, and I initialed it.

12 Q Okay. At -- at who -- what ---

13 A At Mr. Stokes's request.

14 Q Okay. And then you signed as a witness where Mr.
15 Stokes signed that statement?

16 A Yes, sir.

17 Q And the other signature there is who?

18 A Detective Michelle Snell.

19 MR. BAILEY: Please answer any questions Mr. Sims
20 may have for you.

21 WITNESS: All right, sir.

22 CROSS EXAMINATION BY MR. SIMS:

23 Q Mr. Rush, this is twelve days -- now he had been
24 arrested on the 2nd of June. He had gone for a bond
25 hearing and arraignment on the 8th of June.

1 A Um-hmm.

2 Q And now it's the 12th of June. And you definitely
3 knew that he had an attorney who was representing him and
4 had been appointed by the Court.

5 A Yes.

6 Q Okay. And at no time did you make any effort to
7 contact the attorney to tell the attorney that you wanted
8 to talk to his client about a letter that his client had
9 given to you.

10 A I don't recall if I did or not. I -- I -- I think
11 he was at that time represented by the Public Defender's
12 office. I -- I just don't recall whether I talked to Mr.
13 Culler about it or not.

14 Q But there's -- just want to clear up for the record
15 there's absolutely no question that at this point, on -- on
16 June 12th, that you knew that he had a lawyer.

17 A Yeah.

18 Q This contact between you and Sammie Stokes to go
19 over the typewritten version of his letter was instigated
20 or begun by you.

21 A Yes, sir.

22 Q Okay. And you said that you felt it was in his
23 best interests to give you -- to -- to ensure his rights
24 for him to give you a statement giving up all of his rights
25 and telling you, in effect, or making some admissions that

1 were going to be harmful to him, but that was in his best
2 interests.

3 THE COURT: No. He didn't say that. He said to
4 give him the Miranda rights.

5 MR. SIMS: To give him the Miranda rights. Okay.

6 CROSS EXAMINATION BY MR. SIMS RESUMED:

7 Q But that was in his best interests.

8 A Well, it protected his rights; yes, sir. He has a
9 right, you know, uh ---

10 Q You through ---

11 A All -- all of that's because we knew he'd be here
12 one day, and we wanted to be sure that he was protected.

13 Q But you didn't feel it was okay to contact his
14 lawyer and let his lawyer know that you were going over
15 there to talk with him about this letter.

16 A Well, I -- I don't know -- talk about the letter,
17 but let him go over it and -- and -- and sign it, saying
18 that it was the same statement he -- letter he sent me.

19 Q Well, that's basically ---

20 A Wasn't questioned about this letter.

21 Q He wasn't questioned about the letter?

22 A Other than that. I mean he -- he had al -- we had
23 already talked with him about the contents of the letter.

24 Q That was back on the 8th.

25 A Yeah. At this point, we -- taking this -- I asked

1 Michelle to go with me as a witness, as a matter of fact,
2 to go over there and let him look over this and, if he
3 agreed with it, sign it.

4 Q But you were, in effect, talking to him about the
5 contents of his letter ---

6 A Well, I guess ---

7 Q --- again. He had to read over that to say to you
8 that, "yes, the typewritten version of this is the same
9 thing that I wrote" ---

10 A Well, that's right.

11 Q --- "back on June 8th to you."

12 A Yes, sir.

13 Q And you made no effort to contact his lawyer.

14 A Not that I recall.

15 MR. SIMS: That's all I have, your Honor.

16 MR. BAILEY: No Redirect.

17 THE COURT: All right. You may step down.

18 MR. BAILEY: Last, very brief, Michelle Snell.

19 MICHELLE SNELL, being first
20 duly sworn, testified as follows:

21 DIRECT EXAMINATION BY MR. BAILEY:

22 Q Okay. Ms. Snell, you're employed by the Orangeburg
23 County Sheriff's Office? Is that correct?

24 A Yes, I am.

25 Q And what's your position with the Sheriff's office?

1 A Criminal investigation, detective, victim advocate.

2 Q Okay. And I want to call your attention to June
3 12, 1998, and ask whether or not you had worked that day.

4 A Yes, I did.

5 Q Okay. And I want to show you what's been marked as
6 State's Number 8, and ask whether or not you're familiar
7 with this document.

8 A Yes, sir.

9 Q Okay. And were you present with Detective Emory
10 Rush and Sammie Stokes when that letter was gone over with
11 Mr. Stokes?

12 A Yes, I was.

13 Q Okay. And were you present when Emory Rush gave
14 Sammie Stokes his Miranda rights?

15 A Yes, I was.

16 Q Okay. And did Mr. Stokes have an opportunity to
17 review that letter?

18 A Yes, he did.

19 Q Okay. And did you observe him signing the last
20 page of that letter?

21 A Yes, I did.

22 Q Okay. To your -- the best of your knowledge, did
23 he sign that freely and voluntarily, of his own will and
24 accord?

25 A Yes, sir.

1 Q Were any promises or threats made to get him to
2 sign that letter?

3 A No, sir.

4 Q And you witnessed him sign that, and you signed
5 your name as a witness along with Mr. Rush? Is that
6 correct?

7 A Yes, I did.

8 Q Okay. For the record, who was the person that
9 signed that letter? Do you see him in court?

10 A Yes, sir.

11 Q Could you point him out?

12 A Mr. Stokes, in the orange outfit.

13 MR. BAILEY: Thank you. Please answer any
14 questions Mr. Sims may have.

15 CROSS EXAMINATION BY MR. SIMS:

16 Q Ms. Snell, you typed the letter from the
17 handwritten letter?

18 A No, sir; I didn't.

19 Q Who typed the letter?

20 A Secretary.

21 Q The same -- Ms. Fitzgerald or Ms. Fitz -- I'm
22 sorry; I can't remember her last name.

23 A Well, one of the clerical staff.

24 Q One of the clerical staff. You don't know who did
25 it?

1 A No, sir; I don't.

2 Q Okay. And, when you went over there on that -- but
3 that person is employed by the Sheriff's Department ---

4 A Yes, sir.

5 Q --- whoever typed it.

6 A Yes, sir.

7 Q And, when you went over there, you, too, knew that
8 Mr. Stokes had an attorney appointed for him?

9 A Yes, sir.

10 Q And, knowing that, you made no effort to contact
11 his attorney at all, either, did you?

12 A No; I did not.

13 Q Okay. And you all did have conversations about the
14 contents and verifying that the contents of the typewritten
15 letter were the same as the contents of the handwritten
16 letter.

17 A Yes, sir.

18 Q As a matter of fact, you all went through it with
19 him to the extent that he had to make a correction that was
20 done by whoever typed it.

21 A Right.

22 MR. SIMS: That's all I have, your Honor.

23 MR. BAILEY: That's all the State has in regard to
24 Jackson v. Deno hearing, other than to make sure the record
25 reflects that we're moving to introduce all those, 1

1 through 8, for the purposes of this hearing only.

2 MR. SIMS: Your Honor, may I have a moment, please?
3 Your Honor, we would not put forth any -- any -- any
4 evidence at this time on this issue, but we do have some
5 motions as regards to the suppression of the statement.

6 THE COURT: All right.

7 MR. SIMS: Your Honor, I think the Court has had an
8 opportunity to hear everything that went on. There may be
9 some confusion as it relates to when he was actually served
10 with the warrant, but there's -- one officer testified that
11 it's the practice to take him before and have the warrants
12 served upon him, and then they talked with him. And one
13 was unclear. During this period of time, there was a lot
14 of unclear in terms of what actually happened.

15 The point being that he had an attorney appointed
16 for him by -- or he had requested an attorney. The initial
17 statement that was on June the 2nd, he had requested an
18 attorney; he had gone to -- been -- come before the
19 Magistrate at some point. He had asked for an attorney.
20 He had been given the preliminary hearing form which the
21 Magistrate uses when -- when a Defendant requests an
22 attorney.

23 Now, having requested an attorney, then they
24 subsequently talked to him on June the 2nd, after that
25 period of time. We take the position that he had a right

1 to an attorney. He had -- had stated that he wanted an
2 attorney, and they instituted the action by bringing him
3 over to the complex, as it relates to having an
4 interrogation or having -- having to be able to talk with
5 him at that time.

6 We feel that any statement that was given during
7 that period of time, after Mr. Stokes had indicated that he
8 wanted an attorney, would be in violation of his rights
9 against self-incrimination.

10 Then we move on to the conversation or the letter
11 that was on June the 8th of '98, wherein it is very clear
12 that he had been taken over to the Sheriff's -- over to the
13 courthouse, where he had been given a bond -- or he'd been
14 given a bond, and an attorney had been appointed to him.

15 Now, they indicated that the letter was actually
16 given to him, but we take the position that, from the first
17 day, back on June the 2nd, everything that transpired from
18 that time was actually tainted by the violation of his
19 rights and that they did not honor his request to have an
20 attorney appointed, and they interrogated him without the
21 benefit of an attorney.

22 But even assuming that the letter that we're --
23 that was handed to the Sheriff's Department, the letter
24 being one thing that may, if the Court would construe it
25 that way, would be made -- that would -- that would be

1 initiated by Mr. Stokes.

2 However, any conversation in regards to that letter
3 which was instituted by the Sheriff's Department should be
4 suppressed, wherein he was -- after they had gotten the
5 letter, Detective Rush stated that he sent over to the
6 complex to have Mr. Stokes brought over, knowing at that
7 point that he had gone through a bond hearing, that he had
8 an attorney appointed for him, and he made no effort to
9 contact that attorney, but, rather, talked with --
10 initiated contact with Mr. Stokes at that time.

11 Then we come back again to the letter, the
12 typewritten version of that letter, on June the 12th,
13 where, again, clearly, Mr. Stokes had an attorney appointed
14 for him. Mr. Stokes had not had the benefit of his
15 attorney, had not had the benefit of counsel at that time,
16 did not talk to anyone.

17 They made it a point to read him his Miranda
18 rights, allegedly to ensure that his rights, but nobody
19 made any effort to put him in contact with his attorney or
20 even to call his attorney and say to his attorney that
21 "we're going over to talk to your client."

22 Again, this conversation and this information was,
23 again, instituted by the Sheriff's Department with Mr. --
24 with Mr. Stokes, without the benefit of having his attorney
25 present at that time.

1 We take the position, Number One, that the
2 statement on June the 2nd should be suppressed, because he
3 had requested an attorney; that the statements on June 8th
4 should be suppressed as it relates to whether or not to
5 verify that that was his handwriting. Those statements all
6 should be suppressed.

7 And, again, the verification of the handwritten
8 information, through the typed information, on June the
9 12th should also be suppressed as violation of his right
10 against self-incrimination and his right not to have his
11 attorney present at any of those hearings or conversations
12 between him and the -- and the Orangeburg County Sheriff's
13 Department.

14 We bring up one other issue as relates to this,
15 your Honor. We really question the con -- the
16 transcription of the microcassette prior to it being sent
17 to SLED. The person who actually transcribed that is not
18 certified as a court reporter, has no certification in
19 transcription or anything. She's a secretary.

20 As a matter of fact, her qualifications are not
21 even in the area of secretarial science or general
22 secretarial science, but, rather, that of an educator, and
23 being placed in a position to transcribe the microcassette
24 which was handed to her.

25 We feel that that transcription is not valid. It

1 should not be submitted, because of the lack of
2 qualifications on the part of the person who was actually
3 transcribing that, in addition to that person also being
4 employed by the Orangeburg County Sheriff's Department,
5 having a vested interest in terms of the transcription of
6 that information.

7 We bring that same issue as it relates to the
8 handwritten or the typed letter or the typed version of the
9 letter that was submitted on -- on the 8th of June as it
10 relates to the statement that Mr. Stokes may have made. We
11 would also raise that same issue as -- as relates to that
12 person have -- having had no qualifications, and, also, at
13 the time, that that person is also being employed by the
14 Orangeburg County Sheriff's Department.

15 And, based upon the totality of everything that
16 we've talked about, your Honor, we would ask that these
17 statements be suppressed, as a violation of my client's
18 rights against self-incrimination, without having the
19 benefit of an attorney to give him competent advice as it
20 relates to these statements, and having -- these statements
21 having been taken after attorney -- after an attorney had
22 been appointed and one had been requested by the Defendant.

23 MR. BAILEY: Of course, in regard -- excuse me. In
24 regard to Miranda, there's nothing to prevent law
25 enforcement from initiating contact with somebody,

1 regardless of whether or not they've been appointed or
2 retained a lawyer.

3 Mr. Stokes had a right to invoke at any point in
4 time, and, if he had done that, they would have been
5 compelled not to ask him anything else, not to have any
6 further contact. He didn't do that. He waived his rights
7 on each and every occasion.

8 So the fact that he -- that he may have had a
9 lawyer at some point in time during this process really
10 doesn't enter into it, unless Mr. Sims knows something
11 about the law I -- I don't know about, but there's no
12 indication that he ever invoked his rights to confer with a
13 lawyer or to do anything with regard to a lawyer, to be
14 silent. Just the opposite is true. He's waived his rights
15 on each occasion.

16 Law enforcement, to my knowledge, is not under any
17 affirmative duty to go out and locate a lawyer for him, to
18 locate his lawyer, to get the lawyer's permission to
19 interview him, or anything of that nature.

20 In regard to accuracy of the tape, the cassette
21 tape, and transcript, and all that, all three are available
22 to your Honor to review, if you think that's necessary, to
23 play all of them, both of them, compare them with the tape,
24 whatever.

25 I mean, the testimony in the record is, Mr.

1 Whetstone and Ms. Fitzgerald, that, you know, to the best
2 of their knowledge, is not only an accurate depict --
3 representation, transcript records of representation of the
4 tape, but Mr. Whetstone says that the actual interview is
5 the same as the tape and the transcript of the tape.
6 That's the State's position.

7 THE COURT: Okay. First of all, there's nothing
8 before the Court indicating that any law enforcement
9 officer has testified here today or any other law
10 enforcement officer was ever advised by Defendant Stokes
11 that he wanted an attorney. There's nothing in the record
12 concerning that. Now, Mr. Sims.

13 MR. SIMS: Yes, sir.

14 THE COURT: I'm going to take this under advisement
15 and break this thing down into the initial statement and
16 then the letter, in reaching a decision.

17 If I were to suppress, the rest of the -- what I'm
18 concerned about is moot. If I allow the State to go
19 forward with these, and allow the initial tape in, in
20 regards to the first statement, do you have a concern about
21 the SLED cassette tape?

22 MR. SIMS: No, sir. I haven't listened to that.
23 I've listened to the SLED cassette. I did -- have not had
24 the opportunity to listen to the microcassette to make a
25 determination whether or not there was any difference.

1 I've listened to the SLED; I was provided with a copy of
2 the SLED tape.

3 THE COURT: Are you satisfied that it's accurate
4 with what you've heard?

5 MR. SIMS: From what I've heard, I am satisfied
6 that that one -- that that SLED tape is accurate, your
7 Honor. I can make that representation.

8 THE COURT: Okay. All right. You all give me a
9 little time to study this.

10 MR. SIMS: Yes, sir.

11 THE COURT: Before we get into the actual trial,
12 I'll certainly reach a decision. All right. Let me catch
13 up on my notes about that now.

14 MR. SIMS: Yes, sir.

15 THE COURT: I've been looking down at the list that
16 Mr. Sims presented here. Some of these we ought to be able
17 to move right on through, because ---

18 MR. SIMS: Yes, sir.

19 THE COURT: --- some of them are pretty -- I hate
20 to use the word "cut-and-dried," but ---

21 MR. SIMS: I understand.

22 THE COURT: --- normally doesn't present any real
23 problem. What -- Solicitor, what about the motion for
24 access to a courtroom at the courthouse?

25 MR. BAILEY: Your Honor, I've got these in

1 numerical order. You know what number that is?

2 THE COURT: Number 2.

3 MR. BAILEY: Okay. Excuse me. My only concern
4 with that, your Honor, was any security reasons. I -- I
5 think Mr. Stokes is amply familiar with that courtroom, has
6 been convicted there on a couple of occasions, and I'm not
7 sure just what the -- that that motion was made all
8 throughout, on what basis.

9 THE COURT: Well, tell us what you need, Mr. Sims.

10 MR. SIMS: Your Honor, we wanted to have the
11 opportunity -- I -- of course, without going into whether
12 my client and I have discussed it as relates to his
13 involvement in the court, sure, he's been in the court, but
14 in terms of familiarizing himself, getting involved with
15 where he's going to be, and, in my mind, to be able to
16 re -- they said he was calm over there in the jail, to --
17 to bring him to the state where he's going to be able to
18 feel comfortable in that setting and be able to participate
19 and continue to participate and help us in the presentation
20 of our case.

21 THE COURT: You just need to take him up to the
22 courtroom and work with him a little bit up there.

23 MR. SIMS: Yes, sir; that's all.

24 THE COURT: The Sheriff's Department -- the
25 Sheriff's Department will assist Mr. Sims and allow him to

1 go up there and just refamiliarize himself with the
2 courtroom.

3 MR. SIMS: Thank you, your Honor.

4 THE COURT: No problem. Granted. What was this 3?
5 Was that concerning a statement?

6 MR. SIMS: Yes, sir. That was concerning the
7 statement, but, also, we had talked about photographs,
8 videotapes, and physical evidence, prior to them being
9 introduced into court, and that brings to mind one other
10 point, your Honor.

11 I was involved somewhat in the first case by being
12 there, listening to the -- listening to that case. And one
13 of the things that came out was a weapon, a handgun that
14 Mr. Bailey had in that first case, and he presented it to
15 Norris Martin and asked Norris Martin if, in fact, that was
16 the gun that was used, where, on the stand, the State's
17 witness said that was not the gun that was used on the
18 night in question.

19 That, in my mind -- wanted to point that out during
20 this time is that we would ask that that gun not be brought
21 into the courtroom, because it's already been testified
22 under oath by a witness for the State that that was not the
23 gun that was used in the alleged murder of Connie Snipes
24 on -- on May 22nd.

25 And we were talking about having the opportunity to

1 view the evidence that the State is going to present prior
2 to it being brought into the courtroom, sitting on the --
3 on the prosecution table right before the jury, and, if it
4 doesn't get in, at least the jury has had the opportunity
5 to see that information sitting over there by the
6 prosecution table, and we don't want to raise that
7 inference. You know, we can say all we want to, but, if
8 they see it, it's going to raise a question in their mind.

9 And, so, we wanted to be able to have an
10 opportunity to -- to go through what they had -- what the
11 physical evidence, or videotapes, or photographs -- I have
12 been provided copies of all of the photographs, but I don't
13 know whether any of the videotapes -- I have not been
14 provided any of that, so there are none of those, but I
15 would like the opportunity to go over the photographs that
16 the Solicitor intends to use prior to them being introduced
17 into court so that we can make a determination to have a
18 hearing before the Court.

19 THE COURT: Don't -- well, it's simple. Don't
20 exhibit any evidence until it's properly ---

21 MR. BAILEY: Yes, sir. Your Honor, I had already
22 advised Mr. Sims I agreed with ---

23 THE COURT: Okay.

24 MR. BAILEY: --- that motion, not opposed it,
25 and ---

1 MR. SIMS: There was a check by that, your Honor.

2 THE COURT: I'm sorry. I missed it.

3 MR. BAILEY: That's the same as Number 27.

4 MR. SIMS: Yeah.

5 MR. BAILEY: That's the same motion; just kind of
6 in different form.

7 MR. SIMS: The one -- the next one, your Honor,
8 that -- that we're talking about is Number 6. That is
9 Motion Number 6, motion in limine to prohibit testimony
10 regarding the alleged suffering of the victim.

11 We understand that -- from the Solicitor that we
12 were served with an additional aggravated circumstance, I
13 believe, of torture, which we just received a couple of
14 weeks ago.

15 And the question in our mind is that the testimony,
16 as it relates to that suffering, prematurely would
17 influence the jury or be an attempt to influence the jury
18 to reach a verdict of guilty in the guilt phase of this
19 case.

20 I know that he would testify as to what was
21 actually done and what was actually happening, but to get
22 into the -- into any scenario about the graphics of -- of
23 pain, and suffering, and all of that, I think, would be --
24 it would not be appropriate at the sen -- at the guilt
25 phase of the trial, but, rather, if they're going to

1 attempt to try to use the torture as an aggravated
2 circumstances at the second part of the attorney (sic), if
3 we get to that point, as it relates to the penalty phase.

4 MR. BAILEY: Your Honor, I agree with Mr. Sims, and
5 I will not try to elicit any testimony of suffering for
6 just the sake of introducing that in the guilt phase, but
7 the way the written motion is -- is couched, it doesn't --
8 it isn't just simply the guilt phase; it appears to help
9 the penalty phase, too. That's the problem I have with it.

10 Torture is one of the aggravating circumstances
11 that we've alleged and noticed them on, and I can't --
12 certainly, suffering is a part of the definition of
13 physical torture, and so I would not try to get that out in
14 the guilt phase, but certainly the penalty phase.

15 MR. SIMS: Yes, your Honor.

16 THE COURT: With those parameters ---

17 MR. SIMS: Yes, sir.

18 THE COURT: Okay.

19 MR. SIMS: And I think Number 3 is admission --
20 Number 3 we've already discussed. Motions to produce,
21 chain of custody, your Honor, I believe I got that, if the
22 solicitor has indicated to me that the chain of custody
23 report from SLED ---

24 THE COURT: Which one we on?

25 MR. SIMS: You've given me the autopsy; I already

1 have that. We've indicated that we already have the
2 autopsy report. Number 3 was put down, some reason, for
3 twice; twice we put on this chart.

4 And motion to produce, chain of custody; your
5 Honor, I was provided with the SLED chain of custody
6 information, which indicated the chain of custody for all
7 of the physical evidence that was had; I have no problems
8 with that, so I would not raise that at this point.

9 THE COURT: Okay. Number 10.

10 MR. SIMS: You see that Number -- Number 10 ---

11 THE COURT: Witnesses.

12 MR. SIMS: --- of the State's witnesses, your
13 Honor, we had asked and -- and I realize what the case law
14 says. The case law says that, in fact, there's no
15 provision which would require, I believe, that they
16 disclose them to us at this point, but there's some of the
17 witnesses -- and I've talked with Mr. Bailey about some of
18 the witnesses that were called in the first case, that we
19 needed their address, because we were looking for them and
20 they've been looking for -- they had trouble finding them.
21 That was -- and I'd ask for those addresses.

22 I believe I've given them the name of Kenneth
23 Cutter; I believe he's in -- the one that's in Conyers,
24 Georgia, Bertha Culp. There was Tammy Sanders, Travis
25 Stewart, Wesley Culp, Stacy Culp, Yvonne Miller, and

1 Harold -- oh, Harold; we know where he is; he's working
2 with the Department of Social Services.

3 Your Honor, we need this information in order to go
4 out and have our investigator -- he's already talked to
5 some of them, but we've been having difficulty trying to
6 find the others. We need that information in order to
7 adequately prepare and to possibly issue subpoenas for
8 those witnesses coming to testify in the defense -- in our
9 defensive portion of this trial.

10 MR. BAILEY: Your Honor, I want to be as reasonable
11 as I can, but I -- I don't think it's up to me to go track
12 these people down for the defense. I may or may not even
13 call some of these people.

14 THE COURT: If you have the information, turn it
15 over. If you don't have the information, don't worry about
16 it.

17 MR. BAILEY: So, just to make sure I understand
18 what you -- the Court's order is, I need to give them a
19 witness list and -- and addresses on all the witnesses I
20 intend to call?

21 THE COURT: (Nodded head)

22 MR. BAILEY: Could I request, then, the defense do
23 the same thing?

24 MR. SIMS: Yeah.

25 THE COURT: Yeah. You all work together on those.

1 MR. SIMS: Yeah; I'll do that.

2 THE COURT: All right. All right. Number 12? You
3 got photographs, videotapes? I would prefer, if you have a
4 problem over any of those, let's take that up when we get
5 to them.

6 MR. SIMS: Yes, sir. Well, there will be some
7 question about some of the photographs, your Honor. It
8 depends upon which ones the State is intending to introduce
9 and when they intend to introduce those photographs. There
10 will be ---

11 THE COURT: Solicitor, if you'll meet with him,
12 those that you intend to, you all go over them. The ones
13 you can't work out, we'll set time aside at the appropriate
14 time, and we'll ---

15 MR. BAILEY: Yes, sir. Just ---

16 THE COURT: --- reach a decision.

17 MR. BAILEY: There are no videotapes, if that's
18 part of what ---

19 THE COURT: Okay.

20 MR. BAILEY: --- the motion is, and I don't intend
21 to introduce any pictures of the -- of Connie Snipes' body
22 at -- at either phase, because it's so decomposed. Unless
23 some issue comes up, I don't anticipate -- there was
24 some -- some cutting on the body, some mutilation, and, if
25 that is disputed, then I -- then I may be forced to

1 introduce those.

2 MR. SIMS: Well, we can discuss it at that time,
3 your Honor, but I think that would be an appropriate thing
4 to do before we decide to put in those kind of photos of
5 bodies been decomposed.

6 THE COURT: Thirteen.

7 MR. SIMS: Your Honor, that was in the nature of
8 the impeaching evidence that the State may have in its
9 file. I have been given the conversations, or the taped
10 conversations, and the written conversation of Roy Tooth.

11 I've been given the three written statements of
12 Norris Martin, the full summary statement of Norris Martin,
13 and I would ask -- those are the kinds of things -- I don't
14 believe that there are any more out there.

15 I've looked at all of that, but, if there's any
16 other Brady motion or motion pursuant to Rule 5, whether or
17 not there's impeachment or prior inconsistent statements
18 under -- I believe it's 609, that we would be entitled to,
19 that's the -- that's the basis for that -- that motion.

20 MR. BAILEY: Your Honor, I've got an open file
21 policy. He's got everything, including any impeaching
22 information. The reason I didn't agree to the motion as
23 written is because it goes into the stuff about me
24 producing all records showing any prior misconduct, bad
25 acts committed by any witness from the State. I don't know

1 what they've done throughout their entire lives.

2 They're asking for personnel files for all
3 witnesses from the State, and I just don't think I need to
4 produce any kind of stuff -- if it's clearly impeaching as
5 far as prior conviction, and disclosed the rap sheet, I
6 provided that to the defense and will provide it, but he's
7 asking a lot more stuff than the written motion in
8 saying ---

9 MR. SIMS: We will narrow it, your Honor, to the
10 information specifically on Roy Tooth. I believe you gave
11 me the incident reports that he's had, the incidents that
12 he's had while being in prison. I -- I -- I got that
13 information, but I don't have his full record, his juvenile
14 and his adult record.

15 MR. BAILEY: I -- I don't have that -- I don't have
16 his juvenile record. I've got the Department of
17 Corrections record that I provided to you.

18 MR. SIMS: And Norris Martin; I believe his rap
19 sheet would show that he had a burglary back in '87.

20 MR. BAILEY: Right.

21 MR. SIMS: And I believe those would be the two
22 that I'd be most concerned with, your Honor. And, if
23 that's all the information you have, then that -- that
24 solves that problem.

25 THE COURT: All right. Fourteen. He stated he's

1 got an open file; you've had access to it.

2 MR. SIMS: I've had access. He's given me
3 everything that I -- I believe that -- that I am entitled
4 to at this point. I don't know of anything else that -- if
5 I come up with anything, your Honor, I'll bring it to the
6 Court's attention, and I'll talk with Mr. Bailey about it,
7 see if we can work it out first.

8 THE COURT: Okay.

9 MR. BAILEY: You're withdrawing the request of the
10 Court to review my file?

11 MR. SIMS: No. I'm not -- I'm not withdrawing it.
12 I'm just going to go through my information, and, if I deem
13 that that's necessary, I will bring that issue up before
14 the Court. If I talk to you about it, and I'm not
15 satisfied, I will bring it up, so I'm not withdrawing it.

16 MR. BAILEY: All right.

17 THE COURT: Seventeen.

18 MR. SIMS: Your Honor, that's more -- I've been in
19 situations where we have a question when the judge
20 saying -- I know the judge has a right to take an active
21 role in qualifying jurors, but we have also had situations
22 where those questions have tended to, in my mind, lead the
23 jury to believe that they have to answer questions a
24 certain way in order to satisfy the Court, as opposed to
25 answering truthfully, from their own experiences, what they

1 feel in their mind would be appropriate under the
2 circumstances.

3 In some instances, I, in my own mind, having been
4 involved in these kinds of cases, picked up situations
5 where the jurors believe that they have to satisfy the
6 Court, as opposed to being truthful to both the State and
7 the defense, so that an impartial and unbiased juror --
8 jury can be chosen for the defense of Sammie Stokes, and
9 that's why I raised that question, your Honor.

10 THE COURT: Well, in a case, especially like this,
11 you're going to find that I'm going to be very, very
12 limited in what I do. I'm going to let you all do your
13 all's job.

14 MR. SIMS: Yes, sir.

15 THE COURT: Other than the standard qualifications
16 we have to go through -- we know all those -- you won't be
17 hearing a whole lot out of me, but, certainly, if there is
18 a problem, you feel free to object at that time.

19 MR. SIMS: Yes, sir. And I believe he has agreed
20 to Nine -- to Number 18.

21 MR. BAILEY: Yes, sir.

22 MR. SIMS: Number 19; we've gone over that in
23 court, and I believe that's still dealing with ---

24 THE COURT: Which one?

25 MR. SIMS: We're on -- I was going to 19. I was

1 just looking to re-read my motion again just to be sure
2 before I said it. We've already -- that's the Jackson v.
3 Deno again, your Honor, we've raised.

4 THE COURT: Right.

5 MR. SIMS: Motion to limit the trial to a regular,
6 set time. I think we've all been in situations where you
7 end up at 12:00, 1:00 o'clock at night with a jury. I know
8 I have in prosecuting, and sometimes on the other side,
9 where the -- in -- in my mind, there's always brought on
10 additional fatigue and stress for the jury, and, of course,
11 in this situation, we want them to be at a certain point
12 where they can feel comfortable and not feel under the gun
13 or feel tired and may miss something, so I don't know what
14 time ---

15 THE COURT: You don't have to worry about that.
16 It'll be a strain as it is on everybody concerned, and
17 there's no point in pushing, pushing. We've got two weeks
18 set aside, and, normally, these cases are handled within a
19 week ---

20 MR. SIMS: Yes, sir.

21 THE COURT: --- or, you know, eight or nine days
22 maximum, so we ought to have a good time frame where -- for
23 everybody to do their job and not over -- over-stress
24 anybody.

25 In regards to that, while I'm thinking about it

1 now, I haven't been in touch with the Clerk here in the
2 last week or two. What -- how are we set up time-wise
3 on -- on Monday?

4 MR. SIMS: Ten o'clock.

5 THE COURT: Ten o'clock?

6 MR. BAILEY: Yeah; ten o'clock the 25th.

7 THE COURT: Yeah. Don't -- don't worry about that.

8 MR. SIMS: Yes, sir. Number 24; I believe we've
9 been given that information. I don't know of any
10 additional information at this point, and that's on the
11 second page, the first one on the second page, Number 24.

12 If that, in fact, becomes a question, I will bring
13 it up to the Court, but I think -- I think that we've
14 gotten all the information, and the State has provided us
15 with that.

16 Of course, Twenty-five is a standard motion to
17 disclose any relationship, past or present, that the -- any
18 jurors may have had with the Solicitor's office. That does
19 not -- is not solely related to the Solicitor himself, but
20 with anyone who has worked for him and is working in his
21 office, your Honor; just want to be clear on that.

22 THE COURT: Be sure and hand me up something and
23 remind me of that when we go to ---

24 MR. SIMS: Yes, sir.

25 THE COURT: --- process. Okay.

1 MR. SIMS: The -- we've already discussed the issue
2 of the photographs. The taped statements I have. The
3 physical -- Number 28 and Number 29 both have been
4 consented to, your Honor.

5 The issue as it relates to bad acts, under Number
6 30, that is an issue, your Honor. There is a question as
7 it relates to that, and we would ask that the Court -- that
8 is an issue as relates to prior bad acts.

9 MR. BAILEY: Your Honor, I anticipate, in the
10 penalty phase, getting into prior bad acts. The State
11 would in this -- this motion that such proof has been
12 limited to evidence of convictions; it's just flat out
13 incorrect. I mean, I -- I think I submitted a memorandum
14 to the Court that went into -- parts of them went into
15 that, where I cited probably half a dozen cases where prior
16 bad acts that did not result in convictions were allowed to
17 come out in the -- in the penalty phase.

18 MR. SIMS: They are allowed to come out in the
19 penalty phase, but there are also restrictions as to the --
20 if you're talking about 608 or Six O -- 608 is character;
21 609 is prior bad acts or convictions of the accused.

22 And, when you talk about that, in terms of the
23 length of time -- and I also raised the question, too, that
24 prior bad act or prior statement, in terms of the
25 convictions for my client.

1 There's an issue that's been coming up in my mind,
2 your Honor. He was convicted back in, I believe, in '87
3 or -- or '90, '91, somewhere in there, of certain crimes.
4 The question in my mind is whether or not those crimes,
5 when he was convicted back at that time, whether or not
6 they were felonies.

7 In terms of -- if they weren't felonies at the time
8 that they were convict -- that he was convicted of those,
9 the question would be whether or not they would be
10 admissible at this time as a felony conviction pursuant
11 to -- I believe he was trying to use Lyle. And, then, Lyle
12 itself talks about the intent, motive, common scheme or
13 design, and it -- and it depends upon how he's going to try
14 to in -- for what purpose he's going to introduce those.

15 We also get into the question of whether or not
16 that the prior crimes that he's talking about are so
17 closely connected to the present crime as to be able to be
18 admissible, pursuant to what that Lyle standard is, and
19 what it is under -- I believe it's 403(b), where you're
20 talking about the admission of prior crimes.

21 So there's going to be an issue as it relates to
22 that when that issue comes up. We can either argue it now
23 or we can wait until that phase.

24 THE COURT: Penalty phase?

25 MR. SIMS: Yes, sir.

1 THE COURT: Let's cross that bridge when we get to
2 it.

3 MR. SIMS: Yes, sir.

4 MR. BAILEY: Your Honor, just for the record, as
5 far as the guilt phase, I don't intend to introduce -- or
6 try to introduce any Lyle evidence in the guilt phase.

7 THE COURT: Yeah. We'll need -- we need to do that
8 when we get to it ---

9 MR. BAILEY: Yes, sir. That's, your Honor,
10 assuming that we can get some agreement on the redacted
11 portion of the letter, assuming that comes in, because the
12 letter jumps from one -- one murder to the other, and back
13 and forth.

14 THE COURT: Okay.

15 MR. SIMS: Your Honor, Number 31 and 32, they
16 have -- I already have Number 31. Number 32 has been
17 agreed to.

18 The question of Number 33, the criminal records of
19 the State's witnesses, there's no other way that we can get
20 that but from the State, because we don't have the
21 authority to have records check run on any of the witnesses
22 for the State, so it put us at a disadvantage of not
23 knowing whether or not those witnesses would have any
24 criminal records.

25 We can't get it at this point from SLED, and they

1 would be the most appropriate vehicle to provide us with
2 the witness -- with the records of any of the witnesses
3 that they propose to call.

4 MR. BAILEY: Your Honor, Mr. Sims has sat through
5 the prior trial of the co-Defendant, Pattie Syphrett, which
6 all the witnesses may not be -- there won't be any
7 additional witnesses here that -- other -- other than
8 possibly penalty phase witnesses, that he doesn't already
9 know about. I provided him the rap sheets for those people
10 that -- lay witnesses that I felt like might have records.
11 We've ran the rap sheets on them; did not run rap sheets
12 for law enforcement, Dr. Sexton, those kind of people.

13 THE COURT: Okay.

14 MR. SIMS: Number 34, Number 38, Number 39, and
15 Number 40 have all been consented to, your Honor. And, of
16 course, we will argue that -- we can do it when we get to
17 it, your Honor, the issue as it relates to peremptory
18 challenges, not only -- well, that's a qualifying death
19 penalty jurors, and -- and Batson, and all that. I believe
20 that would be an appropriate time to argue that, if we come
21 to a situation where we feel that that strike has been
22 exercised in a manner inconsistent with what the law is at
23 this time.

24 THE COURT: Okay.

25 MR. SIMS: Forty-two and Forty-three, basically, we

1 can argue those both at the same time, your Honor. I feel
2 that, of course, a jury in this kind of case should be
3 sequestered, and we just want to put it on the record that
4 we had that, and I believe that that's not -- that's just a
5 cut-and-dry, as the Court has talked about.

6 THE COURT: I assume that everybody was in
7 agreement that we'd do that ---

8 MR. BAILEY: Yes, sir. The only reason I didn't
9 consent to that was he wants them sequestered during jury
10 selection, and I don't see how you can do that unless you
11 want to ---

12 MR. SIMS: That would probably miss -- miss -- and
13 I -- I -- I apologize for that ---

14 THE COURT: Okay.

15 MR. SIMS: --- because, of course, they would not
16 be sequestered during the jury selection, but segregated
17 from everybody else, as -- as -- as the usual standard.

18 THE COURT: Now some of the judges are not -- are
19 not requiring it anymore, but, if both of you want it,
20 we're going to do it.

21 MR. SIMS: Yes, sir.

22 THE COURT: Both of you tell me not to do it ---

23 MR. SIMS: I want it, your Honor.

24 THE COURT: Okay. Granted.

25 MR. SIMS: Sequestering witnesses, your Honor,

1 we -- that's a motion that we always make to keep the
2 witnesses separated. We would again renew that motion ---

3 THE COURT: Case like this, I'm going to grant it.

4 MR. SIMS: Yes, sir.

5 MR. BAILEY: Your Honor, I -- I would -- wouldn't
6 have any opposition to that. I -- I would ask the Court to
7 consider not having that apply to family members, or to
8 expert witnesses who may form an opinion based on listening
9 to other witnesses testifying.

10 THE COURT: Sure.

11 MR. SIMS: I don't have any problem with that, but
12 I do have some question about the family members, in terms
13 of which family members and what they're going to say, as
14 it relates to -- as this case develops.

15 THE COURT: If it comes up -- if -- if they're
16 going to -- if they're going to testify, you need to keep
17 them out, and then we can let them back in. Let's just
18 work ---

19 MR. BAILEY: I don't anticipate any -- any family
20 members testifying in the guilt phase.

21 THE COURT: Okay.

22 MR. BAILEY: So I wouldn't -- I think they've got a
23 right, under the Victim's Bill of Rights, to be here
24 anyway, probably.

25 MR. SIMS: The information concerning the expert

1 witnesses, I think I've gotten, basically, the information
2 of all the -- the -- the information as it relates to any
3 experts that's going to testify as to -- and competency is
4 not an issue, but I believe Mr. Bailey and I both know that
5 the psychologist who performed part of the evaluation is
6 now dead. He died a couple of -- about a week or so ago.
7 He died as a result of a massive stroke, and I don't know
8 where they're going -- where they're going to go with that,
9 but competency is not an issue as -- as it relates to this
10 case.

11 THE COURT: Okay.

12 MR. SIMS: I don't know of any other experts at
13 this point.

14 MR. BAILEY: Well, we've got potentially a DNA
15 expert. We -- we can talk about ---

16 MR. SIMS: I believe we -- we had talked about the
17 possibility of a stipulation that she would stipulate --
18 that we would stipulate and you would stipulate that the
19 blood that was found on that gray flannel shirt was that of
20 Connie Snipes?

21 MR. BAILEY: Yes, sir.

22 MR. SIMS: And the blood -- and that also -- so we
23 can work out a stipulation as to that DNA person.

24 THE COURT: Now, your lead investigator, I always
25 allow them, certainly, to be at the table with you. And

1 your family members; we're clear on that. And there may
2 be -- okay.

3 MR. SIMS: Number 49 has been taken care of.
4 Aggravating circumstances during voir dire; we are
5 limited -- we raised that issue, and that's Number --
6 when we talk about -- I want to -- when we raise that issue
7 as it relates to -- to conversation as it relate to
8 aggravated circumstances, that also gets into that Lyle
9 area, your Honor, whether or not they are going to even be
10 admitted.

11 And, if you start talking to the jury on Day One
12 about torture, or if you're talking to the jury about
13 kidnapping, criminal sexual conduct, those he's been
14 charged with, but, if you start talking to the jury at the
15 initial stages of the trial about certain aggravated
16 circumstances, for example, when we go back and talk about
17 torture again, and that may or may not rise, based upon how
18 the case develops, but you've already included that in the
19 jury thinking process, which would create a taint on their
20 mind, and that's what we wanted to prohibit, the limit --
21 or in terms of where we're going when we talk to a jury
22 about the potential specifics as it relates to aggravated
23 circumstances.

24 MR. BAILEY: Judge, I agree with that. Again, my
25 problem is that sometimes the written motion is different

1 than what -- what he's saying he wants, and that's why I
2 didn't agree to this one, because this ---

3 THE COURT: Okay.

4 MR. BAILEY: This refers to the legal significance
5 of aggravated circumstance not being brought out in voir
6 dire, and I don't know how you can voir dire the jury
7 without letting them know what an aggravating circumstance
8 is in general. If -- if he's just ---

9 MR. SIMS: In ---

10 MR. BAILEY: --- stay away from specifics, I don't
11 think that voir dire -- the specific mitigating or
12 aggravating circumstances ought to be asked about, because
13 they may or may not even arise during the case.

14 THE COURT: All right. Very good.

15 MR. SIMS: And, your Honor, I believe we've already
16 solved that question about the list of witnesses. I'll
17 give him my list, and he'll give me his list. And the only
18 other is the written charge. I know some judges have a
19 written charge that they would prepare and give us the
20 opportunity to look it over prior to the actual case,
21 before they -- we get to that point. I don't know whether
22 the Court did that or not.

23 THE COURT: No. It's a -- really don't know what
24 I'm going to do till I hear everything.

25 MR. SIMS: Yes, sir.

1 THE COURT: I'll -- I'll give you all -- give you
2 an idea.

3 MR. SIMS: Thank you, your Honor. I believe that's
4 all of my motions that I have at this point, but I do know
5 that there's going to be an issue that's coming up, and I
6 don't know whether the Solicitor's raising this. I'll just
7 wait and maybe hold that; the issue of proportionality; and
8 so he's going to raise that, and I -- and -- and -- and
9 I'll just respond to -- to his issue.

10 MR. BAILEY: Your Honor, I had filed a notice of
11 motion; I'm not sure if you have that yet or not. It was
12 just filed on October the 8th, a notice of motion to
13 preserve notes by expert witnesses.

14 And the basis for that, your Honor, is that the
15 last several of these cases I've done, for whatever reason,
16 the defense experts don't do a written report. I -- I
17 don't think Mr. Sims and Mr. Johnson would tell the experts
18 not to do that, but the experts that -- that testify in
19 these kind of cases know the rules; they know what happens
20 when they submit a report; they get cross-examined on it,
21 so they just don't do it.

22 And -- and I get sandbagged; I don't know what
23 they're going to say, and I -- I would ask that the Court
24 order these experts to preserve their notes, to bring them
25 to the Court, so I have some basis for being -- for cross

1 examination; on the alternative, to require them to submit
2 a written report as a condition of their being able to
3 testify. I -- I think that their dodging the written
4 report violates the spirit of Rule 5, not the letter of
5 Rule 5.

6 MR. SIMS: Your Honor, of course, I have no
7 problem, if I get a written report, turning that over to
8 the Solicitor, but I don't see how he can make someone --
9 if they tell me that they don't usually do any notes, or
10 they don't take any notes, or -- or -- and they don't do
11 that, they just have to write a report after they've had
12 the opportunity to evaluate that person, I don't know if I
13 can make them write notes on what it is that they're doing,
14 but, if I do get a report, of course, I will turn that
15 over; there's no question about that ---

16 THE COURT: If they don't make notes or do
17 something, then they're -- they would be jeopardizing
18 themselves, surely, on cross examination, but let's --
19 let's put it this way. If they have a written report,
20 preserve it, make it available. If they make notes and
21 keep them, they're not to destroy them ---

22 MR. SIMS: Yes, sir.

23 THE COURT: --- or any tests they run.

24 MR. SIMS: Yes, sir. I will definitely -- I will
25 make that, and, as a matter of fact, I'll put that in

1 writing to all of them today.

2 MR. BAILEY: So, your Honor, the next motion I've
3 got was a -- a notice of motion to eliminate or prohibit
4 the defense at any point in trying to educate the jury on
5 the legal effect of a divided jury, and the basis for that
6 is that the law requires them to come back with a unanimous
7 verdict, and what happens if they don't is a matter of law
8 for the Court, not something the jury should be concerned
9 about, because, if they do know that, it would encourage
10 them to ignore your Honor's instructions and -- and -- and
11 hold back and not reach a unanimous verdict, and I cited
12 four or five South Carolina cases that I think support that
13 in my memorandum.

14 THE COURT: Surely you wouldn't do that.

15 MR. SIMS: I wouldn't do that, your Honor, but I do
16 think that I would have the right to tell the jury that
17 they have the opportunity, and they must follow their own
18 conscience, whatever that conscience may be.

19 THE COURT: I'm going to tell them that, too.

20 MR. SIMS: And I know the Court will tell them
21 that, but not into -- in terms of trying to educate them
22 that if -- if you hold out, you -- you know, in terms of if
23 you hold out, you won't get a verdict in this case, but in
24 terms of being able to argue that they have to follow their
25 own conscience, of course.

1 THE COURT: I think you've got an understanding.

2 MR. BAILEY: Yes, sir. Your Honor, the next motion
3 was a motion to prohibit either side from getting into
4 religious arguments, and especially in the penalty phase of
5 this thing.

6 I've just seen situations where one side gets into
7 the Old Testament, one the New Testament, and you -- you
8 object to arbitrary factor of religious beliefs, and
9 they're starting to think about something besides the facts
10 of the case and the Court's instructions.

11 MR. SIMS: Your Honor, if it's not brought in, I
12 definitely understand what the -- and I have some -- some
13 questions about that, too, so, if they're not brought in by
14 the State, then we wouldn't have a ground to respond to it.

15 THE COURT: All right. Granted.

16 MR. BAILEY: Your Honor, I'd next filed a notice of
17 motion for a handwriting sample from the Defendant.
18 Assuming that the Court -- just for the purposes of this
19 motion now, assuming that the letter does come in under the
20 Jackson v. Deno hearing, the handwritten letter talks about
21 two murders.

22 Stokes is charged with the murder of Connie Snipes;
23 some five or six days later is charged with the second
24 murder of Doug Ferguson. As -- as I told the Court, I
25 don't plan on trying to get into the Ferguson murder unless

1 and until we get into the penalty phase.

2 But the handwritten letter jumps back and forth
3 between one murder to the other, and, if I was to try to
4 redact that letter, it would be -- it would have glaring
5 gaps in it. The jury wouldn't know what was going on;
6 they'd be curious about it.

7 And what I'd propose to Mr. Sims was that we go
8 ahead and if we can agree on what should come out -- and I
9 provided a copy of what I think should come out -- then we
10 could have the typed version retyped to omit all those
11 blanks, and stipulate that is his letter. If we can do
12 that, then that would eliminate the necessity for a
13 handwriting expert.

14 MR. SIMS: Your Honor, of course, that's going to
15 be determined by what the Court rule. I, as a matter -- in
16 order to move it on, we would -- we would do that, but not
17 give up our motion as it relates to that statement. I
18 don't have any problems in doing that, but I'd preserve my
19 issue as it relates to the submission of that letter, but
20 we can do that; I think it depends upon how the Court rules
21 whether or not we even use it or not.

22 THE COURT: Okay. That will be fine.

23 MR. SIMS: Yes, sir.

24 MR. BAILEY: Your Honor, the next motion is a
25 motion to prohibit Defendant from arguing proportionality

1 of -- or for evidence of other defendants' sentences.

2 There were numerous people that had some degree of
3 involvement in one or both of these murders. One or more
4 of them may testify for the State. Some may not testify.
5 There have been plea agreements. There have been people
6 that have been tried and sentenced. There's a whole range
7 of people that were involved at different points in the
8 process.

9 My concern is that this jury should be focused on
10 the -- assuming we get to the penalty phase, they ought to
11 be focused on the appropriate punishment for Mr. Stokes'
12 involvement here, and not be distracted or concerned with
13 what other defendants got by their jury trials, or what
14 plea agreements were entered into, anything of that nature.
15 That would be proportionality, and I think that's reserved,
16 under our system, for the Supreme Court to -- to decide
17 proportionality, not the jury.

18 There are two cases that -- that I think are
19 directly on point. Unfortunately, one of them just came
20 out earlier this month; I don't have it, but I'll provide
21 that to the Court between now and the time of trial, if you
22 need it.

23 But The State versus Charping (phon.), the -- the
24 1998 Charping (phon.) suit, where this same issue was
25 addressed by the Supreme Court, they held the trial judge

1 did not err in refusing to let the defense introduce
2 evidence of a co-defendant's life sentence.

3 They held that co-defendant's sentence is not the
4 mitigating evidence, because it doesn't show
5 characteristics of the defendant and the circumstances of
6 the crime. It shows what happened subsequent to the crime
7 to another person, because of their involvement.

8 And the Court further went on to hold that it's not
9 the jury's concern, in a capital case, to weigh the
10 sentence of a similarly situated defendant. That's
11 reserved for the Supreme Court.

12 So that -- that is the issue. And I would also
13 contend, your Honor, that if we're talking about guilt
14 phase testimony, there was a Court of Appeals case that
15 just came out, State versus Michael Moore, in which that
16 issue was addressed.

17 And the Court of Appeals in that case held that the
18 co-defendant's guilty plea may be admissible to impeach the
19 credibility of a testifying co-defendant, but that a guilty
20 plea of a co-defendant is not relative as substantive
21 evidence of the defendant's guilt or innocence, defendant
22 on trial. Now that's not a Supreme Court decision, but it
23 is a -- what I think is a well thought out -- cites a lot
24 of cases -- several states for the proposition.

25 So the State's position is that what happened to

1 another defendant could only be relevant if that defendant
2 testifies for whatever impeachment value. That is, if they
3 have a deal with the State, certainly they ought to be able
4 to elicit that deal, because it might have some bearing on
5 their bias in order to testify.

6 But to -- to argue to the jury to listen to
7 evidence that "Joe Blow got a life sentence; Sam Smith got
8 a plea agreement; they're getting off light; yet, the
9 Solicitor's wanting to execute my client," gets into
10 proportionality and would be against the Charping (phon.)
11 case, and that's the basis of that motion.

12 MR. SIMS: Your Honor, I take the position that
13 we're not talking about proportionality. I've read
14 Charping (phon.), and, in that -- in that particular case,
15 what happened was the defense counsel tried to do -- tried
16 to introduce evidence of a non-testifying witness,
17 non-testifying person, co-defendant, into -- that this
18 person had gotten a life sentence. He wanted to introduce
19 that evidence into the trial, and the judge -- and the
20 Court said he could not do that.

21 But, in this situation, we're, One, going to have
22 people who are going to be testifying, and the agreements
23 and what they got is very relevant as it relates to my
24 ability to argue and show the jury, in that context, in
25 terms of what one gets and the other one gets.

1 I think that in reviewing the proportionality
2 cases, all of the cases -- I believe the last case that the
3 Solicitor was talking about may be State v. Council
4 (phon.), which came out in 1989.

5 I have several questions as it relates to that
6 prohibition, under the cases that he is talking about.
7 First of all, that particular part of the statute deals
8 specifically with the Supreme Court authority or rule that
9 they must review a case in order to determine whether or
10 not the sentence that was handed down by the jury is
11 proportional to the elements or the facts of the case, and
12 that the sentence of death is not the result of passion, or
13 prejudice, or bias. That's that proportionality rule.

14 I take this issue as being one of a constitutional
15 proportion, in that it is a violation of my client's right,
16 under the equal protection clause, to present evidence that
17 a jury should, in fact, be able to hear.

18 And my reasoning for this, your Honor, is this.
19 The State of South Carolina allows victim impact testimony
20 in the death part of a case. And anyone who's ever been
21 involved in a criminal case of this magnitude has heard or
22 seen a daughter, a -- a wife, or a child, or someone get up
23 and talk about the uniqueness of the person who has been
24 killed.

25 And I've been in situations where there have been

1 tears, and the jury has had to sit there while all this
2 highly traumatic and emotional testimony is elicited by the
3 State, in fact, drumming people through there to testify
4 about the uniqueness of that person, or the emotional, the
5 economic impact of that person -- that the loss of that
6 person would have on this particular family and/or the
7 community. That is information that is elicited from the
8 State.

9 But, at the same time, if you are going to deny the
10 Defendant the equal right to put in evidence that a jury
11 should hear, saying that a co-defendant who is equally
12 culpable or equally involved in this particular matter, if
13 they are going to be prohibited from hearing information
14 that this person got either a life sentence, or entered
15 into a negotiation and got a lesser sentence, under the
16 guise that it invades the province of the jury, then it --
17 then -- but, at the same time, allow them to have the
18 victim's impact statement and the victim's impact
19 testimony, under the guise that it shows the uniqueness,
20 that's a legal fiction.

21 And we take the position that in order to -- that
22 if the Courts are going to deny us this right, then that's
23 a violation of our client's right to a fair trial. It's
24 also a violation of the equal protection clause of the
25 Constitution, and, that, therefore, that interpretation as

1 it relates to the state Supreme Court of South Carolina is
2 unconstitutional as it relates to my client, by preventing
3 us from having the same opportunity to present evidence, so
4 that the jurors would have a complete and full view of all
5 the factors involved, and not just the factor that there's
6 been a loss, but, also, the fact that there are other
7 people who were involved in this who are going to be
8 spending the rest of their life, or, either, part of their
9 life, or got no sentence at all.

10 The people who are going to be testifying in this
11 case -- Roy Tooth is in jail now and will be out of jail in
12 approximately ten, nine months. He's made a deal with the
13 State. I think that we should be able to bring that out.

14 Norris Martin, who is the only person who can
15 have -- in effect, based upon the -- the investigation of
16 the Sheriff's Department, the only person who brings my
17 client in -- with the exception of his statement, brings my
18 client into this matter, he has a life sentence.

19 The other persons who are involved would
20 probably -- may have come up in -- in the -- in the
21 sentencing phase, and that may be Faith Lapp in the -- in
22 the sentencing phase of this matter.

23 We -- we wanted to point out to the Court what our
24 position is. We feel that it's a legitimate argument.
25 It's something that we're not trying to introduce

1 collateral testimony or about other people who are not
2 involved in the trial, but these people are going to be, I
3 believe, testifying witnesses in the case, and we should be
4 able to raise that issue and argue that issue before the --
5 before the jury.

6 MR. BAILEY: Your Honor, if I could briefly respond
7 to Mr. Sims' argument. As I understand what he's -- he's
8 saying, I believe there's -- that this is potentially
9 mitigating testimony. And he shouldn't be precluded, under
10 the United States Constitution, from introducing any
11 mitigating testimony.

12 And I think you have to ask yourself, "What -- what
13 is mitigating testimony?" And it's clear that what he's
14 trying to get at is not mitigating testimony.

15 Mitigating testimony is anything about the
16 Defendant's background and character that would -- would --
17 would form the basis for some decision less than the death
18 penalty, anything about the record, circumstances of the
19 offense, and to support the -- the basis for -- for a life
20 sentence.

21 And I'm not -- would not in any way try to prevent
22 him from eliciting what occurred at the crime or -- or
23 the -- the other people's involvement that may have been
24 present either before or after the murders took place.

25 But what he's trying to do is take it a step

1 further and say that something that his client had no
2 control over, that occurred after the crimes we're talking
3 about, my -- my agreement to accept some kind of plea
4 agreement with a co-defendant, potential co-defendant, is
5 somehow mitigating of his involvement.

6 And, when you think about it, it just doesn't make
7 any sense. I mean, it doesn't make him a better or worse
8 person if I cut a deal with somebody else. It, again,
9 just has the jury doing some shopping around and trying to
10 compare sentences instead of concentrating on what all
11 happened, the -- the Defendant they're sworn to make a
12 decision on.

13 MR. SIMS: May I respond just briefly, your Honor?
14 I'm not qualifying this as a mitigating circumstances. My
15 position is simply one of the right of the Defendant to
16 have the jury consider all of the factors in the case and
17 not keep him -- not hinder him or handcuff the Defendant
18 from being able to put forth information that the jury
19 would be able to review, and make a determination on it.

20 I think if we're talking about a fair trial here,
21 if you've got a mother who's sitting on the stand with
22 tears, and begging, and pleading, and talking about what
23 this is going to -- how this is going to impact upon her
24 life, not having her husband there, or a mother or father
25 in tears talking about how they're not going to be able to

1 enjoy the love of their daughter in this situation, and,
2 then, at the same time, since you -- jury can listen to
3 that and make a decision, and you can listen to all of that
4 highly emotional, highly charged information, but you can't
5 hear and you can't compare or say that, "Well, if this guy
6 who's equally culpable is going to get a life sentence,
7 then, you know, we can't compare that," I think that this
8 is a basic issue of equal protection in providing the same
9 benefits and rights to the State and to the Defense, and
10 treating everybody fairly, pursuant to the Constitution and
11 pursuant to his right to a fair trial.

12 MR. BAILEY: Your Honor, can I say two things very
13 briefly? Not to drag this thing out, but, if he wants to
14 try to get a jury to say -- and I assume Norris Martin, for
15 example -- Norris Martin is equally culpable, then he's
16 putting that jury in judgment of Norris Martin, who hadn't
17 had a chance to put his defense up, hadn't had his lawyers
18 represent him or anything.

19 And the second thing, your Honor, is that if I, in
20 a -- in a theoretical case, if I've got co-defendants, and
21 I try one of them and get the death penalty, and, then, I
22 try the second one, and I introduce evidence that the
23 co-defendant got the death penalty, and I argue to that
24 jury this other jury gave this co-defendant a death
25 penalty, "You, therefore, should give him the death

1 penalty," Mr. Sims would quite rightly object to that, but
2 he's wanting to do the same thing.

3 THE COURT: Let me make sure that -- if the witness
4 takes the stand, and there's been some deal, or negotiated
5 sentence, whatever, and the sentence is passed, then Mr.
6 Sims can go into that, as far as biasness, credibility,
7 whatever.

8 What you're worried about and what you feel like
9 the case law backs you up on is he can't get up there and
10 argue because somebody got a life sentence, that Mr. Stokes
11 deserves a life sentence.

12 MR. BAILEY: That's correct, your Honor.

13 THE COURT: And Mr. Sims, in turn, is arguing to me
14 probably what he would argue to the United States Supreme
15 Court.

16 MR. SIMS: Probably.

17 THE COURT: Well, I can see -- can see both sides
18 on there, but we're going to follow what our Supreme Court
19 has laid down, and just what I said; you may do that if
20 they take the stand, but I don't want to hear any "because
21 so-and-so got treated this way, you all can treat my man,
22 my Defendant, my client this way or that a way" ---

23 MR. SIMS: I -- I understand the Court's ruling on
24 that, your Honor, and, again, I would accept to that, but,
25 again, of course, because of the contemporaneous objection

1 rule, I'll raise that again when we get to that point.

2 But I also want to be clear that we're not talking
3 about a situation where I would not be able to argue those
4 same set of facts as it relates to bias, impeachment, and
5 the probability of them lying based upon trying to get to
6 these issues.

7 THE COURT: As that developed, you certainly have a
8 right to do that.

9 MR. SIMS: Thank you, your Honor.

10 MR. BAILEY: Okay. Your Honor, the next motion I
11 had was a motion to prohibit the Defendant from attempting
12 to get Defendant's relatives, family members, whatever, to
13 put up what I characterize as execution impact evidence, to
14 have a -- you know, a mother or -- or other relative to get
15 up there and beg the jury for the child's life, how this
16 person lived. I can't do that with victim impact evidence.

17 I -- I think the law is clear on that, and Booth
18 versus Maryland, that was the type of testimony that was
19 prohibited as victim impact evidence. And, then, when
20 Paine versus Tennessee was passed, they limited the victim
21 impact evidence to descriptions of personal characteristics
22 of the victim, the emotional impact on the victim's family,
23 but they didn't touch that portion of the Booth case that
24 says you can't elicit family members' opinions about the
25 characterizations of the crimes or the Defendant.

1 And I -- I think there's sort of a -- a conflict in
2 our case law between State versus Torrence (phon.) and
3 State versus Earl Matthews. And, in Torrence (phon.), the
4 Court said although a Defendant may present witnesses who
5 know and care for him and are willing, on that basis, to
6 ask for mercy on his behalf, the Defendant may not present
7 witnesses to testify merely to their religious or
8 philosophical attitudes about the death penalty. Nor is a
9 Defendant entitled to present the opinion of a witness
10 about what the verdict -- what the verdict ought to be.

11 In -- in that case, Chief Justice, in his opinion,
12 held that the question by the defense, "Do you have a basis
13 for asking the jury to spare your son's life?" The answer
14 was, "That's my son. I don't want him to die"; they let
15 that stand.

16 In The State versus Earl Matthews, the Court held
17 the trial -- the trial judge properly prohibited testimony
18 of the Defendant's family member concerning the appropriate
19 punishment, because the ultimate decision was for the jury.

20 So I -- I think the Torrence (phon.) decision
21 probably sets out the outside parameter where somebody
22 could go in that regard, and I'd just ask the Court ---

23 THE COURT: Do you have ---

24 MR. BAILEY: --- to limit the Defendant to ---

25 THE COURT: Do you have any problem ---

1 MR. SIMS: Your Honor, in light of my
2 understanding, and -- and he -- and I believe there is a
3 question in terms of whether or not, when you read the two
4 cases, and you kind of put them together, uh, one says it's
5 okay for -- and they did not overturn that case or -- or
6 say that that was an impermissible inference or statement
7 to be made by a family member, and, then, the other they
8 kind of limited what was said, but not specifically as
9 relates to the issue of what he called -- I forgot what he
10 called it, but, in terms of that kind of evidence, I don't
11 foresee it coming out, but I would not be prohib -- I don't
12 want to be prohibited from utilizing those vehicles which
13 are allowed to be under the law.

14 THE COURT: All right. Well, I don't know what to
15 say about that, except to read the decisions and do what
16 you know you're allowed to do, and, if something pops up,
17 we'll just have to deal with it. You know, that's just
18 something that's hard for me to ---

19 MR. SIMS: Yes, sir.

20 THE COURT: --- give direction on, unless, you
21 know, it develops.

22 MR. SIMS: Okay.

23 MR. BAILEY: Just a couple things while we're here,
24 your Honor. I had done a summary chart of the Defendant's
25 convictions and levels of disciplinary records in the

1 Department of Corrections, and given that to Mr. Sims, see
2 if he can stipulate to that, because you can keep out a lot
3 of potentially irrelevant materials pertaining to
4 unsupporting documents.

5 MR. SIMS: Your Honor, I have -- he's got on that
6 some things like lying to a correctional officer as a
7 violation, and this has to do with the adaptability issue,
8 but, lying to correctional officers, and I believe some of
9 the things that they were talking were not in place at a
10 certain time or -- and I've forgotten the -- but I do have
11 some problems with those minuscule kinds of things being
12 said that these are infractions and which may impact upon
13 his adaptability to prison, and, especially in a prison
14 setting, they are not afforded an attorney, where they have
15 a -- where they have to go before an adjustment committee.

16 I believe the process is that they get a
17 correctional officer to represent them, if they get anyone
18 to represent them, and I have some questions in terms of
19 whether or not, when you just say that these are all of the
20 things that he's been charged with, the infractions that
21 he's been charged -- he's been charged with one fighting or
22 assault and battery with intent to kill. I don't
23 believe -- I don't know if that was ever adjudicated in a
24 court of law, but it's on his -- his record, and an
25 adjudication -- without an adjudication, I would be remiss

1 in my duty to consent to allow that kind of information to
2 come in as it relates to what his infractions are while
3 he's been incarcerated.

4 MR. BAILEY: Your Honor, that particular infraction
5 did go to court. That's when Mr. Stokes was convicted of
6 slashing another inmate with a box cutter in the face, and
7 he did go to court, and I think it was Allendale County.
8 He was convicted. That's contained in the disciplinary
9 file, because it started out that way, but it had ended up
10 being a street crime.

11 I -- I -- I think the case of State versus
12 Wimple (phon.) -- I was trying to find it -- that said that
13 disciplinary records come in under the business records in
14 evidence act. And I think certainly Mr. Sims could --
15 could argue that these are minor infractions and the jury
16 should discount them, but, nevertheless, it does bear on
17 adaptability to prison.

18 MR. SIMS: Your Honor, there may be -- and I'm
19 sorry. If I could just respond to that. It may be, under
20 Wimple (phon.), a -- a business record exception, because
21 this is kept in the ordinary course of their business, but
22 the information contained in the records is definitely
23 hearsay, because I don't have the opportunity to
24 cross-examine those persons who made those statements.

25 Now, you can have a business record exception, but

1 how am I going to be able to cross-examine the lying to a
2 correctional officer, whether or not that, in fact,
3 occurred?

4 So, without being able to cross-examine the actual
5 contents of it, that places me -- the violation of my
6 rights to be able to confront the witnesses. I just got
7 a -- a list of things there, and they want to introduce it
8 as a business record exception and have the jury to read
9 all of the documentation or everything else that's
10 contained in there, without -- without us having the
11 benefit to be able to cross-examine what's in the record.

12 THE COURT: All right. Re-read the case; see what
13 you all can work out ---

14 MR. SIMS: Yes, sir.

15 THE COURT: --- by agreement.

16 MR. SIMS: Yes, sir.

17 THE COURT: When the time comes, if we haven't
18 gotten an agreement, then we'll just have to take it piece
19 by piece.

20 MR. SIMS: Yes, sir.

21 THE COURT: But I trust you all can work out
22 most ---

23 MR. BAILEY: Your Honor, other aspect was the --
24 his conviction record, which, as far as I know, includes
25 three ABHANS, two of which the wife was a victim, and one,

1 Jackie Williams, in the Department of Corrections, was a
2 victim. And I -- I've given him copies of the indictments,
3 and the sentencing sheets, and all that. Is there a
4 problem with ---

5 MR. SIMS: I -- I -- I'm aware of the -- the issues
6 that related to Dwight (phon.), which brings another issue
7 we need to -- or that we had talked about an issue. I
8 don't know if my name appears on that indictment?

9 MR. BAILEY: It -- it -- it -- it may; it may. I
10 think it does.

11 MR. SIMS: At that time, back in -- in -- when I
12 was prosecuting, and I would sign all of the indictments,
13 and I want to be sure that that was -- that was cleared up
14 and not put on the indictment that he may be proposing to
15 introduce.

16 THE COURT: You don't have any problem other than
17 that.

18 MR. SIMS: That's -- I -- I mean, it -- I -- I
19 raised that issue earlier, and, in terms of whether or not
20 it was a felony conviction back in Eighty -- '89, '90,
21 because I believe, under that -- under the old -- old
22 criminal system we had, I don't believe we had crime -- we
23 had certain crimes that were not specifically stated as
24 felonies or -- or -- or misdemeanors. And, then, we had
25 that general catch-all ten-year sentence, where you

1 were -- you could get up to ten years for certain kind of
2 crimes, so I'm raising that issue, in terms of whether or
3 not we're talking about situations that were -- back when
4 they were committed, were, in fact, a -- a felony at that
5 time, and I -- I need to go through my mind and -- and --
6 and do some more on that.

7 MR. BAILEY: I don't understand why it makes a
8 difference if it was a felony or -- or misdemeanor. I
9 mean ---

10 THE COURT: Well, I'm having a problem with that,
11 too.

12 MR. SIMS: Well, and I may -- and I was -- and this
13 is something that I've been just thinking about, in terms
14 of whether or not, uh, I know it's a conviction, and if
15 it's -- depending upon what -- what provision of the
16 evidence code we're talking about, if we're talking about
17 under Lyle, or we're talking about under -- what is it --
18 609, uh, there is a provision under 609 that talks about a
19 felony convictions of the accused which are beyond a
20 ten-year period of time.

21 MR. BAILEY: Yeah. That's for impeachment, but
22 what -- what we're talking about is just the penalty phase;
23 the evidence show adaptable to prison and characteristics
24 of the Defendant.

25 If -- if a disciplinary -- prison disciplinary

1 record can come in under Wimple (phon.), which I -- I know
2 it can, then a conviction that carries ten years, violent
3 offense, could certainly come in.

4 As far as Mr. Sims' name appearing in the
5 indictment and all that, that's why I wanted to do the
6 summaries of the records, just to eliminate all those
7 problems for both the Department of Corrections record and
8 the conviction ---

9 MR. SIMS: Your Honor, I -- well, I'd just like to
10 be able to do some more research -- research on that issue.
11 It did come up in my mind, whether or not -- even though
12 609 talks about for impeachment purposes, whether -- even
13 though the attempt is to use it in the penalty phase,
14 whether or not that would also apply to that -- that phase.

15 THE COURT: All right. We'll just leave it open;
16 let you work on that ---

17 MR. SIMS: Yes, sir.

18 THE COURT: --- at that time.

19 MR. BAILEY: Your Honor, to make sure I'm clear on
20 the stipulation on the -- on the DNA evidence, could we
21 have an agreement on that, because I've got to get that
22 witness off, because she's out-of-state.

23 MR. SIMS: I -- again, I believe that -- that we
24 can stipulate to that. I've stated that for the record,
25 that we'll stipulate and draw up the stipulation that can

1 be agreed upon between the State and the Defense on that
2 issue.

3 THE COURT: All right. We got a lot of work done,
4 and we will resume work Monday a week. I will be in
5 Hampton next week, if something pops up, emergency or
6 whatever. I'll be down there; I'll be holding Common
7 Pleas.

8 MR. SIMS: Yes, sir.

9 THE COURT: Appreciate everybody coming. Mr.
10 Stokes appreciates you coming. Nothing else, if you all
11 will see what you can work out on those others we sort of
12 left open, and I'll take a look at this other. I want to
13 do a little ---

14 MR. SIMS: Yes, sir.

15 THE COURT: -- rehash over my statements, Miranda
16 rulings, and whatever.

17 MR. BAILEY: Your Honor, the only thing I can -- I
18 can think of that may cause some problems if we defer till
19 Monday would be the handwriting thing, if we can't reach a
20 stipulation on that letter, uh ---

21 MR. SIMS: If we can -- you know -- but I think
22 that, you know, as I said, that we can reach an agreement
23 as to what the -- those references to Doug Ferguson, and go
24 through that, and just redact that, and reach some kind of
25 an agreement, just hold it until the Court makes his

1 determination.

2 THE COURT: Okay. Try to do that. If it looks
3 like you all have hit an obstacle or whatever, get up with
4 me ---

5 MR. SIMS: Yes, sir.

6 THE COURT: --- in Hampton, okay?

7 MR. SIMS: Yes, sir. Thank you, your Honor.

8 MR. BAILEY: Thank you, your Honor.

9 THE COURT: All right. Before we go, let my clerk
10 explain to you the call we just got, to see if you all can
11 decipher what we got -- what the problem is.

12 MR. BLACKWELL: Our office just called and said
13 that there's a problem with the addresses for the jurors
14 and that we need an order for 911 to release addresses to
15 the Sheriff's Department.

16 MR. BAILEY: That's the most ridiculous thing I've
17 ever heard.

18 MR. BLACKWELL: So we need to ---

19 MR. BAILEY: I'll -- I'll consent ---

20 MR. SIMS: I'll consent to it.

21 MR. BLACKWELL: --- resolve that.

22 MR. SIMS: I'll consent to ---

23 MR. BLACKWELL: I guess probably what we need to do
24 is see if you can call down and find out what order that
25 they were talking about. They were going to send her a

1 copy of something, and then see what we need on that.

2 THE COURT: Are you all going back to Orangeburg
3 now?

4 MR. SIMS: Yes, sir ---

5 THE COURT: Will both of you all get with the Clerk
6 and see what the problem is, and one of you get us an
7 order?

8 MR. SIMS: Yes, sir.

9 MR. BAILEY: We -- we can do ---

10 THE COURT: We can do that ---

11 MR. SIMS: We can do that.

12 MR. BLACKWELL: That time frame was concerned,
13 versus doing it, like, Monday or something, being able to
14 do it today ---

15 MR. SIMS: We'll go back over -- I'm going back,
16 and we can stop by the Clerk's office and ---

17 MR. BAILEY: You want us to fax you an order?

18 THE COURT: That won't work. I'm leaving.

19 MR. BAILEY: Maybe we can just write -- handwrite
20 it or something. I -- I -- I imagine 911, those people
21 were thinking of some kind of Privacy Act violation to give
22 up the addresses to the Sheriff's office. I assume that's
23 what -- that's what ---

24 THE COURT: We need to do it now, because I'm going
25 to be out of town. We need to come up with something now.

1 MR. SIMS: Just do an order ordering that it's
2 consented to by both parties, ordering 911 to release the
3 addresses to the Sheriff's Department.

4 (Hearing ends at 12:15 p.m.)

5 END OF REQUESTED TRANSCRIPT OF RECORD - - -

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WALTER BAILEY
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2 MAY 2000

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IN RE: STATE V. SAMMIE LOUIS STOKES

Dear Mr. Savitz:

In response to your letter of April 20, 2000, the following is my recollection of what happened at the bench conference during Stokes' closing. I made two objections to the closing. First, that Mr. Stokes was impermissibly injecting religion thereby injecting an arbitrary factor as well as arguing factual issues that did not arise during testimony. Second, I objected to his false representation that he had only given one statement. A review of the transcript from the Jackson v. Denno hearing will disclose that he gave two statements, i.e., a taped statement and then an unsolicited letter. Although only the letter was introduced at trial, his argument that he gave one statement was factually incorrect. It is my further recollection that Judge Burch sustained my objection on both points. During the second bench conference, Mr. Stokes began to inject his personal beliefs which I objected to as being improper. My recollection again is that this objection was also sustained.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Walter M. Bailey, Jr.

WMBJR:jgh

cc: The Honorable Paul Burch
Thomas Ray Sims, Esquire
Virgin Johnson, Jr., Esquire
Donald Zelenka, Senior Assistant Attorney General



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WALTER BAILEY
Solicitor

28 July 2000

Joseph L. Savitz, III, Deputy Chief Attorney
SC Office of Appellate Defense
1122 Lady Street, Suite 940
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IN RE: STATE V. SAMMIE LOUIS STOKES

Dear Mr. Savitz:

This is in further response to my letter of April 20, 2000. I have reviewed portions of the file in this case. As I stated in my letter of May 2, 2000, one of the subjects of the bench conference was my objection to the defendant injecting religion into his closing argument. I had previously filed a motion to prohibit any religious arguments on September 24, 1999, which the Judge granted. It is my recollection that Mr. Sims agreed that it would be inappropriate for his client to inject religion into his closing argument.

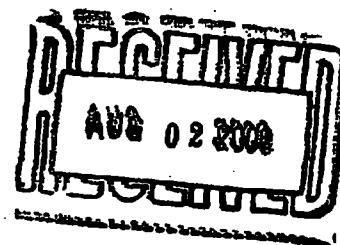
Please do not hesitate to contact me if you have any further questions.

Sincerely,

Walter M. Bailey, Jr.

WMBJR:jgh

cc: The Honorable Paul Burch
Thomas Ray Sims, Esquire
Virgin Johnson, Jr., Esquire
Donald Zelenka, Senior Assistant Attorney General



Well it all started one evening when I was in my room at Turkeville Corr. Inst just chilling out watching TV and my roommate James Ray Tooth came into the room upset and cursing. He said that bitch Connie done did it again not only she got me in here now the bitch done got my daughter locked away by dss all that hoing and hanging out and leaving the baby home alone. I said I thought Connie live with your mother and he said yeah she do, But the only reason my mother lets her stay there because of my daughter, He said my mother don't like Connie and I hate the bitch too. Hell she aint nothing but a hoe and we want the bitch dead anyway. So my mother could get custody of Nicole. He said man stop juking your mother aint with that and he said shit you just dont know, my moms is down homie, Hell you see she brings us weed all the time and if you think that you can get the job done you will be pay well, I said man shit like that cost, He said money is no problem I am going to call my moms. I said hold up because I've been gone awhile and right now I don't know who to trust out there. He said but you still should talk to my moms I said OK call her.

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3. I said it will cost 2,000 dollars and you'll have 10 months to come up with the money and the gun. I'll be getting out in May 98 and right now I've been gone awhile and I don't know who to trust out there so all you got to do is stay in touch with me, She said that no problem I write and come see you and besides I want to see how you look and talk with you face to face. I said OK, But do you think that you can keep up with Connie and Lee that long? She said hell yeah and besides I've gotten him pussy whip... I just laugh and said I hear you "girl" well she wrote and stayed in touch and a month later ~~the~~ Roy came into the room again looking crazy I said what's up Roy, He said that the bitch is pregnant again by god knows who, I said dam, He said mommie wants you to call her tonite after 9:30 count I said OK, I call her and Pattie said I told you the bitch was a whore she is pregnant again and plus I kick her ass out and I am trying to get custody of Nicole from DSS She said the bitch is living with Robbie which is Lee brother, I said is Robbie the father? She said no and Connie don't know who's the father I said will you still be able to keep up with her and she said yes and I said and Lee, she said he is under my control, I said OK and she just went on talking about the baby and that

5. Well a few weeks later she said in a letter that Doug had read one of my letters. But it wasn't no big deal because he also didn't like Connie and wanted her dead too, But she never told me his reasons for disliking and wanting Connie dead, so I wrote her back and ask her what's up with my shit. She wrote back and told me that if she didn't get them back that she would add whatever price I wanted on the 2,000 dollars... Well in April or earlier Connie had gotten out and was living with Pattie so Pattie Jay and Doug was living with some girl in Bamberg along with her sister and her sister boy-friend which was a black guy so Pattie Jay... Well I got out in May 98 which Pattie was suppose to pick me up but never shown up so I took the bus ~~to~~ to Orangeburg and right then I knew she was just bullshitting about the money and the deal, But I said to myself well I will catch up with her one day and get my money for my shit, well I took ~~my~~ the bus to Branchville and went to my "Normie's mortin" partner apartment and cool out with him for a few days, we drink and laugh and took night walks only and talk about the good old days. the night walks was just to keep everybody from sweating me and running back telling my ex-wife all kinds of lies, well one night I told

1. and she said now I want him too because he is running his mouth and he is the only one that could connect me to them, I said I am your asking alot, she said I would do it myself but they will figure that out easy. I said after you didn't show up I didn't look you seriously now I'll have to talk with my boy when he gets in, Then we started talk about sex and I told her my partner Morris hasn't had no pussy all his life, she said stop lying, I said I am serious she said I ought to bring ~~the~~ Connie here and let him have a field day. I said he would love that and I said he'll fuck you too she laugh and said I bet he will and then she said I got to go and get things straight I'll be back in a few and plus Poncho got the baby and I need to get him, I said I'll be right here, well a hour later the police and some probation officer came and lock me up talking about I didn't report in, well I got out in a week and went to stay with my sister on Windsor St. the next night I went back to Branchville and got up with Morris and I told him about Pattie stopping by the day I got locked up in his apartment, he said Oh yeah I said man here's the deal, Here's your chance to get paid and plus get you some pussy finally and all you got to do is break me off proper because she got 2,000 dollars for you. which

and Connie got out and I said what's up girl and
 pull her to me and hug her tight and she said
 ain't nothing. So I got in and we drove off
 and while riding to Branchville Connie said
 Doug ain't shit and I'd love to see him get his
 then she said I had plans tonite but this is
 better. I just laught and looked at Pattie.
 Well we got to Branchville and rode straight
 through town and came up through shake-rag and
 came on a back street, but you can still see the
 town and I spotted Norris or thought
 I did but it wasn't him so we went to
 his apartment and Connie went and knock on
 the door but there wasn't no answer so we
 drove back down town the same back route
 that's when I spot Norris coming out the store
 walking over to two park cars with a bag in
 his hand so ^{we} stop and was trying to decide
^{who} should go call him. So Connie said fuck it I
 go get him and she got out and walk down the
 road and call Norris and they both came back and
 got in, I ask him what's up bro and he said
 that he came down town to get some beer, so we
 went down that dirt road past Owens home
 and I told pattie to stop then Norris and I got
 out and I ask him was he ready to handle the
 business and he said yeah but let's go back
 to my apartment so I can get the pussy
 and

11. I said she is paying us 2,000 dollars. Connie said that fat bitch hasn't got two cent. Then Connie said please don't kill me and Norris said I want some pussy Connie said OK and then Norris past me the gun and said hold that. Then Connie spread a Crocker Sack bag on the ground a bag I didn't even know she had Her and Pattie must of had it up front in the car because she sure didn't get it out the trunk. Well while her and Norris was doing their thing I was looking across the field, when they got finish Connie said You want some too. I wanted so bad to say let's wait till we get back, But deep in my heart I knew she wasn't leaving with us. So I said why not, then I past the gun back to Norris and Connie and I did our thing, then afterward I got up and look at Norris and he looked back at me. Then Connie said yall please don't do it Pattie is only setting yall up, Then I said give me that Crocker Sack bag your sitting on and she did, then while she was still sitting on the ground I put the bag over her head and Norris and I tried to pull the bag all the way down over her shoulder which we only got the bag to go just a little ways over her shoulders, Then I ask Norris what's up? Then he said let me get behind her and when he step completely behind her I step completely behind him then he moved over a little to the left I also moved right behind him then he pull and the gun fired once then he past me the gun and got behind me then I too fire the gun at her head. then we walk back to ~~the~~

13. and went to Bowman at a club call Allen Murray
 I went in to get me some wine and got Pattie
 a soda, Norries already had beer and we just sit
 there and talk about everybody keeping their
 mouth shut, Then Norries said guess what yall
 I said what, Norries said we left the dam
 shovel, then he ask us was he wearing a white
 hat but Pattie or me couldn't remember, I said
 we need to go back and check it out Pattie said
 no I got a bad feeling about going back then
Norries said fuck it. well after sitting there
 for awhile Norries said yall can drop me off on
 the outside of Branchville and I'll walk the rest
 so we pull off then Pattie said Dam we need
 to get rid of her shit and Norries said yeah I
 still got the bag so we rode around and went the
 back way to Reeseville from Bowman and on our way
 Pattie cut up Connie Ed card and let it flow out the
 window took her shorts and the rest of her cloths
 she already had in the car and let them all go out
 the window ^{one} ~~at~~ by one, Then we stop and turn
 around and went back to Bowman and on our way
 we stop on some bridge and Norries got out and ~~threw~~
 toss the bag over, well I am not sure if it was the bag
 because Norries ask me to stop again along side the
 road and he got out and ran to the field and got rid
 of something, Then we took him to Branchville and the
 only thing we all was talking about was everybody
 keeping their mouth shut and not saying nothing

15. and we follow him back down that road we came on and Poncho stop on the bridge and got out the Truck. Poncho came to the car and he said no we better get off this bridge and he went back and pull off and we follow him for maybe another mile or less then he pull over and I pull over right behind him. Then Poncho got out his truck and reach in the back and got a bucket with some water in it and brought it over to the car then Pattie and I got out. Poncho gave me the bucket and a rag and I wipe the blood ~~off~~ ^{off} the back seat and Poncho ~~said~~ said give me the floor mats and I did and he toss them in the woods and he said Now we could get some more mats speaking out loudly ~~because~~ because he and I never said a word to each other. When I got finish cleaning the back seat, Pattie said Poncho take the car and give us the truck and he did so Pattie ask me to drive and I did, Pattie said where do you want to go and I said to my sister house on Windsor St. and that's where we went and that was her first time going there. Now on our way to Orangeburg from Roseville I ask Pattie what was she going to do with that gun she left in the car with Poncho and Pattie say that gun belongs to my best friend Fay and she stole it from her old man so I could use it on Connie and I got to give it back to her before he misses it I said, Dam I hope you didn't told Fay about me Pattie said she knows the deal about Connie

17. Well she never came back Wednesday so I call her Friday and when she answer the phone Pattie ask where are you and I said over on Whalety St. and I ask her have you seen the news yet and Pattie said no and why I said because they are showing shit about Connie on the news, Pattie said Dam man I cant let Doug run to the cops she said can you make it over to Riveton Rd I said yes and Pattie said just come ~~to~~ straight down Riveton to the yellow house and ~~the~~ she said my best friend Fay is over here, I said do you think thats cool for Fay and me to meet and Pattie said I done told you she is down I said ok and left for Riveton, now when I got there Pattie met me at the door I walk in and went to I guess the living room where Fay was sitting I look at Fay and she look at me Pattie said have a ~~seat~~ seat so I sat on the couch with the little baby boy and started playing with him, Pattie said Fay we got to do something about Doug and Fay said you better because he will tell the cops, I said well we got to get my partner from Branchville and Pattie said I know and she said Fay we can get Doug and your oldman because he should be coming back from baby sitting by the time it gets dark and Fay said yeah Pattie said I havent gotten but a little gas in the truck how much in your car Fay. Fay said not much Pattie said I still got these pills I need to take around the corner and sell. Then she said I hate drivinn in the

19. So now it's just Fay and me cooking out watching TV I ask Fay why do she want her old man dead Fay said because he be screaming at me all the time and because I am scare of him and he be starting fights with me for no reason and he is 6'3 about 250 pounds and I am ~~scare~~ scare that one day he is going to kill me and he's got plenty of money he keeps about 1,000 dollars on him all the time. He never gives me anything, I ask her how did she want it done, Fay said we could make it look like he got rob, Fay said Pattie and I were thinking maybe she would call him and act like she was broke down side the road on the Bamberg road near one of them big dumpster and you and your partner could come out the woods and kill him and take his ring and chain and his wallet, But leave the truck there, Oh by the way he got out of state tags on his truck, I ask Fay will she get anything other then some peace and Fay said I'll own two trailer, She said some other stuff but I forgot, I said well we will see. Well Pattie pull up in the yard with Doug and Fay said go in the first room on the left and I did well Doug came in with Pattie walking behind him he sat on the couch Pattie was standing next to Fay while Fay was sitting in the short chair playing with the baby I came out the room and from around the corner to where Doug was sitting I kind of scared him because he didn't know I was there.

21. his arm across his chest ~~area~~ area, then I got up and push him back to the floor then Fay grab his head and Pattie then wrap the rest of tape over his mouth and head, he started fighting but we all hold him down and we all ~~carry~~ carry him to that back room, Then afterward Fay Said I am going to the store to get a soda then there was a noise in the back and Pattie Said Doug is faking it that's the way he is then Pattie and me walk to that back room and just watch him for a few, then Fay Said I am going and I'll be right back then Pattie and I came out the room and sat down on the couch, I told Pattie well do you think she is coming back and Pattie Said yeah I'll trust her with my life I said well when she get back I am going to get Norris, then I got up to peak out the window and I seen all kinds of police running in the yard I said Pattie Fay done set us up because here comes the Cops I ran and got under the bed in the first room on the left...

PS...

there was a bag in the chair with a gun in it, Pattie Said it was Fay I put my gloves in that bag after we were finish, Pattie had load the gun when we came back from the store but we never use it, no more then look at it but Pattie did say we had to get rid of it inside

Sign - Sammie L. Stokes

A.K.A

L-Rasty

ORANGEBURG COUNTY SHERIFF'S OFFICE
CRIMINAL INVESTIGATIVE DIVISION

DEFENDANT AFFIDAVIT

Date: 6-12-78 Time: 3:08 PM Place: Daly City Detention Center

Defendant Name: Sammy L. Stokes a.k.a. L. Stokes Nasty (He)

Age: 31 Date of Birth: [REDACTED] Phone Number [REDACTED]

Address: [REDACTED]

My rights are as follows: § 51. I have the right to remain silent, anything I say can be used against me in court. § 52. I have the right to talk to a lawyer for advice before I am asked any question. If I cannot afford a lawyer, one will be appointed for me before any questions if I wish. § 53. If I decide to answer questions now without a lawyer present, I will still have the right to stop answering at any time. § 54. I also have the right to stop answering at any time until I talk with a lawyer.

I understand the rights above and initialed each. I have been advised of the rights above by F. Emory Rosh of the Orangeburg County Sheriff's Office and wish to make the following statement.

Well, it all started one evening when I was in my room at Turbeville Corr. Inst. just chilling out watching t.v.. My roommate, James Roy Tooth, came into the room upser and cursing. He said that bitch Connie has done it again, not only has she got me in here now, the bitch got my daughter taken away by DSS, all that whoring, hanging out and leaving the baby home alone. I said I thought Connie lived with your mother and he said yeah, she do. The only reason my mother let's her stay there is because of my daughter. He said my mother don't like Connie and I hate the bitch too. Hell, she isn't nothing but a whore and we want the bitch dead anyway so my mother could get custody of Nicole. I said man stop joking, your mother isn't with that. He said shit, you just don't know, my moms is down, homie. Hell, you see she brings us weed all the time and if you think that you can get the job done, you will be paid well. I said man shit that costs. He said money is no problem, I am going to call my moms. I said hold up because I've been gone awhile and right now, I don't know who to trust out there. He said you still should talk to my moms. I said o.k. call her. Well, there wasn't any shame in Partie's games

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Sammie L. Stokes a.k.a. L. Rusty
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because as soon as I got on the phone after Roy was done and told her that I could have it done, she was glad to talk with me. I asked her right off the top was she serious about having Connie killed? She said hell yeah and I asked why? She said because the bitch isn't any good, she caused my son to be locked up - plus, I caught her fucking my old man on the couch, and she treats my son like shit. The only reason I let her stay with me is because of Nicole, my grand baby. She said I owe her and Lee big time. I said who's Lee? She said my boyfriend. I said what has he done? She said he almost killed me by beating me up until I passed out and Connie stood there laughing at me - plus, he tried to get my son kill. I said dam and you're still fucking around with him and Connie after all that shit. She said that's to only keep up with them until I could get them and believe me honey, I owe them both big time. So what's up, do you think that you could handle it, what is it going to cost and don't be playing any games because I done went through all the games with fake people just trying to get my money and then run out on me. I said it will cost \$2,000 and you'll have 10 months to come up with the money and the gun. I'll be getting out in May, 98 and right now, I've been gone awhile and I don't know who to trust out there, all you have to do is stay in touch with me. She said that's no problem. I'll write and come to see you because I want to see how you look and talk with you face-to-face. I said o.k., but do you think you can keep up with Connie and Lee that long? She said hell yeah and besides I've got him pussy whipped. I just laughed and said I hear you "girl". She wrote and stayed in touch with me and a month later, Roy came into the room again looking crazy. I said what's up Roy. He said that the bitch is pregnant again by god knows who. I said dam. He said mommie wants you to call her tonight after 9:30 count. I said o.k. I called her and Pattie said, I told you the bitch was a whore, she is pregnant again. I kicked her ass out and I'm trying to get custody of Nicole from DSS. She said the bitch is living with Robbie, which is Lee's brother. I said is Robbie the father? She said no, Connie don't know who's the father. I said will you still be able to keep up with her and she said yes. I said and Lee. She said he is under my control. I said o.k. She just went on talking about the baby and that she wanted her granddaughter back and how it was all Connie's fault the little girl got taken. Well, as time went by, Pattie and I grew closer as friends or so called friends. I mailed her two gold rings and a Pulsar watch to hold for me till I got out.

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In March, Pattie told me that some guy she knew had gotten out of prison and she was letting him live with her till he got on his feet. She said his name was Doug Ferguson. A week or two later, she claimed that Doug stole my watch and rings and hocked them. She also told me that Doug said he knew me from prison and that he could beat my ass if I didn't like it. She claimed that she was putting him out plus, going to sign a warrant on his ass for stealing my shit and some shit of hers. I said yeah put the cops on his ass before I get out and kick his ass. After Connie had the baby, her and Robbie broke up because she was too wild and didn't want to stay home (so Pattie say). Pattie told me in a letter that her and Connie were back living together, that Connie had to go and do some time for some money she had owed and that she was going to be in custody of Connie's baby boy while she is locked up. She also said that Connie will beat me out and that nothing has changed in the plan. A few weeks later, she said in a letter that Doug had read one of my letters, but it wasn't no big deal because he also didn't like Connie and wanted her dead too. She never told me his reasons for disliking and wanting Connie dead. I wrote her back and asked her what's up with my shit. She wrote back and told me that if she didn't get them back that she would add whatever price I wanted on the \$2,000. Well, in April or earlier, Connie had gotten out and was living with Pattie (so Pattie say). Doug was living with some girl in Bamberg along with his sister and her sister's boyfriend, which was a black guy (so Pattie say). Well, I got out in May, 98. Pattie was suppose to pick me up, but never showed up, so I took the bus to Orangeburg. Right then, I knew she was just bull shitting about the money and the deal. I said to myself, I will catch up with her one day and get the money for my shit. I took the bus to Branchville and went to my partner's "Norris Martin" apartment and cool out with him for a few days. We drank and laughed and took night walks only and talked about the good ole days. The night walks was just to keep everybody from sweating me and running back telling my ex-wife all kinds of lies. One night I told Norris about the deal with Pattie and about the \$2,000. He said oh yeah. I said yeah, but the bitch wasn't serious and besides, I was going to yank her ass anyway and we laughed. Then I said that I'm going to still get my money from her for my shit. He said how? I said, I got her phone number and address and she has been wanting me to fuck her for the longest, but I don't dig fat girls (we laughed). He said, I'll fuck her and I said I know you will

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after all, you haven't had any pussy yet and you're dam near 40 years old. I said, man let's go call her and we did, but got no answer. I asked him did he have a stamp and envelope. He said no, but I got a box full of plain envelopes. You write the letter and I'll mail it tomorrow. I said bet. I wrote the letter talking shit to her. I told her that she was in care of my shit and I hold her for it and that I didn't know Doug or nothing about him. I also told her that I was just 10 miles away from her in Branchville Villa and that she needed to come and tell me something or take me to Doug and let me ask him what's up. The day after I mailed the letter, she came over in a blue station wagon, Norris wasn't home. She told me that she still wanted her business taken care of and that Doug had flipped on her and told Lee and Connie that she wanted them dead. She said now I want him too because he is running his mouth and he is the only one that could connect me to them. I said dam you are asking a lot. She said I would do it myself, but they will figure that out easy. I said after you didn't show up, I didn't take you seriously and now I'll have to talk with my boy when he gets in. Then we started talking about sex and I told her my partner Norris hasn't had no pussy all his life. She said stop lying. I said I'm serious. She said I ought to bring Connie here and let him have a field day. I said he would love that and I said he'll fuck you too. She laughed and said I bet he will. Then she said I got to go and get things straight. I'll be back in a few, Poncho has the baby and I need to get him. I said I'll be right here. Well a hour later, the police and come probation officer came and locked me up talking about I didn't report in. I got out in a week and went to stay with my sister on Windsor Street. The next night, I went back to Branchville and got up with Norris and I told him about Pattie stopping by the day I got locked up in his apartment. He said oh yeah, I said man here's the deal. Here's your chance to get paid, plus get you some pussy finally. All you have to do is break me off proper because she got \$2,000 for you. I haven't seen the money yet. He said hell, I'm down. I said to be ready at any given time. I'll be going back to Orangeburg and we will be back to pick you up. He said I'll be ready whenever. Well to keep people out of our business, I left the next night and went back to Orangeburg. I called Pattie the next day. Before I could say anything, she said man Connie got to go and tonight. I said dam what's the hurry. She said because DSS told me that Connie could no longer live with me. If she stay here another night, they was going to take the boy away from

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me, so she's got to go tonight. I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. She said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She said I wish that were true so we could do all both of them. She said that Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway, I know you've been talking to her on the phone when Roy calls and I wasn't home. You just better not flip on me for her. I laughed and said see you at 9:30 P.M. They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight, but this is better. I just laughed and looked at Pattie. We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer. So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot. Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie

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say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not. I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said all my god, that fat bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us \$2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me and Norris said I want some pussy. Connie said o.k. and then Norris passed me the gun and said hold that. Then Connie spread a crocker sack bag on the ground, a bag I didn't even know she had. Her and Pattie must of had it up front in the car because she sure didn't get it out the trunk. Well while her and Norris was doing there thing, I was looking across the field. When they got finished, Connie said you want some too. I wanted so bad to say let's wait till we get back, but deep in my heart I knew she wasn't leaving with us. So I said why not. Then I passed the gun back to Norris and Connie and I did our thing. Afterward, I got up and looked at Norris and he looked back at me. Connie said yall, please don't do it, Pattie is only setting yall up. Then I said give me the crocker sack bag your sitting on and she did. While she was still sitting on the ground I put the bag over her head and Norris and I tried to pull the bag all the way down over her shoulders, which we only got the bag to go just a little way over her shoulders. I then asked Norris what's up? He said let me get behind her and when he stepped completely behind her, I stepped completely behind him. Then he moved over a little to the left. I also moved right behind him. He pulled and the gun fired once. He passed me the gun and got behind me then I too fired the gun at her head. Then we walked back to get Pattie and when we got to the car. Pattie said well is she dead. I said let's go see, but before we left I took all the bullets out the gun and passed Pattie the gun. Then she said yeah, I got to take that back because it belongs to my best friend. Then we all walked back down to the field and Connie was still there and Norris was just about to dig a hole when a truck pulled up behind Pattie's car. We all ran and jumped in the woods. After the truck left, Pattie said fuck it yall let's go before the dam police come. I said we just can't leave her laying out like that. Then Norris

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said let's put her in the woods. I told Pattie to get Connie's I.D. card and her shorts off the ground and she did. Norris went to the head and shoulders and tried to pick Connie up while I had her legs. He couldn't pick her up with the crock sack bag still over her. So he took the bag off her then we picked her up and put her in the woods while Pattie stood there watching. Then we came out the woods and Pattie said Norris get that bag and he did and we ran out the woods. Pattie asked me to drive because she claimed that she couldn't hardly breath. So I took the keys and ran ahead of her and Norris. When they got to the car, Pattie got in the front and Norris got in the back sitting right behind her and we drove off. We went to Bowman at a Club called Allen Murray. I went in to get me some wine and got Pattie a soda. Norris already had beer and we just sat there and talked about everybody keeping their mouth shut. Then Norris said guess what yall. I said what. Norris said we left the dam shovel, then he asked us was he wearing a white hat. Pattie nor I could remember. I said we need to go back and check it out. Pattie said no, I've got a bad feeling about going back. Then Norris said fuck it. After sitting there for a while, Norris said yall can drop me off on the outside of Branchville and I'll walk the rest, so we pulled off. Pattie said dam, we need to get rid of her shit and Norris said yeah, I still got the bag. We rode around and went the back way to Reesville from Bowman. On our way, Pattie cut up Connie's I.D. card and let it fly out the window, took her shorts and the rest of her cloths she already had in the car and let them all go out the window one by one. Then we stopped and turned around and went back to Bowman. On our way, we stopped on the same bridge and Norris got out and tossed the bag over. I'm not sure if it was the bag because Norris asked me to stop again along side the road and he got out and ran to the field and got rid of something. Then we took him to Branchville and the only thing we all was talking about was everybody keeping their mouth shut. We let Norris out on a dirt road that runs into Branchville. Norris got out and he said when will you be coming back. I said hopefully tomorrow night to straighten you out. Norris said I'll see yall then. So Pattie and I drove off. Pattie said I need to make a phone call when we get in Roseville. She said I need to call Poncho and let him know that I'm alright. So before we got there, I turned the light on and asked her was there anything else in the car. She looked in the back and said dam there is blood all over the back seat, off that bag Norris had.

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Then she said I'll tell Poncho to bring something to clean the car out. I said do you think he'll come and she said hell yeah, besides he wanted her dead too. If anything goes wrong, he is willing to take the blame for me. So she made the call in Roseville, I stayed in the car while she talked. Then when she got back in the car, she said we'll take the back road to Orangeburg because Poncho is meeting us. On our way, all we talked about was Norris acting crazy. Pattie said do you think he will talk. I said, well if he do, he would only be telling on himself and she laughed. She spotted Poncho's truck when it passed by us so we pulled over and he did too. I turned around and pulled up behind him. She got out and went to talk with him. She got back in and she said follow him back down the road and I did. We followed him back down that road we came on. Poncho stopped on the bridge and got out the truck. Poncho came to the car and he said no we better get off this bridge. He went back and pulled off and we followed him for maybe another mile or less. Then he pulled over and I pulled over right behind him. Poncho got out his truck, reached in the back and got a bucket with some water in it and brought it over to the car. Pattie and I got out. Poncho gave me the bucket and a rag and I wiped the blood off the back seat. Poncho said give me the floor mats and I did. He tossed them in the woods. He said hell we could get some more mats (speaking out loud because he and I never said a word to each other). When I got finished cleaning the back seat, Pattie said Poncho take the car and give us the truck and he did so. Pattie asked me to drive and I did. Pattie said where do you want to go. I said to my sister's house on Windsor Street and that's where we went (that was her first time going there). Now, on our way to Orangeburg from Roseville, I asked Pattie what was she going to do with that gun she left in the car with Poncho. Pattie said that gun belongs to my best friend Fay. She stole it from her old man so I could use it on Connie. I got to give it back to her before he misses it. I said, damn I hope you didn't tell Fay about me. Pattie said she knows the deal about Connie and about Doug's big mouth. She don't know who's helping me, so don't worry about that and besides, she wants her old man dead too. So we entered Orangeburg and we just stop talking until I got at my sister's house. Before I got out Pattie said call me in a day or so and I said o.k., got out and she slid on over under the wheel and drove off. I called her on Monday evening and Pattie said I need to see you now. I said well you know where I'm at. She came in

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the truck and I got in and we drove to the Gardens and parked. Pattie said man I got to do something with Doug before they find Connie. Pattie said I know where he is and he wants me to come and pick him up. She said, but it can't be today. I said yeah you're right because we got to go and get Norris and can get him only at night time. Pattie said my friend Fay wants me to help her kill her old man. Pattie said well I was thinking, we could get him and Doug on the same day or night. Pattie said I'll be back Wednesday to tell you more. I said o.k. then she drove me back. On the way back, Pattie said well when are you going to do like you promised. I knew what she was talking about (me having sex with her), I said all in good time, but I knew it wasn't going to happen because I don't dig fat girls. She never came back Wednesday. I called her Friday. When she answered the phone, Pattie asked where are you? I said over on Whalety Street. I asked her if she saw the news yet. Patti said no and why? I said because they are showing shit about Connie on the news. Pattie said dam man, I can't let Doug run to the cops. She said can you make it over to Rivelon Road. I said yes. Pattie said just come straight down Rivelon to the yellow house. She said my best friend Fay is over here. I said do you think that it is cool for Fay and me to meet. Pattie said I done told you, she is down. I said o.k. and left for Rivelon. When I got there, Pattie met me at the door. I walked in and went to I guess the living room where Fay was sitting. I looked at Fay and she looked at me. Pattie said have a seat. So I sat on the couch with the little baby boy and started playing with him. Pattie said Fay we got to do something about Doug. Fay said you better because he will tell the cops. I said we got to get my partner from Branchville. Pattie said I know. She said Fay, we can get Doug and your old man because he should be coming back from babysitting by the time it gets dark. Fay said yeah. Pattie said I've got a little gas in the truck, how much is in your car Fay? Fay said not much. Pattie said I still got these pills I need to take around the corner and sell. Then she said I hate driving in the rain. I said, I'll drive you. We took the truck and went around the corner to somebody's house. Pattie got out and ran up on the people's porch and knocked. She went in and came right back out with plenty money in her hands. Then we went to the store and put gas in the truck and went back to the house. Pattie said Fay we are going to put gas in your car so he can go pick up his partner from Branchville. Fay said that's fine with me. So Pattie and I left again, but in Fay's car this

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time, we were on our way to the gas station. Pattie said I got Fay's gun back at the house, but there isn't no bullets. We got at the gas station, she went in to pay for it and I pumped it getting soaking wet. I told Pattie on our way going to get the bullets, I got to stop and change clothes and we did that. When we got back at the house, I asked Fay did she see the news. Fay said yes, they are still trying to I.D. the body. Pattie said I can go get Doug now and we will keep him here until you go get your partner, but you got to hide until I get him all the way in. Fay said yeah because he will run, he ain't nothing but mouth. Parti said now you'll get your chance to meet the man who took your shit plus, say he'll kick your ass. I said your right. So Parti left Fay and me with the baby while she went to pick Doug up. Now it's just Fay and me cooling out watching t.v. I asked Fay why she wants her old man dead. Fay said because he be screaming at me all the time and because I'm scare of him, he be starting fights with me for no reason. He is 6' 3", about 250 pounds and I'm scare that one day, he is going to kill me. He's got plenty of money, he keeps about \$1,000 on him all the time. He never gives me anything. I asked her how did she want it done. Fay said we could make it look like he got rob. Fay said Pattie and I were thinking that maybe she would call him and act like she was broke down side the road (on the Bamberg road near one of them big dumpsters). You and your partner could come out the woods, kill him, take his ring, chain, and his wallet, but leave the truck there. Oh, by the way, he got out of the state tags on his truck. I asked Fay will she get anything other than some peace. Fay said, I'll own two trailers. She said some other stuff, but I forgot. I said well we will see. Partie pulled up in the yard with Doug. Fay said go in the first room on the left and I did. Doug came in with Pattie walking behind him, and sat on the couch. Pattie was standing next to Fay while Fay was sitting in the short chair playing with the baby. I came out the room and from around the corner to where Doug was sitting. I kind of scared him because he jumped up. I said man do you know me? He said no. I said well you told Pattie that you knew me. I'm the owner of that watch and rings. He said I got them at the house for you, I'm sorry for taking them. Pattie said you're dam right you're sorry, let's tie him up and I said with what. Pattie said with that duck tape on the table. So Fay grabbed the tape and I backed up and was putting some gloves on when Pattie said Doug get on the floor and lay down and he did. So Fay started putting tape around his feet.

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After she took off his shoes, Pattie was trying to hold him down, but he was getting loose. By then, I had my gloves on so I reached down and punched him, he started bleeding. I grabbed him and held him down while Pattie and Fay taped him up. First, Fay taped his feet then Pattie taped his hands together while I held them together by his arms. Then Pattie started putting tape around his head. Doug said please don't do that Pattie, but she kept on and she said I warned you not to mess with me Doug. The tape started sticking to Pattie hands and that's when she asked Fay to help her and Fay got up from holding his feet. I pulled him up so he could sit up then Fay and Pattie took turns wrapping the tape around his head. At first, they left his nose open and taped his mouth up and around his neck then they put some around his arm and across his chest area. I got up and pushed him back to the floor then Fay grabbed his head and Pattie then wrapped the rest of the tape over his mouth and head. He started fighting, but we all held him down and we all carried him to that back room. Then afterward, Fay said I'm going to the store to get a soda. There was a noise in the back and Pattie said Doug is faking it, that's the way he is. Pattie and me walked to that back room and just watch him for a few. Fay said I'm going and I'll be right back. Pattie and I came out the room and sat down on the couch. I told Pattie, do you think she is coming back and Pattie said yeah. I trust her with my life. I said when she get back, I'm going to get Norris. I got up to peak out the window and I saw all kinds of police running in the yard. I said Pattie, Fay done set us up because here comes the cops. I ran and got under the bed in the first room on the left.

P.S. There was a bag in the chair with a gun in it. Patti said it was Fay's. I put my gloves in that bag after we were finished. Parti had loaded the gun when we came back from the store, but we never used it (no more than to look at it). Pattie did say we had to get rid of it tonight.

Telling their family sorry would only make them hate me more. Because saying sorry want bring their loved ones back, It would only add more pain hearing it from me. I will say this much. God is going to bless them and help them make it through this. Without a doubt, God is going to punish me for my part. And there's no excuse because we all have choices in life.

Sammie L. Stokes a.k.a. L. Rusty
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I declare that the statement above is made freely and voluntarily without promise or hope of
-reward or leniency and without fear or threat or physical harm, by any person.

I swear or affirm that this statement is the truth, the whole truth and nothing but the truth, so help
me god.

Sammie L. Stokes
Sammie L. Stokes a.k.a. L. ~~Rusty~~ NASTY (FAC)

Witnesses:

Det. R. Michelle Small
F. Leroy Tuck

ORANGEBURG COUNTY SHERIFF'S OFFICE
CRIMINAL INVESTIGATIVE DIVISION

DEFENDANT AFFIDAVIT

Date: 6-12-98 Time: 3:08 PM Place: Orly. Cty. Detention Center

Defendant Name: Sammie L. Stokes a.k.a. L. ~~Stokes~~ Nasty (He)

Age: 31 Date of Birth: [REDACTED] Phone Number: [REDACTED]

Address: [REDACTED]

My rights are as follows: § 1. I have the right to remain silent, anything I say can be used against me in court. § 2. I have the right to talk to a lawyer for advice before I am asked any question. If I cannot afford a lawyer, one will be appointed for me before any questions if I wish. § 3. If I decide to answer questions now without a lawyer present, I will still have the right to stop answering at any time. § 4. I also have the right to stop answering at any time until I talk with a lawyer.

I understand the rights above and initialed each. I have been advised of the rights above by F. Ensey Rosh of the Orangeburg County Sheriff's Office and wish to make the following statement.

Well, it all started one evening when I was in my room at Turbeville Corr. Inst. just chilling out watching T.V.. My roommate, James Roy Tooth, came into the room upset and cursing. He said that bitch Connie has done it again, not only has she got me in here now, the bitch got my daughter taken away by DSS, all that whoring, hanging out and leaving the baby home alone. I said I thought Connie lived with your mother and he said yeah, she do. The only reason my mother let's her stay there is because of my daughter. He said my mother don't like Connie and I hate the bitch too. Hell, she isn't nothing but a whore and we want the bitch dead anyway so my mother could get custody of Nicole. I said man stop joking, your mother isn't with that. He said shit, you just don't know, my moms is down homie. Hell, you see she brings us weed all the time and if you think that you can get the job done, you will be paid well. I said man shit that costs. He said money is no problem, I am going to call my moms. I said hold up because I've been gone awhile and right now, I don't know who to trust out there. He said you still should talk to my moms. I said o.k call her. Well, there wasn't any shame in Pattie's games

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#5
in

Sammie L. Stokes a.k.a. L. Rusty

Page 2

because as soon as I got on the phone after Roy was done and told her that I could have it done, she was glad to talk with me. I asked her right off the top was she serious about having Connie killed? She said hell yeah and I asked why? She said because the bitch isn't any good, she caused my son to be locked up - plus, I caught her fucking my old man on the couch, and she treats my son like shit. The only reason I let her stay with me is because of Nicole, my grand baby. She said I owe her and Lee big time. I said who's Lee? She said my boyfriend. I said what has he done? She said he almost killed me by beating me up until I passed out and Connie stood there laughing at me - plus, he tried to get my son kill. I said dam and you're still fucking around with him and Connie after all that shit. She said that's to only keep up with them until I could get them and believe me honey, I owe them both big time. So what's up, do you think that you could handle it, what is it going to cost and don't be playing any games because I done went through all the games with fake people just trying to get my money and then run out on me. I said it will cost \$2,000 and you'll have 10 months to come up with the money and the gun. I'll be getting out in May, 98 and right now, I've been gone awhile and I don't know who to trust out there, all you have to do is stay in touch with me. She said that's no problem. I'll write and come to see you because I want to see now you look and talk with you face-to-face. I said o.k. but do you think you can keep up with Connie and Lee that long? She said hell yeah and besides I've got him pussy whipped. I just laughed and said I hear you "girl". She wrote and stayed in touch with me and a month later, Roy came into the room again looking crazy. I said what's up Roy. He said that the bitch is pregnant again by god knows who. I said dam. He said mommie wants you to call her tonight after 9:30 count. I said o.k. I called her and Pattie said, I told you the bitch was a whore, she is pregnant again. I kicked her ass out and I'm trying to get custody of Nicole from DSS. She said the bitch is living with Robbie, which is Lee's brother. I said is Robbie the father? She said no, Connie don't know who's the father. I said will you still be able to keep up with her and she said yes. I said and Lee. She said he is under my control. I said o.k. She just went on talking about the baby and that she wanted her granddaughter back and how it was all Connie's fault the little girl got taken. Well, as time went by, Pattie and I grew closer as friends or so called friends. I mailed her two gold rings and a Pulsar watch to hold for me till I got out.

Sammy L. Stokes a.k.a. L. Rusty

Page 3

After Connie had the baby, her and Robbie broke up because she was too wild and didn't want to stay home (so Pattie say). Pattie told me in a letter that her and Connie were back living together, that Connie had to go and do some time for some money she had owed and that she was going to be in custody of Connie's baby boy while she is locked up. She also said that Connie will beat me out and that nothing has changed in the plan. Well, in April or earlier, Connie had gotten out and was living with Pattie (so Pattie say). Well, I got out in May, 98. Pattie was suppose to pick me up, but never showed up, so I took the bus to Orangeburg. Right then, I knew she was just bull shitting about the money and the deal. I said to myself, I will catch up with her one day and get the money for my shit. I took the bus to Branchville and went to my partner's "Norris Martin" apartment and cool out with him for a few days. We drank and laughed and took night walks only and talked about the good ole days. The night walks was just to keep everybody from sweating me and running back telling my ex-wife all kinds of lies. One night I told Norris about the deal with Pattie and about the \$2,000. He said oh yeah. I said yeah, but the bitch wasn't serious and besides, I was going to yank her ass anyway and we laughed. Then I said that I'm going to still get my money from her for my shit. He said how? I said, I got her phone number and address and she has been wanting me to fuck her for the longest, but I don't dig fat girls (we laughed). He said, I'll fuck her and I said I know you will after all, you haven't had any pussy yet and you're dam near 40 years old. I said, man let's go call her and we did, but got no answer. I asked him did he have a stamp and envelope. He said no, but I got a box full of plain envelopes. You write the letter and I'll mail it tomorrow. I said bet. I wrote the letter talking shit to her. The day after I mailed the letter, she came over in a blue station wagon, Norris wasn't home. She told me that she still wanted her business taken care of. I said after you didn't show up, I didn't take you seriously and now I'll have to talk with my boy when he gets in. Then we started talking about sex and I told her my partner Norris hasn't had no pussy all his life. She said stop lying. I said I'm serious. She said I ought to bring Connie here and let him have a field day. I said he would love that and I said he'll fuck you too. She laughed and said I bet he will. Then she said I got to go and get things straight. I'll be back in a few, Poncho has the baby and I need to get him. I said I'll be right here. Well a hour later, the police and some probation officer came and locked me up talking about I didn't report in. I got out in a week and went to stay with my sister on

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Windsor Street. The next night, I went back to Branchville and got up with Norris and I told him about Pattie stopping by the day I got locked up in his apartment. He said oh yeah, I said man here's the deal. Here's your chance to get paid, plus get you some pussy finally. All you have to do is break me off proper because she got \$2,000 for you. I haven't seen the money yet. He said hell, I'm down. I said to be ready at any given time. I'll be going back to Orangeburg and we will be back to pick you up. He said I'll be ready whenever. Well to keep people out of our business, I left the next night and went back to Orangeburg. I called Pattie the next day. Before I could say anything, she said man Connie got to go and tonight. I said dam what's the hurry. She said because DSS told me that Connie could no longer live with me. If she stay here another night, they was going to take the boy away from me, so she's got to go tonight. I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. She said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She said I wish that were true so we could do all both of them. She said that Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway, I know you've been talking to her on the phone when Roy calls and I wasn't home. You just better not flip on me for her. I laughed and said see yall at 9:30 P.M. They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight but this is better. I just laughed and looked at Pattie. We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer. So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the

Sammy L. Stokes a.k.a. L. Rusty

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business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot. Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not. I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said all my god, that fat bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us \$2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me and Norris said I want some pussy. Connie said o.k. and then Norris passed me the gun and said hold that. Then Connie spread a crocker sack bag on the ground, a bag I didn't even know she had. Her and Pattie must of had it up front in the car because she sure didn't get it out the trunk. Well while her and Norris was doing there thing, I was looking across the field. When they got finished, Connie said you want some too. I wanted so bad to say let's wait till we get back, but deep in my heart I knew she wasn't leaving with us. So I said why not. Then I passed the gun back to Norris and Connie and I did our thing. Afterward, I got up and looked at Norris and he looked back at me. Connie said yall, please don't do it, Pattie is only setting yall up. Then I said give me the crocker sack bag your sitting on and she did. While she was still sitting on the ground I put the bag over her head and Norris and I tried to pull the bag all the way down over her shoulders, which we only got the bag to go just a little way over her shoulders. I then asked Norris what's up? He said let me get behind her and when he stepped completely behind her, I stepped completely behind him. Then he moved over a little to the left. I also moved right behind him. He pulled and the gun fired

Sammie L. Stokes a.k.a. L. Rusty

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once. He passed me the gun and got behind me then I too fired the gun at her head. Then we walked back to get Pattie and when we got to the car. Pattie said well is she dead. I said let's go see, but before we left I took all the bullets out the gun and passed Pattie the gun. Then she said yeah, I got to take that back because it belongs to my best friend. Then we all walked back down to the field and Connie was still there and Norris was just about to dig a hole when a truck pulled up behind Pattie's car. We all ran and jumped in the woods. After the truck left, Pattie said fuck it yall let's go before the dam police come. I said we just can't leave her laying out like that. Then Norris said let's put her in the woods. I told Pattie to get Connie's I.D. card and her shorts off the ground and she did. Norris went to the head and shoulders and tried to pick Connie up while I had her legs. He couldn't pick her up with the crock sack bag still over her. So he took the bag off her then we picked her up and put her in the woods while Pattie stood there watching. Then we came out the woods and Pattie said Norris get that bag and he did and we ran out the woods. Pattie asked me to drive because she claimed that she couldn't hardly breath. So I took the keys and ran ahead of her and Norris. When they got to the car, Pattie got in the front and Norris got in the back sitting right behind her and we drove off. We went to Bowman at a Club called Allen Murray. I went in to get me some wine and got Pattie a soda. Norris already had beer and we just sat there and talked about everybody keeping their mouth shut. Then Norris said guess what yall I said what. Norris said we left the dam shovel, then he asked us was he wearing a white hat. Pattie nor I could remember. I said we need to go back and check it out. Pattie said no, I've got a bad feeling about going back. Then Norris said fuck it. After sitting there for a while, Norris said yall can drop me off on the outside of Branchville and I'll walk the rest, so we pulled off. Pattie said dam, we need to get rid of her shit and Norris said yeah, I still got the bag.. We rode around and went the back way to Reesville from Bowman. On our way, Pattie cut up Connie's I.D. card and let it fly out the window, took her shorts and the rest of her cloths she already had in the car and let them all go out the window one by one. Then we stopped and turned around and went back to Bowman. On our way, we stopped on the same bridge and Norris got out and tossed the bag over. I'm not sure if it was the bag because Norris asked me to stop again along side the road and he got out and ran to the field and got rid of something. Then we took him to Branchville and the only thing we all was talking about was

Sammie L. Stokes a.k.a. L. Rusty

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everybody keeping their mouth shut. We let Norris out on a dirt road that runs into Branchville. Norris got out and he said when will you be coming back. I said hopefully tomorrow night to straighten you out. Norris said I'll see yall then. So Pattie and I drove off. Pattie said I need to make a phone call when we get in Roseville. She said I need to call Poncho and let him know that I'm alright. So before we got there, I turned the light on and asked her was there anything else in the car. She looked in the back and said dam there is blood all over the back seat, off that bag Norris had. Then she said I'll tell Poncho to bring something to clean the car out. I said do you think he'll come and she said hell yeah, besides he wanted her dead too. If anything goes wrong, he is willing to take the blame for me. So she made the call in Roseville, I stayed in the car while she talked. Then when she got back in the car, she said we'll take the back road to Orangeburg because Poncho is meeting us. On our way, all we talked about was Norris acting crazy. Pattie said do you think he will talk. I said, well if he do, he would only be telling on himself and she laughed. She spotted Poncho's truck when it passed by us so we pulled over and he did too. I turned around and pulled up behind him. She got out and went to talk with him. She got back in and she said follow him back down the road and I did. We followed him back down that road we came on. Poncho stopped on the bridge and got out the truck. Poncho came to the car and he said no we better get off this bridge. He went back and pulled off and we followed him for maybe another mile or less. Then he pulled over and I pulled over right behind him. Poncho got out his truck, reached in the back and got a bucket with some water in it and brought it over to the car. Pattie and I got out. Poncho gave me the bucket and a rag and I wiped the blood off the back seat. Poncho said give me the floor mats and I did. He tossed them in the woods. He said hell we could get some more mats (speaking out loud because he and I never said a word to each other). When I got finished cleaning the back seat, Pattie said Poncho take the car and give us the truck so he did so. Pattie asked me to drive and I did. Pattie said where do you want to go. I said to my sister's house on Windsor Street and that's where we went (that was her first time going there). Now, on our way to Orangeburg from Roseville, I asked Pattie what was she going to do with that gun she left in the car with Poncho. Pattie said that gun belongs to my best friend Fay. She stole it from her old man so I could use it on Connie. I got to give it back to her before he misses it. I said, dam I hope you didn't tell Fay about me. She don't know who's helping me, so

Sammie L. Stokes a.k.a. L. Rusty

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don't worry about that and besides, she wants her old man dead too. So we entered Orangeburg and we just stop talking until I got at my sister's house. Before I got out Pattie said call me in a day or so and I said o.k., got out and she slid on over under the wheel and drove off.

Sammie L. Stokes a.k.a. L. Rusy
Page 9

I declare that the statement above is made freely and voluntarily without promise or hope of reward or leniency and without fear or threat or physical harm, by any person.

I swear or affirm that this statement is the truth, the whole truth and nothing but the truth, so help me god.

Sammie L. Stokes
Sammie L. Stokes a.k.a L. ~~Nasty~~ Nasty (FK)

Witnesses:

Det. R. Michelle Small
F. Long

WITNESSES

Oct. E. Rush

ARREST WARRANT #:

D952452

Arrested on May 29, 1998

ACTION OF GRAND JURY

MAY 17 1999

TRUE BILL

Foreman:

Martha Snelgrove
Grand Jury

VERDICT

Guilty

Foreman:

Donna A. Helman
Petit Jury
Date: 9/29/99

DOCKET #: 98CS38-1246

THE STATE OF SOUTH CAROLINA
County of Orangeburg,

COURT OF GENERAL SESSIONS

Term: May, 1999

THE STATE

vs.
(PMB)
Samuel Louis Stokes

INDICTMENT FOR

0116

MURDER

16-3-10

ATTEST: TRUE COPY

Lisa W. Mager
CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
County of Orangeburg)

INDICTMENT #98CS38-1246

At a Court of General Sessions, convened on May 17, 1999,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

MURDER
16-3-10

(PMB)

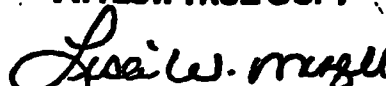
That Samuel Louis Stokes did in Orangeburg County on or about May 23, 1998, feloniously, wilfully and with malice aforethought, kill one Connie Lee Snipes by means of shooting her in the head with a pistol and/or that he did aid and abet Norris Allen Martin in also shooting Connie Lee Snipes in the head with a pistol and that the said victim died as a proximate result thereof.

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

SOLICITOR



ATTEST: TRUE COPY


CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF GENERAL SESSIONS
INDICTMENT # 98-GS-38-1245 TO-1248

STATE OF SOUTH CAROLINA,

-versus-

SAMUEL LOUIS STOKES,

Defendant.

NOTICE OF INTENT TO SEEK
DEATH PENALTY

93 DEC 16 AM 11:13

TO: THE DEFENDANT, SAMUEL LOUIS STOKES AND HIS
ATTORNEY, VIRGIN JOHNSON, JR.:

YOU WILL PLEASE TAKE NOTICE, that, pursuant to Section 16-3-26,
SC Code Ann., 1997 Cum. Supp., upon trial of the above entitled action at least thirty (30) days
from the date of service hereof and of which you will be timely notified, the imposition of a sentence
of death upon the defendant, Samuel Louis Stokes, will be sought by the State.


WALTER M. BAILEY, JR.
SOLICITOR, THE FIRST JUDICIAL CIRCUIT
140 North Main Street, Suite 102
Summerville, South Carolina, 29483
(843) 871-2640

December 16, 1998

DEC 16 AM 10:13
FILED IN 100-100000
U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.

(4) The offender caused or directed another to commit murder or committed murder of Connie Lee Snipes as an agent or employee of another person.

- (5) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.



WALTER M. BAILEY, JR.
SOLICITOR, THE FIRST JUDICIAL CIRCUIT
140 North Main Street, Suite 102
Summerville, South Carolina, 29483
(843) 871-2640

December 16, 1998

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

1683

IN THE COURT OF GENERAL SESSIONS

The State,)
)

vs.)
)

Sammie Louis STOKES,)
)

DEFENDANT.)

RECOMMENDATION OF SENTENCE
DEATH PENALTY

Ca. NO. 98-GS-38-1245 to 12:

We, the jury in the above entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance(s), to wit:
The murder of Connie Lee Snipes was committed while in the commission of Criminal Sexual Conduct in any degree. The murder of Connie Lee Snipes was committed while in the commission of kidnapping. The defendant committed the murder of Connie Lee Snipes for himself or another for the purpose of receiving money or a thing of monetary value. The defendant caused or directed another to commit murder or committed murder of Connie Lee Snipes as an agent or employee of another person.
now recommend to the Court that the Defendant, Sammie Louis STOKES, be sentenced to death.

Foreperson Donna S. Holman

Juror Ray C. Holman

Juror Marian Nelson

Juror DAVID P. Kinkney

Juror John A. Stearns

Juror Arthur J. Taylor

Juror Dorrie High

Juror Leatha Suran

Juror Edith Williams

Juror Dorothy Smith

Juror Debrah Schuster

Juror Thomas M. Johnson

Orangenburg SC

Date: 10/31/99

1684

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

THE STATE)

VS.)

Sammie Louis STOKES)

Defendant.)

AT THE COURT OF GENERAL SESSIONS

FOR THE FIRST JUDICIAL CIRCUIT

NO FINDING OF AGGRAVATING
CIRCUMSTANCES

CASE NO. 98-GS-38-1245-1251

We, the jury in the above-entitled case, are unable to unanimously agree on the existence
of any aggravating circumstances.

Foreperson

_____, SC

Dated: _____

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF GENERAL SESSIONS

The State,)
vs.)
Sammie Louis STOKES)
Defendant.)

RECOMMENDATION OF SENTENCE
LIFE IMPRISONMENT

Ca. No. 98-GS-38-1245-1251

We, the jury in the above entitled case, recommend to the Court that the Defendant, Sammie Louis STOKES, be sentenced to life imprisonment.

Foreperson

Dated: _____

_____, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)

IN THE COURT OF GENERAL SESSIONS

The State,)

VS.)

Sammie Louis STOKES,)

Defendant.)

AFFIRMATION OF DEATH SENTENCE

Case No. - 98 - GS - 38 - 1245 - 1

As the Trial Judge in the above entitled action, and prior to the imposition of the death sentence upon the Defendant, Sammie Louis STOKES, I find as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

Panembur

Presiding Judge

Orangeburg South Carolina

Dated: *October 31, 1999*

ACCEPTED TRUE COPY

Opal W. Mize
 CLERK OF COURT
 ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF ORANGEBURG)

The State,)

vs.)

Sammie Louis STOKES,)

SENTENCE

Ca. No. 98-65-38-1245-125

Defendant.)

The Defendant, Sammie Louis STOKES, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Sammie Louis STOKES, be taken to the Orangeburg Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 1st day of December 1999 upon which day between the hours of six o'clock P.M. and six o'clock A.M., or upon an Order of Execution issued by the South Carolina Supreme Court, the Defendant, Sammie Louis STOKES, shall suffer death by electrocution or by lethal injection in the manner provided by law.



Presiding Judge

Dated: October 31, 1999
Orangeburg, South Carolina

ATTEST: TRUE COPY

Lisa W. Mize
 CLERK OF COURT
 ORANGEBURG COUNTY, SOUTH CAROLINA

WITNESSES

Det. E. Rush

ARREST WARRANT #:

98ORB70

Arrested on May 29, 1998

ACTION OF GRAND JURY

MAY 17 1999

TRUE BILL

Foreman:

Martha Subgune
Grand Jury

VERDICT

Guilty

Foreman:

Dona R. Holman
Petit Jury

Date: 10/29/99

DOCKET #: 98CS38-1247

THE STATE OF SOUTH CAROLINA
County of Orangeburg.

COURT OF GENERAL SESSIONS

Term: May, 1999

THE STATE

vs.

(and)
Samuel Louis Stokes

INDICTMENT FOR

0049

CRIMINAL CONSPIRACY

(16-17-410)

ATTEST: TRUE COPY

Lisa W. Mager
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
County of Orangeburg)

INDICTMENT #98CS38-1247

At a Court of General Sessions, convened on May 17, 1999,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

CRIMINAL CONSPIRACY
(16-17-410)

That Samuel¹ Louis Stokes (pmb) did in Orangeburg County on or about May 23, 1998
and for approximately one year prior thereto, unlawfully and wilfully unite,
combine, conspire, confederate, agree and have tacit understanding with other
persons, whose names are unknown to the Grand Jurors, for the purpose of
Kidnapping, Raping and Murdering Connie Lee Snipes.

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

SOLICITOR Wesley

ATTEST: TRUE COPY

Lisa W. Muzell
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

1690

STATE OF SOUTH CAROLINA

COUNTY OF Orangeburg

STATE

VS.

Sammie Louis Stokes

AKA: _____

Race: _____

Sex: _____

DOB: _____

Age: _____

SSN: _____

DL#: _____

SID#: _____

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:98 -GS- 38 - 1247

A/W#: _____

Date of Offense: _____

S.C. Code § : _____

CDR Code #: 0101419

SENTENCE

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Criminal Conspiracyin violation of § _____ of the S.C. Code of Laws, bearing CDR Code # 0101419☐ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-4:The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand JuryThe plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Cent for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____, plus costs and assessments as applicable*, the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 10/31/99 98-1245

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____ \$

§ 14-1-206 - Assessments 100%.....\$

§ 14-1-211 - Surcharge.....\$ 100.00

(Exceptions: See § 14-1-211)

§ 56-5-2995 (DUI).....\$

County (3%).....\$ 3.00TOTAL.....\$ 103.00Clerk of Court/Deputy Clerk Marcia D. BullockCourt Reporter: Ammitte Male

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

ATTEST: TRUE COPY

David W. Mag...

CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

PRESIDING JUDGE Charles...Judge Code: 1418Sentence Date: 10/31/99

WITNESSES

Det. E. Rush

ARREST WARRANT #:

98ORB/1

Arrested on May 29, 1998

ACTION OF GRAND JURY
MAY 17 1999

TRUE GUILTY

Foreman: Martha Inelgrove
Grand Jury

VERDICT

Guilty

Foreman: Donna R. Holman
Petit Jury
Date: 10/29/99

DOCKET #: 98GS38-1248

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: May, 1999

THE STATE

vs.
(P.A.)
Samuel Louis Stokes

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

ATTEST: TRUE COPY

Lisa W. Mize
CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
County of Orangeburg)

INDICTMENT #98GS38-1248

At a Court of General Sessions, convened on May 17, 1999,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

KIDNAPPING
(16-3-910)

(p. 6)
That Samuel Louis Stokes did in Orangeburg County on or about May 23,
1998, wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct,
or, carry away one Connie Lee Snipes, without authority of law and/or did aid
and abet Pattie Williams Syphrett and/or Norris Allen Martin in kidnapping the
said victim, Connie Lee Snipes.

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

SOLICITOR W. B. By

ATTEST: TRUE COPY

Lisa W. Mraz
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

WITNESSES

Det. E. Rush

ARREST WARRANT #:

98ORB69

Arrested on June 02, 1998

ACTION OF GRAND JURY

MAY 17 1999

TRUE BILL

Foreman:

Martha Snelgrove
Grand Jury

VERDICT

Guilty

Foreman:

Donna R. Holman
Petit Jury

Date: 10/29/99

DOCKET #: 98CS38-1245

THE STATE OF SOUTH CAROLINA
County of Orangeburg.

COURT OF GENERAL SESSIONS

Term: May, 1999

THE STATE

vs.
(pmb)
Samuel Stokes

INDICTMENT FOR

0160

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

(16-3-652)

ATTEST: TRUE COPY

Lisa W. Mugh
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

At a Court of General Sessions, convened on May 17, 1999,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT: CRIMINAL SEXUAL CONDUCT - FIRST DEGREE
(16-3-652)

(pua)
That Samute Stokes did in Orangeburg County on or about May 23, 1998, engage in sexual battery, to wit: vaginal and/or anal intercourse upon and with the body of Connie Lee Snipes without her consent, and/or the victim Connie Lee Snipes submitted to sexual battery under circumstances where she was also the victim of forcible confinement and/or kidnapping and such sexual battery was accomplished by the use of force of a high and aggravated nature, to wit: said victim was forced to submit to sexual intercourse at gunpoint.

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

SOLICITOR

Will Ray

ATTEST: TRUE COPY

Lisa W. Mize
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

COUNTY OF Orangeburg

STATE

vs.

Sammye Davis Stokes98 -GS- 38 - 1245

A/W#:

Date of Offense:

S.C. Code § :

CDR Code #:

SENTENCE

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Criminal Sexual Conduct 1st Degreein violation of § _____ of the S.C. Code of Laws, bearing CDR Code # 01 11610☐ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ year and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 10/31/99 98-1247

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine: _____ \$

§ 14-1-206 - Assessments 100%..... \$

§ 14-1-211 - Surcharge..... \$ 100.00

(Exceptions: See § 14-1-211)

§ 56-5-2995 (DUI)..... \$

County (3%)..... \$ 3.00TOTAL..... \$ 103.00Clerk of Court/Deputy Clerk Marcia HallCourt Reporter: Amelia Male

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____

\$ _____ paid to Public Defender Fund.

Other: _____

CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

PRESIDING JUDGE [Signature]Judge Code: 1 14 18Sentence Date: 10/31/99

ATTEST: TRUE COPY

WITNESSES

Audrey Smith

Chief Charles Tuttle, Jr.

ARREST WARRANT #:

C344640

Arrested on December 06, 1990

ACTION OF GRAND JURY

True Bill

Foreman:

Ray Johnson
Grand Jury **JAN 14 1991**

VERDICT

*Guilty Aggravated
Assault & Battery*

Foreman:

Ada Tennant
Petit Jury
Date: *3-12-91*

DOCKET #: 91GS38-0190

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: January, 1991

THE STATE

vs.

Sammie Louis Stokes

INDICTMENT FOR

0014

ASSAULT AND BATTERY WITH INTENT TO KILL

STATE OF SOUTH CAROLINA)
) INDICTMENT #91GS38-0190
County of Orangeburg)

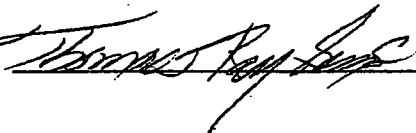
At a Court of General Sessions, convened on January 14, 1991,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT: ASSAULT AND BATTERY WITH INTENT TO KILL

That Sammie L. Stokes did in Orangeburg County on or about December 02,
1990, with malice aforethought commit an assault and battery upon one Audrey
Smith with intent to kill the said victim.

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

SOLICITOR



WITNESSES

Det. E. Rush

ARREST WARRANT #:

D952452

Arrested on May 29, 1998

ACTION OF GRAND JURY

JUL 13 1998

TRUE BILL

Foreman: B. Louise Hughes
Grand Jury

VERDICT

Foreman:

Petit Jury

Date: _____

DOCKET #: 98CS38-1246

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: July, 1998

THE STATE

VS.

Samuel Louis Stokes

INDICTMENT FOR

0116

MURDER

(COMMON LAW)

CERTIFIED TO BE A TRUE AND CORRECT COPY

[Signature]
FIRST CIRCUIT SOLICITOR'S OFFICE

STATE OF SOUTH CAROLINA)
)
County of Orangeburg)

INDICTMENT #98GS38-1246

At a Court of General Sessions, convened on July 13, 1998,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

MURDER
(COMMON LAW)

That Samuel Louis Stokes did in Orangeburg County on or about May 27, 1998, feloniously, wilfully and with malice aforethought, kill one Connie Lee Snipes by means of shooting her in the head with a pistol and that he did aid and abet Norris Allen Martin in also shooting Connie Lee Snipes in the head with a pistol and that the said victim died as a proximate result thereof.

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

SOLICITOR



WITNESSES

Det. E. Rush

ARREST WARRANT #:

98ORB/1

Arrested on May 29, 1998

ACTION OF GRAND JURY

JUL 13 1998

TRUE BILL

Foreman:

B. Louise Hughes
Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 98CS38-1248

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: July, 1998

THE STATE

VS.

Samuel Louis Stokes

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

CERTIFIED TO BE A TRUE AND CORRECT COPY

[Signature]
FIRST CIRCUIT SOLICITOR'S OFFICE

STATE OF SOUTH CAROLINA)
)
County of Orangeburg)

INDICTMENT #98CS38-1248

At a Court of General Sessions, convened on July 13, 1998,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

KIDNAPPING

(16-3-910)

That Samuel Louis Stokes did in Orangeburg County on or about May 22, 1998, wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or, carry away one Connie Lee Snipes, without authority of law and/or did aid and abet Louise Patti Syphrett and/or Norris Allen Martin in kidnapping the said victim, Connie Lee Snipes.

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

SOLICITOR

J. Frank Shattlesworth

WITNESSES

Oct. E. Rush

ARREST WARRANT #:

98ORB/1

Arrested on May 29, 1998

ACTION OF GRAND JURY

▶ MAY 17 1999

TRUE BILL

Foreman: Martha Snelgrove
Grand Jury

VERDICT

Guilty

Foreman: Donna L. Holman
Petit Jury
Date: 10/29/99

DOCKET #: 98GS38-1248

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: May, 1999

THE STATE

vs.
(PMB)
Samuel Louis Stokes

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

STATE OF SOUTH CAROLINA)

) INDICTMENT #98GS38-1248

County of Orangeburg)

At a Court of General Sessions, convened on May 17, 1999,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

KIDNAPPING

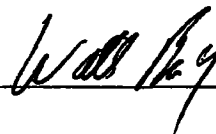
(16-3-910)

(pmb)

That Samuel Louis Stokes did in Orangeburg County on or about May 23, 1998, wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or, carry away one Connie Lee Snipes, without authority of law and/or did aid and abet Pattie Williams Syphrett and/or Norris Allen Martin in kidnapping the said victim, Connie Lee Snipes.

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

SOLICITOR



WITNESSES

Det. E. Rush

ARREST WARRANT #:

98ORB70

Arrested on May 29, 1998

ACTION OF GRAND JURY

JUL 13 1998

TRUE BILL

Foreman:

B. Louise Hughes
Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 98CS38-1247

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: July, 1998

THE STATE

vs.

Samuel Louis Stokes

INDICTMENT FOR

0049

CRIMINAL CONSPIRACY

(16-17-410)

CERTIFIED TO BE A TRUE AND CORRECT COPY

[Signature]
FIRST CIRCUIT SOLICITOR'S OFFICE

STATE OF SOUTH CAROLINA)
)
County of Orangeburg)

INDICTMENT #98GS38-1247

At a Court of General Sessions, convened on July 13, 1998,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

CRIMINAL CONSPIRACY
(16-17-410)

That Samuel Louis Stokes did in Orangeburg County on or about May 22, 1998
and for several weeks prior thereto, unlawfully and wilfully unite, combine,
conspire, confederate, agree and have tacit understanding with other persons,
whose names are unknown to the Grand Jurors, for the purpose of Kidnapping,
Raping and Murdering Connie Lee Snipes.

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

SOLICITOR

J. Frank Shuttlebaum

WITNESSES

Det. E. Rush

ARREST WARRANT #:

98CRB69

Arrested on June 02, 1998

ACTION OF GRAND JURY

JUL 13 1998
TRUE BILL

Foreman:

B. Louise Hughes
Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 98CS38-1245

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: July, 1998

THE STATE

vs.

Samuel Stokes

INDICTMENT FOR

0160

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

(16-3-652)

CERTIFIED TO BE A TRUE AND CORRECT COPY

[Signature]
FIRST CIRCUIT SOLICITOR'S OFFICE

STATE OF SOUTH CAROLINA)
)
County of Orangeburg)

INDICTMENT #98GS38-1245

At a Court of General Sessions, convened on July 13, 1998,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT: CRIMINAL SEXUAL CONDUCT - FIRST DEGREE
(16-3-652)

That Samuel Stokes did in Orangeburg County on or about May 22, 1998,
engage in sexual battery, to wit: vaginal and/or anal intercourse upon and with
the body of Connie Lee Snipes without her consent, the victim Connie Lee Snipes
submitted to the sexual battery under circumstances where she was also the
victim of forcible confinement and/or kidnapping and such sexual battery was
accomplished at the use of force of a high and aggravated nature, to wit: said
victim was forced to submit to sexual intercourse at gunpoint.

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

SOLICITOR

J. Frank Pattlebaum

WITNESSES

Det. E. Rush

ARREST WARRANT #:

F408740

Arrested on June 02, 1998

ACTION JOE FRANKS JURY

TRUE BILL

Foreman:

S. Louise Hughes
Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 98CS38-1249

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: July, 1998

THE STATE

VS.

Samuel Louis Stokes

INDICTMENT FOR

0116

MURDER

(COMMON LAW)

CERTIFIED TO BE A TRUE AND CORRECT COPY

FIRST CIRCUIT SOLICITOR'S OFFICE

STATE OF SOUTH CAROLINA)
)
County of Orangeburg)

INDICTMENT #98CS38-1249

At a Court of General Sessions, convened on July 13, 1998,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

MURDER
(COMMON LAW)

That Samuel Louis Stokes did in Orangeburg County on or about May 28, 1998, feloniously, wilfully and with malice aforethought, kill one Douglas Ferguson by means of striking him on the head and taping his head and face with duct tape thereby causing said victim to suffocate and/or aid and abet Louise Patti Syphrett and Faith Louise Lapp in murdering the victim aforesaid and that the said victim died as a proximate result thereof.

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

SOLICITOR



WITNESSES

Det. E. Rush

ARREST WARRANT #:

98ORB72

Arrested on June 02, 1998

ACTION OF GRAND JURY

JUL 18 1998
TRUE BILL

Foreman:

L. Louise Hughes
Grand Jury

VERDICT

Foreman:

Petit Jury

Date: _____

DOCKET #: 98CS38-1250

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: July, 1998

THE STATE

VS.

Samuel Louis Stokes

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

STATE OF SOUTH CAROLINA)
)
County of Orangeburg)

INDICTMENT #98CS38-1250

At a Court of General Sessions, convened on July 13, 1998,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT:

KIDNAPPING
(16-3-910)

That Samuel Louis Stokes did in Orangeburg County on or about May 28,
1998, wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct,
or, carry away one Douglas Ferguson, without authority of law and or did aid
and abet Faith Louise Lapp in kidnapping the said victim.

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

SOLICITOR

Frank Chattelesum

WITNESSES

Det. E. Rush

ARREST WARRANT #:

98ORB73

Arrested on June 02, 1998

ACTION OF GRAND JURY
JUL 13 1998

TRUE BILL

Foreman:

B. Louise Hughes
Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 98CS38-1251

THE STATE OF SOUTH CAROLINA
County of Orangeburg

COURT OF GENERAL SESSIONS

Term: July, 1998

THE STATE

vs.

Samuel Louis Stokes

INDICTMENT FOR

0049

CRIMINAL CONSPIRACY

(16-17-410)

CERTIFIED TO BE A TRUE AND CORRECT COPY

[Signature]
FIRST CIRCUIT SOLICITOR'S OFFICE

STATE OF SOUTH CAROLINA)
)
County of Orangeburg)

INDICTMENT #98CS38-1251

At a Court of General Sessions, convened on July 13, 1998,
the Grand Jurors of Orangeburg County present upon their oath:

COUNT: CRIMINAL CONSPIRACY
(16-17-410)

That Samuel Louis Stokes did in Orangeburg County on or about May 28, 1998
and for approximately one week thereto, unlawfully and wilfully unite, combine,
conspire, confederate, agree and have tacit understanding with other persons,
whose names are unknown to the Grand Jurors, for the purpose of kidnapping and
murdering one Douglas Ferguson.

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

SOLICITOR

J. Frank Quattlebaum

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of ORANGEBURG)

OICP 38-1240

SAMMIE LOUIS STOKES #5069)

Full name and prison number, if any, of applicant.)

v.)

APPLICATION FOR
POST-CONVICTION RELIEFSTATE OF SOUTH CAROLINA)

Name of Respondent)

INSTRUCTIONS - READ CAREFULLY

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

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

If the applicant 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 applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Orangeburg County Court of General Sessions (Judge M. Duane Shuler)
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 98-GS-38-1245 (First Degree Criminal Sexual Conduct)
 - (b) 98-GS-38-1246 (Murder)
 - (c) 98-GS-38-1247 (Conspiracy)
 - (d) 98-GS-38-1248 (Kidnapping)
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) October 31, 1999: Death plus thirty-five years
 - (b) _____

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. South Carolina Supreme Court
- 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. May 29, 2001, Rehearing Denied
- ii. July 2, 2001
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Stokes, ____ S.C. ____, 548 S.E.2d 202 (2001)
- ii. _____
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) Failure to present mitigating evidence

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

No

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No

(d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) 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) Ineffective Assistance Must be Raised on Post-Conviction Relief

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

Yes

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Thomas R. Sims and Virgin Johnson, Jr.
- ii. Joseph L. Savitz, III
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Trial
- ii. Direct Appeal
- iii. _____

18. State clearly the relief you seek in filing this application.

Resentencing

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

Yes (Murder)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER) VERIFICATION

I, Sammie Louis Stokes, 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.

X Sammie Stokes

Sworn to and subscribed before me

This 17th day of October, 2001.

Warren J. Ferguson L.S.

Notary Public for South Carolina

My Commission Expires Sept 22, 2008

RECORD
 HAZELL
 COURT
 DORCHESTER, S.C.
 01 OCT 17 AM 11:12

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, Sammie Louis Stokes hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

X Sammie Stokes
 Applicant

Sworn to and subscribed before me

This 17th day of October, 2001

Warren J. Ferguson L.S.

Notary Public for South Carolina

My Commission Expires Sept. 22, 2008

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Gary Maynard,¹ Commissioner,
 South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS
 Case No.: 01-CP-38-1240

FIRST AMENDED APPLICATION FOR
 POST-CONVICTION RELIEF

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Orangeburg County Court of General Sessions.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) First Degree Criminal Sexual Conduct – 98-GS-38-1245
 - (b) Murder – 98-GS-38-1246
 - (c) Criminal Conspiracy – 98-GS-38-1247
 - (d) Kidnapping – 98-GS-38-1248
4. On October 31, 1999, applicant was sentenced as follows:
 - (a) First Degree Criminal Sexual Conduct – Thirty (30) years;
 - (b) Murder - Death by electrocution or lethal injection;
 - (c) Criminal Conspiracy – Five (5) years, and;
 - (d) Kidnapping – No sentence imposed. *See* S.C. Code Ann. §16-3-910.
5. A finding of guilty was made after a plea of not guilty.
6. The applicant appealed from the judgment of conviction and sentence.
7.
 - (a) The Court to which applicant appealed:
 - (i) South Carolina Supreme Court.
 - (b) The result in each Court to which applicant appealed:

¹In the interest of accuracy, undersigned counsel have named applicant's custodian, Gary D. Maynard, rather than the State of South Carolina, as the appropriate respondent in this action.

- (i) Convictions and sentence of death affirmed.
- (c) The date of each result:
 - (i) Convictions and sentence affirmed on May 29, 2001.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Stokes*, 345 S.C. 368, 548 S.E.2d, 202 (2001).

8. Not applicable.

9 & 10.

GROUND FOR RELIEF WITH SUPPORTING FACTS

- 9(a) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution. Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10(a) Trial counsel unreasonably failed to submit the autopsy data generated by the state's medical examiner to a qualified, independent pathologist for review. As a result, counsel were unprepared and unable to challenge the state's version of how the crime occurred, and what actions, if any, were taken by applicant in connection with the events surrounding the victim's death. But for trial counsel's deficient performance, there exists a reasonable probability that the result of applicant's trial would have been different.
- 9(b) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution.*
- 10(b) The facts supporting the claim are as follows:
 - 1. Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of applicant's trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994).
 - 2. During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the

result of applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

- 11 & 12. Applicant appealed directly to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
13. None of the grounds set forth in (9) has been previously presented to this or any other Court, State or Federal.
14. Not Applicable.
15. These grounds rely on additional facts outside the record that was before the previous court.
- 16 & 17. Applicant was previously represented by counsel.

Applicant was represented at trial by Thomas Sims, P.O. Box 2016, Orangeburg, SC 29116, and Virgin Johnson, P.O. Box 2107, Orangeburg, SC 29116.

On direct appeal, applicant was represented by Joseph L. Savitz, of the S.C. Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, SC 29201.

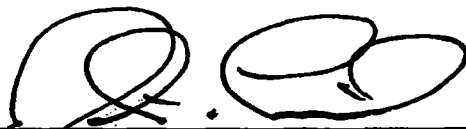
18. Applicant seeks the vacation of his convictions and sentences.
19. Applicant is not under sentence from any other court.

Respectfully submitted,

KEIR WEYBLE
Blume & Weyble, LLC
P.O. Box 11744
Columbia, SC 29211
803-765-1044

ROBERT LOMINACK
Law Office of David Bruck
P.O. Box 11744
Columbia, SC 29211
803-765-1044

May 3, 2002

By: 
Attorney for Applicant

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Gary Maynard, Commissioner,
 South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 01-CP-38-1240

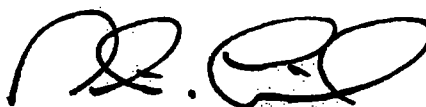
CERTIFICATE OF SERVICE

02 MAY -6 AM 11:11
 FILED FOR RECORD
 LISA W. HAZELL
 CLERK OF COURT
 ORANGEBURG, S.C.

I do hereby certify that I have served upon the attorney for the State, APPLICANT'S FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF, via U.S. mail, first-class, postage pre-paid, at the following address:

Donald J. Zelenka
 Assistant Deputy Attorney General
 Office of the Attorney General
 P.O. Box 11549
 Columbia, SC 29211

This the 3rd day of May, 2002.



ROBERT E. LOMINACK

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LAW OFFICES OF
DAVID I. BRUCK

David I. Bruck
Robert E. Lominack

1247 Sumter Street, Suite 201 (29201)
Mailing Address: P.O. Box 11744
Columbia, South Carolina 29211

Telephone: (803) 765-1044
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E-mail: robert@brucklaw.com

May 3, 2002

Lisa W. Mizell
Clerk of Court
Orangeburg county
Post Office Box Drawer 9000
Orangeburg, SC 29116

02 MAY -6 AM 11:11
FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, S.C.

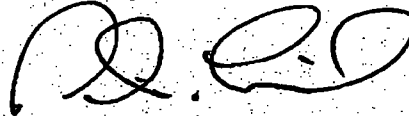
Re: *Sammie Louis Stokes v. Gary Maynard, et al.*
Case No.: 01-CP-38-1240

Dear Ms. Mizell,

Please find enclosed the original and one (1) copy of applicant's *First Amended Application for Post-Conviction Relief*. Please file the original and return a stamped copy in the enclosed self addressed stamped envelope.

If you should have any questions, please do not hesitate to contact this office.

Sincerely,



Robert E. Lominack

cc: Honorable Casey L. Manning (w/ enclosure)
Donald J. Zelenka (w/ enclosure)

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

SAMMIE LOUIS STOKES, #5069) C/A No. 01-CP-38-1240
)

Applicant,)
)

vs.)

RETURN TO APPLICATION FOR
 POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA,)
)

Respondent.)
)

The Respondents, above-named, hereby make a Return to the application for post-conviction relief received May 6, 2002. The Application was filed by his court-appointed counsel, Robert Lominack and Kier Weyble of Columbia, South Carolina. This matter comes before this Court pursuant to the November 14, 2001 Order of the Supreme Court of South Carolina staying the order of execution of Orangeburg County death row inmate Sammie Louis Stokes to allow him to pursue potential state post-conviction relief. The Order assigned the Honorable L. Casey Manning with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. The Respondents would show this Court the following:

I.

On May 17, 1999, an Orangeburg County Jury indicted Sammie Louis Stokes for murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy in the death of Connie Lee Snipes. The State sought the death penalty in the case. The Applicant was represented by Thomas R. Sims and Virgin Johnson

There were two pretrial hearings: the first, on January 19, 1999, concerned the qualification of defense counsel, and the second, on October 14, 1999, concerned pretrial motions. The trial began on October 25, 1999 and ended on October 31, 1999. Judge Paul M. Burch presided at the pretrial hearings and at trial. Following the guilt phase of the trial, the jury found Mr. Stokes guilty of all charges. Following the sentencing phase, Mr. Stokes exercised his statutory right to make a closing argument. The jury found four aggravating circumstances and recommended death, which Judge Burch affirmed. He also sentenced Mr. Stokes to 30 years for first degree criminal sexual conduct, and to five years for conspiracy. Mr. Stokes later pleaded guilty to murdering Mr. Ferguson, for which he received a life sentence.

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The Applicant appealed to the South Carolina Supreme Court. On appeal, he was represented by Joseph L. Savitz of the South Carolina Office of Appellate Defense. The Respondents restated the issues as:

- I. The trial judge properly denied the defense request to admit statements redacted from a letter introduced by the State because the statements were unnecessary and irrelevant to a fair and complete determination of the defendant's guilt.
- II. The trial judge properly barred the defendant from arguing religious matters during his statutory closing argument.

The South Carolina Supreme Court denied the appeal in State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001) on May 29, 2001. On July 2, 2001, a petition for rehearing was denied..

STATEMENT OF FACTS

Not long after his arrest, Mr. Stokes wrote a letter to the police confessing his involvement in Ms. Snipes' murder. At trial, the State introduced the letter as evidence and supplemented it with other testimony, including that of Mr. Stokes' cohort, Norris Martin.

In the letter, Mr. Stokes confessed that he had agreed to kill Ms. Snipes for \$2,000 at the request of his cellmate, James Roy Toothe, and Mr. Toothe's mother, Pattie Syphrette. Ms. Snipes and her two children by Mr. Toothe, Brian and Nicole, lived with Ms. Syphrette. Apparently, the desire to have Ms. Snipes killed originated in Ms. Snipes' behavior regarding Mr. Toothe and the children, especially when she caused Nicole to be taken by the Department of Social Services. See Stokes Confession (Court's Exhibit 4), R. pp. 1658-59.

On May 22, Mr. Stokes called Ms. Syphrette. She said that Ms. Snipes "got to go and tonight." The reason she gave for the sudden urgency was that DSS had given her an ultimatum: to evict Snipes from her home or face losing the remaining grandchild, Brian. *Id.* at 1661-62. Then, as related by Mr. Stokes, the situation developed as follows:¹

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I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. She said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She said I wish that were true so we could do all both of them. She said that Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway, I know you've been talking to her on the phone when Roy calls and I wasn't home.² You just better not flip on me for her. I laughed and said see yall at 9:30 P.M.

They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. While riding to Branchville, Connie said Doug ain't shit and I'd love

¹Although the original confession was transcribed as one long non-paragraphed statement, respondent has inserted paragraphs into this passage for ease of review.

² This phrase was redacted from the Confession published to the jury during the guilt phase. See R. at 969, 11.16-17.

to see him get his. She said I had plans tonight but this is better.³ I just laughed and looked at Pattie.

We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer.

So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot.

Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not.

I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said [oh] my god, that fat

³This phrase also was redacted from the Confession published to the jury during the guilt phase. See R. at 969, 11.22-23.

bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us \$2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me

Stokes Confession, R. pp. 1662-63.

Then, Mr. Martin had sex with the victim. *Id.* At trial, Mr. Martin testified that afterwards, Mr. Stokes took a knife and stabbed the victim in the chest, cut the nipple off of her right breast, then penetrated her anally while she was screaming from the injuries he inflicted on her. R. at 1155, 1.4-1157, 1.2⁴. Afterwards, Ms. Snipes was shot twice in the head; one shot struck her jaw and the other--fatal--shot struck her in the back of the head. *Id.* at 853, 1.4-854, 1.10. Although it is medically impossible to tell which shot came first, Mr. Martin testified that the defendant fired both shots, and that the victim was screaming after the first shot. *Id.* at 893, 1.5-22. Mr. Stokes stated that both he and Mr. Martin each fired one shot, but that Mr. Martin fired the first shot and he fired the second one. Stokes Confession, R. p.1663. Mr. Martin testified that Mr. Stokes scalped the victim and tossed her hair into the woods, *id.* at 1160, 11.13-23, then cut her vagina out. *Id.* at 1160, 1.24-1161, 1.10. A pathologist confirmed these injuries. *Id.* at 1218, 1.8-1221, 1.13.

On May 28, 1998, Mr. Stokes was at Ms. Syphrette's house with Faith Lapp, Ms. Syphrette, and Brian. *Id.* at 1330, 11.20-23. Ms. Syphrette left to get Mr. Ferguson and bring him to the house. *Id.* at 1334, 11.10-19. Ms. Lapp testified that, while they waited, Mr. Stokes told her that if she said anything, he would do to her what he did to Ms. Snipes and, "if he couldn't get to [her], he was going to get to my family and then he said that he was going to have to come back in twenty years and get the baby." *Id.* at 1335, 11.6-11.

⁴This testimony was elicited during the sentencing phase, and not during the guilt phase.

When Mr. Ferguson arrived, he sat down on the couch. *Id.* at 1340, l.9; Stokes Confession, R. p. 1667. Mr. Stokes, who had been hiding in an adjacent bedroom, came out and asked, “[D]o you know me.” R. at 1340, l.15-1341, l.16. Mr. Ferguson kept saying no. *Id.* at 1341, ll.16-17; Stokes Confession. Then, Mr. Stokes said, “Motherfucker, you’re going to know me.” *Id.* at 1341, ll.19-20. Lapp testified that, at that point, she took Brian out of the room while Mr. Stokes and Ms. Syphrette wrapped duct tape around Mr. Ferguson. *Id.* at 1342, ll.19-25. In his confession, Mr. Stokes stated that he punched Mr. Ferguson while he lay on the floor. Stokes Confession, R. p.1668. The pathologist described how they wrapped the duct tape around Mr. Ferguson:

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The unusual thing about his body was that he was wrapped in duct tape. His ankles were taped together, his wrists were taped together and his arms were taped together and then that was taped to his chest and then his face and head was [sic] fully taped.

R. at 1194, ll.4-11. Because they wrapped tape around his nose, his mouth, and his entire head, Mr. Ferguson could not breathe and he died from suffocation. *Id.* at 1206, ll.1-9.

The Respondents attach and incorporate herein by reference the following:

1. Final Brief of Appellant.
2. Final Brief of Respondents.
3. Record on Appeal.
4. State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001) on May 29, 2001.

II. Allegations

Prior to the entry of the order on October 17, 2001, appellate counsel for Mr. Stokes filed an application for post-conviction relief in Orangeburg County. In the application, it was alleged that he received “ineffective assistance of counsel” and that it was based upon a “failure to present

mitigating evidence." On May 6, 2002, the Respondents received the "First Amended Application for Post-conviction Relief. In the Application, made by current counsel, he alleged the following:

9(a) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution. Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).*

10(a) Trial counsel unreasonably failed to submit the autopsy data generated by the state's medical examiner to a qualified, independent pathologist for review. As a result, counsel were unprepared and unable to challenge the state's version of how the crime occurred, and what actions, if any, were taken by Applicant in connection with the vents surrounding the victim's death. But for trial counsel's deficient performance, there exists a reasonable probability that the result of Applicant's trial would have been different.

9(b) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution.*

10(b) The facts supporting the claim are as follows:

1. Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of Applicant's trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).*
2. During closing argument, the prosecutor argued that life in prison without parole would reward Applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock Applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated Applicant's rights as

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guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

III.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. 466 U.S. at 687. Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was the Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. *State v. Pendergrass*, 270 S.C. 1, 239 S.E.2d 750 (1977); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977); *Butler v. State*, 286 S.C. 441, 34 S.E.2d 813 (1985); *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985).

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." *Id.* Rather, the court must place itself in the shoes of Ard's attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Ard bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-64, 2068, 80 L.Ed.2d 674 (1984). In assessing counsel's performance, courts bear in mind that the review is "highly deferential." *Id.* at 689, 104 S.Ct. at 2065. Indeed, it affords a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. See *Id.* And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See *Id.* at 691-92, 104 S.Ct. at 2066-67. Therefore,

deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability--i.e., one adequate to undermine our confidence in the result-- that "the result of the proceeding would have been different." See *id.* at 694, 104 S.Ct. at 2068.

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"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. at 2066; see Satcher v. Pruett, 126 F.3d 561, at 572 (4th Cir 1997)(explaining that " '[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments' " (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066)).

In his initial allegation, he contends that counsel was ineffective prior to and during the guilt phase by failing to submit the autopsy results to and independent pathologist. The record indicates that Dr. Joel Sexton, an expert in forensic pathology, testified in the guilt phase about the autopsy he performed on Connie Snipes on May 28, 1998. R.p. 850-863. ⁵ The Applicant has failed to suggest how this testimony was in error. Nevertheless, the allegation probably raises a question of fact which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

In his remaining allegations, he asserts that counsel was ineffective in the sentencing phase because counsel failed to prepare , investigate and present mitigating evidence. The Applicant, through counsel, fails to specify what evidence counsel failed to present that arises to a Sixth

⁵ Dr. Sexton also testified in the penalty phase. R. p. 1193-1232.

Amendment violation. The record shows that the defense presented in mitigation James Aiken, an expert in adaptability and corrections to testify. R. 1384- 1427. He opined that Stokes "can be incarcerated in the Department of Corrections for the remainder of his life without causing any undue risk or harm to other inmates, staff, nor the general community." R.p. 1394. The Applicant fails to state what the evidence is that counsel failed to develop. Under Rule 12(e), Respondents submit that they are entitled to relief of a more definite statement because the pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Absent greater specificity the allegation must be dismissed.

In his remaining allegation, he contends that counsel should have objected to the prosecution penalty phase argument about the impact of a life sentence in the department of corrections. The portion he refers to apparently is set forth at R.p. 1445-51 where Solicitor Bailey is commenting upon the testimony of James Aiken about the correctional system. See. R.p. 1393- 1425.

There is a two-pronged test for determining whether a prosecutor's misconduct in closing argument " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). Specifically, a defendant "must show [1] that the [prosecutor's] remarks were improper and [2] that they 'prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial.' " United States v. Adam, 70 F.3d 776, 780 (4th Cir.1995). " In determining whether a prosecutor's comments denied the defendant fundamental fairness, the reviewing court should consider: (1) the nature of the comments, (2) the nature and quantum of the evidence before the jury, (3) the arguments of opposing counsel, (4) the judge's charge, and (5) whether the errors were isolated or

repeated. Arnold v. Eyatt, 113 F.3d 1352, 1358 (4th Cir. 1997). "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). Donnelly, 416 U.S. 637, 647 (1974).

The challenged prosecution argument is directly from the testimony of the defense witness. Clearly, it is within the acceptable parameters of closing argument. Accord State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989)(solicitor's comments that inmates come and go as they please, have visits, report to cells after meals to distinguish between life on death row and prison was not error where directly quoting defendant's own witness and did not trivialize a life sentence). State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)(solicitor may state his version of his testimony). Since it was fair comment, under Donnelly v DeChristoforo, there was no deficient performance or prejudice on the part of defense counsel under Strickland, concerning the argument since any objection would likely have been overruled. The allegation may be denied and dismissed.

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

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

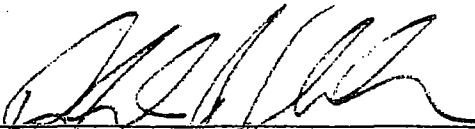
VI.

WHEREFORE, having made its Return, the State requests that a hearing be held.

CHARLES M. CONDON
Attorney General

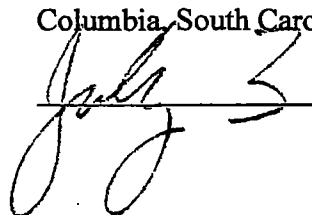
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
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By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
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Columbia, South Carolina

 3, 2002.

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

Sammie Louis Stokes, #5069,) 01-CP-38-1240

Applicant,)

v.)

CERTIFICATE OF SERVICE

State of South Carolina,)

Respondent.)

02 JUL -8 PM 2:43
 FILED FOR RECORD
 LISA W. HAZELL
 CLERK OF COURT
 ORANGEBURG, S.C.

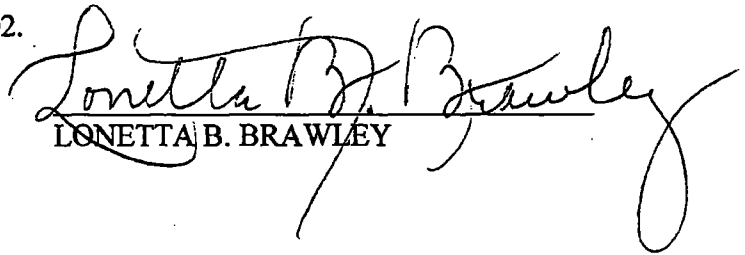
I, Lonetta B. Brawley, do hereby certify:

1. That I am an employee of the Office of the Attorney General.
2. That regular communication by mail exists throughout the State of South Carolina, and that this is a proper circumstance of service by mail.
3. That I have this day served a copy of the Return in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid:

Robert E. Lominack, Esquire
 Law Offices of David Bruck
 Post Office Box 11744
 Columbia, South Carolina 29211

Keir Weyble, Esquire
 Post Office Box 11744
 Columbia, South Carolina 29211

DATED this 3rd day of July, 2002.


 LONETTA B. BRAWLEY

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG)

C/A No. 01-CP-38-1240

Sammie Louis Stokes,)

Applicant,)

v.)

Gary Maynard, Commissioner,)
South Carolina Department)
of Corrections,)

Respondent.)

COPY

DEPOSITION OF
TOMMY SIMS, ESQUIRE

Friday, April 18, 2003
10:56 a.m. - 11:45 a.m.

The deposition of TOMMY SIMS, ESQUIRE, taken on behalf of the Plaintiff at the Law Offices of David I. Bruck, 1247 Sumter Street, Suite 201, Columbia, South Carolina, on the 18th day of April, 2003 before Karen L. Yearwood-Cole, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to agreement of counsel.

APPEARANCES:

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 Columbia, South Carolina 29211
 Attorney for the Applicant

And

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EXHIBITS

(There were no exhibits marked during this deposition.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby waived.

TOMMY SIMS, ESQUIRE

3

1 TOMMY SIMS, ESQUIRE, having been duly sworn, deposes
2 and testified as follows:

3 MR. SIMS - EXAMINATION BY MR. LOMINACK:

4 Q: All right. I'm going to do the deposition and
5 I don't need to tell you, but just in case you
6 don't understand the question, feel free to ask
7 me and I'll try and make it clear.

8 A: Sure.

9 Q: Let me just start, get some of your background.
10 When were you admitted to the bar in South
11 Carolina?

12 A: Oh, gosh, 1981 or '82.

13 Q: Okay. Are you admitted in any other states?

14 A: Mississippi.

15 Q: Were you admitted there before?

16 A: Yeah.

17 Q: When was that?

18 A: In '78.

19 Q: Okay. If you could, remember back that far,
20 try to give me somewhat of a time line of your
21 employment. Where you worked and when.

22 A: Okay. I initially started to work with North
23 Mississippi Rural Legal Services in Greenville,
24 Mississippi back in 1978, as staff attorney.
25 Concentrated mostly on federal employment

TOMMY SIMS, ESQUIRE

4

1 discrimination, that kind of stuff. So I did
2 those kinds of cases. Went before the Fifth
3 Circuit and the whole nine yards. Did that.
4 I moved here and came, I was managing attorney
5 at Palmetto Legal Services in Orangeburg, for
6 the Palmetto Legal Services. I moved to the
7 Solicitor's office where I was an assistant
8 solicitor. A assistant solicitor, deputy
9 solicitor, and acting solicitor. I think that
10 was from about '81 or '82 up through '92.

11 Q: Okay.

12 A: After the election in '92, I then went into
13 private practice and continued in private
14 practice up until now and just about a month or
15 two ago, the Solicitor approached me about
16 doing some part-time prosecuting.

17 Q: Okay. So now you're back at -- doing part-
18 time?

19 A: Part-time, yeah. Which I almost didn't get the
20 letter because the letter was sent to the
21 Solicitor's office as opposed to being sent to
22 my office.

23 Q: Oh, so you still have -- you also have --

24 A: Yeah.

25 Q: -- your private practice still?

TOMMY SIMS, ESQUIRE

5

1 A: Yeah.

2 Q: Okay. Just kind of, if you could, briefly just
3 describe the areas of practice that you've
4 concentrated in since you've been in South
5 Carolina.

6 A: I did, I have done a lot of family court, I did
7 some federal litigation with Legal Services.
8 I have defended cases both on Federal and State
9 level. Of course, I prosecuted everything from
10 DUI to capital murders in the state of South
11 Carolina.

12 Q: All right. Let's talk about your death penalty
13 cases. How many cases have you participated in
14 either as prosecutor or defense counsel?

15 A: Either directly or indirectly as a prosecutor,
16 maybe six or seven, if not more. And on the
17 defense side, I think it's been three.

18 Q: What were those cases on the defense side?

19 A: Let me see. One was State vs. Bayan Aleksey
20 and of course, this one, Stokes and there was
21 -- I can't think of the other name, where my
22 guy decided to work a deal. Oh, what's the
23 name of that case? I can't think of the name
24 off the top of my head.

25 Q: Is it before your appointment in Stokes case?

- 1 A: Yeah.
- 2 Q: Okay.
- 3 A: And I've been appointed right now in a matter
4 over in Barnwell.
- 5 Q: A capital case?
- 6 A: Yeah.
- 7 Q: Now, in Aleksey, were you lead counsel or
8 second counsel?
- 9 A: Second.
- 10 Q: And Stokes?
- 11 A: Lead counsel.
- 12 Q: Lead counsel?
- 13 A: Yeah.
- 14 Q: And what about the other case where the person
15 ended up cooperating?
- 16 A: I was going to be the lead counsel, but we
17 didn't get that far because we didn't have to
18 do it. He ended up testifying, so my job and
19 that responsibility was to work out a deal for
20 him so that he would not face the capital case,
21 or capital murder charges.
- 22 Q: So as a defense attorney, how many capital
23 trials have you seen go through the sentencing
24 phase to verdict?
- 25 A: I guess, as defense, two, I believe.

TOMMY SIMS, ESQUIRE

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1 Q: Aleksey and Stokes?

2 A: Uh-huh (affirmative response).

3 Q: All right. And then you mentioned that you've
4 worked on six or seven as a prosecutor, you
5 said directly or indirectly.

6 A: Yeah.

7 Q: How many of those were you actually a courtroom
8 prosecutor on?

9 A: I was in the courtroom on all of them.

10 Q: Okay.

11 A: And actually did the, without any -- well,
12 basically the solicitor carried the books and
13 I did the case, this is a case involving a guy
14 who had killed a 24-month-old baby. He had
15 sexually abused the child, beat the child, and
16 she died as a consequence of her injuries. And
17 there was sex, anally sexually abused the
18 child. So, I prosecuted that one. And I
19 prosecuted cases in Dorchester County. That's
20 also in the First Circuit.

21 Q: Uh-huh (affirmative response).

22 A: And actually prosecuted most of them, with the
23 exception of maybe the first two, when I first
24 joined the Solicitor's offices. I took an
25 active role.

1 Q: Okay. And can you remember any of the names of
2 the cases, of the defendants?

3 A: Not off the top of my head, no.

4 Q: And how many of those went through sentencing
5 phase verdict?

6 A: Basically, all of them. Especially as a
7 prosecutor, basically all of them. I think the
8 last one that did not go through sentencing
9 phase is because once he was found guilty, he
10 worked out a deal, because Randy Murdock was
11 also involved. He worked out a deal with Randy
12 Murdock to turn evidence on some capital cases,
13 on some murder cases that he had down in the
14 Hampton area. And rather than -- that was part
15 of the agreement. After you've been found
16 guilty, rather than move to the actual
17 sentencing phase, he agreed to turn State's
18 evidence against some people who had been
19 involved in killing his wife. This was a case
20 where he had lured, he and the victim's wife
21 had lured him down from North Carolina and
22 taken him over to Santee and shot him with a
23 shotgun and cut his throat.

24 Q: All right, now. I take it from your earlier
25 time line, all of your experience as a

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TOMMY SIMS, ESQUIRE

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1 prosecutor in capital cases came before you
2 went into private practice?

3 A: Yeah.

4 Q: Okay. All right, now. Turning to the Stokes
5 case.

6 A: Uh-huh (affirmative response).

7 Q: How did you get involved in the case? How were
8 you appointed?

9 A: I was actually not going to be lead chair.
10 There was another attorney who was appointed,
11 Attorney Johnson, Virgin Johnson, who was the
12 actual attorney but had no -- appointed
13 rather, but he had no actual trial, that kind
14 of trial experience. So then once I got
15 involved, he, the judge decided that because of
16 my experience, that he would appoint me as the
17 lead counsel.

18 Q: So originally, Mr. Johnson was appointed as
19 lead counsel?

20 A: Uh-huh (affirmative response).

21 Q: And then you got involved?

22 A: Yeah.

23 Q: And you were subsequently appointed as lead
24 counsel?

25 A: Uh-huh (affirmative response).

1 Q: Do you remember when it was you were appointed?

2 A: The date, I can't give you the date. I know
3 that, I recall being called to the courthouse
4 or went to the courthouse, or something like
5 that, and Sammie was there and the judge made
6 the determination. He asked Mr. Johnson
7 whether or not he'd had any capital experience
8 and he said no.

9 Q: Do you remember about how long after Mr. Stokes
10 was arrested?

11 A: I can't, no.

12 Q: All right. Now, did you get the call from the
13 judge or Mr. Johnson to come on over to the --

14 A: I can't recall whether it was from Mr. Johnson
15 or the judge or whomever. I can't recall.

16 Q: All right. And can you just kind of summerize
17 how the work was divided up between you and Mr.
18 Johnson, with you being lead counsel and him
19 being second chair?

20 A: Well, basically what happened was I -- we just
21 kind of, we would have meetings and we would
22 constantly go through what was going on and
23 what needed to be done and how we were going to
24 do it. I don't think there was a clear
25 delineation that you would handle this and I

TOMMY SIMS, ESQUIRE

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1 would handle that. We just simply met on a
2 regular basis and kind of went through where we
3 were.

4 Q: What about your relationship with Mr. Stokes?

5 A: Sammie and I had a good relationship.

6 Q: Right from the beginning?

7 A: Yeah, right from the beginning.

8 Q: In what way?

9 A: Well, he knew -- he knew who I was and -- of
10 course he knew who I was, because when he was
11 initially -- and that's one of the things we
12 talked about extensively. When he was initially
13 locked up, I was the one who sent him to jail.

14 Q: When you were prosecuting?

15 A: Yeah.

16 Q: And what case was that?

17 A: That was the case involving his wife, where he
18 had strangled his wife down in Brachfield. And
19 so we, Sammie and I, we talked about that. He
20 understood who I was. Mr. Johnson understood
21 who I was. And I think it's on the record
22 somewhere in the case, that I brought that to
23 the Court's attention and it was talked about
24 in the actual, in the case somewhere. I don't
25 know, but I think it was real early on when it

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1 happened.

2 Q: Okay. So you were actually not just the
3 prosecutor who indicted him, but you were the
4 prosecutor who tried him?

5 A: I believe, yeah.

6 Q: All right. And was there also -- he had also
7 gone to jail or been convicted and sentenced
8 for an incident that occurred in prison after
9 the incident with his ex-wife.

10 A: Uh-huh (affirmative response).

11 Q: Were you also the prosecutor on that case?

12 A: No. That happened over there, I think, over in
13 Fairfax, when he was jail over in Fairfax. I
14 think they would have handled, that, in that
15 area.

16 Q: When you talked to Mr. Stokes about your prior
17 involvement as a prosecutor against him, what
18 did you explain to him?

19 A: I explained to him the whole, I tried to go
20 through the whole gamut of it and basically,
21 okay Sammie, you know who I am. You've
22 basically known who I am. I was the prosecutor
23 for all these years. As a matter of fact, I
24 was the one who actually prosecuted you. Do
25 you understand that as a former prosecutor,

TOMMY SIMS, ESQUIRE

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1 that I prosecuted you. And we went through the
2 whole, the whole nine yards.

3 Q: Did anybody else go through it with him?

4 A: I know that Mr. Johnson talked to him about it
5 also, because I was -- and I think I said to
6 Mr. Johnson, look, you know that I prosecuted
7 him and we need to, you need to, you know, see
8 if he agrees and I've talked with him about
9 that, too.

10 Q: All right. So, getting back to your good
11 relationship with Mr. Stokes. In addition to
12 that, how else was -- why would you describe
13 your relationship as good?

14 A: Well, even after the case was over, he had
15 asked me to come down, we'd talk. I'd go down
16 and we'd talk. When he -- when the appeal was
17 done, and he had talked with his appellant
18 lawyer and they felt that they had a good
19 chance because some of the issues that were
20 raised, he called me up and he said, are you
21 going to be handling my case because I still
22 want you to handle this case. And I said,
23 well, Sammie, I don't know. That would be up
24 to the Court. He said, no, I want you to
25 handle it because, his words were, you're top

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1 flight.

2 Q: All right. What about plea negotiations, did
3 Mr. Baily ever extend a plea offer?

4 A: In the first case?

5 Q: Uh-huh (affirmative response).

6 A: In that first case, no. As a matter of fact,
7 we went round and round with Walter about that
8 and the reason that we talked to him about that
9 was because the victim, and I used the phrase
10 with him in talking with him, you're not
11 talking about a Sunday school teacher here.
12 After I read, I don't know how many pages of
13 letters and it talked about the homosexual
14 relationship she had with Roy Toot's mother and
15 things that were going on and the fact that she
16 actually went down to lure the second guy out
17 into the woods. That's what she thought she
18 was doing. She was not a Sunday school
19 teacher. She was a active participant in
20 trying to get somebody out there, to commit a
21 murder herself. So, I constantly talked to him
22 about that and constantly tried to get him,
23 over and over again, to do, you know, to offer
24 us something, but he chose -- he absolutely
25 refused to do it. And even in the second case,

TOMMY SIMS, ESQUIRE

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1 up until the week or day that we were getting
2 ready to go into the actual trial, eventually,
3 that's when he then decided that he would offer
4 the life sentence.

5 Q: All right. Just so we're all clear. The first
6 case, that victim, you're talking about Connie
7 Snipes?

8 A: Connie Snipes, yeah.

9 Q: And the second case was the Doug Ferguson?

10 A: Doug, whatever his name. I can't think of his
11 name.

12 Q: All right. Tell me as much as you can remember
13 exactly what Mr. Bailly's response was, when you
14 were talking to him about Ms. Snipes and why he
15 should extend an offer.

16 A: He just absolutely refused. I don't know if
17 you have ever dealt with Walter, but he gets on
18 his high horse and he'll get on his white horse
19 and think that he has to save the world. And
20 that's the position that he was taking in this
21 matter and chose not to even entertain
22 anything.

23 Q: All right. As you started preparing the case,
24 did you have any problems getting what you
25 needed from the judge in terms of funding or

1 any other resources?

2 A: Not that I can recall.

3 Q: What about access to Sammie? Where was he
4 held?

5 A: Initially, Sammie was held, I believe, in
6 Orangeburg. So he was there.

7 Q: It was easy enough for you to get to him or any
8 expert or anybody else to get to him?

9 A: Yeah. I believe, and I'd have to kind of think
10 about it a little more, but just off the top of
11 my head right now, I think that Sammie was in
12 Orangeburg. As a matter of fact, I can recall
13 talking with Sammie and some of the things he
14 was saying is, you know, you need to tell the
15 jailer to keep these young punks away from me
16 because I'm here just to try and do my thing
17 and I'm not involved with what's going on in
18 the jail.

19 Q: Now, the voir dire in this case. Before this
20 case, had you ever been active in picking a
21 jury --

22 A: Yes.

23 Q: -- in a capital case? Was that as a prosecutor
24 or defendant?

25 A: Both.

TOMMY SIMS, ESQUIRE

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1 Q: Okay. Which case had you picked a jury for as
2 a defense attorney before this one?

3 A: In Bayan's case.

4 Q: And then in some, if not all, of the --

5 A: In all of the actual criminal cases, you know,
6 I don't think the record will reflect, in all
7 of them, that I actively questioned jurors, but
8 in a number of them, if you went back and tried
9 to find them all, you would probably find that
10 I did ask questions and was involved.
11 Especially, in the ones that I was the -- did
12 most of the work in.

13 Q: All right. And what about Mr. Johnson, do you
14 know whether he had ever done voir dire in a
15 capital case?

16 A: I think that was his first case.

17 Q: Did you have any concerns in Mr. Stokes' case
18 about any particular juror sensitivities to
19 either aggravating circumstances or mitigating
20 circumstances?

21 A: Sam and I talked during the period of time
22 about some of the things that we wanted to
23 raise. Sammie's concern was, which ultimately
24 he chose to invoke, he did not want it coming
25 out about him having AIDS.

1 Q: Well, and how did that affect your voir dire
2 questioning?

3 A: I've lived in Orangeburg and that's the only
4 place I've ever lived when I moved here to
5 South Carolina. I felt that I had a pretty
6 good grasp of what the people were and how the
7 people were in Orangeburg. And my opinion to
8 him was that I did not think that that would be
9 a major obstacle in Orangeburg. And we talked
10 about it. We talked about it a number of times,
11 and up through the whole nine yards we talked
12 about it.

13 Q: All right. When you say obstacle, you mean the
14 fact that he had --

15 A: AIDS.

16 Q: -- AIDS. You didn't think that would be an
17 obstacle?

18 A: No.

19 Q: Were there any other facts about the case that
20 you were particularly concerned about when you
21 were picking the jury?

22 A: I explained to him about the things that were
23 going to come out in terms of how the girl was
24 killed and how she was led out there. We
25 talked about those things. And off the top of

TOMMY SIMS, ESQUIRE

19

1 my head, I just, you know. But those are some,
2 of course, when you have those facts in the
3 case, those are things that you would talk over
4 with your client. Initially, you go through
5 everything that's probably going to hit him.

6 Q: All right. Did any of that play a role in how
7 you conducted voir dire or what kind of jurors
8 you thought would be beneficial?

9 A: Of course. That's a factor that you have to
10 take into consideration. I tried to, for
11 example, I tried to look when we got the jurors
12 questionnaires and everything like that, we'd
13 try to look at certain classes of people. Just
14 for an example, not necessarily, saying without
15 going through all those notes again, you'd look
16 at pastors, you'd look at farmers, you'd look
17 at -- farmers have always been conservative,
18 extremely conservative. As a prosecutor, I
19 want them on my trial. As a defense lawyer, I
20 may not want them on there. It depends on what
21 the issues are. Those kind of things. You
22 look at the, kind of get some background in
23 terms of what was going on. And if I'm not
24 mistaken, I'd have to go back, we may have
25 talked with Jeff Blume briefly about the

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1 possibility of doing -- it was one of the cases
2 I was involved on, he came down and we talked,
3 I believe, about doing one of the jury things
4 that he does.

5 Q: You have practice voir dire sessions?

6 A: Yeah.

7 Q: But you talked to Mr. Blume about it, do you
8 whether that actually occurred?

9 A: It did not occur. I know it didn't occur.

10 Q: Okay. Do you remember why?

11 A: No, I don't.

12 Q: Okay.

13 A: Is this the same time, I think, when he got
14 involved with that thing over in Aiken
15 somewhere. I'm not sure. Something over in
16 Aiken or some other -- and I can't swear to
17 this as it relates to this.

18 Q: Sure.

19 A: This is just kind of vague things.

20 Q: All right. When you did talk to him, talk to
21 Mr. Blume, about the possibility of doing a
22 practice session, that I understand didn't
23 occur, but did you talk to him -- was he there
24 to also just give you kind of advise about how
25 to go about it even if you didn't have that

TOMMY SIMS, ESQUIRE

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1 practice session?

2 A: I think we did. I think we did. He kind of
3 said this is the kind of thing that we would
4 probably need, you would probably do if you
5 were going to do that.

6 Q: All right. Do you remember what his advise was
7 or anything?

8 A: No, I don't.

9 Q: And was there any consultant or anybody in the
10 courtroom with you during voir dire?

11 A: No, just -- I'm trying to see if Donna was
12 there. I think Donna Swartz, and I don't think
13 she was.

14 Q: All right. Now, switching gears and getting
15 into the guilt phase. What were your concerns
16 when you went into the guilt phase in terms of
17 the weaknesses that you saw in your case?

18 A: The biggest weakness was Sammie's statement.
19 And I told him over and over again, if they
20 didn't have a statement, they didn't have a
21 case. The way the case went down is when they
22 initially arrested the co-defendant, they tried
23 -- they then, if I'm not mistaken, implicated
24 Sammie and they had nothing on him other than
25 Morris, whatever his name was, because he'd

1 left his hat and I believe his driver's license
2 out there on the scene. Sammie, they brought
3 him in, if I -- may have brought him over. He
4 had been in jail for awhile, for a couple of
5 days. They brought him over for a bond hearing
6 and he came back, he approached the police
7 officer and indicated to the police officer
8 that he wanted to, he had something to tell her
9 and, if I recall correctly, that officer
10 actually did not talk to him at that point.
11 And I asked him, what in the world caused you
12 to write out a statement. He said, my
13 conscious got a hold of me. And I said, this
14 is the wrong time to have a case of conscious.
15 Q: And after he gave the statement, after you
16 learned of it, how much did you focus on trying
17 to get that statement suppressed?
18 A: I think I did number of things in order to try
19 to get it. I think the record will reflect,
20 of course you got a copy of the file, that we
21 went through that issue quite extensively. We
22 got some things redacted out of the statement
23 and some things that we wanted in the
24 statement, the judge ruled against us and we
25 tried to protect the record in order to be sure

TOMMY SIMS, ESQUIRE

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1 that those issues would be raised. Walter
2 wanted all of the, what he considered to be,
3 the self-serving statements redacted out of it
4 and not the issues that we want. Particularly,
5 I tried to, or wanted information in that the
6 jury would hear about her voluntarily coming
7 down because that, to me, did away with one of
8 the issues in terms of kidnaping. I wanted to
9 raise that issue. The issue of her voluntarily
10 wanted, I believe, sex or something like that.
11 Those kinds of things that I wanted in and we
12 spent a considerable amount of time in the
13 trial actually, or during the course of it,
14 trying to raise those issues with the judge.

15 Q: Besides the statement, which I understand was
16 a pretty big weakness in your case, but were
17 there any other smaller weaknesses that you
18 identified before the trial?

19 A: There were, I guess, a number of things. The
20 issues, I think, the kidnaping that I talked
21 about a few moments ago. The issue that the --
22 the sex, the issue of, for hire. Those are
23 weaknesses that would come out. Also, I felt
24 to a lesser degree the fact that there were
25 some issues related to how she was killed.

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1 Q: What issues do you remember those being?

2 A: Well, the issues is the fact that when you have
3 a woman who's nipples have been cut out and her
4 vagina has been cut out, that's going to have
5 to have a role in terms of what people may
6 think.

7 Q: And when you thought about and were preparing
8 for that part of case, exactly how she was
9 killed, what did you do to prepare for that?

10 A: Well, I think my cross-examination bars the
11 other guy. It was his knife, he was the one
12 that had the knife. There was no question
13 about who had the knife. I tried to make as
14 much in roads as I could by exactly pointing
15 those features out. He was the one who was
16 actually the only person who had a weapon out
17 there, to be able to deal with that issue.

18 Q: Did you have an investigator that you hired for
19 the guilt phase?

20 A: Yeah. I think B.J. Johns' group, I believe.

21 Q: Do you know whether -- do you remember dealing
22 with B.J. Johns himself or was it somebody
23 else?

24 A: Somebody else.

25 Q: In his office?

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25

1 A: Yeah.

2 Q: What issues did you have the investigator
3 explore?

4 A: Well, one of the, if I can recall, we went out
5 to the scene. I put on snake boots and chaps
6 and went out there in the field and tried to --
7 because one of the things I was going to try to
8 develop, Morris lives not too far from there
9 and he lived down in Branchfield in a little
10 apartment complex. I went out and tried to
11 walk through the woods back to see if he could
12 have come back through the woods from where he
13 was. Either -- I did both ways. Sammie had
14 told me where they put him out and I got, I
15 tried to walk that area back through the woods
16 to get back to the site where the girl was.
17 And also, I went from his home, from where he
18 lived, to try to see if I could walk through
19 the woods walking over the snakes and stuff.
20 I didn't see any, but --

21 Q: All right. Any other things that you had the
22 investigator focus on?

23 A: I just can't remember everything we talked
24 about and everything. But it was a young guy,
25 young black guy, who would come down. And I

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1 think there was a young lady too, but I can't
2 think of her name.

3 Q: Okay. Both of these, you think, were from B.J.
4 Johns' investigation agency?

5 A: Yeah. I think that girl's name was Terry, I
6 believe, or either the guy's name was Terry.

7 Q: All right. What did you know about the deal
8 that Norris Martin had? He was the co-
9 defendant at the time. What did you know about
10 the deal he had with the State?

11 A: You know, it had been revealed to me in terms
12 of what it was. He was going to testify and
13 get life.

14 Q: That was the extent of it as far as you knew?

15 A: And, you know, the major part was that he was
16 going to testify and get life. There were
17 other things, I guess, let's see; his life
18 sentence, his testimony, what else? That's it.

19 Q: All right. What about Martin's story and his,
20 I don't know if you remember, but there were
21 several different statements that he gave to
22 the police and then he testified and there was,
23 of course, some inconsistencies. How much did
24 you focus in on that?

25 A: We focused in on that a great deal at trial, I

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1 believe, because he had given an initial
2 statement, he gave a second statement, and I
3 think he gave a third statement to Walter and
4 one of his investigators, I believe, if I can
5 recall somewhere around on July 3rd, and there
6 was a fourth statement. I think there may have
7 been four statements. And I went through each
8 one of those statements with him to show the
9 differences in terms of how his statements
10 progressed. And if I recall correctly, I think
11 one of the things I pointed out is that as he
12 got his deals more in his pocket, he began to
13 implicate Sammie more. The first statement did
14 not really do very much. The second statement
15 then the third and then if I recall, the fourth
16 statement, and that was during that July period
17 of time when he had had his deal. And I think
18 I termed it as having it in his hip pocket
19 then.

20 Q: All right. And other than comparing the
21 statements and the obvious inconsistencies
22 between the two, or between the four as you got
23 up to trial, was there anything else done to
24 prepare to attack Martin's credibility once he
25 testified?

1 A: The natural things that we do, I guess, is in
2 terms of, you know, trying to find background
3 stuff on Martin to determine whether or not
4 there was anything that he could do that, if
5 I'm not mistaken, the information that I had,
6 tried to develop, was that Martin was always a
7 follower of Sammie. There was some question as
8 to whether or not there was even a homosexual
9 relationship between the two of them. And, of
10 course, in a case where I'm trying to make him
11 be the villain, I didn't want it to come out
12 that Sammie had, you know, used him and had him
13 doing everything and basically was a follower.
14 I wanted him to be an active person to have an
15 active lead. So to say, that he would be able
16 to make a decision to do something like that.

17 Q: All right. I could be mixing this up, but
18 there were some serious Lyle issues, or 404(b)
19 issues, that arose in the case. And I think
20 they rose both in the guilt phase and the
21 sentencing phase. What do you remember about
22 those issues?

23 A: I'd have to go back and read that transcript
24 part of it. But we did have some serious
25 questions about prior bad acts and stuff like

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1 that, that we raised.

2 Q: All right. Well, I'll get back to that a
3 little bit in the sentencing, I guess, because
4 I think it came up a little bit more in the
5 sentencing phase when they were introducing the
6 evidence of the crime --

7 A: The crime --

8 Q: -- against his wife and the crime in prison?

9 A: Yes.

10 Q: Okay. When you went into the trial, what were
11 your goals in the guilt phase?

12 A: My goals in the guilt phase was to try to, what
13 I did and I think you may have a copy of it in
14 there somewhere, I tried to do an outline. One
15 of the things I wanted to do is to try to get
16 away, cut into, chop into some of the
17 aggravated circumstances. As well as it was
18 important for me to try get the information in
19 about her voluntarily going down to Brachfield,
20 being a party to what was going on, thinking
21 that she was going to go in and kill somebody
22 herself. To get into the kidnaping. And I
23 wanted to also get into, to try and do away
24 with the issue of whether or not there was
25 actually rape and based upon what was said and

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1 how she, we can get around that, that it was a
2 consensual thing. What else? Off the top of
3 my head, those are the kinds of things that you
4 would naturally want to kind of, you know, you
5 can get into -- if I could get away -- if I
6 could actually get the information in about her
7 being, her voluntarily to come down, I felt
8 that I would have a real good chance of at
9 least raising the issue that there was no
10 kidnaping. If you get into the consent as it
11 relates to the sexual abuse, I mean, sexual
12 acts, then that's not an issue either. So we
13 would cut away at what they would have is
14 aggravated circumstances.

15 Q: So, in other words, when you were preparing for
16 the guilt phase and once you started, you were
17 trying to also during the guilt phase, get
18 ready for the sentencing phase by trying to cut
19 out some of those aggravated?

20 A: Yes.

21 Q: So you knew that you were going to eventually
22 be in a sentencing phase?

23 A: I had a very good chance, especially when the
24 judge said he wasn't going to let the statement
25 in. That, you know, you kind of understand

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1 where you are at that point.

2 Q: You mean, he wasn't going to exclude it?

3 A: He wasn't going to exclude it. That statement
4 there, put in there, put him participating, and
5 he says he, you know, he shot her and then
6 gave, if I can recall it correctly, he shot her
7 and everybody shooting her, they each kind of
8 -- that kind of thing. And that's coming out.
9 There's a good chance that a jury is going to
10 find him guilty.

11 Q: Did the judge's ruling not excluding the
12 statement, come as a surprise at all to you or
13 is that what you expected?

14 A: As I've said, I've been practicing law on both
15 sides of the fence for all that period of time.
16 I did not think, and I told Sammie up front, I
17 did not think the judge was going to suppress
18 his statement. He knew that going in.

19 Q: All right. Now, as you prepared for the
20 sentencing phase, as you thought about it, what
21 was the strengths that you identified in your
22 case?

23 A: I felt that coming into it that Sammie's at
24 least, I tried to turn that conscious thing
25 around to his benefit, in terms of him giving

1 a statement and saying that, you know, he was
2 remorseful. He had understood what the
3 consequences was. That was the kind of thing.
4 And actually, when you look at it, you know,
5 and also the fact they would not have had
6 anything, but for his statement.

7 Q: All right. What else did you identify as
8 strengths, if anything?

9 A: Wasn't a whole lot of strength in it, when you
10 get a sixteen or eleven or twelve page
11 confession and bringing in everything. I can't
12 remember whether, I think my outline which is
13 a part of that record should show some other
14 stuff. I can't recall. I'm not sure.

15 Q: What about weaknesses in your case in
16 sentencing?

17 A: The big glaring weakness was, of course, his
18 statement.

19 Q: What else?

20 A: Of course his record. We couldn't put -- you
21 know, those issues. The nature of the case was
22 somewhat a big weakness, too. You're going to
23 be talking about people having menage a trois',
24 you know, homosexual things, things going on in
25 prison, starting in prison. You know, there

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1 wasn't a case -- which is again, when you go
2 back to what I was talking to Walter about, you
3 know, this is not someone who goes downtown and
4 takes a lady as she's coming out of church.
5 Very few of these people, if any of them, had
6 any redeeming factors, who are involved in this
7 thing. So, you know, that's how, again, going
8 back to Walter saying, look, this is the kind
9 of situation we have here.

10 Q: All right. You mentioned Sammie's record,
11 which came in at the sentencing phase. And you
12 had moved at some point during the sentencing
13 phase to be excluded pursuant to Lyle in
14 404(b). What was your understanding -- what
15 chance did you think you had of getting that
16 excluded under Lyle?

17 A: It was -- of course, it was not just only
18 something you raise as a matter of course, but
19 it's something that you raise because you feel
20 that it is an issue that needs to be addressed
21 and hopefully in light of the circumstances of
22 his prior records and how you go through the
23 process in Lyle, and in terms of the relevancy
24 and those kinds of things. These were issues
25 that I wanted to raise and try to keep out. I

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1 didn't think that this was the kind of things
2 that, the prior conduct and prior bad acts,
3 that would come into the kind of thing. Sammie
4 had, you know, abused his wife, but in terms
5 of, he'd never actually killed anybody and he
6 wasn't -- there was no indication of rape.
7 There was other things that I tried to raise
8 that day.

9 Q: And is this something you kind of saw coming?
10 You knew was going to come up and that you
11 prepared for before this sentencing, research-
12 wise?

13 A: Yeah.

14 Q: All right. We talked a little bit about the
15 strengths, or strength and the weaknesses.
16 Once you started the sentencing phase, what was
17 your theme? What did you intend your theme to
18 be?

19 A: I went and I tried to make Norris the bad guy
20 in terms of what happened to the girl. I tried
21 to point out, you know, as we talked about a
22 little bit earlier, I believe, Norris having
23 the knife, Norris -- all of these things taking
24 place in, I believe, his house down there in
25 Branchfield. He had tried to make a lot of to

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1 do about on direct examination about, I think,
2 about not having -- about being made to go.
3 And I think in cross examination, you know, we
4 said, look, you got out of the car, you walk
5 down, you could have done this, you could have
6 done that. These kinds of things. I wanted to
7 try and shift the light off of Sammie as much
8 as possible and onto Morris. That was just one
9 of the things. In my mind, the major problem
10 was the statement and what Sammie has said in
11 the statement.

12 Q: All right. As you were preparing this, you
13 know, long before trial, but as you were
14 preparing for the trial, what experts did you
15 identify that you thought you needed for the
16 sentencing phase?

17 A: I think they're all listed in that, in the
18 records as it relates to, you know, I needed
19 someone to talk about how he's going to be in
20 prison. What would happen in prison. I wanted
21 Donna and some other doctors check out -- I
22 wanted Donna to do her thing as it relates to,
23 you know, the issues that she would be involved
24 in. I wanted to also get into his medical
25 history, what he was going to be like, what's

1 going to happen. Those kind -- looking at his
2 social background, those kinds of things.

3 Q: All right. Now, at some point it became clear
4 that Sammie had AIDS.

5 A: Uh-huh (affirmative response).

6 Q: When did you know that in terms of your
7 involvement with this case? How early on?

8 A: I think it was early on that we knew that he
9 had AIDS.

10 Q: And at some point, that clearly became kind of
11 the centerpiece for what you were going to
12 present at sentencing phase and ultimately
13 didn't get to. We'll talk about that in a
14 minute.

15 A: Yes.

16 Q: But how did you plan to present it?

17 A: We had, Donna was there, I've forgotten the
18 name of the other doctor who was there, the
19 treating physician. And it was my
20 understanding, from what I can recall, that
21 they both were going to testify as to his
22 condition, what his prognosis was, how he would
23 eventually become, Donna used the phrase, that
24 he was going to be a vegetable or could be a
25 vegetable and that even though he sits there

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1 now and he looks healthy, he looks good, his
2 body is literally being eaten up from the
3 inside. And at some point because of this
4 condition, he's going to be a vegetable.

5 Q: And what did Sammie know about your plans at
6 the sentencing phase in terms of introducing
7 evidence of his AIDS?

8 A: We talked about that. Sammie didn't even want
9 his children, he had some children, he didn't
10 even want them in the courtroom. He didn't
11 even want anyone in his family, because he said
12 his family didn't know about it. He didn't
13 want them in. And we thought we had worked
14 that out so that they would not be in there and
15 we were going to call, you know; we were going
16 to start presenting that evidence. Just as we
17 got ready to start presenting that evidence,
18 Sammie then said, no, I don't want it coming
19 in. I don't want it coming out. We called, I
20 believe we called a recess. We went back. We
21 talked with him. I got Donna to come in and to
22 talk with him about that and he just absolutely
23 refused.

24 Q: When you talked to him about it after he told
25 you he didn't want to present it, what was your

1 explanation to him about that evidence?

2 A: I told him that it was my opinion that I
3 believe that this evidence would help him in
4 this phase of the trial because the other
5 information had come in about his, you know,
6 his activities in prison. Jim Aiken, I
7 believe, would testify that, you know, they
8 were going to have him secure. He was going to
9 be here. He was going to be all these good
10 things that they were going to do or they would
11 do for them in jail and to be sure there would
12 be no issue as related to that. His issue
13 would come out to show that even though he
14 looks good, we had him dressed up and
15 everything looking good in court; that his body
16 in situations, his body would be to the point
17 where he is going to be a vegetable. He would
18 not be able to move around. He would not be
19 able to function, in an ordinary sense, the way
20 he had been functioning in prison. That this
21 would be an issue that the jury may want to
22 hear, would probably want to hear, and to make
23 some determination about whether or not he's
24 still going -- see, the judge had already
25 allowed it in that he had cut his boyfriend up

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1 over in -- and the other thing, that he would
2 not be able to do these kind of things again
3 because of his medical condition.

4 Q: What was Sammie's reaction once you explained
5 that to him?

6 A: He said no..

7 Q: And he said no because he didn't want his --
8 was it just his children and family? Was that
9 the extent of his concern?

10 A: And then he got, I think, if I can recall
11 correctly, and this is just -- if I can recall,
12 I believe Sammie said something to the affect
13 that he just didn't want that jury hearing that
14 either. And I do believe that we then went out
15 and put it on the record and had the judge to
16 ask him in terms of certain things that we
17 wanted to bring in and whether or not he
18 understood the input of what he was doing.

19 Q: Did Sammie ever suggest any ways in which he
20 would allow you to bring that evidence in?
21 Anything you could do that would make it okay
22 with him to bring that in?

23 A: Initially, when we had gotten him to the point
24 of saying that he was going to let us use it,
25 we had worked out a situation where his family

1 would not be in. I think his daughters or
2 somebody else in his family. I can't remember
3 who it was. And then he said okay, but then
4 when it came to the actual time for us to put
5 up that evidence, he said no. So, there was no
6 other way that he suggested to us that we would
7 be able, that he would be able to, would allow
8 us to use it.

9 MR. LOMINACK: I think that's all I have right now.

10 MR. ZELENKA: Just a couple of things.

11 MR. SIMS - EXAMINATION BY MR. ZELENKA:

12 Q: You mentioned an outline --

13 A: Uh-huh (affirmative response).

14 Q: -- during your direct examination. Did you
15 have a trial notebook outline of your strategy
16 or what was your reference to on your direct?

17 A: I believe that I had talked about, in some of
18 my notes, I had written down like the elements
19 for armed robbery, the elements for kidnaping
20 -- not armed robbery. I'm sorry, I'm thinking
21 -- the elements for kidnaping. I think I had
22 some case stuff that was there, may have been
23 there too. And I talked about -- I wrote out
24 in terms of how I felt that the facts would fit
25 into those issues.

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1 Q: And now, you didn't bring your file with you
2 today?

3 A: No.

4 Q: Isn't that correct?

5 A: Yes.

6 Q: But you have those notes still in your file?

7 A: They should still be there.

8 Q: Okay. And you've already provided your file to
9 the plaintiff in this matter?

10 A: Yeah. They came down and got the file and made
11 a copy.

12 MR. ZELENKA: Do you have, accessible to him right
13 now, the copy of the information that he's
14 talking about, so we can make that a part of
15 the record? If not, just --

16 MR. LOMINACK: You mean the trial notebook?

17 MR. ZELENKA: Yeah.

18 MR. LOMINACK: I don't -- I can't even recall it off
19 the top of my head.

20 MR. WEYBLE: Probably in there somewhere, but readily
21 accessible, probably not.

22 MR. ZELENKA: Could you provide me a copy?

23 MR. LOMINACK: I can try and find it.

24 MR. ZELENKA: That's all I've got right now.

25 MR. LOMINACK: I think that's it.

1 (There being no further questions, the deposition
2 concluded at 11:45 a.m.)
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CERTIFICATE

This is to certify that the deposition of TOMMY SIMS, ESQUIRE, consisting of Forty-Two (42) pages, is a true and correct transcript of the testimony given by said deponent after being duly sworn; said deposition was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on April 25, 2003.



Karen L. Yearwood-Cole
Court Reporter

Notary Public for South Carolina
My Commission Expires: August 16, 2008

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Jon Ozmint, Commissioner,
 South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 01-CP-38-1240

AMENDED APPLICATION FOR
 POST-CONVICTION RELIEF

04 AUG - 9 PM 2:34
 FILED FOR RECORD
 LISA W. HIZELL
 CLERK OF COURT
 ORANGEBURG, S.C.

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Orangeburg County Court of General Sessions.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) First Degree Criminal Sexual Conduct – 98-GS-38-1245
 - (b) Murder – 98-GS-38-1246
 - (c) Criminal Conspiracy – 98-GS-38-1247
 - (d) Kidnapping – 98-GS-38-1248
4. On October 31, 1999, applicant was sentenced as follows:
 - (a) First Degree Criminal Sexual Conduct – Thirty (30) years;
 - (b) Murder - Death by electrocution or lethal injection;
 - (c) Criminal Conspiracy – Five (5) years, and;
 - (d) Kidnapping – No sentence imposed. *See* S.C. Code Ann. §16-3-910.
5. A finding of guilty was made after a plea of not guilty.
6. The applicant appealed from the judgment of conviction and sentence.
7.
 - (a) The Court to which applicant appealed:
 - (i) South Carolina Supreme Court.
 - (b) The result in each Court to which applicant appealed:
 - (i) Convictions and sentence of death affirmed.
 - (c) The date of each result:
 - (i) Convictions and sentence affirmed on May 29, 2001.

- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Stokes*, 345 S.C. 368, 548 S.E.2d, 202 (2001).

8. Not applicable.

9 & 10. GROUNDS FOR RELIEF WITH SUPPORTING FACTS

- 9(a) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution, as a result of trial counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument.*
- 10(a) The facts supporting the claim are as follows: During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).
- 9(b) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial.*
- 10(b) Prior to instructing the jury at the sentencing phase of the trial, the trial judge was required to make an initial determination of which statutory mitigating factors were supported by the evidence and then to conduct a charge conference. *State v. Victor*, 300 S.C. 220, 387 S.E.2d 248 (1989). In this case, the trial judge failed to follow the clear rule set out in *Victor*. Furthermore, this failure to apply existing state law deprived applicant of due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v.*

Scarpelli, 411 U.S. 778 (1973). Appellate counsel failed to raise this claim on direct appeal; had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

- 9(c) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to submit for the jury's consideration a statutory mitigating circumstance.*
- 10(c) S.C. Code §16-3-20(C) provides that the trial judge "shall include in his instructions to the jury for it to consider . . . the following . . . mitigating circumstances which may be supported by the evidence." In this case, the trial judge failed to instruct the jury on §16-3-20(C)(b)(3) (the victim was a participant in the defendant's conduct or consented to the act), despite the fact that there was evidentiary support for this mitigating circumstance. *See State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986) (trial judge required to instruct the jury on statutory mitigating circumstances), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Rogers*, 338 S.C. 435, 521 S.E.2d 101 (2000). Appellate counsel failed to include this claim on direct appeal had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).
- 9(d) *Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.*
- 10(d) The facts supporting the claim are as follows: From approximately 1981 until 1992, Thomas Sims, who would subsequently be appointed as lead defense counsel for applicant, was employed as an assistant solicitor in the First Circuit Solicitor's Office. In his capacity as assistant solicitor, Mr. Sims prosecuted applicant for a violent offense against his ex-wife. Largely on the strength of applicant's ex-wife's testimony, elicited at the trial by Assistant Solicitor Sims, a jury found applicant guilty of aggravated assault and battery, for which he received a substantial prison sentence. Later, in the capital trial challenged in this application, the prosecution began its sentencing phase presentation with evidence, again offered by applicant's ex-wife, of the offense for which Mr. Sims had previously prosecuted applicant. On cross-examination of the complaining witness, Mr. Sims did not explore several lines of inquiry which, had they been explored, would have mitigated the seriousness of the offense described by the witness and undermined the accuracy of her account. The record of proceedings before the trial court in this case contains no discussion or waiver of the conflict of interest arising out of Mr. Sims' successive involvement

as prosecutor then defender of applicant. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978) *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990); *United States v. Zeigenhagen*, 890 F.2d 937, 940-941 (7th Cir. 1989); *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979).

- 9(e) *Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation.*
- 10(e) The facts supporting the claim are as follows: Applicant suffers from significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as evidenced by a full scale IQ that is below the accepted threshold for mental retardation, and by historical information indicating that his adaptive skills are deficient. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).
- 9(f) *Pursuant to Article I §11 of the South Carolina Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the trial court lacked jurisdiction to sentence applicant to death as a result of the omission from the indictments of the aggravating factor(s) essential to expose him to punishment greater than life in prison.*
- 10(f) The facts supporting the claim are as follows: Applicant was separately indicted for murder, conspiracy, criminal sexual conduct, and kidnapping. Applicant's eligibility for a sentence of death rested on the jury's finding of four statutory aggravating circumstances: murder during the commission of kidnapping; murder during the commission of criminal sexual conduct; murder for hire; and commission of murder as the agent of another. None of the indictments alleged that the victim's murder occurred "during the commission of" either criminal sexual conduct or kidnapping. Likewise, none of the indictments made any reference to murder for hire or commission of murder as the agent of another. *See S.C. Code §16-3-20; Ring v. Arizona*, 122 S.Ct. 2428 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *State v. Brown*, 24 S.C. 224 (1886).
- 9(g) *Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution.*
- 10(g) The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure,

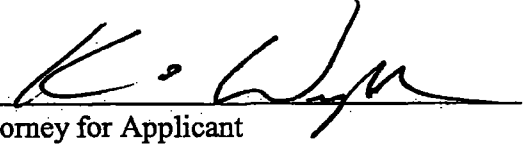
inter alia, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890).

- 11 & 12. Applicant appealed directly to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
13. None of the grounds set forth in (9) has been previously presented to this or any other Court, State or Federal.
14. Not Applicable.
15. These grounds rely on additional facts outside the record that was before the previous court.
- 16 & 17. Applicant was previously represented by counsel.
- Applicant was represented at trial by Thomas Sims, P.O. Box 2016, Orangeburg, SC 29116, and Virgin Johnson, P.O. Box 2107, Orangeburg, SC 29116.
- On direct appeal, applicant was represented by Joseph L. Savitz, of the S.C. Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, SC 29201.
18. Applicant seeks the vacation of his convictions and sentences.
19. Applicant is not under sentence from any other court.

Respectfully submitted,

Keir M. Weyble
Robert E. Lominack
Blume Weyble & Lominack, LLC
P.O. Box 11744
Columbia, SC 29211
803-765-1044

August 6, 2004

By: 
Attorney for Applicant

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Gary Maynard, Commissioner,
 South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 01-CP-38-1240

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for the State the Amended Application for Post-conviction Relief, via U.S. mail, first-class, postage pre-paid, at the following address:

Donald J. Zelenka
 Assistant Deputy Attorney General
 Office of the Attorney General
 P.O. Box 11549
 Columbia, SC 29211

This the 6th day of August, 2004.


 KEIR M. WEYBLE

FILED FOR RECORD
 LISA W. HIZELL
 CLERK OF COURT
 ORANGEBURG, S.C.
 04 AUG -9 PM 2:34

BLUME WEYBLE & LOMINACK, LLC**ATTORNEYS AT LAW**

JOHN H. BLUME
KEIR M. WEYBLE
ROBERT E. LOMINACK

DAVID I. BRUCK, *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR
COLUMBIA, SOUTH CAROLINA 29201

MAILING ADDRESS:
POST OFFICE BOX 11744
COLUMBIA, SC 29211
PHONE: (803) 765-1044
FAX: (803) 765-1143

August 6, 2004

Lisa W. Mizell
Clerk of Court
Orangeburg County
Post Office Box Drawer 9000
Orangeburg, SC 29116

Re: *Sammie Louis Stokes v. Gary Maynard, et al.*
Case No.: 01-CP-38-1240

Dear Ms. Mizell,

Please find enclosed the original and one (1) copy of applicant's *Amended Application for Post-Conviction Relief*. Please file the original and return a stamped copy in the enclosed self addressed stamped envelope.

If you should have any questions, please do not hesitate to contact this office.

Sincerely,



Robert E. Lominack

cc: Honorable Casey L. Manning (w/ enclosure)
Donald J. Zelenka (w/ enclosure)

04 AUG -9 PM 2:34
CLERK OF COURT
ORANGEBURG COUNTY
SC



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

August 25, 2004

Honorable Lisa W. Mizell
Post Office Drawer 9000
Orangeburg, South Carolina 29116

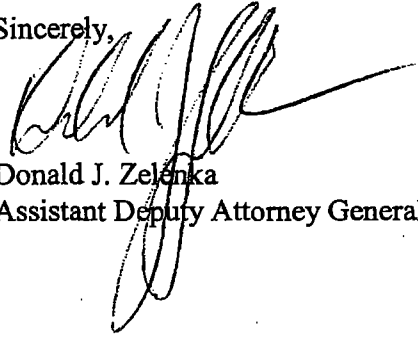
Re: *Sammie Louis Stokes v. State of South Carolina*
01-CP-38-1240

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC
2004 AUG 26 PM 1:03

Dear Ms. Mizell:

Enclosed please find Respondent's *Motion for Protective Order Pursuant to SCRP, Rule 26(c), Motion to Dismiss Amended Allegation 9(g) Pursuant to SCRPC Rules 12(b)(1) and 12(b)(6), and Memorandum of Law in Support of Motion to Dismiss Amended Allegation 9(g)* in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,


Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Keir Weyble, Esquire
Robert Lominack, Esquire
Honorable Casey Manning

STATE OF SOUTH CAROLINA
COUNTY OF Orangeburg

Sammie Louis Stokes

☐ Plaintiff

v.

State of South Carolina

☒ Defendant

check box above indicating submitting party

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

CASE NO.

01 - CP - 38 - 1240

**MOTION INFORMATION FORM
AND COVER SHEET**

name, S.C. Bar no. and address of plaintiff's attorney

Keir M. Wayble
P.O. Box 11744
Columbia, SC 29211
telephone: fax:
e-mail: other:

name, S.C. Bar no. and address of defendant's attorney

Donald J. Zelenka
P.O. Box 11549
Columbia, SC 29211
telephone: 803-734-6305 fax: 803-734-4035
e-mail: other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: YES / NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.

[Signature]
Signature of Attorney for Plaintiff/Defendant

8-25-2004
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: _____

☒ EXEMPT:
(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____

(print name)

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

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

SAMMIE LOUIS STOKES, #5069) C/A No. 01-CP-38-1240
)
 Applicant,)
)
 vs.) MOTION FOR PROTECTIVE ORDER
) PURSUANT TO SCRP, Rule 26(c)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

 The Respondents, State of South Carolina, herein move for a protective order pursuant to Rule 26(c). This motion is based upon the Respondent's motion to dismiss dated August 25, 2004 to dismiss allegation 9(g).¹ Respondents incorporate the motion to dismiss and memorandum in support dated August 25, 2004 by reference. Respondents have been noticed

¹ Allegation 9(g) in the Amended Application is set out as follows:

Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution. 9(g)

- a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

that depositions are set for Friday August 27, 2004 of Warden William M. White, Warden of Broad River Correctional Institution at 10 am and "Institutional Division Director III, Broad River Correctional Institution specifically related to lethal injection procedures.

Since Respondents submit that these matters are outside of subject-matter jurisdiction of the Uniform Post-Conviction Relief Procedure Act, Respondents would request a Protective Order to at a minimum stay the depositions until resolution of the motion to dismiss. A copy of the deposition notices are attached. Respondents below-signed counsel is also informed and believes counsel from the South Carolina Department of Corrections will be making a similar motion to quash the depositions.

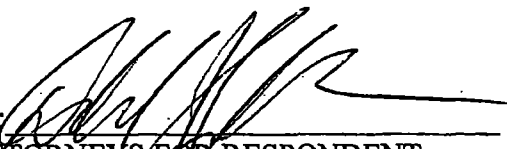
WHEREFORE having made motion, Respondents request the motion for a protective order be granted.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

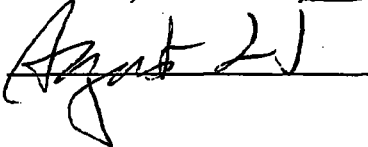
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

By: 

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

Columbia, South Carolina

 August 21, 2004.

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

SAMMIE L. STOKES)

Applicant,)

V.)

JON OZMINT,)

Director, South Carolina)

Department of Corrections.)

Respondent.)IN THE COURT OF COMMON PLEAS
2004 AUG 26 BY CP-38-1240FILED FOR RECORD
CLERK OF COURT

NOTICE OF DEPOSITION

ATTORNEY GENERAL'S OFFICE
RECEIVED 8-16-04

ADMINISTRATIVE INSTRUCTIONS

FILE OPEN END

HAVE COPIES MADE

ROUTE TO

ORDER: TRANSCRIPT

PEN RECORDS CLERK RECORDS

OTHER:

TO: Donald Zelenka, Attorney for Respondent

PLEASE TAKE NOTICE that the Plaintiff, by and through his undersigned attorneys, will

take the deposition of William M. White, Warden of Broad River Correctional Institution, on Friday,

August 27, 2004 at 10:00 a.m.

This deposition will be taken in the office of Blume Weyble & Lominack, LLC, 1247 Sumter Street, Suite 201, Columbia, South Carolina, before an authority authorized to administer oaths, such deposition to be taken pursuant to Rule 30 of the South Carolina Rules of Civil Procedure.

KEIR M. WEYBLE

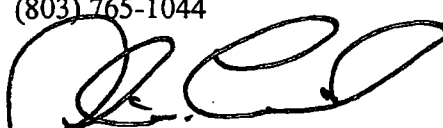
ROBERT LOMINACK

Blume Weyble & Lominack, LLC

P.O. Box 11744

Columbia, SC 29211

(803) 765-1044

BY: 

COUNSEL FOR APPLICANT

August 13, 2004

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF ORANGEBURG

Sammie Louis Stokes

, Plaintiff

SUBPOENA IN A CIVIL CASE

Case Number: 01-CP-38-1240

Pending in Orangeburg County

v.

Jon Ozmint,
SC Dept. Of Corrections

, Defendant

TO: William M. White, Warden
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY

X YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

PLACE OF TESTIMONY

Blume Weyble & Lominack, LLC
1247 Sumter Street, Suite 201, Columbia, SC 29201

DATE AND TIME

August 27, 2004, 10:00am

X YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
Any and all memoranda, notes or other documents relating directly or indirectly to the implementation of execution protocol SK 22.03 and any predecessor(s), successor(s), amendment(s) or modification(s) thereto, including but not limited to: documentation reflecting the qualification requirements for all personnel charged with execution-related responsibilities under the governing "Execution Procedures" protocol, including but not limited to the Institutional Division Director III and executioners; documentation of the identities, qualifications, training and experience of personnel who have participated in and/or are expected to participate in any execution by lethal injection conducted by SCDC; documentation reflecting medical and/or pharmacological research or analysis performed by SCDC or anyone acting on its behalf in connection with the selection of drugs and drug amounts, and the administration of drugs during lethal injection; a comprehensive list of all equipment utilized in connection with the lethal injection procedure; documentation of the dates, substance and attendance of all training sessions for individuals who have participated or are expected to participate in execution(s) by lethal injection; a true and complete copy of all "specific procedures developed to supplement" the execution protocol as referenced in SK 22.03 § 16.6.

PLACE

Same as above

DATE AND TIME

Same as above

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT, SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:

Keir M. Weyble, P.O. Box 11744, Columbia, SC 29211; 803-765-1044

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

DATE Aug. 13, 2004

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

SAMMIE L. STOKES)

Applicant,)

V.)

JON OZMINT,)

Director, South Carolina)

Department of Corrections.)

Respondent.)

IN THE COURT OF COMMON PLEAS

01-CP-38-1240

NOTICE OF DEPOSITION
ATTORNEY GENERAL'S OFFICERECEIVED 8-16-04

ADMINISTRATIVE INSTRUCTIONS

FILE _____ OPEN _____

PAGE _____ COPIES MADE _____

ROUTE TO _____

ORDER: _____ TRANSPORT _____

PEN RECORDS _____ CLERK RECORDS _____

OTHER: _____

TO: Donald Zelenka, Attorney for Respondent

PLEASE TAKE NOTICE that the Plaintiff, by and through his undersigned attorneys, will take the deposition of Institutional Division Director III, Broad River Correctional Institution, on Friday, August 27, 2004 at 11:00 a.m.

This deposition will be taken in the office of Blume Weyble & Lominack, LLC, 1247 Sumter Street, Suite 201, Columbia, South Carolina, before an authority authorized to administer oaths, such deposition to be taken pursuant to Rule 30 of the South Carolina Rules of Civil Procedure.

KEIR M. WEYBLE

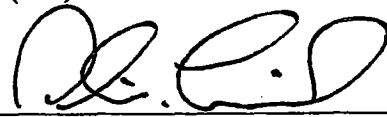
ROBERT LOMINACK

Blume Weyble & Lominack, LLC

P.O. Box 11744

Columbia, SC 29211

(803) 765-1044

BY: 

COUNSEL FOR APPLICANT

August 13, 2004

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF ORANGEBURG

Sammie Louis Stokes, Plaintiff

SUBPOENA IN A CIVIL CASE

Case Number: 01-CP-38-1240

Pending in Orangeburg County

v.

Jon Ozmint,
SC Dept. Of Corrections, DefendantTO: Institutional Division Director III
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY

☒ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

PLACE OF TESTIMONY

Blume Weyble & Lominack, LLC
1247 Sumter Street, Suite 201, Columbia, SC 29201

DATE AND TIME

August 27, 2004, 11:00am

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
Any and all memoranda, notes or other documents relating directly or indirectly to the implementation of execution protocol SK 22.03 and any predecessor(s), successor(s), amendment(s) or modification(s) thereto, including but not limited to; documentation reflecting the qualification requirements for all personnel charged with execution-related responsibilities under the governing "Execution Procedures" protocol, including but not limited to the Institutional Division Director III and executioners; documentation of the identities, qualifications, training and experience of personnel who have participated in and/or are expected to participate in any execution by lethal injection conducted by SCDC; documentation reflecting medical and/or pharmacological research or analysis performed by SCDC or anyone acting on its behalf in connection with the selection of drugs and drug amounts, and the administration of drugs during lethal injection; a comprehensive list of all equipment utilized in connection with the lethal injection procedure; documentation of the dates, substance and attendance of all training sessions for individuals who have participated or are expected to participate in execution(s) by lethal injection; a true and complete copy of all "specific procedures developed to supplement" the execution protocol as referenced in SK 22.03 ¶ 16.6.

PLACE

Same as above

DATE AND TIME

Same as above

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT, SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Keir M. Weyble, P.O. Box 11744, Columbia, SC 29211; 803-765-1044

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

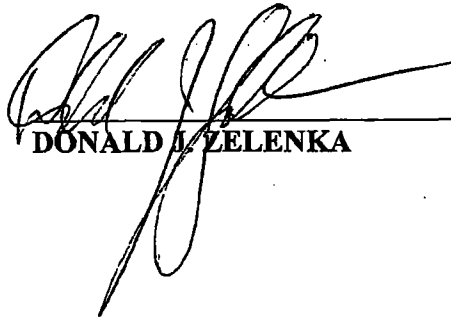
DATE Aug. 13, 2004

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Motion for Protective Order*
Pursuant to SCRP, Rule 26(c) in the foregoing by depositing copies in the United States mail,
postage prepaid, to the following:

Keir M. Weyble, Esquire
Robert Lominack, Esquire
BLUME, WEYBLE & LOMINACK, LLC
Post Office Box 11744
Columbia, South Carolina 29211

This 25th day of August, 2004.



DONALD J. ZELENKA

2004 AUG -6 PM 1:04
FILED 103 RECORD
USA VS. [unclear]
CLERK OF COURT
COLUMBIA, SC

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

SAMMIE LOUIS STOKES, #5069)
Applicant,)

C/A No. 01-CP-38-1240

vs.)

MOTION TO DISMISS AMENDED
ALLEGATION 9(g) PURSUANT TO
SCRCP Rules 12(b)(1) and 12(b)(6).

STATE OF SOUTH CAROLINA,)
Respondent.)

FILED 1001000000
CLERK OF COURT
2004 AUG -6 PM 1:04

The Respondents, above-named hereby make a Motion to Dismiss allegation 9(g) in the amended application for post-conviction relief received August 9, 2004. In the amended application, the Applicant, through counsel, alleged the following in amended allegation 9(g):

Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution. 9(g)

- a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

This motion is made because the particular allegation is beyond the jurisdiction of the Court pursuant to S.C. Code Ann., Section 17-27-10, *et. seq.*, and the mandates of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

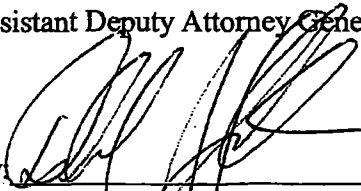
This motion is made pursuant to South Carolina Rules of Civil Procedure, Rule 12(b)(1)(lack of jurisdiction over the subject-matter) and Rule 12(b)(6) (failure to state facts sufficient to constitute a cause of action).

Respectfully submitted,

HENRY D. McMASTER
Attorney General

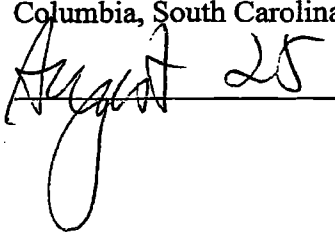
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

By 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

Columbia, South Carolina

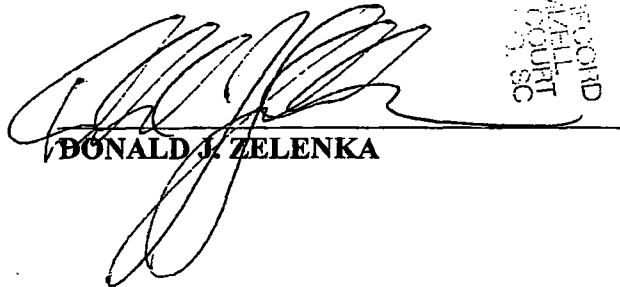
 August 25, 2004.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Motion to Dismiss Amended Allegation 9(g) Pursuant to SCRPC Rules 12(b)(1) and 12(b)(6) and Memorandum of Law in Support of Motion to Dismiss Amended Allegation 9(g)* in the foregoing by depositing copies in the United States mail, postage prepaid, to the following:

Keir M. Weyble, Esquire
Robert Lominack, Esquire
BLUME, WEYBLE & LOMINACK, LLC
Post Office Box 11744
Columbia, South Carolina 29211

This 25th day of August, 2004.



DONALD J. ZELENKA

FILED FOR RECORD
JUL 27 2004
CLERK OF COURT
CLERK OF COURT
CLERK OF COURT
2004 AUG -6 PM 1:04

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

SAMMIE LOUIS STOKES, #5069)

C/A No. 01-CP-38-1240

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

MEMORANDUM OF LAW IN SUPPORT OF
 MOTION TO DISMISS AMENDED
 ALLEGATION 9(g)

FILED FOR RECORDED
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The Respondents, above-named hereby make a Memorandum of Law in Support of

Motion to Dismiss allegation 9(g) in the amended application for post-conviction relief received August 9, 2004 filed this date. In the amended application, the Applicant, through counsel, alleged the following in amended allegation 9(g):

Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution. 9(g)

- a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

Respondents submit that the particular allegation is beyond the jurisdiction of the Court pursuant

to S.C. Code Ann., Section 17-27-10, *et. seq.*, and the mandates of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

Post-conviction relief is a proper avenue of relief only when the Applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). A credit-related claim or challenge to other conditions of confinement does not fall into that category. Id., Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000) (a challenge to the conditions upon which parole eligibility is determined or decided is not cognizable in a post-conviction relief application).

In this allegation, Stokes does not contend, in his present allegation that the "sentence" of death by lethal injection is unconstitutional or beyond the statutory requirements of Section 16-3-20 (A) ("A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years") or §24-3-530 (Capital punishment shall be by electrocution or lethal injection; election of lethal injection.)¹. Instead, he present complaint is a non-specific claim that the "lethal injection

¹§24-3-530. *Capital punishment shall be by electrocution or lethal injection; election of lethal injection.*

(A) A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the person, lethal injection under the direction of the Director of the Department of Corrections. The election for death by electrocution or lethal injection must be made in writing fourteen days before the execution date or it is waived. If the person waives the right of election, then the penalty must be administered by lethal injection.

(B) A person convicted of a capital crime and sentenced to death by electrocution prior to the effective date of this section must be administered death by electrocution unless the person elects death by lethal injection in writing fourteen days before the execution date.

(C) If execution by lethal injection under this section is held to be unconstitutional by an

procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process" and that "because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency." citing Farmer v. Brennan, 511 U.S. 825 (1994) and In re Kimmler, 136 U.S. 436 (1890). This is not a challenge to the sentence, but instead is a challenge to the procedures within the South Carolina Department of Corrections.²

Respondents respectfully submit that these claims are not appropriate for the actions brought under the Uniform State Post-conviction Relief Act, Section 17-27-10, et. seq. (1976). Under the mandates presented in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) and its progeny, this claim must be brought pursuant to appropriate procedures of the Administrative Procedure Act, initially within the South Carolina Department of Corrections. In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), the South Carolina Supreme Court held that, generally, PCR is available "only when the applicant mounts a collateral attack challenging the

appellate court of competent jurisdiction, then the manner of inflicting a death sentence must be by electrocution.

²Alternately, Respondents would requests under Rule 12(e) that the Applicant make more definite and certain what procedures or protocols are specifically inadequate or what personnel lack appropriate qualifications. This failure to present a clear factual basis in the Application, rather than a broad legal conclusion, prevents the Respondent from adequately responding to the allegation. Pursuant to SCRCF, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to how procedures, protocols or personnel the Applicant is referring to are inadequate.

validity of his conviction or sentence ..." Id. at 367, 527 S.E.2d at 749. The only exceptions are that a PCR action may be brought to assert a claim that the applicant's sentence has expired, or that his probation, parole, or conditional release has been unlawfully revoked. Id., *citing* S.C. Code Ann. § 17-27-20(a)(5). In Sullivan v. South Carolina Dep't of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2003), the Court held the Administrative Law Judge has jurisdiction to review DOC grievance proceedings only if they involve the denial of "state created liberty interests." Recently, in Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, the Court held that the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process, and, therefore, review by the ALJD (Administrative Law Judge Division). 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003).

Here, the complaint about procedures and particular personnel within the Department of Corrections cannot fall within the Uniform Post-conviction Relief Procedure Act which does not empower the Court, in that setting to micro- manage procedures or personnel within the Department. Thus, the allegation must be dismissed.

This motion is made pursuant to South Carolina Rules of Civil Procedure, Rule 12(b)(1)(lack of jurisdiction over the subject-matter) and Rule 12(b)(6) (failure to state facts sufficient to constitute a cause of action).

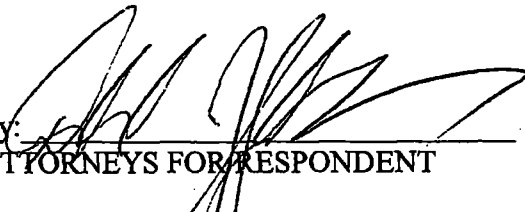
WHEREFORE, Respondents request that the motion to dismiss amended allegation 9(g) be granted.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

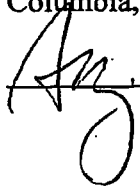
JOHN W. McINTOSH
Chief Deputy Attorney General

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Assistant Deputy Attorney General

By: 
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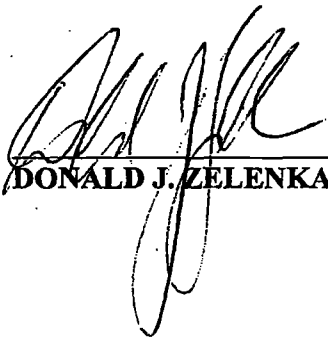
 Aug. 25, 2004.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Motion to Dismiss Amended Allegation 9(g) Pursuant to SCRPC Rules 12(b)(1) and 12(b)(6) and Memorandum of Law in Support of Motion to Dismiss Amended Allegation 9(g)* in the foregoing by depositing copies in the United States mail, postage prepaid, to the following:

Keir M. Weyble, Esquire
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Columbia, South Carolina 29211

This 25th day of August, 2004.


DONALD J. ZELENKA

FILED 1-6-11-2004
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CLERK OF COURT
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July 27, 2007

Hon. L. Casey Manning
 Circuit Judge, Fifth Judicial Circuit
 P.O. Box 192
 Columbia, SC 29202

Re: *Stokes v. Ozmint*

Dear Judge Manning:

I am writing in response to the July 25, 2007 letter to you from attorney Tana Vanderbilt of the South Carolina Department of Disabilities and Special Needs (DDSN). In her letter, Ms. Vanderbilt requests a modification of the Court's June 8, 2005 Order authorizing DDSN to assess whether my client, Sammie Stokes, is mentally retarded. While Ms. Vanderbilt's letter does not propose specific language to be added to or excised from the existing Order, the broad objective of the letter is to obtain authorization to conduct an in-person clinical interview with Mr. Stokes. As discussed below, we believe that modification of the existing Order is neither appropriate nor necessary at this juncture.

First, the existing Order was created with the full participation of attorney James Hill and Dr. Michelle Ford of DDSN, and it prescribes a procedure which was – and to my knowledge remains – consistent with DDSN's established "Atkins Case Process" for performing mental retardation evaluations in capital cases. As it relates to the request in Ms. Vanderbilt's letter, DDSN's Atkins Case Process expressly contemplates cases in which "the historical documents (. . .) clearly rule out the presence of mental retardation." The Order created by the parties and DDSN in this case reflects this portion of the Atkins Case Process by providing that the evaluation of Mr. Stokes should begin with a determination of whether the historical documents supplied to DDSN rule out mental retardation. *See* Order at 2, para. 2. If the documents do, in DDSN's judgment, rule out mental retardation, the Order directs DDSN to simply issue a report to that effect. *Id.* Importantly, however, the Order also provides that, "If, having reviewed the documents, the SCDDSN has not ruled out mental retardation, then it may arrange to interview the applicant if it concludes that such an interview is necessary to its determination of whether the applicant has mental retardation." *Id.* In short, the existing Order does not foreclose an in-person interview with Mr. Stokes. Rather, it simply makes the need for such an interview contingent upon the results of DDSN's review of the historical documents. .

Second, nothing in Ms. Vanderbilt's letter establishes that the two-step procedure prescribed

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 FIFTH JUDICIAL CIRCUIT
 COLUMBIA, SC

Hon. L Casey Manning
July 27, 2007

Page 2 of 2

by the existing Order is unworkable. While the letter stresses the need for a clinical interview in every case, it neither reconciles that position with the language of DDSN's written Atkins Case Process, nor explains why the results of DDSN's review of the historical documents cannot, as the Order requires, be made known before the matter of an in-person interview is taken up. Absent a convincing showing by DDSN that the in-person interview it now seeks cannot be preceded by publication of the results of its document review, there is simply no basis for modifying the existing Order.

Third, although it has, to my knowledge, been supplied with all of the documentation it has requested in this case, I have received no indication that DDSN has yet undertaken the document review prescribed by its Atkins Case Process and the existing Order. If it has not, then the request for a modification of this Court's Order is all the more premature; if it has, then it should be a simple matter for DDSN to make the results of its review known and permit this case to proceed, one way or another, under the existing Order.

In sum, Ms. Vanderbilt's letter does not offer a sufficient basis for disturbing the Order created by the parties and DDSN representatives and endorsed by the Court in 2005, and the request for a modification of that Order should therefore be denied. Should the Court nevertheless be inclined to consider a modification to the Order, Mr. Stokes would request that a hearing be convened at which DDSN would bear the burden of proving the unworkability of the existing procedure.

Thank you for your consideration.

Sincerely yours,



Keir M. Weyble

c: Tana Vanderbilt, Esq.
Susan Hackett, Esq.
Don Zelenka, Esq.
Lisa W. Mizell, Clerk of Court

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT
2001-CP-38-1240

SAMMIE LOUIS STOKES,)

PLAINTIFF,)

VS.)

STATE OF SOUTH CAROLINA,)

DEFENDANT.)

TRANSCRIPT OF RECORD

AUGUST 5, 2009
ORANGEBURG, SOUTH CAROLINA

B E F O R E:

THE HONORABLE CASEY W. MANNING, JUDGE

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

DONALD J. ZELENKA, ESQUIRE
ATTORNEYS FOR THE STATE

ROBERT E. LOMINACK, ESQUIRE
ATTORNEY FOR THE DEFENDANT

HILDA M. JORDAN, CVR
CIRCUIT COURT REPORTER

I N D E XWITNESS/DESCRIPTION PAGE NO.

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1 THE COURT: All right. Are we all ready?

2 You want to set the scene, Mr. Zelenka?

3 MR. ZELENKA: Thank you, Your Honor.

4 Your Honor, we're before the Court on a Application for
5 Post Conviction Relief filed by Mr. Stokes.

6 Mr. Stokes was sentenced to death out of Orangeburg
7 County on an indictment from May 17, 1999.

8 The trial was before Judge Paul Burch. And a list of
9 aggravating circumstances were found and the jury
10 unanimously returned that the death sentence would be
11 appropriate.

12 The appeal was taken to the South Carolina Supreme
13 Court where he was represented by Joe Savitz. His trial
14 counsel were Thomas Sims and Virgin Johnson. The Supreme
15 Court denied the appeal and subsequently a Post Conviction
16 Relief Application was filed, initially, in 2002, and it was
17 amended in 2004.

18 As you recall, this matter was initially set for a
19 hearing on September, 2004. An amendment was made to the
20 application by current counsel alleging two additional items
21 and that this Court felt was appropriate in continuing the
22 case. One was a claim of mental retardation, whether there
23 was evidence of mental retardation, which under Atkins would
24 remove defendant from death row. The other one was a
25 challenge to the South Carolina Department of Corrections

STOKES V. STATE 8/5/09 CAPITAL PCR

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1 procedure on lethal injection.

2 He has presented in his amended application seven
3 allegations including those two allegations, ineffective
4 assistance of counsel at sentencing for failing to object to
5 portions of Solicitor Bailey's closing argument.

6 Ineffective assistance of appellate counsel on two
7 specifications. The first on the alleged failure to hold an
8 on-the-record charge conference, and second to charge the
9 statutory mitigating factor, that the defendant was a
10 participant in the crime and consented to the act. An
11 additional claim, primarily directed towards Thomas Sims, of
12 ineffective assistance of counsel based upon an alleged
13 conflict of interest arising from the fact that Thomas Sims,
14 when he was --

15 THE COURT: Solicitor.

16 MR. ZELENKA: -- when he was the acting solicitor
17 in 1991, prosecuted Mr. Stokes for an assault and battery of
18 -- with intent to kill on the indictment, and he was
19 convicted of assault and battery of a high and aggravated
20 nature. Whether that acted as a conflict of interest in a
21 way that should have precluded his representation in the
22 matter. An Eighth Amendment claim under Atkins verses
23 Virginia, that he suffered from mental retardation. In a
24 conference that we had this June in your chambers, the
25 petitioner's counsel conceded that they were going to

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6

1 abandon that issue. As you recall in 2007, Dr. Donna Cook
2 Culley (sp) of the Department of Disabilities and Special
3 Needs gave an opinion that Mr. Stokes in fact does not meet
4 the diagnostic criteria for mental retardation. There's
5 also -- in ground six, a subject matter jurisdiction claim
6 asserting that the trial judge lacked jurisdiction to
7 sentence the defendant to death because the indictments from
8 May 1999, did not include the specific statutory aggravating
9 circumstances that the defendant was seeking. The seventh
10 allegation concerns a claim of lethal injection under the
11 Eighth Amendment, whether the procedure of the Department of
12 Corrections are, in fact, a violation of the Eighth
13 Amendment. It's my understanding, also, from that June 2000
14 In Chambers Conference that that issue is being abandoned.
15 We had previously moved in August 2004 to have that struck
16 from the allegations asserting that it is not an appropriate
17 claim for state post conviction relief under the Al-Shabaz
18 verses State, a South Carolina decision that the
19 administrative remedies would make it appropriate to go
20 through that rather than state post conviction relief.

21 We have prepared an amended -- a return to the amended
22 application, emailed it to counsel late last night, hand
23 delivered it to counsel this morning, basically addressing
24 my position in each of those claims. And I can summarize
25 those if you'd like me to.

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1 THE COURT: What's your preference, Mr. Lominack, would
2 you like Mr. Zelenka to summarize it?

3 MR. LOMINACK: Your Honor, I think it might be helpful
4 for Mr. Zelenka to summarize it.

5 THE COURT: Okay.

6 MR. ZELENKA: The first claim was a failure to object
7 to solicitor's closing argument. That argument, as noted in
8 our return by Mr. Bailey, we assert is an argument directly
9 related to the evidence that was present in the case
10 primarily through their witness, James Aiken, when he talked
11 about the defendant's adaptability to prison life and went
12 through a series of information concerning, directly, the
13 disciplinary violations that Mr. Stokes had had in the
14 prison setting. The closing argument based upon their
15 allegation was primarily set out in the record in Pages 1450
16 through 1451. Emphasizing that a life without parole is the
17 next sentence to the death penalty, the next most severe.
18 Think of his conduct in prison, think of Jackie Williams,
19 who we saw laying up in the bed cut up. Short of another
20 murder he can't get any more time for anything he does in
21 prison with a life without parole sentence. They can deny
22 his canteen benefits or lock him down for a while, but they
23 can't give him any more time because he's maxed out. He
24 gets a blank check to go around and do whatever he wants to
25 do. There are no controls over him with the life without

1 parole sentence. That is also set out on Page 16 of our
2 return.

3 We assert that those comments were within the
4 parameters of the allowable comments in a death penalty case
5 and was directly related to the evidence that was presented
6 in the case. The comments about the canteen benefits or the
7 locking him down was a direct reference to the violation
8 that the defendant had in Orangeburg/Calhoun County
9 Detention Center when, in fact, the sentence, shall I say,
10 albeit, the discipline that he received at that time was
11 that he was removed from canteen benefits and visitation and
12 locked down for a period of five days. That's a direct
13 reference to that.

14 Apparently, the defendant is asserting that it was
15 injecting some sort of an arbitrary factor into the case.
16 We submit that it is a direct reference to both this
17 particular defendant, the actions that he had done at a
18 particular time and was not a misstatement of the facts, of
19 the conditions. It was not the type of argument that we've
20 more recently seen the Court looking at in State verses
21 Berkhart (sp), and State verses Bryant and State verses
22 Wellman, where there is a assertion about the easy
23 conditions of prison life contrasting that with the death
24 penalty. This was a direct relationship to the information
25 that presented, and, in fact, according to my review of the

STOKES V. STATE 8/5/09 CAPITAL PCR

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1 record the discipline that was particularly given invoked
2 that setting was developed on cross-examination from Mr.
3 Sims by the officer in the Orangeburg/Calhoun Detention
4 Center.

5 It would appear to me, although, we don't have any
6 testimony on this fact, that the attempt was to show that
7 whatever violation he did was a very minor violation. In
8 fact, and didn't seek out a significant amount of punishment
9 as a result of that particular violation. But nevertheless,
10 we submit that that closing argument, that there was no
11 deficient performance on the part of counsel to have
12 objected, to have failed to object to the argument because
13 we submit there wasn't a valid objection that could be made,
14 or if even an objection was made, and the Court may have
15 issued a cautionary instruction, the instruction would have
16 most likely been limited to the facts to consider the actual
17 evidence as was before the Court. There is evidence to
18 support the statement by Solicitor Bailey. In fact, in the
19 record, evidence that was propounded by the defense during
20 the trial, so we submit that neither prong in Strickland,
21 deficient performance or prejudice whether there's a
22 reasonable probability the result would have been different
23 had an objection been made is supported in this particular
24 situation.

25 With respect to the appellate counsel issue, the record

1 reveals that, in fact, at the outset of the penalty phase of
2 the case, Judge Burch inquired of defense counsel and the
3 state what aggravating circumstances, what mitigating
4 circumstances were they intending to present at that
5 particular time. Mr. Sims in that initial statement advised
6 the judge that it was his opinion that he was going to seek
7 a statutory aggravating circumstance on the defendant, that
8 the victim was a participant in the conduct and participated
9 by being involved in the actions of the defendant at the
10 time. That's set out in our return on Page 31, and it's in
11 the record at Page 1083. Counsel Sims in his opening
12 statement discussed his intent to present adaptability to
13 prison evidence. At's in the record on appeal at 1109.

14 THE COURT: Prison argument -- you said prison
15 evidence?

16 MR. ZELENKA: You're right.

17 THE COURT: It's all right.

18 MR. ZELENKA: But I meant adaptability to prison,
19 evidence of adaptability to prison.

20 THE COURT: Okay. My grammatical mistake. Sorry.

21 MR. ZELENKA: That's okay, Judge.

22 With regard to the closing arguments after the evidence
23 was presented, Judge Burch declared that he was going to
24 review his check list. That's in the record, 1421. During
25 the closing arguments Solicitor Bailey made a general

STOKES V. STATE 8/5/09 CAPITAL PCR

11

1 reference to mitigation, but specifically to the
2 adaptability to prison life, evidenced in Mr. Aiken's
3 testimony on that. That's the record, 1446, and 1451 made
4 no reference at that time to the statutory mitigating factor
5 that Mr. Sims had suggested he was going to pursue before
6 the penalty phase began.

7 Mr. Stokes made a personal statement of remorse in the
8 record of appeal at 1459 to 1460, and counsel Sims made his
9 argument in testimony that Stokes would never be a free man
10 in a maximum security prison, and the factors for maximum
11 security prison was presented through Mr. Aiken. He makes
12 no reference at that time that the victim was a participant
13 in the defendant's conduct or consented to that act.

14 Pre-charge objections were made at 1468. There is no
15 request for a charge conference. There was no objection or
16 request at that time for any statutory mitigating
17 circumstances and during the jury charge, Judge Burch
18 specifically said: There are things of statutory mitigating
19 circumstances which are not alleged or brought forth in this
20 case, and then there are what we call non-statutory
21 mitigating circumstances. He didn't instruct the jury to
22 consider any specific statutory mitigating circumstances.
23 In fact, he said in that instruction that there were not any
24 statutory mitigating circumstances shown in this particular
25 case, and that's at 1480, Lines 3 through 6, and that was

1 something Judge Burch specifically said. After his
2 instructions there was no objection to the failure to charge
3 any mitigating factors at that particular time.

4 Now, as the Court knows, in State verses Victor, the
5 South Carolina Supreme Court set out, propounded a formula
6 as to how the judge should handle mitigating circumstances.
7 He should make his determinations as to what mitigating
8 circumstances he thought were appropriate in a Chambers
9 Conference, provide the defense and the state with an
10 understanding of what he intended to charge, that the
11 defense counsel could object to that charge at that
12 particular time. There's no reference in the record that
13 that, in fact, occurred, but we do have a reference in the
14 record that the judge made some sort of determination based
15 upon his own comments at Page 1480, about what mitigating
16 circumstances might be available in the situation, and the
17 defense counsel did not object to the failure to give those
18 particular instructions. In a case that was handled by
19 appellate counsel, back in the '90s, State verses Humphries,
20 a 1996 case, --

21 THE COURT: That's Mr. Savitz?

22 MR. ZELENKA: Yes, Mr. Savitz. Yes. He handled
23 that appeal in 1996.

24 He attempted to argue that a non-objected to statutory
25 mitigating circumstance should have been charged. The South

STOKES V. STATE 8/5/09 CAPITAL PCR

13

1 Carolina Supreme Court in 1996, held that the failure to
2 show on the record that a request was made precluded the
3 Court from getting jurisdiction to review that particular
4 failure to instruct. In other words, that issue was not
5 preserved for direct appeal. My argument is since no
6 objection was made either to the lack of an on the record
7 charge conference or to the failure to give the instruction
8 on that particular mitigating circumstance, those issues
9 were not preserved for direct appeal under the precedent of
10 the Court. That precedent continues subsequent to the
11 trial. In a case called State verses Camille Evans, (sp)
12 where the same argument was made then with intoxication
13 evidence information, and the Court found you have to make
14 the request, the request has to be denied, for you to have
15 preserved that issue for an appeal.

16 So it's our position that counsel Savitz could not have
17 been found to be deficient for failing to raise this issue
18 on appeal because it was an unpreserved claim. It would
19 have been inappropriate for them to have raised that; either
20 of those two claims.

21 With respect to the conflict of interest claims by Mr.
22 Sims, we concede that Mr. Sims name was on the indictment
23 against Mr. Stokes for the December 1990 incident involving
24 Audrey Smith that resulted in a conviction for assault and
25 battery of a high and aggregated nature. We concede that

1 Mr. Sims personally prosecuted that particular situation.
2 The record before this Court reveals that after Judge Shuler
3 appointed Thomas Sims, in addition to Virgin Johnson, to
4 handle the case there was a qualification of Mr. Sims that
5 was done on the record, and it can be found in Line 4 of the
6 transcript, at the beginning of that transcript, roughly
7 around Page 1504 through 1507. And in that inquiry, Mr.
8 Sims advises the Court and as would be appropriate, that he,
9 in fact, was a prosecutor from up until 1993 in the
10 Orangeburg Solicitor's Office. There is no reference at
11 that time of his prior prosecution of Mr. Stokes, and I
12 cannot find in the record that there was any reference
13 specifically to Mr. Sims prosecuting Mr. Stokes previously.

14 Upon information and belief, we intend to present
15 evidence to show through testimony of Mr. Sims and Mr.
16 Johnson that, in fact, there were discussions with Mr.
17 Stokes after the appointment between them --

18 THE COURT: Mr. Stokes would certainly recall who
19 prosecuted him.

20 MR. ZELENKA: Well, apparently, he did, according
21 to the record, and that discussion was made with him. The
22 opportunity to have a different counsel appointed, and, in
23 fact, Mr. Stokes desired to have and expressed a desire to
24 have Mr. Sims continue in representing him at that time, and
25 Mr. Sims, based upon his own evaluation thought he could

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1 handle that. He didn't think his performance would be
2 adversely affected by the fact that he had previously
3 prosecuted him.

4 The South Carolina Supreme Court in an opinion, State
5 verses Childers, recognized the fact that there's no per se
6 ineffective assistance of counsel by the fact that defense
7 counsel is appointed to represent an individual and had
8 previously prosecuted that individual. There are other
9 opinions that we've also cited in our return from other
10 jurisdictions that support that concept, and the question is
11 whether, in fact, that prior position by Mr. Sims adversely
12 affected his performance. I believe Mr. Sims will testify
13 that it didn't inhibit any action he took in the particular
14 case, and there was also the assistance of Virgin Johnson in
15 the case and in the discussions in Mr. Sims presence, as I
16 understand it.

17 The record also reveals that the state advised the
18 Court at the outset of the penalty phase that it did not
19 intend to put in evidence the particular indictment of Mr.
20 Stokes prior conviction, that is the indictment from 1991,
21 is the indictment that had Mr. Sims name on it. And in
22 State Exhibit No. 1, before the Court there was a chart, in
23 fact, of the prior indictments, prior convictions, that Mr.
24 Stokes received, and there was no reference to Mr. Sims on
25 that. Audrey Smith was the first witness that the state

1 called in the case to describe the two prior incidences in
2 which Mr. Stokes had allegedly but ultimately been convicted
3 of assaulting Ms. Smith, his wife, his prior wife at that
4 time, as well as additional information concerning a series
5 of letters that Mr. Stokes had written. Mr. Sims did do the
6 cross-examination of Audrey Smith, but there is no reference
7 at any time during the trial that the jury would not have
8 been under the impression at all that Mr. Sims had
9 previously prosecuted him.

10 We would submit in the record in this case, standing on
11 its own, that there was no record of conflict of interest
12 that adversely affected the representation of Mr. Stokes,
13 again, in this particular matter.

14 The subject -- issue, which we submit is the remaining
15 claim, the subject matter jurisdiction on whether the
16 indictment required to include the statutory aggravating
17 circumstance is a matter of subject matter law. I believe
18 Your Honor will recall the case of State verses Downs, a
19 case in which that issue was initially raised before the
20 South Carolina Supreme Court. When it went to the South
21 Carolina Supreme Court the court said as a matter of state
22 law, and based upon an old case, State verses James Butler,
23 in which the Court had held at that time there was no
24 requirement under our capital sentencing complex to have a
25 list of aggravating circumstance within the indictment. It

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1 continued in that holding and found as a matter of state
2 law, subject matter jurisdiction was not lost by the failure
3 to include statutory aggravating circumstances and based
4 upon the notice that had been given by the solicitor
5 consistent with 16-3-25, that, in fact, the Court did have
6 authority to sentence the defendant to death. So the
7 subject matter jurisdiction claim, we submit, is without
8 merit, and we also provide the Court with cases, subsequent
9 cases to Downs that have supported that holding by the South
10 Carolina Supreme Court.

11 On that point, I'll rest.

12 THE COURT: Thank you, Mr. Zelenka. Have a seat.

13 All right, Mr. Lominack.

14 MR. LOMINACK: Your Honor, we are just about
15 prepared to go forward. I'd like to -- I spoke to Mr.
16 Zelenka about this already. There's one exhibit that I
17 think we can agree to have admitted, that is the trial
18 transcript of the 1991 trial, that Mr. Zelenka was just
19 describing?

20 MR. ZELENKA: Yes. I have no objection to that.

21 THE COURT: You can mark it.

22 (Plaintiff's Exhibit No. 1, 1991
23 trial transcript, was marked and entered.)

24 THE COURT: This is the conviction for the assault
25 and battery, Mr. Lominack?

1 MR. LOMINACK: Yes, that's right, Your Honor.

2 COURT REPORTER: Plaintiff's One, Judge.

3 THE COURT: Thank you.

4 MR. ZELENKA: Judge, let me --

5 THE COURT: Yes, sir.

6 MR. ZELENKA: -- make a clarification. With our
7 initial return we included the final brief of appellant,
8 final brief of respondent, the record on appeal consisting
9 of four volumes and the opinion of the South Carolina
10 Supreme Court. I don't think I need to make that as
11 evidence in this case?

12 THE COURT: I have that before me. Is there any
13 objection or -- clarification?

14 MR. LOMINACK: No. As long as we're free to refer
15 to them?

16 THE COURT: Yes, sir.

17 MR. LOMINACK: We're just about ready to call our
18 first witness. I hold all of the witnesses today in the
19 highest regard.

20 THE COURT: Sequestration?

21 MR. LOMINACK: I think we would request that they
22 be sequestered.

23 THE COURT: That's fine with me. Who absolutely
24 needs to remain; anyone?

25 MR. LOMINACK: Mr. Savitz will be our first

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1 witness, so he will remain.

2 THE COURT: All right.

3 MR. ZELENKA: No.

4 THE COURT: Okay. No objection from the state.

5 You gentlemen, I guess there are places here in the
6 courthouse for you all. We'll call you as we need you.

7 (Witnesses exit courtroom.)

8 MR. LOMINACK: I'm ready to call our first
9 witness.

10 THE COURT: All right, sir.

11 MR. LOMINACK: Joseph Savitz.

12 (WHEREUPON, Joseph Savitz, was
13 sworn to tell the truth.)

14 THE COURT: All right. Please be kind enough to
15 tell us your full name and spell your last name for the
16 record.

17 MR. SAVITZ: My name's Joseph L. Savitz,
18 S-A-V-T-I-Z.

19 THE COURT: What does the "L" stand for?

20 MR. SAVITZ: Lee.

21 THE COURT: Joseph Lee Savitz.

22 MR. SAVITZ: Savitz, III.

23 THE COURT: You may proceed.

24 MR. LOMINACK: Thank you, Your Honor.

25 JOSEPH L. SAVITZ, III., DIRECT EXAMINATION

1 BY MR. LOMINACK:

2 Q Mr. Savitz, can you describe for us your occupation?

3 A I am the Chief Attorney at the Division of Appellate
4 Defense, which is part of the Office of Indigent Defense, in
5 Columbia, and what I do is criminal appeals.

6 THE COURT: Mr. Savitz, I'm sorry. I'm going to
7 ask you to speak up. I don't think we have any microphones
8 in here today. Just speak up a little bit.

9 MR. SAVITZ: Okay, I will. Thank you.

10 BY MR. LOMINACK:

11 Q Okay, you're the Chief Attorney --

12 A Yes.

13 Q -- at the Office of Appellate Defense. How long have
14 you been with the Office of Appellate Defense?

15 A I've been with the Office of Appellate Defense since
16 January 2, 1985.

17 Q All right. Can you describe for us the nature of your
18 work?

19 A Okay. What we do at Appellate Defense is the majority
20 of the criminal appeals in the state. Most of the criminal
21 defendant's are indigent and we're the agent -- we're kind
22 of like -- we handle the public defender appeals and the
23 private lawyer appeals where their clients become indigent
24 during the course of the trials, which is most of them. So
25 we do most of the criminal appeals before the Court of

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1 Appeals and the South Carolina Supreme Court. We do the
2 majority of the capital appeals. Actually, two attorneys,
3 myself and Bob Dudek do the majority of the capital appeals
4 in the state and have for years.

5 Q Okay. So you sort of answered my next question.

6 You do personally handle a significant portion of the
7 capital direct appeals in this state?

8 A Yes.

9 Q Can you describe for us just briefly what you do when a
10 new capital appeal comes to you?

11 A What we do when a new capital appeal comes in --

12 THE COURT: I hate to do this, but let's make sure
13 everything's being fully recorded because we don't have
14 microphones. Can you test him real quick?

15 COURT REPORTER: Judge, I have microphones on the
16 primary and the back-ups. He's fine.

17 THE COURT: We're good. Okay.

18 MR. SAVITZ: Do I need to speak up even more?

19 THE COURT: I can hear fairly well. I just want
20 to make sure we get everything. I do apologize.

21 A Well, everything we handle is just about the same.
22 Capital appeals are a little bit different because there are
23 more hearings. We have to -- there's a lot more information
24 material you have to compile, and we're really given not a
25 whole lot of guidance on where some of the hearings and

1 stuff are. So a lot of times you have changes in attorneys
2 and things like that. So they're a little bit harder at the
3 front end, getting everything together, but once we have
4 everything together, the transcripts and the rest of the
5 materials, we read the transcripts and try to identify
6 issues that the guilt phase and the sentencing phase that we
7 can raise on appeal. Hopefully, most of the times we're not
8 trying for directed verdict to get someone acquitted so they
9 walk, but we're trying in most cases, that I've handled, to
10 get them a new trial or a new sentencing.

11 BY MR. LOMINACK:

12 Q Okay. Now, did you handle the direct appeal in State
13 verses Sammie Stokes?

14 A Yes, I did.

15 Q Okay. Now, prior to your testimony here this morning,
16 have you had a chance to review the brief that you filed in
17 this case?

18 A I looked over the brief, and I looked over selected
19 portions of the transcript, and I believe I talked with you,
20 and I believe I talked with Mr. Zelenka about, you know,
21 what I would be testifying to today. I haven't read the
22 entire transcript, but I did look at the portions that
23 relate to the allegations against me, and I glanced over the
24 brief.

25 Q Okay. Have you also -- you mentioned the allegations

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1 against you; --

2 A Yes.

3 Q -- have you also had a chance to look at the
4 Application for Post Conviction Relief?

5 A Yes, I have.

6 Q Specifically, the two claims of ineffective assistance
7 of appellate counsel concerning failure to challenge the
8 trial judge's failure to hold a Victor Conference --

9 A Right.

10 Q -- and the failure to charge statutory mitigating
11 circumstance that is set out at 16-3-20(c)(a)(3)?

12 A Right. Yeah.

13 Q Okay. So you've reviewed all those things?

14 A Yes, I have.

15 Q Have you also -- forgive me if you mentioned this --
16 have you also reviewed the file that you created in
17 connection with your work during the Stokes case?

18 A I looked at my notes for the -- that I prepared before
19 I wrote the brief, and I also looked at my notes that I did
20 or the outline for the oral argument that I ultimately gave
21 in the Supreme Court.

22 Q Do any of those materials reflect that you gave any
23 specific consideration to jury instruction issues during --

24 A No. As a matter of fact, I think whatever they were
25 talking about, the mitigators, and I don't know what page

1 number it is. I can't remember. But I highlighted a
2 portion further down the page, but had not highlighted the
3 earlier up where they were talking about the victim provoked
4 or was a participant in the murder. I did not highlight
5 that either in the record, and I did not write down that
6 that had been an issue that had been discussed in my notes.

7 Q Well, having gone back and reviewed these parts of the
8 record, again, are you aware of any strategic reason you
9 might have had for not identifying those as issues
10 considering them to be raised?

11 A I'll be honest with you, I can't remember why I --
12 unless I dismissed it. I mean, I can't remember what I was
13 thinking at the time. I didn't highlight it so -- and I
14 usually highlight everything that seems significant to me.
15 It's not highlighted in the record. I mean, that's the kind
16 of thing I argued in Humphries, and I argued Victor, and I
17 argued the Evans case. I mean, it's the kind of issue that
18 I was arguing. And there was certainly -- the law up until
19 Evans came out and finally settled it, it was kind of
20 unclear. I mean, I've always argued it that capital judges
21 need to do more. The Supreme Court hasn't followed me often
22 in that, but this is one of the things that I was saying
23 would be -- make things a lot easier if the judge -- you
24 know, there are only a limited number of mitigators
25 available, and, you know, it would take five minutes to run

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1 down them and say do you want this, either no or yes. If
2 yes, what's your evidence. I've argued that starting, I
3 guess with Humphries and Victor, and finally the Court
4 clarified and said there was some, you know, confusion about
5 the law as to whether or not that was required. And in
6 Evans, they ultimately said that it was not required.

7 So, you know, that's the kind of thing I was arguing
8 during that time. I cannot remember why I did not argue it
9 in this case.

10 Q Okay, so --

11 A I can't say I abandoned it as a strategic matter.

12 Q Okay.

13 A And matter of fact, you can't abandon. Abandoning the
14 winning issue in favor of a losing issue is not a valid
15 strategy, I don't think.

16 Q Okay. I think you've been quite clear, but you are not
17 suggesting that you did this as a strategy?

18 A No. No, not at all.

19 MR. LOMINACK: Just a moment, Your Honor.

20 No further questions.

21 JOSEPH SAVITZ, III., CROSS-EXAMINATION

22 BY MR. ZELENKA:

23 Q Mr. Savitz, other than Humphries --

24 A Uh-huh (affirmative response).

25 Q -- what other direct appeals have you handled where

1 you've ever raised a non-objected, non -- a non-objected,
2 statutory mitigating factor that was not related to
3 intoxication?

4 A Well, that's where most of them come up in the context
5 of intoxication, and that may be -- I mean, there wouldn't
6 be any difference I suppose. I mean, in some cases the
7 victim was asking for it. Mitigator is probably not all
8 that mitigating in this case. There was certainly some
9 evidence of the mitigator. And it wasn't that bad as a
10 mitigator in this case. I raised it -- but, usually it's
11 the three, intoxication or mental state mitigators. There's
12 usually one omitted, and I think every time that's happened
13 there is evidence of intoxication I've raised it whether it
14 was objected to or not.

15 Q And there have been opinions by the Court that
16 suggested where, even where there was a failure to object to
17 that they would make a determination that would be different
18 than they did in the non-intoxication, isn't that correct?

19 A Yeah -- I mean, like I say, most of the cases -- I
20 mean, I don't know that they suggested that there would be a
21 different treatment. I know that most of the time it came
22 up as a, you know, a matter of intoxication, but to me, I
23 mean, I can't see any reason to distinguish between one
24 mitigator and another. You know, either -- the judge either
25 has to charge them or you don't -- they're supported by the

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1 evidence or they're not and the judge either has to charge
2 them or he doesn't. I don't see any reason legally to
3 distinguish between one mitigator and another when it comes
4 to what I'm talking about, the framework I'm talking about.

5 Q Okay. Did you review the trial judge's instructions?

6 A Yes.

7 Q Okay, and did you review it at the time prior to your
8 briefing?

9 A I read it. Yeah, I'm sure I read it at the time.

10 Q And did you realize, prior to your briefing, that the
11 judge did not instruct on any statutory mitigating
12 circumstances?

13 A Yes. I'm sure I did.

14 Q And did you see within there that the judge, in fact,
15 found that the statutory mitigating circumstances had not
16 been presented?

17 A Yeah, and actually it kind of hit me the other day why
18 would you charge that, I mean, it's -- I can't see -- why
19 not just not say anything instead of saying the legislature
20 has provided for all these mitigators, there're not any in
21 this case. None of these are in this case sounds kind of
22 like a charge on the facts, but, I mean, that's something
23 that just occurred to me the other day, but I'm sure when I
24 read it at the time, I, you know, said, well, he's telling
25 them there're no mitigators in this case. It didn't occur

1 to me that -- there might be something wrong with that
2 charge.

3 Q And did you review the objections that had been made to
4 that jury instruction?

5 A Yes, I did.

6 Q And did you see that there was no objection made to the
7 failure to give statutory mitigating circumstances?

8 A Yes, I did.

9 Q And did you see that there was no objection made to a
10 failure, at all, during the record, of an on-the-record
11 charge conference?

12 A Yes, I did.

13 Q And prior to reviewing that, did you review the
14 evidence that was presented in the guilt phase concerning
15 the circumstances of the death that occurred in these cases?

16 A Yes, I did.

17 Q Were you aware of a statutory mitigating circumstance
18 that the victim was a participant in the crime or consented
19 to the act?

20 A Yes, I was.

21 Q So at the time you did your brief --

22 A Uh-huh (affirmative response.)

23 Q -- you were aware of the existence of the evidence --

24 A Right.

25 Q -- in the record?

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1 A Yes.

2 Q You were aware of the fact that the trial judge did not
3 give an instruction on that specific statutory mitigating
4 circumstance?

5 A Right.

6 Q You were aware that no objections had been made to the
7 failure to give that instruction; is that correct?

8 A Right. That's correct.

9 Q Okay. In light of the decision in State verses
10 Humphries, you're aware the Court held specifically in
11 Humphries that a failure to object to the failure of the
12 trial court to give an instruction did not preserve that
13 issue for review; isn't that correct?

14 A See that's -- I mean, that's -- they -- it was unclear
15 exactly, to me, anyway, up until the Evans case what they
16 were saying, and what I was arguing and what it seemed to
17 suggest was that the procedure that I was suggesting, which
18 I still think is a good idea, that the judge go through
19 every mitigator. I mean, like I say, there's only a
20 hand-full of them, and we wouldn't even be here talking
21 about this today if they'd have adopted -- well, actually,
22 we would because it happened in this case, but the -- you
23 know, the only thing I can say is that based upon -- I don't
24 know why I didn't raise it. If I had it to do over again, I
25 don't know if this is like hindsight being 20/20. I don't

1 think it is, but based upon the charge the judge did give
2 that there isn't any mitigation whatsoever in this case.
3 And the fact that he did -- I mean, he did hold a charge
4 conference. I mean, you know, the judge has the discretion
5 to hold the charge conference any time he wants to. He did
6 hold a charge conference and this mitigator was mentioned
7 during that charge conference. Unfortunately, it was never
8 mentioned again through -- in the sentencing phase. And so,
9 you know, the judge has the discretion to hold the charge
10 conference whenever he wants to. So they mention it. It
11 was raised at an issue at the beginning of the sentencing
12 phase, and I just didn't highlight it. So I don't know.
13 Apparently I just missed it. If I had this case to do over
14 again, I would have -- based upon the uncertainty of the law
15 at the time, the issues I was raising them, I would raise
16 it.

17 Q Okay.

18 A Not to say that I would win, but I would just say the
19 law was so uncertain that --

20 Q But you were aware that the failure to make a specific
21 request or objection to the lack of mitigating circumstance
22 instruction didn't first occur in your representation of Mr.
23 Sean Humphries; isn't that correct?

24 A That -- yeah, that's the first time that I believe I
25 raised it.

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1 Q That had been the law since longer than 1993, and
2 subsequent to that period of time; isn't that correct?

3 A Yeah. I mean, that's -- I don't know how subtle the
4 law was until Evans, because I kept raising it. I mean, I
5 may have been just missing the messages the Court was
6 sending, but to me it seemed, even as late as Evans that the
7 law was just uncertain, and that the statute -- that was one
8 of the things that the statute required the trial judge to
9 do, which was to say, here are all the mitigators, which
10 ones you want and which ones don't you want. The ones you
11 want, what's your evidence. As I say, I still think that's
12 a good idea.

13 Q Okay. So even your own opinion that you had in 1996,
14 the South Carolina Supreme Court stated, quote: In the first
15 place this issue was not raised below and it's not preserved
16 for review.

17 A Right.

18 Q Are you saying that you didn't read that or you didn't
19 think to have --

20 A Well, then they came out with the Victor case which
21 seemed to suggest what I was suggesting is that the judge
22 had to have a charge conference where he just went down the
23 mitigators -- I mean --

24 Q Okay, but that had already been decided at that time?

25 A Right.

1 Q It had been decided when you argued Humphries.

2 A Yes.

3 Q Victor was already the law -- in fact, even with that
4 the Court said and concluded again: Absence such request
5 the issue is not preserved. Citing State verses Longworth,
6 and you were certainly familiar with State verses Longworth,
7 weren't you?

8 A Yes.

9 Q Okay. So the Court is -- there is no qualification in
10 their determination. They're saying it's not preserved?

11 A But then you've got Evans where they say, you know, the
12 law is kind of unclear on this, so I mean --

13 Q With respect to intoxication; correct?

14 A That is the context in which the issue was decided in
15 Evans. But I mean, I can't see any reason to distinguish
16 between mitigators when you're talking about whether or not
17 they have to be charged. Failure to charge a mitigator is
18 error.

19 Q And the Court clarified that they agreed with you,
20 there isn't any difference. That's what they held in Evans?

21 A Evans, they finally said --

22 Q Intoxication ones are the same as any other mitigation
23 circumstances and they have to be requested?

24 A And in Evans they finally made it unavoidably clear
25 that you had to request the mitigator in order for the issue

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1 to be preserved when it wasn't charged. Up until that point
2 I was still raising the issue.

3 Q But you don't have any idea why you didn't raise the
4 issue in this case?

5 A I do not.

6 Q Despite the fact that you reviewed the evidence --

7 A The only thing I can think of is that, you know, as I
8 say, there's basically two people doing capital appeals in
9 South Carolina, which is, you know, too few, I think anybody
10 would agree. And during that time, this case was going on
11 --

12 THE COURT: And for the record, you and Mr. Dudek.

13 A -- Me and Mr. Dudek. We've got some other people. Not
14 to shorten them. Cat Hudgens is doing some. Betsy Franklin
15 Best is doing some, but at the time Dudek and I were doing
16 them all. And also at the time, this was kind of like
17 things are now, it was another economic turndown. We were
18 moving from Lady Street to the Edgar Brown Building. And I
19 don't know if it was just so much going on or -- there comes
20 times when these things bottle neck, because the Court
21 requires us to do a capital appeal about once every three
22 months in addition to the other case load that we do. And
23 that's -- that is too many. That is too many cases to do.
24 And I -- the only thing I can think of is that we had so
25 much stuff going on at the time that I just missed it. I

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1 honestly do not know why I didn't raise it. If I had the
2 case today and looked at the judge's charge that he did
3 give, and looked at the fact that the mitigator was
4 mentioned, and that there was evidence supporting that
5 mitigator, I would have raised the issue today.

6 Q Well, are you saying that in 2000, only you and Mr.
7 Dudek were doing death penalty appeals?

8 A Most of them, yeah. That's about right.

9 Q Most of them?

10 A Yeah.

11 Q Well, you initially said you were doing all of them.
12 Well, you weren't doing all of them?

13 A Well, Janice Facing (sp) was doing on every once in a
14 while.

15 Q And Wanda Carter --

16 A Okay.

17 Q -- was doing one then?

18 A Okay.

19 Q In fact, State verses Holmes, right?

20 A Yeah.

21 Q So there were other lawyers in your unit that were also
22 doing capital cases other than you?

23 A They were doing an occasional capital case, but I think
24 it's more fair to say that Mr. Dudek and I were basically
25 doing all of the capital cases since we were also reviewing

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1 work that they did, as well.

2 Q In 2000?

3 A Yes. Yes. We need more lawyers. Let me make that
4 clear. We need more lawyers to do capital cases. I don't
5 want any confusion about that.

6 Q Okay. In your direct appeal brief --

7 A Uh-huh (affirmative response).

8 Q -- do you remember what the first issue was that you
9 raised?

10 A I'll be honest with you. I do not.

11 Q Okay. Let me provide you with a copy of your brief?

12 A Okay.

13 Q I've handed you a copy of the final brief of appellant.

14 A Okay. Thank you.

15 Q And the first issue that you raised was that the judge
16 erred by refusing to allow the defense to introduce the
17 portion of appellant's letter to the police -- the state had
18 redacted which indicated the decedent had willingly
19 accompanied appellant?

20 A Uh-huh (affirmative response).

21 Q Suffred Martin(sp) is a member of a conspiracy to kill
22 Doug Brunson (sp)?

23 A Yes.

24 Q Do you recall that?

25 A Yes.

1 Q And do you recall why the defense was trying to get
2 that information in as evidence?

3 A Well, I mean, other than the fact that it makes the
4 victim look like she had -- I'm sure it was to make the
5 victim look like she was somehow complicit in her own
6 death.

7 Q Complicit in her own death? Do you mean a statutory
8 mitigating factor?

9 A Well --

10 Q That she consented to or --

11 A Well, she thought that she was going to murder somebody
12 else when -- and it turns out she was herself the victim.
13 To me that gets the -- to me that gets you the mitigator.

14 Q But that didn't come in did it?

15 A Yeah. And I mean, I argued that it should have. I
16 still think it should have.

17 Q And the reason that you argued that it should have was
18 to support the existence of a statutory mitigating factor
19 that you're now saying that you should have objected to by
20 the failing of the judge to charge; isn't that correct?

21 A Well, I mean, plus, there's -- yeah, there's that.
22 There's that, but there's also the idea that by excluding
23 that you sanitize the victim, and the jury doesn't get the
24 full story of what exactly is happening in this case. So
25 there's that. I mean, that's atmospherics. It's still

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1 murder, but that's atmospheric. The victim is certainly
2 less sympathetic when you know what you know. All due
3 respect to the victim, but she's certainly less sympathetic
4 when you know exactly what her involvement in this case was,
5 and why she ended up being killed, and it happens to support
6 the mitigator as well.

7 Q Well, it was sought to be presented to create the
8 existence of that mitigator; isn't that correct?

9 A That's right.

10 Q And that information did not come in, did it?

11 A No, it did not.

12 Q And at the time that Mr. Sims made a suggestion at the
13 beginning of the penalty phase he had a hope and expectation
14 that that would come in as a basis for that mitigating
15 factor; isn't that correct?

16 A I -- yeah, I guess so. I can't say what he was
17 thinking, so --

18 Q It didn't come in, and he didn't get that instruction
19 given; correct?

20 A If that's what happened, that -- I mean, I don't
21 remember exactly the sequence of events.

22 Q Well, you're saying that you should have argued the
23 failure to have given that statutory mitigating circumstance
24 instruction. You argued that the evidence that would have
25 supported that instruction was excluded from the jury's

1 determination. On what basis would you have argued to the
2 judge in your appellate brief, the judges in your appellate
3 brief, that there was a factual basis for that statutory
4 mitigating instruction when you had argued that it had been
5 excluded improperly?

6 A Well, I haven't read the entire record, so I don't know
7 if that's the only evidence that would have supported the
8 mitigator. I just can't say. I'm assuming that there was
9 other evidence in there that would have supported the
10 mitigator.

11 Q So you're saying --

12 A But I don't know. I haven't read the record, so I
13 don't know.

14 Q So your testimony that you should have raised the issue
15 lacks any factual support because you don't know the
16 existence of any evidence; is that what you're saying?

17 A If there was no factual support for any mitigator, then
18 it is not error not to charge it, because if there is
19 factual support for that mitigator then it was error not to
20 charge it. I mean, that holds true for any case.

21 I do remember this issue because I thought, you know,
22 they -- under just basic rules of evidence I thought the
23 jury should have been allowed to hear this. It did happen
24 to support the mitigator, but there were other reasons for
25 admitting it as well. I know -- whether or not there was

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1 other evidence that supported the mitigator, I don't know.
2 I don't remember.

3 Q Okay. No further questions.

4 THE COURT: Mr. Lominack, you made a request to me
5 outside of the hall to have a moment with Mr. Stokes -- I'm
6 sorry. Go ahead.

7 MR. LOMINACK: No redirect, Your Honor.

8 THE COURT: Okay.

9 MR. LOMINACK: Thank you, Mr. Savitz.

10 THE COURT: Mr. Savitz, you may step down, sir.

11 MR. SAVITZ: Thank you.

12 THE COURT: Does Mr. Savitz need to hang around or
13 --

14 MR. ZELENKA: Not on behalf of the state, Your
15 Honor.

16 MR. LOMINACK: No, Your Honor.

17 MR. ZELENKA: We thank him for coming.

18 MR. SAVITZ: Thank you.

19 THE COURT: You're going to go back to Columbia,
20 Mr. Savitz?

21 MR. SAVITZ: Oh, yes.

22 THE COURT: Okay. Have a safe trip.

23 Your next witness?

24 MR. LOMINACK: We call Jeff Bloom, Your Honor.

25 THE COURT: All right.

1 All right, Mr. Bloom, come around this way.

2 (WHEREUPON, Jeff Bloom, was sworn
3 to tell the truth.)

4 THE COURT: Please take a seat. Tell us your full
5 name and spell your last name for the record.

6 MR. BLOOM: Jeffrey P. Bloom, B-l-o-o-m.

7 THE COURT: Are you ready to proceed?

8 MR. LOMINACK: Thank you, Your Honor.

9 JEFF BLOOM - DIRECT EXAMINATION

10 BY MR. LOMINACK:

11 Q Mr. Bloom, tell us what you do?

12 A I am a licensed attorney in South Carolina, and have
13 been so since 1985, and licensed in North Carolina since
14 1983. I was in the public defender's office in Horry County
15 for seven years. I was in the Richland County -- ran the
16 Richland County Public Defender Office from 1992 to 1999.
17 Around April of 1999, I went into private practice and have
18 been doing -- been in private practice since that time. I
19 handle a lot of capital cases and beginning in April, 1999,
20 when I went in private practice, also consulted with private
21 attorneys in capital cases, both as to preparation as well
22 as jury selection.

23 Q Okay. Well, you covered a lot of the ground I wanted
24 to cover in one shot, there.

25 So you started this consulting work as well as your

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1 private practice in April of 1999?

2 A That's correct.

3 Q So then presumably you were providing these consulting
4 services during August of 1999, as well?

5 A That is correct, and in relation to this case
6 specifically, I consulted with Attorney Sims in regards to
7 Mr. Stokes' trial. My specific role when I met with Mr.
8 Sims was jury consulting issues, which was shortly sometime
9 after April 1999. It was once I went into private practice,
10 fairly soon thereafter.

11 Q Do you recall how you came to be involved with the
12 case?

13 A Yes. An investigator, Mr. Billy Johns, J-o-h-n-s, who
14 is now deceased, regrettably, had been hired by Mr. Sims on
15 the case, and doing investigative work, interviewing
16 witnesses, I presume, and Mr. Sims was looking for a jury
17 consultant, and Mr. Johns and I had had a long-standing
18 professional relationship. So Mr. Johns recommended me to
19 Mr. Sims, and Mr. Sims gave me a phone call and I came down
20 to his -- or an office. I can't recall if it was his office
21 or another attorney's office here in Orangeburg and met with
22 him on Mr. Stokes case. I never met with Mr. Stokes.

23 THE COURT: Was that Theresa Johns husband?

24 MR. BLOOM: It was, Your Honor. Yes, sir.

25 THE COURT: Okay, sorry. I'm sorry, to interrupt.

1 MR. LOMINACK: That's quite all right.

2 THE COURT: I just want to get these things -- I
3 just want to connect the dots.

4 MR. LOMINACK: Quite all right, Your Honor.

5 BY MR. LOMINACK:

6 Q So you mentioned that you came, had a meeting -- this
7 was a face-to-face meeting, I presume with Mr. Sims?

8 A That's correct, at a law office here in Orangeburg.

9 Q Okay. Do you recall who else was present?

10 A I know Mr. Johns was. My best recollection is that he
11 and I rode from Columbia together. And Mr. Johns had a
12 meeting with Mr. Sims about some investigative tasks. Then
13 I met with Mr. Sims about some jury consultation issues.

14 Q Do you recall whether Mr. Johnson, Virgin Johnson, was
15 present that day?

16 A I don't think Mr. Johnson was present at that meeting.
17 The only person I remember dealing with in the case was Mr.
18 Sims.

19 Q Okay. And if you could, sort of briefly summarize for
20 us the nature of the assistance that Mr. Sims asked you to
21 provide?

22 A As to the jury selection issue, Mr. Sims was very
23 adamant about wanting a juror profile. Of doing some
24 research both in terms of social science, voter election
25 rolls; those kinds of things in providing him with the model

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1 juror for his case. And I told him I didn't do that kind of
2 work. That jury profiling was not something I did. That I
3 didn't necessarily even believe in it that much, and I
4 didn't think it was something through voir dire you can get
5 to in terms of the type of voir dire we're allowed. What I
6 was available to help him with was to assist him with voir
7 dire questions aimed at getting fair and reasonable jurors.

8 The second issue that came up while I was meeting with
9 him was a potential conflict of interest issue. And my best
10 recollection is that Mr. Johns, actually, informed me about
11 it on the ride up here to Orangeburg from Columbia. At the
12 time I met with Mr. Sims I was very concerned about a
13 potential conflict of interest issue where he had previously
14 prosecuted Mr. Stokes. So that was the subject of our
15 discussion as well.

16 Q Now, when you say that was the subject of your
17 discussion, did you make any suggestions to Mr. Sims about
18 how he ought to handle that matter?

19 A I thought it was a very substantial and serious issue.
20 I was trying to impress upon Mr. Sims that if he had
21 previously prosecuted Mr. Stokes that that prior conviction
22 would be an issue at a capital sentencing proceeding. I
23 don't think he fully understood how or why that would be.
24 But I kept emphasizing that conviction is going to become in
25 play at capital sentencing, and he did not seem as concerned

1 about the conflict issue.

2 What I stressed to him in my experience, I stressed and
3 told him at a minimum what he needed to do is request a
4 hearing in front of the assigned circuit judge to the case,
5 request in writing that it be an Ex Parte Hearing so the
6 solicitor should not be present because it was an
7 attorney/client issue, and let the circuit judge be aware of
8 it, and let the circuit judge conduct a hearing where that
9 issue could be played out and fully discussed. Mr. Sims
10 kept saying don't worry about it, Mr. Stokes has waived
11 that. I said, well, you know, it may be one thing for you
12 to sit in the jail with Mr. Stokes and he verbally tells you
13 he doesn't have a problem with it, but there may be some
14 other consequences there affects from there. You really
15 need to have a hearing where he's on the record, an Ex Parte
16 Hearing, and it may even be that you need to absent yourself
17 from the hearing so that Mr. Stokes is free to tell the
18 judge whatever he may need to tell the judge about that
19 prior prosecutor/defendant relationship.

20 Q Okay. So you conveyed all these concerns to Mr. Sims?

21 A Very much so, and it wasn't a long meeting. I'm
22 certain it was under an hour, maybe even as short as a
23 half-hour, and those were the only two things we discussed,
24 jury profiling, which I told him I couldn't help him with
25 and my concern over the conflict issue. When I left the

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1 meeting at the office in Orangeburg he still seemed focused
2 on wanting somebody to do jury profiling for him and still
3 did not seem to appreciate the nature of the conflict of
4 interest issue.

5 Q Okay. So after -- subsequent to that meeting, did you
6 have any further contact with Mr. Sims or Mr. Johnson?

7 A I then had a phone call with Mr. Sims at some point,
8 and I can't remember if I called him or he called me. And,
9 again, the issue of jury profiling came up. I said, well,
10 if that's really what you want in the case there's -- I
11 can't help you with that. I don't do that. I don't think
12 it's productive. I don't think you're going to get very far
13 in voir dire with identifying or creating a jury profile.
14 It's just not something that case law supports. And
15 secondly, I again asked him, have you filed any kind of
16 written motion on this potential conflict of interest issue
17 we discussed or had a hearing, and he indicated, no. And he
18 still didn't seemed concerned about it. And I told him that
19 really needed to be something that was settled on the record
20 long before trial. I again emphasized to him that it seemed
21 to me to be the type of conflict of interest issue that was
22 fluid, and by that, I mean, some conflict of interest issues
23 are very clear cut and the parties or the defendant can
24 either waive it or not. Others, as we all know, ebb and
25 flow and they may not be as serious at first glance, but

1 something can develop through the course of litigation that
2 makes the conflict of interest issue more substantial.
3 That's how I saw this and what I was trying to emphasize
4 with him. It was a short phone call, though, and I
5 basically concluded by telling him, well, there's really not
6 much I can do for you, one because he continued to want jury
7 profiling, which I didn't do, and two he didn't seem at all
8 to appreciate the gravity of the conflict of interest issue.
9 And I concluded that I just needed to sever any professional
10 relationship to the case because -- and I don't mean this
11 rudely, but I didn't want to work with an attorney who
12 failed to appreciate the gravity of that issue.

13 I never billed him for the case. I hadn't invested
14 that kind of time, and that concluded the contact I had with
15 Mr. Sims in the case.

16 MR. LOMINACK: One moment, Your Honor.

17 THE COURT: Yes, sir.

18 MR. LOMINACK: Nothing further.

19 THE COURT: All right. Mr. Zelenka?

20 JEFFREY BLOOM - CROSS-EXAMINATION

21 BY MR. ZELENKA:

22 Q Mr. Bloom, when did your meeting with Mr. Sims occur?

23 A It would have been after April 1999, because I left the
24 public defenders office right around tax day, somewhere
25 around April 15th. And prior to the trial of this case,

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1 whenever that was. So I want to say it was May or June is
2 my best recollection. I could be off. I know it wasn't two
3 weeks before the trial. I know it was some weeks before
4 trial.

5 Q Okay. And when did the telephone call occur?

6 A That would have been a few weeks after my meeting with
7 Mr. Sims in Orangeburg. Certainly within 30 days. So
8 roughly two to four weeks from our meeting and still prior
9 to trial.

10 Q No further questions.

11 THE COURT: I have a question, Mr. Bloom.

12 JEFFREY BLOOM - DIRECT EXAMINATION

13 BY THE COURT:

14 Q I have a question.

15 A Yes, sir.

16 Q Did you ever specifically indicate to Mr. Sims there
17 was a case or a rule that he was in direct conflict with in
18 representing Mr. Stokes?

19 A I --

20 Q I really understand your concern.

21 A Yes, sir.

22 Q And you offered him an opinion. Did you offer him an
23 opinion or a case or a rule?

24 A I didn't provide a case. I know I discussed the
25 conflict of interest rules generally. I may have cited a

1 specific rule at the time. I probably would not have cited
2 a rule in our meeting. I may have in the phone conversation
3 because I learned of the conflict through Mr. Johns, I
4 believe, on the ride up here or right before the meetings.
5 So after that I had an opportunity to go back and look at
6 the rules. So probably in the phone call I may have told
7 him my main concern was rule whatever, at the time.

8 Q Okay. Thank you, sir.

9 MR. LOMINACK: Your Honor, just one more question,
10 if I may.

11 THE COURT: Yes.

12 JEFFREY BLOOM - REDIRECT EXAMINATION

13 BY MR. LOMINACK:

14 Q Mr. Bloom, and I think this will become clear later on,
15 if Mr. Sims time records were to indicate that this meeting
16 actually happened on August 17, 1999, you wouldn't have any
17 --

18 A I wouldn't -- I would defer -- it's been 10 years. I
19 would defer to his time records.

20 Q Okay.

21 A As I said, my best recollection is how I answered Mr.
22 Zelenka, but I would defer to his time records as
23 documentation on that. It could have been later.

24 Q Okay. Thank you.

25 THE COURT: Anything further of this witness?

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1 MR. ZELENKA: Nothing further, Your Honor.

2 THE COURT: Nobody wants to keep Mr. Bloom, is
3 that right?

4 All right. Thank you, Mr. Bloom.

5 MR. LOMINACK: Your Honor, that concludes our
6 testimony portion of our case in chief.

7 THE COURT: All right.

8 Do you want to take a break and think about anything,
9 Mr. Zelenka, or are you ready to proceed?

10 MR. ZELENKA: I --

11 THE COURT: Let's take a little break.

12 (Court at recess for short break.)

13 (Court in session after short break.)

14 THE COURT: Please keep your seats.

15 Are you-all ready?

16 MR. ZELENKA: Yes, sir. State would call Thomas
17 Sims.

18 THE COURT: All right, Mr. Sims, come around.

19 (WHEREUPON, Thomas Sims was sworn
20 to tell the truth.)

21 THE COURT: Take a seat, sir, and tell us your full
22 name and spell your last name for the record.

23 MR. SIMS: My name is Thomas Ray Sims, S-i-m-s.

24 THOMAS SIMS - DIRECT EXAMINATION

25 BY MR. ZELENKA:

1 Q Mr. Sims, what is your present occupation?

2 A I have several. Presently, I am a lawyer in
3 Orangeburg. Also, I am a United Methodist Pastor.

4 Q Okay. As part of your practice with law, when did you
5 become a member of the South Carolina Bar?

6 A I believe it was in '81, '80 or '81. Somewhere in
7 there.

8 Q Okay. Subsequent to becoming a member of the bar,
9 briefly describe your professional, occupational status?

10 A Before becoming a member of the South Carolina Bar, I
11 was admitted into the Mississippi Bar. I practiced law in
12 Mississippi with North Mississippi Rural Legal Services. I
13 moved from Mississippi, came out here with Palmetto Legal
14 Services as managing attorney in the Orangeburg County
15 office, in the Orangeburg office, rather. Of course, we
16 covered six counties in this area. From Legal Services I
17 moved over to the Solicitor's Office as an assistant
18 solicitor.

19 Q Okay. Who was the solicitor at that time?

20 A Norman Fogle, when I first started.

21 Q Okay. And Mr. Fogle was replaced by Joe Mizell?

22 A Joe Mizell.

23 Q And did you continue working with Mr. Mizell?

24 A Yes, I did.

25 Q What was your role in Mr. Mizell's office?

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1 A With Joe, I started out handling most of the criminal
2 cases in General Sessions. Then eventually became deputy
3 solicitor. When Joe Mizell resigned, I became acting
4 solicitor for a period of time.

5 Q Okay, you were acting solicitor -- not through the
6 Governor, but through the Attorney General's Office?

7 A The Attorney General's Office. Yes.

8 Q Okay. And you recall your representation of the state
9 in State verses Sammie Stokes?

10 A Yes, I do.

11 Q And did that occur in 1990 and 1991?

12 A I can't remember the date, but, yes, I do remember
13 representing that in the state.

14 Q Involving an incident surrounding August 5th; is that
15 correct?

16 A Yes, that is correct.

17 Q And you participated in preparing the indictment on
18 that particular case; is that correct?

19 A Yes. We had a process at that time where it would
20 actually come from the Sheriff's Department. We had a
21 number of young ladies who worked in the office who were
22 familiar with doing indictments and they would prepare them
23 and we would just simply sign them.

24 Q Okay. And you signed the indictment for that
25 particular incident; is that correct?

1 A Yes.

2 Q And you handled the prosecution of Mr. Stokes; is that
3 correct?

4 A Yes, I did.

5 Q Do you have any recollection of that prosecution?

6 A Not now. But, of course, when I began -- when I got
7 involved in this case, of course, I did.

8 Q Okay. Now, in 1992 you ran for solicitor?

9 A Yes, I did.

10 Q Against Walter Bailey?

11 A Yes.

12 Q Is that correct?

13 A That's correct.

14 Q And subsequent to Mr. Bailey's election what did you
15 do?

16 A I went into private practice and I opened my office up
17 here in Orangeburg where I had been basically stationed.

18 Q And describe your practice since 1992?

19 A Since 1992, I have done criminal defense work. I've
20 been involved in a number of capital murder cases, also. I
21 do a lot of civil work and I do family court and probate
22 court; general practice across the state.

23 Q While you were in the solicitor's office did you handle
24 any death penalty cases?

25 A Yes, I did.

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1 Q Do you recall the names of those cases?

2 A Well, there were a number in Dorchester County that we
3 handled. Then there was one in particular in which I
4 prosecuted a young man from Holly Hill who had raped and
5 sodomize and anally sexually abused a 2 year-old baby and
6 who had killed her and I prosecuted the case. That's one
7 that will always stay with me, and I prosecuted that case,
8 and I participated in a number of other cases, also.

9 Q And you were preparing some capital cases at the
10 conclusion of your services with the solicitor, too; isn't
11 that correct?

12 A Yes.

13 Q All right. With respect to your involvement in Mr.
14 Stokes' case, --

15 A Uh-huh. (Affirmative response.)

16 Q -- after completion of that trial did you have any more
17 involvement with Mr. Stokes directly before you were
18 appointed --

19 A Before --

20 Q -- in the capital case?

21 A Oh. Are you asking me, whether after the prosecution
22 that I did in the solicitor's office up until the time that
23 I was appointed, did I have any more involvement? No. Not
24 that I know of.

25 Q Okay. Did you have any involvement with Audrey Smith

1 subsequent to the period of time?

2 A No. Not that I know of.

3 Q Okay. Did you ever represent her in any civil capacity
4 or --

5 A I can't remember.

6 Q Okay. Now, in 1999, you were appointed by Judge Wayne
7 Shuler to represent Mr. Stokes; is that correct?

8 A Yes. Uh-huh. (Affirmative response.)

9 Q And Virgin Johnson was also appointed?

10 A Yes.

11 Q Okay. Do you remember the qualification hearing that
12 you had with Judge Shuler?

13 A Yes, I do.

14 Q And have you reviewed the transcript about that
15 qualification hearing?

16 A I've tried to, but I did not go through all 1400, 1500
17 pages of documents, but I did remember -- and I do remember
18 that because I was called over and when I came over there
19 was some question of whether or not Mr. Johnson was
20 qualified to have first chair. And at that point he had me
21 to put my qualifications on the record.

22 Q Okay. And did part of your qualifications involve your
23 prior major felony trial experience; isn't that correct?

24 A That's correct, yes.

25 Q However, during that qualifications you did not

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1 indicate to Judge Shuler that, in fact, you had participated
2 in the prosecution of Mr. Stokes, did you?

3 A No, I did not.

4 Q Do you recall why not; what the purpose of that was?
5 Was it just the question was never asked?

6 A It was never asked, and I did not -- it just didn't
7 come up. I mean, as a matter of fact, I probably had to
8 look at Sammie, Mr. Stokes, rather, and -- for it to all
9 come back.

10 Q Okay. Mr. Stokes was present in the courtroom for that
11 January conference; isn't that correct?

12 A That's correct, he was.

13 Q Do you recall meeting with Mr. Stokes and discussing if
14 at all your prior prosecution of him?

15 A As I recall, after going through the information we did
16 discuss with Mr. Stokes, my role, who I was, and what my
17 role had been in the previous matter with him. We discussed
18 it, me and Attorney Johnson. We did discuss it. He never
19 expressed any desire not to have me as his attorney.

20 Q Okay. Did you indicate to him that he could have
21 another lawyer represent him in these matters, if you
22 recall?

23 A We talked about it and I don't -- and I can't sit here
24 under oath and say to you that I said to Mr. Stokes, you
25 know, if you want another lawyer you can get one. I can't

1 make that representation to you.

2 Q What was the purpose of those discussions?

3 A For him to know fully who I was, what was there before
4 him, and it was in my mind that if I tell you that, you
5 know, hey, you know who I am. I'm the one who prosecuted
6 you, sent you to jail, do you still want me as your lawyer,
7 and he says, yes. That also says the other side to me that
8 if I don't want you I can say I don't want you any more.

9 Q But just to be clear, did you have that type of
10 discussion with Sammie?

11 A We had that type of discussion in terms of, look, you
12 know who I am. I'm the prosecutor, I was the prosecutor
13 here. I've been here and you know who I am. I've - you and
14 I have met before, we've been involved before.

15 Q So it was clear from your discussion that Sammie could
16 have said he didn't want you as a lawyer?

17 A Yes.

18 Q Right?

19 A Yes.

20 Q And he said he wanted you to continue?

21 A Yeah.

22 Q Okay.

23 A Actually, if - after the trial, even after all the
24 information that came out, the guilt phase and everything
25 else, he called me and said to me that his appellate lawyer

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1 thought that they were going to win the case. He wanted me
2 to continue. He still wanted me to be his lawyer. Because
3 his words were, you know, you're top flight. I want you
4 back.

5 Q And, in fact, you represented Mr. Stokes after this
6 trial, is that correct, on the other charge?

7 A Yes. On the other -- on the second. There were two
8 capital murder cases, and in the second case I represented
9 him also, in that one.

10 Q Okay. Now, do you have any recollection or any
11 discussions with Jeffrey Bloom?

12 A I believe I -- in the early stages we talked with
13 Jeffrey Bloom about doing some jury work. And we were
14 trying to discuss how we were going to go about doing that
15 and I think he gave some basically rudimentary information
16 to us, but then this thing in Aiken came up. There was some
17 major trial in Aiken in that circuit that he got involved
18 in.

19 Q So he didn't assist you, based upon that?

20 A I believe so, because what happened, I believe we met
21 in my office once and we talked about that for a few
22 moments. We talked about what we might or might not be able
23 to do, and I think that case in Aiken just kind of took it
24 over after that, because he'd already been involved in that,
25 is my recollection.

1 Q Do you recall having a discussion with Mr. Bloom
2 specifically about the conflict of interest based upon your
3 prior prosecution?

4 A I don't.

5 Q You don't have any recollection?

6 A I don't have any recollection of that.

7 Q Do you have any recollection of Mr. Bloom calling you
8 and asking you if you'd yet had an Ex Parte Hearing with the
9 judge about the conflict issue?

10 A I -- I -- this has been over 10 years ago, and I can't
11 say as I recall that. No, I don't recall that.

12 Q All right. Now, from your representation in January of
13 1999, through the trial, did your client ever indicate to
14 you any desire to have you removed as his lawyer?

15 A None.

16 Q During that period of time did you discuss with him the
17 fact that the state was intending to put in evidence of the
18 convictions he had --

19 MR. LOMINACK: Objection to the leading, Your
20 Honor. I've tried to let it go for a while, but --

21 THE COURT: All right, sir.

22 BY MR. ZELENKA:

23 Q Did Mr. Bailey provide you information about statutory
24 aggravating circumstances and evidence in aggravation?

25 A Yes.

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1 Q What information, if any, related to Mr. Stokes prior
2 convictions did that include; if you recall?

3 A He had -- I believe in our records, and I know that I
4 was given the copies of letters that had been written to the
5 -- to his wife or his girlfriend at that time. That they
6 had planned to use that or attempted to use that. He was
7 going to use those letters and use her as a witness.

8 Q Was there anything about prior convictions?

9 A Yeah. We talked about the S&M with the young man in
10 prison. He talked about a number of other things, and I
11 specifically remember those two because we talked about
12 those two in depth, and especially about that situation with
13 the young man who was over there -- I believe it was
14 Allendale that was -- we talked about that case particularly
15 because of the nature, and we talked about the other issues,
16 also.

17 Q Okay. Was there a discussion about the use or
18 knowledge of the use of the -- a particular conviction that
19 you were involved in in prosecuting Mr. Stokes for?

20 A Yes. I told him -- and we talked about that,
21 definitely. It was a part of the case, it was a part of the
22 case. As a former prosecutor, my practice was to look at
23 the case from both sides, because I knew, as a prosecutor,
24 what I would have done, and I would look at it from both
25 sides to try to develop a defense around what I thought they

1 would use, and, of course, that information would come up.

2 Q Okay. Did you anticipate that both the conviction
3 would come in at the end and that Audrey Smith would testify
4 in the state's case?

5 A Yes, I did.

6 Q And what, if anything, did you do in relation to that
7 particular type of testimony in his defense?

8 A We -- we -- and I couldn't find my records. I tried to
9 look for my records, but I know we had an in depth
10 discussion with Mr. Stokes in regards to that, to all of the
11 information because we would meet with him on a regular
12 basis to discuss what was coming up, and let him know the
13 kinds of things that he was going to be facing.

14 Q Okay. Did you have a theory in mitigation as to how to
15 address the Audrey Smith incident?

16 A I wrote -- I know we talked about it, and one of the
17 issues was -- I'm trying to remember off the top of my head
18 -- I knew that it was coming in, and part of his elocution
19 or was to show remorse and to be -- and to show that he was
20 sorry for some of the things that he had done, and that --
21 you know, I guess that was part of it. But it was much more
22 -- going through that you write down stuff, you put it down,
23 and I just don't have those records. I'm sorry.

24 Q Okay. You cross-examined Audrey Smith?

25 A Yes.

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1 Q Is that correct?

2 A Uh-huh. (Affirmative response.)

3 Q Did the fact that you had previously prosecuted Mr.
4 Stokes for that same incident that was part of Audrey
5 Smith's testimony, did that affect the way that you
6 approached her on cross-examination or any objection you may
7 have available to you?

8 A Now, look, if I thought that I couldn't have
9 represented Mr. Stokes to the best of my ability I would not
10 have been in the case.

11 Q All right. And was that consideration that you had
12 from the beginning of your appointment with Mr. Stokes being
13 aware that you had, in fact, prosecuted him?

14 A I take the position that if I got a conflict, if I have
15 a moral issue, if I have an ethical issue or if I have any
16 issue that's going to prevent me from presenting anyone, I
17 will not take the case.

18 Q Okay.

19 A And if I'd had that kind of reservations about
20 representing Mr. Stokes, I wouldn't be sitting here today.

21 Q Is there anything that you learned in your prosecution
22 of Mr. Stokes that inhibited you in his defense in any
23 manner?

24 A No. Because -- I -- no, huh-uh. No.

25 Q At any time throughout that representation, did you

1 have a concern about that fact that you thought you needed
2 to present to the Court by formal motion or otherwise?

3 A I'm not so sure that we didn't, and we had that
4 discussion, and it's somewhere on the record in terms of my
5 having prosecuted him for that, and I've tried to rack my
6 mind. We went across the state, had meetings and hearings,
7 and I'm not so sure that it was never not put on the record.
8 And I believe that the transcript of that second case, it
9 may have come up there, too. So I'm not sure. I cannot say
10 for sure.

11 Q Did Virgin Johnson ever indicate to you any concern
12 about your continuing the representation of his client based
13 upon the prosecution?

14 A We talked about it. We talked about it in depth, but,
15 no.

16 Q Okay. Let me move on to a different topic.

17 A Okay.

18 Q In the penalty phase of the case, the state presented
19 evidence of the defendant's prison record, disciplinary
20 violations and the like, and you presented testimony from
21 former warden from CCI, James Aiken --

22 A Uh-huh. (Affirmative response.)

23 Q -- on adaptability to prison life of Mr. Stokes; do you
24 recall that?

25 A Yes, I do.

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1 Q Do you recall the solicitor's closing argument in the
2 case where he made reference to canteen benefits and the
3 like, have you reviewed that portion?

4 A I reviewed that portion, yes, sir. Yes, I did.

5 Q Now, you did not make any objection to that particular
6 portion of his argument, did you?

7 A No, I did not.

8 Q Okay. Do you recall if you're of an opinion then or
9 now that an objection could have been made and the basis for
10 that objection, if any?

11 A Well, first of all, I did not believe that it was at
12 that time an impermissible objection, and also the fact when
13 you weigh what we had put in that Mr. Jim Aiken -- when Jim
14 Aiken sits on the stand and says he messed up we will kill
15 him. Saying in no uncertain terms, saying that he will be
16 dead, I felt that that was minuscule in light of everything
17 else we had to do, and I simply, at that point, when I
18 looked back over that part of the transcript felt that that
19 was not an issue, as far as I was concerned at that time, in
20 light of the evidence that had already been put in by us in
21 regards to adaptability to prison and the ability of the
22 prison system to control Mr. Stokes.

23 Q Now, in the penalty phase of the case, you sought to
24 introduce certain information out of Mr. Stokes statements
25 concerning potential involvement by the victim Connie Snipes

1 (sp) into the case, and the judge excluded that; do you
2 recall that?

3 A Yes.

4 Q Do you recall that before the penalty phase began you
5 indicated to the judge that a mitigating factor that you
6 were going to utilize was the victim was a participant in
7 the act or consented to the act?

8 A We did have the mitigating -- we had the discussion and
9 we -- and, of course, I brought it up. I'd been fighting
10 the whole case because Walter had redacted that part of the
11 -- that part of the statement, his statement, from the
12 letter from his written confession, and I had fought during
13 the whole case to have that brought back into the trial.

14 THE COURT: I apologize, but when you say Walter,
15 you mean to say Walter Bailey?

16 A I'm sorry. The solicitor Walter Bailey. The solicitor
17 had redacted that part of the statement, and I felt that it
18 was a very important part of -- to get it back, so I did try
19 to bring that in again at that time, but to the best of my
20 recollection there was an indication that it was not going
21 to be used, and if it was no objection then I would have to
22 concede that I did not put the actual objection on the
23 record when we got back on the record.

24 BY MR. ZELENKA:

25 Q Okay. Now, with respect to the judges instruction on

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1 mitigation, he did not instruct that mitigating factor that
2 the victim was a participant in the crime and consented to
3 the act; is that correct?

4 A I believe that's correct.

5 Q Okay. And, in fact, indicated that the only mitigating
6 factor being presented was adaptability to prison life; is
7 that correct?

8 A Yes.

9 Q And you did not object to the lack of that instruction
10 being included after the judge gave the instruction, did
11 you?

12 A I would have to concede that I did not.

13 Q Okay.

14 MR. ZELENKA: No further questions at this time.

15 THE COURT: All right, Mr. Lominack.

16 MR. LOMINACK: Thank you, Your Honor.

17 THOMAS SIMS - CROSS-EXAMINATION

18 BY MR. LOMINACK:

19 Q Morning.

20 A How're you doing.

21 Q Let me start at the very end and talk to you about Mr.
22 Bailey's closing argument.

23 A Uh-huh. (Affirmative response.)

24 Q What was your understanding at the time of this trial,
25 in 1999, about whether the prosecution could present

1 evidence or argument about the conditions of confinement in
2 prison?

3 A There -- and, of course, I'd have to go back and -- we
4 did the case law and everything, and I knew what the case
5 law was, but in light of what was said, and what we had
6 already put in, had made a decision, that we had information
7 in the record that had a witness who had testified that he
8 could definitely be controlled so what Walter said was, I
9 believe, something to the effect of taking his canteen --
10 and I don't have it before me, but taking his canteen
11 privileges. There had been an incident that we had
12 discussed once before that had come out in the Court where
13 the incident -- and we had talked about what had happened, I
14 believe, over here in Orangeburg, in regards to that. So I
15 definitely took it to relate to that and not in terms of a
16 more, I guess, angry or a more sinister information. And
17 with the information that I had I thought we had a good --
18 basically defended against that.

19 Q All right. When you didn't object, the reason you
20 didn't object was based on your understanding of what the
21 law permitted Mr. Bailey to do at the time?

22 A No. No. It was a combination of what I felt that we
23 needed as a trial, in this particular part of the case, what
24 we felt that the effect of it would be in terms of saying
25 what we had -- what we had was a person like Jim Aiken, who

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1 was so graphic in his presentation about adaptability and
2 not only that, Mr. Aiken was very clear in terms of his
3 background, in terms of how he had handled situations before
4 and how this system would be able to come down upon -- on a
5 person who acted out. He mentioned he went all the way from
6 taking away privileges, he went to -- I believe he went
7 through the issues of placing them in maximum security.
8 Then he also said that if they continued to act out, we
9 could kill him. We would, not could. I think he said
10 something like we would kill him.

11 Q Now, when you're representing somebody in a penalty
12 phase in a capital case do you think it's healthy or harmful
13 for the jury to believe that person may have canteen
14 privileges if sentenced to live in prison?

15 A I don't think that anybody would think that if you have
16 life in prison then if you're going the death penalty that
17 you're not going to have at least a minimal amount of
18 movement. Canteen privileges, buying stuff from the canteen
19 to eat, to live.

20 Q And so is it your opinion today, as a lawyer, that that
21 is admissible evidence during the penalty phase of a capital
22 case, today?

23 A I don't -- it depends on how it's phrased and how it's
24 used and how it is done in terms of whether or not --
25 whether or not you would be able to get into it. Depends on

1 if you're using that to show -- let me see how I can put it.
2 If your argument is to the extent that you are trying to
3 make the Court believe or make the jury believe that a
4 person who is in prison is going to have the same kind of
5 lifestyle as someone who is outside, I would stand up on the
6 tables and object.

7 Q All right. When do you think it's permissible for the
8 jury to speculate about the types of privileges that a
9 prisoner may have who is sentenced to life in prison?

10 A In this situation, in this limited situation, as I
11 stated earlier, in the light of what we had put in evidence,
12 and where we had gone with the case, I did not feel that
13 that limited statement was one which would have been
14 impermissible.

15 Q All right. Let me back up and let's talk about your
16 pre-trial research and your preparation for the case. Now,
17 you had conducted a good bit of legal research on a variety
18 of evidentiary issues, right?

19 A Yeah.

20 Q And specifically, you focused your research on the
21 admissibility on a prior convictions of Mr. Stokes?

22 A Under Lyle. Is that what you're talking about?

23 Q Yes.

24 A Yes.

25 Q And, in fact, let me show you these two documents. Or

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1 a compilation of documents and see if you can identify each
2 of those.

3 A Looks like my writing.

4 Q What else is in those documents?

5 A Some photograph cases --

6 Q Would it be fair to say that these are two volumes of
7 photo copies of legal cases that you printed out and made
8 notes on and bound as Volume 1 and Volume 2?

9 A I didn't bind them. I don't I -- I don't recall
10 binding them.

11 Q Do you remember labeling them Volume 1 and Volume 2?

12 A I don't remember, but apparently -- that's my writing
13 on those cases.

14 Q And this is -- specifically, if you look at Volume 2,
15 that's your writing in the first couple pages, two or three
16 pages?

17 A Yeah, sure.

18 Q So this does appear to be your research you conducted
19 prior to the trial, right?

20 A No question. Yeah.

21 MR. LOMINACK: Your Honor, we'd move to admit both
22 of these as separate exhibits, I think without objection.

23 THE COURT: Well, have you had a chance to look and
24 see what's all in it?

25 MR. ZELENKA: No, he provided it to me.

1 THE COURT: Okay.

2 MR. ZELENKA: I don't have any objection for that
3 limited purpose. I don't know what the relevance is to that
4 at this stage.

5 THE COURT: Neither do I. So it's admitted without
6 objection. Go ahead.

7 If we need to I'll give you both a chance later on --

8 MR. ZELENKA: If relevance becomes --

9 THE COURT: That's fine. Mr. Lominack, does this
10 represent some or all of Mr. Sims pre-trial notes,
11 preparation, cases for this trial or would you state it a
12 different way?

13 MR. LOMINACK: From our review of the file, these
14 represent the sum total of the legal research that was
15 conducted in preparation for the trial.

16 Plaintiff's No. 2, which is Applicant's Exhibit No. 2.
17 Plaintiff's No. 3, is Applicant's Exhibit No. 3.

18 THE COURT: I see Mr. Sims is shaking his head. I
19 would give him a chance to clarify.

20 MR. LOMINACK: That's fine.

21 (Plaintiff's Exhibit No. 2, Volume
22 1, was marked and entered.)

23 (Plaintiff's Exhibit No. 3, Volume
24 2, was marked and entered.)

25 BY MR. LOMINACK:

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1 Q Now, Mr. Sims, you'd agree that -

2 THE COURT: Well, let's let him do it now. What
3 does that mean to you, sir?

4 A That's some of the research -- now, when you-all came
5 and got the file I thought everything was there. Whoever
6 came and got it, I don't remember when, but you said that
7 the sum total and that's not an accurate statement.

8 Q All right. Do you have your file?

9 A No. I told you a few moments ago I do not.

10 Q Where is your file?

11 A It's somewhere in storage. You know, 10 years later --
12 when you-all came and got it -- I gave --

13 Q All right. So you believe there were additional
14 printouts of cases in your file beyond what's in there?

15 A There were additional cases I looked -- some additional
16 research that I did. This is not the sum total, this is on
17 an issue that I was looking at.

18 Q Do you know what other issues you conducted legal
19 research about?

20 A We did research on kidnaping, we did research on the
21 criminal sexual conduct. We did research on the mitigation.
22 I personally -- that doesn't mean that because I have some
23 cases in here that I would copy every case that I read
24 through when I'm getting ready to go through a trial.
25 That's some of the cases that I read, and I just printed

1 those out. You don't have to -- you don't have to write out
2 every case or print every case that I go through. So when
3 you say that's the sum total, I definitely --

4 Q It may be that you read other cases, but this could
5 well represent the cases that you actually printed out and
6 took notes on?

7 A That represents the cases, some of the cases that I
8 read, I'll put it that way. Represents some of the cases
9 and some of my research. Not the sum total of my research.

10 Q Because you could have read cases on the computer and
11 not printed them out or put them in the folder because
12 either they weren't helpful or you just didn't need them,
13 right?

14 A Because I thought that I knew what they were saying and
15 I knew what the law was I did not need to have a hard copy
16 of it.

17 Q Okay. That's fine. Now, the focus of your research
18 about the admissibility of the prior convictions was
19 regarding State verses Lyle, right?

20 A That's what's in here, yeah.

21 Q Okay. And Rule 404(b), of course, right? And Rules
22 608 and 609, which concern impeaching witness through
23 character reference or prior convictions?

24 A That's part of it, yes.

25 Q Well, and that is the focus of your research regarding

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1 the admissibility of prior convictions, right?

2 A That's what's in here.

3 Q Okay. Can you remember any other focus of your
4 research or argument about the admissibility of prior
5 convictions?

6 A Not after 10 years, no.

7 Q Okay, but you do remember focusing on State verses
8 Lyle?

9 A Uh-huh. (Affirmative response.)

10 Q 404(b)?

11 A Yeah.

12 Q That's Rule 608?

13 A That's in here.

14 Q And Rule 609?

15 A Yeah.

16 Q Okay, but you don't necessarily remember there being
17 any other -- about the admissibility of prior convictions,
18 right?

19 A I'll say it this way, I don't necessarily remember what
20 I don't have before me. No, sir.

21 Q All right. And if you had another theory about how to
22 keep out prior convictions from the penalty phase of a
23 capital case, you would argue that theory at pre-trial
24 motions hearing, right?

25 A Yeah, probably would have --

1 Q Okay.

2 A -- if I felt that it was relevant under the
3 circumstances, yes.

4 Q Right. If you felt like it was a legitimate legal
5 theory you would have presented it to the Court?

6 A I'm obligated to.

7 Q Both in writing, probably, capital case, right?

8 A Most likely it would be writing -- sometimes you write
9 and then you build -- if you build your case, you build your
10 case on the record.

11 Q Right. Throughout the pre-trial hearing and throughout
12 the trial, right?

13 A That's not necessarily through writings. That's why
14 you proffer evidence, that's why you put forth evidence.

15 Q Now, after conducting the legal research that you
16 conducted, it was your belief at the time that prior
17 convictions were not admissible in the penalty phase of a
18 capital case, right?

19 A (No response.)

20 Q Wasn't that your argument throughout the trial?

21 A I don't believe -- I really don't know. Like I said, I
22 really don't. I know what I did during the trial. I mean,
23 but for 10, 12 years later to come and say I did this and I
24 did that, that's kind of a stretch.

25 Q All right. Well, let me show you the transcript, this

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1 is Volume 4, if you could turn to Page 1606.

2 A Okay. 1606?

3 Q That's right. 1606. This is the pre-trial hearing
4 occurring on October 14, 1999.

5 A Okay.

6 Q All right. If you could look at the bottom of Line 15.
7 That's you talking and you're talking about the prior
8 convictions of Mr. Stokes, and you say, they're allowed to
9 come out in the penalty phase, but they are also
10 restrictions if you're talking about 608 -- 608 is
11 character, 609 is prior bad acts and victims of the accused.
12 Then you go on to say, and when you talk about that in terms
13 of length of time, I also raise that question, too. That
14 prior bad act or prior statement in terms of the conviction
15 of my client -- and then continuing on Page 1607 -- there's
16 an issue that's been coming up in my mind, Your Honor, he
17 was convicted in '87 or '91, somewhere in there of certain
18 crimes. The question there is whether or not those crimes,
19 when he was convicted back at that time, whether or not they
20 were felonies. And that was a part of your argument?

21 A Right. Uh-huh. (Affirmative response.)

22 Q And the reason you were making -- raising a concern
23 about whether or not his prior conviction was a felony or
24 not, was because you were focused on Rule 609, which regards
25 the permissibility of impeaching a witness with a prior

1 felony conviction, right?

2 A In terms of the length of time, I believe this had to
3 do with the length of time. Any conviction that's over 10
4 years old, after a certain period of time is not permissible
5 to be used. There are restrictions.

6 Q Okay.

7 A And also whether or not those cases are felonies, that
8 was another issue, also. So the length of time that it
9 would be used -- that you could use a case or use a prior
10 conviction, I should say.

11 Q All right. Right now, at least what we're read so far
12 is focused on Rule 608 and Rule 609, right?

13 A Yes.

14 Q And if you could look, you continue on in Line 7, and
15 you discuss the issue of Lyle and its applicability to prior
16 convictions and their admissions at the penalty phase of a
17 capital case, right?

18 A Uh-huh. (Affirmative response.)

19 Q Okay. Right?

20 A Yeah.

21 Q So your argument at this point was Rule 608,
22 Rule 609, and Lyle and 404(b), is that right?

23 A 403(b).

24 Q 403(b). Do you think you probably meant 404(b)?

25 A Probably.

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1 Q Okay. If you would turn to Page 1636, this is a
2 continuation about October 14, 1999, hearing -- oh, wait,
3 let me back up for a second. At the bottom of 1607, just --
4 the Court asked you whether or not you were referring to
5 evidence in the guilt phase or the sentencing phase?

6 A What line?

7 Q Line 24.

8 A Yeah. It says penalty phase. And I say, yes, sir.

9 Q And you say yes. So we're talking, at this point,
10 about the admissibility of prior convictions at the
11 sentencing phase, right?

12 A Yeah.

13 Q Okay. And then it -- Page 1636, at line -- at the end
14 of Line 7, you raise the issue of your name possibly
15 appearing on the 1991 indictment, right?

16 A Yes.

17 Q All right. And that begins a discussion when you,
18 again, at Line 18, you begin to discuss your concern about
19 whether or not that conviction was a felony when the crime
20 occurred, at Lines 18 through 20?

21 A Yeah, because at that time we had misdemeanors that
22 were unclassified that a person could get up to 10 years in
23 jail and there was no codification of certain kinds of
24 crimes, they were common law, in that you could get up to 10
25 years.

1 Q Right. And if it was not a felony, then it wouldn't be
2 permissible to use it under Rule 609, right? That's where
3 the argument was going, right?

4 A Yeah.

5 Q Okay. And then on 1637, you go on at Lines 14 through
6 20 to set that argument out more specifically, right?

7 A I did use 609, yeah.

8 Q And Lyle, right, at Line 17?

9 A Yeah, sure.

10 Q So a large focus of your work prior to trial was on
11 these evidentiary issues regarding prior convictions?

12 A A large part of the -- it was on a lot of things, but
13 when the trial began, the trial -- I always say a trial has
14 a life of its own. And as the trial began to move into
15 different areas, you begin to focus on those areas and try
16 to anticipate where the prosecutor is going. As you recall,
17 you just said yourself, I was trying to stay where I thought
18 he was going. So you may have other issues, but when you
19 begin in a trial, and you begin to try to defend or move --
20 you begin to move according to the way the trial is going.

21 Q Right. Well, of course. You've got to be able to
22 adapt?

23 A Yes.

24 Q Like all trial lawyers. And at the time of the trial
25 was it your understanding, and subsequently, was it your

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1 understanding that character evidence could not be used in
2 the penalty phase, right?

3 A I'm trying to think what my thinking was at that time.
4 I'm trying to --

5 Q If you'd just take a look at Page 1089, beginning at
6 Line 5, and see if that refreshes your recollection.

7 THE COURT: What page?

8 MR. LOMINACK: 1089.

9 A Beginning at Line 6, he has it highlighted.

10 BY MR. LOMINACK:

11 Q I think that's probably Mr. Savitz highlighting --

12 A Okay. That was one of the things I said, yeah.

13 Q Okay. So -- and I'm not giving you a hard time. You
14 did a lot of research. Do you recall whether you filed a
15 pre-trial, a written pre-trial motion regarding prior
16 convictions?

17 A We argued them. No. I don't recall if I did or not.
18 And I'd have to see if --

19 Q Let me show you that and see if you can identify that?

20 A That's my signature, yes.

21 Q So in addition to conducting pre-trial research you
22 even filed a motion and you don't do that for every issue,
23 right?

24 A No.

25 Q And you did you'd file 150 motions, right?

1 THE COURT: Instead of just showing it to the
2 witness why don't you tell him what it is. What is it?

3 MR. LOMINACK: Motion to prevent us or prior bad
4 acts.

5 THE COURT: Okay.

6 A I have filed 50 or more.

7 BY MR. LOMINACK:

8 Q And so in addition to the pre-trial research and the
9 written motion you argued this issue a couple times in the
10 same pre-trial hearing, trying to get the judge to not admit
11 any prior convictions because of Rule 404(b) Lyles?

12 A Yeah.

13 Q And then continued on, even in the penalty phase at
14 Page 1089, arguing that the judge should allow the state to
15 try to introduce character evidence, right?

16 A Yes.

17 Q Okay. And that's all. That's all I was getting at.

18 A Okay.

19 Q And you weren't doing -- I mean, defense attorneys have
20 to raise lots of issues and they come in categories. Issues
21 you feel like you've got to raise to preserve them, and
22 issues you raise because you're right and you're going to
23 win on that issue. This issue was one that you felt like
24 you were right on and this evidence wasn't coming in, right?

25 A The judge refused on all occasions to allow that kind

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1 evidence to come -- to follow my position.

2 Q Right, but before the judge ruled on that you put this
3 in the category of the types of things you think you're
4 going to win. You did not think that evidence of prior
5 convictions was going to come in?

6 A No. Yeah, I did not think. I was trying to keep it
7 out as much as possible, as much as I possibly could.

8 Q And you thought it was going to stay out?

9 A I hoped so.

10 Q And you thought so?

11 A Yes.

12 THE COURT: Lawyers are always hopeful.

13 BY MR. LOMINACK:

14 Q And in a couple instances you talked about just the
15 jury knowing about -- knowing that someone was convicted
16 verses the jury hearing the underlying facts of that
17 conviction. Do you recall any of that?

18 A I probably would have argued it. That's a good
19 argument. I'll write that down, if I didn't.

20 Q I think you did. And you didn't think the prior
21 convictions were coming out and you certainly didn't think
22 that the judge was going to allow a victim from a prior
23 crime to walk into the courtroom and testify about those
24 facts that were unrelated to this case, right?

25 A I guess you could probably say that.

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1 Q Now, this has been touched on. You signed the 1991
2 indictment of Mr. Stokes.

3 A Uh-huh. (Affirmative response.)

4 Q Can you identify that document?

5 A That's my signature.

6 Q And that's the indictment, the 1991 indictment?

7 A Uh-huh. (Affirmative response.)

8 Q For assault and battery with intent to kill?

9 A Yeah.

10 MR. LOMINACK: Your Honor, we'd move to admit this
11 as Applicant's Exhibit No. 4, I think without objection?

12 MR. ZELENKA: No objection.

13 (Plaintiff's Exhibit No. 4,
14 indictment, was marked and entered.)

15 BY MR. LOMINACK:

16 Q All right. I think you already said this, but you
17 signed the indictment, you obviously prosecuted the case,
18 right?

19 A Yeah.

20 Q And you were the only prosecutor representing the state
21 on that case, at least in the courtroom?

22 A I believe I was, yeah.

23 Q So you conducted the opening and --

24 A Yeah.

25 Q And the victim in that case was Audrey Smith?

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1 A Yeah.

2 Q And that was the first witness in the penalty phase of
3 this capital trial?

4 A Yeah.

5 Q Now, when you -- on direct when you're discussing your
6 conversations with Mr. Stokes about your prior
7 representation, he recognized who you were, right?

8 A Of course.

9 Q And you made sure he knew that you were the one who
10 prosecuted him?

11 A In our conversations we talked about that and we
12 discussed that, yes.

13 Q Okay, because you wanted to make sure he knew that you
14 were the same person who put him in prison back in '91 or
15 whenever it was?

16 A I would think that if somebody sent me to jail I would
17 definitely know who they were.

18 Q Okay. And you reminded him to make sure and for you to
19 know that he knew, right?

20 A Yeah. We talked about that indictment, too. We talked
21 about those kinds of things that would come in, that they
22 would try to use. Yes.

23 Q Okay. And other than telling him, making sure that he
24 knew that you were the one that prosecuted him, you also
25 asked him if he still wanted you on the case, right?

1 A I can not sit here and say that I did that. I'm not
2 going to lie about that. I don't recall that.

3 Q But that was pretty much the extent of your
4 conversations with him about your involvement with the
5 capital case and your 1991 prosecution, right?

6 A To the extent; what do you mean?

7 Q That you were the one who prosecuted him in 1991?

8 A Yes.

9 Q And that he went to prison based on that prosecution
10 and that you were now representing him in this case?

11 A Yes.

12 Q If the lawyer were to say I discussed the whole nine
13 yards with my client, that would be the whole nine yards,
14 right?

15 A As far as I'm concerned.

16 Q Okay. And -- you mentioned or Mr. Zelenka asked you
17 about a meeting with Jeff Bloom, and you said you didn't
18 remember meeting with him or talking with him about a
19 perceived conflict of interest. You're not saying that
20 didn't happen, you just don't recall it 10 years later,
21 right?

22 A Yes. That's what I'm saying.

23 Q And you never asked another attorney that was not
24 connected with the case, to meet with Mr. Stokes and discuss
25 the issue of your representation, did you?

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1 A No, I did not.

2 Q And as Mr. Zelenka informed you, there's no record of
3 you informing the Court of your prior representation. Do
4 you disagree with that?

5 A What I said was, that I thought we did somewhere. I
6 could not swear that we did or did not, but I thought that
7 when we went -- I'm trying to remember where the place was.
8 I think we may have met Judge Burch over in Darlington,
9 somewhere. I'm not sure. I cannot say definitively that
10 there's a record of that.

11 Q You remember what you were meeting with the judge in
12 Darlington about?

13 A We had -- now that you mention it, and whether or not
14 that was the second case, we were getting ready for the
15 second case, because there were two cases that we were
16 involved in, and I was trying to determine whether, in my
17 mind, I'm trying to say whether that was the second case we
18 were involved in or whether that was still part of the first
19 case.

20 Q And so it's quite possible that that happened after the
21 first case, right?

22 A It's quite possible, yes.

23 Q And throughout the trial anytime Mr. Stokes was being
24 asked to waive a right, whether it was to testify or to give
25 closing argument in the guilt phase, that was done on the

1 record?

2 A Yeah.

3 Q The Court would make sure that that was on the record?

4 A Yeah, sure.

5 Q And there were a couple of times where you had bench
6 conferences about Mr. Stokes waiving something and a couple
7 of times Mr. Bailey made sure to put that on the record,
8 that Mr. Stokes was waiving?

9 A Yes.

10 Q So an issue as serious as a potential conflict, you
11 would have expected the judge knew about it, he would have
12 made sure that was on the record at some point, whether it
13 was when you first told him or later, right?

14 A I can't speak for the judge.

15 Q Would it surprise you for -- would it surprise you that
16 the judge would put all the things on the record that Judge
17 Burch did during the trial, but leave that out?

18 A I -- like I said, I don't know, and I'm not sitting
19 here saying that we did on the record. What I said was I
20 thought we did. And I can't remember where it was or if it
21 happened.

22 Q Or it could have just happened after this trial --

23 A Yeah.

24 Q -- or before the Ferguson matter was taken up?

25 MR. LOMINACK: Court's indulgence.

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1 THE COURT: Sure.

2 MR. LOMINACK: Nothing else, Your Honor.

3 Thank you, Mr. Sims.

4 MR. SIMS: Sure.

5 THE COURT: Anything on redirect?

6 MR. ZELENKA: I have a few questions, Your Honor.

7 THOMAS SIMS - REDIRECT EXAMINATION

8 BY MR. ZELENKA:

9 Q Mr. Sims, did you anticipate that Audrey Smith would
10 testify in the penalty phase of the case?

11 A I believe I did. I believe I explained that. When we
12 would have our meeting -- yeah, that was going to be one of
13 the things that we got in, that they were going to use.

14 Q And it is reflected in the October hearing that you
15 expressed a concern to the Court that your name likely
16 appeared on the indictment. You were trying to make sure
17 that that didn't go before the jury; isn't that correct?

18 A That's correct.

19 Q So, at least at that time, there would have been an
20 understanding that you likely had prosecuted the defendant
21 to Judge Burch's knowledge --

22 A Yes.

23 Q -- and not the state's knowledge because he said they
24 weren't going to put that in. Is that not correct?

25 MR. LOMINACK: Objection to leading.

1 THE COURT: It's leading. Answer the question,
2 anyway.

3 A Well, basically it came to the judge's attention that I
4 had signed that indictment, had been involved in the
5 prosecution of Mr. Stokes before, and I wanted to be sure
6 that there not a slip-up with my name going back to the jury
7 as the one who had signed that indictment.

8 BY MR. ZELENKA:

9 Q Now, with respect to your discussions with Mr. Stokes.
10 I just want to be clear on what was said because I'm sensing
11 that there's a little conflict in some of your testimony.

12 A Okay.

13 Q What exactly did you tell him his options were as far
14 as representation, who could represent him?

15 A Let me put it this way, he knew that I had been the
16 prosecutor. He knew that I had been the one to prosecute
17 him, and, of course, my practice would have been to say,
18 look, you have any problems with that? And, of course,
19 after the trial he had no problem with it because he wanted
20 me to go back and represent him again if the matter had been
21 -- if the appeal had been upheld. So Sammie had -- Mr.
22 Stokes, I'm sorry. I keep calling you Sammie. Mr. Stokes
23 knew quite well if he had a problem with it all he had to do
24 was to voice a problem, because during the course of our
25 conversations I said, now, look, if you've got a problem

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1 with this let me know. And during the trial, when that
2 issue came up -- we talked about that indictment, too.

3 Q Okay. And Virgin Johnson was present during your
4 discussions with him about that?

5 A Yes.

6 Q Okay. Now, with respect to legal research, this wasn't
7 the first capital case you were involved in was it?

8 A No, it was not.

9 Q And as a prosecutor of capital cases, did you have
10 planned and anticipated putting in evidence concerning prior
11 bad acts in penalty phase of cases that you were involved in
12 prosecuting?

13 A Sure, because, as I said, one of the things that I felt
14 was an advantage having been a prosecutor, I could think
15 like the prosecutor and try to anticipate some things.

16 Q And when Mr. Bailey gave you his Notice of Evidence in
17 Aggravation, and potential witness list you had an
18 understanding that that was something they were going to try
19 to present; is that not correct?

20 A Yes.

21 Q Facts and circumstances concerning disciplinary --
22 facts and circumstances concerning the other crimes he'd
23 been convicted of in addition to the Audrey Smith material;
24 isn't that correct?

25 A Yes.

1 Q And you'd had that knowledge at the time you had the
2 discussion with Mr. Stokes; isn't that also correct?

3 A That's correct.

4 MR. ZELENKA: No further questions at this time.

5 THE COURT: All right. Anything further?

6 MR. LOMINACK: Yes, Your Honor. I have additional
7 questions.

8 THOMAS SIMS - RECROSS EXAMINATION

9 BY MR. LOMINACK:

10 Q If you could turn to Page 1636, again.

11 A Okay.

12 Q Now, Mr. Zelenka just asked you a couple of questions
13 about the indictment and the judge being aware of your prior
14 prosecution.

15 A 16 --

16 Q 1636.

17 A Okay.

18 Q And at Line 7, you say, I don't know if my name appears
19 on the indictment, and then at Line 11 you go on to say, at
20 that time when I was prosecuting, I would sign all of the
21 indictments. So I wanted to make sure that was cleared up
22 and not on the indictment that he may be proposing to
23 introduce.

24 A Yes.

25 Q You just didn't want the jury to see his attorney's

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1 name on the prosecution document?

2 A That's very true.

3 Q And the judge said, you don't have any problem other
4 than that, and then you go into your argument about 608 or
5 609, but the judge had no knowledge, at least based on this
6 question that you had personally prosecuted that case rather
7 than just conducted the ministerial task of signing the
8 indictment?

9 THE COURT: You're talking about Judge Burch?

10 MR. LOMINACK: Judge Burch.

11 THE COURT: And not Judge Shuler?

12 MR. LOMINACK: Right. That's right. The trial
13 judge.

14 A Based upon that, that was the extent that was on the
15 record out there in the courtroom, yes.

16 BY MR. LOMINACK:

17 Q Okay. Now, Mr. Zelenka asked you a couple of questions
18 because he sensed there was a conflict in what you had said,
19 before this trial you did not believe that prior convictions
20 and character evidence about a defendant was admissible in
21 the penalty phase of a capital case, right?

22 A And I argued against -- my whole -- I argued --

23 Q Well, putting aside you argued, you believed that was
24 inadmissible evidence, right?

25 A Based upon this information that I had and what I

1 researched and what I did I felt that we could probably try
2 to keep it out. I did not say that all character and all
3 prior bad acts was inadmissible. I said based upon what I
4 had here. You didn't think that the prior conviction
5 involving Audrey Smith was coming into evidence, right?

6 A What I just read a few moments ago, I thought it was
7 '87 and '86, which would have been beyond the 10 year limit.

8 Q Okay, so in other words, because of the date of the
9 Audrey Smith conviction, the one that you prosecuted, you
10 believed it was not going to be admissible, right?

11 A And we talked -- you just read a few moments ago where
12 we read the rule. Also, the question of whether or not it
13 was a felony in '86, because the state of South Carolina had
14 not codified a lot of the old common law laws, and even for
15 a common law small crime, I think you could get up to 10
16 years. Grand larceny may have been one of those areas.
17 There were some other cases that were within the purview
18 that was not codified as a felony, but rather, you could get
19 up to 10 years for it.

20 Q All right. And the nice thing about Rule 609, right,
21 is it's pretty specific. It's 10 years felony. There's not
22 as much discretion involved in applying Rule 609 as maybe
23 some other rules, right?

24 A I would have to go back and start reading 609 again.
It's been a while, and I haven't had that issue to come up

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1 in a trial lately. So I can't say. I won't use your
2 terminology, but I know at the time I did this the issues,
3 that are in here, the ones that I was focusing on.

4 Q Okay, and because of your research and your reading of
5 Rule 609, the fact that the Audrey Smith conviction that you
6 prosecuted were not coming into evidence, right?

7 A I was trying to prevent them from coming into evidence.

8 Q And you did not think they would?

9 A I did not -- I wanted to keep them out.

10 Q Okay. And you would have told -- any time you're
11 talking with your client, you tell them what you think is
12 going to happen, based on your research and your experience,
13 and you would have told Mr. Stokes that based on your
14 research you were going to be able to keep that evidence
15 out, right?

16 A I probably -- what I tell a lot of my defendants is
17 that I'm going to make the argument, I'm going to try my
18 best to keep it out, but I don't wear the black robe.

19 Q But all attorneys have to give their -- what they
20 expect to happen without any certainty, a 100 percent
21 certainty, you're not making guarantees, but you would have
22 told Mr. Stokes your opinion, which is this prior conviction
23 is not going to be admitted in the penalty phase, right?

24 A I probably would not have said I don't think it's going
25 to be admitted. I probably would have told him that most

1 judges in this state are not -- in a case like this, and
2 this is my honest opinion, are not going to stand up and
3 make that kind of call. They're going to let an appellate
4 court do it.

5 Q All right.

6 MR. LOMINACK: Your Honor, I'd ask for permission
7 to unseal Mr. Sims deposition from April 2003?

8 THE COURT: Fine with me. I've got it here.

9 BY MR. LOMINACK:

10 Q Let me hand you up the original --

11 A Okay.

12 Q -- of your deposition, April 2003. If you will turn to
13 Page 33, Line 10 or Line 14. I'm asking you about prior bad
14 acts and prior convictions and I say: What was your
15 understanding, what chance did you think you had of getting
16 that excluded under Lyle? And your answer was that it was
17 no something you raised as a matter of course, but something
18 you raised because you feel it is an issue that needs to be
19 addressed and hopefully in light of the circumstances of his
20 prior record and how you go through the process in Lyle, and
21 in terms of the relevancy and those kinds of things. You go
22 on to say at the top of Page 34: I didn't think this was the
23 type of thing that -- the prior conduct and the prior bad
24 act that would come into this kind of thing. You were
25 saying that you did not think that prior bad acts would be

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1 admitted to this trial?

2 A Yes, but that's not what you asked me a few moments
3 ago. You asked me how I would deal in terms of telling my
4 client that, and my -- and what I said to you a few moments
5 ago was that I would have -- that was my felling, but I
6 would have said to my client just what I told you a few
7 moments ago. That I think that this is an issue that we can
8 probably keep out, but I don't think that there's a judge in
9 the state under these circumstances, who will not -- who
10 will do that. That's what I said, not in regards to this
11 question here, the way this question was asked, but the way
12 you asked the question a few moments ago.

13 Q But you told him that you didn't think that this would
14 be admissible?

15 A Yeah.

16 Q Right?

17 A Uh-huh. (Affirmative response.) That's right.

18 Q And so you certainly wouldn't have discussed with him
19 the possibility of you cross-examining the witness that you
20 didn't think was going to be able to testify, right; we're
21 talking about Audrey Smith?

22 A I don't know. I can't say that I did or did or did
23 not.

24 Q You don't have any recollection about talking to Mr.
25 Stokes about Audrey Smith taking the witness stand and you

1 cross-examining her?

2 A No, I don't.

3 Q And you've conducted -- let's be clear, Mr. Johnson was
4 your co-counsel, but he didn't do an opening, a closing, a
5 direct or a cross throughout the trial, right?

6 A No.

7 Q You did every single thing?

8 A Yeah.

9 Q All right. And so you couldn't have talked to Mr.
10 Stokes about the details of your cross-examination because
11 you didn't think she was going to testify, right?

12 A I would have talked to him about the letters and
13 everything else that was part of the discovery, and you
14 share your discovery with your client. You sit there and
15 you go through it with them.

16 Q Sure.

17 A Okay.

18 Q But you wouldn't have told him that Audrey Smith was
19 going to testify and you were going to cross-examine her,
20 because you did not think she was going to testify, right?

21 A I have no recollection that I either did or did not.

22 Q But you do recall reminding him that you were the
23 prosecutor from 1991, right?

24 A Yeah.

25 Q And do you recall that today?

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1 A I believe I did. I would have -- that would have
2 definitely been something I would have done.

3 Q Okay.

4 MR. LOMINACK: No further questions.

5 THE COURT: Anything further, Mr. Zelenka?

6 MR. ZELENKA: Yes.

7 THOMAS SIMS - FURTHER REDIRECT - EXAMINATION

8 BY MR. ZELENKA:

9 Q Mr. Sims, you knew that Audrey Smith was on the
10 solicitor's witness list, didn't you?

11 A Yeah.

12 Q And you knew that an individual on the witness list was
13 likely to be shown by the state to be a witness in the case,
14 correct?

15 A Yeah.

16 Q And you anticipated that, didn't you?

17 MR. LOMINACK: Objection to the leading, Your
18 Honor.

19 THE COURT: What --

20 MR. LOMINACK: I'm sorry, Your Honor.

21 THE COURT: You know, we don't have a jury to sway.
22 I mean, Your Objection is noted. Mr. Zelenka can rephrase
23 the question.

24 MR. ZELENKA: Fine.

25 BY MR. ZELENKA:

1 Q Did you think that the judge would or would not allow
2 the admission of testimony from Audrey Smith concerning the
3 incident with your client?

4 A I fought to keep it out, but as I just told him, and
5 I'll say it again, and I've been practicing law for 30
6 years. I've been a prosecutor, I'm been defense counsel,
7 and I have yet to see a judge take the stand and bite the
8 bullet without saying I'm going to let appellate court deal
9 with it.

10 Q So as I understand your question, you anticipated he
11 was going to let the information in?

12 A Yeah.

13 Q Okay, and you had that understanding, as you say, based
14 upon your practice --

15 A Yes.

16 Q -- throughout your representation of your client; is
17 that correct?

18 A Yes.

19 Q And also referring to Page 1636, Mr. Bailey told the
20 judge that he thought your name was on the indictment; isn't
21 that correct?

22 A I believe so.

23 Q And that's at Line -- 1636, Line 9 through 10, right?

24 A Yeah, it may be. I think it does.

25 Q And you said when you were prosecuting you put your

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1 name on all indictments, right?

2 A Well, at that time, there was nobody else there,
3 really, who was doing any work.

4 MR. ZELENKA: Nothing further.

5 THE COURT: Anything further, Mr. Lominack?

6 MR. LOMINACK: No, Your Honor.

7 THE COURT: Mr. Sims, you may step down.

8 MR. SIMS: Thank you.

9 THE COURT: Any other witnesses; Mr. Johnson?

10 MR. ZELENKA: That would be correct.

11 THE COURT: As I recall, Mr. Johnson was once an
12 investigator for the solicitor's office?

13 MR. SIMS: He was once an investigator at Hampton.

14 THE COURT: Oh, that's right.

15 MR. SIMS: At Hampton. Not here.

16 THE COURT: Not here.

17 MR. SIMS: Not here.

18 THE COURT: For Mr. Murdaugh.

19 MR. SIMS: Yes.

20 THE COURT: I remember that.

21 We have one more witness?

22 MR. ZELENKA: Yes, Your Honor.

23 THE COURT: All right. We'll take a short break.

24 MR. SIMS: May I be excused.

25 THE COURT: Sure. You don't want to stay do you?

1 MR. SIMS: No.

2 MR. ZELENKA: I have no objection.

3 THE COURT: All right.

4 (Court in recess for short break.)

5 (Court in session after break.)

6 THE COURT: Mr. Johnson, if you'll come around,
7 place your right hand on the Bible for me.

8 (WHEREUPON, Virgin Johnson, was
9 sworn to tell the truth.)

10 THE COURT: Please take a seat, tell us your full
11 name, and spell your last name for the record.

12 MR. JOHNSON: Virgin, V-I-r-g-I-n, Johnson, J-o-h-
13 n-s-o-n, Junior.

14 VIRGIN JOHNSON - DIRECT EXAMINATION

15 BY MR. ZELENKA:

16 Q Mr. Johnson, how long have you been practicing law?

17 A Since 1988.

18 Q 1988?

19 A Yes, sir.

20 Q As part of your practice have you handled major felony
21 cases?

22 A Yes, sir.

23 Q Prior to your appointment in Mr. Stokes case in 1999,
24 briefly describe your background at that time?

25 A Okay. Well, I started practicing law in the 14th

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1 Judicial Circuit. I went to law school -- I started working
2 with the solicitor's office before I was an attorney
3 practicing law, and in the 14th Judicial Circuit, it is kind
4 of like, you get a deal or you try the case. So I did a lot
5 of trial work down there. I tried kidnappings, burglary, I
6 mean, you name it. I've tried it.

7 Q Okay. At some time you entered private practice?

8 A Yes, sir.

9 Q Okay. As part of your private practice were you
10 appointed to represent Sammie Stokes?

11 A Yes, I was.

12 Q On these charges?

13 A Yes, sir.

14 Q And Mr. Sims, who has already testified, was your co-
15 counsel on the case?

16 A Yes, sir. Well, when we started out, I was the first
17 chair, but after Thomas was appointed it was decided I would
18 be the second chair because Thomas had the experience. That
19 was my first death penalty case.

20 Q And at some point in time did you become aware that
21 Thomas Sims had actually prosecuted Sammie Stokes?

22 A Yes, I did.

23 Q Were you aware at all of any discussions that occurred
24 between Mr. Stokes and yourself and/or Mr. Sims concerning
25 potential conflict of interest issues?

1 A How many times, we -- yes, we discussed it with Sammie.
2 How many times we discussed it, I don't know. But I know we
3 discussed it at the beginning. I didn't discuss it with
4 Sammie separate, but Thomas and I sat down with Sammie and
5 discussed it. Yes.

6 Q Okay. Briefly, describe the recollections of those
7 discussions?

8 A Only thing I can remember is, you know, Thomas said,
9 you know, I think -- I think the way Thomas said it was, you
10 know I put you in jail or I prosecuted you and Sammie said
11 yes. And it went through the questions of do you have a
12 problem with me representing you, do you think -- you know,
13 do you want somebody else, and he said no.

14 Q Okay. And did he seem to express that same opinion
15 throughout your representation or did he ever request other
16 counsel be appointed in the case because of that?

17 A No. Now, it's my understanding from my relationship
18 and Sammie and Thomas it was good through both trials. We
19 had the first death penalty where he got convicted and the
20 second part he got life. So we had a great relationship
21 through the whole process. And even after Sammie was on
22 appeal, if I remember correctly, he asked if he got -- if
23 somehow it was overturned and we had to try it again, he
24 wanted Thomas. I know he wanted Thomas back.

25 Q Okay. Now, back to your representation, if you recall

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1 Audrey Smith testifying in the penalty phase, Mr. Stokes,
2 ex-wife --

3 A Yes, sir.

4 Q -- concerning the prior assaults that he had been
5 convicted of, one that Thomas had actually prosecuted; do
6 you recall that?

7 A Yes, sir, I remember her testimony.

8 Q All right. Were you aware of the state's intent to
9 present that testimony during your representation before it
10 was presented?

11 A I don't remember if we became aware earlier or just
12 before, but I guess she testified, so I became aware at some
13 time, but I don't remember at what point in time I became
14 aware.

15 Q Okay. Do you recall any specific discussions, if at
16 all, that Thomas may have had concerning the potential that
17 that information, that evidence of that prior conviction of
18 assault and battery of a high and aggravated nature could
19 possibly be presented at the penalty phase of the trial?

20 A I mean, yes. I mean, we had to tell him all possible
21 information that could possibly be presented. Yes.

22 Q And he did not then request, as you recall, to have
23 Thomas removed as his counsel?

24 A No.

25 Q If at any time during the representation did you sense

1 that Mr. Sims was hesitating to act on his client's behalf
2 based upon that prior conviction?

3 A No.

4 MR. LOMINACK: Objecting to that sensing and the
5 speculation that obviously requires.

6 THE COURT: He heard and he saw, he was there. I'm
7 going to allow that question over your objection. He saw
8 it, he heard it. I think he can give an opinion about that.
9 Give him a chance to cross him.

10 Go ahead.

11 A Thomas did his very best. I didn't think it played --
12 had any affect on him at all. And since we talked about him
13 prosecuting him, no. No.

14 MR. ZELENKA: I have no further questions.

15 MR. LOMINACK: Just briefly, Your Honor.

16 VIRGIN JOHNSON - CROSS-EXAMINATION

17 BY MR. LOMINACK:

18 Q Mr. Johnson, so you recall Mr. Sims reminding Mr.
19 Stokes that he was the one that prosecuted him --

20 A Yes.

21 Q -- in 1991, right?

22 A Yes, sir.

23 Q And he said something like, I'm the one that put you in
24 jail, remember?

25 A I think those were his words.

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1 Q And did he have a problem with that?

2 A Did he have a problem with that, I understand?

3 Q Then he said to Mr. Stokes, do you have a problem with
4 me representing you now?

5 A Yeah. But that wasn't -- That was said, but then we
6 discussed the fact of him going to trial and it could be
7 prejudice. I mean, you know, did he have a problem. Yes,
8 he said that, but he said more. This has been 10 years ago.
9 I can't remember every word.

10 Q Sure. And when you were talking about Mr. Zelenka
11 asking you about the Audrey Smith testimony, what you said
12 was you discussed all of the evidence that may come out in
13 the case. I mean, when you're going over discovery, right,
14 when you're talking well, this witness may testify to this,
15 they may bring your statement in through this officer, and
16 you prepare the client for what's going to come out in
17 trial, right?

18 A Yes, sir.

19 Q And that's what you were talking about --

20 A That's what I was talking about.

21 Q -- about Audrey Smith?

22 A Yes.

23 Q Okay. Just the usual expectations of witnesses and
24 things --

25 A Yes.

1 Q -- like that that you prepare a client for?

2 A Yes.

3 MR. LOMINACK: Court's indulgence?

4 THE COURT: Yes, sir.

5 MR. LOMINACK: Nothing further, Your Honor.

6 THE COURT: Anything further, Mr. Zelenka?

7 MR. ZELENKA: I just have one area. It's not
8 directly responsive, but --

9 VIRGIN JOHNSON - REDIRECT EXAMINATION

10 BY MR. ZELENKA:

11 Q Do you recall any personal meeting that you had with
12 Mr. Sims and Jeff Bloom?

13 A No, but Thomas met with Donna and Jeff. You know Jeff
14 was kind of like the resident expert, so if Thomas had a
15 question he would call, but I did not personally met with
16 Jeff, I don't think.

17 Q When you say Donna you mean Donna --

18 A Donna --

19 Q -- Schwartz-Watts?

20 A -- right.

21 Q That you-all had retained as a mental health expert?

22 A Right.

23 Q Okay.

24 MR. ZELENKA: No further questions.

25 MR. LOMINACK: Court's indigence?

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1 THE COURT: Yeah. Take your time.

2 VIRGIN JOHNSON - RE-CROSS - EXAMINATION

3 BY MR. LOMINACK:

4 Q If you can -- and I know it's been a long time. If you
5 can can you just tell the Court everything that you
6 specifically recall Mr. Sims discussing his prior
7 representation and his current representation at the capital
8 trial?

9 A And no more than I said just now. I think that's about
10 all I can tell you. I can't remember word for word.

11 Q Okay, but you remember that?

12 A I remember that. I remember that.

13 MR. LOMINACK: Nothing further.

14 THE COURT: All right. You may step down, Mr.
15 Johnson.

16 MR. JOHNSON: Thank you. Your Honor, may I be
17 excused, also?

18 THE COURT: All right. You may be excused.

19 MR. JOHNSON: Thank you, sir.

20 MR. ZELENKA: No further witnesses.

21 THE COURT: All right. Anything further?

22 MR. LOMINACK: Nothing further, Your Honor.

23 THE COURT: All right. Can I ask y'all two
24 questions. One, was there ever a waiver on the record when
25 Judge Shuler appointed Mr. Sims to represent Mr. Stokes?

1 MR. ZELENKA: Not in the record that we have, Your
2 Honor.

3 THE COURT: There's no waiver on the record that
4 anybody could find. Okay. Now, the only other question,
5 sort of a minor thing that I -- I meant to ask Mr. Bloom,
6 but Mr. Bloom never wrote Mr. Sims a letter telling him he
7 had a conflict or something like that. It was just verbal?

8 MR. LOMINACK: It was just verbal.

9 THE COURT: All right. If I have any other
10 questions I'll let y'all know.

11 Are y'all going to make arguments? I'm going to give
12 you both a chance to submit proposed orders. We'll talk
13 about the times when y'all want to do it, how you want to do
14 it.

15 MR. LOMINACK: Right. That's what I was going to
16 say. We're going to have to --

17 THE COURT: Look, I'll tell you what I'll do. I'll
18 even let you get a transcript of this before it's required.
19 I'll make it as convenient as I can.

20 You want 30 days or 60 days or however much time you
21 want just let me know.

22 MR. LOMINACK: I think our preference would be 60
23 days from receipt of the transcript, I think would probably
24 be a fairly short record and a fairly quick turn around
25 time.

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1 THE COURT: This is what I suggest y'all do, 60
2 days from receipt of the transcript. Y'all exchange with
3 each other first -- ten days between the exchange. Look at
4 it. If you have any objections before you send the final
5 product to me. Let's say 60 days for preliminary proposed
6 order. Y'all exchange, look at it, see what you quibble
7 about the difference in the proposed order, then 10 days
8 after that send them to me. If that fair enough? And if
9 y'all have any objections I want to get them at the same
10 time. So don't send a proposed order and a week later I'm
11 getting I object to this, I object to that. I don't care
12 what you object to, but I want y'all to look at each other's
13 orders first before you sent them to me.

14 MR. LOMINACK: But Your Honor, If I could --

15 THE COURT: Help me out, here.

16 MR. LOMINACK: -- I feel like it's necessary for me
17 to say this because I know there are some things going on in
18 another case right now that -- some arguments are being made
19 that I don't want to have to put myself in the position of
20 having -- made against us down the road, and that is,
21 historically, and certainly from the prospective of a post
22 conviction relief applicant in capital cases in South
23 Carolina, there has been a problem --

24 THE COURT: Well, just send me what you want. Just
25 send me what you want.

1 MR. LOMINACK: I think what we would like to do is
2 submit post-hearing briefs, memoranda, whatever you want to
3 call it.

4 THE COURT: That's good. That's good.

5 MR. LOMINACK: Both of our -- our arguments, and at
6 that point it becomes -- what we want is your findings. We
7 don't want Mr. Zelenka's findings, our findings to become --

8 THE COURT: Well, I'll just make it easy on all of
9 you. I don't care how you do it. Brief, orders, whatever
10 is easiest for you to do. I don't care. So my suggestion
11 is whatever's easiest for you, whatever is easiest for Mr.
12 Zelenka, y'all agree on that and I'll agree. It doesn't
13 matter to me.

14 MR. ZELENKA: I have no problem with that.

15 MR. LOMINACK: Same thing. Do you want them
16 simultaneously or -- well, I don't think there'll be any
17 need to change --

18 THE COURT: So you want to submit briefs first?

19 MR. LOMINACK: Yes.

20 THE COURT: That's fine.

21 MR. LOMINACK: Okay.

22 THE COURT: You know, it's no skin off my back one
23 way or the other.

24 MR. LOMINACK: I understand, I understand. And
25 should we submit them simultaneously?

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1 THE COURT: I would suggest that, yes.

2 MR. LOMINACK: That fine. 60 days --

3 THE COURT: That's fine.

4 MR. LOMINACK: -- from the receipt of the
5 transcript?

6 THE COURT: That's fine.

7 MR. ZELENKA: That's tomorrow, right?

8 THE COURT: My guess is she'll have it ready within
9 10 to 15 days at the latest, right?

10 COURT REPORTER: No, sir. May 30, but not 10 or
11 15.

12 THE COURT: Come on. I'll give you a letter asking
13 you to speed it up. You think 30 days it's going take?

14 COURT REPORTER: I'd like to have at least 30 days.

15 THE COURT: Okay. That's good. That's good.

16 Anything further, gentlemen?

17 MR. LOMINACK: Not from the applicant, Your Honor.

18 MR. ZELENKA: Nothing from the state.

19 THE COURT: Okay. Thank you all for your
20 presentation. I know you've worked very hard on this. I
21 know it's very important to everybody. And that's why I
22 suggested what I suggested. Take your time. It's been a
23 long time that I've had this case that y'all have had this
24 case, and another month or so couldn't make that much
25 difference. So good luck to everybody.

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MR. LOMINACK: Thanks, Judge.

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MR. ZELENKA: Thank you.

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(This proceeding was concluded.)

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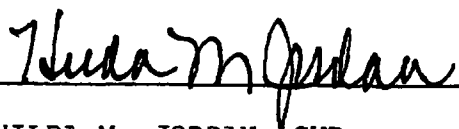
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CERTIFICATE

I, THE UNDERSIGNED HILDA M. JORDAN, CVR, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 19TH DAY OF MARCH, 2009.

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


HILDA M. JORDAN, CVR

COLUMBIA, SOUTH CAROLINA

OCTOBER 23, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 01-CP-38-1240
COUNTY OF ORANGEBURG	)	
	)	
Sammie Louis Stokes,	)	
	)	
<i>Applicant,</i>	)	
	)	
v.	)	
	)	
Jon Ozmint, Commissioner,	)	
South Carolina Dept. of Corrections	)	
<i>Respondent.</i>	)	

**MEMORANDUM CLARIFYING GROUND 9(d), AND
MOTION TO SUPPLEMENT THE RECORD**

I. INTRODUCTION.

In Ground 9(d) of his application for post-conviction relief, applicant, Sammie Louis Stokes, has alleged that his lead counsel labored under a conflict of interest in violation of the Sixth Amendment and state law. At the August 5, 2009, evidentiary hearing Stokes and respondent presented evidence relevant to this claim. Stokes was not among the witnesses who testified. Immediately after the hearing, respondent's counsel, Don Zelenka, remarked that he was surprised Stokes had not been called to testify. Undersigned counsel interpret Mr. Zelenka's remark as an indication that respondent's arguments from this point forward -- most immediately, the arguments likely to appear in its post-hearing briefing -- will feature the absence of testimony from Stokes as a basis for denying post-conviction relief. In the interests of accurately framing the issues to be resolved by this Court and of facilitating more focused and useful post-hearing briefing, Stokes submits this memorandum to clarify the legal bases under which he is entitled to relief on the

existing record.¹ Additionally, and without waiving his contention that relief is required on the evidence presented at the August 5 hearing, Stokes respectfully requests that the Court authorize expansion of the record to include the attached affidavit containing his direct testimony as it relates to trial counsel's conflict.²

As discussed below, the legal issues raised by Ground 9(d) are simply (a) whether trial counsel labored under an actual conflict of interest, and if so, (b) whether Stokes was supplied with the information necessary to validly waive his right to conflict-free counsel. The record developed at the evidentiary hearing is sufficient to establish both that trial counsel had an actual conflict of interest, and that Stokes could not possibly have waived his right to counsel unencumbered by conflict. Stokes' attached affidavit merely reinforces the latter point by corroborating what his trial counsel have already acknowledged: that Stokes was never advised of the specific conflict arising out of counsel's successive service as prosecutor and defense counsel, of the ways in which that conflict could manifest itself at the 1999 trial, of the adverse effects that could flow from the conflict, or of his right to insist upon representation by (or at least consultation with) non-conflicted counsel.

¹This memorandum is not intended to serve as Stokes' post-hearing brief, which will be submitted in accordance with the schedule agreed upon prior to the conclusion of the August 5, 2009 hearing.

²Stokes recognizes the possibility that respondent will wish to cross-examine him concerning the contents of his affidavit. Should respondent make such a request, Stokes would not be opposed to the establishment of some procedure to accommodate it, *e.g.*, re-opening of the evidentiary hearing for that limited purpose, supplementation of the record with Stokes deposition testimony, etc.

II. LEAD TRIAL COUNSEL'S CONFLICT OF INTEREST.³

Prior to his appointment as Stokes' defense attorney, Sims was an assistant solicitor. In 1991, he indicted and personally prosecuted Stokes for Assault and Battery with Intent to Kill in connection with an incident involving Stokes' former wife, Audrey Smith. A jury convicted Stokes of Assault of a High and Aggravated Nature and he was sentenced to ten years in prison. Seven years later Sims accepted appointment to represent Stokes in his capital trial.

From the time of his appointment through the end of trial, Sims never disclosed his prior prosecution of his client to either the judge who appointed him or the judge who presided over the trial. Jeff Bloom, an experienced criminal defense attorney whom Sims consulted for assistance with jury selection, learned of the conflict and advised Sims to reveal it to the trial court. Sims never followed this advice, and the trial court remained unaware of Sims' conflict.

According to the evidentiary hearing testimony of both Sims and his co-counsel, Virgin Johnson, Sims never advised Stokes of the potential consequences of this conflict of interest. While Sims and Johnson recalled reminding Stokes that Sims had prosecuted him, no one apprised Stokes of the distinct possibility that Sims would be required to confront and cross-examine Audrey Smith – the victim and star witness in the 1991 trial at which Sims argued for and obtained a conviction against Stokes. As it happened, the prosecution's first aggravation witness at the penalty phase of Stokes' 1999 capital trial was none other than Audrey Smith, who took the stand and recounted the story previously elicited from her by then-Assistant Solicitor Sims at the 1991 ABWIK trial.

³For the limited purpose of this memorandum, Stokes will only briefly summarize the facts of trial counsel's conflict. A more thorough and detailed discussion will be set forth in Stokes' post-hearing brief.

A. Legal standards governing conflict of interest claims.

To prevail on a conflict of interest claim, a prisoner must ordinarily establish that an “actual conflict” “adversely affected his counsel’s performance.” *Mickens v. Taylor*, 535 U.S. 162, 174 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). “[G]overnment employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper.” *United States v. Zeigenhagen*, 890 F.2d 937, 940 (7th Cir. 1989) (citations omitted); see also *Skelton v. State*, 672 P.2d 671 (Okla.Cr.App. 1983) (“such a situation creates a pervasive atmosphere of impropriety which cannot be waived”); *Worthen v. State*, 715 P.2d 81 (Okla.Cr.App. 1986) (similar). Such successive representation creates “the possibility that the attorney might be subject to subtle influences which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner.” *People v. Kester*, 361 N.E.2d 569, 572 (Ill. 1977). Because of this danger, some courts consider successive representation of prosecution then defendant a *per se* violation of the Sixth Amendment even when counsel’s connections are attenuated by the passage of time, see *Zeigenhagen*, 890 F.3d at 940 (counsel’s appearance for prosecution at defendant’s sentencing hearing precluded representation of defendant by same counsel twenty years later), and even in the absence of any showing of adverse effect,⁴ see *id.* at 941; *Worthen*, *supra*; *Skelton*, *supra*; *People v. Martin*, 564 N.Y.S.2d 503, 506 (N.Y.App.Div. 1990); see also *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979).

In assessing “adverse effect” under *Mickens* and *Cuyler*, the question is whether a conflict

⁴This is consistent with the judiciary’s responsibility to protect the integrity, in fact and appearance, of the criminal justice system. See, e.g., *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) (“It ... is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”); *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”).

“adversely affected . . . *counsel’s performance*,” *Mickens*, 535 U.S. at 174, not whether counsel’s performance adversely affected the *outcome of the trial*, as is required under the more familiar *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of counsel analysis. See *Glasser v. United States*, 315 U.S. 60, 76 (1942) (“To determine the precise degree of prejudice [flowing from a conflict of interest] is at once difficult and unnecessary”); *id.* (granting relief on violation of right conflict-free counsel after declining to “indulge in nice calculations as to the amount of prejudice” caused).

The record as it stood at the close of the evidentiary hearing proves the elements necessary for a grant of relief in this case. As the transcripts of the 1999 and 1991 trials establish, Sims first prosecuted Stokes for ABWIK (and obtained a conviction for ABHAN), and then accepted the job of defending Stokes in a death penalty trial at which the facts of the 1991 offense proved to be a featured portion of the prosecution’s case for a death sentence. The 1999 record likewise shows that it was Sims who conducted the very brief, insipid cross-examination of Audrey Smith, and in so doing both cemented the existence of a conflict and illustrated its most tangible (but very likely not its only) adverse effect. The evidentiary hearing testimony contains nothing inconsistent with these facts, and nothing to which Stokes could have personally testified would have changed them or otherwise contributed to the conflict or adverse effect analysis.

B. Waiver of the conflict of interest.

While it is possible for a defendant to waive his right to conflict-free counsel, any such waiver “not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970). To establish the existence of a waiver, it is “incumbent upon the State to prove ‘an

intentional relinquishment or abandonment of a known right or privilege.” *Brewer v. Williams*, 430 U.S. 387, 404 (1977), *quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). When assessing the State’s proof, a reviewing court must “indulge in every reasonable presumption against waiver.” *Brewer, supra*; *see also Glasser*, 315 U.S. at 70.

Where the record indicates at least the possibility that a defendant possessed information sufficient to form the basis of a valid waiver, the defendant’s own testimony is often necessary to complete the evidentiary picture and facilitate a final resolution of the issue. On the other hand, where the record does not support a finding that the defendant was aware of the “relevant circumstances and likely consequences,” *Brady, supra*, of counsel’s conflict of interest, then the State cannot meet its burden of proving waiver, and the presence or absence of testimony from the defendant is immaterial.

Such is the case here. While Stokes’ testimony would conceivably be necessary if the existing record indicated that counsel had fully apprised him of the relevant facts and circumstances, the record in this case contains no such indication. On the contrary, the undisputed testimony of both trial counsel shows, at most, only that Stokes was reminded that Sims had been a prosecutor, and perhaps that he had once prosecuted Stokes himself. Neither attorney could testify that Stokes was further informed that the offense for which Sims prosecuted Stokes would be featured in the prosecution’s case for death, that Audrey Smith herself would testify, that Sims would be tasked with cross-examining her, or how these circumstances could impact Sims’ representation. Absent proof that Stokes was advised of these critical facts, the State simply cannot prove a waiver sufficient to negate the impact of counsel’s conflict.

III. THE AFFIDAVIT OF MR. STOKES.

While the existing record is, for the reasons set forth above, sufficient to establish Stokes' entitlement to relief on Ground 9(d), he offers the attached affidavit as further proof that no valid waiver occurred – or even could have occurred – in this case. Pursuant to S.C. Code § 17-27-80, Stokes requests that his affidavit be admitted as his direct testimony in this proceeding. *See also Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) (rejecting respondent's contention that PCR court erred in relying upon affidavits admitted in lieu of live testimony pursuant to S.C. Code §17-27-80). As noted above, Stokes recognizes that respondent should be afforded an opportunity to cross-examine him concerning the content of his direct testimony should it desire to do so.

Respectfully submitted,

Keir M. Weyble
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
803-765-1044 or
607-255-3805

Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271

By: 

Counsel for Sammie Louis Stokes

August 18, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 01-CP-38-1240
COUNTY OF ORANGEBURG	)	
	)	
Sammie Louis Stokes,	)	
	)	
<i>Applicant,</i>	)	
	)	Affidavit of Sammie Louis Stokes
v.	)	
	)	
Jon Ozmint, Commissioner,	)	
South Carolina Dept. of Corrections	)	
<i>Respondent.</i>	)	
	)	

Personally appeared before me, Sammie Louis Stokes, who being duly sworn states as follows:

1. After I was arrested and charged with murder in 1998, Thomas Sims and Virgin Johnson were appointed to represent me. At my trial in 1999 I was convicted and sentenced to death and am now incarcerated at Lieber Correctional Institution.

2. After they were appointed to my case, Mr. Sims and Mr. Johnson mentioned that Mr. Sims had prosecuted me in 1991 for assaulting my wife. Mr. Sims told me that if I had a problem with this fact, I could ask for another attorney. Neither Mr. Sims nor Mr. Johnson said anything else about this issue.

3. I remembered being prosecuted in 1991 and going to prison after being convicted, but I did not remember who the prosecutor was because I was not in the courtroom during that trial.

4. Neither Mr. Sims nor anyone else ever told me that my prior convictions would be used against me at my death penalty trial. I also was never told that Audrey Smith would be allowed to testify about the prior crime at my death penalty trial.

5. Because I was not present for my 1991 trial and did not see Audrey Smith testify, I did not know enough about her testimony to know whether or not Mr. Sims could, or did, do a good job cross-examining her.

6. If I had known that Mr. Sims handled my whole trial for the prosecution in 1991, that the 1991 conviction would be used against me at the 1999 trial, and that Audrey Smith would testify and be cross-examined by Mr. Sims, I would have asked to have a different lawyer.

FURTHER AFFIANT SAYETH NOT.

Sammie Stokes
Sammie Louis Stokes

Sworn to me this
17th day of AUGUST, 2009.


Notary Public for South Carolina

My Commission Expires: 11/28/2010

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
 Case No.: 01-CP-38-1240

Sammie Louis Stokes,)
Applicant,)

Certificate of Service

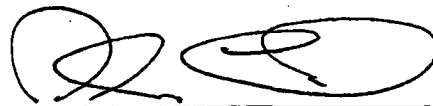
v.)

Jon Ozmint, Commissioner,)
 SC Dep't of Corrections,)
Respondent.)

I hereby certify that a copy of Applicant's Memorandum Clarifying Ground 9(d) and Motion to Supplement the Record in the above-referenced case has been served upon the Respondent, via U.S. mail, first-class, postage pre-paid, at the following address:

Donald J. Zelenka
 Deputy Assistant Attorney General
 Office of the Attorney General
 Post Office Box 11549
 Columbia, SC 29211

This the 18th day of August, 2009.



Robert Lominack

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 01-CP-38-1240
COUNTY OF ORANGEBURG	)	
	)	
Sammie Louis Stokes,	)	
	)	
<i>Applicant,</i>	)	
	)	
v.	)	
	)	
Jon Ozmint, Commissioner,	)	
South Carolina Dept. of Corrections	)	
<i>Respondent.</i>	)	

**POST-HEARING MEMORANDUM IN SUPPORT OF
AMENDED APPLICATION FOR POST-CONVICTION RELIEF**

Applicant, Sammie Louis Stokes, by and through undersigned counsel, submits this memorandum pursuant to instructions issued by the Court at the conclusion of the August 5, 2009 evidentiary hearing. Stokes will begin with a brief description of the relevant procedural history, and then discuss the facts and legal principles that warrant relief.

I. RELEVANT PROCEDURAL HISTORY.

Stokes was found guilty of murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy, and sentenced to death by an Orangeburg County jury on October 31, 1999. The South Carolina Supreme Court affirmed his convictions and sentence on May 29, 2001. *State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001). On October 17, 2001, Stokes filed an application for post-conviction relief. On March 11, 2002, this Court appointed undersigned counsel to represent Stokes in connection with his post-conviction relief proceedings. Stokes, through counsel, amended his application for post-conviction relief on May 2, 2002, and again on August 6, 2004. After a delay in the proceedings to facilitate a determination of whether Stokes had mental retardation, this

Court convened an evidentiary hearing on August 5, 2009. At that hearing, Stokes presented evidence relevant to Grounds 9(b), 9(c) and (9(d) of the amended application. This memorandum discusses those grounds for relief in light of the evidence and relevant law.¹

II. GROUNDS FOR RELIEF.

9(d) Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.

A. Relevant facts.

1. Crimes, arrest, and appointment of counsel.

In early 1998, Stokes was finishing a ten year prison sentence for aggravated assault and battery when his cellmate, Roy Toothe, approached him about a plan to murder Toothe's girlfriend, Connie Snipes. At the time, Snipes was living with Toothe's mother, Pattie Syphrette. Syphrette wanted Snipes killed because of her belief that Snipes had been unfaithful to Toothe, and because she disapproved of Snipes' treatment of her children, who were Syphrette's grandchildren; DSS had already taken custody of one child, and its investigation was ongoing. ROA 1658-59. Stokes agreed to the plan.

Stokes was released from prison in early May, 1998. ROA 782; 1660. Shortly thereafter, DSS ordered Syphrette to evict Snipes from her home or risk losing another grandchild to removal by DSS. 1661-62. Unwilling to have another grandchild taken, Syphrette contacted Stokes and set

¹Counsel are not proceeding on Claims 9(a), 9(e), and 9(f) in Applicant's Amended Application for Post-Conviction Relief. Moreover, respondent previously argued that this Court should dismiss Claim 9(g) - the lethal injection claim - because it was not cognizable within the Uniform State Post-Conviction Act. Counsel agree with the respondent's argument and for the purposes of these proceedings withdraw this claim. Counsel reserve the right to litigate this claim at a later date and in a different procedural posture.

her plan in motion. As a ploy to lure Snipes to a secluded area, Syphrette asked her to assist in the murder of one Doug Ferguson. Snipes agreed. ROA 1662. Stokes and Syphrette then picked up Snipes and another man, Norris Martin, and drove to a wooded area, ostensibly for the purpose of killing Ferguson. After Stokes, Martin, and Snipes walked some distance into the woods, the true purpose of the venture was revealed to Snipes. Martin had sex with Snipes, and she was then shot to death. ROA 888-92; 1663.

Approximately five days later, a farmer happened across Snipes' decomposing corpse and notified authorities. ROA 810-13. At the crime scene investigators found items known to belong to Norris Martin, including a state-issued identification card. ROA 819, 821-22. After interviewing Martin and obtaining other information linking Syphrette to the crime, the police made their way to her house. As it happened, Syphrette was then in the process of actually carrying out the Ferguson murder.² Just before the police arrived, Syphrette and Stokes wrapped Ferguson with duct tape; the tape covered his mouth and nose, and he suffocated. ROA 1206. Stokes and Syphrette were arrested a short time later.³

Orangeburg County attorneys Thomas Sims and Virgin Johnson were appointed to defend Stokes. The trial court held a formal appointment hearing at which attorneys Sims and Johnson placed their qualifications on the record. Describing his criminal law experience, Sims emphasized his handling of "major criminal prosecutions" in the First Circuit Solicitor's office from 1982 until

²Syphrette wanted Ferguson dead because he knew too much about the Snipes homicide. Syphrette had originally approached him about taking part in killing Snipes, but he had refused and Syphrette feared he would go to the police and implicate her.

³Stokes pled guilty to the Ferguson murder and was sentenced to life in prison without the possibility of parole.

1993, but said nothing about any individual cases he took part in as a prosecutor. ROA 1502-03. Satisfied with counsel's qualifications, and unaware of any countervailing circumstances, the trial court designated Sims as lead counsel.

2. Sims' 1991 prosecution of Stokes.

Just over seven years before his appointment as Stokes' lead defense counsel for the Snipes capital murder trial, Sims, then an assistant solicitor, signed an indictment against Stokes for assault and battery with intent to kill. The victim was Stokes' ex-wife, Audrey Smith. On March 12, 1991, Sims appeared at the trial on that indictment as the only representative for the State; he presented all of the evidence, which consisted primarily of testimony from Audrey Smith; he made all of the arguments to the judge and jury; and he secured a conviction for aggravated assault and battery. Stokes himself appeared in the courtroom only briefly, before the trial began. After the trial judge denied his request for time to locate and hire a private attorney, Stokes declined to be present for the actual trial proceedings, and therefore observed none of the prosecution's case against him, and none of Sims' activities as the prosecutor. 1991 Tr. 14-15, 33-34. Stokes also declined to be present for the reading of the verdict or for sentencing.⁴ 1991 Tr. 138-39.

The 1991 prosecution arose out of a December 1990 domestic violence incident. In testimony elicited by Sims, Audrey Smith claimed that she and Stokes had sex in a schoolyard, then walked to a nearby field where Stokes choked her until she lost consciousness. 1991 Tr. 42-46. Some time later, Smith, still lying in the field, woke up, walked to a nearby house, and called 9-1-1. 1991 Tr. 46. Smith also claimed that before they walked to the field, Stokes had her read a letter in

⁴It was during the resulting ten year prison term that Stokes became acquainted with Roy Toothe and Patty Syphrette.

which he expressed an intent to kill her, and that Stokes then told her he had changed his mind. 1991 Tr. 44.

In a cross-examination spanning approximately twenty pages, defense counsel raised doubts about Smith's claims by establishing a series of inconsistencies between the testimony she had given at a preliminary hearing and the story she told at trial. *See* 1991 Tr. 48-67. Additionally, defense counsel called two other witnesses who saw Stokes and Smith just before the alleged assault and described the couple as having appeared normal. 1991 Tr. 97-99; 103-05. Sims responded to this challenge to Audrey Smith's credibility by focusing much of his closing argument on an effort to convince the jury that she had been truthful, and that her version of events was accurate. 1991 Tr. 124. As shown by the jury's guilty verdict, Sims' advocacy on behalf of Audrey Smith's veracity were successful.

3. Stokes knew little, and the 1999 trial judge knew even less.

It is undisputed that neither Sims nor anyone else ever informed the 1999 trial court that Sims had personally prosecuted Stokes in 1991, and the record of pre-trial and trial proceedings associated with the Snipes case contains no mention of the issue. With no knowledge of his own about the possibility that lead defense counsel was (or could be) burdened by a conflict of interest, the trial judge made no inquiry, conducted no colloquy, and secured no waiver.

Sims' casual approach to the issue was also reflected in the advice he gave to Stokes. According to Sims, his co-counsel Johnson, and Stokes himself, Sims did little more than remind Stokes in broad terms that he had been a prosecutor, and that he had once prosecuted Stokes.⁵ While

⁵*See* PCR Tr. 55 (Sims: "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him."); *id.* at 56 (Sims, explaining his rationale for reminding Stokes of who he was: "For him to know fully who I was, what was there before him, and

Sims and Johnson both recalled these communications to Stokes, neither of them had any recollection of informing Stokes of any of the ways in which Sims' work as the prosecutor at the Audrey Smith ABWIK trial could affect his representation if Smith were to appear as a prosecution witness at the Snipes capital murder trial.⁶ Stokes, whose absence from the 1991 trial left him with no independent knowledge of Sims' work or Smith's testimony at that proceeding, likewise recalls that neither Sims nor Johnson discussed these matters with him.⁷ Consistent with Stokes' account, Sims also had no recollection of advising Stokes that Smith would testify and Sims would cross-

it was in my mind that if I tell you that, you know, hey, you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes."); *id.* at 84 (Sims' advice to Stokes about 1991 prosecution was limited to reminder that Sims had prosecuted Stokes, and that Stokes had gone to prison as a result); *id.* at 88 (Sims: "Let me put it this way, [Stokes] knew that I had been the prosecutor. He knew that I had been the one to prosecute him, and, of course, my practice would have been to say, look, you have any problems with that?"); *id.* at 102 (Johnson: "Only thing I can remember is ... [Sims] said ... you know I put you in jail or I prosecuted you and [Stokes] said yes. And it went through the questions of do you have a problem with me representing you ... do you want somebody else and he said no."); Affidavit of Sammie Stokes at para. 2 ("After they were appointed to my case, Mr. Sims and Mr. Johnson mentioned that Mr. Sims had prosecuted me in 1991 for assaulting my wife. Mr. Sims told me that if I had a problem with this fact, I could ask for another attorney. Neither Mr. Sims nor Mr. Johnson said anything else about this issue.").

⁶PCR Tr. at 95-96 (Lominack: "You don't have any recollection about talking to Mr. Stokes about Audrey Smith taking the witness stand and you cross-examining her?" Sims: "No, I don't."); *id.* at 105 (Johnson generally recalled advising Stokes about types of evidence prosecution might present).

⁷Affidavit of Sammie Stokes at para. 4-5 ("Neither Mr. Sims nor anyone else ever told me that my prior convictions would be used against me at my death penalty trial. I also was never told that Audrey Smith would be allowed to testify about the prior crime at my death penalty trial. Because I was not present for my 1991 trial and did not see Audrey Smith testify, I did not know enough about her testimony to know whether or not Mr. Sims could, or did, do a good job cross-examining her.").

examine her.⁸ Sims further admitted that he never arranged to make another attorney available to Stokes for the purpose of advising him on the conflict of interest issue. PCR Tr. 85.

4. Sims' lack of appreciation for the gravity of the issue.

Sims' failure to alert the trial court to his apparent conflict of interest came in the face of explicit advice to the contrary from a seasoned capital defense attorney. When Jeff Bloom, whom Sims had attempted to enlist as a jury selection expert,⁹ learned of Sims' role in the 1991 prosecution, he immediately recognized it as a "very substantial and serious issue." PCR Tr. 43. At the PCR hearing Bloom testified that he "tr[ie]d to impress upon Mr. Sims that if he had previously prosecuted Mr. Stokes that that prior conviction would be an issue at a capital sentencing proceeding."¹⁰ *Id.* Sims, however, did not "fully underst[an]d how or why that would be." *Id.* Bloom nevertheless urged him to, "at a minimum[,] ... request a hearing in front of the assigned

⁸PCR Tr. at 96 (Lominack: "But you wouldn't have told [Stokes] that Audrey Smith was going to testify and you were going to cross-examine her, because you did not think she was going to testify, right?" Sims: "I have no recollection that I either did or did not.").

⁹Bloom is an experienced criminal defense attorney, having worked as a public defender for fourteen years, including seven years as head of the Richland County Public Defender Office. PCR Tr. 40. Bloom also has significant experience in handling capital cases. *Id.*

¹⁰Bloom was unquestionably correct. The admissibility of character and prior bad acts evidence in a capital sentencing proceeding was firmly established long before Stokes' trial:

Information as to a defendant's record of previous criminal convictions has always been deemed relevant to the process of imposing sentence upon a plea or verdict of guilt. So fundamental is this proposition that it requires no citation of authority . . . We . . . hold that information concerning prior criminal convictions shall be admissible as additional evidence during the sentencing or resentencing phase of a capital trial under our statute.

State v. Plath, 281 S.C. 1, 8, 313 S.E.2d 619, 623 (1984).

circuit judge ..., request in writing that it be an *ex parte* hearing ..., and let the circuit judge be aware of it, and let the circuit judge conduct a hearing where that issue could be played out and fully discussed.” *Id.* at 44. When Sims responded that there was nothing to “worry about” because Stokes had “waived that,” Bloom tried again: “I said, well ... it may be one thing for you to sit in the jail with Mr. Stokes and he verbally tells you he doesn’t have a problem with it, but there may be some other consequences there affects [sic] from there.” *Id.*

During a subsequent phone call with Sims, Bloom made yet another effort to awaken him to the conflict he was facing, but Sims “still didn’t seem[] concerned about it.” PCR Tr. 45. Bloom pressed: “I told him that really needed to be something that was settled on the record long before trial. I again emphasized to him that it seemed to me to be the type of conflict of interest issue that was fluid” *Id.* Once again, Sims “didn’t seem at all to appreciate the gravity of the conflict of interest issue.” *Id.* Unable to get through to Sims, Bloom “concluded that [he] just needed to sever any professional relationship to the case because ... [he] didn’t want to work with an attorney who failed to appreciate the gravity of that issue.” *Id.* at 46.

Bloom’s suspicion that Sims did not appreciate the likelihood that he would actually come face to face with Audrey Smith was confirmed by Sims’ conduct at the trial, and by his testimony at the PCR hearing, both of which made clear his erroneous belief that evidence of a defendant’s character or prior convictions is inadmissible at the penalty phase of a capital trial.¹¹ At the time of

¹¹That Sims’ lack of concern over the conflict rested on his belief that he could avoid confronting Smith, rather than on a belief that actually having to confront her would not give rise to a conflict, is illustrated by his response to the prosecution’s request to admit the 1991 indictment. Rather than objecting to its admission, Sims merely expressed concern that the jury not see his name on it, and added – as if to suggest his signature on the indictment was merely *pro forma* – that, “back when I was prosecuting, I would sign all of the indictments.” ROA 1636. Sims’ desire to prevent the jury from seeing his signature indicates that he understood, on some level, the impropriety of acting

Stokes' trial, Sims conducted extensive research and prepared written and oral arguments that the 1991 conviction was inadmissible under Rules 404(b), 608, and 609, SCRE. ROA 1088-89, 1607, 1737-38; PCR Tr. 68-69. He filed a pretrial "Motion to Prevent Use of Prior Bad Act," in which he argued that evidence of a defendant's prior bad acts was admissible only to impeach a defendant who chose to testify, and that the "facts underlying such convictions, not to mention facts which have been alleged but never proven, have been excluded from evidence." Motion to Prevent Use of Prior Bad Act, ¶ 1, filed September 20, 1999. At the hearing on his motion Sims further suggested that Stokes' prior conviction might not be admissible because it may not have met the felony requirement of Rule 609, SCRE.¹² Sims also argued that even if Rule 609's requirement's were met, Rule 404(b) and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), precluded admission of the 1991 conviction. ROA 1607. Neither the trial judge nor the Solicitor were persuaded by these arguments. ROA 1638.

Undeterred, Sims continued to make sweeping statements about the inadmissibility of prior convictions at a capital sentencing trial. In fact, his misapprehension of the scope of a capital penalty phase remained apparent until just moments before Audrey Smith took the stand for the prosecution. Relying on two non-capital cases, *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998), and *State v. Brooks*, 335 S.C. 140, 515 S.E.2d 764 (Ct. App. 1999), Sims articulated the general rule that in order to admit evidence of prior crimes, there must be some connection to the charged crime. ROA 1088. But as Solicitor Bailey correctly pointed out, the general rule invoked by Sims did not apply at the

(or at least being seen) as prosecutor and then as defense counsel. His failure to seize the opportunity to alert the court to the rest of the story, however, is strong evidence of his mistaken belief that he had seen the last of Audrey Smith.

¹²Rule 609, SCRE, entitled Impeachment by Evidence of Conviction of Crime, sets out the requirements which must be met before a witness may be confronted with a prior conviction.

penalty phase of a capital trial, and the law had consistently allowed the admission of evidence of a defendant's character and propensity for violence in such a proceeding. ROA 1089-90.

Sims' PCR testimony further illustrated his belief that there was a plausible legal basis for preventing Audrey Smith from testifying about the facts underlying Stokes' 1991 conviction. PCR Tr. 81.¹³ In that testimony Sims admitted having been confident during trial that he could preclude the state from introducing evidence of the prior conviction, PCR Tr. 81, and he agreed that he would have expressed this confidence to his client, PCR Tr. 95. Sims was also confident that the trial court would prevent Audrey Smith from taking the stand and testifying about the incident underlying the 1991 conviction. Indeed, even at the PCR hearing nearly a decade later, Sims adhered to his belief that the prior conviction and the evidence supporting it were inadmissible. *See, e.g.*, PCR Tr. 92 (reiterating view that classification of prior conviction as felony is relevant to admissibility at penalty phase of a capital trial).

5. Audrey Smith's appearance at the capital sentencing trial.

As dictated by settled law, the trial judge rejected Sims' arguments against admission of the 1991 conviction and Audrey Smith's story supporting it. ROA 1090. Moments later, the concerns expressed months earlier by Jeff Bloom were realized as the prosecution called Smith as its lead-off penalty phase witness. ROA 1111. On the witness stand, Smith gave approximately sixteen pages of direct testimony detailing two assaults she claimed to have suffered at the hands of Stokes, one of which was the 1990 incident for which Sims had been the prosecutor. While Smith's story

¹³Elsewhere in his PCR testimony, Sims responded to questions from Mr. Zelenka by suggesting that he had anticipated that the trial court would admit the evidence of Stokes' prior conviction, and that Smith would be permitted to testify about the underlying facts of that conviction. PCR Tr. 60, 98. These suggestions contradict other portions of his PCR testimony cited in the text, and cannot be squared with his consistent course of conduct prior to and during the trial itself.

generally followed the version Sims had elicited from her at the 1991 trial, there were material differences in the details. For example:

- ◆ On cross-examination at the 1991 trial, Smith was forced to concede that she had initiated contact with Stokes after moving back to Branchville and breaking up with her boyfriend. 1991 Tr. 65-67. This fact was not mentioned at the 1999 trial.
- ◆ At the 1991 trial, Smith acknowledged that after she read Stokes' letter, he told her that he had changed his mind and did not intend to kill her. 1991 Tr. 44, 54. In her 1999 testimony, Smith made no mention of Stokes changing his mind. ROA 1120-21.
- ◆ At the 1991 trial, Smith was confronted with an inconsistency between her preliminary hearing testimony and her trial testimony, and was forced to resort to a claim that the preliminary hearing transcript must have been incomplete. 1991 Tr. 55. Neither the inconsistency nor the criticism of the transcript appeared at the 1999 trial.
- ◆ At the 1991 trial, Smith testified that Stokes took her into the field to look for a "box." 1991 Tr. 45. At the 1999 trial, Smith claimed Stokes had actually been looking for guns. ROA 1123.
- ◆ At the 1991 trial, Smith testified that after Stokes placed a cord around her neck, he asked, "Is it tight?," to which she replied, "Yeah." In 1999, Smith simply said that "he put it around my neck and I passed out." ROA 1124.

In contrast to the twenty-page cross-examination of Smith conducted by Stokes' public defender at the 1991 trial, Sims' cross-examination at the capital trial covered a mere two pages of the transcript. While Smith had provided Sims with multiple opportunities to challenge the details of her claims, and in so doing to raise at least some questions about her portrayal of what had transpired between she and Stokes, Sims made use of none of them. He did not expose Smith's own role in reinitiating contact with Stokes; he did not highlight the changes in her testimony (all of which favored the prosecution); and he did not confront her with the fact that she had been forced to deny the accuracy of a court transcript in an effort to defend testimony Sims himself had elicited

from her at the 1991 trial. Instead, Sims merely asked Smith to confirm that she had not heard from Stokes since his release from prison in 1998, that it had been some time since Stokes had written to her, and that Stokes had been jealous and possessive. ROA 1139-40. Sims then sat down, putting a quick end to his unexpected and awkward confrontation with the woman whose story he had himself convinced a jury to accept eight years earlier.

B. Relevant legal principles and discussion.

1. The law governing conflicts of interest.

The Sixth Amendment guarantees that the accused in a criminal case be afforded counsel whose ability to act on his client's behalf is unimpaired by a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Wood v. Georgia*, 450 U.S. 261 (1981). Our justice system presumes that counsel will act as an accused's advocate, *Anders v. California*, 386 U.S. 738 (1967), and the Supreme Court has emphasized that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronin*, 466 U.S. 648, 655 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); see also *Argersinger v. Hamlin*, 407 U.S. 24, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Nowhere is the fundamental safeguard of conflict-free counsel more essential to ensure the proper functioning of our adversarial system, and to maintain the public confidence through the appearance of impartiality, than in the trial of a capital case. See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Conflicts of interest can take a variety of forms. As a general matter, "an actual conflict of

interest occurs[] ‘... when a defense attorney places himself in a situation inherently conducive to divided loyalties’” *State v. Gregory*, 364 S.C.150, 153, 612 S.E.2d 449, 450 (2005) (quoting *Duncan v. State*, 281 S.C. 435, 438; 315 S.E.2d 809, 811 (1984)); *see also, e.g., Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). To establish entitlement to relief, “a defendant need not demonstrate prejudice if there is an actual conflict of interest.” *Gregory*, 364 S.C. at 153, 612 S.E.2d at 450 (citing *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) *citing Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980)); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (where counsel’s representation is adversely affected by conflict of interest, there is no need “to indulge in nice calculations as to the amount of prejudice arising from [the] denial [of the right to conflict-free counsel]”); *see also Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (a prisoner alleging a conflict of interest must ordinarily show an “actual conflict” “adversely affected his counsel’s performance”); *id.* at 172 n.5 (quoting *Holloway*, 435 U.S. at 482) (“[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.”); *Holloway v. Arkansas*, 435 U.S. at 489 (“representation of conflicting interests is suspect because of what it tends to *prevent* the attorney from doing”) (emphasis added); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991).

Successive engagement as prosecutor and then defense lawyer carries inherent risks which, depending upon the circumstances, can ripen into actual conflict. While it is ordinarily permissible for counsel who prosecuted an individual to later represent that same individual in a different, wholly

unrelated proceeding,¹⁴ counsel's representation of an individual he previously prosecuted in the same matter or, as is the case here, in a different but related matter, is universally prohibited.¹⁵ *United States v. Ziegenhagen*, 890 F.2d 937, 940 (7th Cir. 1989) ("[G]overnment employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper."); *People v. Martin*, 564 N.Y.S.2d 503, 506 (N.Y.App.Div. 1990) ("The fact that [counsel] had previously prosecuted defendant should have alone ... been sufficient to establish a conflict of interest"); see also *State v. Wareham*, 143 P.3d 302, 306-07 (Utah Ct. App. 2007) ("defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client"); *Worthen v. State*, 715 P.2d 81, 81 (Okla. Crim. App. 1986) (same); *People v. Hoskins*, 392 N.E.2d 405, 408 (Ill. App. Ct. 1979).¹⁶

The consensus among courts that have addressed these circumstances is that a conflict of interest exists – and a new trial is therefore required – where an attorney serving as defense counsel

¹⁴See, e.g., *State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2006); *Hendricks v. State*, 128 P.3d 1017, 1021-22 (Mo. 2006); *State v. Cobbs*, 584 N.W.2d 709, 710 (Wis. Ct. App. 1998); *Smart v. Maass*, 939 P.2d 1184 (Or. Ct. App. 1997) (defense counsel prosecuted defendant on a burglary charge 13 years prior to his representation of defendant on statutory rape charges); *Maiden v. Bunnell*, 35 F.3d 477, 481-82 (9th Cir. 1994).

¹⁵Because the conflicts they generate are so acute, and the need to avoid them is so obvious, such cases arise very infrequently and the number of reported decisions addressing them is small. While Stokes' research yielded no published decisions from the South Carolina appellate courts, this memorandum identifies the relevant cases from elsewhere in the country, all of which condemn the type of successive representation present in this case.

¹⁶See also *United States v. Sheppard*, 121 Fed. Appx. 508, 510 (4th Cir. 2005) (defendant's appellate counsel initially appeared on behalf of the prosecution in the same matter); *Skelton v. State*, 672 P.2d 671 (Okla. 1983) (defendant's trial counsel originally appeared on behalf of the state at arraignment and preliminary hearing in same matter); *People v. Kester*, 261 N.E.2d 569, 570 (Sup. Ct. Ill. 1977) (same).

previously prosecuted his client in a different but related case, and counsel's participation in the earlier prosecution was substantial and personal. Cases are considered "related" when the prior conviction is used in the subsequent case as evidence against the defendant. *Wareham*, 143 P.3d at 307 (attorney prosecuted defendant on matter used to enhance sentence in later proceeding at which same attorney served as defense counsel); *Ziegenhagen*, 890 F.2d at 940-41 (7th Cir. 1989) (attorney appeared for prosecution to recommend sentence length for two convictions used to enhance punishment for subsequent conviction rendered with same attorney then acting as defense counsel); *Worthen*, 715 P.2d at 81 (attorney prosecuted defendant twice and both resulting convictions were used to enhance punishment for later offense as to which same attorney served as defense counsel); *Hoskins*, 392 N.E.2d at 742 (attorney prosecuted defendant and secured probationary sentence, which was later revoked for conduct as to which same attorney represented defendant).

Counsel's participation in a "related" prior prosecution is regarded as sufficiently personal and substantial to generate an impermissible conflict if he appeared on behalf of the government in the earlier proceeding, and would be required to challenge the conviction rendered at the earlier proceeding in his new capacity as defense counsel.¹⁷ This is so because the close relationship between proceedings places counsel in the impossible position of having to attack his own work product and the credibility of a former client or complainant. See *Wareham*, 143 P.3d at 307 ("defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client"); *Ziegenhagen*, 890 F.2d at 940 (conflict arose where "defense attorney was required to make a choice of advancing his

¹⁷By contrast, there is no substantial or personal relationship between proceedings if counsel merely served as a prosecutor in the relevant government agency at the time that the defendant was prosecuted. *Hernandez v. Johnson*, 108 F.3d 55, 560 (5th Cir. 1997).

own interests to the detriment of his client's interests"); *see also United States v. Sheppard*, 121 Fed. Appx. 508, 511 (4th Cir. 2005) (observing that court of appeals knew of no "instance where counsel were permitted to appear before a court as counsel of record, argue on the record, and then successfully argue that the words and arguments were not attributable to them"); *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (conflict of interest can "exist between an attorney's own personal interest and those of the client"); *United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir. 1991) (counsel's circumstances must not cause him to "harbor substantial personal interests which conflict with the clear objective of his representation of the client."). Counsel in such circumstances also confront the choice of having to inappropriately rely upon or ignore confidences obtained while serving in their former capacity. *See, e.g., United States v. Nicholson*, 475 F.3d 241, 250-52 (4th Cir. 2007); *Pinkney v. United States*, 851 A.2d 479, 488 (D.C. 2004); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991).

Personal and substantial participation as prosecutor and then defense counsel in related cases is so intolerable both because of the influence, tangible and intangible, that counsel's successive roles have on the representation, and because of the unseemly shadow such representation casts across the integrity of a criminal proceeding. *See State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450-51 (005) (even the possibility that counsel may be tempted "to dampen the ardor of his defense" is sufficient to prove an actual conflict of interest requiring relief); *Kester*, 361 N.E.2d at 572 (under such conditions counsel is "subject to subtle influence which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner," and this influence can be expected to generate a "subliminal reluctance" to attack prior work); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980) ("Both the fact and the appearance of total professional

commitment are endangered by adverse representation in related cases.”). Impermissible successive representation is especially disturbing and erosive of public confidence when it occurs in a capital case. *See, e.g., Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) (“It . . . is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”); *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (acknowledging “the notion, deeply rooted in the common law, that ‘justice must satisfy the appearance of justice’”); *Howerton v. State*, 640 P.2d 566 (Okla.Crim.App. 1982) (“The public has a right to absolute confidence in the integrity and impartiality of the administration of justice”).

2. Thomas Sims labored under a conflict of interest.

Sims’ successive engagement, first as the prosecutor at Stokes’ 1991 trial for ABWIK against Audrey Smith, and later as defense counsel tasked with confronting Smith at Stokes’ 1999 capital trial, created a clear and manifestly impermissible conflict of interest. Sims’ participation in the 1991 prosecution was unquestionably both personal and substantial; as described *supra*, he not only signed the indictment against Stokes, he also appeared as the sole representative of the prosecution at the jury trial, and fought hard for Smith’s credibility when it was attacked by Stokes’ public defender. It is equally clear that the two proceedings became related when the prosecution made the 1991 judgment and the live testimony of Audrey Smith a featured component of its case for a death sentence at the 1999 trial. Under the decisions discussed above, these facts alone are sufficient to dictate a finding that Sims’ representation violated the Sixth Amendment, and that a new trial must be ordered. *See, e.g., Gregory, supra; Ziegenhagen, supra; Wareham, supra; Worthen, supra.*

That Sims’ role as prosecutor and advocate for Audrey Smith in 1991 was irreconcilable with his duty as lead defense counsel for Stokes in 1999 is confirmed by his handling of the issues relating

to the 1991 case at the 1999 capital trial. While he managed to avoid alerting the trial judge to the full measure of his involvement in the 1991 case, Sims' ill-conceived arguments based on *Lyle*, *Cutro*, *Brooks* and the Rules of Evidence could not shield him from a confrontation with the conviction he secured at the 1991 trial, or with the live testimony of Audrey Smith. And when that confrontation occurred, Sims reacted in precisely the manner a conflicted lawyer would: by pulling his punches in the cross-examination of Audrey Smith.¹⁸ In so yielding to the urge "to dampen the ardor of his defense," *Gregory*, 364 S.C. at 153, 612 S.E.2d at 450, and by making the "choice of advancing his own interests to the detriment of his client's interests," *Ziegenhagen*, 890 F.2d at 940, Sims cemented the conflict Jeff Bloom had warned him about months earlier.

Finally, it must be emphasized that this case differs from the other cases cited herein in an important respect. Whereas the conflicted attorneys in those cases compromised their representation of defendants facing prison time, the conflict in this case manifested itself in the sentencing phase of a death penalty trial. This not only raised the stakes of Sims' gamble that he could avoid a run-in with Audrey Smith as high as they could go, it also meant that when his gamble failed – as it did – Sims was not only confronted with the *result* of his prior prosecution, but also with the very *witness* whose story he had embraced and vouched for as an officer of the court in 1991. The result was a clearer, more tangible manifestation of conflict than was necessary to support a grant of relief in any of the other cases, and a death sentence imposed under circumstances that defy the fundamental

¹⁸Sims' failure to use what was available to him in the cross-examination of Audrey Smith, *see supra* at 10-11 (describing points of vulnerability in Smith's story), stands in sharp contrast to his handling of the Norris Martin cross-examination, where Sims appeared to regard no detail as too small or trivial to warrant inquiry. *See* ROA 903-29 (guilt phase); 1167-83 (penalty phase). The source of the disparity in Sims' approaches is self-evident: he was free to attack Martin's credibility as any zealous advocate would, but his hands were tied by the conflict during the Smith examination.

expectation that a man on trial for his life will be represented by loyal, conflict-free counsel.

3. Stokes did not waive, and could not possibly have waived, his right to conflict-free counsel.

While it is possible for a defendant to waive his right to conflict-free counsel, any such waiver “not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970). “[W]hether such a relinquishment or abandonment has occurred depends ‘in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’” *Minnick v. Mississippi*, 498 U.S. 146, 159 (1990) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)). When the existence of a waiver is disputed, it is “incumbent upon the State to prove ‘an intentional relinquishment or abandonment of a known right or privilege.’” *Brewer v. Williams*, 430 U.S. 387, 404, (1977) (quoting *Zerbst*, 304 U.S. at 464). And in considering the proof offered by the state, a reviewing court must “indulge in every reasonable presumption against waiver.” *Brewer*, *supra* (citations omitted); *see also id.* (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 238-40 (1973); *United States v. Wade*, 388 U.S. 218, 237 (1967)) (“This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.”).

In the context of a potential (or in this case, actual) conflict of interest, any waiver purporting to be valid must be preceded by specific advice to the defendant regarding his right to effective representation, the details of his attorney’s possible conflict, the potential perils of the conflict, and an opportunity to discuss the matter with outside counsel. *See, e.g., United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992) (citations omitted); *Pinkney v. United States*, 851 A.2d 479, 488-89

(D.C. 2004); *United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991). A valid waiver of a conflict also requires “at least some affirmative effort by the trial court to inform the defendant of the way the conflict might operate to impact deleteriously upon the reasoned and competent presentation of his or her defense.” *United States v. Casiano*, 929 F.2d 1046, 1053 (5th Cir. 1991); *see also Maiden v. Bunnell*, 35 F.3d 477, 480 (9th Cir. 1994) (defendant’s acknowledgment during colloquy that defense counsel previously prosecuted him, and that defendant nevertheless desired that counsel remain on case, insufficient to constitute valid waiver). Additionally, because conflicts are inherently fluid, a waiver at the commencement of representation may not “serve to waive all conflicts of interest that arise throughout the course of that defendant’s criminal proceedings.” *Swartz*, 975 F.2d at 1048 (defendant’s waiver did not extend to the sentencing phase of trial when defense counsel chose to pursue new strategy and argument).

None of the essential elements of a valid waiver are present in this case. To begin with, the trial record contains no mention of Sims’ 1991 prosecution of Stokes, let alone a discussion or colloquy with Stokes about the effects of Sims’ prior engagement on his representation in connection with the 1999 capital trial.¹⁹ *See* PCR Tr. 14 (Conceding this point at the outset of the evidentiary hearing, Mr. Zelenka stated, “I cannot find in the record that there was any reference specifically to Mr. Sims prosecuting Mr. Stokes previously.”).

Furthermore, Sims did not understand or appreciate the nature of his conflict, and therefore

¹⁹Sims did disclose on the record that he personally signed Stokes’ 1991 indictment. Tr. 26-127. However, this disclosure was made only in response to the introduction of the indictment as evidence, and Sims’ ensuing failure to reveal his additional role as the trial prosecutor in the 1991 case was misleading.

could not have provided Stokes with the advice necessary to make an informed waiver. As demonstrated by his statements at trial and his testimony at the PCR hearing, Sims steadfastly believed that Stokes' 1991 conviction and the evidence supporting it were inadmissible at the penalty phase of the 1999 capital trial. Operating on this firmly held yet hopelessly misguided belief, it would have been impossible for Sims to have provided Stokes with an accurate or frank assessment of the nature and possible effects of his conflict.²⁰

Sims' and Johnson's PCR hearing testimony confirms that no such assessment was ever made available to Stokes. As described *supra* at 5, Sims and Johnson testified consistently that their advice to Stokes about Sims' past consisted of nothing more than a reminder that he had been a prosecutor, and had once prosecuted Stokes, and an inquiry about whether Stokes had a "problem" with that. PCR Tr. at 88; 102. Neither attorney had any recollection of specifically informing Stokes that the 1991 conviction was likely to be admitted, that Audrey Smith was likely to testify for the prosecution, or that Sims would face an obvious conflict if called upon to challenge Smith's story on Stokes' behalf.

These omissions by 1999 trial counsel were especially significant in this case because Stokes himself had been absent from virtually all of the 1991 trial, and therefore had no independent knowledge of how Audrey Smith had testified, how her story had been challenged by his public defender, or how then-Assistant Solicitor Sims had conducted himself at the 1991 proceeding. And like his attorneys, Stokes also had no knowledge that either the 1991 conviction or, more

²⁰Sims' failure to appreciate the nature or seriousness of the conflict is corroborated by the testimony of Jeff Bloom, who observed that Sims never "fully understood how or why" the conflict was problematic, and "didn't seem at all to appreciate the gravity of the conflict of interest issue." PCR Tr. at 43, 45.

importantly, the testimony upon which it rested, would be admitted at the 1999 trial. In short, by everyone's account – Sims', Johnson's and Stokes' – Stokes was not told of, and did not otherwise know of, most of the information that would have been essential to a valid waiver of Sims' conflict of interest. Had Stokes been properly informed, he would not have waived the conflict. Stokes Affidavit ¶ 6. Because he was not so informed, the record in this case cannot possibly support a finding of a "knowing, intelligent" waiver "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

For all of the foregoing reasons, Stokes' Sixth Amendment right to representation by counsel unencumbered by conflict of interest was violated, and he is entitled to post-conviction relief from his death sentence.

9(b) and (c) Appellate counsel failed to raise on direct appeal the trial court's related failures to: (1) conduct an independent assessment of the evidence to determine which statutory mitigators were supported by the evidence and (2) instruct the jury on a mitigator for which there was evidentiary support.

Under *Strickland v. Washington*, 466 U.S. 688 (1984), Mr. Stokes must establish that his attorney's representation "fell below an objective standard of reasonableness." *id.* At 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The same standards apply to review of appellate counsel's performance. *Evitts v. Lucey*, 469 U.S. 387 (1985). To prove that deficient performance of appellate counsel was prejudicial, Mr. Stokes must prove that, but for counsel's errors, there is a reasonable probability that the claim not raised would have prevailed on appeal.

A. Relevant Facts

Right up until the moment she was killed, Connie Snipes, who believed she was accompanying Stokes and Syphrette to murder another man, willingly participated in the events preceding her death. There was evidence to support that:

- Snipes located Martin and asked him to go with her and Stokes. ROA 878-79.
- Snipes voluntarily got in the car with Stokes, Martin, and Syphrette. ROA 882.
- When they arrived at the designated location, Snipes voluntarily accompanied Martin and Stokes into the woods. ROA 888-89, 920.
- Snipes voluntarily had sex with Martin and Stokes once in the woods. ROA 922, 971-72; 1169.

Indeed, even the solicitor conceded that there was evidence from which the jury could infer that Snipes had accompanied Stokes and Martin voluntarily and that she had sex with them voluntarily. ROA 989-90.

These facts formed the basis of the defense theory that Snipes voluntarily participated in at least some of Stokes's conduct and thus, there was evidence to support the statutory mitigator relating to a victim's participation. *See* S.C. Code § 16-3-20(C)(b)(3) ("The victim was a participant in the defendant's conduct or consented to the act."). Just before the penalty phase began, Sims, in response to the court's question, indicated that the defense intended to establish that Snipes' conduct satisfied the victim participation statutory mitigator. ROA 1082-83. While the court indicated some skepticism about the evidentiary support for this mitigator, ROA 1084-85, it never revisited the issue. Moreover, there is no evidence that the court ever conducted the statutorily-required assessment of the evidence at the conclusion of the penalty phase. Of course, this failure on the trial court's part also prevented the defendant from lodging an objection to the trial court's evaluation of

the evidence. Ultimately the court did not include this factor in its instructions to the jury. ROA 1479-80.

On direct appeal Stokes's lawyer, Joseph Savitz, failed to raise as an issue either the trial court's failure to conduct the statutorily-required evidentiary review or the trial court's failure to instruct the jury on a mitigating factor that was supported by the evidence. In his testimony at the PCR evidentiary hearing Savitz was unable to recall a strategic reason for these failures. PCR Tr. 24-25. To the contrary, Savitz testified that before and after the Stokes appeal he had pressed these very issues because he believed they had merit. *Id.*

B. The trial court's failure to independently assess the mitigation evidence

The Eighth Amendment requires that a jury consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Any impediment to a juror's consideration of relevant mitigating factor is unconstitutional. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *see also Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms so as not to restrict the jury's consideration of penalty phase evidence); *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation). To that end South Carolina's death penalty statute obligates the trial court to conduct its own independent review of the penalty phase evidence in order to determine which statutory mitigating factors are supported. Indeed, absent a waiver from the defense the court is required to submit to the jury any mitigating circumstance with evidentiary support. S.C. Code § 16-3-20(C). To ensure compliance with this statutory requirement, the supreme court set out a specific procedure for trial

courts.

Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

[*State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989)]

In the years following *Victor* the supreme court has consistently approved this approach. More importantly, it has never suggested a deviation from the statutory requirement. See *State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Rogers*, 338 S.C. 435, 438, 527 S.E.2d 101, 103 (2000); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1997). Therefore, for at least 10 years prior to Stokes's trial the law was settled that the trial court had an obligation to assess the penalty phase evidence to determine which statutory mitigators were supported by the evidence.

Such an evaluation never occurred at Stokes's trial. The trial court simply did not conduct the required analysis and never engaged in the procedure set out in *Victor*. To be sure, subsequent cases have clarified defense counsel's duty to object to the trial court's initial determination at the "Victor conference." See e.g., *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1997). But these cases are grounded in the assumption that a *Victor* conference actually occurs. Here, the trial court never engaged in its own review of the evidence and, therefore, contrary to the cases cited *supra*, the defense was never presented with an opportunity to object to the trial court's determination. Given the trial court's rather clear failure to satisfy the statutorily-required evaluation of evidence, appellate counsel's failure to raise this issue on direct appeal represented ineffective assistance of counsel.

C. Trial court's obligation to instruct the jury on all mitigators that are supported by the evidence.

As discussed *supra*, ample evidence presented at both phases of Stokes's trial established that Snipes at the very least participated the Stokes' conduct. The state supreme court acknowledged as much. *State v. Stokes*, 345 S.C. 368, 374, 548 S.E.2d 202, 205 (2001) (noting evidence that Snipes voluntarily accompanied Stokes into the woods). Based on the evidence that had already been presented, trial counsel alerted the court to its reliance on this statutory mitigating factor at the outset of the penalty phase. ROA 1084. The trial court ultimately did not charge the jury on this or any other statutory mitigating circumstance. This failure was error.

The trial judge "shall include in his instructions to the jury for it to consider . . . the following . . . mitigating circumstances which may be supported by the evidence." S.C. Code § 16-3-20(C). That statute imposes an obligation, which existed at the time of Stokes's trial, on the trial court to instruct the jury on any mitigating factor that was supported by the evidence. *State v. Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Bowman*, 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005) (acknowledging duty of trial court to instruct on mitigating factor supported by evidence), *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006); *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002) (trial court was required to instruct the jury on a statutory mitigator raised by evidence of intoxication); *State v. Young*, 305 S.C. 380, 409 S.E.2d 352 (1991) (same). When assessing mitigating evidence, a trial court should not narrowly construe what is relevant and what is not. *See Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation); *Tennard v. Dretke*, 542 U.S. 274

(2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms so as not to restrict the jury's consideration of penalty phase evidence). In fact, the trial court must instruct on every mitigating factor for which there is any evidence without regard to the weight of the evidence. *Pierce*, 289 S.C. at 435, 346 S.E.2d at 711.

The trial court's premature refusal to charge the jury on an instruction both supported by the evidence and requested by trial counsel seems to have rested on the court's guilt phase assessment of this evidence. "The victim having participated in the act situation, if that goes back to what was not allowed [in the guilt phase] because of the way the letter came in and all, you're not going to be able to do it. . ." ROA 1084 (trial court's response to request to charge victim participation mitigator). The court may well have been correct in its assessment that evidence of Snipes's conduct was irrelevant to the defendant's guilt and was, therefore, inadmissible at the guilt phase of the trial. But this guilt phase evidentiary ruling should not have governed the evidentiary analysis at the penalty phase given the very different issues to be decided by the jury at that point in the trial.

Appellate counsel failed to include this claim on direct appeal and had no strategic reason for this failure. PCR Tr. 24-25. There exists a reasonable probability that the result of applicant's appeal would have been different had appellate counsel properly raised this claim. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

III. CONCLUSION

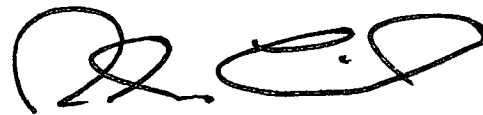
For the foregoing reasons this Court should vacate applicant's sentence and remand the case to the Orangeburg County Court of General Sessions for a new sentencing trial.

Respectfully submitted,

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February 15, 2010



Counsel for Mr. Stokes

Robert Lominack

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HENRY McMASTER
ATTORNEY GENERAL

February 16, 2010

Honorable Winnifa B. Clark
Clerk of Court, Orangeburg County
P. O. Drawer 9000
Orangeburg, SC 29116

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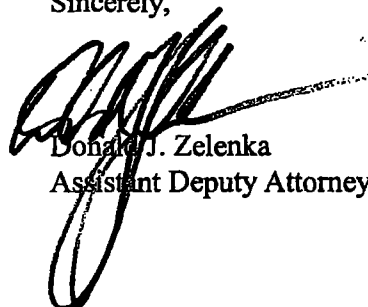
CMS

Re: Sammie Louis Stokes v. State
01-CP-38-1240

Dear Ms. Clark:

Enclosed please find Respondent's *Post-Hearing Memorandum* in the above-referenced matter for filing. By copy of this letter, I am serving all interested parties with same.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Keir Weyble, Esquire
Robert E. Lominack, Esquire
Honorable L. Casey Manning
Sandi Wofford, Victims Assistance

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

SAMMIE LOUIS STOKES, #5069)

C/A No. 01-CP-38-1240

Applicant,)

RESPONDENT'S POST-HEARING
MEMORANDUM

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

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The Respondents, above-named, hereby make a Post-Hearing Memorandum of Law to the amended application for post-conviction relief received August 9, 2004.

The Applicant made an initial application on May 6, 2002. The Application was filed by his court-appointed counsel, Robert Lominack and Keir Weyble of Columbia, South Carolina. The Respondent made a Return to the initial application on July 3, 2002. The matter was initial set for a hearing on September 13, 2004. On August 9, 2004, the Applicant made an amended application. The matter was continued by Order of Continuance dated August 26, 2004 to allow the South Carolina Department of Disabilities and Special Needs complete an evaluation of the Applicant on whether he possessed the disability of mental retardation. On October 22, 2007, the Department submitted a report to Judge Manning that opined the Petitioner was not mentally retarded.

The Respondents requested a status conference. On June 4, 2009 a status conference was held in Richland County. During the conference, the Applicant's counsel advised the Court that it was abandoning the issue concerning lethal injection. Upon inquiry, the Court was also advised

that it was abandoning the issue concerning mental retardation raised in the application. The Court scheduled a hearing for August 5, 2009 in Orangeburg County. The Respondent made a Return to the Amended Application on August 5, 2009.

On August 5, 2009 a hearing was convened in Orangeburg County before the Honorable Casey Manning, Presiding Judge. The Applicant was present and represented by appointed counsel Weyble and Lominack. The Respondent was represented by Donald J. Zelenka. Testimony was received from prior appellate counsel Joseph Savitz (PCR Tr.p. 19-39), Jeffrey Bloom (PCR Tr.p. 40-48), prior trial counsel Thomas Sims (PCR .Tr.p. 49-98) and Virgin Johnson (PCR Tr.p. 100-108).. The Applicant did not testify. At the conclusion of the hearing, it was agreed that simultaneous briefing would occur after receipt of the transcripts. On December 28, 2009, Applicant's counsel advised Respondents that it was abandoning allegation 9(a) and only proceeding on allegations 9(b), 9(c), and 9(d). This Briefing follows:

I.

PROCEDURAL HISTORY

On May 17, 1999, an Orangeburg County Jury indicted Sammie Louis Stokes for murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy in the death of Connie Lee Snipes. The State sought the death penalty in the case. The Applicant was represented by Thomas R. Sims and Virgin Johnson

There were two pretrial hearings. The first, on January 19, 1999, before the Honorable Duane Shuler, concerned the qualification of defense counsel and a request for an evaluation. ROA, p. 1500 - 1508. The second, on October 14, 1999, concerned pretrial motions before Judge Paul Burch. ROA 1510-1642.

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The trial began on October 25, 1999 and ended on October 31, 1999. Judge Paul M. Burch presided at the pretrial hearings and at trial. Following the guilt phase of the trial, the jury found Mr. Stokes guilty of all charges. Following the sentencing phase, Mr. Stokes exercised his statutory right to make a closing argument. The jury found four aggravating circumstances and recommended death, which Judge Burch affirmed. He also sentenced Mr. Stokes to 30 years for first degree criminal sexual conduct, and to five years for conspiracy. Mr. Stokes later pleaded guilty to murdering Mr. Ferguson, for which he received a life sentence.

The Direct Appeal

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The Applicant appealed to the South Carolina Supreme Court. On appeal, he was represented by Joseph L. Savitz of the South Carolina Office of Appellate Defense. In his Final Brief of Appellant, he asserted the issues on appeal as follows:

- I. The judge erred by refusing to allow the defense to introduce the portion of appellant's letter to the police the state had redacted, which indicated that the decedent had willingly accompanied appellant, Syphrette and Martin as the member of a conspiracy to kill Doug Ferguson.
- II. The judge erred at sentencing by refusing to allow appellant to tell the jury during allocution that he had asked God to forgive him for his crimes.

State v. Stokes, Final Brief of Appellant, p. 3. The Respondents restated the issues as:

- I. The trial judge properly denied the defense request to admit statements redacted from a letter introduced by the State because the statements were unnecessary and irrelevant to a fair and complete determination of the defendant's guilt.
- II. The trial judge properly barred the defendant from arguing religious matters during his statutory closing argument.

The South Carolina Supreme Court denied the appeal in State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001) on May 29, 2001. On July 2, 2001, a petition for rehearing was denied..

STATEMENT OF FACTS

Not long after his arrest, Mr. Stokes wrote a letter to the police confessing his involvement in Ms. Snipes' murder. At trial, the State introduced the letter as evidence and supplemented it with other testimony, including that of Mr. Stokes' cohort, Norris Martin.

In the letter, Mr. Stokes confessed that he had agreed to kill Ms. Snipes for \$2,000 at the request of his cellmate, James Roy Toothe, and Mr. Toothe's mother, Pattie Syphrette. Ms. Snipes and her two children by Mr. Toothe, Brian and Nicole, lived with Ms. Syphrette. Apparently, the desire to have Ms. Snipes killed originated in Ms. Snipes' behavior regarding Mr. Toothe and the children, especially when she caused Nicole to be taken by the Department of Social Services. *See Stokes Confession (Court's Exhibit 4), R. pp. 1658-59.*

On May 22, Mr. Stokes called Ms. Syphrette. She said that Ms. Snipes "got to go and tonight." The reason she gave for the sudden urgency was that DSS had given her an ultimatum: to evict Snipes from her home or face losing the remaining grandchild, Brian. *Id.* at 1661-62. Then, as related by Mr. Stokes, the situation developed as follows:¹

I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. She said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She said I wish that were true so we could do all both of them. She said that Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway. I know you've been talking to her on the phone when Roy calls and I wasn't home.² You just better not flip on me for her. I laughed and said see yall at 9:30 P.M.

¹Although the original confession was transcribed as one long non-paragraphed statement, respondent has inserted paragraphs into this passage for ease of review.

² This phrase was redacted from the Confession published to the jury during the guilt phase. *See R.* at 969, ll.16-17.

They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight but this is better.³ I just laughed and looked at Pattie.

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We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer.

So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot.

Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not.

³This phrase also was redacted from the Confession published to the jury during the guilt phase. See R. at 969, 11.22-23.

I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said [oh] my god, that fat bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us \$2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me

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Stokes Confession, R. pp. 1662-63.

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Then, Mr. Martin had sex with the victim. *Id.* At trial, Mr. Martin testified that afterwards, Mr. Stokes took a knife and stabbed the victim in the chest, cut the nipple off of her right breast, then penetrated her anally while she was screaming from the injuries he inflicted on her. R. at 1155, 1.4-1157, 1.2⁴. Afterwards, Ms. Snipes was shot twice in the head; one shot struck her jaw and the other--fatal--shot struck her in the back of the head. *Id.* at 853, 1.4-854, 1.10. Although it is medically impossible to tell which shot came first, Mr. Martin testified that the defendant fired both shots, and that the victim was screaming after the first shot. *Id.* at 893, 1.5-22. Mr. Stokes stated that both he and Mr. Martin each fired one shot, but that Mr. Martin fired the first shot and he fired the second one. Stokes Confession, R. p.1663. Mr. Martin testified that Mr. Stokes scalped the victim and tossed her hair into the woods, *id.* at 1160, 1.13-23, then cut her vagina out. *Id.* at 1160, 1.24-1161, 1.10. A pathologist confirmed these injuries. *Id.* at 1218, 1.8-1221, 1.13.

On May 28, 1998, Mr. Stokes was at Ms. Syphrette's house with Faith Lapp, Ms. Syphrette, and Brian. *Id.* at 1330, 1.20-23. Ms. Syphrette left to get Mr. Ferguson and bring him to the house. *Id.* at 1334, 1.10-19. Ms. Lapp testified that, while they waited, Mr. Stokes told her

⁴This testimony was elicited during the sentencing phase, and not during the guilt phase.

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that if she said anything, he would do to her what he did to Ms. Snipes and, "if he couldn't get to [her], he was going to get to my family and then he said that he was going to have to come back in twenty years and get the baby." *Id.* at 1335, 11.6-11.

When Mr. Ferguson arrived, he sat down on the couch. *Id.* at 1340, 1.9; Stokes Confession, R. p. 1667. Mr. Stokes, who had been hiding in an adjacent bedroom, came out and asked, "[D]o you know me." R. at 1340, 1.15-1341, 1.16. Mr. Ferguson kept saying no. *Id.* at 1341, 11.16-17; Stokes Confession. Then, Mr. Stokes said, "Motherfucker, you're going to know me." *Id.* at 1341, 11.19-20. Lapp testified that, at that point, she took Brian out of the room while Mr. Stokes and Ms. Syphrette wrapped duct tape around Mr. Ferguson. *Id.* at 1342, 11.19-25. In his confession, Mr. Stokes stated that he punched Mr. Ferguson while he lay on the floor. Stokes Confession, R. p.1668. The pathologist described how they wrapped the duct tape around Mr. Ferguson:

The unusual thing about his body was that he was wrapped in duct tape. His ankles were taped together, his wrists were taped together and his arms were taped together and then that was taped to his chest and then his face and head was [sic] fully taped.

R. at 1194, 11.4-11. Because they wrapped tape around his nose, his mouth, and his entire head, Mr. Ferguson could not breathe and he died from suffocation. *Id.* at 1206, 11.1-9.

II. Allegations

Prior to the entry of the order on October 17, 2001, appellate counsel for Mr. Stokes initially filed an application for post-conviction relief in Orangeburg County. In the application, it was alleged that he received "ineffective assistance of counsel" and that it was based upon a "failure to present mitigating evidence." On May 6, 2002, the Respondents received the "First Amended Application for Post-conviction Relief." In the 2002 Application, made by current counsel, Stokes alleged the following:

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9(a) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution. Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).*

10(a) Trial counsel unreasonably failed to submit the autopsy data generated by the state's medical examiner to a qualified, independent pathologist for review. As a result, counsel were unprepared and unable to challenge the state's version of how the crime occurred, and what actions, if any, were taken by Applicant in connection with the vents surrounding the victim's death. But for trial counsel's deficient performance, there exists a reasonable probability that the result of Applicant's trial would have been different.

9(b) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution.*

10(b) The facts supporting the claim are as follows:

1. Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of Applicant's trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).*

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2. During closing argument, the prosecutor argued that life in prison without parole would reward Applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock Applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated Applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); see also, e.g., *Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

On August 9, 2004, Respondents received a pleading styled "Amended Application for Post-Conviction Relief" dated August 6, 2004. In the application, he raised the following:

1. *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, as a result of trial counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument.* 9(a)
 - a. The facts supporting the claim are as follows: During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 414, 362 S.E.2d 13 (1987). 10(a)

2. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial.* 9(b)

- a. Prior to instructing the jury at the sentencing phase of the trial, the trial judge was required to make an initial determination of which statutory mitigating factors were supported by the evidence and then to conduct a charge conference. *State v. Victor*, 300 S.C. 220, 387 S.E.2d 248 (1989). In this case, the trial judge failed to follow the clear rule set out in *Victor*. Furthermore, this failure to apply existing state law deprived applicant of due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Appellate counsel failed to raise this claim on direct appeal; had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(b).

3. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to submit for the jury's consideration a statutory mitigating circumstance.* 9(c)

- a. S.C. Code § 16-3-20(C) provides that the trial judge "shall include in his instructions to the jury for it to consider...the following...mitigating circumstances which may be supported by the evidence." In this case, the trial judge failed to instruct the jury on § 16-3-20(C)(b)(3) (the victim was a participant in the defendant's conduct or consented to the act), despite the fact that there was evidentiary support for this mitigating circumstance. *See State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986) (trial judge required to instruct the jury on statutory mitigating circumstances), *overruled on other grounds, Torrence*, 305 S.C. 45,

406 S.E.2d 315 (1991); *State v. Rogers*, 338 S.C. 435, 521 S.E.2d 101 (2000). Appellate counsel failed to include this claim on direct appeal had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. See *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(c)

4. *Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.* 9(d)

- a. The facts supporting the claim are as follows: From approximately 1981 until 1992, Thomas Sims, who would subsequently be appointed as lead defense counsel for applicant, was employed as an assistant solicitor in the First Circuit Solicitor's Office. In his capacity as assistant solicitor, Mr. Sims prosecuted applicant for a violent offense against his ex-wife. Largely on the strength of applicant's ex-wife's testimony, elicited at the trial by Assistant Solicitor Sims, a jury found applicant guilty of aggravated assault and battery, for which he received a substantial prison sentence. Later, in the capital trial challenged in this application, the prosecution began its sentencing phase presentation with evidence, again offered by applicant's ex-wife, of the offense for which Mr. Sims had previously prosecuted applicant. On cross-examination of the complaining witness, Mr. Sims did not explore several lines of inquiry which, had they been explored, would have mitigated the seriousness of the offense described by the witness and undermined the accuracy of her account. The record of proceedings before the trial court in this case contains no discussion or waiver of the conflict of interest arising out of Mr. Sims' successive involvement as prosecutor then defender of applicant. See, e.g., *Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990); *United States v. Zeigenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989); *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979). 10(d)

5. *Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation.* 9(e)

- a. The facts supporting the claim are as follows: Applicant suffers from significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as evidenced by a full scale IQ that is below the accepted threshold for mental retardation, and by historical information indicating that his adaptive skills are deficient. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). 10(e)

6. *Pursuant to Article I § 11 of the South Carolina Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the trial court lacked jurisdiction to sentence applicant to death as a result of the omission from the indictments of the aggravating factor(s) essential to expose him to punishment greater than life in prison. 9(f)*

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A12.
- a. The facts supporting the claim are as follows: Applicant was separately indicted for murder, conspiracy, criminal sexual conduct, and kidnapping. Applicant's eligibility for a sentence of death rested on the jury's finding of four statutory aggravating circumstances: murder during the commission of kidnapping; murder during the commission of criminal sexual conduct; murder for hire; and commission of murder as the agent of another. None of the indictments alleged that the victim's murder occurred "during the commission of" either criminal sexual conduct or kidnapping. Likewise, none of the indictments made any reference to murder for hire or commission of murder as the agent of another. *See* S.C. Code § 16-3-20; *Ring v. Arizona*, 122 S.Ct. 2428 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *State v. Brown*, 24 S.C. 224 (1886). 10(f)

7. *Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution. 9(g)*

- a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

During the status conference on June 4, 2009, counsel for the Applicant advised the Court and opposing counsel that he was withdrawing amended ground 7 set out as 9(g) [Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in

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unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution]. [The Respondents had made a motion to dismiss the allegation on August 25, 2004 under SCCP 12(b)(1) and 12(b)(6) as beyond the jurisdiction of the court in a state post-conviction relief proceeding under *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000)].

During the proceeding on June 4, 2009, counsel for the Applicant also advised the Court and opposing counsel that he was abandoning ground five - allegation 9(e) [*Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation*]. [The October 22, 2007 submission by the South Carolina Department of Disabilities and Special Needs opined that Stokes did not meet the diagnostic criteria for mental retardation].

Finally, during post-hearing briefing, Respondents were advised that Applicant was also abandoning allegation 9(a). [*counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument*].

III.

GENERAL LAW RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. 466 U.S. at 687. Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that

appointed counsel were not deficient in their performance nor was the Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

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H14.
At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." *Id.* Rather, the court must place itself in the shoes of Stokes' attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Ard bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-64, 2068, 80 L.Ed.2d 674 (1984). In


 assessing counsel's performance, courts bear in mind that the review is "highly deferential." Id. at 689, 104 S.Ct. at 2065. Indeed, it affords a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. See Id. And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S.Ct. at 2066. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See Id. at 691-92, 104 S.Ct. at 2066-67. Therefore, deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability--i.e., one adequate to undermine our confidence in the result-- that "the result of the proceeding would have been different." See id. at 694, 104 S.Ct. at 2068.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691, 104 S.Ct. at 2066; see Satcher v. Pruett, 126 F.3d 561, at 572 (4th Cir 1997)(explaining that " '[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments' " (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066)).

9 (A) - Ineffective Assistance in Failing to Object to Penalty Phase Closing Argument .

In his first amended allegation, Stokes, through counsel, contends that counsel should have objected to the prosecution penalty phase argument about the impact of a life sentence in

the Department of Corrections. This issue was specifically abandoned in the post-hearing briefing. As such, it must be dismissed for lack of prosecution.

9(b) - Ineffective Assistance of Counsel on Appeal - Failure to Hold A Charge Conference on Mitigating Circumstances.

9(c) - Ineffective Assistance of Counsel on Appeal - Failure to Brief Failure to Instruct on Statutory Mitigating Circumstance (b)(3) - the victim was a participant in the defendant's conduct or consented to the act.

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416.
In specification 9(b) and 9(c), the Applicant asserts that appellate counsel Joseph Savitz, Chief Attorney of the South Carolina Office of Appellate Defense was deficient in failing to present two separate grounds in the appeal - the alleged failure to hold a charge conference on the record and the particular failure to instruct on the statutory mitigating circumstance 16-3-20(C)(b)(3) that "the victim was a participant in the defendant's conduct or consented to the act." Respondent submits that counsel cannot be deemed deficient because neither issue was preserved for review by objection or ruling by the trial court.

Standard of Review for Ineffective Appellate Counsel Claims

A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Tisdale v. State, 357 S.C. 474, 475, 594 S.E.2d 166, 167 (2004); Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999).

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417.
The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)(following Smith v. Murray, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. Id. at 285 (applying Strickland).

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Jones, 463 U.S. at 754, 103 S.Ct. 3308. "Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal. Holladay v. State, 629 So.2d 673 (Ala.Cr.App.1992), McCoy v. Lynaugh, 874 F.2d 954, 965-66 (5th Cir.1989). Rather, counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)." Davis v. State, 720 So.2d 1006, 1014 (Ala.Crim.App.1998).

" [E]xperienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most

on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed.'

Jones v. Barnes, 463 U.S. 745, 746, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).⁵

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#18.
In applying the [Strickland] test to claims of ineffective assistance of counsel on appeal ..., reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993). see also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989). Indeed, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting Jones, 463 U.S. at 751); see also Smith, 882 F.2d at 899 (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. "Generally, only when ignored issues are clearly stronger

⁵The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland, 104 S.Ct. at 2065; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir.1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

than those presented, will the presumption of effective assistance of counsel be overcome." ' Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986)). Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

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219.
Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002); Gilchrist v. State, 612 S.E.2d 702, 705 (S.C. 2004) (appellate counsel not ineffective where trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."). See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal).

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, the Applicant must prove prejudice by showing he would have prevailed on appeal had a writ been filed by counsel and granted by this Court. See, Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal).

WHAT THE RECORD SHOWED

The record reveals that at the outset of the penalty phase, Judge Burch made inquiry of the state and defense of the aggravating and mitigating factors it intended to pursue. Counsel Sims advised Judge Burch at that time that:

....under section B(3), *the victim was a participant in the defendant's conduct or consented to the act, we think there is ample evidence in the record that the victim participated up to a point by being involved in the actions of the defendant at the time and we would think that it would be a mitigating circumstance.* Your honor, we also intend to – what we consider to be mitigating, his adaptability to prison and there would be a third matter (which concerned the medical condition of Stokes).

ROA 1083, ll. 1-22. (Emphasis added).

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x 10.
In counsel Sims' opening penalty phase opening statement, he discussed their intent to present adaptability to prison evidence, but did not present any statement concerning the victim's involvement or provocation factor. ROA 1109.

Prior to the penalty phase closing arguments after the evidence was presented, Judge Burch declared that: "I'll review my checklist." ROA 1429. During the closing arguments, the solicitor made general references to evidence in mitigation concerning adaptability to prison. ROA 1446, 1451. Stokes made a personal statement of remorse. ROA 1459-1460. Counsel Sims made his argument concerning former warden James Aiken's testimony that Sims would never be a free man and in a maximum security prison and the factors for a maximum security prison. ROA 1466-1467.

Pre-charge objections were made which did not include either of the presently challenged issues. ROA 1468. During the jury charge, Judge Burch addressed mitigation circumstances. ROA 1479-1481. In particular, he stated: " Now there are such things as statutory mitigating circumstances which are not alleged or brought forth in this case and then there are what we call non-statutory mitigating circumstances ..." ROA 1480, ll. 3-6. Judge Burch did not instruct the jury to consider any specific statutory mitigating circumstance.

After the instructions, there were no objections to the failure to instruct any particular statutory mitigating factor nor the failure to hold an on the record charge conference. ROA 1486 (no objection to the charge by the defense).

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x 21
During the PCR hearing, counsel Savitz declared that he reviewed the trial record, but did not highlight any portion where there was a discussion concerning whether the victim was provoked or was a participant in the crime. PCR Tr.p. 24. He concluded that he could not recall what he was thinking when he was preparing the brief, but suggested that it was something similar to what he had argued in *State v. Humphries*, *State v. Victor* and *State v. Evans*. He asserted that it was his opinion that trial judges should do more and specifically make inquiry as to each mitigating factor on the record. However, Savitz conceded that the Court ultimately said it was not required. PCR Trp. 25. He could not recall why he would not have argued to have the matters addressed on the record as he had been arguing in the same time period - albeit unsuccessfully. PCR 25.

On cross-examination, Savitz admitted that when he raised non-objected statutory mitigating factors that it was usually related to issues of intoxication. PCR 26. He admitted that he had reviewed the trial judge's instructions prior to briefing. PCR 27. He admitted that he realized that the judge did not instruct on any specific statutory factors. PCR 27, l. 13. He recognized that the trial judge further concluded that there were no mitigators in the case. PCR 27-28. Mr. Savitz further admitted that he reviewed the objections made to the jury instructions and determined that no objection had been made to the failure to give statutory mitigating circumstances. PCR 28, l. 8. He further was aware that there was no objection to the failure to have an on the record discussion concerning the mitigators. PCR 28, l. 9-12.

Counsel Savitz further admitted that he was aware of the existence of a statutory mitigating factor of the victim was a participant in the crime or consented to the act at the time of the briefing. PCR 28. Further, he acknowledged that he was aware of the existence of evidence in the record and the fact that the judge did not give the instruction. PCR 28-29.

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122.
However, Savitz questioned whether in *State v. Humphries*, that the Court had held that a failure to object to the trial court's failure to give an instruction did not preserve the issue for appeal. PCR 29. He felt that until the *Kamell Evans* case that he was arguing a procedure to require the judge to go through each mitigating factor on the record. PCR 29. In admitted hindsight, Savitz stated that the judge has the discretion to hold a charge conference any time he wants to and admits that Judge Burch did hold a charge conference and mentioned the mitigator during the conference. However, Savitz stated that it was never mentioned again after the beginning of the penalty phase. Savitz suggested that he missed it and would have raised it had it seen it because this was an issue he was raising at the time. PCR 30. However, he recognized that he probably would not win, but thought that the law was uncertain at the time. PCR 30.

Savitz however, admitted that in 1993 in *Humphries* the Court had held that a failure to make a specific request for a mitigation circumstance waived the right and that he may have been missing the message that the Court was sending, but still raised the issue in *Evans* contending that the law was uncertain concerning preservation of the issue. PCR 31-32. He admits that in *Evans*, the Court made clear that a request for the factor had to be made to preserve the issue when it was not charged. PCR 33. However, he had no idea why he did not raise the issue. PCR 33, l. 5.

Counsel Sims conceded that he did not object to the failure to give the particular statutory mitigating circumstance instruction. PCR 65.

ANALYSIS

Respondent submits that the Applicant has failed to show either deficient performance or prejudice under *Strickland v. Washington*. Appellate counsel Savitz cannot be deemed deficient in failing to raise these two issues because neither were presented to the trial court by a timely objection on the record. Absent a request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for review. *State v. Evans (Kamell)*, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).

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23.
In *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989), the Supreme Court set forth the proper procedure for submission of statutory mitigating factors to the jury in the penalty phase of a capital case:

Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

See, *State v. Stanko*, 376 S.C. 571, 577-578, 658 S.E.2d 94, 97 - 98 (S.C., 2008) (not preserved).

One of the earlier cases addressing this assertion was handled by appellate counsel Savitz prior to his handling in the instant case resulted in rejection of the argument as not preserved. *State v. Humphries*, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996). The Court has constantly rejected this claim absent request and objection , except in the intoxication evidence area which was corrected in *Evans*. The recent cases have stated that absent a request by counsel to charge a mitigating circumstance at trial, the issue whether the mitigator should have been charged is not preserved for review. See *State v. Vazquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005); *State v. Bowman*, 366

S.C. 485, 494, 623 S.E.2d 378, 383 (2005); and *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883, n. 3 (2005).

Here, there was no request by counsel for the instruction on the particular statutory mitigator and no objection to the failure to give the instruction. ROA 1486-87. Since there was no objection, nothing was preserved for the appeal. Reasonable appellate counsel cannot have raised the issue on appeal since there was no objection. This Court must conclude that counsel was not deficient.

Further, there was nothing in the record to show that the trial court failed to hold a charge conference. Similarly, there was no showing that the defense objected to the lack of a charge conference to preserve the issue for an appeal. Appellate counsel cannot be found to be deficient when the issue was not raised at trial.

Since there is no showing that the Court refused to hold a charge conference or that the defense objected to the failure to instruct on the particular mitigating factor, reasonable appellate counsel could not have been required under the constitution to assert these unpreserved claims, particularly in 2000 when the appellant's brief was written after the decision in *Humphries*. His claims set forth in these two specifications must be dismissed. ⁶

⁶This Court does not need to address whether there was any evidence of the statutory mitigating factor that "the victim was a participant in the defendant's conduct or consented to the act" under Section 16-3-20(b)(3), because the specific request was not made by trial counsel and a Sixth Amendment claim of ineffective assistance of trial counsel is not raised. However, even if asserted as a trial counsel claim, the prejudice prong cannot be satisfied where the evidence revealed that the victim's death was the idea and the plan by the Applicant was to create a subterfuge. Simply put, Connie Snipes did not consent to the violence that was about to strike her involving the violent rape, stabbing, maiming and ultimately shooting. There is no reasonable probability that the result would have been different had request for the instruction been made or if the instruction had been given. Any suggestion otherwise is groundless in light of this horrific factual record of malice against the victim.

9(d) - Conflict of Interest - Thomas Sims as Prosecutor in 1991.

The Applicant in this specification asserts that counsel Thomas Sims had an actual conflict of interest in representing Stokes because he had personally previously prosecuted Stokes on Indictment 91-GS-38-0190 involving the December 2, 1990 incident involving the assault on Audrey Smith that resulted in a conviction for assault and battery of a high and aggravated nature and sentence of 10 years after a jury trial before Judge John H. Smith. The record also reveals that Sims signed the indictment for assault and battery with intent to kill and personally handled the trial. Further, the evidence of the conviction and sentence was introduced by the state in the penalty phase in State Exhibit One in the chart [ROA 1110-1111] and also through the penalty phase testimony of Audrey Smith. It should be noted that counsel Sims cross-examined Smith in the matter. The record reveals that there is no indication on the record before the jury that Sims had prosecuted Stokes.

Respondent submits that there is credible evidence in the record, based upon the testimony of both Virgin Johnson and Thomas Sims, that Stokes knowing and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial. Respondents note that the Applicant failed in their burden of proof at the hearing and failed to call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement after the hearing is insufficient to satisfy their burden of proof.

How This Issue Was Presented

The record initially reveals that Judge Shuler appointed Thomas Sims after initially appointing Virgin Johnson. A pretrial hearing was held on January 19, 1999 in Stokes presence by

Judge Shuler. During the qualification, Sims noted that he was in the Solicitors Office from 1982-1993. ROA 1502-1504. No objection is made to the representation by either Sims or Stokes. Nothing is stated on the record about Sims prior prosecution of Stokes in the earlier matter involving Audrey Smith. A review of the trial record reveals no further on the record inquiry concerning the prior representation. In the penalty phase of the trial, the Solicitor indicates that he is presenting the chart, State Exhibit One, rather than the indictments to remove any potential prejudice. ROA 1085.

The Stokes-Audrey Smith Trial

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This Court has before it the transcript of the March 12, 1991 trial of Stokes for the incident against Audrey Smith. Plaintiff Exhibit 1. The record reveals that Sims personally prosecuted the case and signed the indictment against Stokes. The victim, Audrey Smith, the ex-wife of Stokes was the primary witness. The crime involved a December 2, 1990 incident between them. At the trial, Stokes was represented by Reddick Bowman. However, Stokes chose to waive his presence in court during the trial. Tr.p. 4-14. Audrey Smith testified in the 1991 trial that Stokes had gone on a walk with her to a schoolyard and then took her clothes off and forced her to have sex with him after she refused. Tr.p. 43. She stated that he had a letter that stated he was going to kill her that night and he told her that he had changed his mind. Tr.p. 44. He later took out an extension cord and put it around her neck and held it tight until she became unconscious. Tr.p. 46. She later woke up in the field and called 911 from a nearby house. Tr.p. 46-47.

During cross-examination by Mr. Bowman, Smith stated that when she woke up she reached for her shoes and hid when she saw some automobiles because she thought that Stokes was returning. Tr.p. 48-49. She admitted that Stokes did not own an automobile, but had friends who did. She said he was supposed to arrive at 6 the evening before , but did not get there until 7 PM at

Turnkey Apartments in Branchville. Tr.p. 50. She stated that they traveled across the open field. She stated that they went up there at the schoolyard swinging and two of his friends came by. Tr.p. 52-53. A little while after the friends left, she stated that they had sex. Tr.p. 53. She stated sometime after that he put the cord around her neck but she could not be definite about the time. Tr.p. 54.

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Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. Tr.p. 56. Smith stated that she thought she did say to the police that Stokes took the letter back from her because he feared that she would take it to the police. Tr.p. 59. She admitted that she was afraid of Stokes who did not let her talk to his friends, however, she did not scream in fear that date nor have any conversation with his friends. Tr.p. 60-61. She stated that they would not have help her anyway because they were his friends. Tr.p. 62.

After Smith testified, Stokes remained outside of court due to his dissatisfaction with appointed counsel and the court's refusal to delay the matter to allow him to attempt to retain counsel. Tr.p. 67-68.

Solicitor Sims next asked Smith on re-direct examination concerning why she did not request help from the two men at the schoolyard when they came up. She stated that she had not seen the threatening letter yet and that they were just sitting and talking then. Tr.p. 71-72.

Audrey Smith's Testimony in the Penalty Phase

In the State's case in aggravation, the Solicitor Bailey put in record the following criminal record:

March 9, 1998	Assault and Battery of A High and Aggravated Nature - 8 years and 5 years probation.
August 31, 1990 -	Paroled from conviction.

March 13, 1991 - Assault and Battery of a High and Aggravated Nature.

10 year sentence.

April 3, 1991 - Parole from first sentence revoked.

February 11, 1993 Assault and Battery of a High and Aggravated Nature

3 years consecutive.

ROA. 1110-1111.

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The state also presented the testimony of Audrey Smith, the Applicant's ex-wife who testified about incidents where Stokes assaulted her. The incidents included a November 1987 incident when Stokes held a knife to her throat which resulted in a tussle and her hands getting cut when she tried to grab the knife and held her hostage and threatened to kill her children and brother if she made a sound. ROA 1115-1117. She later attempted to call for her brother after he placed her in a ditch and Stokes stabbed her three times in the back and then he fled. ROA 1118-1119. She then stated she went to the hospital. ROA 1119. He was convicted in March due to that assault.

Ms. Smith next described an incident on December 2, 1990. ROA 1119. Stokes had gotten out on an early release program. Smith was staying at her mother's home. Stokes came by and they went for a walk up the hill implicitly to get something that a lady was making for him. However, he forced her to have intercourse with him and then went to the high school and gave her a letter that stated he was going to kill her that night. ROA 1120-21. She said they walked away and that Stokes declared that he was looking for guns that he left in a field. Unable to find the guns, Stokes pulled out an extension cord with knots on it and put the cord around her neck and she passed out. When she awoke, she was bleeding and fled to the emergency room. ROA 1125. She stated that she was

in the hospital for 3 to 4 weeks. ROA 1125. She stated that this included being in the regular part of the hospital for 8 days and then being placed in the Rose Center, a place for people with mental and emotional problems for 11 to 12 days to deal with returning to Branchville. ROA 1126. Smith testified that as a result of this assault on March 31, 1991, Stokes received a ten year sentence. Id.

Smith testified that while being locked up he wrote her a series of threatening letters towards her or anyone who may attempt to aid her. State Exhibit 2, 3, 4, 5, 6, 7, 8. ROA 1127- 1138. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. ROA 1138.

On cross-examination, defense counsel Simms had her confirm that Stokes had no direct contact with her after he got out of prison and had not come around or called her in 1998. She stated that it had been a couple of years since Stokes had written her. ROA 1139-1140. She asserted that Stokes had told her when they were having problems that he was on drugs and jealous, and possessive of her. ROA 1140 - 41. She confirmed that in a number of the letters Stokes wrote that he was asking to be able to talk and write him and that he was trying to get his head straight. Id.

On re-direct examination, she stated that she had to go to Branchville Police Department and the Parole Department to get the letters stopped. ROA 1141. ⁷

⁷ The State also put into evidence various prison violations. In particular, the state presented a chart [State Exhibit 9] which included the following:

- July 1, 1998 - fighting without a weapon
- January 4, 1992 - refusing or failing to obey promptly or properly a direct order.
- January 22, 1992 - out of place, lying to employees.
- January 26, 1992 - out of place.
- February 26, 1992 - exciting or creating a disturbance, refusing or failing to obey promptly and properly a direct order.
- April 11, 1992 - out of place.
- July 12, 1992 - possession of a weapon.
- July 29, 1992 - fighting without a weapon.

ANALYSIS

Respondent submit that Sims prior prosecution of Stokes does not create an actual conflict of interest requiring a retrial. First, the Respondent submits that there is credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the earlier prosecution and Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter. Further, there is credible evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter.

December 3, 1993 - gambling.

July 28, 1993 - lying to employees.

ROA 1142-43.

The state called Roy Stevens, a former criminal investigator at the South Carolina Department of Corrections who testified about the incident with Jackie Williams which resulted in the February 11, 1993 conviction for assault and battery of a high and aggravated nature. ROA 1144. He stated that Stokes and Jackie Williams were inmates at Allendale Correctional Institution. He described and presented photographic evidence of Jackie Williams slashed face from a box cutter used by Stokes in a restroom fight. ROA 1145 - 46. State Exhibits 10, 11, 12, 13. The photos revealed sutures and a number of cuts on Williams face. ROA 1147-49. There were 10 sutures. 1149-1150.

He stated that he was not aware of any other fights between Williams and Stokes. ROA 1151.

The state also presented testimony concerning the Orangeburg- Calhoun Regional detention Center. Evidence was presented from Keith Simmons, a former correctional officer that on July 27, 1999, after 5 PM, a fight broke out between Stokes and another inmate Shawn Windburn, a houseman with small privileges. When food was being delivered to Stokes, they had words and Stokes started hitting on Windburn. ROA 1278-79. He described seeing Stokes hitting Windburn in the head numerous times. ROA 1279. It required Windburn being sent to the hospital. ROA 1279. He said that Stokes was locked down as a result.

On cross-examination, he described that fights in the jail are not uncommon. However, Simmons stated that he personally placed Stokes in the cell, but that Stokes did not try to hit him nor be aggressive. He stated that the only thing that happened to Stokes was an incident report and that his canteen privileges and no visitations were allowed for five days. ROA 1283, 1. 17-25. He stated there was nothing unusual about the punishment. ROA 1283-84.

On re-direct, this incident was described as a major infraction. ROA 1284.

Testimony of Counsel

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Counsel Thomas Sims testified at the hearing that he did recall representing the state in the 1991 Stokes prosecution. PCR 51. He stated that he signed the indictment and handled the prosecution, but did not recall the details at this time. PCR 52. He stated that he subsequently entered private practice after losing his race for Solicitor against Walter Bailey. PCR 52. He stated that he had no further involvement with Audrey Smith after the 1991 prosecution in any civil matter. PCR 53-54. Sims stated that he was appointed by Judge Shuler . He stated that during the qualification hearing, his prosecution trial experience was presented, but he did not specifically state that he had previously prosecuted Stokes at that time. He stated that the question was never asked. PCR 55.

Importantly, Sims stated that he discussed his prior prosecution with Stokes:

...after going through the information we did discuss with Mr. Stokes , my role, who I was, and what my role had been in the previous matter with him. We discussed , me and Attorney Johnson. We did discuss it . He never expressed any desire not to have me as his attorney.

PCR 55. As to whether he could have another lawyer represent him, Sims stated that we talked about it, but could not state under oath that he said to Stokes: "if you want another lawyer you can get one."

PCR 55. However, he testified that the discussion was that he was told that Sims had prosecuted him and sent him to jail and "do you still want me as your lawyer , and he says yes."

Sims opined that it was clear from his discussions that Sammie could have said he didn't want you as his layer and he said he wanted him to continue. PCR 56. In support of this understanding, Sims noted that after the trial and sentencing, after the Smith testimony and death sentence, that Stokes contacted him and told him that his appellate lawyer thought that they were going to win the case

and that Stokes stated that he wanted Sims as his lawyer again "because you're top flight...I want you back." PCR 57. In fact, Sims did continue to represent Stokes on the remaining charges. PCR 57.⁸

Sims was firm in his recollection that Stokes never indicated any desire to have him removed as his layer in the case. PCR 58.

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Counsel Sims stated that he was aware that the prosecution was providing him information concerning the statutory aggravating circumstances. PCR 58-59. He stated that he was aware that they planned to use letters that he had written his girlfriend and Stokes prior convictions . PCR 59. Sims stated that they talked about the matters in depth. Sims stated that he would look at the issue from both sides and try to develop a defense. . He stated that he anticipated that both the conviction and that Audrey Smith would testify in the penalty phase. PCR 59-60. He stated that he reviewed these matters with Stokes. PCR 60. As to the Smith incident, Sims stated that he knew it was coming in and that he needed to address it with a showing of remorse. PCR 60.

Counsel Sims stated that he cross-examined Smith in the penalty phase. PCR 60. He denied that the fact that he had previously prosecuted Stokes for the same incident affected the manner that he handled the testimony. He stated that if he thought that he could not have represented Stokes to the best of his ability that he would not have been in the case. PCR 61. He declared that there was nothing that he learned in the earlier prosecution that inhibited his defense. PCR 61.

Counsel does not recalled whether they made any formal motion about the earlier prosecution, but thinks it was more fully developed in the record in the second case. Sims asserted

⁸ Counsel Sims recollection of Mr. Jeffrey Bloom's role and advice was different that Mr. Bloom's. Particularly, he recalled contacting Mr. Bloom to assist , but that he was involved in a major trial in Aiken and would not not able to assist. PCR 57. Sims had no recollection of any discussion with Bloom concerning the conflict of interest issue. PCR 58.

that Virgin Johnson, his co-counsel, never expressed any concern about Sims continuing in the case. PCR 61.

On cross-examination, Sims stated that he research the admissibility of prior convictions prior to trial. PCR 68-69. He noted that other issues they researched concerned kidnapping, criminal sexual conduct and mitigation. PCR 71. He noted that he looked at State v. Lyle and Rules 404(b), 608 and 609. PCR 72. Counsel Sims stated that he attempted to present an argument in an attempt to keep out the prior convictions in the penalty phase, trying to rely upon these rules. PCR 74-80. Counsel stated that he was trying to keep out the evidence of the prior convictions. PCR 80.

Counsel Sims stated that he made sure that Stokes knew that he was the person who prosecuted him and had sent him to jail previously. PCR 83. He stated that they talked about the indictment that he had signed also. PCR 83. However, he stated that he could not stated that he asked him if he still wanted him on the case. PCR 83-84.

Counsel Sims again confirmed that he had ne recollection of any discussion with Jeff Bloom concerning a conflict of interest. PCR 84. However, counsel Sims thought that there was a discussion with a judge at some time concerning the prior prosecution. PCR 85.

Counsel Sims, on redirect, confirmed that he anticipated that Audrey Smith would testify in the penalty phase. PCR 87. He stated that it was one of the things that they got and would likely use. Sims further confirmed that this concern was raised with the trial court at the October 14 hearing because Sims's name appeared on the indictment. PCR 87, ROA 1636. ⁹ It was agreed it would be removed from being presented to the jury. PCR 87. See also, ROA 1085. Counsel Sims stated that

⁹It is therefore evident to the State and Judge, as well as Sims about the potential introduction of the Audrey Smith evidence on October 14.

he wanted to be sure that there were no slips ups in court concerning his name on the indictment. PCR 88.

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Counsel Sims clarified that Stokes knew that he had been the one to prosecute him and his practice was to state that did he have any problems with that . Further, he recalled that after the trial Stokes wanted Sims to represent him again. Sims felt that Stokes knew that if he had any problem, he only had to speak up and let them know. PCR 88-90. He stated that Mr. Johnson was present during the discussions. PCR 89. Further, counsel Sims stated he knew that the state intended to introduce prior bad act evidence , that this information was included in his evidence in aggravation and that the state would try to introduce it. PCR . 89-90. Counsel stated that he expected the material 1 to be introduced. PCR 93-94, 98. He stated that he anticipated the 1991 conviction evidence to be introduced. PCR 98.

Co-counsel Virgin Johnson testified concerning his representation of Stokes in 1999. He stated that he was initially first chair, but when Mr. Sims was appointed, he became second chair. PCR 101. Johnson stated that at some point he learned that Sims had prosecuted Stokes previously. Johnson stated that recalled Sims discussing the prior prosecution with Sammie at the beginning. He recalled Sims telling Stokes that he put him in jail and that Sammie recalled that . PCR 102. Johnson stated that they went through questions of do you have a problem with me representing you, do you think - - you know do you want somebody else and he [Stokes] said no. PCR 102, l. 8-13. Johnson confirmed that Stokes never requested other counsel be appointed throughout the trial. To the contrary, he asserted that their relationship was good throughout both trials. He also recalled after the conviction while the matter was on appeal, Stokes expressed a desire to have Sims represent him. PCR 102.

Johnson recalled Audrey Smith testifying at the trial concerning the prior assaults. Johnson recalled the fact that Stokes was told prior to the trial that the evidence of the prior conviction could possibly be presented. PCR 103. Johnson stated that Stokes did not request that Sims be removed. Further, Johnson never saw Sims hesitate to act on Stokes behalf at any time. PCR 104. He stated that Sims did his very best. The prior prosecution did not have any effect. PCR 104.

Johnson stated that in the discussions, we discussed the fact that it could be prejudice related to Audrey Smith's testimony. PCR 105.¹⁰

1. *No Per Se Conflict of Interest.*

Independent of the apparent waiver of the conflict of interests, there is no *per se* conflict based upon the prior prosecution involving a different crime. In *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233, 235 (S.C. 2007), the Supreme Court of South Carolina affirmed the state's lower appellate court on the conflict issue concluding that defense counsel prior prosecution of the defendant did not require removal as a conflict of interest. The Court held:

Childers asked the trial judge to relieve defense counsel based on defense counsel's prior prosecution of him and his perceived lack of defense counsel's trial preparation. Defense counsel told the trial judge he was ready and prepared to go to trial and he had no independent recollection of prosecuting Childers. Childers failed to show his

¹⁰In the PCR hearing, the Applicant called Richland County Attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. PCR 41-43. However, unlike Sims testimony, Mr. Bloom suggested that he recalled a discussion about a potential conflict of interest which Bloom was concerned about based upon the prior prosecution. PCR 43. Bloom stated that he tried to emphasize this to Mr. Sims who Bloom contended did not fully understand why it would be a problem. Bloom contended that he told Sims that at a minimum he must request a hearing before a judge on the issue in an ex parte setting and allow Stokes to express his desires to the court. PCR 44. Bloom stated that in his next telephone contact with Sims that he learned that Sims had not followed through with Bloom's suggestions. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue.

counsel had any divided loyalties or an actual conflict of interest. *See Gregory*, 364 S.C. [150] at 152, 612 S.E.2d [449] at 450 [2005] ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's."); *See also People v. Abar*, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y.App.Div. 2002)(finding there was no conflict of interest where defendant's public defender had previously prosecuted him on unrelated charges when she was employed as an assistant district attorney); *State v. Cobbs*, 221 Wis.2d 101, 584 N.W.2d 709 (1998)(concluding there was no actual or serious potential conflict where defendant's counsel had previously prosecuted defendant while working in the district attorney's office). The Court of Appeals correctly found the trial judge did not abuse his discretion by denying Childers' request to relieve counsel.

State v. Childers, 645 S.E.2d 233, 235 (S.C. 2007).

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Given there was no evidence of conflict, or even serious potential conflict under the particular facts of this case, there could be no Sixth or Fourteenth Amendment error. *See Mickens v. Taylor*, 535 U.S. 162, 171(2002)("we think 'an actual conflict of interest' meant precisely a conflict that affected counsel's performance-as opposed to a mere theoretical division of loyalties")(emphasis in original). The record clearly shows counsel did not claim an actual conflict, or move to be relieved based on his perception of a conflict. *Compare Holloway v. Arkansas*, 435 U.S. 475 (1978)(trial counsel advised the court of an actual conflict of interest and requested different counsel be appointed for co-defendants). Moreover, the record shows Petitioner relied upon counsel, and expressed no complaint of counsel, prior to the trial. In short, neither case law nor fact support Petitioner's position.

Petitioner may submit that *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), provides that Petitioner was not required to show prejudice where his right to choice of counsel was violated. Respondent does not disagree with that reading of the case; however, this is not a choice of counsel matter, and *Gonzalez-Lopez* is neither relevant or dispositive to the issue here. Petitioner was represented by an appointed counsel and did not request the services of another whom he could

retain or who would waive compensation. The particular right evaluated in *Gonzalez-Lopez* was not invoked in the instant case. "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 126 S.Ct. at 2561. Clearly, the resolution of the issue in *Gonzalez-Lopez* is not applicable to the present case with its differing factual underpinning. In fact, in regard to the factual basis posed by Petitioner, Respondent asserts that two of Petitioner's critical factual assertions lack support in the record.

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* The record is void of any attempt by the Applicant to have counsel Sims removed with the uncontradicted record that he was aware of the prior prosecution. The record does not show Petitioner was "vehemently" opposed to counsel's representation because of Sims' former role as a prosecutor, nor does the record show an actual conflict of interest. The state court in Childers adopted the logic of other jurisdictions that essentially hold such a situation does not show "competing interests" or "divided loyalties" that could form a basis for finding an actual conflict in representation. *Childers*, 645 S.E.2d at 235. In support of its decision, the state court cited with favor *People v. Abar*, 290 A.D.2d 592 (N.Y. App. Div. 2002), *affirmed* 786 N.E.2d 1255 (N.Y. 2003), and *State v. Cobbs*, 584 N.W.2d 709 (Wis.App.1998), *review denied* 222 589 N.W.2d 629 (Wis. 1998), both of which fully support the state court's findings. The court in *Abar* noted that "[a]lthough the transfer of a defense attorney to a District Attorney's office might well create a conflict of interest constituting a disqualification of the District Attorney's staff from prosecuting the defendant previously represented by the former defense attorney" the converse situation does not provide the same opportunity for "abuse of confidence" or the appearance of conflict. 290 A.D.2d at 593. Similarly, in *Cobbs*, a former prosecutor had also been appointed defense counsel. While a prosecutor, counsel had represented the state against Cobbs. The court found that the former

representation had absolutely nothing to do with the present representation, and that counsel had broken ties with the office more than five years before the instant charge. The court concluded there was no conflict of interest. Such sound logic is persuasive in evaluating when confidences are placed in counsel, and when abuse may occur.

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In this case, with at least a six (6) year lapse between even being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between the former offense and the instant case. The only matter was the existence of the conviction - a proven fact - as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction. There is no showing that the prior prosecution adversely affected his representation of Stokes based upon this state witness - a person whom he never represented. There were no divided loyalties in the matter.

The simple fact of the former prosecution did not, in and of itself, provide proof of a conflict of interest. Given the lack of an actual conflict, the Petitioner otherwise must show adverse effect to be entitled to relief. *Id.* This precisely follows this Court's well-defined precedent:

...the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). See also, *State v. Wareham*, 143 P. 3d 302 (Utah App. 2006) (attorney's prosecution of individual present no general bar to attorney's subsequent representation in a criminal defense capacity); *Hendricks v. State*, 128 P.3d 1017 (Mont. 2006) (per se ineffective assistance of counsel as a conflict of interest does not result when appointed counsel previously prosecuted defendant on another matter).

Further, Respondent submits that there was a knowing waiver of a conflict of interest. SCACR, Rule 407, Rule 1.7(b)(1-2), wherein it essentially states that a lawyer should not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client unless:

- 1.) the lawyer reasonably believes the representation will not be adversely affected; and
- 2.) the client consents after consultation.

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However, the comments to Rule 1.7 recognize that a client may consent to representation notwithstanding the conflict. However, it notes: "when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Further, the comments noted that "there may be circumstances where it is impossible to make the disclosure necessary to obtain consent."

In United Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1991), the court set out factors which may be used in

- 1.) the nature of the litigation;
- 2.) the type of information the lawyer may have access;
- 3.) whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation; and
- 4.) the issues in dispute.

See generally, Jarvis and Tellum, When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflict. 33 Williamette L. Rev. 14t (1997).