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**S.C. Supreme Court**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Honorable Michael Nettles, Circuit Court Judge

Case No. 08-CP-43-00905  
Appellate Case No. 2013-001968

BOBBY WAYNE STONE..... Petitioner,

v.

STATE OF SOUTH CAROLINA..... Respondent.

APPENDIX  
VOLUME IX OF XV

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Chief Justice TOAL:

\*33 This is an appeal from a capital sentencing proceeding. The jury sentenced Appellant Bobby Wayne Stone to death, and Appellant argues that testimony from the victim's widow impermissibly injected an arbitrary factor into the jury's deliberations. Appellant did not raise this issue at trial, and \*34 the issue is therefore not preserved for review. For this reason, we express no opinion on the merits, and we affirm the trial court's decision.

#### FACTUAL/PROCEDURAL BACKGROUND

This case arises out of the shooting death of a Sumter County Sheriff's Deputy. According to Appellant, he began the day leading\*\*488 up to the fatal encounter by purchasing some alcohol and two firearms. Appellant spent the remainder of the day wandering in the woods near what would become the crime scene, shooting the firearms and becoming increasingly intoxicated. Towards the end of the day, Appellant attempted to visit the home of an acquaintance near the woods.

The acquaintance asked Appellant to leave her property, and the acquaintance later reported the incident to the police. After hearing banging on a door to her home and gunshots outside her house, the acquaintance phoned the police again. The victim was the first officer to respond to the call, and the evidence at trial established that Appellant was on the acquaintance's porch near a side door when the victim arrived at the scene. The occupants of the home directed the victim towards the porch as the source of the disturbances, and as the victim neared the side porch, he sustained two fatal gunshot wounds. While the State alleged that Appellant shot the victim intentionally, Appellant claimed that he was startled when the victim turned a corner outside the home and yelled "Halt!" or "Hold it!" and that the gun fired accidentally.

A jury convicted Appellant of murder and sentenced him to death. On appeal, this Court affirmed Appellant's convictions but reversed his death sentence. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002) (remanding for a new sentencing proceeding based on the improper exclusion of a juror from the penalty phase, the failure to charge the statutory mitigator addressing the defendant's impairment or mentality at the time of the crime, and the failure to instruct the jury that a life sentence meant life imprisonment without the possibility of parole). This Court remanded the case to the trial court to conduct a second sentencing proceeding. *Id.*

On remand, the State called several members of the victim's family and former co-workers as witnesses. The record reveals\*35 that the primary purpose of these witnesses' testimonies was to describe the impact of the victim's death on these individuals and on the community. One such witness was the victim's widow, and in response to a question regarding "significant events in her life" since the murder, the victim's widow testified that she had attempted suicide after learning that this Court had reversed Appellant's initial death sentence and that there would be another sentencing proceeding in this case. At the conclusion of the second sentencing proceeding, the jury sentenced Appellant to death.

This appeal followed, and Appellant raises the following issue for review:

Did the victim's widow's testimony regarding her suicide attempt impermissibly inject an arbitrary factor into the jury's deliberations?

#### LAW/ANALYSIS

Appellant argues that the victim's widow's testimony regarding her suicide attempt impermissibly injected an arbitrary factor into the jury's deliberations. We disagree.

Appellant's argument is not preserved for review. At trial, Appellant objected as the victim's widow began to describe her suicide attempt. The record reveals that Appellant based his objection on causation grounds, arguing that the testimony implied that the cause of the suicide attempt was not the victim's murder, but the financial pressures the victim's widow was experiencing and the fact that Appellant would have another sentencing proceeding. In allowing the testimony, the trial court held that the victim's widow had attributed the facts relayed in the testimony to her relationship with the victim, and that the testimony was therefore relevant and admissible.

Appellant's argument before this Court goes along quite different lines. Appellant now argues that the victim's widow's testimony improperly invited the jury to speculate about the finality of its decision on the appropriate punishment and improperly invited the jury to consider how its decision might impact the victim's widow's future health. Thus, while Appellant's argument below focused on what caused the victim's widow to attempt suicide—meaning, what caused the testimony<sup>\*36</sup> to be relevant—Appellant's argument on appeal abandons the issue of relevance and addresses only the effect this testimony may have had on the jury. Because <sup>\*\*489</sup> Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review. See *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Appellant alleges that his argument on appeal is simply an augmentation of his objection at trial, but a thoughtful examination reveals that this is not so. Primarily, Appellant's objection at trial was based on relevance, and that issue has been abandoned here. Second, whether the suicide attempt by the victim's spouse minimized the jury's sense of responsibility (by suggesting that the jury's ultimate decision would be subject to review by a higher court) or maximized the jury's sense of responsibility (by implying that imposing a life sentence might lead the victim's widow to attempt suicide again), these considerations are wholly independent of the relevance argument presented below. If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.<sup>FN1</sup>

FN1. It is important to note that in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), we held that South Carolina's strict error preservation rules are no less applicable in death penalty cases.

For these reasons, we hold that Appellant's argument is not preserved for review.

#### CONCLUSION

For the foregoing reasons, we affirm Appellant's sentence. Our review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. See *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (holding that the death penalty was warranted where defendant killed a law enforcement officer while the officer was performing his official duties); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 <sup>\*37</sup> (1999) (same); and *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991) (same).

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur:

S.C., 2007.  
*State v. Stone*  
376 S.C. 32, 655 S.E.2d 487

END OF DOCUMENT

COPY

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

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JAN - 4 2008

S.C. SUPREME COURT

v.

BOBBY WAYNE STONE,

APPELLANT

Appeal from Sumter County

Howard P. King, Circuit Court Judge

Opinion No. 26408

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S.C. SUPREME COURT

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S.C. SUPREME COURT

PETITION FOR REHEARING

Counsel for Bobby Wayne Stone petitions for rehearing pursuant to *Rule 221(a), SCACR*, because the Court's procedural bar analysis is inconsistent with the analytical framework it utilized in *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007), which counsel also argued. The Court writes, "If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call." On the other hand, the Court should not require either trial or appellate counsel to anticipate a procedural Steven Bartman lurking in the appellate box seats.

Contrary to the Court's opinion in this case, appellate counsel did not abandon "the issue of relevance" and address "only the effect this testimony may have had on the jury." Counsel modeled the Brief of Appellant and his oral argument on the brief he filed in *Burkhart* and the Court's

subsequent opinion in that case. The cases cited by counsel - including *Burkhart*, but excepting *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005), and *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004) – all concern the issue of legal relevance.

The argument presented in the *Burkhart* brief read:

The judge erred by allowing an expert witness, an employee of the South Carolina Department of Corrections, to testify about the nature and quality of life for a capital defendant sentenced by the jury to life without parole, since such “evidence” is both speculative and arbitrary and violates *S.C. Code Section 16-3-20(C)* and *16-3-25(C)(1)*, as well as *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984).

Trial counsel had not argued that the State’s evidence regarding general prison conditions constituted an arbitrary factor. Nevertheless, the Court held that “this entire subject matter injected an arbitrary factor into the jury’s sentencing deliberations.” 640 S.E.2d at 454. The issue presented in the present case reads:

The trial judge committed reversible error by permitting the victim’s widow to testify that she had attempted suicide when she learned – from a message left on her answering machine – that the Supreme Court had reversed Stone’s death sentence and “they were going to retry this case over again,” as his testimony introduced an arbitrary factor into Stone’s resentencing, in violation of *S.C. Code Section 16-3-25(C)(1)*.

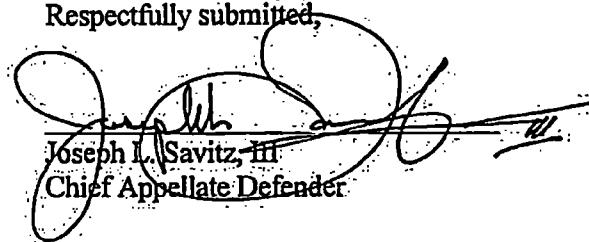
Counsel cannot reconcile the Court’s disparate treatment of these two cases. (Both involve capital resentencing.)

Counsel agrees that his brief and argument on appeal stressed “the effect [the widow’s] testimony may have had on the jury.” But it is axiomatic that “reversal is not required unless appellant was prejudiced by the error.” *State v. Mitchell*, 386 S.C. 572, 336 S.E.2d 150, 151 (1985). Thus, there are two components to reversible error: (1) the error itself and (2) the harm it caused. Moreover, *S.C. Code Section 16-3-25 (C)(1)* requires the Court to determine “[w]hether the

sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." By its very nature, this argument can *only* be made on direct appeal.

Both *Burkhart* and this case involve similar errors and similar harm. For this reason, the Court should grant rehearing, reverse Bobby Wayne Stone's death sentence and remand for resentencing.

Respectfully submitted,



Joseph I. Savitz, III  
Chief Appellate Defender

This 4th day of January, 2008.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Sumter County  
Howard P. King, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V. \_\_\_\_\_

BOBBY WAYNE STONE,

APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon S. Creighton Waters, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of January, 2008.

  
Joseph L. Sartz, III  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day  
of January, 2008.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: March 19, 2017.



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 23, 2008

✓ Chief Appellate Defender Joseph L. Savitz, III  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Stone, Bobby Wayne

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied,

s/ Jean H. Toal C.J.

s/ James E. Moore J.

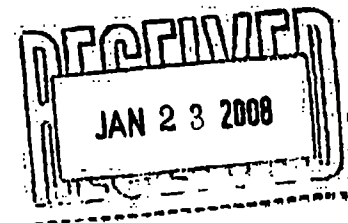
s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

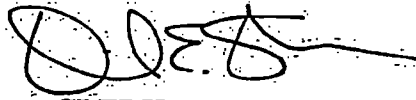
January 23, 2008.”

The remittitur is today being forwarded to the lower court.



Chief Appellate Defender  
Joseph L. Savitz, III  
Page Two  
January 23, 2008

Very truly yours,



CLERK

DES/dmh

cc: Assistant Attorney General S. Creighton Waters  
The Honorable Cecil Kelly Jackson

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )  
 )  
BOBBY WAYNE STONE, SK 5051 )  
 )  
 *Applicant,* )  
 )  
 v. )  
 )  
THE STATE OF SOUTH CAROLINA. )  
 )  
 *Respondent.* )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
Case No.: -CP-

APPLICATION FOR  
POST-CONVICTION RELIEF

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Sentencing court: Sumter County Court of General Sessions.
3. Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
  - (a) Murder: 96-GS-43-698
  - (b) Possession of a Weapon During the Commission of a Violent Crime: 96-GS-43-0698
  - (c) Burglary in the First Degree: 96-GS-43-0698
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) Sentenced on January 28, 1997 as follows:
    - (i) Murder: Death
    - (ii) Possession of a Weapon During the Commission of a Violent Crime: Five Years
    - (iii) Burglary in the First Degree: Thirty Years
  - (b) Resentenced on February 27, 2005 as follows:
    - (i) Murder: Death

6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. Appeals:
  - (a) The Courts to which applicant appealed:
    - (i) The South Carolina Supreme Court.
  - (b) The result in each Court to which applicant appealed:
    - (i) Convictions affirmed; sentences affirmed in part; death sentence reversed and remanded.
    - (ii) Death sentence upon remand affirmed.
  - (c) The date of each result:
    - (i) Convictions affirmed; sentences affirmed in part; death sentence reversed and remanded on July 15, 2002.
    - (ii) Death sentence on remand affirmed on December 20, 2007.
  - (d) Citations of any written opinion or orders entered pursuant to such results:
    - (i) 567 S.E.2d 244 (S.C. 2002)
    - (ii) 655 S.E.2d 487 (S.C. 2007)
9. Not applicable.

10 & 11.           **GROUNDS FOR RELIEF WITH SUPPORTING FACTS**          

**10(a): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.**

**11(a): Supporting Facts:** Trial counsel’s performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel’s acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to seek appropriate instructions from the trial court. In particular, counsel failed to request an instruction requiring the jury to disregard testimony when the court sustained defense counsel's objection to such testimony. (Trial Tr. vol. 1, 162, January 27, 1998; Trial Tr. vol. 3, 519.)
- 2) Counsel failed to object to the prosecutor's improper and prejudicial closing argument, in which the prosecutor repeatedly asserted that Applicant did not dispose of his gun prior to arrest so that he could kill more police officers. (Trial

Tr. vol. 4, 844-47, Jan. 27, 1998.) Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.

**10(b): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.**

**11(b): Supporting facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to properly object to the victim's widow's testimony and thus preserve for appeal whether such testimony violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law. During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92.) Counsel objected, and the trial court overruled the objection. (R. at 1105-06.) On appeal, the South Carolina Supreme Court held that counsel's objection was inadequate and thus, the issue was procedurally barred. *See State v. Stone*, 655 S.E.2d 487, 488-89 (S.C. 2007). Counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.
- 2) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on law enforcement in Sumter County generally and on various law officers in particular. (R. at 835-41, 1095-1104.) This evidence included testimony alleging, *inter alia*, that the sheriff's office brings all of its law enforcement trainees to Kubula's gravesite during their orientation. (R. at 840-41.) Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.

**10(c): Applicant was denied the right to effective assistance of appellate counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the appellate proceedings.**

**11(c): Supporting Facts:** The court reporter's failure to transcribe effectively, during the resentencing proceedings, the voir dire of nineteen prospective jurors (R. at 197-98, 1646)—eight of which were disqualified (R. at 197-98) and three of which were empanelled (R. at 572-74, 578-79)—rendered impossible the effective assistance of counsel during Applicant's appeal. Further, appellate counsel's performance on direct appeal was both

unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Appellate counsel failed to pursue on appeal the denial of Applicant's rights to a fair and impartial jury, a fair trial, a fair sentencing hearing, and a fair appeal in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Applicant was denied these rights due to the court reporter's failure to transcribe effectively during the resentencing proceedings the voir dire of nineteen prospective jurors (R. at 197-98, 1646), eight of which were excluded (R. at 197-98) and three of which were empanelled (R. at 572-74, 578-79).
- 2) Appellate counsel failed to raise on appeal the trial court's error in refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

**10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.**

**11(d): Supporting Facts:** Several errors at trial violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Those errors include, but are not necessarily limited to, the following:

- 1) The State suppressed evidence that was both exculpatory and material to Applicant's guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).
- 2) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).
- 3) During the resentencing proceedings and in violation of Applicant's right to a fair trial, the court reporter failed to effectively transcribe the voir dire of nineteen prospective jurors (R. at 197-98, 1646), eight of which were excluded (R. at 197-98) and three of which were empanelled (R. at 572-74, 578-79).

**10(e): Applicant was denied the right to a fair and impartial jury—guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution—during the sentencing phase of his trial.**

**11(e): Supporting Facts:** During the resentencing proceedings, the court reporter failed to effectively transcribe the voir dire of nineteen prospective jurors (R. at 197-98, 1646), eight of which were excluded (R. at 197-98) and three of which were empanelled (R. at 572-74, 578-79).

- 12.. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief or a petition for writ of habeas corpus in state or federal court.
13. Not applicable.
14. None of the grounds set forth in (10) have been previously presented to this or any other court, state or federal.
- 15.. Not Applicable.
16. These grounds rely on additional facts outside the record that was before the previous courts.
17. Applicant was previously represented by counsel.
18. Counsel:
  - a. Name and address of each attorney who represented Appellant:
    - i. Cameron B. Littlejohn, Jr.  
1720 Main Street, Suite 202  
Columbia, SC 29201
    - ii. James H. Babb  
Howle & Babb  
7 E. Hampton Avenue  
Sumter, SC 29150
    - iii. Joseph L. Savitz, III  
South Carolina Commission on Indigent Defense  
1330 Lady Street, Suite 401  
Columbia, SC 29201
  - b. Proceedings at which each attorney represented appellant:
    - i. Trial
    - ii. Trial
    - iii. Direct Appeal
19. Applicant seeks relief from his convictions and sentences.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

**BOBBY WAYNE STONE, SK 5051**  
**PRO SE APPLICANT**  
Lieber Correctional Institution  
P.O. Box 205  
Ridgeville, SC 29472

BY:   
BOBBY WAYNE STONE

April 1, 2008.

# BLUME WEYBLE & NORRIS, LLC

## ATTORNEYS AT LAW

JOHN H. BLUME  
KEIR M. WEYBLE  
TERESA L. NORRIS  
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

May 4, 2009

James C. Campbell  
Sumter County Clerk of Court  
141 North Main Street  
Sumter, SC 29150

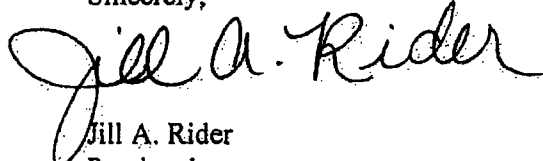
RE: *Bobby Wayne Stone v. State of South Carolina*

Dear Mr. Campbell :

Please find enclosed for filing, the original and one copy of Applicant's Amended Post-Conviction Relief Application, with certificate of service. Please return the extra copy to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact this office.

Sincerely,

  
Jill A. Rider  
Paralegal

cc: Robert Lominack  
Creighton Waters

STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )  
BOBBY WAYNE STONE, SK 5051 )  
*Applicant,* )  
v. )  
THE STATE OF SOUTH CAROLINA. )  
*Respondent.* )

IN THE COURT OF COMMON PLEAS  
Case No.: 08-CP-43-905

AMENDED  
APPLICATION FOR  
POST-CONVICTION RELIEF

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Sentencing court: Sumter County Court of General Sessions.
3. Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
  - (a) Murder: 96-GS-43-698
  - (b) Possession of a Weapon During the Commission of a Violent Crime: 96-GS-43-0698
  - (c) Burglary in the First Degree: 96-GS-43-0698
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) Sentenced on January 28, 1997 as follows:
    - (i) Murder: Death
    - (ii) Possession of a Weapon During the Commission of a Violent Crime: Five Years
    - (iii) Burglary in the First Degree: Thirty Years
  - (b) Resentenced on February 27, 2005 as follows:
    - (i) Murder: Death
6. A finding of guilty was made after a plea of not guilty.



Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.

- 3) Counsel failed to secure the assistance of a homicide reconstruction expert; the failure to secure this necessary expert assistance prevented the defense from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant essentially "ambushed" and "executed" the victim.
- 4) Counsel failed to object to the prosecution's racially discriminatory use of its peremptory challenges. *See Batson v. Kentucky*, 476 U.S. 79 (1986).
- 5) Counsel failed to object to the presence of numerous law enforcement officers present in the courtroom throughout applicant's trial.

**10(b): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.**

**11(b): Supporting facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Counsel failed to properly object to the victim's widow's testimony and thus preserve for appeal whether such testimony violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law. During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92.) Counsel objected, and the trial court overruled the objection. (R. at 1105-06.) On appeal, the South Carolina Supreme Court held that counsel's objection was inadequate and thus, the issue was procedurally barred. *See State v. Stone*, 655 S.E.2d 487, 488-89 (S.C. 2007). Counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.
- 2) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on law enforcement in Sumter County generally and on various law officers in particular. (R. at 835-41, 1095-1104.) This evidence included testimony alleging, *inter alia*, that the sheriff's office brings all of its law enforcement trainees to Kubula's gravesite during their orientation. (R. at 840-41.) Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.

- 3) Counsel failed to present evidence during the resentencing proceedings of applicant's cooperation with law enforcement, including that applicant had previously provided information to law enforcement regarding certain other criminal activities.
- 4) Counsel failed to conduct a reasonable investigation into potentially mitigating evidence regarding applicant's social and medical history, low intellectual functioning, neurological damage, and other mitigating circumstances. Counsel also failed to gather relevant social history, educational and medical records which would have corroborated the mitigating evidence that was presented at applicant's trial.
- 5) Counsel failed to object to the presence of numerous law enforcement officers in the courtroom throughout the resentencing trial.
- 6) Counsel failed to conduct an adequate voir dire, thus allowing the erroneous and prejudicial qualification of potential jurors who were predisposed to sentence the applicant to death or were otherwise legally unqualified to serve. Counsel also failed to ask adequate questions to determine whether many jurors were (or were not) qualified to serve on a capital jury.

**10(c): Applicant was denied the right to effective assistance of appellate counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the appellate proceedings.**

**11(c): Supporting Facts:** The court reporter's failure to transcribe effectively, during the resentencing proceedings, the voir dire of nineteen prospective jurors (R. at 197-98, 1646)—eight of which were disqualified (R. at 197-98) and three of which were empanelled (R. at 572-74, 578-79)—rendered impossible the effective assistance of counsel during Applicant's appeal. Further, appellate counsel's performance on direct appeal was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Appellate counsel failed to pursue on appeal the denial of Applicant's rights to a fair and impartial jury, a fair trial, a fair sentencing hearing, and a fair appeal in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Applicant was denied these rights due to the court reporter's failure to transcribe effectively during the resentencing proceedings the voir dire of nineteen prospective jurors (R. at 197-98, 1646), eight of which were excluded (R. at 197-98) and three of which were empanelled (R. at 572-74, 578-79).
- 2) Appellate counsel failed to raise on appeal the trial court's error in refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

**10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution.**

**11(d): Supporting Facts:** Several errors at trial violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Those errors include, but are not necessarily limited to, the following:

- 1) The State suppressed evidence that was both exculpatory and material to Applicant's guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).
- 2) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).
- 3) During the resentencing proceedings and in violation of Applicant's right to a fair trial, the court reporter failed to effectively transcribe the voir dire of nineteen prospective jurors (R. at 197-98, 1646), eight of which were excluded (R. at 197-98) and three of which were empanelled (R. at 572-74, 578-79).
- 4) The presence of numerous armed officers in the courtroom during both phases of the trial violated the applicant's right to a fair trial.

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13. Not applicable.
14. None of the grounds set forth in (10) have been previously presented to this or any other court, state or federal.

15. Not Applicable.
16. These grounds rely on additional facts outside the record that was before the previous courts.
17. Applicant was previously represented by counsel.
18. Counsel:
  - a. Name and address of each attorney who represented Appellant:
    - i. Cameron B. Littlejohn, Jr.  
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    - ii. James H. Babb  
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    - ii. Trial
    - iii. Direct Appeal
19. Applicant seeks relief from his convictions and sentences.
20. Applicant is not under sentence from any other court.

Respectfully submitted,

**JOHN H. BLUME**  
Cornell Law School  
112 Myron Taylor Hall  
Ithaca, NY 14853  
(607)-255-1030


**ROBERT E. LOMINACK**

Law Offices of Robert E. Lominack, P.C.

P. O. Box 5508

Columbia, SC 29250

(803) 753-7057

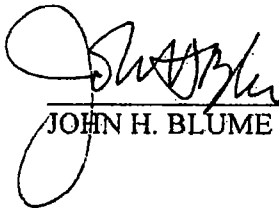
BY:   
JOHN H. BLUME

May 4, 2009.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

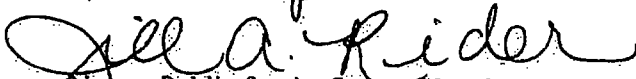
VERIFICATION

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

  
\_\_\_\_\_  
JOHN H. BLUME

SWORN to and subscribed before me this

4<sup>th</sup> day of May, 2009.

  
Notary Public for the State of South Carolina  
My Commission Expires: 6-19-16



# BLUME WEYBLE & NORRIS, LLC

## ATTORNEYS AT LAW

JOHN H. BLUME  
KEIR M. WEYBLE  
TERESA L. NORRIS  
DAVID L. BRUCK *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR  
COLUMBIA, SOUTH CAROLINA 29201  
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POST OFFICE BOX 11744  
COLUMBIA, SC 29211  
PHONE: (803) 765-1044  
FAX: (803) 765-1143

June 25, 2009

James C. Campbell  
Sumter County Clerk of Court  
141 North Main Street  
Sumter, SC 29150

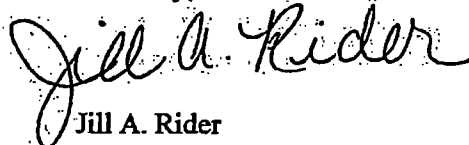
RE: *Bobby Wayne Stone v. State of South Carolina*

Dear Mr. Campbell :

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If you should have any questions, please do not hesitate to contact this office.

Sincerely,

  
Jill A. Rider  
Paralegal

cc: Robert Lominack  
Creighton Waters





whether the improper arguments violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.

- 3) Counsel failed to secure the assistance of a homicide reconstruction expert; the failure to secure this necessary expert assistance prevented the defense from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant essentially "ambushed" and "executed" the victim.
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**10(b): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.**

**11(b): Supporting facts:** For the reasons set forth below, trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

- 1) Counsel failed to properly object to the victim's widow's testimony and thus preserve for appeal whether such testimony violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law. During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92.) Counsel objected, and the trial court overruled the objection. (R. at 1105-06.) On appeal, the South Carolina Supreme Court held that counsel's objection was inadequate and thus, the issue was procedurally barred. *See State v. Stone*, 655 S.E.2d 487, 488-89 (S.C. 2007).
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**JOHN H. BLUME**  
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**ROBERT E. LOMINACK**  
Law Offices of Robert E. Lominack, P.C.  
P. O. Box 5508  
Columbia, SC 29250  
(803) 753-7057

BY:   
\_\_\_\_\_  
JOHN H. BLUME

June 25, 2009.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

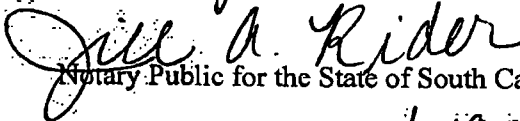
VERIFICATION

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

  
\_\_\_\_\_  
JOHN H. BLUME

SWORN to and subscribed before me this

25<sup>th</sup> day of June 2009.

  
Notary Public for the State of South Carolina

My Commission Expires: 6-19-16



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )  
  
BOBBY WAYNE STONE, )  
 )  
Applicant, )  
 )  
v. )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
CA No. 08-CP-43-905

THIRD AMENDED APPLICATION FOR  
POST-CONVICTION RELIEF

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Sentencing Court: Sumter County Court of General Sessions.
3. Not Applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
  - (a) Murder: 96-GS-43-698
  - (b) Possession of a Weapon During the Commission of a Violent Crime: 96-GS-43-0698
  - (c) Burglary in the First Degree: 96-GS-43-0698
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) Sentenced on January 28, 1997 as follows:
    - i. Murder: Death
    - ii. Possession of a Weapon During the Commission of a Violent Crime: 5 Years
    - iii. Burglary in the First Degree: 30 years
  - (b) Resentenced on February 27, 2005 as follows:
    - i. Murder: Death
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.

8. Appeals:

- (a) The Courts to which applicant appealed:
  - i. The South Carolina Supreme Court
- (b) The result in each Court to which applicant appealed:
  - i. Convictions affirmed; sentences affirmed in part; death sentence reversed and remanded.
  - ii. Death sentence upon remand affirmed.
- (c) The date of each result:
  - i. Convictions affirmed; sentences affirmed in part; death sentence reversed and remanded on July 15, 2002.
  - ii. Death sentence on remand affirmed on December 20, 2007.
- (d) Citations of any written opinion or orders entered pursuant to such results:
  - i. 567 S.E.2d 244 (S.C. 2002)
  - ii. 655 S.E.2d 487 (S.C. 2007)

9. Not applicable.

10 & 11.   GROUNDS FOR RELIEF WITH SUPPORTING FACTS  

10(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt-or-innocence phase of his capital trial.

11(a): Supporting Facts: For the reasons set forth below, trial counsel’s performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

- 1) Counsel failed to object to the prosecutor’s improper and prejudicial closing argument, in which the prosecutor repeatedly asserted that Applicant did not dispose of his gun prior to arrest so that he could kill more police officers. (Trial Tr. Vol. 4, 844-47, January 27, 1998). Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.
- 2) Counsel’s failure to secure the assistance of appropriate crime scene and other experts prevented the defense team from adequately corroborating applicant’s statement regarding the nature of the homicide and from rebutting the prosecution’s theory that applicant “ambushed” and “executed” the victim.
- 3) Counsel failed to object to the prosecution’s racially discriminatory use of its preemptory challenges. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

- 4) Counsel failed to object to the presence of numerous law enforcement officers present in the courtroom throughout applicant's trial.
- 5) Counsel failed to object to the use of shackles on applicant. These shackles were visible when applicant was in the courtroom as well as when he was being transported from the jail to the courtroom. *See Deck v. Missouri*, 544 U.S. 622 (2005).

10(b): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial.

11(b): Supporting facts: For the reasons set forth below, trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

- 1) Counsel failed to properly object to the victim's widow's testimony and thus preserve for appeal all available grounds on which such testimony violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law. During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92). *See State v. Stone*, 655 S.E.2d 487, 488-89 (S.C. 2007).
- 2) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on law enforcement in Sumter County generally and on various law officers in particular. (R. at 835-41, 1095-1104.) This evidence included testimony alleging, inter alia, that the sheriff's office brings all of its law enforcement trainees to the victim's gravesite during their orientation. (R. at 840-41.) Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.
- 3) Counsel failed to present evidence during the resentencing proceedings of applicant's prior cooperation with law enforcement, including that applicant had previously provided information to law enforcement regarding certain other criminal activities.
- 4) Counsel failed to conduct a reasonable investigation into potentially mitigating evidence regarding applicant's impoverished childhood and the family dysfunction resulting from the essentially polygamous household in which he was raised, applicant's very low intellectual functioning, and neurological damage from exposure to dangerous neurotoxins and other chemicals as well as the maternal ingestion of alcohol during the developmental period. Counsel failed to gather relevant social history, educational and medical records which would have corroborated the mitigating evidence that was presented at applicant's trial. Counsel also failed to investigate, develop and present evidence of applicant's good character.
- 5) Counsel failed to object to the presence of numerous law enforcement officers in the courtroom throughout the resentencing trial.

- 6) Counsel failed to conduct an adequate voir dire, thus allowing the erroneous and prejudicial qualification of potential jurors who were predisposed to sentence the applicant to death or were otherwise legally unqualified to serve. Counsel also failed to ask adequate questions to determine whether many jurors were (or were not) qualified to serve on a capital jury.
- 7) Counsel failed to secure the assistance of appropriate crime scene and other experts. The failure to secure this necessary expert assistance prevented the defense team from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant "ambushed" and "executed" the victim.

10(c): Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the appellate proceedings.

11(c): Supporting Facts: For the reasons set forth below, appellate counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

- 1) During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92). Counsel objected, and the trial court overruled the objection. (R at 1105-06). Appellate counsel failed to properly raise this claim on direct appeal. Rather than argue the issue consistent with the objection at trial, appellate counsel based the appellate claim on a different legal argument. The South Carolina Supreme Court held that the claim as formulated by appellate counsel was not preserved for review. *See State v. Stone*, 655 S.E.2d 487, 488-89 (S.C. 2007).

10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution.

11(d): Supporting Facts: Several errors at trial violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Those errors include, but are not necessarily limited to, the following:

- 1) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).
- 2) The presence of numerous armed officers in the courtroom during both phases of the trial violated the applicant's right to a fair trial.

10(e): Applicant's conviction and death sentence were obtained in violation of the Fifth and Sixth Amendments to the United States Constitution and South Carolina law.

11(e): Supporting Facts: The state forced applicant to wear shackles when being transported to the courtroom and also once inside the courtroom. *See Deck v. Missouri*, 544 U.S. 622 (2005).

12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief or a petition for writ of habeas corpus in state or federal court.

13. Not applicable.

14. None of the grounds set forth in (10) have been previously presented to this or any other court, state or federal.

15. Not Applicable.

16. These grounds rely on additional facts outside the record that was before the previous courts.

17. Applicant was previously represented by counsel.

18. Counsel:

a) Name and address of each attorney who represented Appellant:

i. Cameron B. Littlejohn, Jr.  
1720 Main Street, Suite 202  
Columbia, SC 29201

ii. James H. Babb  
Howle & Babb  
7 E. Hampton Avenue  
Sumter, SC 29150

iii. Joseph L. Savitz, III

b) Proceedings at which each attorney represented appellant:

i. Trial  
ii. Trial  
iii. Direct Appeal

19. Applicant seeks relief from his convictions and sentences.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

**JOHN H. BLUME**  
Cornell Law School  
112 Myron Taylor Hall  
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(607) 255-1030

**ROBERT E. LOMINACK**  
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(803) 351-0436

BY:   
COUNSEL FOR APPLICANT

March 22, 2012

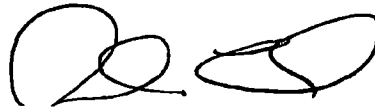
STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )  
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**BOBBY WAYNE STONE, SK 5051** )  
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Applicant, )  
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v. )  
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**STATE OF SOUTH CAROLINA,** )  
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\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
CA No. 08-CP-43-905

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Applicant's Third Amended Post-Conviction Application, via US mail, first-class, postage pre-paid, at the following addresses:

Alphonso Simon, Jr.  
Assistant Attorney General  
Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211



Robert Lominack

Columbia, South Carolina

This 22<sup>nd</sup> day of March 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
	)	
Bobby W. Stone	)	C/A No. 2008-CP-43-00905
	)	
Applicant,	)	RETURN, MOTION TO DISMISS AND
v:	)	MOTION FOR MORE DEFINITE
	)	STATEMENT TO THIRD AMENDED
The State of South Carolina,	)	APPLICATION FOR POST-CONVICTION
	)	RELIEF
	)	(Capital Case)
Respondent.	)	
_____	)	

Respondent, above-named, hereby makes Return to the third amended application for post-conviction relief ("APCR"), served by Bobby Wayne Stone ("Applicant") on March 22, 2012. This APCR stems from a murder conviction and death sentence.

This case is before this Court by Order of the South Carolina Supreme Court dated February 21<sup>st</sup>, 2008, granting a stay of execution to litigate this PCR, and the Order of Chief Justice Toal on December 17<sup>th</sup>, 2008, reassigning continuing jurisdiction of this case to the Honorable Michael Nettles. A hearing was held on April 11<sup>th</sup>, 2008, at which Robert Lominack, Esquire and Jim Brown, Esquire were appointed as Applicant's counsel. Since then, John Blume, Esquire has been substituted for Mr. Brown.

#### I. Procedural History

The procedural history of this case is as follows.

##### A. First trial

During the August 1996 term, the Sumter County Grand Jury indicted Applicant, Bobby Wayne Stone, for murder, first degree burglary, and possession of a weapon during

a violent crime (96-GS-43-0698). The state gave notice of intent to seek the death penalty, and served its Notice of Evidence in Aggravation.

The trial judge in the original case was the Honorable R. Markely Dennis, Jr. Applicant was represented at the first trial by Cameron B. Littlejohn, Jr., and James H. Babb; Solicitor Wade S. Kolb prosecuted the original case for the state.

On August 20<sup>th</sup>, 1996, Judge Dennis granted the defense motion to draw a jury from another county due to pretrial publicity. Jury selection took place in Georgetown County on January 20<sup>th</sup> through January 22<sup>nd</sup>, 1997. Trial began before Judge Dennis and a jury on January 23<sup>rd</sup>, 1997, and on January 26<sup>th</sup>, 1997, Applicant's jury convicted him of all charges.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on January 27<sup>th</sup>, 1997. Judge Dennis submitted the following aggravating factors to the jury:

- (1) Murder was committed while in the commission of burglary in any degree.
- (2) Murder of a local law enforcement officer during or because of the performance of his official duties.

The following mitigating factors were submitted to the jury:

- (1) The Defendant has no significant history of prior criminal convictions involving the use of violence against another person.
- (2) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.

On January 28<sup>th</sup>, 1997, Applicant's jury found the existence of both aggravating factors and recommended a sentence of death. Judge Dennis then sentenced Applicant

to death for murder, to a consecutive thirty (30) years for first degree burglary, and to five (5) years consecutive to both of the other counts for possession of a weapon.

A timely Notice of Appeal was filed and served on January 31<sup>st</sup>, 1997. Following briefing and oral argument by both sides, this Court affirmed the guilt phase result but reversed the sentencing phase and remanded for resentencing. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

### **B. Resentencing**

The Honorable Howard P. King handled the resentencing proceeding. Applicant was again represented by Mr. Babb and Mr. Littlejohn; the case was prosecuted by Solicitor Kelly Jackson and Assistant Solicitor Dudley Saleeby.

Jury selection began in the case on February 22<sup>nd</sup>, 2005. At the conclusion of the evidentiary hearing, Judge King submitted the following aggravating factors to the jury:

- (1) Murder was committed while in the commission of burglary in any degree.
- (2) Murder of a local law enforcement officer during or because of the performance of his official duties.

{2<sup>nd</sup> R. 1343-1346}. The following mitigating factors were submitted to the jury:

- (1) The murder was committed while the defendant was under the influence of a mental or emotional disturbance.
- (2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
- (3) The mentality of the defendant at the time of the crime.
- (4) Any non-statutory mitigating circumstance.

{2<sup>nd</sup> R. 1354-1355}.

On February 27<sup>th</sup>, 2005, the jury found the existence of the aggravator relating to the murder of a law enforcement officer and recommended a sentence of death. {2<sup>nd</sup> R. 1367}. The judge so sentenced Applicant. {2<sup>nd</sup> R. 1374}.

A timely notice of appeal was filed and served. Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Applicant on appeal from the resentencing. On September 6<sup>th</sup>, 2007, Savitz filed a Final Brief of Appellant, in which he raised the following issue:

The trial judge committed reversible error by permitting the victim's widow to testify that she had attempted suicide when she learned - from a message left on her answering machine - that the Supreme Court had reversed Stone's death sentence and "they were going to retry this case over again," as this testimony introduced an arbitrary factor into Stone's resentencing, in violation of *S.C. Code Section 16-3-25-(C)(1)*.

The State, represented by Assistant Attorney general S. Creighton Waters, filed a Final Brief of Respondent the same day.

Following oral argument, the South Carolina Supreme Court issued an opinion on December 20<sup>th</sup>, 2007 in which it affirmed the death sentence. *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (2007).

Applicant then filed on January 23<sup>rd</sup>, 2008 a Petition for Stay of Execution to pursue this PCR action. The State responded with a letter that did not object to the stay. Consequently, on February 21<sup>st</sup>, 2008, the South Carolina Supreme Court issued an Order staying the execution to litigate the instant action. Applicant then filed on April 9<sup>th</sup>, 2008, the APCR. The State filed a Return, Motion to Dismiss, and Motion for Summary Judgment dated May 12<sup>th</sup>, 2008.

Applicant filed an Amended Application dated May 4<sup>th</sup>, 2009. This Amended Return follows.

## II. Facts

It is undisputed that Applicant killed Sumter County Sheriff's Deputy Charlie Kubala.

### A. 2/26/96: Sgt. Kubala is killed after responding to a 911 call from Ruth Griffith's house.

On the evening of the incident, February 26<sup>th</sup>, 1996, Ruth Griffith was being visited at her Sumter home by her daughter Mary Ruth McLeod. They heard knocking at the back door, and Ruth pulled the curtain back on the door and saw Applicant. {1<sup>st</sup> R. 229-32; 257-58. 2<sup>nd</sup> R. 682-683}.

Ruth told her daughter that Bobby Stone was outside and she did not want him in her home. McLeod went outside and accosted Applicant, telling him to go home because they have had trouble before. Applicant initially headed towards a little shed in Griffith's backyard, but after McLeod told him that was not the way home he headed back through the woods. As Applicant walked away, McLeod saw that he had something under the back of his jacket. She walked to the edge of the woods to make sure he was going home, and she saw Applicant standing there, holding a shotgun across his arms, and staring back at the house. McLeod again told Applicant he better go home, and said she was going to call the police. Applicant's eyes were glazed; he walked a little bit off balance; and he was holding what appeared to be a beer can. {1<sup>st</sup> R. 232; 262-63; 277. 2<sup>nd</sup> R. 683-687; 710-712}.

McLeod went back inside and called 911, and Sergeant Charlie Kubala responded to Ruth's house. Kubala reported arriving at the scene at 6:06 p.m. McLeod told Kubala

what happened, and they walked to the edge of the woods where Applicant had gone. Applicant was nowhere to be seen. Sgt. Kubala told the women to call him if they had any more trouble. {1<sup>st</sup> R. 232-33. 2<sup>nd</sup> R 687-689}.

Before McLeod left to go see her daughter, she unsuccessfully begged Ruth to leave the house. Evidently Ruth should have listened, because shortly after McLeod left Ruth heard gunshots in her backyard. At 6:47 p.m., she called her neighbor Landrow Taylor, who also had heard the shooting and promptly came over. Taylor called 911 at close to 7:00 p.m. {1<sup>st</sup> R. 232-34; 279-80. 2<sup>nd</sup> R. 689-690}.<sup>1</sup>

Ruth and Taylor then heard someone jiggle the door handle to Ruth's car, which was parked right outside her bedroom window. They called 911 again at 7:02 p.m. As the two people cowered in the living room, afraid to go near the windows, they heard someone banging on the rarely-used side door, which led from the washroom onto a small screened-in porch used to store wood. The light on the porch was off, and it was dark. Taylor hollered, "What are you trying to do back there?"; there was a moment of silence but the beating started back. {1<sup>st</sup> R. 234-38; 253-54; 265-71; 281-82}.

Meanwhile, Sergeant Kubala reported arriving back at the scene. Taylor went out onto the front porch and motioned to the deputy, who walked around the corner of the house. Taylor went back inside the house. The dispatcher radioed Kubala about another call, but Kubala replied that he was busy. {1<sup>st</sup> R. 282-84; 2<sup>nd</sup> R. 804-806; 826-827}.

Suddenly, Taylor and Ruth heard someone shout, "Halt!," or "Hold it!," followed immediately by three or four gunshots. As Taylor ran back out onto the front porch, Deputy

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<sup>1</sup> Ms. Griffith was in poor health and Mr. Taylor was deceased, so their testimony from the first trial was read into the record.

John Prince came pulling up in his cruiser. Taylor saw a flashlight and walkie-talkie lying on the ground, and yelled at Prince that Kubala was around the side of the house. Meanwhile, Ruth called 911 to report the officer down. {1<sup>st</sup> R. 240-42; 283-85; 2<sup>nd</sup> R. 806}.

Deputy Prince shined a flashlight, saw Kubala, and ran to his side. Kubala was laying face up and bleeding profusely from his mouth and neck. His gun lay near the fingertips of his right hand, and off the fingertips of his right hand was his walkie talkie, from which the radio transmissions were clearly audible. His flashlight lay between his body and his right arm. Deputy Prince rolled Kubala over to clear an airway, but another gunshot rang out and Prince sought cover by the corner of the house. {1<sup>st</sup> R. 285-88; 297-99; 2<sup>nd</sup> R. 807-808; 810-812}.

Other officers and EMS arrived shortly thereafter. Because Prince had heard another shot, the police cleared a nearby shed and the surrounding area. EMS found the victim not breathing and without a pulse. Although he was wearing his protective vest, Sergeant Charles Kubala of the Sumter County Sheriff's Department died at the scene from one gunshot that entered his right ear, and another that entered his neck. {2<sup>nd</sup> R. 809; 828-829; 924-933}.

**B. 2/26-27/96: Applicant is caught and gives a statement**

Officers then began to set up a perimeter to snare the assailant. SLED bloodhound and SWAT teams were called, and off-duty officers from various jurisdictions volunteered to assist. A SLED helicopter equipped with forward-looking infrared radar and an extremely powerful spotlight called "midnight sun" began searching the woods nearby Ruth's house. After searching for a while, the SLED helicopter located a subject lying

prone underneath two fallen trees. The helicopter used the midnight sun to light up the spot. {2<sup>nd</sup> R. 848-857; 867; 887-888}.

Meanwhile, police ground teams directed by the helicopter moved in on the suspect. It was extremely slow going through heavy brush. Finally, they neared the suspect, who lay perfectly still on his back. The officers repeatedly ordered the suspect to raise his hands, but he would not comply. Finally, one of the agents put his foot on the suspect's chest while the other officers attempted to take control of the suspect's hands. Near the suspect's left hip was found a .22 pistol. The suspect, who proved to be Applicant, resisted being handcuffed, and officers had to carry him out of the dense woods. {2<sup>nd</sup> R. 857-862}.

Applicant was taken to the law enforcement center where he gave a statement. In his statement, Applicant said that he woke up the morning of February 26<sup>th</sup> and smoked some marijuana. He went to the store and bought some beer, and met a man named David. David offered to sell Applicant three guns, and they agreed to meet on a nearby dirt road.

According to Applicant, David arrived at the meeting place with a .22 pistol and a .410 shotgun. The two men walked around in the woods, drinking beer and target shooting. They agreed on a price of \$100 for both guns. As they walked around, Applicant decided to stop by and say hi to Ruth, whom he described as an old drinking buddy. David stayed in the woods with the guns.

Applicant claimed that as soon as he entered Ruth's backyard, a woman he did not know came out of the house "raising cane" at him and telling him to get off the property. Applicant returned to the woods, and found and paid David, who left. Applicant then

walked around the woods shooting the guns and finishing off the beer. Around dark he decided to return to Ruth's.

Applicant walked up the steps to the little screen porch, set down the shotgun, but kept the .22 in his right hand. He admitted he started beating on the inside door, which broke because he hit it too hard. Applicant then heard a man's voice yelling outside the house, and as he turned, the gun went off. Applicant ran into the woods. In his statement, Applicant claimed the gun only went off once, and he never saw the deputy or his patrol car.

Applicant denied ever firing the gun again after he ran off the porch. He also claimed he did not know what was going on even though he hid in the woods for hours surrounded by police officers with a helicopter overhead. {2<sup>nd</sup> R. 901-910}.

### C. Forensic evidence

Police processed the scene and collected various items of evidence confirming that Applicant murdered Sgt. Kubala. The pistol recovered from under Applicant at the time of his arrest was an extremely accurate target pistol which fired powerful .22 "long rifle" ammunition. The weapon was found with five rounds in its clip and a shell casing lodged in the ejection port. SLED conclusively matched this gun to two bullet fragments and one bullet taken from Sgt. Kubala's body. The .22 pistol also matched to three spent .22 cartridge cases found on the side porch as well as other casings found in the nearby woods. Kubala's 9mm service pistol, on the other hand, was found fully loaded and had not been fired. {2<sup>nd</sup> R. 832 943; 970-973; 1016; 1022-1034}.

Leaning up against the wall of the side porch was a single-shot .410 shotgun, with a live shell inside and its hammer cocked back in the firing position. This shotgun was conclusively matched to a spent .410 shell casing found in the woods near Ruth's house. {2<sup>nd</sup> R. 943; 953; 1017-1019}.

The screen door to that side porch had three holes which appeared to be from bullets. The screen around these holes not only tested positive for lead but also was microscopically consistent with holes made from bullets SLED test fired through the screen door with Applicant's .22 pistol. Ruth had nailed a board to cover a broken window pane on the door inside the screen porch that leads into the main house itself. After the incident, this board was knocked out and was hanging loosely from only one nail. {2<sup>nd</sup> R. 695-698; 699-701; 850-853; 950-959; 1000-1007}.

A knife was found in Applicant's coat pocket. Tests taken shortly after arrest indicated gunshot residue on the palm and back of Applicant's right hand, as well as the presence of lead on Applicant's left palm and sleeve. The victim had lead on his right palm; however, this only likely indicated handling of a weapon. The victim's shirt did not have any gunshot residue, which indicates Kubala was not hit by a close range shot. {2<sup>nd</sup> R. 990-993}.

#### D. Character and victim impact evidence

Applicant's extensive prior record was admitted. In 1985, Applicant was convicted on seven indictments for breaking into a motor vehicle, larceny, housebreaking, grand larceny, housebreaking, grand larceny, breaking into a motor vehicle, petty larceny, breaking into a motor vehicle, grand larceny, breaking into a motor vehicle, grand larceny,

and grand larceny. For all of these crimes he received a youthful offender sentence not to exceed six years, and Applicant was paroled in 1985. {2<sup>nd</sup> R. 649-660}.

In 1987, Applicant pled guilty to two counts of 2<sup>nd</sup> degree burglary and two counts of grand larceny on one indictment, and 2<sup>nd</sup> degree burglary and grand larceny on another indictment. For these crimes, Applicant received a total active sentence of twenty years plus five years probation. {2<sup>nd</sup> R. 649-660}.

Applicant was paroled in June of 1993 after serving approximately five years. The state elicited that he faced substantial time if his parole was revoked. A witness noted that Applicant's conditions of parole and probation precluded him from possessing firearms, using controlled substances, drinking alcohol to excess, or otherwise violating the law. Of course, Applicant violated all of those conditions on February 26<sup>th</sup>, 1996. {2<sup>nd</sup> R. 660-664}.

The state then presented Sgt. Kubala's family members, fellow officers, and friends who universally testified that he was a young, bright, and energetic officer who devoted much time to his community, including the Explorers, the YMCA, and the Special Olympics. Kubala's mother, father, and widow described the trauma of losing Sgt. Kubala, particularly on his widow and children. Particularly moving was testimony from Captain Hobbs and Major Metts, who were close friends with Sgt. Kubala on the force and particularly affected by the loss of their comrade in the line of duty. Captain Hobbs noted that all new recruits are taken to the crime scene and Sgt. Kubala's grave to impress upon them the seriousness of the job. {2<sup>nd</sup> R. 641-648; 834-841; 1046-1093; 1095-1104}.

**E. The defense's sentencing phase case**

Applicant first called social worker TeAnne Oehler, who described Applicant's upbringing – in particular the poverty and his mother's affair with the allegedly abusive and drunk Wesley Miles. Oehler theorized this upbringing led to his poor performance and frequent troubles with the law, which began with an arrest for stealing a car. She concluded that these factors about Petitioner's upbringing affected his judgment and decision making. {2<sup>nd</sup> R. 1128-1151}. On cross, Oehler admitted she believed Petitioner had anti-social personality disorder and a problem with authority figures, and admitted Petitioner's extensive history of burglary and theft. {2<sup>nd</sup> R. 1163-1167}.

Applicant's paternal aunt Bernice his sister Melinda, and his niece Linda testified about Applicant's parents, his upbringing, and his family, and their relationship with Applicant. {2<sup>nd</sup> R. 1168-1172; 1183-1188; 1194-1202; 1203-1204}.

Ruth Griffith's sister-in-law Mary Wilson testified at the first trial, and her testimony was read into the record. She stated her daughter Michelle was living with Griffith at some point in the 90s and Applicant would visit her there. She also stated Applicant did some work for Griffith, and some times all of them would go out to a honky tonk. Supposedly, Griffith admitted drinking beer and smoking marijuana with Applicant. {1<sup>st</sup> R. 622-30}. On cross, Wilson admitted it was prior 1987 that this occurred. {1<sup>st</sup> R. 634}. Wilson's testimony from the first trial's sentencing phase was also read into the record, during which she described Wesley Miles's drinking problem. {1<sup>st</sup> R. 635-37}.

Psychopharmacologist Dr. Andrew Morton described the effects of Applicant's drinking on his brain, and on his judgment and decision making. {2<sup>nd</sup> R. 1222-1246}.

Former warden James Aiken stated that Applicant would easily adapt to prison, despite his commission of some infractions. The defense asked Mr. Aiken to describe what Petitioner's life in prison would be like, at which point he stated that Petitioner would in the company of many dangerous people, and that Petitioner was relatively old and vulnerable to violent and sexually aggressive inmates. Mr. Aiken also was allowed to testify that regardless of whether Petitioner was good in prison or bad in prison, SCDC could safely contained "under the gun" for the rest of his life. {2<sup>nd</sup> R. 1259-1273}.

### III. Allegations in Current Application

10(a): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his capital trial.

11(a): Supporting Facts: For the reasons set forth below, trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984):

1) Counsel failed to object to the prosecutor's improper and prejudicial closing argument, in which the prosecutor repeatedly asserted that Applicant did not dispose of his gun prior to arrest so that he could kill more police officers. (Trial Tr. Vol. 4, 844-47, January 27, 1998). Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.

2) Counsels' failure to secure the assistance of appropriate crime scene and other experts prevented the defense team from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant "ambushed" and "executed" the victim.

3) Counsel failed to object to the prosecution's racially discriminatory use of its peremptory challenges. See Batson v. Kentucky, 476 U.S. 79 (1986).

4) Counsel failed to object to the presence of numerous law enforcement officers present in the courtroom throughout applicant's trial.

5) Counsel failed to object to the use of shackles on applicant. These shackles were visible when applicant was in the courtroom as well as when he was being transported from the jail to the courtroom. See Deck v. Missouri, 544 U.S. 622 (2005).

10(b): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial.

11 (b): Supporting facts: For the reasons set forth below, trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

1) Counsel failed to properly object to the victim's widow's testimony and thus preserve for appeal all available grounds on which such testimony violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law. During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92). See State v. Stone, 655 S.E.2d 487, 488-89 (S.C. 2007).

2) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on law enforcement in Sumter County generally and on various law officers in particular. (R. at 835-41, 1095-1104.) This evidence included testimony alleging, inter alia, that the sheriff's office brings all of its law enforcement trainees to the victim's gravesite during their orientation. (R. at 840-41.) Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.

3) Counsel failed to present evidence during the resentencing proceedings of applicant's prior cooperation with law enforcement, including that applicant had previously provided information to law enforcement regarding certain other criminal activities.

4) Counsel failed to conduct a reasonable investigation into potentially mitigating evidence regarding applicant's impoverished childhood and the family dysfunction resulting from the essentially polygamous household in which he was raised, applicant's very low intellectual functioning, and neurological damage from exposure to dangerous neurotoxins and other chemicals as well as the maternal ingestion of alcohol during the developmental period. Counsel failed to gather relevant social history, educational and medical records which would have corroborated the mitigating evidence that was presented at applicant's trial. Counsel also failed to investigate, develop and present evidence of applicant's good character.

5) Counsel failed to object to the presence of numerous law enforcement officers in the courtroom throughout the resentencing trial.

6) Counsel failed to conduct an adequate voir dire, thus allowing the erroneous and prejudicial qualification of potential jurors who were predisposed to sentence the applicant to death or were otherwise legally unqualified to serve. Counsel also failed to ask adequate questions to determine whether many jurors were (or were not) qualified to serve on a capital jury.

7) Counsel failed to secure the assistance of appropriate crime scene and other experts. The failure to secure this necessary expert assistance prevented the defense team from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant "ambushed" and "executed" the victim.

10(c): Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 4 of the South Carolina Constitution during the appellate proceedings.

11(c): Supporting Facts: For the reasons set forth below, appellate counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

1) During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92). Counsel objected, and the trial court overruled the objection. (R at 1105-06). Appellate counsel failed to properly raise this claim on direct appeal. Rather than argue the issue consistent with the objection at trial, appellate counsel based the appellate claim on a different legal argument. The South Carolina Supreme Court held that the claim as formulated by appellate counsel was not preserved for review. See State v. Stone, 655 S.E.2d 487, 488-89 (S.C. 2007).

10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution.

11(d): Supporting Facts: Several errors at trial violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Those errors include, but are not necessarily limited to, the following:

1) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. See Ake v. Oklahoma, 470 U.S. 68 (1985).

2) The presence of numerous armed officers in the courtroom during both phases of the trial violated the applicant's right to a fair trial.

10(e): Applicant's conviction and death sentence were obtained in violation of the Fifth and Sixth Amendments to the United States Constitution and South Carolina law.

11(e): Supporting Facts: The state forced applicant to wear shackles when being transported to the courtroom and also once inside the courtroom. See Deck v. Missouri, 544 U.S. 622 (2005).

#### IV. Responses to Allegations

Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4<sup>th</sup> Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4<sup>th</sup> Cir. 1996). The court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4<sup>th</sup> Cir. 1996).

As the Supreme Court made clear in Strickland:

. . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon

such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4<sup>th</sup> Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4<sup>th</sup> Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4<sup>th</sup> Cir. 1995).

Next, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. Applicant bears the "highly demanding" and "heavy burden" in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" (citing Strickland). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4<sup>th</sup> Cir. 1997) ("given the overwhelming

aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed. Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.”).

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant's attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52 (1985).

**Ground 10(a): Ineffective assistance of counsel during the guilt phase.**

Applicant asserts five claims of ineffective assistance of counsel during the guilt phase of Applicant's first trial.

### **1. Failure to object to closing argument**

Applicant first contends his counsel should have objected to argument that Applicant did not dispose of his gun so he could kill more officers. Again, this issue is substantively without merit and should be denied as a matter of law.

As noted before, Applicant gave a statement in which he asserted the gun went off accidentally when he heard a man's voice behind him, and he never saw he had shot a deputy. During the solicitor's closing argument on the presence of malice and intent and the lack of accident, he noted that Applicant's actions after the crime were inconsistent with those claims in his statement, inasmuch as Applicant fled the scene, ran through bushes and briars in the dark of night, and hid under a log for four hours. The solicitor responded to defense questioning of witnesses on the fact that Applicant never tried to get rid of the gun in all that time, which the defense asserted was supportive of his claim that he did not know he shot a deputy. The solicitor suggested an alternate proposition more consistent with the evidence – that Applicant knew he had already killed one officer, and he kept the gun because he was trying to escape the perimeter and might need to use it again. {1<sup>st</sup> R. 844-45}.

There was no deficiency or prejudice as the argument was clearly permissible as a matter of law. Of course, arguments must be confined to evidence in the record (and reasonable inferences therefrom), although failure to do so will not automatically result in reversal. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Cannon, 229 S.C. 614, 93 S.E.2d 889 (1956). A solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.

See State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

Here, the solicitor's argument was proper, as he was clearly arguing the State's version of events and arguing against the claim of accident in Applicant's statement. The solicitor was also responding to an obvious defense contention raised in their questioning as to the significance of the fact that Applicant retained the gun. Since the argument was permissible, counsel could not have been deficient for failing to object nor could Applicant have been prejudiced. Hough v. Anderson, 272 F.3d 878 (7<sup>th</sup> Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, even if error, it cannot be said that the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Given the overwhelming evidence, this one comment cannot meet that standard. See, e.g. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (one isolated event is not prejudicial); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984) (momentary lapse of good taste will rarely be prejudicial).

Both of these issues should be denied as a matter of law. See Rule 12(b)(6), SCRPC ("failure to state facts to constitute a cause of action"); Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no

genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**2. Failure to utilize crime scene and other experts to rebut State's theory**

Applicant next contends his counsel was ineffective in the guilt phase for failing to hire "crime scene and other experts" who would have opined the evidence supported Applicant's statement in which he asserted the gun went off accidentally when he heard a man's voice behind him, and he never knew or saw that he had shot a deputy.

As an initial matter, Applicant fails specify exactly what these crime scene and other experts could offer that would support Applicant's statement and rebut the State's theory of ambush. To succeed on such a claim, Applicant would need to offer the specific evidence that would satisfy the prejudice prong of Strickland. See, e.g. Corbett v. State 627 S.E.2d 365, 370 (Ga.App. 2006); Bassette v. Thompson, 915 F.2d 932 (4<sup>th</sup> Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony). Since he does not specify exactly what these experts could offer that was not brought out at trial, this claim must be dismissed as a matter of law pursuant to S.C. Code § 17-27-70(b) (1976), due to the failure to allege facts to support the legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts

to constitute a cause of action"). Finally, without more, summary judgment should be granted as to the issue. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); United States v. Clark, 49 M.J. 98 (U.S. Armed Forces 1998) (hearing should be had on applicant's claim counsel failed to hire accident reconstructionist where Applicant presented affidavit and report from reconstructionist).

Regardless, the claim fails. Entitlement of an indigent defendant to a certain expert was addressed in Moore v. Johnson, 225 F.3d 495, 503 (5th Cir.2000), which specifically dealt with the asserted right to a jury selection expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985):

[A] defendant cannot expect the state to provide him a most-sophisticated defense; rather, he is entitled to 'access the raw materials integral to the building of an effective defense. . . . Most of those raw materials come to the defendant in the form of his court-appointed lawyer-in his expert knowledge about how to negotiate the rules of court, how to mount an effective defense, and so forth.

Here, counsel were not deficient in addressing this issue through examination, and there was no constitutional need for the crime scene and other experts. Counsel repeatedly elicited that it was dark, and that the murder weapon was a target pistol with an extremely light trigger pull. {1<sup>st</sup> R. 333; 372; 669; 713; 724-25}. Counsel also elicited that the victim was only 5'8" and the wooden part of the walls of the screened porch would be over his head. {1<sup>st</sup> R. 427-28}. Counsel argued the issue in closing. {1<sup>st</sup> R. 855; 860-68}. The issue was more than adequately joined by counsel through cross-examination and argument.

Further, there was no prejudice as a matter of law. There is no reasonable probability a jury would have accepted Applicant's version of events, even with a crime scene expert and other experts, when Applicant asserted in his statement: (1) that he unintentionally only fired once, when in fact there were three casings on the porch, two bullets in the victim, and three holes in the screened porch {1<sup>st</sup> R. 662}, and (2) that he did not know he shot a deputy and did not know what was going on for the four hours he was at large, even though he spent that time hiding under a log in a thick brush. {1<sup>st</sup> R. 695-96}.

Moreover, Applicant was not entitled to a jury charge on involuntary manslaughter or accident anyway. Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Cabrera-Pena, supra; State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Applicant – a felon on probation and not entitled to have a weapon – admitted he was banging on the side door of a house from which he had already been sent away once, while holding a loaded pistol in his hand. Such conduct hardly can meet either test for involuntary manslaughter – as it involves a felon with no good reason to be in possession of a weapon, such that the possession is the proximate cause of the homicide. It also involves trespass after notice; and burglary – given that the South Carolina Supreme Court found the screened porch itself was part of the dwelling. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

Similarly, Applicant cannot show entitlement to accident, as he must not only have been acting lawfully but must shown that he used due care in the handling of the weapon. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). Not only was Applicant behaving unlawfully many times over but by no stretch can invading an enclosed porch and banging on the back door with a loaded pistol in one's hand be considered due care. Since Applicant was not entitled to either an involuntary manslaughter or accident charge under any view of the evidence, then counsel could not have been deficient nor Applicant prejudiced from the failure to get an expert to support his statement. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (no ineffectiveness in failing to get homicide reconstructionist where counsel elicited the testimony through other means and the Applicant was not entitled to a voluntary manslaughter charge in any event).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

### **3. Failure to challenge *Batson* violation**

Applicant next contends counsel was ineffective during the guilt phase by failing to make a Batson motion challenging the prosecution's alleged racially discriminatory use of its strikes.

After jury selection, the State indicated it wished to make a Batson motion, but that if the defense did not have one it would withdraw its Batson motion. The State argued that if it had to explain its strikes the defense should have to explain them as well. The court responded that if the State had a Batson motion it would hear it, but that the State should proceed carefully as the court may just grant relief and the State could end up with a worse

redraw. The State then agreed it was satisfied with the jury. The defense then took a fair amount of time – even being asked by the judge if they needed a recess – before deciding they did not want to make a Batson motion either. {1<sup>st</sup> R. 2095-97}.

The record reflects that the solicitor used three strikes on black females, one strike on a black male, and one strike on a white female. The solicitor presented two black females and one black male before exhausting his strikes. {1<sup>st</sup> R. 2102-05}.

This claim should be dismissed as a matter of law of summary judgment granted. The record clearly reflects that counsel made a strategic decision not to pursue a Batson motion after much deliberation, and Applicant has made no allegations as to why this decision was unreasonable other than the implicit fact that Applicant was convicted. See Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4<sup>th</sup> Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4<sup>th</sup> Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial); Bunch v. Thompson, 949 F.2d 1354 (4<sup>th</sup> Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight); See generally Bell v. Evatt, 72 F.3d 421 (4<sup>th</sup> Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel).

Further, the solicitor here presented three black jurors, and struck one white one. While "a Batson violation can occur notwithstanding the fact that members of the defendant's racial group are seated on the jury," Matthews v. Evatt, 105 F.3d 907, 917 n.8 (4<sup>th</sup> Cir. 1997), a solicitor's acceptance of members of the struck juror's racial group is a

valid consideration in the determination of whether there was discrimination in the jury selection process. See State v. Dyar, 317 S.C. 77, 79, 452 S.E.2d 603, 604 (1994) (citing State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)); Burks v. Borg, 27 F.3d 1424, 1429 (9<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 1160 (1995). The solicitor's presentation of black jurors and striking of a white juror here refutes any inference of racially discriminatory action.

Finally, the evidence of guilt in this case was completely overwhelming, especially given, as argued before, that Applicant was not entitled to an accident or involuntary manslaughter instruction. As a matter of law, successful Batson motion would not have had a reasonable probability of a different result. See Reed v. Norris, 195 F.3d 1004 (8<sup>th</sup> Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

The issue should be denied as a matter of law. See Rule 12(b)(6), SCRCP ("failure to state facts to constitute a cause of action"); Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### **4. Failure to object to presence of officers**

Applicant next contends counsel was ineffective for failing to object to the presence of uniformed officers in the courtroom during trial.

This claim fails as a matter of law. In order to prevail on such a claim, Applicant must show that measures taken in the courtroom created either an actual or inherent prejudicial effect on the jury. "Inherent prejudice occurs when 'an unacceptable risk is presented of impermissible factors coming into play.'" State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) (quoting Flynn). See also State v. Paige, 375 S.C. 643, 654 S.E.2d 300 Ct. App. 2007). (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it they could tell the picture was of the victim).

There is no evidence in the record that there was an abundance of uniformed officers in the courtroom to the point that had counsel objected, there would have been a reasonable probability of a different result. Nor does Applicant identify or provide any such evidence that an intimidating or prejudicial atmosphere was created to the point where due process was violated. See, e.g. Holbrook v. Flynn, 475 U.S. 560 (1986) (finding no prejudice from presence of armed officers stationed as guards); Hill, 331 S.C. 94, 501 S.E.2d 122 (any prejudice from presence of officers is wholly speculative, and Hill failed to present any evidence the officers had an effect on the jury); Paige, 375 S.C. 643, 654 S.E.2d 300 (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it they could tell the picture was of the victim).

Indeed, with regard to officers present as spectators, the possibility of prejudice is even less, as trials are public and open to police officers as well, and there is no evidence or allegation that the officers behaved in an intimidating way to the jurors. See Hill v. Ozmint, 339 F.3d 187 (4<sup>th</sup> Cir. 1993) (nothing in record indicates courtroom was filled with an array of officers or that they were positioned to indicate Hill was dangerous; further, victim's fellow officers were impacted by his death and entitled to be present absent a Holbrook issue); Lambert v. McBride, 365 F.3d 557 (7<sup>th</sup> Cir. 2004) (finding no ineffectiveness from a failure to object to officers present as spectators where they were entitled to be there like any spectator and there was no evidence they sought to intimidate the jury). Further, it is simply impossible and not required that a courtroom be totally sanitized, as "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance." Holbrook, 475 U.S. at 567.

As such, the issue should be denied as a matter of law. See Rule 12(b)(6), SCRPC ("failure to state facts to constitute a cause of action"); Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## **5. Failure to object to shackling of defendant**

Applicant next asserts trial counsel was ineffective for failing to object to the use of visible shackles during the guilt phase of Applicant's first trial. Applicant is not entitled to relief upon this claim. There is no evidence in the record to support this claim. Furthermore, Applicant has not indicated in the Application that there is evidence to support this claim.

Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes. Brewster v. Bordenkircher, 745 F.2d 913 (4th Cir.1984).

State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). Inasmuch as this claim raises factual issues as to whether Applicant was shackled during the first trial and any consideration counsel may have had regarding any alleged shackling, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## **Ground 10(b): Ineffective Assistance of Counsel During the Sentencing Phase**

Applicant next makes six allegations of ineffective assistance of counsel as to the resentencing proceeding.

### **1. Failure to preserve issue as to widow's suicide attempt**

Applicant first contends his counsel was constitutionally ineffective for failing to preserve an issue as to the admissibility of the widow's victim impact testimony that she attempted suicide upon finding out the South Carolina Supreme Court reversed the first

sentencing proceeding. This issue is without merit and should be dismissed as a matter of law.

a. Events at trial

At resentencing, widow Teresa Kubala described her relationship with the victim, the pain of finding out about his death, and the difficulties of moving on in her life without the victim. She specifically noted the counseling and help she needed to even start dating again, as she thinks of Sgt. Kubala every day and felt like she was cheating on the man she had married at age 19.

Near the end of her testimony, the solicitor asked if there was "anything significant" in her life she would like to tell the jury. She stated that after she and her new husband returned from a family trip to celebrate their first anniversary, she found a message on her machine that "they were going to retry this case over again, that the supreme court had overturned it." She went on to state that her new husband had gotten hurt working at UPS and was dealing with trying to get workers compensation, and they were trying to make two house payments until they could sell one. She said UPS would not take her husband back, so he lost his job and had to find another, "and everything just blew up."

At this point, the defense approached for an off the record conference, after which the solicitor asked Teresa to state what happened as a result of "the things you went through with Charlie and the things after." Teresa then described taking a bottle of Tylenol PMs before her husband woke, but then having second thoughts and telling him what she had done. She then described going to the hospital for treatment and then spending three days in a ward, which led her to realize she did not have as many problems as she

thought. At this point the solicitor stopped the questioning and moved on. {2<sup>nd</sup> R. 1090-1092}.

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After the State rested, the defense put its objection on the record. The defense argued that the causation factor for the suicide was not the crime but because the legal proceeding was about to occur again, and asserted that the time that had passed from the original crime and this resentencing proceeding "lessens the direct effect that she would otherwise be allowed to testify about." Thus, the defense contended the suicide attempt was extremely prejudicial. The trial court responded that objection was timely, but Teresa's testimony was at least partially related to Sgt. Kubala's murder, even though that was not the only thing she mentioned. {2<sup>nd</sup> R. 1105-1107}.

Applicant raised an issue related to this event on direct appeal, but the South Carolina Supreme Court found it was not preserved. The court noted that counsel at trial argued the issue as one of causation – that the suicide attempt was related more to financial difficulties rather than the victim's murder – but on appeal Applicant was asserting that the reference to direct review invited the jury to speculate on the finality of their decision, and the reference to suicide invited the jury to speculate on the effect of their decision on the widow's health. On direct appeal, the Court found the latter issues were distinct from that raised at trial and not preserved.

Applicant now contends counsel was ineffective for failing to preserve the issue.

**b. The evidence of a suicide attempt was sufficiently tied to the impact on Teresa of Applicant's crime, even if the reversal and other personal factors were also mentioned.**

However, counsel could not have been deficient nor Applicant prejudiced, as while defense counsel did raise the "causation" issue and could not be deficient on that basis, the trial court was correct in overruling the causation argument anyway. Of course, victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993). In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. See State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721,730 - 731 (2000) (setting forth the above discussion).

As the previous discussion notes, victim impact evidence is not just to provide a glimpse of the victim's life, but also to show the impact of the victim's death on those left behind. See Hughey, supra (noting the admissibility of testimony that the survivors would miss the victim's cooking and mothering, and citing: "State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (admitting testimony from victim's mother concerning the impact of her son's death); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (admitting testimony of victim's stepdaughter concerning the victim's standing in the community, the victim's grandchildren, and the impact the crime had on her); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations)"). See also State v. Byram 326 S.C. 107, 485 S.E.2d 360 (1997) ("victim impact evidence which was introduced showed the specific harm committed by appellant in murdering the victim").

Along these lines, undoubtedly a surviving member's suicide attempt or suicidal feelings due to the murder of the loved one is a relevant and admissible part of victim impact evidence in a sentencing phase. See U.S. v. McVeigh, 153 F.3d 1166 (10<sup>th</sup> Cir. 1998) (evidence concerning impact of federal building bombing on families of victims, such as fear and hatred suffered by victims' children and suicidal feelings of surviving spouse, was admissible during capital trial's penalty phase); Moreno v. State, 38 S.W.2d 774 (Tex. Ct. App. 2001) (testimony from victim's grandmother about the suicide of his uncle following the murder was admissible as showing the psychological impact of the crime, and citing other cases admitting psychological effects on survivors following commission of a crime). Indeed, other decisions show that suicidal feelings or depression are often admitted without question in presentencing reports for the judge in the non-capital context. See, e.g. People v. Stidham, 533 N.E.2d 957 (Ill. Ct. App. 1989) (presentence report contained father's observations of his son's depression, loss of sleep and weight, suicidal statements and attempt, and psychiatric hospitalization).

The remaining question is whether the suicide attempt was not admissible based on, as defense counsel phrased it, "causation" – since Teresa mentioned other issues she faced in relation to her decision to take her own life. However, the trial court was correct in ruling in this case that Teresa's testimony about the event sufficiently tied it in with Applicant's crime.

First, like most issues we humans deal with in our lives, there are often multiple and interrelated factors at work, and simply because other problems leaked into Teresa's heartbreak from this crime does not give Applicant the windfall of making the event inadmissible, since at a minimum it was at least in part based on the chronic loss she faces

from losing her first husband. State v. Gill, 167 S.W.3d 184, 196 (Mo. 2005) (“It is not necessary that every piece of victim impact evidence relate to the direct impact of the victim's death on the witness.”).

Second, though, part of losing the loved one is not just losing his or her company, it also losing the help, comfort, and aid that the murdered family member provided to the daily life of a household. Cf., e.g. State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations). Having one's personal and financial life thrown into complete turmoil may not be as important as losing the loved one itself, but it is still an important and relevant impact of the crime on the survivors. Indeed, Teresa had just finished testifying as to how she thought of Sgt. Kubala every day and how she needed counseling to even begin considering a new relationship. Obviously it would be very hard to nurture a new relationship when, as Teresa testified, her mind goes every day to the man to whom she was married at age 19, and for whom she bore two children. The fact is her life had changed greatly in the negative due to Applicant's crime, and none of the present demons she mentioned – new husband, the new husband's job situation, the difficulty of two house payments, and feelings she was “cheating on” Sgt. Kubala with her new relationship – would have existed had Applicant not taken the victim's life. The fact that Teresa's life had changed in many respects was a consequence of the crime, and thus was admissible victim impact.

Moreover, and putting aside for the moment any issue as to the mention of the prior reversal in an of itself, when one reads Teresa's testimony in its entirety, it is clear that while the reversal might have been a trigger point, it was the daily anguish of living without

Sgt. Kubala that was ultimately part of Teresa's fateful decision – not the mere possibility of resentencing in a vacuum. For example, she had testified that she moved away from Sumter to stop going to the victim's gravesite every day, which was negatively affected her children. {2<sup>nd</sup> R. 1089-1090}. Indeed, given that this sentencing phase was tried so far removed from the original crime, it was relevant for the State to show that this murder had a continuing impact on the survivors that had not eased with the passage of time.

The judge was correct that the evidence was sufficiently tied to the impact of this crime on the survivors for it to be admissible.

**c. Any contention that the reference to reversal at the same time impermissibly minimized and maximized the jury's sense of responsibility is without merit.**

As the previous discussion shows, the attempted suicide was admissible on its own, as it was sufficiently related to the murder. The remaining question is whether counsel were deficient for failing to preserve error from the mention of the South Carolina Supreme Court's reversal of the first sentencing phase. In his direct appeal brief, Applicant contended there was error for two reasons: (1) that the mention of supreme court review lessened the jury's sense of responsibility for sentencing, ala State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979) and Caldwell v. Mississippi, 472 U.S. 320 (1985), and (2) that the mention of this impermissibly maximized the jury's sense of responsibility inasmuch as it implied a life sentence would trigger another attempt. These were the arguments the state supreme court found unpreserved.

In any event, these issues are without merit and thus counsel could not be deficient nor Applicant prejudiced. First, this is simply not a Caldwell issue, where there was

extensive argument that the responsibility for determining the appropriateness of the sentence rested with someone other than the jurors. 472 U.S. 320. Likewise, in Tyner there was an extensive explanation of everyone from the trial judge to the United States Supreme Court who would "determine whether your recommendation was right or not." Tyner, 273 S.C. at 659, 258 S.E.2d at 566. No such argument was made in the present case; there was merely a matter-of-fact mention of a retrial that was a necessary predicate fact to otherwise admissible victim impact evidence of the suicide attempt. There was no harping on this predicate fact, and no implication that the jury was not completely responsible for sentencing. Indeed, the trial court expressly charged them that they were completely responsible for the "final decision," and unlike those cases, no one told them different. {2<sup>nd</sup> R.623}.

Applicant also cannot succeed with any contention that the mention of the reversal impermissibly maximized the jury's responsibility by perhaps suggesting that Teresa would try suicide again if the jury returned a life sentence. First, Applicant has a bit of a logical problem with his argument, in that he asserts in the same sentence that the mention of the reversal both minimized and maximized the jury's responsibility. Regardless, no one said that at all – there was no argument along those lines, simply a brief matter-of-fact mention of a predicate fact. Indeed, as noted before, suicides are generally admissible victim impact evidence, and any suicide attempt might carry the inference that any sort of subsequent victory for the defense might trigger another attempt. The same could be said for other psychological problems suffered by a survivor, but that concern does not mean the defendant gets to escape having the jury hear the actual impact of what he has done on those who have suffered.

Neither of Applicant's concerns are sufficient to mandate reversal given the circumstances of this case. As such, counsel was not deficient nor Applicant prejudiced by the failure to preserve the issue in this regard. See Hough v. Anderson, 272 F.3d 878 (7<sup>th</sup> Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

**d. There was no prejudice.**

Finally, there was no error under Strickland. Applicant committed an extremely aggravated crime in ambushing a police officer, and he has an extensive criminal history – including an then-active parole that provided ample evidence of motive. The victim impact evidence was especially moving without regard to Teresa's testimony as to the suicide attempt, from the close friends of Sgt. Kubala's responding to the scene, or helping with the family after the crime, to the discussion of one officer taking Sgt. Kubala's young son to the scene to explain to him why his brave daddy was gone. As repeatedly noted before, the mention of reversal was made briefly and matter-of-factly and then no further mention was made again in either argument or testimony. Under these circumstance, these two lines of text in this 800-page sentencing hearing could not have been prejudicial. See, e.g. Havard v. State, 928 So.2d 771, 792 -793 (Miss. 2006) (Payne recognizes it is unlikely a brief statement in victim impact testimony could inflame the jury beyond the facts of the case so as to make the proceeding fundamentally unfair); State v. Young, 196 S.W.3d 85, 111 (Tenn. 2006) (no prejudice from improper victim impact testimony where trial court instructed jury how to consider the evidence, and the prosecution did not rely on

or stress the offending testimony in closing argument). See also State v. Gill 167 S.W.3d 184, 196 (Mo. 2005) (defendant did not show that the emotion displayed by the witnesses was unduly prejudicial).

Any error did not affect this sentencing result. It simply cannot be said that there is a reasonable probability that, absent this one little brief exchange in one witness's testimony, that "the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 504 S.E.2d at 823-824 (citing Strickland).

The issue should be denied as a matter of law. See Rule 12(b)(6), SCRCP ("failure to state facts to constitute a cause of action"); Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## 2. Failure to object to victim impact evidence.

Applicant next contends trial counsel was ineffective in failing to object to victim impact evidence that displayed the effect of Sgt. Kubala's death on law enforcement in

Sumter County, including testimony that rookie officers are taken to the spot where Kubala died to impress upon them the seriousness of the job.

As noted before, victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993). In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. See State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721, 730 - 731 (2000) (setting forth the above discussion).

As the previous discussion notes, victim impact evidence is not just to provide a glimpse of the victim's life, but also to show the impact of the victim's death on those left behind. See Hughey, supra (noting the admissibility of testimony that the survivors would miss the victim's cooking and mothering, and citing: "State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (admitting testimony from victim's mother concerning the impact of her son's death); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (admitting testimony of victim's stepdaughter concerning the victim's standing in the community, the victim's grandchildren, and the impact the crime had on her); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations)"). See also State v. Byram 326 S.C. 107, 485 S.E.2d 360 (1997) ("victim impact evidence which was introduced showed the specific harm committed by appellant in murdering the victim").

The challenged evidence in the present case was admissible as a matter of law; thus, counsel could not have been deficient nor Applicant prejudiced. First, as to the specific officers, they were not merely coworkers, but friends who ate together, spent off-duty time together with each other and their families, and did community projects together. Moreover, the loss of the victim affected the way they perceived and went about their jobs. This evidence involved their specific personal relationships with the victim and was undoubtedly admissible under Payne.

The greater issue to Applicant is apparently the admissibility of the lasting effect of the killing on the Sumter County law enforcement community in general. However, this larger effect on the community is admissible as well. As noted in Payne:

[Defendant] Payne echoes the concern voiced in Booth's [Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440] case that the admission of victim impact evidence permits a jury to find that defendants whose victims are assets to their *community* are more deserving of punishment than those whose victims are perceived to be less worthy. (citation omitted). As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss resulting to the *community* might be.

Payne, 501 U.S. at 823-824 (emphasis added) (quoted in Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002)). Other passages in Payne support the idea that evidence on the crime's impact of the larger community is admissible:

In Justice O'Connor's concurrence, she explains her view that "[a] State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community." Payne, 501 U.S. at 829, 111 S.Ct. 2597 (O'Connor J., concurring) (emphasis added). Although obviously relevant to the Government's argument, this of course is not part of the holding of Payne,

but rather dicta from the concurrence. Second, the Payne majority opinion cites a statement of Justice White from the dissenting opinion of Booth v. Maryland, one of the cases that Payne overruled: " 'The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' " Payne, 501 U.S. at 826, 111 S.Ct. 2597 (quoting Booth, 482 U.S. at 517, 107 S.Ct. 2529 (White J., dissenting) (citation in original omitted) (emphasis added)).

United States v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y. 2006).

And, a number of courts have upheld admission of the effect of a law enforcement officer's murder on the law enforcement community. See United States v. Battle, 173 F.3d 1373 (11<sup>th</sup> Cir. 1999) (permissible to show how murder of corrections officer emboldened inmates and made the prison more dangerous, but how a death sentence would send a message to those emboldened inmates); United States v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y. 2006) (permissible to show murder of undercover officer had chilling effect on other undercover officers); People v. Brown, 93 P.3d 244 (Cal. 2004) (permissible to show officer was a good police officer and to admit testimony brother saluted his grave because officer gave life for the community).

In any event, in view of the other victim impact evidence, it cannot be said that the one description of taking rookie officers to the crime scene is such that, absent this one little brief exchange in one witness's testimony, "the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 504 S.E.2d at 823-824 (citing Strickland).

The issue should be denied as a matter of law. In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**3. Failure to present evidence of Applicant's cooperation with police.**

Applicant next contends his counsel was ineffective in failing to present evidence of his alleged cooperation with police on other criminal matters.

Applicant provides no specifics of supposed cooperation with the police; thus, it is impossible to respond as to whether such alleged conduct could possibly meet the prejudice standard so that an evidentiary hearing would be warranted. As such, this matter must be dismissed as a matter of law pursuant to S.C. Code § 17-27-70(b) (1976), due to the failure to allege facts to support the legal conclusion. Alternatively, this allegation is subject to dismissal or summary judgment pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action"), and Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).<sup>2</sup>

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<sup>2</sup> Rule 12(e), SCRCPP, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact.

See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

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**4. Failure to conduct a reasonable investigation into mitigating evidence**

Applicant next contends his counsel failed to conduct a reasonable investigation into potentially mitigating evidence regarding his social and medical history, intellectual functioning, and neurological issues, and failed to gather the relevant records.

Respondents deny that counsel were deficient or Applicant prejudiced. First, Applicant's claim is insufficient as he does not set forth with particularity exactly what evidence counsel failed to uncover. As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").<sup>3</sup>

Second, the record reflects that counsel hired and called in the mitigation case a clinical social worker, who testified extensively to these issues, a psychopharmacologist, who described the effect of drinking and drugs on Applicant, and corrections consultant, who testified as to Applicant's adaptability, and family, who further described Applicant's

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<sup>3</sup> Rule 12(e), SCRPC, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

difficult upbringing and various social problems. {2<sup>nd</sup> R. 1222-1258}. Most important to this issue is the fact that counsel hired and called a social worker who testified in detail during the mitigation case about the psychosocial assessment she conducted of Applicant's life. Counsel also argued these points in opening and closing. {2<sup>nd</sup> R. 637-38; 1333-36}.

A number of courts have rejected similar claims where counsel actually hired experts, conducted an investigation, and presented a case in mitigation on the issues – as a “fancier” mitigation case is insufficient for relief. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g. Tucker v. Ozmint, 350 F.3d 433 (4<sup>th</sup> Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4<sup>th</sup> Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence

of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems); Wilson v. Ozmint, 352 F.3d 847 (4<sup>th</sup> Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant's family life and the large amount of evidence introduced at the plea hearing); Davis v. State, 875 So.2d 359 (Fla. 2004) (rejecting claim that counsel was ineffective for failure to present a "qualified" expert on the relationship between sexual abuse and PTSD, where, unlike Wiggins, counsel conducted an investigation into background and presented three mental health experts, with a number of diagnoses; relief is not warranted simply because PCR counsel can later find a "more favorable" expert report); Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins).

Indeed, if the qualified experts counsel hired failed to identify every possible malady or issue, that is not an actionable basis for ineffective assistance of counsel. Poyner v. Murray, 964 F.2d 1404, 1419 (4<sup>th</sup> Cir. 1992). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions. See Wilson v. Greene, 155 F.3d 396 (4<sup>th</sup> Cir. 1998) (to be reasonably effective, counsel is not required to second-guess the contents of an expert's report).

While many of the cases cited here conducted evidentiary hearings as to counsel's investigation, the trial record in this case reflects that counsel hired and called the typically appropriate experts, and Applicant has not identified with specificity what experts or what of consequence was not only missed but also was not within the bailiwick of the experts counsel did retain and call. Thus, Applicant's claim should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

Inasmuch as these claims raise factual issues as to counsel's preparation and representation, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**5. Failure to object to the presence of law enforcement officers**

Applicant next contends counsel was ineffective for failing to object to the presence of uniformed officers in the courtroom during the resentencing proceeding.

This claim fails as a matter of law. In order to prevail on such a claim, Applicant must show that measures taken in the courtroom created either an actual or inherent prejudicial effect on the jury. "Inherent prejudice occurs when 'an unacceptable risk is presented of impermissible factors coming into play.'" State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) (quoting Flynn). See also State v. Paige, 375 S.C. 643, 654 S.E.2d 300 Ct. App. 2007). (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it they could tell the picture was of the victim).

There is no evidence in the record that there was an abundance of uniformed officers in the courtroom to the point that had counsel objected, there would have been a reasonable probability of a different result. Nor does Applicant identify or provide any such evidence that an intimidating or prejudicial atmosphere was created to the point where due process was violated. See, e.g. Holbrook v. Flynn, 475 U.S. 560 (1986) (finding no prejudice from presence of armed officers stationed as guards); Hill, 331 S.C. 94, 501 S.E.2d 122 (any prejudice from presence of officers is wholly speculative, and Hill failed to present any evidence the officers had an effect on the jury); Paige, 375 S.C. 643, 654 S.E.2d 300 (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it they could tell the picture was of the victim).

Indeed, with regard to officers present as spectators, the possibility of prejudice is even less, as trials are public and open to police officers as well, and there is no evidence or allegation that the officers behaved in an intimidating way to the jurors. And, given that the defense put on the record its strategic decision in consultation with Applicant not to

request sequestration of witnesses, some of the officers would have been witnesses waiting to testify. {2<sup>nd</sup> R. 655}. See Hill v. Ozmint, 339 F.3d 187 (4<sup>th</sup> Cir. 1993) (nothing in record indicates courtroom was filled with an array of officers or that they were positioned to indicate Hill was dangerous; further, victim's fellow officers were impacted by his death and entitled to be present absent a Holbrook issue, and since there was no sequestration, the officers may have been waiting to testify); Lambert v. McBride, 365 F.3d 557 (7<sup>th</sup> Cir. 2004) (finding no ineffectiveness from a failure to object to officers present as spectators where they were entitled to be there like any spectator and there was no evidence they sought to intimidate the jury). Further, it is simply impossible and not required that a courtroom be totally sanitized, as "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance." Holbrook, 475 U.S. at 567.

As such, the issue should be denied as a matter of law. See Rule 12(b)(6), SCRPC ("failure to state facts to constitute a cause of action"); Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### **6. Failure to conduct adequate voir dire of jurors**

Applicant contends his counsel were ineffective in conducting capital voir dire.

This claim should be dismissed or denied as a matter of law. Respondents deny that counsel were deficient or Applicant prejudiced. First, Applicant's claim is insufficient

as he does not set forth with particularity exactly what questions counsel failed to ask and which jurors would have been excluded or included but for counsel's deficient questioning. As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").<sup>4</sup>

Moreover, the record supports denial as a matter of law. Given that the conducting of *voir dire* and other issues surrounding jury selection are particularly within the control of counsel and voir dire techniques are vastly different, review is "highly deferential" and any voir dire error must be egregious and obvious. See, e.g. Yeatts v. Angelone, 166 F.3d 255, 265 (4<sup>th</sup> Cir. 1999) (citing Strickland, 466 U.S. at 689); DeLong v. Thompson, 790 F. Supp. 594, 603 (E.D. Va. 1991), aff'd, 985 F.2d 553 (4<sup>th</sup> Cir. 1993) (unpublished); Beintema v. State, 936 P.2d 1221, 1227 (Wyo. 1997); Amer v. State, 872 P.2d 100 (Wyo. 1994).

Here, as noted before, Applicant what questions counsel failed to ask and what jurors would have been excluded or included but for counsel's deficient questioning. The

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<sup>4</sup> Rule 12(e), SCRPC, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

record reflects that counsel's questions in *voir dire* were appropriate and relevant, and again – the question is not whether counsel conducted *voir dire* exactly how collateral attack counsel would have conducted it, but whether counsel met the absolute minimum standard of competence. There are no “magic” questions, of which the failure to ask is *per se* deficient.

Thus, Applicant's claim should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees that dismissal or summary judgment is appropriate, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**7. Failure to utilize crime scene and other experts to rebut State's theory**

For the reasons set forth above in response to the second allegation in Ground 10(a), Respondent submits Petitioner is not entitled to relief upon this claim. In the event ~~this Court disagrees that dismissal or summary judgment is appropriate, Respondent~~ requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**Ground 11(c): Ineffective Assistance of Appellate Counsel**

Applicant next makes one claim of ineffective assistance of appellate counsel. Specifically, Applicant asserts appellate counsel was ineffective for not presenting an argument on appeal that was consistent with the argument raised by trial counsel below. Applicant's contention is without merit.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). 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). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to

identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although

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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, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7<sup>th</sup> Cir. 1986)). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

**a. What occurred at trial**

At trial, Teresa Kubala, Sgt. Kubala's widow, testified about her life after her husband's death. She noted that she moved to get away from some of the memories of her life with him, she had been in and out of counseling, and she had been on medication for depression. {R. 1089}. Teresa further testified about the issues she had when she first started beginning a relationship with her second husband. {R. 1090}. After discussing her second marriage, the following exchange occurred at trial:

- Q [from Solicitor Jackson]. Teresa, how long from the time that Charlie was murdered till you married Mike?
- A. It was five years.
- Q. And since then is there anything significant in your life that you'd like to tell the jury about?
- A. Yes. I'm ashamed of it, but I'll tell them. February the 11th, 2003, I woke up very depressed. They had called and told me that they were going to retry this case over again, that the supreme court had

overtured it, and they called. They ended up having to, leaving a message. We had gone away. It was our first anniversary, Mike and I'd first anniversary, and we had gone and taken the kids to the beach, and we got back on that first anniversary, that was on my answering machine, and so I had that to deal with, and my husband, Mike, now he was working for UPS and got hurt on the job, and he was going through workman's comp and stuff, and we were trying to sell his house because we had two house payments when we got married, and the UPS wouldn't take, take him back, so he lost his job and had to find another job, and everything just blew up. So that morning I got up, and Mike was still asleep.

{2<sup>nd</sup> R. 1090, I 14 - 1091, I 12}. At that pont, defense counsel objected. {2<sup>nd</sup> R. 1091, II 13-4}. After a bench conference, the trial judge overruled the objection and noted that counsel would be allowed to put the objection on the record at a later time. {2<sup>nd</sup> R. 1091}.

At the next break, defense counsel asserted the reasoning for Applicant's objection to the testimony regarding Teresa's suicide attempt:

Your Honor, we objected to that. It was apparent from her testimony that the causation factor there was not what had happened seven years earlier, but the fact that the legal proceeding was about to occur again. Your Honor, do you think the break in time, I mean the period from 1996 to 2003 certainly lessens the direct effect that she would otherwise be allowed to testify about. We think the fact that she was able to testify about this attempted suicide was extremely prejudicial to the defendant and that that testimony should have been excluded.

{2<sup>nd</sup> R. 1106, II 4-15}. In response, the trial court stated as follows:

All right. My view of it, and I thank you for that, Mr. Littlejohn, and it timely, your objection was timely made, and I did overrule the objection. In my view it was partially related to the situation of Mr. Kubala, Sgt. Kubala, and I think he is the appropriately the victim in fact of testimony. Granted it was not the only thing, but I think she did, that she did relate it to her relationship with her husband as a part of what lead up to that particular suicide, and so I think that it was relevant, and for that reason I did overrule it, but your objection is noted.

{2<sup>nd</sup> R. 1106, I 16 - 1107, I 2}.

On appeal, appellate counsel contended the trial judge committed reversible error by permitting the victim's widow to testify that she had attempted suicide when she learned ~~from a message left on her answering machine that the Supreme Court had reversed~~ Stone's death sentence and "they were going to retry this case over again," as this testimony introduced an arbitrary factor into Stone's resentencing, in violation of S.C. Code § 16-3-25(C)(1). See Final Brief of Appellant. The South Carolina Supreme Court affirmed Applicant's sentence, finding the issue raised on appeal was not preserved for appellate review. State v. Stone, 376 S.C. 32, 35, 655 S.E.2d 487, 488 (2007).

**b. Applicant cannot show that he was prejudiced by appellate counsel's briefing**

Without addressing whether appellate counsel was deficient, Applicant's claim for relief in this ground is without merit because he cannot show that he was prejudiced by appellate counsel not utilizing the same argument made at trial on appeal. The trial court was correct in admitting the evidence. Victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993). In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. See State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721, 730 - 731 (2000) (setting forth the above discussion).

Victim impact evidence is not just to provide a glimpse of the victim's life, but also to show the impact of the victim's death on those left behind. See Hughey, supra (noting

the admissibility of testimony that the survivors would miss the victim's cooking and mothering, and citing: "State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (admitting testimony from victim's mother concerning the impact of her son's death); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (admitting testimony of victim's stepdaughter concerning the victim's standing in the community, the victim's grandchildren, and the impact the crime had on her); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations)". See also State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) ("victim impact evidence which was introduced showed the specific harm committed by appellant in murdering the victim").

Along these lines, undoubtedly a surviving member's suicide attempt or suicidal feelings due to the murder of the loved one is a relevant and admissible part of victim impact evidence in a sentencing phase. See U.S. v. McVeigh, 153 F.3d 1166 (10<sup>th</sup> Cir. 1998) (evidence concerning impact of federal building bombing on families of victims, such as fear and hatred suffered by victims' children and suicidal feelings of surviving spouse, was admissible during capital trial's penalty phase); Moreno v. State, 38 S.W.2d 774 (Tex. Ct. App. 2001) (testimony from victim's grandmother about the suicide of his uncle following the murder was admissible as showing the psychological impact of the crime, and citing other cases admitting psychological effects on survivors following commission of a crime). Indeed, other decisions show that suicidal feelings or depression are often admitted without question in presentencing reports for the judge in the non-capital context. See, e.g. People v. Stidham, 533 N.E.2d 957 (Ill. Ct. App. 1989) (presentence report

contained father's observations of his son's depression, loss of sleep and weight, suicidal statements and attempt, and psychiatric hospitalization).

~~The remaining question is whether the suicide attempt was not admissible based~~  
on, as defense counsel phrased it, "causation" – since Teresa mentioned other issues she faced in relation to her decision to take her own life. The trial court was correct in ruling in this case that Teresa's testimony about the event sufficiently tied it in with Appellant's crime.

First, like most issues people deal with in our lives, there are often multiple and interrelated factors at work, and simply because other problems leaked into Teresa's heartbreak from this crime does not give Appellant the windfall of making the event inadmissible, since at a minimum it was at least in part based on the chronic loss she faces from losing her first husband. State v. Gill, 167 S.W.3d 184, 196 (Mo. 2005) ("It is not necessary that every piece of victim impact evidence relate to the direct impact of the victim's death on the witness."). Second, part of losing the loved one is not just losing his or her company, it also losing the help, comfort, and aid that the murdered family member provided to the daily life of a household. Cf., e.g. State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations). Having one's personal and financial life thrown into complete turmoil may not be as important as losing the loved one itself, but it is still an important and relevant impact of the crime on the survivors. Indeed, Teresa had just finished testifying as to how she thought of Sgt. Kubala every day and how she needed counseling to even begin considering a new relationship. Obviously it would be very hard to nurture a new relationship when, as Teresa testified, her mind goes every day to the

man to whom she was married at age 19, and for whom she bore two children. The fact is her life had changed greatly in the negative due to Appellant's crime, and *none* of the present demons she mentioned – new husband, the new husband's job situation, the difficulty of two house payments, and feelings she was "cheating on" Sgt. Kubala with her new relationship – would have existed had Appellant not taken the victim's life. The fact that Teresa's life had changed in many respects was a consequence of the crime, and thus was admissible victim impact.

Moreover, when one reads Teresa's testimony in its entirety, it is clear that while the reversal might have been a trigger point, it was the daily anguish of living without Sgt. Kubala that was ultimately part of Teresa's fateful decision – not the mere possibility of resentencing in a vacuum. For example, she had testified that she moved away from Sumter to stop going to the victim's grave site every day, which was negatively affecting her children. {2<sup>nd</sup> R. 1089-1090}. Indeed, given that this sentencing phase was tried so far removed from the original crime, it was relevant for the State to show that this murder had a continuing impact on the survivors that had not eased with the passage of time.

Overall, the trial judge was correct that the evidence was sufficiently tied to the impact of this crime on the survivors for it to be admissible. Thus, Applicant cannot show that he was prejudiced.

In the event this Court disagrees that dismissal or summary judgment is appropriate, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**Ground 10(d): Claims of Violation of Due Process**

Applicant makes claims of two due process violations. All should be denied or dismissed as a matter of law.

1. Failure to approve funding for a jury selection expert.

Applicant next asserts a due process violation from the refusal to fund a jury selection expert. This freestanding claim can only be raised on direct appeal and is inappropriate in PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

Even if this claim could be raised in PCR, the issue should still be dismissed as a matter of law. As noted by the Fifth Circuit in Moore v. Johnson, 225 F.3d 495, 503 (5th Cir.2000), which addressed an indigent defendant's asserted right to a jury selection expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985),

[A] defendant cannot expect the state to provide him a most-sophisticated defense; rather, he is entitled to 'access the raw materials integral to the building of an effective defense. . . . Most of those raw materials come to the defendant in the form of his court-appointed lawyer-in his expert knowledge about how to negotiate the rules of court, how to mount an effective defense, and so forth. . . . [J]ury selection is not a mysterious process to be undertaken by those learned in the law only with the assistance of outside professionals. All competent lawyers are endowed with the 'raw materials' required to pick a jury fairly disposed toward doing substantive justice. . . . [A] defendant does not lack 'an adequate opportunity to present [his] claims fairly' because he has been denied a jury consultant.

See also Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007) (noting the constitution does not require an indigent defendant to get all the assistance his wealthier counterpart might buy, and finding no prejudice shown from the denial of a jury selection expert).

Here, at both proceedings Petitioner had the assistance of James Babb and Cameron Littlejohn, both who have extensive experience in jury trials in the Midlands. Babb, in particular, has been trying major criminal cases in Sumter and Clarendon counties for years. Certainly they had the "basic tools" to conduct jury selection (in Babb's home counties) such that no expert was needed. Since there was no constitutional violation or resulting prejudice from the denial of any such request, the claim should be denied as a matter of law. See Rule 12(b)(6), SCRCP ("failure to state facts to constitute a cause of action"); Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## **2. Presence of law enforcement officers in courtroom.**

Applicant next contends he was denied due process based on the alleged presence of uniformed officers in the courtroom during both the trial and the resentencing proceeding.

First, this freestanding claim can only be raised on direct appeal and is inappropriate in PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been

raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

~~Moreover, this claim fails as a matter of law. In order to prevail on such a claim,~~  
Applicant must show that measures taken in the courtroom created either an actual or inherent prejudicial effect on the jury. "Inherent prejudice occurs when 'an unacceptable risk is presented of impermissible factors coming into play.'" State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) (quoting Flynn). See also State v. Paige, 375 S.C. 643, 654 S.E.2d 300 Ct. App. 2007). (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it they could tell the picture was of the victim).

There is no evidence in the record that there was an abundance of uniformed officers in the courtroom such that prejudice can be shown. Nor does Applicant identify or provide any such evidence that an intimidating or prejudicial atmosphere was created to the point where due process was violated. See, e.g. Holbrook v. Flynn, 475 U.S. 560 (1986) (finding no prejudice from presence of armed officers stationed as guards); Hill, 331 S.C. 94, 501 S.E.2d 122 (any prejudice from presence of officers is wholly speculative, and Hill failed to present any evidence the officers had an effect on the jury); Paige, 375 S.C. 643, 654 S.E.2d 300 (finding no actual or inherent prejudice, where there was no evidence that jurors were exposed to spectators wearing button of victim, and no evidence that if they did see it they could tell the picture was of the victim).

Indeed, with regard to officers present as spectators, the possibility of prejudice is even less, as trials are public and open to police officers as well, and there is no evidence or allegation that the officers behaved in an intimidating way to the jurors. And, given that

the defense put on the record its strategic decision in consultation with Applicant not to request sequestration of witnesses, some of the officers would have been witnesses waiting to testify. ~~{2<sup>nd</sup> R. 655}~~. See Hill v. Ozmint, 339 F.3d 187 (4<sup>th</sup> Cir. 1993) (nothing in record indicates courtroom was filled with an array of officers or that they were positioned to indicate Hill was dangerous; further, victim's fellow officers were impacted by his death and entitled to be present absent a Holbrook issue, and since there was no sequestration, the officers may have been waiting to testify); Lambert v. McBride, 365 F.3d 557 (7<sup>th</sup> Cir. 2004) (finding no ineffectiveness from a failure to object to officers present as spectators where they were entitled to be there like any spectator and there was no evidence they sought to intimidate the jury). Further, it is simply impossible and not required that a courtroom be totally sanitized, as "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance." Holbrook, 475 U.S. at 567.

As such, the issue should be denied as a matter of law. See Rule 12(b)(6), SCRPC ("failure to state facts to constitute a cause of action"); Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law). See also S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**Ground F: Fifth and Sixth Amendment violations due to shackling during transport to courtroom and once inside courtroom.**

Applicant next asserts his constitutional rights were violated by the alleged shackling of Applicant when he was transported to the courtroom and when he was inside the courtroom. At the outset, Respondent would note that Applicant has not identified when Applicant was allegedly improperly shackled.<sup>5</sup>

First, Respondent submits Applicant cannot establish a factual basis for this claim. Applicant has not identified any evidence supporting this claim in the Application. There is no indication in the record that Applicant was visibly shackled during the first trial. Since there is not factual basis for granting relief in this claim, it should be denied and dismissed with prejudice.

Second, this is a freestanding claim that can only be raised on direct appeal and is inappropriate in PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes. Brewster v. Bordenkircher, 745 F.2d 913 (4th Cir.1984).

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<sup>5</sup> Rule 12(e), SCRCP, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). In Deck v. Missouri, 544 U.S. 622, 626-29, 125 S. Ct. 2007, 2010-12 (2005), the United States Supreme Court noted that it has been long established that the routine use of visible shackles was not permitted, and that a special need would have to be present for visible shackling to be used during the guilt phase of a trial. Thus, to the extent Applicant is asserting that he was improperly shackled during the guilt phase of the first trial, Applicant's claim was clearly available at trial and for his direct appeal. As a result, this claim for relief must be denied and dismissed with prejudice.

In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### **CONCLUSION**

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be denied and dismissed as a matter of law, or in the alternative that its motions for a more definite statement be granted.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

Bobby W. Stone

C/A No. 2008-CP-43-00905

Applicant,

v.

CERTIFICATE OF SERVICE

The State of South Carolina,

(Capital Case)

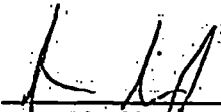
Respondent.

I, Alphonso Simon Jr., counsel for the Respondent, certify that I have served the **Return, Motion to Dismiss and Motion for More Definite Statement to Third Amended Application for Post-Conviction Relief** by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

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Columbia, SC 29201

This 18th day of April, 2012.



ALPHONSO SIMON JR.

# COPY

STATE OF SOUTH CAROLINA )  
 ) COURT OF COMMON PLEAS  
 COUNTY OF SUMTER )

Bobby Wayne Stone, )  
 )  
 ) APPLICANT, ) PCR HEARING  
 ) 2008-CP-43-905  
 )  
 ) -VS- )  
 )  
 ) State of South Carolina, )  
 )  
 ) RESPONDENT. )  
 \_\_\_\_\_ )

BEFORE THE HONORABLE MICHAEL G. NETTLES, JUDGE

APRIL 23 AND 24, 2012

SUMTER, SOUTH CAROLINA

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REMA K. GANTT THOMAS  
 CIRCUIT COURT REPORTER

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1 Monday, August 23, 2012.

2 (The defendant,  
3 together with counsel, was personally present in the  
4 courtroom.)

5 THE COURT: We'll put the caption on the  
6 record, and I'll be glad to hear from the State.

7 MR. SIMON: May it please the Court?

8 THE COURT: Yes, sir.

9 MR. SIMON: Your Honor, we are appealing  
10 the case of Bobby Wayne Stone, the applicant, versus  
11 the State of South Carolina, respondent, capitol  
12 post-conviction relief action. The case number is  
13 2008-CP-43-905.

14 THE COURT: Very good. Might counsel  
15 approach the bench for a moment?

16 Yes, sir, Mr. Blume, you're recognized.

17 MR. BLUME: Your Honor, this is a  
18 post-conviction relief hearing in the case of Bobby  
19 Wayne Stone versus the State of South Carolina.  
20 Your Honor had asked for counsel for each side to  
21 give some opening remarks on what basically the  
22 evidence will be at this hearing and what issues  
23 they go to.

24 And for the applicant, today we will call  
25 three witnesses. The first witness will be Dr.

1 James Merikangas. The second one will be Dr. Howard  
2 Becker, and the third one will be Dr. Arlene  
3 Andrews.

4 These witnesses all will present testimony  
5 relevant to Mr. Stone's claim that his trial counsel  
6 failed to conduct a proper investigation into all  
7 available mitigating evidence. And the primary  
8 thrust of this testimony would be that counsel did  
9 not do an assessment or hire anyone that was  
10 qualified to do an assessment of Mr. Stone's  
11 cognitive functioning and basically that he has a  
12 neurological impairment or brain damage.

13 And the testimony which will be presented  
14 through Dr. Merikangas and others will be that Mr.  
15 Stone does have extensive neurological impairments  
16 and that he has diagnosed Mr. Stone with what's  
17 called fetal alcohol spectrum disorder, which is a  
18 neurological impairment caused by early ingestion of  
19 alcohol, but that he has brain damage on a number of  
20 different fronts.

21 Dr. Becker is an expert in researching  
22 fetal alcohol spectrum disorder. He will testify  
23 and provide the Court information of what that means  
24 to have fetal alcohol spectrum disorder and the  
25 various primary and secondary effects of that.

1           And then Dr. Andrews will testify  
2           regarding Mr. Stone's history and social history and  
3           put some of this evidence really in context, not  
4           just simply the relevance to the night in question  
5           but through Mr. Stone's life story and trying to  
6           contextualize that for the Court.

7           And then so that is the primary issue  
8           today. There may be some other possible character  
9           witnesses to testify. Then we would also have  
10          another claim not in the application, which has to  
11          do with whether counsel -- trial counsel -- provided  
12          effective assistance of counsel in failing to secure  
13          the necessary expert to support Mr. Stone's  
14          statement to the police that he did not  
15          intentionally shoot Sgt. Kubala.

16          The Court may remember the trial.  
17          Essentially, there were two competing versions of  
18          what happened, which is not unusual in cases of this  
19          magnitude. The prosecution's theory which was  
20          presented at trial was that Mr. Stone effectively  
21          ambushed Sgt. Kubala and intentionally killed him.

22          The defense's theory at trial, Your Honor,  
23          was that -- consistent with Mr. Stone's statement to  
24          law enforcement was that Mr. Stone did not  
25          intentionally shoot Sgt. Kubala. He was startled by

1 him when he came up behind him. He turned toward  
2 the sound, and that's when the gun went off.

3 We don't know, and our contention is not  
4 that that was an erroneous theory. In fact, we  
5 believe that it's true. It was what happened. And  
6 what our primary contention is that there was  
7 evidence from which someone qualified in homicide  
8 reconstruction and firearms could have supported  
9 substantially Mr. Stone's statement to the police  
10 that this was not an intentional act on his part.

11 And so we will call tomorrow an expert in  
12 the area who will testify based upon certain aspects  
13 of the evidence and the physical evidence as a  
14 whole. He will testify in that regard. Then, as  
15 the Court knows, there will probably be additional  
16 testimony at a later point.

17 There's one expert that we didn't call.  
18 Dr. Hart (SP) was not available this week. He's  
19 been subpoenaed, I understand, in a trial in another  
20 jurisdiction. And we consulted with the Attorney  
21 General's Office. Their preference was not to do  
22 this by deposition but to reconvene at some later  
23 point.

24 The Court expressed that preference, too.  
25 So we'll be anticipating that at some point in time

1 we will call back Dr. Hart and they may have a  
2 different witness, and then we would try to do Mr.  
3 Littlejohn, who is also not available, at that time.

4 But the primary focus of the testimony  
5 will be presented today, and tomorrow we think the  
6 applicant's case will conclude by tomorrow as to  
7 those issues.

8 THE COURT: Very good, thank you.

9 All right, who would like to speak on  
10 behalf of the State?

11 MR. SIMON: May it please the Court, Your  
12 Honor?

13 THE COURT: Yes, sir.

14 MR. SIMON: My name is Al Simon. My  
15 co-counsel is Don Zelenka. Just to give you an  
16 overview of what we think the evidence is going to  
17 show as to the applicant's claims in this case, in  
18 the application the applicant has raised five claims  
19 of ineffective assistance, the first one being  
20 counsel should have objected to part of the closing  
21 argument made by the Solicitor during the first  
22 trial.

23 We believe that the evidence is going to  
24 show that counsel made a reasonable decision and  
25 decided not to object to that testimony. We believe

1 that the record itself shows that the closing  
2 statements that they are challenging were actually  
3 proper statements made by the Solicitor in light of  
4 the testimony that was given at trial.

5 Second, the next claim is whether they  
6 discussed that they were going to put up witnesses  
7 for tomorrow, that being counsel should have  
8 utilized a crime scene expert and other experts to  
9 basically try to corroborate the applicant's  
10 statement. We believe that the testimony during the  
11 course of this hearing is going to show that counsel  
12 did utilize a crime scene expert.

13 While they didn't call him to testify at  
14 trial, they did utilize an expert in developing  
15 their theory of the case regarding the cross  
16 questions for the State's witnesses. And we believe  
17 that what will be shown is that what counsel did was  
18 reasonable and that the applicant wasn't prejudiced  
19 by anything counsel did in that regard.

20 The third issue is related to their  
21 assertion that defense counsel should have moved for  
22 a Batson motion on jury selection. We believe that  
23 the testimony will show that counsel made a  
24 reasonable decision in not moving for a Batson  
25 motion.

1           The fourth claim asserts that counsel  
2           should have objected to the presence of law  
3           enforcement officers in the courtroom. We believe  
4           the evidence is going to show that while there were  
5           law enforcement personnel in the courtroom, many of  
6           whom were testifying, the presence of law  
7           enforcement was not overwhelming in this case, and  
8           it was not a presence that would have warranted an  
9           objection by trial counsel.

10           And the last claim would be dealing with  
11           the guilt phase. They assert that the applicant's  
12           trial counsel should have objected to the use of  
13           visible tracking during the guilt phase. We believe  
14           the evidence is going to show, the testimony is  
15           going to show, that visible tracking was not in use  
16           in this case.

17           Going to the issues raised regarding the  
18           sentencing phase at the second trial, there make  
19           seven claims, the first being they assert that  
20           counsel should have objected -- utilized a different  
21           objection in objecting to the victims' testimony at  
22           trial.

23           In looking at the claim, we see this as  
24           them asserting that the objection should have along  
25           the same lines of the United States Supreme Court's

1 decision in Caldwell v. Mississippi. What happened  
2 at trial was not similar to Caldwell. It was not a  
3 Caldwell case.

4 Counsel made a strategic decision in  
5 deciding what type of objection to use, and the  
6 applicant can't show that he was prejudiced by the  
7 argument that was raised, and the argument they say  
8 should have been raised would have been without  
9 merit.

10 Next, they assert that counsel should have  
11 objected to the victim impact testimony relating to  
12 basically the impact of Deputy Kubala's death on the  
13 Sheriff's Department and law enforcement in general.  
14 We believe the testimony that was presented at trial  
15 was well within reason with all of the victim impact  
16 testimony. It was limited but not inflammatory.

17 Counsel made a strategic decision not to  
18 object to it, and the applicant can't show he was  
19 prejudiced on that point.

20 The next claim that they assert is that  
21 counsel should have presented evidence that the  
22 applicant had cooperated with police on prior  
23 occasions.

24 We believe that the evidence and testimony  
25 during this hearing is going to show that, first, if

1 they were going to present such testimony, it would  
2 open the door for that evidence to automatically  
3 come in. Counsel made a reasonable strategic  
4 decision in not presenting that testimony and in  
5 looking at the pitfalls of presenting that.

6 The next is regarding the investigation  
7 and presentation of a mitigation case. We believe  
8 the record will show, first, a lot of the  
9 information -- we believe a lot of the information  
10 that's being presented now was information that was  
11 presented at trial, maybe in a different fashion.

12 But overall the presentation that was  
13 given at trial was an adequate one, a proper one,  
14 after a full and thorough investigation. And the  
15 applicant wasn't prejudiced in that regard.

16 The next claim is a similar claim to the  
17 one that was listed first regarding the guilt phase,  
18 that being the presence of law enforcement personnel  
19 in the courtroom. As to the claim in the guilt  
20 phase, we believe the testimony is going to show  
21 that while there were law enforcement officers that  
22 were in and out of the courtroom who testified that  
23 their presence was warranted.

24 In the next claim, they assert that  
25 counsel failed to conduct an adequate voir dire. We

1 believe that the record of the voir dire shows that  
2 counsel did engage in a full and vigorous voir dire  
3 of the jurors and believe that the record will show  
4 that no improperly qualified jurors sat on the jury.

5 And the last claim within ineffective  
6 assistance of trial counsel in the sentencing phase  
7 is, again, the crime scene and other experts, for  
8 the same reasons that were asserted for that,  
9 counsel utilized experts and did an adequate job of  
10 doing that for the same reasons that I mentioned  
11 back in the sentencing phase.

12 They also raise a claim of ineffective  
13 assistance of counsel essentially asserting that  
14 appellate counsel could have raised the same issue  
15 that was raised by trial counsel on appeal. We  
16 believe that the record is going to show and also  
17 the case law is going to show that the applicant  
18 can't show that he was prejudiced by the argument  
19 that was raised by the appellate counsel on appeal.

20 There are two due process claims in their  
21 fourth ground, that being that there's a due process  
22 violation and the Court did not allow him to hire a  
23 jury selection expert, and, second a claim of a due  
24 process violation due to the presence of law  
25 enforcement in the courtroom.

1           Those claims are not claims that are  
2     viable for a post-conviction relief. They could  
3     have been raised at trial, could have been raised on  
4     appeal. They weren't. Since they could have been  
5     raised, they are barred and stayed.

6           And the final claim, the Fifth Amendment  
7     claim related to for allegation of physical  
8     shackelling. Again, that's a claim that could have  
9     been raised at trial, could have been raised in the  
10    direct appeal. It wasn't. Since it could have been  
11    raised it is barred. Thank you, Your Honor.

12           THE COURT: Thank you, Mr. Simon.

13           Mr. Blume, you're recognized.

14           MR. BLUME: We're ready to proceed, Your  
15    Honor.

16           THE COURT: All right, you may call your  
17    first witness.STOP

18

19

20

21           MR. BLUME: We call Dr. James Merikangas.

22           THE COURT: Yes, sir, if you could please  
23    come forward.

24           CLERK OF COURT: State your name, please.

25           DR. MERIKANGAS: James Merikangas.

1 (The witness was sworn.)

2 CLERK OF COURT: Thank you. Have a seat  
3 up here, please.

4 THE COURT: I'm going to ask you if you  
5 could, please, to have a seat in the witness chair.  
6 I'm going to ask you to speak loudly, clearly, and  
7 slowly in order that we can hear everything that  
8 you've got to say. I'm going to ask that you start  
9 with your full name, and I'm going to ask you to  
10 spell that last one for us.

11 MR. MERIKANGAS: Yes, sir. I am James R.  
12 Merikangas, spelled M-E-R-I-K-A-N-G-A-S.

13 JAMES R. MERIKANGAS, having first been  
14 duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. BLUME:

17 Q Dr. Merikangas, good morning. What is  
18 your occupation?

19 A I'm a medical doctor specializing in  
20 neurology and psychiatry.

21 Q And where are you currently employed?

22 A I'm self-employed. My office is in  
23 Bethesda, Maryland.

24 Q And what is your educational background?

25 A I'm a graduate with a degree in physics

1 from Villanova University in 1960, and then a  
2 graduate of the U.S. Navy Guided Missile School.  
3 And I attended Capitol University of America in  
4 Washington, D.C., for a year in '60-'63 and attended  
5 Johns Hopkins University School of Medicine,  
6 received my medical degree in 1969.

7 I did internships in medicine and  
8 pediatrics at Washington Hospital Center. And then  
9 in 1973, I completed residencies in both psychiatry  
10 and neurology at the Yale University in New Haven.  
11 In 1973, I was chief resident in neurology at Yale.

12 Q And in between your time at Villanova and  
13 Johns Hopkins, were you also in the military?

14 A Yes, I served in the Navy as a regular  
15 office board the U.S.S. Kitty Hawk in the Far East.  
16 I was a guided missile officer and nuclear weapons  
17 loading officer.

18 Q So you are board-certified in both  
19 neurology and psychiatry?

20 A Yes, separately in both boards.

21 Q And are there many people that have  
22 certifications in both?

23 A There are about a hundred.

24 Q In the country?

25 A Yes, sir.

1 Q And are you a member of any professional  
2 organizations?

3 A I'm a member of quite a few. The  
4 American Academy of Psychiatry in the Law is one,  
5 American Neuropsychiatric Association, the American  
6 Academy of Neurology, are the major ones.

7 Q And have you ever been qualified as an  
8 expert witness?

9 A I have.

10 Q Have you been qualified as an expert  
11 witness in both neurology and in psychiatry?

12 A Yes.

13 Q And have you ever been qualified as an  
14 expert witness in the state of South Carolina?

15 A Yes.

16 Q And you've testified previously in the  
17 state?

18 A I have.

19 Q In both criminal and civil matters?

20 A That's correct.

21 MR. BLUME: Your Honor, at this point I  
22 would offer Dr. Merikangas as an expert in the field  
23 of psychiatry and neurology.

24 MR. SIMON: No objection, Your Honor.

25 THE COURT: Any query with regard to his

1 qualifications?

2 MR. SIMON: No voir dire necessary.

3 THE COURT: All right. He is so  
4 qualified, and he'll be allowed to render his  
5 opinion in the field of neurology and psychiatry.

6 Q Dr. Merikangas, what did your evaluation  
7 in this case consist of, or what were you asked to  
8 do?

9 A I was asked to evaluate Mr. Stone to  
10 determine what his neurological and psychiatric  
11 condition may be and how that may have things to do  
12 with the actions for which he has been convicted.

13 Q And so in the course of conducting this  
14 evaluation, what did you do?

15 A I reviewed his medical records, his school  
16 records, his prison records, assessments by others,  
17 and I interviewed him and examined him physically in  
18 September of 2010 and again in January of this year,  
19 a physical exam and psychiatric interview.

20 Q And in the course of your evaluations,  
21 were you provided with a number of different  
22 documents to review?

23 A Yes.

24 Q And in a minute, I'm going to sort of show  
25 you these. So based upon the materials that you've

1 reviewed and your physical examination of Mr. Stone,  
2 do you believe you have sufficient information to  
3 provide the Court with your opinions and  
4 conclusions?

5 A Yes. I should add that I also reviewed  
6 the images of his brain, the MRI scan, the PET scan,  
7 and the electroencephalographic information, as well  
8 as the neuropsychological testing.

9 Q And the opinions that you're going to  
10 provide the Court with today, will they all be to a  
11 reasonable degree of medical certainty?

12 A Yes, sir.

13 Q So before we go through this in detail,  
14 Dr. Merikangas, can you briefly summarize what your  
15 conclusions are?

16 A My conclusions are that Bobby Stone is an  
17 brain-damaged individual who suffers from congenital  
18 brain damage, with fetal alcohol spectrum effects,  
19 and that his intelligent is below average, and that  
20 as a consequence of his organic brain problems, that  
21 he suffers from attentional problems, cognitive  
22 problems, and difficulty with impulse control.

23 Q And so that is on the brain. Did you  
24 reach any other conclusions in the case?

25 A In regards to his physical condition or

1 his --

2 Q Psychiatric opinions.

3 A Psychiatrically, he has a history of abuse  
4 while growing up, history of exposure to toxic  
5 substances from contaminated water in Turkey Creek  
6 where he lived, that he was both subject to and  
7 witness to physical and psychological abuse by his  
8 parents and by others in the family situation, a  
9 very disturbed background.

10 And in school, he failed several grades,  
11 was held back, only went as far as the tenth grade.  
12 His performance was in the -- how shall I say? His  
13 limited intellectually functioning had him labeled  
14 as educable but mentally deficient, and he was in  
15 special classes when he was in school.

16 Q So your first major point that you  
17 mentioned to the Court was that you determined,  
18 based upon your neurological examination, that Mr.  
19 Stone has brain damage?

20 A Yes.

21 Q So can you tell me based upon what you  
22 reviewed, what are the basic risk factors of  
23 exposures that he had that led to this brain damage?

24 A Well, the abuse of alcohol which was  
25 prevalent in his family and the physical and mental

1 abuse that occurred when he was growing up. He also  
2 had a series of brain injuries, and he was exposed  
3 to toxic substances during his early development.  
4 Those are all factors which could lead to damage of  
5 his brain both in development and in acquired  
6 injuries.

7 Q And were you provided with evidence  
8 regarding the maternal ingestion of alcohol?

9 A Yes, I was. There's evidence that his  
10 mother was at point hospitalized and given Librium,  
11 which is a drug commonly used for the treatment of  
12 alcohol withdrawal.

13 Q And were you provided any other anecdotal  
14 evidence of maternal ingestion of alcohol?

15 A Yes, other witnesses who stated that she  
16 drank as well as everyone else in the family was  
17 drinking.

18 Q Dr. Merikangas, you also mentioned some  
19 neurotoxin exposure?

20 A Yes.

21 Q And so what is the basis for that?

22 A Well, a study done on Turkey Creek, which  
23 was nearby, showed that it was an outlet for  
24 industrial waste from toxic substances from a dye  
25 company and others, which included heavy metals,

1 lead, copper, zinc, and others, which are toxic to  
2 the brain and toxic to developing brains in  
3 particular. And these results were recorded by the  
4 chemist both before and after the formation of the  
5 Environmental Protection Agency.

6 Q And so why would -- well, first, let me  
7 show you what's been marked as Applicant's Exhibit  
8 One and ask you if this is something that you  
9 reviewed.

10 A Yes, this is an affidavit by Dr. James  
11 Shine, who is a lecturer in applied chemistry at  
12 Harvard and studied the pollution in the Turkey  
13 Creek.

14 Q And is this a report that you relied upon  
15 in reaching your conclusions?

16 A Yes, it is.

17 Q And so why is this significant to you?

18 A Well, it's significant because we know  
19 that these chemicals are damaging to the brain of  
20 children, particularly when they are developing.  
21 And by poisoning -- basically poisoning the nerve  
22 cells -- they cause abnormalities in the brain, both  
23 anatomic and in function.

24 Q And the particular metals at issue here I  
25 believe you mentioned were lead and zinc?

1           A     And copper, as well.

2           Q     And is it well documented that exposure to  
3 these types of substances can adversely affect brain  
4 development and function?

5           A     Yes. The one that's most well-known, of  
6 course, is lead poisoning.

7           Q     So you have the maternal ingestion of  
8 alcohol. You have this neurotoxin exposure. Was  
9 there anything else in the history in the records  
10 you reviewed that could have impacted negatively on  
11 Mr. Stone's brain development and function?

12          A     Well, he did fall out of a truck when he  
13 was eight years old and struck his head, and he's  
14 had other subsequent brain injuries. But the  
15 participation and the witnessing of abuse and the  
16 fear of abuse can adversely brain development in  
17 children. There are instances recorded when his  
18 neighbor, Mr. Miles, actually chased him out of the  
19 fields with other children, fired gunshots.

20                    There was other people being beaten and  
21 abused that he witnessed. And so he grew up in a  
22 constant state of fear and terror with this alcohol  
23 abusing family situation.

24          Q     So, Dr. Merikangas, you described a number  
25 of different potential causes for the brain damage

1 that you previously mentioned and determined that  
2 you had diagnosed Mr. Stone with a fetal alcohol  
3 spectrum disorder with additional symptoms. So  
4 that's the potential causes. Can you now tell the  
5 Court what you base your opinion of brain damage on,  
6 the actual evidence that Mr. Stone has brain damage?

7 A Well, I based it largely upon the images  
8 of his brain, the MRI scan of the brain. His brain  
9 is anatomically abnormal. His frontal lobes are  
10 smaller than normal. His ventricles, which are the  
11 fluid-filled spaces inside the brain, are abnormally  
12 large, and this condition is

13 THE COURT: I'm sorry. What was the  
14 abnormally large?

15 A The ventricles. They are the fluid-filled  
16 spaces inside the brain. The ventricles enlarge in  
17 a condition called hydrocephalus, which is dripping  
18 water on the brain. But it's a sign that the brain  
19 has lost brain tissue or never had brain tissue to  
20 the extent that the space is filled with fluid in  
21 excess to normal.

22 And the corpus callosum, which is the  
23 white matter track that connects the left hemisphere  
24 to the right hemisphere, in the case of Mr. Stone,  
25 has at least three different abnormalities which are

1 characteristic to the effects of alcohol on the  
2 fetus, thus the name fetal alcohol spectrum  
3 disorder.

4           It is too thin. It is too humped. It is  
5 too arched. And these things have been  
6 mathematically investigated by Dr. Bookstein, who is  
7 a world expert in the area of fetal alcohol spectrum  
8 effects. In addition to that, he had, in addition  
9 to magnetic resonance image which shows an  
10 anatomical --

11           Q     Can you stop right there?

12           A     Sure.

13           Q     Let me show you what's been marked as  
14 Plaintiff's Exhibit Three. And is that the report  
15 of Dr. Bookstein that you were referring to?

16           A     Yes, this is an affidavit where he gives  
17 his analysis of the brain based upon the anatomy.

18           Q     And so as a neurologist and a  
19 psychiatrist, what was particularly relevant to you  
20 that Dr. Bookstein found in this report?

21           A     Well, when I look at an MRI, I look at it  
22 as a clinician. From my experience at looking at  
23 thousands of brain images, I form conclusions. Dr.  
24 Bookstein does it mathematically.

25                   He actually has people with documented

1 fetal alcohol effects and normal controls, and he  
2 then mathematically places Mr. Stone's brain images  
3 on this template to come up with it. So it's much  
4 more scientific than just my clinical view of the  
5 brain images.

6 Q And did Dr. Bookstein conclude based upon  
7 his analysis of Mr. Stone's corpus callosum that it  
8 is mathematically most certain that he has fetal  
9 alcohol spectrum disorder?

10 A Yes.

11 Q So you were describing the imaging when  
12 you said you viewed the images and discussed their  
13 abnormalities. Did you also have the opportunity to  
14 review what's been marked as Plaintiff's Exhibit  
15 Two, which is an affidavit and report by Dr. Reuben  
16 Gur.

17 A Yes, I did.

18 Q And what, if anything, was significant to  
19 you about Dr. Gur's report?

20 A Well, Dr. Gur likewise has a mathematical  
21 approach to brain imaging. He looked at the MRI  
22 scan and did volumetric structural analysis. And as  
23 I stated, when I look at a scan, I'm looking at it  
24 as a doctor who practices and takes care of people.

25 He looks at it as a scientist who's a

1       tenured professor at the University of Pennsylvania  
2       who has, again, mathematically analyzed the brain  
3       images to show that the ventricles are too large,  
4       that they're not symmetrical, that the frontal lobes  
5       are too small. And in addition to the MRI, he  
6       looked at the PET scan of the brain.

7               Q       And what was significant in the PET scan  
8       analysis?

9               A       The PET -- the positron emission tomogram  
10       -- is a procedure that uses radioactive glucose to  
11       show the function of the various parts of the brain.  
12       The brain uses glucose, that is, sugar, as fuel.

13               And as the brain uses oxygen and sugar, if  
14       you label it with radiation, you can actually see  
15       the areas that have normal function, excess  
16       function, or decreased function.

17               And the pattern of function in Mr. Stone's  
18       brain is distinctly abnormal. He has decreased  
19       functioning in the limbic system, the system that  
20       has to do with emotional control, and the amygdala,  
21       the system that has to do with reactions to fear,  
22       recognition, and startle.

23               He also had increased function in those  
24       parts of the cortex which try to compensate for his  
25       decreased areas of functioning. So this is also an

1 abnormal PET scan that's consistent with the effects  
2 of alcohol on the developing fetus on other forms of  
3 congenital brain damage.

4 Q Okay. So you've now discussed the neuro  
5 imaging, which is both the MRI and the PET scan, and  
6 both the structural and functional abnormalities  
7 that both you saw and Dr. Gur and that Dr. Bookstein  
8 saw. And was there other evidence -- objective  
9 evidence -- of brain damage that you found during  
10 your evaluation?

11 A Well, I of course looked at his  
12 psychological testing. He had three sets of  
13 psychological testing when he was in school, all of  
14 which showed he was mentally deficient, and which  
15 also there was testing done more recently,  
16 neuropsychological testing, that demonstrated a 20  
17 point difference between his performance IQ and his  
18 verbal IQ, which is itself evidence of brain damage.

19 Q Okay. So let's talk about those. Instead  
20 of mixing those up, let's go through individually,  
21 because I think it's really important to do so. You  
22 mentioned neuropsychological testing. What  
23 neuropsychological test results did you review.

24 A He had a battery called the  
25 Halstead-Reitan, which is the most widely used test

1 by neuropsychologists to demonstrate brain damage.  
2 And he had an impairment factor of 0.7, which shows  
3 that he has moderate brain damage.

4 Q Okay. So the neuropsychological testing  
5 results also showed brain damage?

6 A Yes.

7 Q Then you also mentioned his school  
8 records, his school performance. So, Dr.  
9 Merikangas, let me show you what's been marked as  
10 Plaintiff's Exhibit Eight. And are those the school  
11 records that you were provided with?

12 A Yes, they are.

13 Q And so I know this is going back to his  
14 childhood. Can you tell, what as a neurologist and  
15 a psychiatrist was relevant to you that you saw in  
16 these records?

17 A Well, it's relevant because this does go  
18 back to childhood. In other words, he has always  
19 been mentally deficient. It's not something that he  
20 acquired later because of the brain damage when he  
21 fell out of the truck when he was eight or when he  
22 had a motor drop on his head when he was working on  
23 a car or from other substance abuse or something  
24 else.

25 He was born with a brain which was

1 abnormal, and it was demonstrated when he was in  
2 third grade all the way through his school  
3 experience, in which case he did very poorly in  
4 school. On at least three separate occasions, he  
5 was placed into special classes and held back.

6 Q And he was given -- in the psychological  
7 test that he was given, one of the tests that he was  
8 administered was a Bender. Can you tell the Judge,  
9 what's a Bender?

10 A The Bender-Gestalt is a test where he has  
11 to reproduce a figure and to draw it. And, again,  
12 it is a test which is very sensitive to brain  
13 damage. And he did very badly on that.

14 Q So that's indicative of brain damage in  
15 the school system?

16 A Yes.

17 Q And based upon these records that you  
18 reviewed, was he also ever found to have what was  
19 then called EMH or minimal EMH?

20 A Yes, but not in the sense that we use  
21 mental retardation today. The criteria were that  
22 his IQ was low, his performance was low, the  
23 discrepancies in his testing indicated some brain  
24 damage, and he was put into special classes for the  
25 educable mentally retarded.

1 Q With an IQ from 69 to 75?

2 A That's correct.

3 Q And so you have this record of  
4 psychological testing in the school showing these  
5 problems indicating brain damage. So you talked  
6 about that, and you talked about the  
7 neuropsychological testing which has happened. And  
8 you talked about the brain imaging.

9 So let me ask you -- well, one, actually  
10 let me show you what's been marked as Plaintiff's  
11 Exhibit Seven. You were talking about the corpus  
12 callosum earlier. Is this what you were speaking  
13 of?

14 A Yes, this is the Exhibit Seven, and it  
15 shows a picture, a cross-section, of Mr. Stone's  
16 brain. This white matter in fact is the corpus  
17 callosum. The front of his brain is on the left of  
18 the picture, and the back is on the right.

19 And it's right tucked through the midline,  
20 the brain stem and the pons down here. And this is  
21 the structure which is abnormally formed and too  
22 small, one that was analyzed by Dr. Bookstein, which  
23 is the major finding of fetal alcohol effects.

24 Q And do studies demonstrate the corpus  
25 callosum you mentioned previously is uniquely sort

1 of susceptible to being damaged by maternal  
2 ingestion of alcohol?

3 A Yes, it is.

4 Q So you've talked about these various  
5 indicators of brain damage, and you also mentioned  
6 that you did a physical examination of Mr. Stone?

7 A I did.

8 Q Can you please -- well, was there anything  
9 of significance to you as a neurologist in that  
10 evaluation?

11 A There were several things.

12 Q Can you please explain to the Judge what  
13 they would be?

14 A Well, one is the morphology of his face is  
15 abnormal. The space between his lip and his nose,  
16 called the philtrum, is smaller and flatter than  
17 normal. It would be more evident if he had had that  
18 exam as a child.

19 As you get older, it becomes less  
20 striking. He has a 58-centimeter head in  
21 circumference and low-set ears. And we know from  
22 the brain imaging, not from my exam, that his  
23 ventricles, the space inside his skull, is less  
24 brain and more fluid than is normal.

25 Looking at the rest of his morphology and .

1 structure, he has a short stature. He's always been  
2 small. His growth curve from the pediatric medical  
3 records, instead of being a normal pattern of growth  
4 as he gets older, he starts to drop off in his size  
5 as he gets older.

6 So he doesn't match the normal growth  
7 curve, and that's typical for fetal alcohol effect.  
8 He has small hands and feet, which is also seen with  
9 fetal alcohol effects. And he also has another  
10 abnormality which I don't think is related to fetal  
11 alcohol but is frequently seen in people who have a  
12 20-point difference in their IQ is that his  
13 handedness and the cortex of his brain are indicated  
14 by the hair patterns on his skull.

15 The normal right-handed person, if you  
16 look at the occipital area of the back of the skull,  
17 the hair will circulate in a clockwise position. I  
18 know this sounds odd. But if you look at a true  
19 genetic left-hander, it circulates in a  
20 counterclockwise position. And I'm sure the people  
21 in the audience are now looking at the head in front  
22 of them to see that.

23 But in his case, the hair circulation on  
24 the posterior of his scalp was counterclockwise,  
25 which indicates that genetically he should be

1 left-handed, but his functioning is of a  
2 right-hander. So this is called cross-dominance.

3 And you see that in brain damage. You see  
4 that in people who have 20-point difference between  
5 their verbal and their performance IQ. That's just  
6 another factor.

7 He also has a heart murmur. Cardiac  
8 abnormalities are very commonly seen in fetal  
9 alcohol effects. So we have these different  
10 factors. All of them converge to say that they are  
11 from the results of alcohol ingested by his mother  
12 when she was pregnant with him.

13 Q Dr. Merikangas, let me show you  
14 Plaintiff's Exhibit Four. You had mentioned the  
15 growth deficits in this case. And does this  
16 represent what you're talking about?

17 A Yes, this was done by the pediatrician.  
18 This is as he's growing up. It shows that his curve  
19 is below normal in every measurement after he  
20 reaches the age of nine or ten, and then it's on a  
21 downward trajectory in terms of his weight. And his  
22 stature is also reduced.

23 Q Did you also find any abnormalities in  
24 what's called tracking in your physical examination?

25 A Yes. Part of the neurological examination

1 is to have the patient follow the finger in front  
2 of his eyes to see how the eyes move. And he had  
3 several problems with that. His tracking is ataxic.

4 It's not even. It's not smooth. And he  
5 has exophoria, that one eye tends to turn outwards.  
6 This also would be called strabismus, except that  
7 it's a tendency not a fixed feature.

8 This is a problem with the brain stem. It  
9 controls the nerves that control eye musculature.  
10 So that's more indication there's something wrong  
11 with his brain.

12 Q And this visual spatial eye tracking  
13 difficulty you noticed, was there also evidence in  
14 this in his school records that it was present as a  
15 young child?

16 A It was noted as a child, and several of  
17 the psychologists commented on his "lazy eye."

18 Q So, Dr. Merikangas, was there anything  
19 else about your physical examination of relevance?

20 A Well, the other important negatives is I  
21 didn't find other things wrong which would be  
22 attributed to different conditions, like, you know,  
23 brain tumors or multiple sclerosis or Parkinson's  
24 Disease. And all of these are things that you see  
25 in congenital brain damage.

1           Q     So, then, is it fair to say that it is  
2 your opinion that Mr. Stone has had brain damage  
3 since birth?

4           A     Yes, and probably before.

5           Q     And while there might have been other  
6 contributing factors along the way, primarily this  
7 is a neurodevelopmental problem?

8           A     Yes, there were a lot of factors that made  
9 the existing brain damage worse as he grew up.

10          Q     So, Dr. Merikangas, you've mentioned that  
11 you have diagnosed Mr. Stone with a fetal alcohol  
12 spectrum disorder. Now, that's a medical diagnosis,  
13 correct?

14          A     It is, yes.

15          Q     And so can you tell the Judge briefly --  
16 you mentioned that he has it, but what is fetal  
17 alcohol spectrum?

18          A     Well, it is all the physical features that  
19 we have discussed, but also it has a lot of mental  
20 effects, including the reduced IQ, his increased  
21 ability to -- I should say decreased ability to deal  
22 with events in his life, increased startle  
23 responses, and his lack of attention.

24                   He has been categorized as having  
25 attention deficit hyperactivity disorder. Also

1 noted in school is that he couldn't sit still. He  
2 had to get up frequently to go to the bathroom. He  
3 didn't pay attention.

4 And his school performance is typical for  
5 someone who has both a low IQ and an attentional  
6 problem. People with fetal alcohol effects are  
7 often diagnosed psychiatrically as having anxiety  
8 and impulsivity.

9 Q And so, Dr. Merikangas, now let's move on  
10 to another area that you mentioned. You discussed  
11 the fact that Mr. Stone's psychiatric history is  
12 relevant for both the victim of abuse and witnessing  
13 abuse and chaotic environment. Why does that  
14 matter?

15 A Well, it matters because research shows  
16 that it actually impairs brain impairment. It's not  
17 just psychological. It physically impairs the brain  
18 development to have child abuse.

19 There used to be a condition called  
20 failure to thrive where children had low growth rate  
21 and weight because of abuse by their parents. And  
22 he is certainly a victim of abuse and a witness of  
23 abuse.

24 And I didn't diagnose him as having  
25 post-traumatic stress disorder, partly because he's

1 not very verbal and conversant about psychological  
2 symptoms. But he has many of the characteristics of  
3 people who have post-traumatic stress disorder. His  
4 jumpiness, his anxiety, his impulse control, his  
5 attention, all those things are consistent with  
6 that.

7 Q So you said that you didn't diagnose him  
8 with PTSD because he's not very verbal. And you  
9 attribute that to his low cognitive function?

10 A I do.

11 Q Now, Dr. Merikangas, you said this does  
12 matter neurodevelopmentally but it also matters  
13 because he has symptoms of someone who has current  
14 psychiatric symptoms of someone who's been  
15 traumatized?

16 A That's correct.

17 Q So let me turn to one final here. At his  
18 trial -- well, actually, two final areas. But at  
19 his trial, there was testimony that he might satisfy  
20 the criteria for what's sometime called antisocial  
21 personality disorder. Are you familiar with that?

22 A I'm familiar with that.

23 Q Now, do you agree or disagree with that  
24 conclusion?

25 A I disagree with that.

1 Q Okay. Why do you disagree?

2 A Well, he does not meet the criteria laid  
3 out for antisocial personality disorder. He doesn't  
4 have a history of conduct disorder as a child, which  
5 is the major feature of that. Most of the school  
6 reports indicate that he's a nice kid, doesn't hurt  
7 people, doesn't have violent behavior.

8 And any criminal behavior that he had was  
9 always in association with others. He is the kind  
10 of person who with low IQ might fall prey to  
11 designing others, to use a term of art.

12 Q Prior to the age of 15, based on your  
13 review, how many times had he been arrested?

14 A He hadn't been but once.

15 Q One time. And does the diagnostic  
16 criteria recall a pervasive pattern?

17 A You have to have a pervasive pattern of  
18 repetitive actions which gets you in trouble with  
19 the law in a number of areas, and none of his crimes  
20 were crimes of violence.

21 Q So in addition to the fact that he doesn't  
22 meet the conduct disorder criteria which is a  
23 prerequisite for the diagnosis, are there any other  
24 reasons you believe he doesn't meet the criteria of  
25 a personality disorder.

1           A     Well, I think that the brain damage trumps  
2     the antisocial personality disorder, that you don't  
3     make that diagnosis if the behavior is attributed to  
4     some other cause. In his case, it is his brain  
5     damage, his experience with trauma, and his low IQ.

6           Q     So, Dr. Merikangas, you've now talked  
7     about the fact that he has fetal alcohol spectrum  
8     disorder, that he has this brain damage, and you've  
9     talked about why you believe he has the brain damage  
10    and sort of its effects on the parts of the brain  
11    structure. So what relevance, if any, does his  
12    brain abnormalities have to the offenses he was  
13    found guilty of committing?

14          A     Well, if you take it in the context of the  
15    various accounts of what happened, he was at the  
16    time of this event suffering from an extreme  
17    emotional disturbance. He was suffering from his  
18    congenital brain damage, and he was suffering from a  
19    disorder of the ability to control impulses with  
20    increased startle. In other words, if someone had  
21    come up behind him in the dark, he would react not  
22    with deliberation and planning but just in a reflex  
23    way.

24          Q     And there was also testimony in this case  
25    that Mr. Stone was intoxicated, was actually very

1 intoxicated at the time of the crime. What effect  
2 would that have had on his preexisting brain  
3 dysfunction?

4 A Well, people who are brain-damaged are  
5 more susceptible to the direct effects of alcohol,  
6 and alcohol intoxication would not make his behavior  
7 better but worse.

8 Q So, Dr. Merikangas, let me turn to one  
9 final area. The South Carolina death penalty  
10 statute has several statutory mitigating  
11 circumstances which may or may not, depending upon  
12 your conclusions, be relevant in this case.

13 The first one which I want to ask you  
14 about is the statute says that it's a statutory  
15 mitigating that the murder was committed while the  
16 defendant was under the influence of a mental or  
17 emotional disturbance. Based upon your evaluation,  
18 do you believe that Mr. Stone met the criteria for  
19 that statutory mitigating circumstance?

20 A Yes.

21 Q And if you had been called as a witness at  
22 trial, would you have testified to that effect?

23 A I would have testified to everything I  
24 testified to today.

25 Q And another statutory mitigating

1       circumstance is the capacity of the defendant to  
2       appreciate the criminality of his conduct or to  
3       conform his conduct to the requirements of the law  
4       was substantially impaired. Based upon your  
5       evaluation in this case, do you believe that Mr.  
6       Stone's condition meets the criteria for that?

7             A     I do, yes.

8             Q     And, again, if you had been called to  
9       trial, you would have testified to that effect?

10            A     Yes.

11            Q     And, finally, there's a statutory  
12       mitigating circumstance related to the age or  
13       mentality of the defendant at the time of the crime.  
14       So in this case, we wouldn't be talking about age.

15                    We would be talking about mentality. But  
16       based upon your evaluation, do you believe that Mr.  
17       Stone would qualify for that mitigating  
18       circumstance?

19            A     Yes.

20            Q     And would you have so testified?

21            A     I would have.

22                    MR. BLUME: Court's indulgence.

23                    Dr. Merikangas, if you could please answer  
24       any questions that the Attorney General's Office  
25       might have.

1 THE COURT: Mr. Zelenka, I believe we're  
2 going to take a break. We're going to reconvene at  
3 2:00. Very good. We'll stand at ease.

4 And we're going to allow you to get a bite  
5 to eat as well. But the law requires that you not  
6 discuss your testimony with either counsel.

7 DR. MERIKANGAS: Yes, sir.

8 THE COURT: And we will ask you to comply  
9 with that order.

10 Anything from the applicant before we  
11 recess for lunch?

12 MR. BLUME: No, sir.

13 THE COURT: Anything from the State?

14 MR. ZELENKA: No, Your Honor.

15 THE COURT: All right, we'll stand at ease  
16 until 2:00.

17 (Court in recess for lunch.)

18 THE COURT: If we can have the witness  
19 resume the stand.

20 Dr. Merikangas, is that close?

21 DR. MERIKANGAS: Yes, sir.

22 THE COURT: Very good. I'll ask you to  
23 resume the witness stand and remind you that you're  
24 still under oath.

25 Mr. Zelenka, you're recognized.

1 MR. ZELENKA: Thank you.

2 CROSS-EXAMINATION

3 BY MR. ZELENKA:

4 Q Dr. Merikangas, how are you this  
5 afternoon?

6 A Fine.

7 Q Let me first ask you a question about your  
8 involvement in this case. When were you retained?

9 A In 2010.

10 Q And when did you evaluate the defendant,  
11 when you had personal consultations with him?

12 A In September of 2010, also in January of  
13 this year.

14 Q And when did you do your written report in  
15 this case?

16 A I don't have a written report. I just  
17 have a short letter.

18 Q You have a short letter?

19 A Right, to Mr. Blume.

20 Q And what did that letter say?

21 A Would you like to --

22 Q Did you do any written report concerning  
23 the findings which you've stated today in the  
24 courtroom?

25 A No..

1 Q Why didn't you do that?

2 A I wasn't asked to.

3 Q Is that the normal practice in your  
4 profession of neurology or psychiatry to not do  
5 written reports in matters of this significance?

6 A It is the normal practice to follow the  
7 instructions and requests of the attorney who hired  
8 me. In my own practice caring for people, obviously  
9 I would have a written report.

10 Q Okay. So why didn't you treat this as  
11 your normal practice and still do a written report,  
12 despite whether or not Mr. Blume made a written  
13 request?

14 A I can show you the release that I had Mr.  
15 Stone sign that says that I am not his treating  
16 physician but that my consultation was strictly for  
17 a legal matter. I'm not licensed to practice  
18 medicine in South Carolina. Therefore, I had a  
19 release for him to sign stating that I was simply  
20 consulting on a legal matter and I'm not his doctor.

21 Q Okay. In your curriculum vitae that was  
22 provided to us that was dated July 2010, it  
23 reflected a number of occasions that you had spoken  
24 at defense conferences involving the death penalty,  
25 isn't that correct?

1           A     Yes, sir.

2           Q     Okay.  And one of the conferences you  
3 spoke at -- this is on page 27 -- was "Prosecutorial  
4 misconduct in capitol cases:  Hubris, arrogance, and  
5 the abuse of power," in Paris, France, July 8, 2005.  
6 What was that about?

7           A     Exactly what it said.  It was about  
8 prosecutorial misconduct and how prosecutors,  
9 instead of seeking justice, seek winning by  
10 concealing evidence, by distorting facts, by hiring  
11 corrupt witnesses.

12          Q     Okay.  And who invited you to speak at  
13 that conference?

14          A     The organizers of that international  
15 meeting.

16          Q     Was Mr. Blume involved in that?

17          A     No, sir.

18          Q     Was any members of the South Carolina  
19 Death Penalty Resource Center involved in that?

20          A     No.  It was entirely my own work.

21          Q     Okay.  In your practice, do you normally  
22 review medical records of mothers, as well as the  
23 client?

24          A     Yes.

25          Q     Why is that important?

1           A     Because many of the neurological diseases  
2     have a genetic origin, and the family history is one  
3     of the important things in every medical  
4     examination.

5           Q     And is his family history about medical  
6     determinations better when it's done  
7     contemporaneously with the particular medical need  
8     that that individual goes to the hospital or to the  
9     doctor for?

10          A     Yes.

11          Q     It's not always reliable to look back when  
12     circumstances have changed, like a defendant who's  
13     facing a death sentence, isn't that correct?

14          A     Well, past recollection is never as good  
15     as current evaluation.

16          Q     Okay. And did you look at the medical  
17     records of the defendant's mother?

18          A     No, sir.

19          Q     You didn't? You had a basis for your  
20     evaluation. Your determination is that the mother  
21     was suffering under some alcohol abuse at the time  
22     that the defendant was being born, isn't that  
23     correct?

24          A     Yes.

25          Q     So what information did you have that at

1 the time the defendant was born, his mother was even  
2 drinking alcohol?

3 A I had no direct information. I had  
4 statements made by others about the mother and the  
5 family.

6 Q What are those statements? What do you  
7 mean?

8 A Including the record that she had been  
9 treated with Librium.

10 Q When was she treated with Librium?

11 A Those are affidavits from the witnesses.  
12 I don't have the whole list of them here.

13 Q When was she treated with Librium?

14 A I don't know the precise date.

15 Q Was it before or after the defendant was  
16 born?

17 A I think it was after.

18 Q How long after the defendant was born was  
19 Maybell treated?

20 A I don't know.

21 Q You don't know?

22 A I don't know.

23 Q But your assumption is this happened. Did  
24 you look at the tuberculosis records?

25 A I did not.

1 Q You didn't? Why didn't you look at those  
2 records which were more contemporaneous to the time  
3 of the defendant's birth?

4 A Because I didn't have them.

5 Q Why didn't you have them?

6 A I don't know.

7 Q Do you know at that particular time that  
8 she admitted that she drank coffee?

9 A I don't know.

10 Q That she admitted that she drank tea?

11 A I have not seen those records.

12 Q So you don't know that she admitted that  
13 she was a smoker?

14 A Don't know.

15 Q Okay. So, then, you also don't know that  
16 at that time she denied using alcohol?

17 A Don't know.

18 Q Okay. Were you provided any notes from  
19 the social worker who worked with the defense team  
20 in 1997 and 2005?

21 A I have notes from a social worker, but I  
22 don't know if they were at that time.

23 Q Well, did those notes reflect that the  
24 defendant told the social worker that his father  
25 drank and his mother didn't drink?

1           A    I haven't seen them.

2           Q    Okay. Did you inquire of the defense team  
3 whether they had any records, reports, data,  
4 documents, notes that reflected in fact that the  
5 mother was not a drinker at that particular time?

6           A    No..

7           Q    Why not?

8           A    Because of the physical evidence, the MRI  
9 scans, the PET scans, those things which don't rely  
10 on recollection. Plus my understanding that many  
11 alcoholics lie about their drug and alcohol use  
12 caused me to deal with the real evidence rather than  
13 hearsay.

14          Q    Okay. When was the MRI done?

15          A    I don't have a copy in front of me. It  
16 was on a computer disk, so I can't tell you exactly.

17          Q    It wasn't done in '97, was it?

18          A    No.

19          Q    It wasn't done in 2005?

20          A    I don't think so.

21          Q    It was done more recent than that, isn't  
22 that correct?

23          A    I think it was done in reference to this  
24 proceeding.

25          Q    Okay. This proceeding being the

1 post-conviction relief proceeding before Judge  
2 Nettles, is that correct?

3 A Yes, sir. That's my understanding, but I  
4 can't say for sure.

5 Q Was there any documentation that you  
6 reviewed that the defendant suffered under alcohol  
7 abuse, drug abuse?

8 A There was documentation that the defendant  
9 was drinking heavily on the day of this incident.  
10 He had at least twelve beers.

11 Q Was there an indication that he began  
12 drinking when he was much younger than that?

13 A That's my understanding.

14 Q Okay. Approximately how old was the  
15 defendant when he began drinking?

16 A I don't know.

17 Q Does the ingestion of alcohol have any  
18 effect on the brain?

19 A Any effect?

20 Q Yes, any effect on the structure of the  
21 brain.

22 A Not in the sense that we have described it  
23 today, no.

24 Q Okay. Does the ingestion of drugs have  
25 any effect on the brain?

1           A    It depends on which drug.

2           Q    What drug would have an effect on the  
3 structure of the brain?

4           A    Drugs like cocaine that can cause small  
5 strokes in the brain or methamphetamine.

6           Q    Okay. Did you have any indication that  
7 the defendant ever used cocaine?

8           A    I saw no evidence of cocaine use on the  
9 brain scans. I believe the history is he tried it a  
10 couple of times, but he's not a cocaine abuser.

11          Q    Okay. Now, where does the defendant today  
12 fit on the growth curve?

13          A    The growth curve stops after he has  
14 stopped growing, and he doesn't fit anywhere on it.

15          Q    Okay. So the defendant has stopped  
16 growing?

17          A    Yes.

18          Q    Okay. And is he normal stature, is he  
19 normal weight today?

20          A    I'm not sure I know what you mean.

21          Q    Okay. Well, you relied upon a growth  
22 curve, Plaintiff's Exhibit Four, I believe, talking  
23 about his growth from --

24          A    Right. It stops at age 20. There aren't  
25 any growth curves after that.

1 Q Okay. But where does his growth curve  
2 stop?

3 A Age 13.

4 Q And why wasn't it continuing to age 20?

5 A I imagine he stopped seeing a pediatrician  
6 the year he was 13.

7 Q Okay. Do you know if his growth pattern  
8 changed, his low weight?

9 A He certainly obviously gained some weight.

10 Q What effect does that have -- what do you  
11 mean "obviously gained some weight"?

12 A Well, just looking at him, he's sitting  
13 over there.

14 Q Approximately how much do you think he  
15 weighs?

16 A Do you want me to speculate? I'm here  
17 under oath. I'm not going to guess.

18 Q Okay. So when you did your physical  
19 examination of the defendant for fetal alcohol  
20 syndrome, you didn't weigh him?

21 A It would have been totally irrelevant.

22 Q Okay. Why is that?

23 A Because the weight the man has now has  
24 nothing to do with fetal alcohol. Plus I was in a  
25 jail that did not provide me with a scale.

1 Q Did you ask?

2 A No.

3 Q Okay. Well, then, why was it significant  
4 that you pointed out the growth curve which  
5 suggested that he had an extremely low weight and  
6 extremely short of stature?

7 A Because that growth curve is standardized  
8 against what's normal. It indicated that his is  
9 abnormal and that his growth was abnormal, which is  
10 one of the characteristics you want to look at when  
11 examining congenital or developmental conditions.

12 Q Okay.

13 A That's why pediatricians do growth curves.

14 Q Okay. But you don't know if his weight  
15 changed to return to some normal level after the age  
16 of 13, do you?

17 A I'd say right now it's a little over a  
18 normal level for his height.

19 Q Okay. But from 13 to 20, you don't have  
20 that information?

21 A No, sir, I don't.

22 Q And it could have corrected itself,  
23 couldn't it have?

24 A I doubt it, seriously.

25 Q Why do you doubt it seriously?

1 A Well, first of all, there's no  
2 documentation of it. And, second, if you look at  
3 the trajectory and extrapolate from those lines,  
4 there is no evidence of that.

5 Q But you're speculating now, aren't you?

6 A No, I'm making an estimate based upon my  
7 professional experience.

8 Q Okay. How old is the defendant now?

9 A Well, he was born in 1965, so that's how  
10 old he is.

11 Q Okay. Do you know when his mother went in  
12 for tuberculosis treatment?

13 A I think he was about three years old when  
14 she did that.

15 Q Okay. And at that time, she reported that  
16 she didn't drink alcohol, isn't that correct?

17 A Yes.

18 Q Now, you relied upon I believe it's  
19 Exhibit Three, an affidavit of Dr. Reuben Gur, is  
20 that correct?

21 A Not the affidavit so much as his report.

22 Q Okay. And his report of December 5, 2011,  
23 with the results of magnetic resonance imaging, the  
24 MRI, reflected that he was in an abnormal range, is  
25 that correct?

1 A Yes.

2 Q Did you talk with Dr. Gur?

3 A No.

4 Q Why didn't you speak with Dr. Gur?

5 A Because his report speaks for itself.

6 Q And he also used the PET results, is that  
7 correct?

8 A Yes.

9 Q It also suggested in that report that it  
10 showed the abnormalities of the defendant's brain.  
11 But did it really state what the causation was for  
12 those abnormalities?

13 A No, that wasn't his task. He's a  
14 neuropsychologist, not a medical doctor.

15 Q Okay. Did it limit those abnormalities to  
16 the possibility of fetal alcohol syndrome?

17 A No.

18 Q Could there have been other causes for  
19 those abnormalities?

20 A Perhaps.

21 Q Was there any evidence that the defendant  
22 ever had seizures in the material that you reviewed?

23 A I don't recall.

24 Q With respect to Dr. Bookstein's report of  
25 August 6, 2010, he concluded upon your review of

1 this material that his analysis to the relation of  
2 the commissure of the callosum that are atypical of  
3 the normal range but consistent with the  
4 consequences of prenatal exposure to alcohol, a  
5 chemical that is known to affect the relationship of  
6 brain structures at the time of it actively  
7 developing, correct?

8 A You're asking me whether that's a correct  
9 quote?

10 Q No, I'm asking you did you rely upon that?

11 A I took it into account. I also relied  
12 upon mainly my own examination of the scans.

13 Q Okay. The testing that Dr. Bookstein  
14 utilized in 2010, was that particular testing  
15 available in 1997 and 2005?

16 A You know, I'm not sure.

17 Q You're not sure?

18 A I'm not sure. I'd have to look it up.

19 Q Okay. But I thought you said that if you  
20 would have testified in 2005, you would have  
21 testified exactly as you testified here today?

22 A Based upon my own examination of these  
23 scans, not based upon someone else's.

24 Q But those scans could not have existed at  
25 that particular time?

1 MR. BLUME: I object in that it assumes  
2 facts not in evidence. He has said he didn't know.  
3 In fact, this testing was available in 2005. But  
4 the question assumes that it was not available, and  
5 he said he doesn't know whether it was or not.

6 THE COURT: All right. Well, I will  
7 sustain the objection in view of the fact that he  
8 does not know. And you are free to present whatever  
9 evidence you can in that regard --

10 MR. ZELENKA: Thank you, Your Honor.

11 THE COURT: -- at a later date and time  
12 through another witness.

13 DR. MERIKANGAS: Could I answer the  
14 question?

15 THE COURT: You can rephrase whatever  
16 question you have.

17 DR. MERIKANGAS: Because I found the  
18 answer.

19 THE COURT: Okay.

20 Q Do you have the answer?

21 A It was available in 2001. Dr. Bookstein  
22 has an article in 2001.

23 Q He used Edgeworth in 2001?

24 A He used -- he wrote an article, "The  
25 geometric morphometries of corpus callosum and

1       subcortical structures in fetal alcohol affected  
2       brain," in 2001. So it was at least available then.

3             Q     Okay.

4             A     I don't know other than that.

5             Q     Okay. Was it the standard in the area for  
6       testing the MRIs?

7             A     The standard is what I do, namely, visual  
8       inspection of the MRIs, which has been available for  
9       20 years now.

10            Q     Okay. So you didn't even need to rely on  
11       Dr. Bookstein's report, is that what you're saying?

12            A     That's true.

13            Q     Okay. Were you aware that by Dr.  
14       Bookstein's own admission that his assessments did  
15       not become acceptable within the community until  
16       around 2006?

17            A     That would not surprise me, but I was not  
18       aware of his statements.

19            Q     Okay. Why would that surprise you?

20            A     Because medical progress is always ahead  
21       of general acceptance, and not very many people have  
22       the computer skills available to them.

23            Q     Okay. So in 2005, when this case was  
24       tried in February of 2005, this wouldn't have been  
25       the norm?

1           A     I'm not sure what you mean by the norm.

2           Q     Generally accepted medical practice in the  
3 state of South Carolina.

4           A     I can't answer that.

5           Q     Okay. Sir, you made a statement about  
6 mental retardation. I just want to make sure I  
7 understand that. You're saying the defendant is not  
8 mentally retarded based upon your assessment of him,  
9 is that correct?

10          A     Not exactly.

11          Q     Please explain.

12          A     Now, we don't have the evidence that would  
13 prove mental retardation, because I don't have his  
14 adaptive living scales identified and carried out.  
15 We know he has intellectual deficiency and was in  
16 special classes all through grade school and beyond.

17                 But I don't have enough information to  
18 make that assessment. It's a multifactorial  
19 assessment and based not solely on IQ scores but on  
20 a number of other factors.

21          Q     Okay. But you do need significantly  
22 sub-average intelligence testing prior to the age of  
23 18, isn't that correct?

24          A     Yes.

25          Q     And the testing that was reflected in

1 Plaintiff's Exhibit Eight suggests his IQ was around  
2 78, full-scale IQ, isn't that correct?

3 A Well, normal would be 100, so I think that  
4 is significantly sub-average.

5 Q But you would recognize in the field that  
6 significantly sub-average, including the DSM-4,  
7 which you relied upon to some extent previously in  
8 your testimony, says it's approximately 70?

9 A I don't recall referring to the DSM-4 in  
10 my testimony.

11 Q Okay. I thought you referred to  
12 diagnostic criteria for conduct disorder and  
13 antisocial personality disorder?

14 A That criteria has existed for a long time  
15 before DSM-4, and soon there will be a DSM-5 that  
16 changes it.

17 Q Okay. Well, in the generally accepted  
18 criteria for mental retardation, you would  
19 acknowledge that it's approximately 70, wouldn't  
20 you?

21 A I think that the "American Journal of  
22 Mental Deficiency" has different criteria than DSM.  
23 There is a real argument between psychologists,  
24 especially developmental psychologists, and the  
25 American Psychiatric Association for these

1 definitions.

2 Q Okay. But you're --

3 A Which is why they're changing them.

4 Q But you're a psychiatrist, aren't you?

5 A Among other things.

6 Q Okay. And what criteria do you look at in  
7 making psychiatric assessments for mental disorders?

8 A When I was the medical director of the  
9 mental retardation treatment unit at the University  
10 of Pittsburgh between the times of 1973 and 1979, we  
11 didn't have these same criteria.

12 And mental retardation is based on a  
13 global assessment of the patient and treatment  
14 thereof. So I don't feel bound by a committee  
15 report from the American Psychiatric Association.  
16 I'm also a neurologist.

17 Q Explain why your understanding of the  
18 family abuse that occurred -- that you found  
19 information that occurred in Mr. Stone's life, why  
20 that supports an assessment of the fetal alcohol  
21 syndrome that you've talked about. Please explain.

22 A The family abuse, except for alcohol  
23 abuse, does not influence fetal alcohol. Family  
24 abuse indicates other factors in his psychological  
25 maldevelopment and in the retarded growth of areas

1 of his brain. So it's not related.

2 Q So it's not related, okay. I  
3 misunderstood. The facial morphology you talked  
4 about with the upper lip, it appeared from your  
5 testimony that you were suggesting that that  
6 distinction isn't as present today as you speculate  
7 it would have been in his youth, is that correct?

8 A Yes. Generally speaking, these features  
9 are more easily perceived in children.

10 Q Okay. So is it your testimony that you do  
11 not know whether he had that feature when he was a  
12 child?

13 A Well, my testimony is I looked at  
14 childhood photographs, but they were blurry and  
15 indistinct. And I couldn't say under oath that it  
16 was there. But generally speaking, the short  
17 philtrum does not change in terms of getting shorter  
18 as you get older.

19 Q Okay. So you didn't see it, but you're  
20 speculating now that it existed when you don't see  
21 it today?

22 A I wouldn't use the word "speculating."  
23 I'd say in my experience and also in the literature,  
24 these features become less distinct when patients  
25 mature.

1           Q     You do not have an opinion that the  
2 defendant suffers from antisocial personality  
3 disorder, isn't that correct?

4           A     My opinion is that he does not.

5           Q     And one of the suggestions for that is  
6 that he suffers, in your opinion, from brain damage,  
7 which trumps the personality disorders which could  
8 be found, is that correct?

9           A     Yes.

10          Q     But you also appear to be saying that he  
11 didn't meet the criteria for a conduct disorder,  
12 correct?

13          A     Correct.

14          Q     And what criteria do you utilize for  
15 conduct disorder since you don't subscribe  
16 apparently to the criteria set out in the  
17 diagnostics and statistics manual?

18          A     He lacks a callous disregard for the  
19 rights of others, which is the key feature of  
20 antisocial personality. And in fact, he has the  
21 opposite. He's caring for a schizophrenic patient  
22 in the jail now, taking care of his mental,  
23 physical, and bodily needs as a compassionate  
24 caregiver.

25                     And that's totally contradictory to

1 antisocial personality disorder. And that's easily  
2 demonstrated today rather than trying to go back  
3 into history where he was never diagnosed with that  
4 even by three different psychologists in the school  
5 system.

6 Q Okay. But you are aware of evidence in  
7 the record that he began drinking around age 12?

8 A Yes. He comes from an alcoholic family.  
9 It's not unusual.

10 Q That he started committing thefts during  
11 the pre-18 age period, correct?

12 A Yes.

13 Q You're aware of his criminal record --

14 A Yes.

15 Q -- isn't that correct?

16 A I am.

17 Q Yet you're claiming that that doesn't  
18 satisfy any of the requirements for conduct  
19 disorder?

20 A Well, any requirements? He doesn't have  
21 the rest of the requirements, and lots of people  
22 from impoverished, abused backgrounds commit thefts  
23 without having antisocial personality disorder.

24 Q Did you have any information that he had  
25 destroyed property?

1           A     Yes.

2           Q     Did you have any information that it was  
3     deceitful and theft that he was involved in?

4           A     Deceitfulness or theft, that's two  
5     different things.

6           Q     That's one criteria, deceitfulness or  
7     theft.

8           A     I think it's poorly phrased, because  
9     they're two different things.

10          Q     Well, there was some information of theft,  
11     wasn't there?

12          A     There was.

13          Q     And I'm showing you DSM-4TR, and that's  
14     the phrase that they use, isn't that correct?

15          A     Again, it's a committee report that I  
16     don't necessarily agree with and which is in the  
17     process of being changed and corrected.

18          Q     Serious violation of the rules, he had  
19     that, didn't he?

20          A     Which rules?

21          Q     Often stays out late at night, despite  
22     parental objection, beginning before the age 13.  
23     Has run away from home overnight at least twice  
24     while living in parental or parental surrogate home.  
25     Is often truant from school beginning before age 13.

1 He's got one of those, doesn't he?

2 A This is a man that lived in basically a  
3 polygamous relationship where his wife had two  
4 different men that she acted like the wife to in two  
5 adjacent homes.

6 Q You mean his mother?

7 A His mother -- I'm sorry, his mother -- a  
8 very atypical family and does not apply to an  
9 ordinary kid who runs away from home. Plus I have  
10 no evidence that he did spend nights out more than  
11 twice as it says in that book.

12 Q He didn't need to hit all of those, did  
13 he?

14 A No.

15 Q Okay. Now, in preparation for your  
16 testimony and your meetings with the defendant, you  
17 tried to speculate as to what occurred at the time  
18 of the crime, isn't that correct?

19 A No.

20 Q You connected -- attempted to connect the  
21 circumstances of his version of the crime with the  
22 evidence which you suggest exists concerning brain  
23 damage, is that correct?

24 A I didn't question him about his version of  
25 the circumstances of the crime.

1 Q You didn't?

2 A I relied on testimony, statements, and  
3 some partial transcripts and different versions of  
4 the evidence that were presented at trial. I didn't  
5 question him about it.

6 Q Okay. Well, why didn't you do that?

7 A Well, I've got a lot of suspicion for what  
8 criminal defendants might tell me in exculpatory  
9 arguments, and I take it with a grain of salt. Plus  
10 it was a long time ago, and memory, as you pointed  
11 out today, fades.

12 I thought the contemporaneous accounts  
13 would be much more reliable. Plus the account that  
14 was presented by his defense witnesses of the hair  
15 trigger on the pistol, and his intoxication, and his  
16 brain damage, and the darkness make it all very  
17 plausible that this was an accidental shooting.

18 Q But the version he gave was the version he  
19 gave to the police after the shooting, isn't that  
20 correct?

21 A Yes.

22 Q He wouldn't have had those same protection  
23 factors available to him at the time when he gave  
24 those statements to the police?

25 A What do you mean, protection?

1 Q Self-protection, the same thing you were  
2 concerned about when you spoke to him in 2010 or  
3 2011. Why would that have changed?

4 A Memory fades.

5 Q Memory fades?

6 A Plus when you're intoxicated, it's hard to  
7 form a correct memory.

8 Q So at the time you gave the statement that  
9 y'all are relying on, it would not have been a  
10 correct memory?

11 A I didn't say I was relying on it.

12 Q Okay.

13 MR. ZELENKA: Court's indulgence one  
14 moment.

15 Q Did you have other information that he had  
16 impulse control problems?

17 A Just his school records, which indicated  
18 that, psychological reports from the school, and my  
19 understanding of what is generally wrong with brain-  
20 damaged people.

21 Q Okay. What particularly in the school  
22 records? Let me provide you with Plaintiff's  
23 Exhibit Eight.

24 A He has problems with visual coordination  
25 and integration. He has functioning in the

1 borderline range in intelligence, substantial  
2 deficits in the performance area. Some of these  
3 records are fairly illegible. I don't believe there  
4 is a precise statement about impulse disorders  
5 except the description that he can't sit still, that  
6 he has to get up.

7 MR. ZELENKA: Court's indulgence one  
8 moment.

9 Q What information do you have that the  
10 defendant -- or the nature of the exposure that the  
11 defendant had to toxic materials in Turkey Creek?

12 A Reported by Dr. Shine in the analysis of  
13 the water there and the statements that the children  
14 played in and around that creek when they were  
15 growing up.

16 Q When would Mr. Stone have played around  
17 Turkey Creek, and how often did he play, and what  
18 was the nature of his play at Turkey Creek?

19 A I can't tell you that precisely.

20 Q Okay.

21 A That the children swam in the creek and  
22 played around in the dirt. That's all I know.

23 Q You don't know how often?

24 A No.

25 Q You don't know how significant their

1 exposure was?

2 A No.

3 Q Did you have any information that he drank  
4 the water?

5 A No. He had well water, though. That's  
6 the information I had.

7 Q Dr. Merikangas, particularly what  
8 affidavits did you have that you reviewed that  
9 suggested the time period that the mother was  
10 drinking?

11 A I don't have a list in front of me, sir.

12 Q So you don't know?

13 A I don't know.

14 Q Did any of those affidavits state  
15 specifically that she was drinking during the  
16 defendant's prenatal period?

17 A Not according to my recollection.

18 Q Okay.

19 Q Thank you very much, Dr. Merikangas.

20 A Thank you.

21 THE COURT: I've just got a follow-up  
22 question. You mentioned the drug use -- pardon?

23 MR. BLUME: Pardon me?

24 THE COURT: I was wanting to ask one  
25 clarification.

1 MR. BLUME: Oh, I'm sorry.

2 THE COURT: You had mentioned the drug  
3 Librium, is that correct?

4 DR. MERIKANGAS: Yes, sir.

5 THE COURT: Describe for the record what  
6 Librium is and what are some of the other uses for  
7 Librium?

8 DR. MERIKANGAS: Librium is  
9 chlordiazepoxide, which is a minor tranquilizer.  
10 It's used for the treatment for anxiety, and it is  
11 specifically used when treating alcohol withdrawal  
12 to prevent delirium tremens and other consequences  
13 of withdrawing from alcohol.

14 THE COURT: Very good.

15 REDIRECT EXAMINATION

16 BY MR. BLUME:

17 Q. Your Honor stole my first question, which  
18 was the evidence indicates -- I believe these are  
19 the records from the sanatorium --

20 A. Right.

21 Q. -- when Mr. Stone was two years old --  
22 that his mother was routinely given Librium, is that  
23 correct?

24 A. Right.

25 Q. And then so what is the primary if not

1       overwhelming reason you would be prescribing  
2       Librium?

3             A       To prevent alcohol withdrawal, and  
4       seizures, and delirium tremens.

5

6             Q       And now you were asked questions about  
7       whether there had been either any admission of  
8       alcohol use by the mother, and the answer was no.  
9       In your experience, is this in fact uncommon?

10            A       The general rule that we teach the medical  
11       students about when alcoholics are lying, we say  
12       it's when they move their lips.

13            Q       And so in addition to that, I think your  
14       testimony was that's why you wanted to look at these  
15       other considerations?

16            A       That's right. I wouldn't take a statement  
17       as possible because someone who drinks tells me  
18       they're not.

19            Q       And the corpus callosum damage which you  
20       had discussed that you saw and which Dr. Bookstein  
21       found in his report and which was also documented in  
22       Dr. Gur's report, based on all the known evidence  
23       what damages the corpus callosum?

24            A       Alcohol during fetal life.

25            Q       And that is basically just Dr. Bookstein's

1 research, is it not, that alcohol use and alcohol  
2 use only is what causes this kind of damage?

3 A That's correct.

4 Q And now so fetal alcohol spectrum disorder  
5 is a medical diagnosis?

6 A Yes.

7 Q And thus in making that, you rely upon the  
8 totality of the clinical information before you?

9 A Yes.

10 Q And in Mr. Stone's case, is there any  
11 evidence at all that you reviewed that anything  
12 caused this brain damage he has after he was born?

13 A No.

14 Q At least the primary brain damage that you  
15 see?

16 A That's right.

17 Q There might be other contributing factors,  
18 but not the type of damage that you see?

19 A His small frontal lobes, the abnormalities  
20 in the corpus callosum, the enlarged and  
21 asymmetrical ventricles, those are not caused by  
22 anything but his congenital condition.

23 Q And then also, Dr. Merikangas, let me ask  
24 you. You were provided with Mr. Stone's school  
25 records?

1           A     Yes, sir.

2           Q     And let me show you what's been marked as  
3     Plaintiff's Exhibit Five. Is that a summary of his  
4     school records that you were provided?

5           A     It is.

6           Q     And Mr. Zelenka asked you about one IQ  
7     test when he was eleven, which indicated he had an  
8     IQ of 78?

9           A     Yes.

10          Q     Based upon the school records, was there  
11     an IQ ever administered after he was age eleven?

12          A     At age 14, he was administered an IQ test.

13          Q     All right. And what was his IQ at age 14?

14          A     Full-scale was between 69 and 75.

15          Q     And was that the basis of the school  
16     system determining Mr. Stone had mental retardation  
17     or was educably mentally retarded?

18          A     Yes.

19          Q     And those also -- did those school records  
20     also not indicate that he was given a Bender score  
21     several times in the school system?

22          A     Yes.

23          Q     And were those indicative of brain damage?

24          A     They were.

25          Q     And so the low cognitive functioning when

1 he was a young child and the Bender score when he  
2 was a young child, what do they suggest to you?

3 A That he was suffering from mental  
4 deficiency, probably mental retardation.

5 Q And you were asked questions about  
6 antisocial personality disorder. Basically, the  
7 primary thing I recall you said is he doesn't meet  
8 the criteria because he doesn't have the pervasive  
9 pattern before the age of 15?

10 A That's correct.

11 Q He had one criminal conviction prior to  
12 the age of 15. Do you recall what it involved?

13 A A joy ride on a tractor with another boy.

14 Q And then you were also asked about the  
15 growth deficiency and whether he now currently is  
16 caught up. And I want you to explain to the Court  
17 whether it matters or not whether it's caught up  
18 today.

19 A It's totally irrelevant to his childhood  
20 diagnosis.

21 Q And why is it irrelevant?

22 A Because he's no longer growing. This is  
23 something that you have a pattern and trajectory of  
24 low growth, low weight in childhood, and then you  
25 stop growing, and then you gain more weight, simply

1 putting on fat, and that has nothing to do with the  
2 question.

3 Q And it's the growth deficiencies in  
4 childhood which are indicative of a fetal alcohol  
5 spectrum disorder?

6 A That's correct.

7 MR. BLUME: A moment's indulgence.  
8 Nothing further.

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

10 DR. MERIKANGAS: Thank you, Your Honor.

11 THE COURT: The rule is going to be  
12 applied for all witnesses. It will be direct, cross,  
13 and redirect. There is no recross. You have an  
14 obligation to object to any new object that's  
15 brought out.

16 You may call your next witness, Mr. Blume.

17 MR. BLUME: We would call Dr. Howard  
18 Becker.

19 THE COURT: Dr. Becker, if you could come  
20 forward, please, sir.

21 CLERK OF COURT: State your name, please.

22 DR. BECKER: Howard Becker.

23 (The witness was sworn.)

24 CLERK OF COURT: Thank you. Have a seat  
25 up there, please, sir.

1 THE COURT: Yes, sir. Have a seat in the  
2 witness chair there. I'm going to ask you to pull  
3 up real close to that microphone, speak loudly,  
4 clearly, and slowly in order that we can hear  
5 everything that you've got to say. Let's start with  
6 your full name once again.

7 DR. BECKER: Howard Becker.

8 THE COURT: Very good, Dr. Becker.

9 Mr. Blume, you're recognized.

10 HOWARD BECKER, having first been duly  
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BLUME:

14 Q Dr. Becker, where are you currently  
15 employed?

16 A The Medical University of South Carolina  
17 in Charleston.

18 Q And what do you do there?

19 A I'm a professor in the Department of  
20 Psychiatry and the Department of Neuroscience.

21 Q And what is your educational background?

22 A I received my bachelor's degree at  
23 University of Buffalo, and then I received my  
24 master's and Ph.D. in the field of biopsychology  
25 from Rutgers University. And then I did a year of

1 postdoctoral training at MUSC in Charleston in the  
2 area of alcohol research and psychiatry.

3 Q In what area do you currently conduct  
4 research?

5 A My general field is the area of  
6 neuroscience, the particular psychopharmacology with  
7 a particular focus on alcoholism and alcohol  
8 dependence.

9 Q Now, just to be clear, you're not a  
10 clinician?

11 A That is correct.

12 Q You're a researcher?

13 A That is correct.

14 Q And do you do any work in the area of  
15 fetal alcohol?

16 A I have conducted research in developmental  
17 alcohol exposure, including prenatal alcohol effects  
18 and effects on young developing subjects.

19 Q And you also teach in this area?

20 A Correct.

21 Q About the effects and consequences of  
22 fetal alcohol?

23 A That's correct.

24 Q And you do research in this area, as well?

25 A That's correct.

1           Q     And have you ever been qualified as an  
2 expert witness in the area of fetal alcohol spectrum  
3 disorder?

4           A     Not from a clinical standpoint, but I have  
5 testified before, describing what this is.

6           Q     As a researcher, as a teaching expert?

7           A     Correct.

8           MR. BLUME: Your Honor, at this point we  
9 would move to have Dr. Becker admitted as an expert  
10 in the area of fetal alcohol spectrum disorder.  
11 He's not going to diagnose Mr. Stone. He's going to  
12 talk basically about the disorder and what it is.

13           THE COURT: Let me ask you a question,  
14 just out of pure ignorance. Wouldn't there be some  
15 underlying field of expertise that he would be  
16 required to be an expert in? Is there such thing as  
17 an expert in this particular area?

18           MR. BLUME: Yes. I believe there are  
19 people that through their experience and training  
20 know about the disorder and can explain it. In  
21 fact, I've called Dr. Becker to testify in this  
22 regard in one other case.

23           THE COURT: Any query with regard to his  
24 qualifications to testify as a fetal alcohol  
25 spectrum disorder expert?

1           MR. ZELENKA: Not for purposes of this  
2 proceeding. The claim is ineffective assistance of  
3 counsel. And as I understand it, it's whether  
4 counsel should have utilized experts in assisting in  
5 their defense, not necessarily that those experts  
6 would be used to testify in front of a jury. So for  
7 the purposes I understand it's being presented, I  
8 don't have any objections.

9           THE COURT: Okay, very good.

10           In view of the fact that the State does  
11 not object, I do qualify him to testify in the area  
12 of fetal alcohol spectrum disorders.

13           Q     All right, Dr. Becker, let's get to it.  
14 So tell the Court, what is a fetal alcohol spectrum  
15 disorder?

16           A     Fetal alcohol spectrum disorder refer to a  
17 spectrum of both physical and functional problems  
18 that arise from gestational alcohol exposure.

19           Q     Dr. Becker, of course, I should have asked  
20 this before I started. But in order to illustrate  
21 your testimony today, have you prepared -- did you  
22 prepare a Power Point presentation?

23           A     I did.

24           Q     Visual slides to assist in your  
25 presentation?

1           A     Yes.

2           Q     So we're going to try make this work since  
3 you don't have a clicker. So I'll try and operate  
4 it for you --

5           A     Right.

6           Q     -- while I ask the questions. You talked  
7 about what fetal alcohol spectrum disorder is. So  
8 let's start with the basics. Why does it matter?  
9 Why is alcohol -- the determination of alcohol -- so  
10 critical?

11          A     So this slide describes what a teratogen  
12 is. Alcohol has been shown to be a teratogen. As  
13 indicated here, it's any agent that causes the  
14 death, malformation, or growth retardation and/or  
15 functional deficits in an embryo or fetus.

16                 The teratogenic effect of the agent is  
17 typically dose related. Another important feature  
18 in the field of teratology is that there are  
19 critical periods of susceptibility to the agent that  
20 will dictate what the outcome will be and that  
21 susceptibility to a teratogen is influenced by a  
22 variety of factors, biological factors, including  
23 genetic as well as environmental factors.

24          Q     How long have we known about the -- well,  
25 I don't know if this is the right word -- effects of

1 alcohol on the developing fetus?

2 A Well, fetal alcohol syndrome first came to  
3 be known as such in 1973. Before then, there was  
4 one report by a Belgian physician reported on a  
5 constellation of effects that were a consequence of  
6 prenatal alcohol exposure in a French journal. It  
7 did not really receive much attention here.

8 But the landmark paper was a paper  
9 published by Ken Johnson and David Smith in 1973 in  
10 the medical journal "Lancet," that described a  
11 common cluster of symptoms that they coined the term  
12 "fetal alcohol syndrome," eight unrelated children  
13 coming from three different ethnic backgrounds, born  
14 to alcoholic mothers, and they referred to that as  
15 fetal alcohol syndrome. And that was in 1973, so  
16 that's the first time that it was referred to as a  
17 syndrome, a medical condition.

18 Q Okay. And so are there diagnostic  
19 criteria?

20 A Right. So that paper identified three  
21 primary diagnostic criteria with the addition that  
22 the assumption is that there was maternal alcohol  
23 use. So you have to have alcohol in the picture.

24 But the three criteria that are used for  
25 the diagnosis of the full-blown fetal alcohol

1 syndrome is that there is pre- and postnatal growth  
2 deficiency, there's a distinctive pattern of facial  
3 anomalies or malformations, and there is central  
4 nervous system dysfunction.

5 Q And so you have to have all three of those  
6 to have what's called fetal alcohol syndrome?

7 A Right. So this slide really just depicts  
8 the notion that you have to have all three of those  
9 criteria met for the diagnosis of fetal alcohol  
10 syndrome. I think the next slide will show that not  
11 everyone that is born to a mother who abuses alcohol  
12 might necessarily have an end result of fetal  
13 alcohol syndrome.

14 So in the whole universe of children that  
15 are born to women who drink heavily during their  
16 pregnancy, a certain proportion of those children  
17 will satisfy the three diagnostic criteria for fetal  
18 alcohol syndrome.

19 Q But as you say, not all will. And is that  
20 why it's called a spectrum disorder?

21 A Right. It's considered a spectrum  
22 disorder because it's been recognized that in fact a  
23 larger proportion of children born to mothers who  
24 have been excessively drinking during their  
25 pregnancy will exhibit one or two of the criteria

1 but not all three.

2           And so that's many times referred to as  
3 FAE, as indicated here, or fetal alcohol effects.  
4 And I think the next slide may raise the point that,  
5 again, in this whole universe of children who are  
6 born to women who were drinking during their  
7 pregnancy that a large proportion of those children  
8 may meet one or two of the diagnostic criteria, not  
9 necessarily all three.

10           And so there's a larger number of children  
11 that suffer from the incomplete expression of fetal  
12 alcohol syndrome, also known as fetal alcohol  
13 effects, and that's why this is referred to as a  
14 spectrum disorder.

15           Q     And we'll come back to this later. But  
16 does the research indicate that it can actually in  
17 some ways be more debilitating long-term to not have  
18 the full syndrome?

19           A     There is evidence to indicate that it's  
20 more debilitating in the sense that typically these  
21 children fall under the radar because they don't  
22 exhibit, for example, full-blown mental retardation.

23                     They may be compromised in their  
24 intelligence, so they may not have been diagnosed at  
25 an early age because they may not have the facial

1 anomalies. And so they don't receive the kind of  
2 social support or state support that someone of a  
3 full-blown syndrome would receive. So they wind up  
4 living with this for a number of years and  
5 unfortunately don't get the proper help.

6 Q Okay. So the purpose, I think what you're  
7 get here, is like you said, this falls on a  
8 continuum or on a slide. There can be different  
9 types of effects depending upon manifestation in a  
10 particular individual?

11 A Right. And so that's just like it  
12 depicts. There's a spectrum of effects on one end.  
13 On the left-hand side, you see the extreme end is  
14 fetal alcohol syndrome where these children are  
15 meeting all three diagnostic criteria. On the other  
16 extreme is the partial expression of this syndrome,  
17 and these individuals may exhibit alcoholic birth  
18 defects, referred to as ARD there, or alcohol  
19 related neurodevelopmental deficits or disorders.

20 And so that is under the umbrage of fetal  
21 alcohol effects. And this slide just points to the  
22 fact that really it's been known for a number of  
23 years now that fetal alcohol syndrome itself only  
24 represents the tip of the iceberg.

25 That's what this is really showing in that

1 a large proportion of children that are born to  
2 mothers that have abused alcohol during their  
3 pregnancy suffer from a number of problems even in  
4 the absence of the full-blown diagnostic fetal  
5 alcohol syndrome.

6 Q Okay. So the first criteria is pre- and  
7 postnatal growth deficiencies?

8 A Right.

9 Q So what does this mean?

10 A Okay. So this is just a depiction of what  
11 we mean by that. Typically, children born to  
12 mothers who have heavily used alcohol during their  
13 pregnancy show growth retardation based on a smaller  
14 head circumference, smaller weight, smaller length.  
15 What you see there is the black bar represents the  
16 normal range of growth from birth on to usually  
17 adolescence.

18 The red lines represent the deficit that's  
19 typically seen in children with fetal alcohol  
20 syndrome or those that are prenatally exposed to  
21 alcohol.

22 Q And in some cases, do the growth  
23 deficiencies that you see in children disappear over  
24 time?

25 A From what I know of the clinical reports,

1 I would say that in most instances there is growth  
2 catch-up. And in fact, if the mother stops drinking  
3 sometime during gestation, we always recommend not  
4 to drink when you're pregnant.

5 But certainly, once you know you're  
6 pregnant, to not be drinking alcohol, because we  
7 know that there is a fetal catch-up in the deficit  
8 growth. And so postnatally after birth, there is  
9 certainly evidence to suggest that there is catch-up  
10 of this growth retardation as the individual  
11 matures.

12 Q But it's nevertheless a relevant fact for  
13 consideration, growth deficiency in a child?

14 A Right, especially at birth. These things  
15 are particularly noted early on in the neonatal  
16 phase.

17 Q And you mentioned the distinctive pattern  
18 of facial anomalies?

19 A Right. And that's showing this slide,  
20 this is basically a cartoon that just depicts what  
21 we're talking about here -- short palpebral  
22 fissures, which you see on the upper left-hand.  
23 That just reflects a smaller opening of the eyes.

24 There is a flattening of the mid face,  
25 sometimes a short nose, low nasal bridge. One of

1 the classic features is an indistinct philtrum,  
2 which is the ridge that's between your nose and your  
3 lip, and that's usually flattened. There's also a  
4 thinner upper lip and a smaller head in general with  
5 low-set ears.

6 So that constellation of facial anomalies  
7 is fairly distinct for fetal alcohol syndrome. And  
8 that was one of the first clues that this was in  
9 fact a syndrome that related to heavy alcohol use  
10 during gestational development.

11 Q And this, I take it, is the representation  
12 for it?

13 A Right. This is a picture of some of the  
14 individuals. Some of those individuals there are  
15 from the first eight children that were identified  
16 in that 1973 landmark paper. And what is also  
17 fairly well recognized is that these are much --  
18 these facial anomalies are very difficult to detect  
19 as the individual matures. So if it's not picked up  
20 early on, it is typically difficult to be able to  
21 clearly discern these types of facial anomalies.

22 Q So why is that? Do we know why it's  
23 difficult later on?

24 A I think it's just growth and development  
25 that masks some of this. In some cases, it doesn't.

1 It's just more difficult. I think it's more  
2 striking in a young child, and that's my  
3 understanding.

4 Q And just to be clear on this, there are  
5 many children with fetal alcohol effects or fetal  
6 alcohol spectrum disorder who will not have these  
7 facial features?

8 A Absolutely. In fact, like I said, you  
9 could have someone that is influenced by gestational  
10 alcohol exposure that has no outward physical  
11 appearances per se, may have had some growth  
12 retardation early on but caught up. But it's the  
13 brain deficits that are probably the most damaging  
14 and most enduring.

15 Q And so that's what you have referred to as  
16 CNS dysfunction?

17 A Right, central nervous system or brain  
18 dysfunction.

19 Q And so what do you mean by that?

20 A Well, I think this is a quote that comes  
21 from a report from the Institute of Medicine in '96.  
22 Basically, it's just referring to the fact that it's  
23 the CNS or the brain deficits or dysfunctions that  
24 are noted to be the most serious and enduring  
25 problems.

1           In many cases, malformations, for example,  
2           there's collective surgeries that can be done, but  
3           you can't fix the brain. And so these turn out to  
4           be some of the most pernicious effects of fetal  
5           alcohol exposure, poor social outcomes and the like.  
6           So that's just some quotes from that report that  
7           highlight that.

8           And this slide just indicates that alcohol  
9           has been shown to be a neurobehavioral teratogen,  
10          which really focuses in particular on the fact that  
11          it does have an effect on the developing brain. And  
12          as a consequence, there are a number of cognitive  
13          and behavioral deficits that are exhibited in these  
14          individuals.

15          Q       And unlike the facial features and the  
16          growth deficiency, the cognitive problems are  
17          current?

18          A       That is true. But in particular, this  
19          slide is really just showing the fact that, as I  
20          mentioned, alcohol is a classic teratogen. Those  
21          effects are dose related. It depends on how much  
22          the mother was drinking.

23          But even as important is when the drinking  
24          occurred. And so this is just illustrating that as  
25          the embryo, the fetus, develops in the womb, there's

1 activity in the first trimester that's  
2 organogenesis. That occurs when the major organ  
3 systems are developing.

4 And so if the mother is drinking very  
5 heavily at that time, you may see a number of heart  
6 defects, kidney defects, limb defects, skeletal  
7 defects. If the mother continues to drink in the  
8 second or third trimester, this is a period of time  
9 when the fetus is really growing in a dynamic way.

10 And so this is when you see the greatest  
11 impact on growth retardation. But what is most  
12 important here is that the brain is an organ system  
13 that develops throughout the entire gestational  
14 period.

15 And so it is vulnerable to alcohol at any  
16 time during pregnancy. And in fact, the brain  
17 continues to grow even after we're born, and alcohol  
18 -- if the mother continues to drink and is nursing  
19 the child, alcohol can pass from the breast milk so  
20 that the infant is still being exposed. So the  
21 brain is a very vulnerable organ at all times of  
22 gestational development in particular.

23 Q You mentioned heart defects, and that's a  
24 commonly associated finding?

25 A If the alcohol exposure is occurring at a

1 period of time when the heart tissue is developing,  
2 that is correct. That will be an organ system that  
3 is going to be influenced, just like if the alcohol  
4 exposure is occurring at a time when the kidneys are  
5 developing, you'll see kidney defects. That's just  
6 a classic consequence of a general teratogenic  
7 effect.

8 Q And the same with facial features. You  
9 see the facial features if the mother is drinking at  
10 the time that particular facial feature is  
11 developing?

12 A That's correct. And it's usually earlier  
13 on in gestation rather than later on in gestation.

14 Q Now, you said that this affects the brain.  
15 And so what do we know about alcohol's effect on  
16 brain development?

17 A Right. So this slide is just taking a  
18 mid-brain slice through the brain, just showing you  
19 the different parts of the brain. And I've just  
20 highlighted some of the areas of the brain that are  
21 especially vulnerable to alcohol during development.

22 One of them is a large area up on top, is  
23 the cerebral cortex. That area has been shown to be  
24 vulnerable to gestational alcohol exposure.

25 That's important to decision-making,

1 executive functioning, those types of cognitive  
2 aspects. The dark band there in the center -- I  
3 don't know if you can see -- is a tan band. That's  
4 the corpus callosum.

5 That's the bundle of fibers that connects  
6 the left side of the brain with the right side of  
7 the brain. That's an area that has been shown to be  
8 especially sensitive to gestational alcohol  
9 exposure.

10 And then there are other parts of the  
11 brain -- the cerebellum, which is back over here,  
12 important for motor control and also motor learning  
13 -- in the area of the brain that is very much  
14 susceptible to the damaging effects of alcohol, and  
15 other structures as well.

16 Q I wanted to talk about the corpus callosum  
17 a little bit. What does the research show about  
18 alcohol's effect on the corpus callosum?

19 A Right. This is one of the striking  
20 effects that has been noted in a number of clinical  
21 investigations of children born to alcoholic  
22 mothers, that the corpus callosum is very sensitive  
23 to that alcohol exposure.

24 What you're looking at here is from a  
25 report illustrating a normal brain on the upper

1 left-hand side. The rest of the brains represent  
2 individuals who were exposed to alcohol prenatally.  
3 And you can see that anomaly.

4 You can see that white band in the center  
5 of the brain that sort of envelopes that black  
6 space, which is the ventricle. That's where we're  
7 talking about spaces in the brain. That's the  
8 corpus callosum.

9 And if you look at the other brains, you  
10 can see that the corpus callosum is much reduced in  
11 size. It may be altered in its shape. In some  
12 cases, the corpus callosum is totally missing, and  
13 in some cases --

14 Q This is what you're talking about here, I  
15 assume?

16 A Right. This is called corpus callosum  
17 agenesis where there is the lack of or almost the  
18 full lack of a corpus callosum, which means that the  
19 two hemispheres are not able to talk with each  
20 other.

21 Q And I believe you mentioned this. But is  
22 it fair to say that the research shows that children  
23 who have been exposed to alcohol have a higher  
24 instance of corpus callosum abnormalities?

25 A Yes, that's one of the main areas of the

1 brain that have been shown to be negatively impacted  
2 by gestational alcohol exposure.

3 And this just shows another part of the brain,  
4 the cerebellum, that at the top is the normal  
5 control. The bottom is an individual that was  
6 exposed to alcohol prenatally.

7 And so this is another part of the brain,  
8 the cerebellum, that is damaged both grossly, as you  
9 see on the left, but also when you dig down into the  
10 cellular levels, you see there's a disordering of  
11 cellular layers.

12 And so alcohol has been shown to influence  
13 both neurogenesis, which is the development of new  
14 neurons, migration of neurons, maturation of neurons  
15 and their signal, which is critical for proper brain  
16 function.

17 Q Now this, I take it, just indicates --  
18 you've been talking about the effects on the brain.  
19 And this I think reflects the effects on sort of  
20 brain functioning and behavior. So what are the  
21 common neurobehavioral defects that you see in  
22 children who have been exposed to alcohol?

23 A Right. So these are some of the hallmark  
24 features that have been reported in these children.  
25 Hyperactivity would be one, impulsivity. These kids

1       tend to exhibit attention deficits, learning/memory  
2       type of deficits. They in particular have poor  
3       spatial and motor coordination.

4                Another major problem that these kids  
5       experience is difficulty in social situations. They  
6       are difficult in picking up appropriate social cues,  
7       so they have difficulty sometimes in social  
8       situations. And they also have deficits in  
9       executive function, decision-making type of  
10       function.

11              Q       Okay. So there's been some discussion too  
12       about IQ scores and how the IQ score could be  
13       negatively impacted by the maternal ingestion of  
14       alcohol. Can you explain that?

15              A       Right. So this is basically showing, as  
16       most people probably know, IQ is just on a continuum  
17       as well, as an inverted U-shape function or a  
18       bell-shaped function. And if you look at the yellow  
19       bars, that is what you would typically see in the  
20       normal population.

21              You can see the average IQ of an adult is  
22       usually about 100, with some variation. And what  
23       I'm showing you here is from a report that shows  
24       individuals with fetal alcohol exposure show a shift  
25       to the left or they have a much higher frequency of

1 exhibiting lower IQs. So, for example, their  
2 average IQ tends to be somewhere in the range of  
3 about 70 as opposed to 100.

4 Q And you were talking about IQ. But it's  
5 also general intellectual performance, isn't that  
6 correct?

7 A That's correct. And so this slide is  
8 basically just illustrating the fact that there is  
9 compromised intellectual capacity in these children.  
10 But importantly, also what these investigators show  
11 -- this is Sarah Madison and Ed Riley's work at San  
12 Diego State at UCSD -- they're basically showing  
13 here normal controls in the yellow bars, and then  
14 they're contrasting two other different populations.

15 One is a prenatal ethanol-exposed  
16 individual. That's the pink bars. And then the  
17 green bars represent those individuals that satisfy  
18 all of the criteria for a full-blown fetal alcohol  
19 syndrome diagnosis. And in both cases, there is a  
20 clear deficit in IQ, general intellectual  
21 performance.

22 But in many cases, even though some of  
23 these children did not exhibit the full-blown fetal  
24 alcohol syndrome, they show just as much of an  
25 intellectual deficit as those that were diagnosed

1 with fetal alcohol syndrome. And that's a problem.

2 THE COURT: Could you explain the NC, the  
3 PEA?

4 DR. BECKER: Sure, normal controls.  
5 Normal controls are the --

6 THE COURT: Okay, I've got it.

7 DR. BECKER: And then prenatal exposed to  
8 alcohol is the pink, and fetal alcohol syndrome --

9 THE COURT: That's all three of them?

10 DR. BECKER: All of the diagnostic  
11 criteria. So the FAS or the green bars represent  
12 the most extreme case, satisfying all the diagnostic  
13 criteria. And the point here -- and you'll see it  
14 in other slides from reports in the literature  
15 indicate, once again, that it's the CNS or brain  
16 dysfunctional effects that are the most damaging,  
17 because in many instances, these children don't  
18 necessarily have to satisfy all the criteria for  
19 fetal alcohol syndrome but show as much if sometimes  
20 not even more cognitive deficits and other kinds of  
21 behavioral dysfunctional problems.

22 Q And this, again, is a reflection of the  
23 same general chronology?

24 A This is basically saying the same thing  
25 but tests on measures of what looks like more social

1 ability. So this is the slide I was referring to.

2 So this is a composite of a variety of  
3 different neuropsychological tests conducted on  
4 individuals of the same three classifications --  
5 normal controls, those that have been prenatally  
6 exposed to alcohol but don't satisfy the full-blown  
7 fetal alcohol syndrome diagnosis, and those that do  
8 with the green symbols.

9 And so if you look at this, on the x axis  
10 there, that's just the number of different types of  
11 assessment instruments. Children who are exposed to  
12 alcohol while developing in the womb clearly have  
13 deficits in general IQ, the full-scale IQ, as well  
14 as in reading and spelling.

15 These kids are notorious for having  
16 problems with arithmetic. They have difficulty in  
17 handling money, for example. And they show deficits  
18 in a number of other kinds of cognitive measures, as  
19 seen here.

20 The important thing to note here is if you  
21 look at the overlap between the pink symbols and the  
22 green symbols, again, this reflects the fact that  
23 even though many of these children do not exhibit  
24 the full-blown fetal alcohol syndrome as depicted by  
25 those pink symbols, they show very similar cognitive

1 deficits, intellectual problems, as those that have  
2 the full-blown syndrome, again speaking to the fact  
3 that the brain is so vulnerable to this effect of  
4 alcohol.

5 Q And this is the executive function. Just  
6 briefly, what do you mean by executive function?

7 A Decision making, being able to understand  
8 consequences for one's actions, being able to put a  
9 sequencing of events together, understanding  
10 cause/effect type relationships. This is an example  
11 of what's called the Tower of London test.

12 And basically, it's really a way of  
13 determining whether a child is able to follow rules,  
14 and there's two simple rules here. First, let me  
15 describe. So basically what you have here is three  
16 doughnuts of different sizes with three tasks.

17 And so the task here is you're told, "We  
18 would like you to be able to arrange these doughnuts  
19 so that the largest one is on the bottom and the  
20 smallest one is on the top. But there's two rules  
21 to follow.

22 "Number one is you can never put a larger  
23 one on top of a smaller one, and you can only move  
24 one doughnut at a time." And so you start out with  
25 what's shown there at the top, and then what you're

1 supposed to end with is what's shown near the  
2 bottom.

3           And as you can see in the right-hand  
4 portion of the slide here, individuals that have  
5 been prenatally exposed to alcohol exhibit a number  
6 of rule violations and difficulties in completing  
7 this type of task, which really speaks to being able  
8 to deal with sequential type of information and  
9 being able to process things just as simple as those  
10 kind of rules to complete the task.

11           Q     You've been talking about executive  
12 function, and certainly you've been talking about  
13 difficulty with abstract thinking. Does this slide  
14 represent the various types of problems in executive  
15 function that you see?

16           A     Right. So this is showing the fact that  
17 the brain dysfunction that follows from prenatal  
18 alcohol exposure, I think most would agree, is the  
19 most serious consequence of prenatal alcohol  
20 exposure.

21                     In many cases, they produce lifelong  
22 permanent problems for these individuals. They have  
23 difficulty with abstract thinking. As I mentioned,  
24 problems with sequencing and processing and  
25 organizing information.

1           They show a behavioral inflexibility. In  
2 many cases, they can't change their behavior in an  
3 appropriate manner depending on the circumstance  
4 that they're placed in. They exhibit poor  
5 short-term memory, have difficulty in understanding  
6 things like cause and effect relationships, which  
7 sort of relates to affect thinking in a way.

8           They have difficulty in predicting  
9 outcomes or understanding how an event now can have  
10 some consequence later. And they also are  
11 classically known to exhibit poor judgment on a  
12 variety of different circumstances.

13           Q     And so this brain dysfunction you can see  
14 in a variety of ways in real life, I think is what  
15 you're trying to get at here?

16           A     I think that's exactly the point here, is  
17 that if you look at the right-hand side of the slide  
18 -- and this really translates to what these kids for  
19 the most part are having to deal with. And, again,  
20 in most cases these are children who do not have the  
21 full-blown fetal alcohol syndrome.

22           They have partial expression of the  
23 syndrome. But they tend to be very easily  
24 distracted, unfocused. They can't handle money very  
25 well. They have difficulty with math. They have

1 difficulty with learning and memory situations.

2           They don't understand consequences very  
3 well. They tend to be more impulsive. This next  
4 point is what I mentioned before. They tend to have  
5 difficulty perceiving appropriate social cues from  
6 peers or even authoritative figures. They don't  
7 follow rules very well, have difficulty obeying  
8 laws.

9           They get into typically some problems with  
10 the law. And they also exhibit poor judgment, and  
11 they tend to be very easily victimized, taken  
12 advantage of by others who sometimes have nefarious  
13 intentions.

14           Q    You mean sort of letting either criminal  
15 or other inappropriate activity --

16           A    Exactly.

17           Q    -- by other people? And so I think --  
18 what are secondary disabilities? What do you mean  
19 by secondary disabilities?

20           A    Secondary disabilities are disabilities  
21 that you're not born with but develop or emerge as a  
22 function of having had some of these brain  
23 dysfunctions that you were born with. And this is  
24 probably one of the reasons why these brain  
25 dysfunctions are so serious.

1           And in many cases, they go unrecognized  
2           until much later in development, unfortunately. So  
3           many of these children grow up with a number of  
4           mental health problems. They suffer from anxiety  
5           and depression in many instances.

6           They have attentional deficit problems.  
7           They typically have difficulty at school. They drop  
8           out early. They get expelled from school in many  
9           cases. A lot of these kids tend to have trouble  
10          with the law.

11          They are usually of a minor nature  
12          initially in terms of things like traffic violations  
13          or petty theft type situations, sometimes with  
14          property damage type things. Many of them -- or  
15          some of them -- are confined. They're  
16          institutionalized. They're in a psychiatric  
17          hospital.

18          Those are typically going to be those that  
19          are the most extremely affected, the FAS kids. Many  
20          of them have problems because of the impulsive  
21          nature of the way they behave, or they have problems  
22          with alcohol and other drugs. And they also exhibit  
23          inappropriate sexual behavior, get into problems  
24          with that.

25          Q       Not everyone is going to exhibit all of

1 those problems?

2 A Correct. This is just a composite of the  
3 types of things that they reported over about 25  
4 years of following these kids. This is compiled  
5 from both studies that have been done  
6 retrospectively, which means you're reviewing  
7 previous charts where there's good evidence of the  
8 mother drinking, or prospectively, when you had  
9 evidence of a mother drinking heavily through  
10 pregnancy.

11 And in many cases, prospective studies  
12 mean you're following these children as they  
13 develop. So a lot of that pioneering work was done  
14 by Ann Streissguth of the University of Washington  
15 in Seattle.

16 Q And this I think just reflects basically  
17 the same thing?

18 A Right. This reflects the problem that  
19 these issues are enduring throughout these  
20 individuals? development. Many of them continue to  
21 persist even into the adolescent and young adult or  
22 even mid-adult ages, whereas, you know, you could  
23 see over 90 percent of all of these individuals have  
24 problems with psychiatric or mental health problems.

25 Q Now, again, you've been talking about the

1 secondary disabilities, and you mentioned this  
2 previously. What is the greatest risk factor for  
3 these secondary disabilities that you talked about?

4 A Well, this is sort of a counter-intuitive  
5 point here, but it's interesting that those  
6 individuals that have higher IQ -- normal IQ but  
7 higher IQ -- tend to have the greatest risk factors  
8 for developing these secondary disabilities because  
9 they're not caught early on, and they don't receive  
10 the kind of social services that could help address  
11 or mitigate some of these issues.

12 So in a counter-intuitive way, if you  
13 suffer from the full-blown fetal alcohol syndrome,  
14 you're usually identified early on,  
15 institutionalized, and receive the kind of care that  
16 would be needed for someone like that.

17 It's the individuals who are caught in the  
18 middle with the FAE or middle of the spectrum that  
19 suffer the greatest, because they have these  
20 behavioral deficits in brain dysfunction, but they  
21 don't receive the kind of services that would help  
22 address those problems.

23 And the greatest protective factor is  
24 really to be diagnosed early. And, again, that's  
25 one of the issues that with fetal alcohol syndrome,

1 that's typically diagnosed at an earlier stage than  
2 the spectral disorder.

3 Q Now, these are risk factors for what?

4 A So these are risk factors for having  
5 damage as a consequence of gestational alcohol  
6 exposure. As I mentioned before, the amount of  
7 alcohol exposure is critical. I should mention that  
8 alcohol passes freely from the mother's circulation  
9 to the fetal circulation.

10 It passes right through the placenta. And  
11 so when the mother is drinking, in essence the fetus  
12 is drinking. And so the amount of alcohol exposure  
13 is going to be important.

14 Q But is it also true there's no safe  
15 amount?

16 A That is correct. That is the safest  
17 statement to make. And people are certainly told to  
18 not drink when they know they're pregnant. Pattern  
19 of exposure is critical.

20 Whether you drink it in large volumes in a  
21 binge-like fashion will be important versus chronic.  
22 And we know that, for example, if you're having two  
23 cocktails before dinner, your blood alcohol is going  
24 to spike much greater than it did having the two  
25 drinks during the course of eating, when you drink

1 on an empty stomach versus a full stomach.

2 Those are variables that are important in  
3 terms of the developing fetus. The developmental  
4 timing is critical in that it will dictate what the  
5 consequence might be, whether you will in fact have  
6 physical anomalies, structural anomalies, or the  
7 problems would be more of a functional nature, brain  
8 dysfunction nature.

9 The genetics we're not as clear about.  
10 There is a lot of research being done in this arena,  
11 but it's not entirely clear what makes some fetuses  
12 more resilient than others. There are maternal  
13 factors that are being studied.

14 For example, there's some thought that  
15 depending on whether you're the first child, second  
16 child, or third child of a mother, whether or not  
17 that may relate to a greater vulnerability.

18 And then there are other variables  
19 obviously that are related to problems associated  
20 with excessive alcohol drinking. So these are all  
21 risk factors associated with damage that can be  
22 produced by alcohol.

23 Q And what?

24 A Well, typically, mothers who are drinking  
25 heavily are not taking in the proper kind of

1 nutrition that is critical for the well-being of the  
2 fetus. And this also extends into early neonatal  
3 care.

4 Q So, then, Dr. Becker, we've sort of now  
5 gone through your Power Point and the points that  
6 you make. And just to be clear, you're not a  
7 clinician?

8 A That's correct.

9 Q And so you did not diagnose Mr. Stone or  
10 evaluate Mr. Stone. That's not what you do?

11 A I have never seen him before today.

12 Q But the information you presented today is  
13 information about what we know about the effects of  
14 maternal ingestion of alcohol on the fetuses?

15 A That's correct.

16 Q And the fetal alcohol spectrum disorder?

17 A Right, that's correct.

18 Q Please answer any questions for Mr.  
19 Zelenka may have.

20 THE COURT: Mr. Zelenka, you're  
21 recognized, cross-examination.

22 MR. ZELENKA: Thank you.

23 CROSS-EXAMINATION

24 BY MR. ZELENKA:

25 Q Dr. Becker, when did the Center for

1 Disease Control come out with these guidelines for  
2 diagnosing fetal alcohol syndrome?

3 A Well, the National Center on Alcohol Abuse  
4 and Alcoholism came out with their concerns earlier,  
5 I think in 1986, possibly, when official warnings  
6 needed to be placed on alcoholic beverages  
7 indicating that if you're pregnant, you should not  
8 be drinking.

9 Q With respect to South Carolina, what is  
10 the rate that pediatricians are looking for fetal  
11 alcohol syndrome back in 1968 or 1966, do you know?

12 A Well, in 1966 and 1968, it was not  
13 necessarily recognized as a syndrome per se. So  
14 they would be diagnosed perhaps in a child that was  
15 not going to appropriately thrive because of, you  
16 know, small size or some other kinds of medical  
17 complications.

18 It was not recognized as a syndrome per se  
19 until '73. And even then, it takes a while for, you  
20 know, general practitioners and pediatricians to be  
21 aware of it.

22 Q How approximately how long in your  
23 understanding of the expertise in the diagnoses that  
24 were done did it gain some recognized flavor within  
25 pediatricians in South Carolina?

1           A     I really can't answer that. I don't know.

2           Q     But the one factor --

3           A     Not soon enough, I suppose.

4           Q     But the one factor that you pointed out  
5     that was the critical point is the mother ingesting  
6     alcohol?

7           A     That's correct.

8           Q     And you testified essentially that no  
9     amount of alcohol during the pregnancy is a safe  
10    amount, correct?

11          A     That is correct. That's a very slippery  
12    slope to go down. It's where scientific evidence  
13    and social policy kind of intermingle. You know, no  
14    one would argue that drinking is a good thing to do  
15    when you're pregnant.

16                 It doesn't mean that if you have consumed,  
17    you're going to initially have a problem. But we're  
18    talking here about heavy drinking or binge-like type  
19    drinking at the very least.

20          Q     Heavy drinking or binge type of drinking,  
21    okay. And you pointed out that depending upon the  
22    time period, it may have different effects. If  
23    you're drinking throughout all three trimesters, it  
24    can have a greater effect --

25          A     That's correct.

1 Q -- is that correct?

2 A That's correct.

3 Q Based upon your study and research?

4 A That's correct.

5 Q And in the particular Power Point slide  
6 that you have which showed the -- I think it was  
7 four or five brain studies, pictures of those  
8 brains, there was a significant difference between  
9 the normal brain and the last brain that you showed,  
10 is that correct?

11 A That's correct.

12 Q And what was the last brain that you  
13 showed on that particular Power Point?

14 A Well, the last brain was, if I remember  
15 correctly -- and these are all MRI images, and that  
16 one showed a very undeveloped or almost absent  
17 corpus callosum. And there was also a large black  
18 space which is indicative of missing brain tissue.

19 Q Okay. And that was the most extreme  
20 effect, is that correct?

21 A Yes -- yes.

22 Q And you described that was fetal alcohol  
23 syndrome, correct?

24 A Correct. Those effects also exist on a  
25 continuum. The magnitude of the actual structural

1 deficit exists on a continuum as well. And that's  
2 why I think there was reference earlier that people  
3 who do morphometric analysis, which is a fancy way  
4 of saying you take more accurate measurements of the  
5 shape and size of different brain structures to be  
6 able to discern on a spectrum the degree of the  
7 deficit.

8 Q So those that suggested in that continuum  
9 or photographs you had have a lesser effect or  
10 lesser identifiable effect. They wouldn't possess  
11 all of the secondary effects that you suggested, is  
12 that correct?

13 A I would not say that's necessarily  
14 correct. And I think we have to be careful about  
15 separating structural things that you can see in the  
16 brain from functional consequences, because, as I  
17 mentioned, there could be much more subtle damage to  
18 neurons and neuron connectivity that really relate  
19 to function.

20 And in many instances, individuals that  
21 suffer from a variety of behavioral disorders may  
22 have these kind of subtle effects but still have a  
23 major impact in their everyday life.

24 Q Okay. And someone who may have a subtle  
25 FAE or something like that may have other factors

1 which create those same secondary results too, isn't  
2 that correct?

3 A Presumably.

4 Q Those effects that you talked about, they  
5 aren't unique to fetal alcohol spectrum disorder,  
6 are they?

7 A The secondary? They're not necessarily  
8 unique, but they have been recorded as consequence  
9 of gestational alcohol exposure.

10 Q Okay. But someone could possess all those  
11 factors and not have fetal alcohol syndrome, I guess  
12 that's what I'm trying to say?

13 A Yes, that's certainly possible.

14 Q So the fact that the behavioral factors  
15 line up with an individual doesn't necessarily mean  
16 he suffers under fetal alcohol syndrome?

17 A Well, again, we're not talking about -- we  
18 have to distinguish between fetal alcohol syndrome  
19 and a lesser, more partial expression of that. And  
20 the other issue is whatever evidence there may be  
21 that there was alcohol exposure.

22 And that really is the key feature that  
23 ties in to the relationship between gestational  
24 alcohol exposure and these consequences.

25 Q So cognitive deficits alone doesn't mean

1 fetal alcohol exposure, correct?

2 A No, there are other instances.

3 Q Executive functioning deficits, making bad  
4 judgment, not able to handle money and the like,  
5 that doesn't necessarily mean fetal alcohol  
6 exposure, does it?

7 A No, it doesn't have to be.

8 Q In the secondary results you reflected in  
9 your slide -- and I want to make sure I understand  
10 this -- 94 percent of the individuals identified  
11 with fetal alcohol spectrum or fetal alcohol effect  
12 have mental health problems, is that correct? Did I  
13 read that slide correctly?

14 A In that report that's shown, yes, that's  
15 correct.

16 Q Ninety-four percent?

17 A The high end of a number of different kind  
18 of mental health issues, anxiety disorders,  
19 depression, attentional deficits.

20 Q Seventy percent disruptive in school, is  
21 that correct?

22 A I don't remember the exact number, but  
23 that is a very common outcome in these children.

24 Q Sixty percent trouble with the law, sixty  
25 percent confined?

1           A     Right, that reflected -- the confined  
2 reflected the entire spectrum of effects, with most  
3 of those confinements of the more extreme fetal  
4 alcohol syndrome, because they're identified early  
5 on and institutionalized.

6           Q     Okay. And approximately how large was  
7 that test data that did that particular study? How  
8 large was the group there?

9           A     I can check. I think it was four hundred  
10 and fifty some-odd cases, if I'm not mistaken. That  
11 was a composite of a fairly large number of  
12 subjects.

13           MR. ZELENKA: Court's indulgence.

14           THE COURT: Sure.

15           MR. ZELENKA: No further questions, Your  
16 Honor.

17           THE COURT: Any redirect?

18           MR. BLUME: No, sir, Your Honor.

19           THE COURT: You may step down.

20           We're going to take about a five-minute  
21 recess. We will stand at ease for five minutes.

22           (Court in recess.)

23           THE COURT: Mr. Luminack, you may call  
24 your next witness.

25           MR. LUMINACK: Your Honor, just briefly I

1 want to explain. Mr. Blume is with another witness,  
2 making sure that he has time to look at some of the  
3 Court exhibits so that he's prepared first thing  
4 tomorrow morning. And we checked with Mr. Zelenka,  
5 and he has no problem with Mr. Blume being absent  
6 just for a little bit while I conduct the direct  
7 examination of this witness.

8 THE COURT: Very good.

9 MR. LUMINACK: The applicant calls Dr.  
10 Arlene Andrews to the stand.

11 THE COURT: Dr. Andrews, please come  
12 forward.

13 CLERK OF COURT: State your name, please.

14 DR. ANDREWS: Arlene Bowers Andrews.

15 (The witness was sworn.)

16 CLERK OF COURT: Thank you. Have a seat,  
17 please, ma'am.

18 THE COURT: Dr. Andrews, take your time  
19 and come forward. Watch your step. I'm going to  
20 ask you to have a seat in the witness chair. I want  
21 you to speak loudly, clearly, and slowly in order  
22 that we can hear everything that you've got to say.  
23 And, once again, state your name, please, ma'am.

24 DR. ANDREWS: Arlene Bowers Andrews.

25 THE COURT: Thank you, Dr. Andrews.

1                   Mr. Luminack, you're recognized.

2                   ARLENE BOWERS ANDREWS, having first been  
3                   duly sworn, testified as follows:

4                                   DIRECT EXAMINATION

5                   BY MR. LUMINACK:

6                   Q     Good afternoon, Dr. Andrews.  If you  
7                   could, tell us where you work presently.

8                   A     I work at the University of South Carolina  
9                   for the College of Social Work.

10                  Q     And what do you do at USC?

11                  A     I'm a professor.

12                  Q     And how long have you been a professor?

13                  A     Since 1986.

14                  Q     So well over 20 years?

15                  A     Well over 20 years.

16                  Q     All of it's been in social work?

17                  A     That's correct.

18                  Q     Okay.  And before starting there, if you  
19                  could, just summarize for the Court your education  
20                  and professional training.

21                  A     I have a bachelor's degree from Duke  
22                  University, and a Master of Social Work from the  
23                  University of South Carolina, and a Ph.D. in  
24                  clinical community psychology, also from the  
25                  University of South Carolina.

1 I've worked in a number of agencies. I  
2 started my career with the South Carolina Department  
3 of Mental Retardation, which is now a part of the  
4 South Carolina Department of Disabilities and  
5 Special Needs. I also worked as a planner with the  
6 Governor's Office and then moved into working with  
7 the nonprofit sector in child abuse prevention.

8 I was executive director of the Council on  
9 Child Abuse and Neglect. I was also the executive  
10 director of Sister Care, which is a program for  
11 battered women and their children.

12 I then went to work at the University of  
13 South Carolina in my present position where I've  
14 done a good bit of work around the development of  
15 education on child-welfare issues. I teach in the  
16 area of research of community practice and also  
17 victimization and survivor services.

18 MR. LUMINACK: Your Honor, may I approach  
19 the witness?

20 THE COURT: You may.

21 Q Dr. Andrews, I'm going to hand you what's  
22 been marked as Plaintiff's Exhibit Number Ten. Is  
23 that your current CV?

24 A It is.

25 Q And I don't want you to describe it in any

1 detail. But does that CV list the publications the  
2 research that you've engaged in over the years?

3 A It does.

4 Q And I also don't want you to go into  
5 detail. But does it also list any of the  
6 professional organizations and awards or honors that  
7 you've received over the last three decades of your  
8 work?

9 A Yes, it does.

10 Q And I know you wouldn't volunteer this on  
11 your own. But can you -- were you in Washington,  
12 D.C., last week?

13 A I was.

14 Q And were you there to accept an award?

15 A I was.

16 Q Can you tell the Court and describe what  
17 that award was for?

18 A I was nominated by the Governor's Office  
19 of South Carolina for an award from the U.S.  
20 Department of Health and Human Services to represent  
21 the state of South Carolina for the Commissioner's  
22 Award for Child Welfare Advocates. It's awarded by  
23 the commissioner of the division of Children and  
24 Youth.

25 MR. LUMINACK: Your Honor, I'd move at

1 this time to admit Plaintiff's Exhibit Number Ten,  
2 Dr. Andrews' CV.

3 THE COURT: Any objection from the State?

4 MR. ZELENKA: Without objection.

5 THE COURT: All right, it's into evidence  
6 as Petitioner's Exhibit what?

7 COURT REPORTER: Ten.

8 MR. LUMINACK: Ten.

9 THE COURT: Ten into evidence without  
10 objection from the State.

11 MR. LUMINACK: Thank you, Your Honor.

12 (Applicant's Exhibit Number Ten, Andrews  
13 CV, was entered in evidence.)

14 Q Dr. Andrews, in all of your work, is it  
15 pretty routine for you to consult and work with  
16 psychiatrists and psychologists?

17 A Yes.

18 Q And when you're working either in this  
19 capacity, meaning the forensic capacity or a  
20 criminal case, or when you worked at what was then I  
21 guess the Department of Mental Retardation that's  
22 now DDSN and throughout your professional life, is  
23 it common to prepare what is known as a biological,  
24 psychological, sociological history?

25 A It is.

1           Q     And can you explain for the Court what  
2     that is?

3           A     Generally, from a social worker's  
4     perspective, our interest is in understanding a  
5     person's social functioning, and that has to do with  
6     their social relationships with their families,  
7     their peers, people in the greater community, how  
8     the society might affect them.

9                     And so we do an extensive assessment of  
10    all the different people with whom that individual  
11    has interacted. We also use our training, building  
12    on research studies and theory, to try and  
13    understand some of the things that may have  
14    happened, given the unique factors in any person's  
15    social life.

16                    And then we use that to form an opinion  
17    and recommend some sort of intervention usually if  
18    it's in a treatment setting, which is where these  
19    assessments often take place.

20                   MR. LUMINACK: Your Honor, at this time I  
21    would offer Dr. Andrews as an expert in the field of  
22    licensed clinical social work.

23                   MR. ZELENKA: No objection.

24                   THE COURT: All right, she is so qualified  
25    in the area of licensed clinical social work -- is

1 that the correct denomination?

2 MR. LUMINACK: Yes, Your Honor.

3 THE COURT: Very good. You are so  
4 qualified, and you may render opinions in that  
5 field.

6 Q Dr. Andrews, did Mr. Blume and I contact  
7 you and ask that you conduct an assessment of Mr.  
8 Bobby Wayne Stone's social history?

9 A Yes.

10 Q And how did you go about conducting that  
11 assessment?

12 A I interviewed a number of people in Mr.  
13 Stone's social network, family members, some of his  
14 friends. I interviewed him. I also reviewed a  
15 number of records, records from his schooling, from  
16 the health records that were available. I looked at  
17 criminal justice records. And so I put together a  
18 comprehensive assessment based on multiple sources  
19 of information.

20 Q Just to provide a road map for the Court  
21 before we get into the specifics of your findings,  
22 can you please summarize your conclusions after  
23 conducting the assessment of Mr. Stone?

24 A I found that there were several dominant  
25 themes in Mr. Stone's life, including severe

1 poverty. There's evidence in the record that it was  
2 persistent throughout his life.

3 I also found evidence of cognitive  
4 impairment on his part and the part of some of his  
5 siblings that he was a child of alcoholics and has  
6 some functioning related to what we often see in  
7 children of alcoholics, that there was a great deal  
8 of chaos in the family environment, that he was  
9 raised in a somewhat confusing family situation  
10 because his father was rather debilitated due a  
11 drinking problem.

12 And his parents were separated, and his  
13 mother was in a relationship with a father-like  
14 figure to whom she was not married who lived right  
15 next door, and he was married and had a family  
16 there, as well. One of the most notable things in  
17 his life was the extreme violence to which he was  
18 exposed, including child abuse as well as into  
19 adulthood threats of severe violence by Eugene  
20 Miles, who was the man who lived next door.

21 He also suffered a very traumatic loss of  
22 his father and then a traumatic loss of his mother,  
23 who was very dear to the family and important to  
24 them. He was exposed to environmental toxins, and  
25 he suffered a stigma related to experiences that he

1 felt at school in and other social environments  
2 where he felt people treated him badly.

3 And even though he had all these what we  
4 call adverse events in his life, he also shows a lot  
5 of signs of resilience, because he's known as a very  
6 hard worker, he's known as someone who cares a lot  
7 for others and is willing to do things like yard  
8 work or help people out, and is respected by his  
9 peers for that.

10 Q Dr. Andrews, what is a sociogram?

11 A A sociogram is a device that we sometimes  
12 use to help understand the relationship that people  
13 in a social network have with one another. It helps  
14 us to know who are the most important people in a  
15 social network, and we gather these as we gather  
16 information about it.

17 And I prepared one in this case because it  
18 was -- the social dynamics are a little bit  
19 confusing, and I found it was helpful if I charted  
20 them out in a sociogram.

21 MR. LUMINACK: Your Honor, may I approach  
22 the witness with what has been marked as Plaintiff's  
23 Exhibit Eleven?

24 THE COURT: Yes.

25 Q And, Dr. Andrews, is that the sociogram

1 that you prepared in relation to your assessment of  
2 Mr. Stone?

3 A It is. It's a series of sociograms,  
4 because it shows changes over time.

5 Q And would that assist you in describing  
6 your assessment and the conclusions of your  
7 assessment to the Court?

8 A Yes.

9 MR. LUMINACK: Your Honor, I'd move  
10 Plaintiff's Exhibit Eleven, the sociogram, into  
11 evidence at this point.

12 THE COURT: Any objections?

13 MR. ZELENKA: Your Honor, this is the  
14 first I've seen this. Honestly, I'm not sure I  
15 understand it just by looking at it. If we could  
16 defer the admissibility till after she testifies. I  
17 have no objection to her referring to it right now.

18 THE COURT: All right, very good.

19 Mr. Luminack, what do you have to say  
20 about the fact that he hasn't seen it?

21 MR. LUMINACK: I don't know that Mr.  
22 Zelenka hadn't seen it. But we can do it two ways.  
23 We can also admit this as just a Court's exhibit.  
24 This is the type of thing that would be a  
25 demonstrative exhibit at trial.

1           And so I want to make sure that the record  
2 includes everything that this expert would have used  
3 both substantively, and there may be some things  
4 that I admit through her as substantive evidence,  
5 but also demonstrably, because when it goes up on  
6 appeal, I want to make sure the record reflects this  
7 is the type of the jury would have seen, whether or  
8 not it would have gone back to the jury room. And  
9 by the way, there's nothing on here that she's not  
10 going to say.

11           THE COURT: Okay, very good.

12           What do you have to say about that, Mr.  
13 Zelenka?

14           MR. ZELENKA: Well, then, they don't need  
15 the demonstrative exhibit.

16           THE COURT: I'm going to allow it into  
17 evidence.

18           MR. ZELENKA: My objection is simply that  
19 I haven't seen it yet. I may not have any objection  
20 after she testifies.

21           THE COURT: All right, very good. Well,  
22 I'm going to allow it into evidence over your  
23 objection.

24           Very good, Mr. Luminack.

25           MR. LUMINACK: And I've got a copy for the

1 Court.

2 THE COURT: Very good.

3 (Applicant's Exhibit Number Eleven,  
4 Andrews charts, sociogram, was entered in evidence.)

5 Q And you can hold onto that, Dr. Andrews.  
6 Dr. Andrews, the Court's got a copy and Mr.  
7 Zelenka's got a copy, and I do, as well. We'll  
8 start at page one. If you could, please tell the  
9 Court when and where Bobby Wayne Stone was born.

10 A He was born in 1965 and when his family  
11 was living in Poston, which is a little town on the  
12 east side of Florence County near the Pee Dee River.  
13 His grandfather ran a store there and the post  
14 office, and the family were all sharecroppers.

15 There were two notable things. His  
16 parents were married, and two notable things about  
17 his parents were that each had a disability. His  
18 mother, Maybell, had been severely burned when she  
19 was six years old, which caused severe scarring on  
20 her lower legs.

21 And this created for her a lifelong  
22 problem with pain. She often had trouble sleeping  
23 at night and often had trouble with the pains in her  
24 legs.

25 Q Let me stop you for one second, Dr.

1 Andrews.

2 MR. LUMINACK: Your Honor, I don't mean to  
3 be too informal, but Dr. Andrews and I would like to  
4 refer to some of these family members by their first  
5 name to avoid confusion, given the commonality.

6 THE COURT: That's not a problem.

7 Q Dr. Andrews, the mother, Maybell, that's  
8 Bobby Wayne's mother?

9 A That's correct.

10 Q What is the DISAB notation? Does that  
11 refer to the burns?

12 A That refers to the disability related to  
13 her legs and some degree of lifelong impairment  
14 because of that.

15 Q And who was Bobby Wayne's father?

16 A I call him Bobby O, because Bobby Wayne is  
17 named for his father. He had a serious injury also  
18 when he was a child that caused him to have a head  
19 injury, a traumatic brain injury or head injury. It  
20 caused him to have a plate in his head.

21 He was able to work, though. And when he  
22 did work, he did farming or tree-trimming. He was  
23 sometimes a truck driver. And so he -- and he went  
24 as far as the sixth grade. He had a sixth-grade  
25 education.

1           Q     And did Bobby Wayne have any siblings when  
2 he was born? In other words, were there any older  
3 siblings that had already been born?

4           A     His older sister, Melinda, had already  
5 been born. She was about 18 months older than he  
6 was.

7           Q     Could you describe just the very early  
8 years of Bobby Wayne's life?

9           A     Well, the family was poor, but they did  
10 farming. His mother was a housewife, although she  
11 had worked some. She worked some in a sewing room.  
12 Later in life, she worked sometimes cleaning houses  
13 for people but mostly sitting with older people.

14                     But it was a very small community, and for  
15 the most part, Bobby Wayne could run around in the  
16 community -- this was like his first seven years of  
17 life -- because a lot of the people in the community  
18 were relatives.

19           Q     All right, if you could flip to page two  
20 of the sociogram. And you've introduced at least  
21 when he was born his immediate sibling and his  
22 mother, Maybell, and his father, Bobby O. Can you  
23 talk to us a little bit about his paternal  
24 relatives, the Stone family that are related to his  
25 father?

1           A     Well, they lived near Bobby O's parents.  
2     That was his grandmother -- Bobby Wayne's  
3     grandmother -- Lottie Stone, and his grandfather,  
4     Deleon Stone. And there were some aunts and uncles  
5     who were nearby or came to visit their parents at  
6     times.

7                     What's notable about the family history is  
8     that on both sides of his family history, there were  
9     some people who had problems with alcoholism, which  
10    we'll see becomes a very prominent theme in his  
11    life, as well.

12                    But on his grandmother's side, there were  
13    brothers who were alcoholics. And on his  
14    grandfather's side, there were brothers who were  
15    alcoholics and a sister who was married to an  
16    alcoholic who actually was very violent and caused  
17    her death. She was murdered as a result of that.

18                    His grandfather also had a sister with  
19    schizophrenia. So we often look to see if there are  
20    family patterns, and in this particular case, we did  
21    see that there was a family pattern.

22            Q     All right. And just from here on out, if  
23    you do not have someone marked by a particular color  
24    that's coded to either disability or alcoholism,  
25    does it mean that person necessarily did not suffer

1 from that condition, or does it mean that you just  
2 simply did not have the information to say that?

3 A It means that I don't have the  
4 information. I don't know. A lot of these people  
5 are deceased and unavailable, although in this case  
6 I was able to talk to two of the aunts.

7 Q Okay. I know that it appears that Bobby  
8 Wayne now has two siblings, Tammy and Jerry Epps.

9 A He does.

10 Q Now could you please talk about Tammy?

11 A They were born while he was still in  
12 Poston. Tammy was born about when he was about two  
13 years old, and then Jerry wasn't born until he was  
14 about five.

15 Q Did anything significant happen to the  
16 family between Tammy's birth and Jerry's birth?

17 A Yes, a major event happened in that right  
18 after Tammy was born, the father and the mother,  
19 Bobby O and Maybell, were diagnosed with  
20 tuberculosis. And in their case, the treatment for  
21 tuberculosis was that they were admitted to a  
22 sanatorium in Columbia, which means they had to  
23 leave their children.

24 When they left, Bobby O had to give up his  
25 job, and as a result of that, they lost their house.

1 Their mattresses were burned. The children were all  
2 placed out with different relatives. They were  
3 separated, and so they lived apart. The father was  
4 hospitalized for six months, and the mother was  
5 hospitalized for three months.

6 Q And did you actually find or at least  
7 review the records for both Maybell and Bobby O's  
8 stay at the South Carolina Sanatorium?

9 A I did.

10 MR. LUMINACK: Your Honor, may I approach  
11 the witness?

12 THE COURT: You may.

13 Q Dr. Andrews, I'm going to hand you  
14 Plaintiff's Exhibits Twelve and Thirteen. Does  
15 Plaintiff's Exhibit Twelve appear to be the TB  
16 records for Bobby O. Stone?

17 A Yes.

18 Q And does Plaintiff's Exhibit Thirteen  
19 appear to be the records you reviewed regarding  
20 Maybell Stone?

21 A Yes.

22 MR. LUMINACK: Your Honor, at this time  
23 I'd move into evidence Plaintiff's Exhibits Twelve  
24 and Thirteen.

25 MR. ZELENKA: No objection.

1           THE COURT: All right, twelve and thirteen  
2 are into evidence without objection from the State.

3           MR. LUMINACK: Thank you, Your Honor.

4           (Applicant's Exhibit Number Twelve,  
5 Sanatorium Records, Bobby O; and Applicant's Exhibit  
6 Number Thirteen, Sanatorium Records, Maybell, were  
7 entered in evidence.)

8           Q     Dr. Andrews, when you reviewed those  
9 records, was there anything significant in those  
10 records about Bobby Wayne's family at that time?

11          A     Well, one of the things that's in the  
12 records -- and obviously they're about the  
13 tuberculosis treatment. But they also have  
14 indications of how poor they were.

15                 Bobby Wayne's father was only 33 years  
16 old, but he needed double dentures, indicating that  
17 he had lost his teeth. And he asked the social  
18 worker for help because he had no income.

19                 It was interesting to me because Bobby  
20 Wayne had also lost his teeth by the time he was 30,  
21 because we know from the records that he had no  
22 teeth at the time of his arrest. There is also  
23 information in the records regarding vocational  
24 planning for Bobby Wayne's father in which a doctor  
25 observed that he didn't seem to be very intelligent.

1           And the vocational counselor said that  
2 even though he had a sixth-grade education, he was  
3 only reading at the third-grade level.

4           Q     And, Dr. Andrews, you indicated earlier  
5 that Bobby Wayne's father was at the sanatorium for  
6 six months, I believe, and his mother was there for  
7 three months. After they were discharged and  
8 released from the sanatorium, what did they go back  
9 to? What had happened to their house, if anything?

10          A     Well, at that point they had to find  
11 another place to live. Maybell was discharged  
12 before -- the mother was discharged before the  
13 father was. And it looked from the records as if  
14 she went to live with her family, who at the time  
15 were living in Scranton, not in Poston.

16          Q     And once Bobby Wayne's father was  
17 discharged, had anything happened to their home and  
18 furniture?

19          A     Yes, they lost -- they had to put the  
20 furniture in storage, but they had lost their home.  
21 So it's not clear exactly where they lived at first.  
22 They eventually did go back to Poston.

23          Q     And so that takes us back to Bobby's  
24 youngest sibling, Jerry, being born. He was born in  
25 Poston?

1           A     Right.

2           Q     So between the time Tammy was born in  
3     Poston and Jerry was born in Poston, that's when the  
4     TB treatment occurred?

5           A     That's correct.

6           Q     Okay.

7           A     And the family disruption.

8           Q     All right. If you could, turn to page  
9     three of the sociogram. And I notice that now you  
10    have added school. Can you describe how Bobby  
11    Wayne's early school years went for him?

12          A     Bobby Wayne did start school at age six,  
13    while the family was living in Poston. And we see  
14    from the first time he went to first grade that when  
15    he entered, his readiness tests indicate that he was  
16    in the bottom tenth percentile, which is a very low  
17    performance.

18                   He then failed the first grade and had to  
19    repeat it. And this was the first of many tests  
20    that showed that Bobby Wayne had problems learning  
21    at school. His parents did always send him to  
22    school. His attendance was very good throughout  
23    school.

24                   We also will see a pattern on his learning  
25    that his learning seems to be a cognitive problem.

1 It's not related to behavior problems. There are no  
2 records in the school -- no indication in the school  
3 records that there were behavior problems that were  
4 causing the learning problems.

5 Q All right. Just after Bobby Wayne began  
6 school, did something significant happen to his  
7 father?

8 A It did. It's the first indication that we  
9 have in the record that his father has a serious  
10 drinking problem. Soon after Bobby Wayne started  
11 first grade for the first time, his father was  
12 arrested for DUI. And the records note that this  
13 was his second offense of DUI.

14 Q All right. I notice you've now coded his  
15 father in red. Is that to indicate the serious  
16 drinking problem that would then be documented  
17 further along?

18 A It is. On the sociogram when there's a  
19 drinking problem, when I become aware of a drinking  
20 problem from information that I have, I will mark it  
21 in red.

22 Q All right. And during these early school  
23 years for Bobby Wayne, how was the family faring  
24 generally?

25 A Well, at that point Maybell was working

1 sometimes, and she sometimes worked at a restaurant  
2 while Melinda, who was only seven or eight at the  
3 time, watched the younger children. We also know  
4 from Tammy's school record -- early school record at  
5 HeadStart -- that at age five, she often arrived  
6 dirty, in soiled clothing, and hungry, which is a  
7 sign that the family is struggling.

8 Q If you could, please now turn to page four  
9 of the sociogram. And now you have the maternal  
10 family noted, and you've got a dotted line between  
11 Bobby Wayne's parents. What does that dotted line  
12 signify?

13 A Well, when Bobby Wayne was almost eight,  
14 just before he was eight years old, the family moved  
15 from Poston to Sumter. And at that point, Maybell  
16 and Bobby were clearly having problems in their  
17 relationship. And it began a period of 14 years of  
18 separation.

19 They never really divorced, but they  
20 stayed separated. And so they -- and their family  
21 relocated, and from that point forward Maybell and  
22 her children lived near her family, who were the  
23 grandfather, Baker Floyd, and the grandmother, Mary  
24 Floyd, and the Floyd relatives.

25 Q And obviously had less contact with Bobby

1 Wayne's father, Bobby O, and his family?

2 A That's correct. The father, Bobby O, came  
3 to the home sometimes, and Bobby Wayne did see him  
4 occasionally. But they didn't see the Stone family  
5 as much as they had when obviously they lived near  
6 them.

7 Q And were there any indications that any of  
8 Bobby Wayne's maternal grandparents had problems  
9 with alcohol?

10 A Yes. His grandfather, Baker Floyd, had  
11 been arrested for DUI during the period when his  
12 parents were at the sanatorium.

13 Q All right. And now that Maybell has taken  
14 the family to Sumter and separated from Bobby  
15 Wayne's father, was she working at that point?

16 A She did. She started working cleaning  
17 houses and sitting with older people, and sometimes  
18 she worked with her sister at a store that she had.  
19 Sometimes she worked at the flea market.

20 So she had a variety of things that she  
21 did, but she mostly sat with older people. They  
22 also went to church with her mother. They went to  
23 the Church of God of Prophecy, and they often went  
24 on Wednesday night and Sunday. So this is where  
25 Bobby Wayne learned his faith.

1           Q     All right, Dr. Andrews, if you could turn  
2     to page five of the sociogram. You mentioned a  
3     minute ago that Bobby Wayne's mother and father had  
4     separated and she moved to Sumter. And now I notice  
5     on page five there's a man named Eugene Miles. Can  
6     you explain who he is?

7           A     While they were living in Poston, Maybell  
8     had developed a relationship with a man who worked  
9     with Bobby Wayne's father. The man's name is Eugene  
10    Miles, or was Eugene Miles.

11           And when Maybell and her family moved to  
12    Sumter, Eugene Miles and his family also moved to  
13    Sumter. And he lived with his wife and four  
14    children right next door to where Maybell lived with  
15    her children.

16           And they became like one big polygamous  
17    family. Sometimes Eugene slept at Maybell's home,  
18    and sometimes he slept in his own home. The  
19    children shared Christmases together. They did  
20    things together, and it's as if they were one big  
21    family. And everybody in the neighborhood knew  
22    about this arrangement, and people in the family  
23    knew it, as well.

24           Q     And did the relationship between Maybell  
25    and Eugene Miles continue for a number of years?

1           A     It continued until Maybell died.

2           Q     What role did Eugene Miles play in the  
3 Stone family, Bobby Wayne Stone?

4           A     It's a very prominent role. You'll see  
5 that I've marked Eugene Miles with alternating  
6 colors, because there was a conflict in that  
7 relationship. He had a very serious drinking  
8 problem, although he could be very nice when he was  
9 sober.

10                    So people in some ways liked him. They  
11 looked to him for some guidance. But when he became  
12 drunk, he became violent, unlike Bobby Wayne's  
13 father, who drank a lot, but I have no record of his  
14 having been violent when he was drunk.

15                    Eugene Miles, though, would go into  
16 drunken rages and would start yelling, cursing,  
17 would curse specifically at the Stone children. He  
18 would wave a gun. Sometimes he fired the gun.

19                    He once shot Douglas Edwards, who is  
20 almost the same age as Bobby Wayne. They called him  
21 Poochie. He's a cousin who also lived in both  
22 towns. So the threats of violence were very  
23 serious. He also once threatened Melinda with a  
24 gun.

25           Q     Melinda being Bobby Wayne's older sister?

1           A     Bobby Wayne's older sister. So these  
2     outbursts were very unpredictable. And Maybell,  
3     because she sat with older people, was often gone  
4     for very long hours and gone into the evening.

5           So the children were often home alone, and  
6     it became very terrifying for them to have to  
7     anticipate that these rages might occur or that this  
8     violence might happen. They felt very powerless and  
9     afraid. Sometimes they would run out into the woods  
10    near their house and try to hide in the woods and  
11    stay out there for the night.

12          Q     Did Eugene Miles ever direct violence  
13    towards Bobby Wayne specifically?

14          A     He did. There was one occasion when Bobby  
15    Wayne was little -- and we know that this was before  
16    he was nine years old, because it was before his  
17    grandfather died, although I don't have an exact age  
18    on it.

19                 And at that time, Gene Miles beat Bobby  
20    Wayne so badly that he was bruised from head to  
21    foot. And the family was very upset about it. His  
22    grandfather and his uncle came over and tried to  
23    confront Eugene about it, but he wouldn't come out  
24    of his house at that point.

25                 Bobby Wayne was also exposed to Gene Miles

1       beating his wife and beating his children on many  
2       occasions. But after Gene beat Bobby Wayne so  
3       badly, Maybell threatened to leave if he ever did  
4       that again. And he didn't beat Bobby Wayne again  
5       after that.

6               Q     Dr. Andrews, you mentioned a minute ago or  
7       two times you used the word "unpredictable" or  
8       "unpredictability." Can you explain why that's  
9       significant to you that Eugene Miles' violence and  
10      his rages were unpredictable?

11             A     It creates in a child what we call  
12      anticipatory anxiety, which is a state of sort of  
13      like hypervigilance, constant anticipation that  
14      something terrible may happen. It causes children  
15      to have difficulty learning, to have difficulty  
16      controlling their own emotions, because they're  
17      absorbed with this never knowing what might happen  
18      next.

19             We see it very often in children of  
20      alcoholics, and we see it very often in children who  
21      have been exposed to serious physical abuse. It  
22      also causes them to cling to one another in what we  
23      call traumatic bonding, in feeling that "It's us  
24      against the world, and we have to do what we can to  
25      watch out." It's a very serious condition to have

1 to live in with this never knowing what might  
2 happen.

3 Q If you could, Dr. Andrews, turn to page  
4 six of your sociogram. You now have some additional  
5 people listed as living in the household of Bobby  
6 Wayne's family. Can you talk about those people and  
7 explain how they ended up there?

8 A Well, Maybell was known to be a very  
9 generous person, very caring, and she did always  
10 watch out for her children. She was very  
11 protective. She tried to protect them from Gene.

12 And she also would reach out to other  
13 children. So there were periods of time when her  
14 nephew, Douglas, who's known as Poochie, and Jerry  
15 Edwards also lived in the family. And they probably  
16 lived there most of the time through Bobby Wayne's  
17 teen years.

18 There was another girl, Angie, who came to  
19 live there when Bobby Wayne was twelve. She was  
20 ten. She's Tammy age. And she lived there for most  
21 of Bobby Wayne's teen years, too. So most of the  
22 time, there were seven children living in Maybell's  
23 home.

24 Q And did Bobby Wayne and Douglas, Poochie,  
25 also do things together?

1           A     Very much so. They were only three months  
2     apart in age, and they hung out together a lot.

3           Q     And what was one of the things that they  
4     did together that was significant to your  
5     assessment?

6           A     They went swimming in Turkey Creek almost  
7     every day in the summer and after school for several  
8     years. That was one of their favorite things to do.

9           Q     And we've heard a little bit, I think,  
10    about the exposure to environmental toxins. From  
11    your review of the records, does Turkey Creek have a  
12    documented history of being filled with  
13    environmental toxins?

14          A     Yes, at the time that they would have been  
15    swimming in it.

16          Q     Okay. So Bobby Wayne is not quite a  
17    teenager but getting there. How did his family  
18    characterize him during this time and at this age?

19          A     Bobby Wayne was known as someone who was a  
20    quiet child, someone who avoided fights, and  
21    particularly because Poochie, who he hung out with a  
22    lot, was not like that at all. He was known as a  
23    wild child, someone who was always getting into  
24    something.

25                 But Bobby Wayne was also someone who was

1 very helpful. He tried to watch out for his  
2 sisters, and he was known as being helpful to his  
3 mom. She had a garden. She grew vegetables. And  
4 he was very helpful in terms of helping with the  
5 house.

6 Q Dr. Andrews, as we're looking at page six,  
7 did you find in your assessment of his life that  
8 there were a lot of lifelong friends that you've  
9 just left off of this sociogram, or does this kind  
10 of represent almost his entire world?

11 A These seem to be the people who were very  
12 important to Bobby Wayne. I did find some people  
13 who hung out with some later in his teen years, but  
14 no lifelong friends. Most of his life centered  
15 around his family.

16 Q All right. If you could turn to page  
17 seven, you've now shaded three people with red. Can  
18 you talk to us a little bit about Bobby Wayne's  
19 father? You indicated that he had been arrested for  
20 DUI twice by the time Bobby Wayne was in first or  
21 second grade. Did that drinking problem continue?

22 A It did. By the time Bobby Wayne was 12,  
23 his father was on his -- had been arrested six times  
24 for DUI and in fact was incarcerated when he was 12.  
25 He was sent to prison. For specifically at that

1 time, it was his sixth DUI, driving under  
2 suspension, and other liquor law violations.

3 His uncle, Walter Floyd, who lived nearby  
4 and eventually ended up living in Maybell's home  
5 too, was also arrested for DUI. And Eugene Miles  
6 was arrested for food stamp fraud. So I've marked  
7 in a beige kind of color where there have been law  
8 violations.

9 Q So so far, the categories of criminal  
10 violations among the family involved alcohol-related  
11 offenses and theft or stealing?

12 A Right. Well, thus far, there hasn't been  
13 any stealing offenses yet, but there will be.

14 Q I guess fraud --

15 A Yes.

16 Q -- food stamps?

17 A Fraud, yes -- food stamps, yes. The other  
18 thing that happened when was nine was his  
19 grandfather died, and his grandfather had been one  
20 of his protectors.

21 Q All right. If you could turn to page  
22 eight, and I want to return to Bobby Wayne's school  
23 history. You talked a little bit about his  
24 struggles early on when he was in first grade. Can  
25 you tell us what Bobby did after that?

1           A     He had consistent difficulty learning at  
2 school. School was very hard for him. In the third  
3 grade -- after repeating first grade and then  
4 attending second grade, in the third grade he was  
5 referred for special education because he was  
6 diagnosed with a learning disability at that point.  
7 At this point, the examiner also noted that his eyes  
8 did not work together properly.

9           Q     Dr. Andrews, let me stop you for one  
10 second. I forgot all about handing this up to the  
11 Court.

12           MR. LUMINACK: Your Honor, may I approach  
13 the witness --

14           THE COURT: Certainly.

15           MR. LUMINACK: -- with this report? This  
16 is a copy of what is already an exhibit, but I've  
17 highlighted it for the Court. I don't intend to  
18 submit this separately, but I wanted the Court to be  
19 able to follow along and see the notations that Dr.  
20 Andrews is referring to.

21           Q     So, Dr. Andrews, you were just saying in  
22 third grade -- and I think this is page one of the  
23 packet I just handed up -- he underwent a  
24 psychological evaluation. And can you describe what  
25 they found?

1           A     They found that he at that point had a  
2     full-scale IQ of 86 with a verbal at 97 and a  
3     performance IQ of 76, which is a wide range of  
4     difference in scores between verbal and performance,  
5     and that that indicates deficits in sequencing and  
6     spatial abilities at the performance level, which  
7     are clues to how he solved problems basically.

8           Q     And I think you mentioned this. But on  
9     page two, can you tell the Court what the examiner  
10    had noted?

11          A     The examiner noticed that his eyes did not  
12    seem to work together properly and that he has an  
13    erratic pattern of strengths and weaknesses.

14          Q     And then on page three, did Bobby Wayne  
15    undergo another psychological evaluation later in  
16    his school years?

17          A     Yes, he did. This one is at age eleven.  
18    He was in the fourth grade.

19          Q     And what was his IQ in the fourth grade?

20          A     It was 78. Full-scale IQ was 78.  
21    Although his verbal was 90, his performance was 70.  
22    So we still have that problem with there being a big  
23    difference in the two performance areas.

24          Q     If you could on page four, how did the  
25    examiner say that Bobby is functioning overall?

1           A     In the borderline range of intelligence  
2     with substantial deficits in the performance area.

3           Q     And at this point, he's undergone two  
4     school psychological evaluations, and how did they  
5     label it? What have they determined he needs, and  
6     how did they diagnose him?

7           A     They have determined that he is need of  
8     special education and placed him in classes for  
9     students with learning disabilities. So they've  
10    determined that he has a disability and that it  
11    affects his learning.

12          Q     All right. And if you could turn to page  
13    six of that packet, did he undergo yet another  
14    psychological evaluation when he was in the seventh  
15    grade, at age 14?

16          A     He did, at age 14. At that point, he had  
17    a full-scale IQ between 69 and 75.

18          Q     What else did the examiner note about the  
19    psychological evaluation and their own observations  
20    about Bobby Wayne?

21          A     That verbal skills were below the normal  
22    range except in arithmetic and comprehension, that  
23    all performance skills were below the normal range  
24    except picture arrangement and object assembly; that  
25    the Bender with four errors was below the fifth

1 percentile, which is extremely low, the quality  
2 level expected of the average  
3 eight-and-a-half-year-old or an eight-year,  
4 five-month-year-old, even though he was a teenager;  
5 that his adaptive functioning was generally low to  
6 normal range. And the conclusion was that at this  
7 time, Bobby is functioning overall in the EMH, which  
8 is educable mentally handicapped, range.

9 Q And is that a different designation than  
10 learning disabled?

11 A It is.

12 Q And does it indicate that they had now  
13 noted more severe problems than they had noted  
14 previously?

15 A It does.

16 Q All right, Dr. Andrews --

17 Your Honor, may I approach the witness?

18 THE COURT: Yes.

19 Q Dr. Andrews, I'm going to hand you what  
20 was previously marked by Mr. Blume as Plaintiff's  
21 Exhibit Six.

22 Your Honor, a copy of the report.

23 THE COURT: Thank you.

24 Q I notice on the sociogram you have  
25 color-coded not only Bobby but all three of his

1       siblings in blue. Can you tell the Court why you  
2       did that and what that indicates?

3             A     I made an indication of everyone who was  
4       educable mentally handicapped according to their  
5       school records.

6             Q     All right. And can you just summarize --  
7       and you feel free to refer to Plaintiff's Exhibit  
8       Six. But can you summarize how Melinda, Tammy, and  
9       Jerry did during their school years?

10            A     Starting with Melinda, who's the oldest,  
11       we have a record that she was classified as educably  
12       mentally handicapped by at least the sixth grade,  
13       and she also had difficulty with grades. She only  
14       completed through the ninth grade, although she  
15       started the tenth grade.

16            We have fewer records on her than we do on  
17       the others. His other sister, Tammy, from the time  
18       she was very young, was determined to be in need of  
19       EMH classes and spent her entire school history,  
20       grades one through tenth, in special classes for  
21       children who had EMH.

22            And likewise Jerry, who from a very young  
23       age, starting in fourth grade, placed in EMH  
24       resource classes. I would say all of the children  
25       were sent to school regularly.

1            Their attendance was generally very good  
2 until they -- Jerry, by the way, did graduate. He  
3 finished high school. And I didn't see any  
4 indication in their records of any behavior  
5 problems.

6            Q     But just to be clear, all four do have a  
7 documented history of being labeled and diagnosed as  
8 EMH placement in special ed?

9            A     That's correct.

10          Q     So a child who is Bobby's age, approaching  
11 his teen years and then a little bit older, and  
12 who's obviously struggling in school and elsewhere,  
13 what does he need to succeed and to begin to  
14 improve?

15          A     There are two things that every child  
16 needs in addition to the special education if  
17 they're having learning problems. One is -- and  
18 usually parents are advised on these issues. But in  
19 the record, it indicates that his parents did not  
20 come for the advisory meetings.

21                    But the two things they need are social  
22 support and order. And signs of order would be that  
23 they have a very regular schedule in their home,  
24 that they have someone who can help them remember  
25 things because remembering may be difficult.

1           They need clear expectations about what  
2           are appropriate behaviors. They need someone who  
3           can calm them, because it can be very frustrating to  
4           be -- to have learning difficulty, to feel like  
5           you're failing or to feel -- I know Bobby Wayne  
6           talked about how feeling that teachers seemed to  
7           intentionally try to embarrass you, which is a very  
8           normal way that children who are in EMH classes are  
9           likely to feel.

10           So you want someone who can help you deal  
11           with those hurtful kind of experiences. You need  
12           someone who can stop and remind you -- help you to  
13           stop and think before you do things, because you've  
14           heard the words "executive functioning" today.

15           That really has to do with how we plan  
16           things out, follow our plan, assess whether that  
17           plan worked and whether we would do it that way  
18           again the next time. People who have trouble  
19           learning need help doing that.

20           And so you need very individualized  
21           nurturing, communication, and a sense of order in  
22           your home. You also need consistent social support  
23           from someone who's helping you with all these. We  
24           generally nowadays in schools have individualized  
25           education plans in which parents and others are

1 helped in their own role of giving those things to  
2 their children.

3 But I did not find any sign that these  
4 things were available to Bobby Wayne as part of  
5 meeting his learning and the needs related to his  
6 cognitive impairment.

7 Q If you could now turn to page nine of your  
8 sociogram. His Grandmother Floyd is no longer part  
9 of the sociogram. What happened to her?

10 A She died when he was -- let's see, what  
11 grade was he in? He was about 13. And it's at this  
12 point that he really starts -- I mentioned that  
13 social support is very important.

14 Maybell was extremely poor in providing a  
15 sense of support for him, but there were others in  
16 his family. And when his grandmother died, they  
17 didn't go to church quite as much, so they lost that  
18 kind of support.

19 Q And did anything change with Melinda and  
20 her relationship with this family?

21 A At that point, Melinda was 16, and she  
22 left school and got married and moved away from the  
23 home for a while.

24 Q And his father, Bobby O, did he continue  
25 to run into problems?

1           A     He did. He continued to get arrested for  
2 drinking-related problems. And when he was 14, he  
3 went back to prison.

4           Q     And I don't think you need to go into all  
5 the details, but I notice you now have Douglas,  
6 Jerry, Terry, and Tony all colored in red. Were  
7 they getting into criminal problems?

8           A     They were. It was -- when Bobby Wayne was  
9 about 12 or 13, he started drinking sometimes. And  
10 the people, the men in his life, were all starting  
11 to get in trouble with the law, mostly for stealing  
12 offenses.

13                     And the first time Bobby Wayne got in  
14 trouble was with Poochie. They broke into a house,  
15 and then they stole a tractor, and they were going  
16 to drive it to Florence.

17           Q     They were going to drive the tractor?

18           A     That's correct.

19           Q     And in your assessment, looking at the  
20 records and interviewing, is that the only time that  
21 Bobby Wayne got in trouble before he was 15 years  
22 old?

23           A     Yes.

24           Q     And in conducting your assessment, did you  
25 discover any pattern of pervasive, you know, bad

1 behavior or criminal activity in Bobby Wayne's  
2 childhood up to the age of 15?

3 A No.

4 Q Now, of course, in his later teens, did he  
5 begin to then get into trouble and be arrested?

6 A Yes, he did.

7 Q Without -- you don't need to go into all  
8 the details. But can you kind of characterize what  
9 that trouble was and what happened as he got into  
10 criminal trouble?

11 A Well, the first time, when he was 16 and  
12 was involved with the Department of Juvenile Justice  
13 -- it was then the Department of Youth Services --  
14 he and a friend took a radio from a truck and then  
15 took the truck.

16 And then he and Poochie took a van and  
17 were going to take it to Florida, and they got  
18 caught. And that's when he first went to DJJ to the  
19 reception and evaluation center there.

20 When he was 17, he was with friends again,  
21 and this time he was also -- he got in trouble for  
22 stealing. They were breaking into bars and trying  
23 to take money out of the machines that were in the  
24 bars.

25 Q Did any of these incidents involve any

1 degree of violence towards anyone?

2 A Not that the record indicates and not that  
3 I was able to determine, no.

4 Q I think you mentioned a minute that Bobby  
5 Wayne began to drink. Do you know approximately  
6 when he began to drink?

7 A I understand it was when he was around 12  
8 or 13.

9 Q And was he ever arrested for DUI?

10 A He was, when he was 19.

11 Q And from your interviews with others, was  
12 his house kind of known as a place to come if you  
13 wanted to drink?

14 A It was. It was known as a place where  
15 young people drank, and there was just a lot of  
16 drinking that went on around there.

17 Q And a lot of people coming and going?

18 A Lot of people coming and going.

19 Q All right, if you could turn to page ten.  
20 Bobby O is no longer on the chart. Can you talk to  
21 us about what happened to him and how he died?

22 A Yes, this was -- Bobby -- it happened at a  
23 time when Bobby Wayne was in jail awaiting trial.  
24 He and his -- the cousin, Jerry, and Ray Tobias had  
25 been arrested. They had broken into some

1 businesses, and he was awaiting trial.

2 And at that time, his father was out with  
3 Gene Miles and some other people, and they had been  
4 fishing or something. But they were in a camper  
5 truck that was pulling the boat.

6 And his father, who was intoxicated, fell  
7 out of the truck and was run over by the car that  
8 was behind them. And he died of massive head  
9 injuries.

10 Q What did Bobby Wayne's family had happened  
11 to the father?

12 A Well, the most interesting thing about  
13 this, although it was very difficult for the family  
14 that they lost their family, was that the family  
15 believed that Gene Miles intentionally hurt Bobby  
16 Wayne's father, Bobby O, that he caused the death of  
17 Bobby O. And this reflects how powerful they felt  
18 that Eugene Miles was and what his potential for  
19 violence was.

20 Q And did Maybell receive any money because  
21 of Bobby O's death?

22 A She did. She received some insurance  
23 money, and with it she bought the land that their  
24 trailer was on, but she put the land in Eugene  
25 Miles' name so that she could continue to get food

1 stamps.

2 Q All right, if you could turn to page  
3 eleven. You mentioned a minute ago that Bobby Wayne  
4 was in jail and eventually went to prison. Do you  
5 remember how long he spent in prison?

6 A He was in prison for six years.

7 Q And how did he do during those six years?

8 A He was described as a model inmate, and he  
9 had only one notable disciplinary problem. It was  
10 alcohol-related. He tried to smuggle alcohol into  
11 the prison.

12 Q And while Bobby Wayne was in prison, how  
13 was his family doing?

14 A Well, they were continuing to get in  
15 trouble for alcohol-related offenses and for  
16 stealing.

17 Q When Bobby gets out of prison,  
18 approximately how old was he?

19 A He was just -- it was just before his 20th  
20 birthday.

21 Q And where did he go to live after leaving  
22 prison?

23 A He went to live with his mother, who was  
24 still at her place, and his sister Melinda was  
25 living there with her child, and his brother Jerry,

1 and their Uncle Chalk, who was Walter Floyd.

2 Q And turning to page 12, what happened to  
3 Maybell a couple of months after Bobby Wayne came  
4 home?

5 A About two months after Bobby Wayne came  
6 home, Maybell unexpectedly died. Her health had been  
7 failing somewhat, but she went into the hospital and  
8 died of heart failure. This was extremely traumatic  
9 for the family.

10 Maybell had been the center, the heart of  
11 the family. She's the one that really kept them  
12 together and was their primary support and was very  
13 caring and nurturing. So it's very difficult on  
14 them, because at this point the children only have  
15 each other.

16 Although they were adults, they basically  
17 looked to each other for care and protection. They  
18 still lived next door to Gene Miles at that point in  
19 time and were still feeling threatened by him,  
20 because he still was prone to these rages.

21 Q You said earlier that Bobby Wayne had  
22 begun drinking relatively early in his childhood.  
23 Did that change after his mom died?

24 A It did. As far as I can tell, Jerry --  
25 Bobby Wayne's younger brother, Jerry, moved out of

1 the home, and he was married. And the people who  
2 stayed there started drinking all the time. Bobby  
3 Wayne started drinking every day.

4 We see that Melinda got in some trouble  
5 with drinking. Eugene Miles was drinking every day.  
6 And we see that there were more drinking offenses in  
7 the records. One of the ways they seemed to be  
8 coping was this grief was by drinking very heavily.

9 Q And despite that, was there also evidence  
10 that Bobby Wayne was trying to work and stay  
11 employed and do the best he could?

12 A Bobby always tried to work, and he was  
13 working with Gene Miles. Bobby Wayne had trained as  
14 an auto mechanic, and he was helping Eugene Miles.  
15 At that point, he had started working on cars, and  
16 Bobby Wayne would try to help him.

17 He did have some accidents related to that  
18 work. At one point, a transmission fell on Bobby  
19 Wayne's head. And at another, he cut off the tip of  
20 his finger, so he was having some difficulty with  
21 that work.

22 Q Did he ever transition out of working as  
23 an auto mechanic and then did anything else?

24 A He did. Gene Miles was having a hard time  
25 working because his drinking was so severe, and they

1 were having a hard time making the business work.  
2 So Bobby Wayne switched to doing yard work, and that  
3 seemed to go much better for him.

4 I talked with Easter and Leonard Bartlett,  
5 who were clients of his. He did their yard. And he  
6 was very thorough in the way that he did the work,  
7 very committed to doing a good job.

8 MR. LUMINACK: Court's indulgence, Your  
9 Honor.

10 Q Dr. Andrews, if you could, provide the  
11 Court with your opinion about the combined effect of  
12 all of the things that went into Bobby Wayne's  
13 social history on his development as a child and as  
14 an adult.

15 A Well, the combined effects of all of these  
16 things -- the chronic and persistent poverty, being  
17 the child of alcoholics, living with insecurity and  
18 the danger in his family environment, the traumatic  
19 loss and grief over first his father, then his  
20 mother, being exposed to environmental toxins,  
21 facing the stigma that he had about his family  
22 situation and his learning problems.

23 Combined, even without the cognitive  
24 impairment, we call these adverse life events.  
25 They're hard for anyone to deal with. But given his

1 cognitive impairment, they would have been  
2 especially hard to manage. I found a clear pattern  
3 that he was always dependent on somebody.

4 He was very suggestible. Most of the  
5 times he -- all the times until this offense, when  
6 he got in trouble he was with someone else, usually  
7 an older man in his circle or Poochie, who's his  
8 age. When he had order and good influences, he  
9 delivered.

10 He was a competent, caring, good person.  
11 And what I found was that the family just really  
12 fell apart after Maybell died and were having a hard  
13 time adjusting to that. He never received any  
14 vocational or educational training that you would  
15 expect a person with lifelong impairments to have.

16 He never received any grief support. He  
17 never received any -- the only alcohol treatment he  
18 received was for a very brief period when he was in  
19 a youth correctional center.

20 He never received mental health treatment  
21 for the effects of the childhood and adult trauma  
22 that he experienced with his violent exposure. But  
23 he also never stopped trying to work and to take  
24 care of his family.

25 Q Thank you, Dr. Andrews.

1                   No further questions, Your Honor.

2                   THE COURT: Cross-examination, Mr.  
3 Zelenka.

4                   MR. ZELENKA: Thank you.

5                   CROSS-EXAMINATION

6 BY MR. ZELENKA:

7                   Q    Dr. Andrews, did you prepare a written  
8 report?

9                   A    Not a report. I was asked to submit a  
10 summary of what I had found, although it is not  
11 complete. My investigation was not complete at the  
12 time. I think that was in September or October of  
13 2011.

14                  Q    Okay. Did you review the notes of Dee Ann  
15 Sellers (PH) that she had worked on in 1997 and  
16 2005?

17                  A    Yes.

18                  Q    Did those notes indicate that her  
19 interviews with the defendant would have  
20 corroborated the records?

21                  A    Yes.

22                  Q    Did you find any information by Ms.  
23 Sellers' notes that suggested that the mother  
24 actually drank?

25                  A    Not from Ms. Sellers' notes, no.

1           Q     All right. Did you review the information  
2 where it was reported that the mother was intolerant  
3 of her husband and other drinking in the household?

4           A     I don't recall that.

5           Q     Okay. When you reviewed the reports from  
6 the tuberculosis hospitalization, did you note in  
7 that information that she denied that she was in  
8 fact exposed to alcohol herself?

9           A     I saw on the intake form that she said  
10 that she did not use alcohol.

11          Q     But she admitted smoking, using tea,  
12 coffee, that information?

13          A     That's correct.

14          Q     Was there anything in the diagnoses that  
15 suggested that she was suffering under any  
16 alcohol-related problem while she was in the  
17 sanatorium?

18          A     Not that I saw, no.

19          Q     You stated that the family was concerned  
20 about Mr. Miles' violent actions, is that correct?

21          A     Very much so, yes.

22          Q     How often did Mr. Miles act violently?

23          A     From their report, it was very often.

24          Q     Daily, weekly, monthly?

25          A     I'd have to review my notes on that. But

1 my impression was that it was at least weekly.

2 Q At least weekly. Yet the defendant goes  
3 to work with that same individual, but he's  
4 concerned about violence, is that correct?

5 A This individual was in a father-like role  
6 relative to Bobby Wayne. He had treated the  
7 stepchildren almost as if they were his own  
8 children. And it's not unusual to see this what we  
9 call traumatic bonding with an abusive parent.

10 We also know that Bobby Wayne was very  
11 dependent on others for guidance. And one of the  
12 only people available to him was Eugene Miles.

13 Q Okay. And when did he go to work with Mrs.  
14 Miles?

15 A I don't have an exact date on that. I  
16 don't know.

17 Q Was it after his father had died?

18 A I think he had done some work with him  
19 before his father died, as well.

20 Q That was before his father's death?

21 A And after.

22 Q So after his father died, when you say he  
23 was blaming this individual for his father's death,  
24 he then ended up going to work with him?

25 A He did, yes. But I didn't say that Bobby

1 Wayne specifically was the only one that blamed this  
2 individual for his father's death. I said there  
3 were a number of members of the family who believed  
4 that.

5 Q Okay. So Bobby Wayne didn't think that  
6 Mr. Miles killed his father, was involved in that?

7 A He's aware that that's a possibility, and  
8 he knows that his family feels that way.

9 Q Okay. Did you interview Bobby Wayne  
10 Stone?

11 A Yes.

12 Q Did you ask him what he was doing around  
13 the time of the murder of Deputy Kubala?

14 A I looked at his life history. I did not  
15 look at the crime itself.

16 Q So you didn't ask him about the  
17 circumstances of the crime?

18 A I did not.

19 Q What was going on in his history at that  
20 particular time?

21 A I asked him about the months prior to that  
22 time or the general period of time prior to that  
23 time.

24 Q Well, why didn't you ask him about the  
25 critical month in his life -- maybe the most

1 critical month in his life -- that led up to the  
2 death of Mr. Kubala?

3 A I'd have to look at my notes to see how  
4 far up I went, but I was mostly looking at patterns  
5 across his whole life and in the months prior. So I  
6 don't know how specifically we got to that period.  
7 I know that he said that he was drinking all the  
8 time.

9 Q Drinking all the time, meaning what?

10 A And the other problem that -- partly when  
11 one talks to Bobby Wayne, he has memory problems.  
12 It's really hard for him to put things in sequence  
13 from one point in time to another. And that's part  
14 of the cognitive problems that he has. It's very  
15 difficult to get that.

16 Q Okay. In your social history, you don't  
17 discuss what type of relationships he was having at  
18 that immediate time period -- girlfriends,  
19 expectations like that -- or did you just avoid that  
20 out of the materials that he provided?

21 A I did ask him about girlfriends. But,  
22 again, I don't have the sequence of time within the  
23 month prior to this.

24 Q What type of social relationships did he  
25 have with women?

1           A    With women?

2           Q    Uh-huh.

3           A    He occasionally had dating-typing  
4 relationships. To my knowledge, he didn't have an  
5 active one at this point in time. I know he had  
6 seen someone named Michelle Lynch at one point, and  
7 the -- but I don't know any other more specific  
8 information than that.

9           Q    So what was his relationship with Michelle  
10 Lynch?

11          A    There was a time at which he had been  
12 dating her. But, again, I don't have specific dates  
13 on that.

14          Q    Did it become violent, fearful,  
15 unpredictable?

16          A    Not that I'm aware of.

17          Q    The information about Turkey Creek, who  
18 provided that to you?

19          A    Bobby Wayne did. His sister, Melinda, was  
20 aware that they went swimming there. Again, I'd  
21 have to look more close at my notes to know the  
22 exact sources on that.

23          Q    And did he say where in Turkey Creek he  
24 was playing?

25          A    He did tell me the location. Again, I'd

1 have to look at my notes, but I didn't go by there.  
2 It's near where some sort of a Confederate battle  
3 marker is.

4 Q What did he say he did at Turkey Creek?

5 A They went in the water and played. It was  
6 hot, and they went in there to swim.

7 Q How long?

8 A Apparently, it was almost every day after  
9 school and almost every day in the summers. They  
10 spent a lot of time down there.

11 Q For how many years?

12 A Over a period of several years.

13 Q So he would go swimming every day, is what  
14 he told you?

15 A Most days in the summer.

16 Q Okay. Then you're willing to believe  
17 that, and you're asserting he had memory problems?

18 A He couldn't tell me the exact years. He  
19 just knew it was while he was in school.

20 Q Now, did you discuss with Bobby his  
21 knowledge of his mother's drinking?

22 A I did.

23 Q And what did he tell you?

24 A He didn't -- he said that she didn't  
25 drink.

1 Q Okay. Yet you're stating that he was the  
2 son of alcoholic parents. That sounds like two.

3 A That would be Eugene Miles and Bobby Stone  
4 -- Bobby O. Stone.

5 Q Eugene Miles and Bobby Stone were the  
6 alcoholics?

7 A The two father figures in his life, yes.

8 Q Oh, okay. I didn't understand that. I  
9 assumed you meant his mother. So based on your  
10 understanding of the social history, his mother was  
11 not an alcoholic, correct?

12 A I don't know. I don't have information.  
13 I know that she was surrounded by people who had  
14 alcohol problems. I don't know her history, because  
15 I don't have those records.

16 Q Okay. And any of the records you saw  
17 concerning Bobby Wayne's birth did not indicate that  
18 she was suffering under any alcohol problems at that  
19 particular time, is that correct?

20 A I don't have records of his birth.

21 Q Okay. Did you have any information that  
22 while she lived in Poston that she was drinking?

23 A I didn't have access to people who were  
24 with her on a regular basis. Her husband is  
25 deceased. His parents are deceased. The people I

1 did talk to, two of his father's sisters, were not  
2 around her very often at the time.

3 MR. ZELENKA: Court's indulgence, Your  
4 Honor.

5 Q Just one final question, and it's one I  
6 always ask people. Your opinion on the death  
7 penalty is you're morally opposed to it?

8 A I am, for religious reasons.

9 Q Okay, thank you. No further questions.

10 THE COURT: Any redirect, Mr. Luminack,  
11 Mr. Blume?

12 MR. LUMINACK: Court's indulgence.  
13 Nothing further.

14 Thank you, Dr. Andrews.

15 We ask that she be excused.

16 THE COURT: You may step down.

17 Anything we need to resolve before we  
18 break for the evening? Anything from the State?

19 MR. ZELENKA: Nothing, Your Honor.

20 THE COURT: Anything from the defense or  
21 from the petitioner?

22 MR. BLUME: No, Your Honor.

23 THE COURT: Very good. All right, we'll  
24 reconvene at 9:30 in the morning. Is that going to  
25 pose any difficulty for anybody?

1 You're coming from Columbia?

2 MR. ZELENKA: Columbia.

3 THE COURT: Are you all coming from  
4 Columbia, as well?

5 MR. BLUME: Yes, sir.

6 THE COURT: Is 9:30 too early. Do you all  
7 need to start later?

8 MR. BLUME: I think 9:30 is fine.

9 THE COURT: Very good. We'll get cranking  
10 at 9:30; 9:30 sharp. We'll stand at ease until  
11 then.

12 - End of Day -

13 Tuesday, January 24, 2012

14 (The defendant, along with counsel, was  
15 personally present in the courtroom.)

16 THE COURT: Anything from the applicant  
17 before we begin this morning?

18 MR. BLUME: No, sir, Your Honor. We're  
19 ready to proceed.

20 THE COURT: Anything from the State?

21 MR. SIMON: Nothing, Your Honor.

22 THE COURT: Very good. Mr. Blume, you're  
23 recognized, Mr. Luminack.

24 MR. BLUME: Thank you.

25 MR. LUMINACK: I guess we're waiting for

1 Mr. Stone.

2 THE COURT: Okay, very good: We'll wait  
3 until he gets in. I assumed he would already be  
4 here. Here he comes.

5 MR. ZELENKA: Judge, I need to step out a  
6 minute, but Mr. Simon is here.

7 THE COURT: Very good.

8 MR. LUMINACK: Your Honor, again, we'd  
9 request that his hands be free like yesterday.

10 THE COURT: Let me speak with security, if  
11 I could, just for a moment.

12 MR. LUMINACK: Thank you, Your Honor.

13 THE COURT: Very good. Mr. Luminack,  
14 you're recognized.

15 MR. LUMINACK: The applicant calls Joseph  
16 Savitz to the stand.

17 CLERK OF COURT: State your name, please.

18 MR. SAVITZ: My name is Joseph L. Savitz  
19 III.

20 (The witness was sworn.)

21 THE COURT: Mr. Savitz, if you could have  
22 a seat in the witness chair. I'm going to ask you  
23 to pull up real close to that microphone. Speak  
24 loudly, clearly, and slowly in order that we can  
25 hear everything that you've got to say. And let's

1 start with your full name again.

2 MR. SAVITZ: Okay. My name is Joseph L.  
3 Savitz -- S-A-V-I-T-Z- III.

4 THE COURT: Thank you, Mr. Savitz.

5 Mr. Luminack, you're recognized.

6 MR. LUMINACK: Thank you, Your Honor.

7 JOSEPH L. SAVITZ, III, having first  
8 been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. LUMINACK:

11 Q Good morning, Mr. Savitz.

12 A Good morning.

13 Q I almost hate to ask this, but where are  
14 you working right now?

15 A I'm not working anywhere right now.

16 Q Are you retired?

17 A Yes, I am.

18 Q Before retiring, where did you work?

19 A I worked at the Office of Appellate  
20 Defense from January of 1985 until January of last  
21 year.

22 Q So well over 20 years?

23 A Twenty-six years.

24 Q Okay. And were you ever the head of the  
25 Appellate Defender Office?

1           A    Yes, I was.  It's a pretty good little  
2 while.

3           Q    Do you remember how long?

4           A    Probably about a decade.  Seems like  
5 longer than that, but probably about a decade.

6           Q    And if you could, just briefly describe  
7 the nature of your work at ADO.

8           A    Appellate Defense is a state agency, and  
9 we handle most of the indigent criminal appeals in  
10 the state, direct appeals and PCR appeals.  What I  
11 handled while I was there was murder direct appeals,  
12 capitol and non-capitol basically.

13          Q    All right.  And did you actually handle  
14 Mr. Stone's direct appeal from his resentencing  
15 trial?

16          A    Yes, I did.

17          Q    And have you had a chance to review the  
18 brief you filed in that case?

19          A    Yes, I have.

20          Q    As well as the State Supreme Court  
21 opinion?

22          A    Yes.

23          Q    Do you recall how many claims you raised?

24          A    I raised a single issue.

25          Q    And if you could, tell the Court what that

1 claim involved.

2 A What the issue involved, the victim's  
3 widow testified that when the Supreme Court reversed  
4 Bobby's first death sentence that she had attempted  
5 suicide. There was an objection to that, and that's  
6 the issue I raised on direct appeal.

7 Q And did you believe that that testimony  
8 was inadmissible?

9 A Yes, I still believe that.

10 Q And that's why you raised it?

11 A That's right.

12 Q And do you recall what the objection below  
13 was?

14 A I think that they objected that it was not  
15 strictly victim impact evidence and that it was not  
16 the result of the incident itself but the result of  
17 the opinion coming out.

18 Q And do you recall what the Supreme Court  
19 said about your claim on direct appeal?

20 A My claim was a little bit broader than  
21 that, I think, that I said that it was not  
22 admissible under any circumstance, as victim impact  
23 or as anything, that it was -- and the Court said  
24 that because I had argued not strictly what defense  
25 counsel, trial counsel, had argued, that it was

1 procedurally barred from the direct appeal.

2 Q And did you have any reason -- any  
3 strategic reason -- for raising the claim in a  
4 manner that the Supreme Court ultimately found was  
5 barred?

6 A No. I mean, I thought we were going to  
7 win. I mean, I had a strategic reason in raising it  
8 to win. But I did not say, "I'm going to raise this  
9 so that it will be procedurally barred and we will  
10 lose." No, I did not do that.

11 Q All right.

12 MR. LUMINACK: Court's indulgence.

13 Nothing further.

14 Thank you, Mr. Savitz.

15 MR. SAVITZ: Thank you.

16 THE COURT: Cross-examination, Mr. Simon.

17 CROSS-EXAMINATION

18 BY MR. SIMON:

19 Q Good morning, Mr. Savitz.

20 A Good morning to you.

21 Q How are you doing?

22 A I'm doing well, thank you.

23 Q In your time at Appellate Defense, how  
24 many capitol cases did you draft briefs for?

25 A I'll be honest with you. I was there 26

1 years, and I started doing them the first year I was  
2 there. By the time I left, I was doing probably  
3 four a year. So I really lost count. I did half of  
4 the capitol appeals while I was there, and I was  
5 there for 26 years. So, I mean, it was a lot of  
6 them.

7 Q And one of the briefs you worked on, you  
8 worked on Mr. Stone's first direct appeal, correct?

9 A Bobby was one of the first clients I had  
10 on a non-capitol housebreaking or burglary or  
11 something, and I did that. I did his first capitol  
12 trial, which we won the sentencing, and then I did  
13 the second.

14 Q Okay. Going to the issue that you raised.

15 A Uh-huh.

16 Q When you raised it, did you believe it was  
17 preserved?

18 A Yes, I did. I did. I thought it was  
19 preserved.

20 Q And why did you raise that issue as  
21 opposed to the exact same reason that was raised by  
22 counsel?

23 A I thought that what they had raised, that  
24 the ground advanced for the admissibility of the  
25 testimony was it was victim impact evidence. They

1 argued in response that no, it's not really victim  
2 impact evidence because it's not a result of the  
3 murder itself.

4 And I argued that not only was it not  
5 admissible for that reason but that it just wasn't  
6 admissible at all.. There wasn't any basis under  
7 which -- and it really isn't victim impact. It's a  
8 Supreme Court impact.

9 Their opinion came out, and that was the  
10 reason she said that she attempted suicide. My  
11 argument was that that testimony wasn't admissible  
12 under any basis, that it was totally inadmissible.  
13 And to be honest with you, I don't know why they  
14 didn't reverse this death sentence.

15 If it was because I was ineffective, then  
16 I was ineffective, if it was because trial counsel  
17 was ineffective or both of us. But I thought the  
18 issue was good. I still think the issue is good,  
19 and I still think that they should have reversed on  
20 it.

21 Q And talking about the issue that you did  
22 raise, essentially you argued that the statement  
23 constituted an arbitrary factor, correct?

24 A That's right. It did two things. It told  
25 the jury that whatever sentence that -- it told the

1 jury if they gave the death sentence, it would be  
2 reviewed by the Supreme Court and possibly reversed,  
3 which kind of takes them off the hook.

4 It also said, "If you give him a life  
5 sentence, I'm going to commit suicide," or "there's  
6 a possibility I will commit suicide." There were  
7 really two aspects to it. And I thought it was a  
8 terrible utterance, horribly prejudicial at the  
9 time, and I still think it was, you know, fairly  
10 prejudicial to the case.

11 Q Okay. Do you recall if there were any --  
12 there were no arguments during closing argument by  
13 the Solicitor regarding the statement, were there?

14 A I do not remember.

15 Q And you're familiar with Caldwell v.  
16 Mississippi?

17 A Yes.

18 Q Did you believe this case was similar to  
19 Caldwell v. Mississippi?

20 A I thought there were certain aspects of  
21 that, I guess. To me, the testimony was bad in so  
22 many different ways. I mean, if you read the brief,  
23 it's not just like one issue. I mean, it's not just  
24 one problem with it. There are several problems  
25 with it. And, you know, I thought it was some of

1 the worst possible testimony that I could imagine,  
2 that I certainly encountered in the time that I was  
3 at Appellate Defense.

4 I mean, for a jury to hear that "If you  
5 give this guy a life sentence, there's a good chance  
6 I'll try to kill myself. If you give him a life  
7 sentence, don't worry about it. It'll be reviewed,"  
8 I can't imagine anything much more prejudicial than  
9 that or inadmissible.

10 Q But the statement itself didn't actually  
11 say that the sentence would be reviewed, did it?

12 A Yes. It told them that the jury -- it  
13 told them that the sentence had been reviewed and  
14 had been reversed previously, which any intelligent  
15 juror would say, "Hey, they're going to review this  
16 again," which is A.

17 B was like "The last time they reviewed it  
18 and they reversed it, I tried to kill myself."  
19 Well, what that tells the jury is "If you give this  
20 guy a life sentence, there's a good chance I'll try  
21 to kill myself again."

22 So if I were on that jury, the option  
23 would only be to sentence him to death, knowing that  
24 you would probably prevent a victim's widow from  
25 killing herself and that the Supreme Court would

1 review it to make sure that you had done the right  
2 thing. It gave the jury really only one choice to  
3 make, and that's why I thought it was so bad.

4 MR. SIMON: Beg the Court's indulgence for  
5 a second. No further questions, Your Honor.

6 THE COURT: Any redirect?

7 MR. BLUME: No, Your Honor. We'd ask that  
8 Mr. Savitz be excused.

9 THE COURT: Mr. Savitz, you're free to  
10 leave. You're welcome to stay if you'd like.

11 MR. SAVITZ: Thank you. I'm out of here.

12 THE COURT: Very good.

13 All right, Mr. Blume, you're recognized.

14 MR. BLUME: Yes, we would call Wayne Hill.

15 THE COURT: Yes, sir, please come forward.

16 CLERK OF COURT: State your name, please.

17 MR. HILL: Wayne N. Hill, Sr.

18 (The witness was sworn.)

19 THE COURT: Pull up real close to that  
20 microphone. Speak loudly, clearly, and slowly in  
21 order that we can hear everything that you've got to  
22 say, and have a seat.

23 MR. HILL: Yes, sir, Your Honor.

24 THE COURT: Let's start with your full  
25 name, once again.

1                   MR. HILL: Yes, sir. My name is Wayne --  
2                   W-A-Y-N-E -- N for initial Hill -- H-I-L-L -- Sr.  
3                   And if I could, I'd like to advise the Court and  
4                   counsel that I do have a hearing loss. I lost my  
5                   hearing aid, so I may have to ask you to speak up or  
6                   to come closer, with the Court's indulgence.

7                   THE COURT: Mr. Blume speaks real loud.  
8                   And if he doesn't, let me know and we'll tell him to  
9                   speak up.

10                  All right, Mr. Blume.

11                  MR. HILL: Thank you.

12                  THE COURT: Can you hear me?

13                  MR. HILL: Yes, sir.

14                  THE COURT: Very good.

15                  All right, Mr. Blume, you're recognized.

16                                   DIRECT EXAMINATION

17                  BY MR. BLUME:

18                  Q     Mr. Hill, what is your current occupation?

19                  A     I'm a consulting forensic examiner.

20                  Q     And what is your educational background?

21                  A     Pardon me?

22                  Q     What's your educational background in this  
23                  regard?

24                  A     I have a two-year degree in police  
25                  science. I have had ELT-approved emergency medical

1 technician/ambulance training. And on the informal  
2 side as an EMT working in the ambulance for two  
3 years, I received informal training from  
4 radiologists when I would bring victims of violent  
5 contact, car wrecks, etc., in, and they would show  
6 me how to read an x-ray for injuries like broken  
7 bones or hematomas, large blood deposits in tissue,  
8 some simple things like that. I can't read an x-ray  
9 for tuberculosis or cancer, but a fractured bone and  
10 major bodily injury, that I can tell.

11 Q And formal training in firearms?

12 A Yes, sir. I took the distance training  
13 course from North American School of Firearms on  
14 firearms manufacture, customization and munitions  
15 manufacturing, customization, marketing, and  
16 teaching people gun safety.

17 Q And have you been approved by any  
18 organizations with regard to teach in this regard,  
19 instruction in the area of firearms and how  
20 [inaudible].

21 A Yes, sir. For about a three-year period,  
22 I was approved by the Massachusetts Department of  
23 Education as a distance training instructor in  
24 forensic sciences and crime scene photography,  
25 specifically homicide events reconstruction

1 sciences, which I wrote the course book for.

2 In Iowa, I was approved as a firearms  
3 safety instructor, that being the course mandated by  
4 the state before you could get a professional carry  
5 permit as an armored car driver, security guard,  
6 etc.

7 Q And have you ever been a police officer?

8 A Yes, sir. I spent 14 years in law  
9 enforcement, ranging from dispatcher to chief in a  
10 very small department.

11 Q And could you describe your experience in  
12 the area of homicide reconstruction?

13 A As reconstructing homicides, I have been  
14 retained since 1989 and formally retained in 2007  
15 cases. I've been requested to testify regarding my  
16 findings in 41 of those cases, spread between two  
17 Federal District Courts, one in Minnesota, the  
18 southern district of Illinois, and 20 states,  
19 including the state of South Carolina, and before  
20 the Joint Philippine Senate Committees of Human  
21 Rights and Civil Defense.

22 Q And you mentioned South Carolina. Have  
23 you been qualified as an expert in homicide events  
24 reconstruction and firearms in South Carolina?

25 A Yes, sir. I've even been qualified as a

1 homicide events reconstruction expert or a firearms  
2 expert, either one. I would clarify that counsel  
3 will probably be most familiar with the term  
4 "homicide events reconstruction" as crime scene  
5 reconstruction.

6 I use the "homicide reconstruction" title  
7 because I try to restrict my practice to homicides  
8 or what could have been a homicide rather than the  
9 typical barroom brawl.

10 Q So you have been qualified in South  
11 Carolina in this area?

12 A Yes, sir, six times -- Bamberg County,  
13 Lexington County, Greenville County, and three times  
14 in Spartanburg County.

15 Q And in addition to your expertise in  
16 providing expert testimony in the courts in the  
17 United States, have you provided any expert  
18 assistance to any foreign governments?

19 A I was invited to testify before the  
20 Philippine Senate regarding a questionable death of  
21 a Philippine Navy ensign aboard ship, which had been  
22 classified for two years as a suicide. I had  
23 already submitted an 11-page affidavit to my  
24 findings.

25 I had been contacted by the family and

1 asked to assist. They didn't believe it was a  
2 suicide, and I looked at it to see if I could help  
3 them accept that. When I looked at the crime scene  
4 photographs and the autopsy, I found out that no,  
5 this was not a suicide.

6 It was a staged scene. And I sent them an  
7 11-page affidavit submitted to the Senate hearings.  
8 They invited me to come testify before them, and I  
9 did in 1997. They declared it to be a murder and a  
10 naval cover-up.

11 And January 11th of this year, six  
12 command-level naval officers and four senior  
13 enlisted were charged with non-bailable murder in  
14 the Philippines based on my testimony and others.

15 MR. BLUME: Your Honor, at this point I  
16 would offer Mr. Hill as an expert in homicide events  
17 reconstruction and firearms.

18 THE COURT: Any query with regard to his  
19 qualifications from the State?

20 MR. SIMON: Just one thing, Your Honor.

21 VOIR DIRE

22 BY MR. SIMON:

23 Q In terms of your homicide reconstruction  
24 expert or I guess training, what training did you  
25 have?

1           A     In 14 years in college, my major was  
2 police science. I was taught crime scene  
3 investigation and looking to see what evidence was,  
4 what evidence you would expect from certain violent  
5 actions such as prying a window open with a tool or  
6 breaking in; violent contacts, what kind of evidence  
7 you would expect to find, in what form, and then how  
8 to process it.

9                     As an EMT, again, I was taught what  
10 happens with the body and other objects in a violent  
11 crash, the physics involved, the human anatomy and  
12 function involved. As a trained firearms  
13 manufacturer or gunsmith, I've learned about the  
14 function of firearms on my own.

15                    I've self-studied dispersal patterns of  
16 powder when it's fired, various types of powder and  
17 distances, different bullet shapes, how they reacted  
18 in clay or dirt or gel or fired through metal like a  
19 car panel, etc., my own research. I was also  
20 approved to teach police officers empty-handed  
21 defensive tactics right up to lethal empty-handed  
22 tactics, no weapons used.

23                    That all combined, and in 1989 an attorney  
24 contacted me to see if I could tell him what  
25 happened in a shooting. And the evidence spoke --

1 you know, showed me what happened.

2 I related it, and I've been being retained  
3 since then. The courts have found me qualified, and  
4 police agencies have contacted me and asked my  
5 opinion on things, like I said, 207 times.

6 Q Just so I understand, for the most part,  
7 outside of your period in school and your time as an  
8 EMT, the rest is pretty much self-taught?

9 A I believe what you're asking me is do I  
10 have a specific four-year college degree in this --  
11 no.

12 Q What about training with any organizations  
13 that deal with homicide reconstruction?

14 A I am a member of the American Board of  
15 Forensic Examiners, the American College of Forensic  
16 Examiners. They accepted the title I gave what I do  
17 as a specific specialty.

18 Q But have you taken any courses in that?

19 A No. I've worked hard at this, but no.

20 Q And on the firearms side, have you taken  
21 any courses in regards to firearms examination?

22 A Firearms -- what was the last word?

23 Q Firearms education or examination.

24 A Okay, I'm familiar -- I have read works on  
25 tool-mark examination. I'm familiar with it. I do

1 not come into a courtroom and say that I do that,  
2 because I'm not comfortable with my own level of  
3 expertise on a tool-mark identification of a bullet.  
4 I don't do that.

5 I talk about what happened when a bullet  
6 went into somebody or hit something. As far as it  
7 came out of that gun, I accept the State's review  
8 unless there's something glaringly obvious.

9 Q While you worked at the police department,  
10 did you have any training with regards to homicide  
11 reconstruction?

12 A Again, it was basically crime scene  
13 processing, so you're learning how evidence is  
14 created and what to look for.

15 Q But you didn't take any courses while you  
16 were with the police department regarding that?

17 A Again, the academy -- the Police Academy  
18 taught you, again, what particular -- if I punch you  
19 in the nose, what kind of evidence I would expect to  
20 find at the scene and how to look for it, how to  
21 process it, collect, so the lab can properly handle  
22 it, the basic start.

23 Q I guess what I want to know is, after the  
24 academy, you didn't do any further training in that  
25 regard?

1           A     I have not had specific training in --  
2     there's no formal course for my field, put it that  
3     way.

4           Q     And what about training after you left the  
5     police department?

6           A     It's all been practical experience, other  
7     than defensive tactics.

8           MR. SIMON: No further questions, Your  
9     Honor.

10          THE COURT: All right. He has tendered  
11     him as an expert in homicide events reconstructions  
12     and as a firearms expert. Do you object?

13          MR. SIMON: Yes, Your Honor.

14          THE COURT: Okay, on what grounds?

15          MR. SIMON: On the grounds that basically,  
16     in terms of homicide reconstruction and in firearms,  
17     based on his testimony he appears to be more self-  
18     taught than --

19          THE COURT: What law would you rely upon  
20     that says that an expert can't rely on personal  
21     experience?

22          MR. SIMON: Actually, Your Honor, I'm  
23     going to withdraw my objection on that.

24          THE COURT: Okay. Well, that sounds good.  
25     All right, very good. He is indeed qualified as an

1 expert in homicide events reconstructions and  
2 firearms.

3 MR. BLUME: Thank you.

4 THE COURT: He'll be allowed to render his  
5 opinions in these areas.

6 Mr. Blume, you're recognized.

7 MR. BLUME: Thank you.

8 EXAMINATION CONTINUED

9 BY MR. BLUME:

10 Q Mr. Hill, what materials did you review in  
11 Mr. Stone's case?

12 A To the best of my recollection, I reviewed  
13 prior trial transcripts, the trial transcript  
14 testimony of I believe -- good time for a mental  
15 block -- the defendant, the trial transcripts of Lt.  
16 Parnell's testimony and other law enforcement  
17 officers' testimony regarding their actions at the  
18 scene.

19 I read the crime lab reports regarding  
20 evidence recovered from the scene. I reviewed the  
21 State's crime scene photographs. I reviewed autopsy  
22 photographs, I believe, as well as the autopsy  
23 reports. I've been out to the actual shooting scene  
24 yesterday to correlate it in an overview -- actual  
25 overview compared to the finite photographs I saw.

1           Q     And did you also review Mr. Stone's  
2 statement to law enforcement?

3           A     Yes, sir. That would be part of what I  
4 talked about, the police reports.

5           Q     And did you also examine or look at the  
6 weapon in this case?

7           A     Yes, sir, I looked at it yesterday.

8           Q     So, Mr. Hill --

9           A     And the screen door.

10          Q     Right. And the other trial exhibits --

11          A     Yes.

12          Q     -- photographs? Now, do you believe that  
13 based upon the materials that you reviewed, your  
14 visit to the crime scene, and your examination of  
15 the exhibits that you have enough information to  
16 offer opinions in this case?

17          A     Yes, sir, I do.

18          Q     So, Mr. Hill, let me start out and ask  
19 you, what is trigger pull?

20          A     Trigger pull is quite simply the physics  
21 involved. When a gun is cocked, particularly this  
22 type of gun -- it's called a single-action only --  
23 every time the slide comes back and pulls out the  
24 fired cartridge, and ejects it, and picks a new  
25 round up from the magazine and loads it in the

1 chamber, it also resets the hammer and trigger  
2 sears.

3 The hammer sear sits on top of the trigger  
4 sear, and to drop that hammer and fire that weapon,  
5 you've got to move the trigger sear, which is at the  
6 top of the trigger assembly, out from under that  
7 hammer, and it falls under a spring pressure.

8 So what's required is to overcome the  
9 friction between the two as a result of spring  
10 pressure, you have to move the trigger back. We  
11 measure that in pounds or ounces as to how much  
12 pressure you have to put like this on the trigger to  
13 move it out from under that sear.

14 Q And in this case, based upon the analysis  
15 that was done by the South Carolina Law Enforcement  
16 Division, what was the trigger pull of the weapon  
17 that according to their testimony fired the  
18 projectile that took Sgt. Kubala's life?

19 A The South Carolina Law Enforcement  
20 Division firearms section identified that as a  
21 one-and-a-half-pound trigger pull.

22 Q One point five pounds?

23 A One point five pound trigger pull, yes.

24 Q And on this particular weapon,  
25 approximately how far would you have to move the

1       move the trigger with 1.5 pounds of pressure for the  
2       gun to discharge?

3             A     I haven't specifically measured this one,  
4       but based on past experience -- because several  
5       years somebody brought up the question about how far  
6       you have to move the trigger as opposed to just the  
7       pressure you have to put on it.

8             And I began measuring trigger pulls. I  
9       find that on average a single-action trigger will  
10      take about five-hundredths of an inch of movement  
11      before it releases the sears.

12            Q     Five one-hundredths of an inch?

13            A     Five one-hundredths of an inch, yes, .05.

14            Q     One point five pounds of pressure as  
15      opposed to five one-hundredths of an inch?

16            A     Yes.

17            Q     And given that, how would you describe the  
18      amount of movement required to fire the gun in  
19      question?

20            A     Minimal.

21            Q     What is the trigger pull on a typical gun  
22      used by, for example, law enforcement?

23            A     When you're a gunsmith, you generally  
24      would set a duty trigger, particularly single  
25      action, at least three and a half, preferably four

1 and a half, five pounds.

2 Q And why is that?

3 A Because a law enforcement officer is going  
4 to be pointing his gun at somebody sometime in his  
5 career. If you have the trigger pull too light, and  
6 we have historic cases involving that, he can be  
7 startled, he can trip or stumble, somebody can fall  
8 into him and cause him to reflexively squeeze that  
9 gun, or jerk, or twitch.

10 And if you have too light a trigger, it's  
11 going to go bang. And we've got historic cases of  
12 police officers who said, "I didn't intend to shoot  
13 the guy. I stumbled as we were walking," etc.

14 In my law enforcement career, I was in the  
15 transition period where you were told, "Quit cocking  
16 the gun under any circumstances. Shoot it double  
17 action only."

18 Q And what's the difference between double  
19 action and single action?

20 A With a double-action firearm -- I'll use a  
21 revolver first, because that's what we transitioned  
22 from -- you can either cock the hammer back -- the  
23 term describes the trigger's function. Single  
24 action, you cock the hammer, not the trigger, and  
25 all you're doing is releasing the hammer with the

1 trigger, a single action.

2 In a double action, you're starting from  
3 scratch. The hammer is down, and you pull the  
4 trigger back, and it lifts the hammer up in the  
5 cocked position and then releases it, two actions,  
6 double action. That takes, generally speaking,  
7 double action trigger will travel a half an inch  
8 before it's cocked the hammer and ready to drop it.

9 I just tested a gun the other day. It had  
10 a .45 -- four five-hundredths of an inch, five  
11 hundredths short of a half inch -- of trigger travel  
12 to cock the hammer and then drop it.

13 I have had situations myself with a  
14 double-action revolver where I've had the trigger  
15 pulled halfway back when the person in front of me  
16 stopped doing what had me pulling that trigger back,  
17 and I got to say, "Ooh, okay," and let that trigger  
18 back forward without firing a shot. Had it been  
19 single action, he would have had a bullet hole in  
20 him.

21 Q And in your opinion and based upon your  
22 experience with firearms, do you consider 1.5 pounds  
23 to be an unsafe trigger pull?

24 A I'm going to have to qualify that, because  
25 we're talking situations. In a person's hand on the

1 street, in a law enforcement officer's hand on the  
2 street, absolutely. In a target shooter's hand on  
3 the range at a target, no, that would be an Olympic  
4 target trigger. In fact, that would be kind of a  
5 heavy Olympic target trigger.

6 Q With a trigger pull this light, is there  
7 an increased likelihood of an unintentional  
8 discharge in a firearm?

9 A Yes.

10 Q And, again, can you explain why that's  
11 true?

12 A Pardon me?

13 Q Can you explain why that's true?

14 A You have a very light weight -- I haven't  
15 tested it yet, but I might get an answer. But I  
16 would suspect at this point that it takes more  
17 pressure on your fingertip to punch through the side  
18 of an eggshell than it does to move that trigger at  
19 a pound and a half.

20 And when you add in it only has to go  
21 five-hundredths of an inch, if you take that weapon  
22 itself when it's empty and jack the slide back and  
23 put your finger on the trigger, if you're not paying  
24 attention, you could set it off before you intended  
25 to. If somebody come up behind you and startled

1 you, you could set it off.

2 Q And did you personally handle the gun at  
3 issue in this case?

4 A Yes.

5 Q And based upon not only the SLED testimony  
6 but your handling the weapon, is this a very easy  
7 gun to fire?

8 A Let me try to put it this way. If you  
9 were holding the weapon in your hand down at your  
10 side, and for some reason you extended these three  
11 fingers so that the gun itself rested on your  
12 trigger finger, it would fire. The weight of the  
13 gun would be sufficient to push that trigger down  
14 against your finger hard enough to fire it.

15 Q Mr. Hill, did you -- before taking the  
16 stand today, did you make sure that the gun in  
17 question, the safety was on?

18 A Yes, it is. There's no magazine to get  
19 ammunition out of. The chamber is empty. There's  
20 nothing stuck on the front of the slide, and the  
21 safety is on.

22 MR. BLUME: Your Honor, I would ask  
23 permission to show him the gun. He's examined it.  
24 There's nothing in there. The gun is no risk, and  
25 he's examined it.

1 THE COURT: All right. Is he going to be  
2 shooting it?

3 MR. BLUME: He's not going to shoot it.

4 THE COURT: He's not going to pull the  
5 trigger. You're just going to show it to him?

6 MR. BLUME: Well, actually, I was going to  
7 ask him --

8 THE COURT: Ask him to point at that wall  
9 over there, if he does.

10 Let's make sure that the barrel is going  
11 to be pointed over there.

12 MR. HILL: Actually, if you don't mind, I  
13 will double-check it.

14 THE COURT: Very good.

15 A: Now, to check this, we'd normally take and  
16 pull the slide back thusly, look into the chamber,  
17 and then as I've learned from experience, look back  
18 at the pull face of this bullet. You can have the  
19 bullet held here so that when you pull it back this  
20 way, you don't see it. You put it right back in the  
21 chamber. This is empty, and the safety is back on.

22 Q: Okay. Can you remove the safety?

23 A: Yes.

24 Q: And then you're pointing it this way. Can  
25 you pull the trigger?

1 (Whereupon, the witness pulled the  
2 trigger.)

3 MR. BLUME: Your Honor, I would ask --  
4 again, I'm doing it. I would ask that you do this.

5 THE COURT: No.

6 MR. BLUME: For demonstrative purposes,  
7 just to get an example of what we're talking about  
8 here of how easy it is to pull this trigger.

9 MR. HILL: May I approach?

10 THE COURT: Certainly.

11 MR. HILL: And it's ready to squeeze the  
12 trigger.

13 (Whereupon, the Court pulled the trigger.)

14 Q Mr. Hill, if you'd put the safety back on,  
15 I can return the gun.

16 A It is.

17 Q Now, Mr. Hill, in the demonstrations or  
18 pull that you did, the trigger only fired once?

19 A That's correct.

20 Q If there were a magazine -- if the gun  
21 were loaded, would that be true? If the gun were  
22 loaded -- in other words, once you fire, what  
23 happens?

24 A In that particular weapon where I used a  
25 single-action semiautomatic, the gun doesn't do

1 anything until you put the magazine in which holds  
2 the cartridges that will fire from the weapon.

3 If you just insert the magazine, nothing  
4 still happens. You have to first pull the slide  
5 back, as we saw. That takes the cartridge -- when  
6 it comes back forward, it picks the cartridge up out  
7 of the magazine, slides it in the chamber, and cocks  
8 the hammer -- internal hammer -- on that gun.

9 To fire the weapon, you pull the trigger,  
10 as we discussed. You heard the firing pin be  
11 released and strike forward on the edge of the  
12 chamber. Were a cartridge in there, that would fire  
13 the cartridge. The recoil force of the cartridge  
14 would then cycle that slide back on its own.

15 You wouldn't have to pull it. It would  
16 ejected the fired casing, come forward, picking up  
17 another cartridge, loading it in the chamber, and  
18 recocking the hammer so all you had to do is pull  
19 the trigger. That's why it's called semiautomatic.  
20 It automatically reloads, but it doesn't  
21 automatically fire.

22 Q And how long does that process take?

23 A When you take it step by step, it sounds  
24 like a substantial process. But if you were  
25 watching that slide, you'd probably barely perceive

1 -- be able to perceive its movement.

2 The best way to give you an example, the  
3 average shooter -- and I have timed this myself.  
4 Research studies have been done. I've confirmed  
5 that research with my own. The average shooter,  
6 even a non-practiced shooter, can fire six rounds  
7 per second with a semiautomatic pistol.

8 Q So that's how fast it would be --

9 A That's two-tenths of a second between  
10 shots, and that's from your reaction. The gun is  
11 ready to go before that.

12 Q Now, based upon your experience in law  
13 enforcement and your experience in this area, is the  
14 chance of an unintentional discharge greater or  
15 lower if the person handling the gun is intoxicated?

16 A The easiest answer for that is I know of  
17 only one police department --

18 MR. SIMON: Objection, Your Honor,  
19 speculation.

20 THE COURT: What do you have to say about  
21 that, Mr. Blume, about his -- is he qualified to --

22 MR. BLUME: I believe that his answer will  
23 be based upon experience he has had with people that  
24 are intoxicated with firearms, which I don't believe  
25 makes it at least susceptible to a speculation

1 objection.

2 A It would also be based upon --

3 Q I think you should wait, Mr. Hill.

4 THE COURT: You might want to lay the  
5 proper foundation. Has he done any tests with  
6 regard to intoxicated shooters? It seems to be a  
7 dangerous endeavor, but go ahead.

8 Q Do you have any experience in the area of  
9 dealing with people who are intoxicated with  
10 weapons?

11 A Yes, sir, I do, and I --

12 Q And can you tell us what that experience  
13 is?

14 A Pardon?

15 Q What is that experience?

16 A That's what I was about to say. I've been  
17 around people that have been intoxicated and around  
18 firearms. I've also -- the departments I've worked  
19 on have had policies about you being intoxicated as  
20 a police officer with your firearm or on duty.

21 And also I'm a member of the NRA and  
22 familiar with their absolute stance on any --  
23 they're big on gun safety -- their stance on whether  
24 you should have alcohol and a firearm on the range  
25 at the same time, as well as policies known

1 generally amongst police departments on that.

2 Q And why do police departments have those  
3 policies?

4 A Mostly, because of liability lawyers,  
5 because if you go out and you're intoxicated and  
6 your judgment's impaired, go ahead and shoot  
7 somebody, you're going to be in big trouble.

8 Q But why is there a danger according to  
9 these matters of having someone with a loaded weapon  
10 while intoxicated?

11 A You're physically impaired. And we need  
12 to remember that back in the Wild West days, alcohol  
13 was the anesthetic before you had any major surgery.  
14 It tends to deaden your sensations.

15 So if you've got a pound-and-a-half  
16 trigger and you can't feel a pound and a half with  
17 your finger, or you can't concentrate enough on two  
18 objects at the same time, which is actually how the  
19 field sobriety testing was first thought up and  
20 tested -- an intoxicated person cannot focus on two  
21 things at the same time such as standing up steady  
22 and listening to your instructions.

23 So now if he's got his finger on a  
24 pound-and-a-half trigger and you're talking to him,  
25 he's either paying attention to the trigger, or he's

1 paying attention to you. That's dangerous. NRA,  
2 same thing.

3 If you've had alcohol, do not go to the  
4 range, do not handle your weapons, don't clean them,  
5 leave them alone, for the same reason. Distraction,  
6 your disability under the influence of alcohol, and  
7 the drunker you get, the worse it is.

8 Q Have you, yourself, seen instances where  
9 people who were startled unintentionally fired  
10 weapons? Are you familiar with situations where  
11 people would be startled and unintentionally fire a  
12 weapon?

13 A If you've been a target shooter, if you've  
14 been a regular handler of firearms, if you haven't  
15 had an accidental discharge, you're going to have  
16 one someday. Hopefully, that's why I would also  
17 teach you don't point a gun at anything you don't  
18 intend to shoot.

19 I've been at the range on target practice  
20 and been going to fire a shot and been doing the  
21 double-action trigger slowly, and it went off before  
22 I expected to. And that startled me, and I actually  
23 went kabam.

24 And you get real mad when you do that.  
25 You're supposed to know better than that, and it

1 still embarrasses you because other people are  
2 looking at you. You goofed up, and somebody down  
3 the line does it.

4 Q And based upon your research and your  
5 expertise, are you familiar with situations where  
6 even trained police officers have been startled and  
7 unintentionally fired their weapons?

8 A As I mentioned earlier, you've got  
9 historic civil cases, wrongful death, police  
10 investigation because somebody had a suspect at  
11 gunpoint at the time, and they had cocked their gun  
12 and literally had stumbled on a curb or stepped on  
13 something slick, or somebody come up and slapped  
14 them on the back and startled them somehow, boom.

15 And the guy hit him with a shot when he  
16 shouldn't have been shot, unintentionally, and it  
17 was a big mess. That's actually why they changed  
18 the training to don't care what the situation is,  
19 you never cock that hammer back, to emphasize you  
20 mean business.

21 Q And, Mr. Hill, in your experience and  
22 research, can a person fire a weapon -- a weapon  
23 like this -- multiple times unintentionally?

24 A It's possible.

25 Q And how would that happen?

1           A     And right now, you're talking about an  
2     unimpaired person, correct?

3           Q     Yes.

4           A     Because there's a difference. Yes, it's  
5     possible. The more you impair a person's  
6     perceptual ability, the more his mistakes can  
7     stumble over themselves, so to speak.

8                     I was explaining when you're intoxicated -  
9     - I found this every time I arrested somebody for  
10    DUI and they wanted to resist -- they were usually,  
11    as I put it, about three steps behind me. I'd start  
12    to put their arm behind their back, and before they  
13    figured out I was putting their arm behind their  
14    back, I had applied the cuffs.

15                    Their thought processes are slower. So if  
16    something startles them, they're trying to figure  
17    out what startled, and they're still not paying  
18    attention. And it just kind of snowballs.

19           Q     So, Mr. Hill, now that we know some  
20    background, I want to move more directly to the  
21    issues in this case. I want to show you what was  
22    part of the trial exhibit numbers.

23                    Your Honor, these were introduced at  
24    trial. Rather than separately marking them, I think  
25    it would just be easier to use exhibit numbers from

1 the trial itself.

2 THE COURT: Very good.

3 Q So I'm going to show you what was entered  
4 as State's Exhibit --

5 A Twenty-nine?

6 Q -- Twenty-Nine, State's Exhibit  
7 Twenty-Two, State's Exhibit Nine, State's Exhibit  
8 Sixteen, and State's Exhibit Seven. Are you  
9 familiar with these photographs?

10 A Yes, sir. These appear to be photographs  
11 that I reviewed earlier during my examination of the  
12 case to start with.

13 Q And based upon these photographs, for  
14 example -- and after you look at it, if you could  
15 show it to Your Honor -- State's Exhibit Nine and  
16 State's Exhibit Twenty-Two, are these photographs of  
17 the porch that Mr. Stone was on at the time the  
18 weapon was fired?

19 A Yes. Photograph State's Exhibit Nine and  
20 photograph State's Exhibit Twenty-Two appear to be,  
21 as I would put it, 90-degree views -- straight-on  
22 views  
23 -- of the back of that house with the porch, what  
24 was purported to be the porch that the defendant was  
25 on beating on the door.

1           Q     And is State's Exhibit Seven the same  
2     thing?

3           A     That appears to be a view from the corner  
4     of the house to the other corner of the house,  
5     showing that porch on one end, on the left side, in  
6     State's Exhibit Seven.

7           Q     And so what he was standing on, according  
8     to the testimony at trial, was he was inside this  
9     porch?

10          A     I haven't seen that. Yes, in State's  
11     Exhibit Nine, the house is kind of a barn red color,  
12     and then the porch area in question where the  
13     defendant was alleged to be is a white painted part  
14     of the structure.

15          Q     And let me show you now State's Exhibit  
16     Twenty-Nine. And could you describe that as a  
17     close-up view of the screen door of the porch?

18          A     Yes. As you look at State's Exhibit Nine  
19     and you look at the white porch, this would be the  
20     left-hand side of that white square. And that  
21     contains the screen door entry to that particular  
22     box structure in State's Exhibit Twenty-Nine.

23          Q     Now, according to the witnesses' testimony  
24     at trial from Ruth Rippet [ph] and Landro Taylor,  
25     what was Mr. Stone doing on that porch?

1           A     He had entered the porch, and according to  
2     the occupants of the house's testimony, he was  
3     beating on what I would call the interior entry  
4     door. You'd go on the porch, and then you'd go in  
5     the house through that next door, what I call the  
6     interior entry door. He was beating on it, and they  
7     believed -- I believe they said he was trying to  
8     break it in.

9           Q     Okay. So he was facing the house beating  
10    on the door, the door facing the [inaudible].

11          A     Yes, the interior entry door would be  
12    looking straight at you from State's Nine as you're  
13    looking at that box, white box. If you could see  
14    through that, you'd be looking at the interior entry  
15    door.

16          Q     And according to the witnesses, they heard  
17    Sgt. Kubala say, "Halt," and then shots were  
18    immediately fired, is that correct?

19          A     That's my recollection of the testimony,  
20    yes.

21          Q     And did you also review Mr. Stone's  
22    statement to law enforcement?

23          A     Yes.

24          Q     And how did he describe what happened?

25          A     He said he was knocking on the door, as

1       though he was trying to get somebody's attention.  
2       And he heard something, and he turned. And there  
3       was a flash, and he ran out of the place and ran  
4       away.

5               Q       What he said is that he heard a sound, he  
6       turned toward the sound, and the gun went off?

7               A       Yes.

8               Q       And let me show you and ask you, have you  
9       personally looked at State's Exhibit Fifteen?

10              A       Yes, sir, I did, yesterday and today.

11              Q       And can you tell the Judge what State's  
12       Exhibit Fifteen is?

13              A       It's the exterior -- yes, and I believe  
14       it's Twenty-Nine. That is the screen door that's  
15       pictured in State's Exhibit Twenty-Nine, to the best  
16       of my knowledge.

17              Q       And according to the trial testimony that  
18       you reviewed, this is the area of the screen that  
19       the bullets went through that took Sgt. Kubala's  
20       life, is that correct?

21              A       Yes. The void area in the screening and  
22       the narrow band across the door structure that's  
23       there is where SLED identified, based on chemical  
24       testing the two bullets that passed through when  
25       they cut that section of the screen out for further

1 examination.

2 Q I believe it's this area below the wooden  
3 bar --

4 A Yes.

5 Q -- that the bullets passed through?

6 A You have two wooden cross-pieces across  
7 the door forming an oblong square just below the  
8 center -- vertical center -- of the door. And the  
9 area cut out by SLED is on the -- as you're facing  
10 the door with the door handle toward you, is on the  
11 far right-hand side in that little oblong square.

12 Q And how high is this off the ground?

13 A That was 32 and a half inches.

14 Q Thirty-two and a half inches. And do you  
15 recall from the evidence how tall Mr. Stone is?

16 A I believe approximately five-eight. I'm  
17 not positive on that.

18 Q Would five-five refresh your recollection  
19 if that's the testimony that he is?

20 A I would accept your statement, yes.

21 Q Now, Mr. Hill, is -- based upon what we  
22 know about this gun and the testimony on the gun and  
23 how easy it is to fire, the testimony based upon  
24 that, and based upon where these holes are in the  
25 screen -- now, just to be clear of the orientation,

1 this door leads to the outside to this porch, but  
2 it's elevated?

3 A That's correct. As you can see in State's  
4 Exhibit Nine, it's about -- I believe about four  
5 cinder blocks up from ground level. Or put another  
6 way, if you set that door on defense or prosecutor  
7 table, you'd have it more oriented to its height at  
8 the scene.

9 Q The trial testimony was the porch was  
10 approximately 36 inches above the ground?

11 A Yes.

12 Q So this door is on top of that, and Mr.  
13 Stone is standing on this porch?

14 A Correct.

15 Q So based upon the weapon and Mr. Stone's  
16 story that he turned toward the sound, and as he  
17 turned toward the sound, the gun went off, that he  
18 didn't intend to discharge it, and the physical  
19 evidence based upon the height, his shot is  
20 consistent with his story?

21 A Yes.

22 Q And why is that?

23 A Because -- well, where the door sits now,  
24 you would have the porch floor that he'd be standing  
25 on. So, as you can see from the height of the

1 bullet exit, he does not have the gun up at shoulder  
2 level. It's more down toward his waistline.

3 Q If he had the gun up to about shoulder  
4 level? Can you just come down here and tell us what  
5 you're talking about?

6 A If I can use this original.

7 Q The safety's on? If you could just make  
8 sure the safety's on. Let's just check it one more  
9 time to be sure.

10 A The safety's on. Now, allowing that I'm  
11 three inches taller than he is, if I fired from the  
12 shoulder, it would strike just slightly higher.

13 Q On the other hand, if someone turned, I  
14 believe if they turned this way.

15 A If I'm standing here beating on the door  
16 and I stood around with -- well, it comes to right  
17 there.

18 Q And the shoulder height, would that be the  
19 most likely normal position that someone would  
20 intentionally fire from?

21 A Okay, start with shoulder height again,  
22 please.

23 Q Well, I mean, based upon just your  
24 experience as a shooter, if someone is going to  
25 intentionally aim and shoot, how are they normally

1 going to do that?

2 A They normally point.

3 Q And based upon where the bullet holes are  
4 in this case, if someone had done, then we would  
5 expect to see the bullet holes going through much  
6 higher --

7 A Above the oblong square, yes.

8 Q -- above the oblong as opposed to down  
9 around what would be Mr. Stone's waist?

10 A Yes, you'd expect to see it higher.  
11 That's more consistent with somebody who's doing  
12 what's called cowboy action shooting, whereas you  
13 would know from the Western shooting from the hip.

14 Q Or unintentionally firing a gun?

15 A Pardon me?

16 Q Or unintentionally firing a gun?

17 A Yes.

18 Q Now, so based upon your review of the  
19 physical evidence in this case, is there anything in  
20 it that contradicts Mr. Stone's story that he  
21 unintentionally fired the weapon?

22 A No.

23 Q And I believe you testified it is  
24 consistent with his statement to the police?

25 A Yes.

1           Q     Now, I have two final questions, one of  
2     which is that Mr. Stone when he was interrogated by  
3     law enforcement, he was asked, "How many times did  
4     you shoot the gun?" And what he said was, "Well, I  
5     only thought I fired once." Do you recall that?

6           A     Yes, I do.

7           Q     So based upon your experience in this  
8     area, are you surprised by that?

9           A     No. The best example I can give I had an  
10    intoxicated driver one time who would not give me  
11    his ID and was resisting. I physically pinned his  
12    chest and head to the desk, removed his wallet, took  
13    his driver's license out, let him go.

14                   And he stood up, looked at me with his  
15    driver's license and went, "How the blank did you  
16    get my driver's license?" What can I say? Alcohol  
17    does not make memory improve.

18           Q     And is it also not true that there have  
19    been studies done, even with trained law enforcement  
20    officers, and they cannot accurately recall how many  
21    times they fired a weapon?

22           A     That's correct. It's actually part of the  
23    fight or flight reflex which was identified in 1900.  
24    Part of that is when a person perceives a threat --  
25    that is, their perception, not reality -- if they

1 perceive it as a threat, the reflex kicks in. They  
2 tunnel focus on what they think is the threat.

3 Shopkeepers can generally tell you the  
4 exact shape of the muzzle of a gun. They can't tell  
5 you the guy who was holding it, because they're  
6 focused on that type of thing. It just changes your  
7 perspective.

8 Q And in this particular case, Mr. Stone's  
9 statement is that he wheels or turns right towards  
10 the sound, and the gun goes off. Given -- is it  
11 fair to say that this is a weapon that's on the  
12 heavy side --

13 A It's substantial, yes.

14 Q -- for a pistol? So is it possible that  
15 the very act of wheeling with your finger on the  
16 trigger, given this light trigger pull, could  
17 discharge the weapon?

18 A I would say. If you've ever held a pail  
19 of water and swung it, as you swing it, it feels a  
20 lot heavier. That's called centrifugal force, and  
21 it's trying to move that bucket out away from the  
22 center of the pivot. That handgun, we have the same  
23 thing. It would have a centrifugal force trying to  
24 move it away from your hand, and you could actually  
25 put pressure on the trigger by that spin. It's

1 possible.

2 Q And the gun could fire without having the  
3 tactile sensation of pulling the trigger?

4 A Correct, because to you, you're not  
5 pulling your finger back but you're pushing the gun  
6 against your finger. Again, that's all premised on  
7 that 1.5 pound trigger. If you've got a 3-pound  
8 trigger pull, it's different.

9 Q Right.

10 MR. BLUME: Court's indulgence.

11 Q Mr. Hill, just a couple of just  
12 housekeeping points. Based upon the testimony --  
13 Mr. Hill, have you seen this before, what's been  
14 marked as Plaintiff's Exhibit Fourteen?

15 A It looks similar to a SLED diagram, a  
16 South Carolina Law Enforcement Division crime lab  
17 schematic, that I saw before, yes.

18 Q The document's the height on the screen --  
19 the height of the shot?

20 A The bottom panels of the screen up to the  
21 outgoing bar or 24 inches from frame edge to cross-  
22 bar edge. The center bar, of course, I described it  
23 as the two wooden slats crossing the door at  
24 approximately below center height. It is listed as  
25 seven-eighths of an inch high. And from then to the

1 top of the frame, the top screen is four zeros and  
2 seven-eighths inch.

3 Q And the bullet holes are 32 and a half  
4 inches?

5 A They're listed as 32 and a half inches  
6 from the bottom of the door, yes.

7 MR. BLUME: Your Honor, we'd offer this as  
8 Plaintiff's Exhibit Fourteen.

9 THE COURT: Any objection from the State?

10 MR. SIMON: No objection, Your Honor.

11 THE COURT: It's into evidence.

12 (Applicant's Exhibit Number Fourteen,  
13 Screen Door Diagram, was entered in evidence.)

14 Q So, finally, Mr. Hill, according to  
15 testimony that you reviewed, were the lights off?  
16 In the pictures that we've looked at of this porch,  
17 the lights are on. But according to trial  
18 testimony, was the lights on this porch on?

19 A According to the testimony, the best I  
20 recall, there was no lighting in the back of the  
21 house area there. The porch light was not on, so it  
22 actually would have been in the shade. The house  
23 would have created a shadow from the street light in  
24 front of the house, making the back appear darker as  
25 you came out of the street light.

1 Q And was it night time or daytime when this  
2 occurred?

3 A The best of my understanding, it was pitch  
4 night.

5 Q So then, finally, Mr. Hill, in summary,  
6 based upon your examination of the weapon, the  
7 testimony of the examiners, and your review and  
8 examination of this door, is the physical evidence  
9 consistent with Mr. Stone's statement that he did  
10 not intentionally fire the weapon?

11 A I see nothing that contradicts that.

12 Q Thank you.

13 THE COURT: Cross-examination. Mr. Simon,  
14 you're recognized.

15 CROSS-EXAMINATION

16 BY MR. SIMON:

17 Q Mr. Hill, first let's go to your  
18 credentials again. You've had, what, 14 years on a  
19 police force?

20 A Yes, sir.

21 Q And in that time, you said you went from  
22 being a dispatcher to chief in a small town?

23 A Very small town, yes, sir.

24 Q At any point in time during that career,  
25 were you ever an investigator?

1           A     I spent some time as investigator in a  
2     small town, yes.

3           Q     In homicides?

4           A     No, just investigator. The title was  
5     investigator, remained said investigator. I  
6     photographed one or two crimes we had.

7           Q     And you also mentioned that you are a  
8     member of the American Board of Forensic Examiners?

9           A     That's correct.

10          Q     And how did you become a member of that  
11     organization?

12          A     Let's see. I'm trying to remember whether  
13     I was invited or I heard about them and contacted  
14     them. I applied. I filled out an application  
15     process, and was reviewed, and admitted to  
16     membership.

17          Q     And so basically you apply, you send them  
18     a check, and then you become a member?

19          A     Yes, I applied. Part of the application  
20     process was listing those courts that I had been  
21     qualified as an expert, what I was qualified in by  
22     that court, my background that qualified me for the  
23     court to say that, submitting samples of formal  
24     reports I had written and articles I had written,  
25     and any references, attorney references, that I

1 might have, and submitting it to them for their  
2 review, a background check.

3 Q You also indicated you were a member of  
4 the American College of Forensic Examiners?

5 A That's correct.

6 Q And with that particular organization, was  
7 that one where you filled out an application and  
8 sent a check?

9 A That one, the American Board of Forensic  
10 Examiners is the parent agency of the American  
11 College of Forensic Examiners. I'm not sure how you  
12 explain the corporate structure, but this is the  
13 higher level of the American Board. And you are  
14 invited to apply for that, and then you are, again,  
15 reviewed again and determined whether you're  
16 eligible enough, I guess you'd say, to become part  
17 of the college, a fellow of the College of Forensic  
18 Examiners.

19 Q Okay. Let's --

20 A I guess you say you'd get your basic ABA  
21 membership from an attorney, and then you've got  
22 higher levels of that ABA, that kind of arrangement.

23 Q Did they send you any kind of certificate?

24 A Yes, sir.

25 Q And would you have been listed as

1 certified?

2 A A certified forensic examiner,  
3 specializing in homicide events reconstruction, yes.

4 Q Let's talk about your examination in this  
5 particular case. Did you consult with any of the  
6 SLED agents who were involved in the investigation?

7 A Personally, no.

8 Q How about any of the folks from the Sumter  
9 County Sheriff's Office?

10 A No.

11 Q Okay. When you went to the scene -- you  
12 say you went to the scene?

13 A Yes, sir, yesterday.

14 Q And at that point in time, was the house  
15 in the same state as it was in the pictures?

16 A No, they had done some remodeling.  
17 There's been some modifications to the steps at the  
18 porch. I think they -- well, they covered up the  
19 window, and they may have shortened the width of the  
20 porch. The steps are partially torn away. It's  
21 different.

22 Q Did you have the pictures when you went to  
23 view the scene?

24 A Pardon me?

25 Q Did you have the photos?

1           A     Oh, yes. I've got State's Exhibit Seven,  
2     which is the corner view of the front of the house  
3     and that side with the porch on it; and State's  
4     Twenty-Two, which is a low-level lighting directed  
5     toward that side of the house that has the porch  
6     structure there, showing it in the picture; and  
7     State's Exhibit Sixteen, which is a picture more of  
8     the front of the house, kind of the corner where  
9     there's a tree structure, and I believe that's Sgt.  
10    Kubala's squad car parked at the edge of it.  
11    There's the porch side, and that's the corner view  
12    with the porch in front. There's a tree here, and I  
13    think there's the front of the house.

14                 MR. SIMON: May I beg the Court's  
15    indulgence for just a minute? Your Honor, may I  
16    approach the witness?

17                 THE COURT: Yes.

18           Q     Mr. Hill, do you recall seeing this photo?

19           A     Yes, sir, I've seen this. You've handed  
20    me State's Exhibit Twenty, and I have seen a similar  
21    photograph, yes.

22           Q     And would that be the photo where it  
23    appears that there are a number of markers from the  
24    Sheriff's Office, right?

25           A     Yes, sir. Visible in State's Exhibit

1 Twenty is the porch structure looking through the  
2 screen door out toward the front. And there are  
3 orange cones that I can identify one that's numbered  
4 number two.

5 It's on the porch step. And number nine,  
6 it's within the porch itself visible through the  
7 screen door. On number one, there's also another  
8 cone that I can't make out that number to be able to  
9 identify it.

10 In the lower right-hand section of the  
11 photograph in the grassy area, there are orange  
12 cones numbers five, six, and seven that are visible.  
13 And there's what looks to be a deputy -- probably a  
14 deputy walking through the scene, as well. There's  
15 also what appears to be a small cooler with a green  
16 top and handle on the left-hand side of the steps to  
17 the porch.

18 Q And it also shows the steps of the porch,  
19 right?

20 A Yes, there are three steps visible from  
21 ground level up to the base of the porch that you  
22 would step into.

23 Q And am I correct in saying there are about  
24 three or four cones on the inside of the porch?

25 A I see what looks like perhaps an orange

1 bucket on the far left of the screen door inside,  
2 and I see two identifiable cones similar to the ones  
3 visible on the outside.

4 One cone has two numerals on it. It could  
5 be 17, it could be 11, but it's in the right-hand  
6 lower corner of the screen porch. Behind that, you  
7 can see a cone that has one numeral partially  
8 visible. I won't care to guess what that numeral  
9 is.

10 And then in that center would be the strip  
11 from the base of the door up to that cross-bar  
12 there. And right next to that is an orange cone  
13 that appears to have a nine on it, the best I can  
14 see.

15 Q And I'm now showing you what was State's  
16 Exhibit Twenty-One at the trial. Is that basically  
17 what's in that photo of the scene?

18 A Yes, I would say the camera man has  
19 probably taken a step closer.

20 Q You said you reviewed the transcript,  
21 correct?

22 A And if you will, that lower right cone  
23 that I talked about earlier, it looks like it's a  
24 number ten on that one in the screen door, lower  
25 right corner of the screen door. It looks like a

1 numeral ten on that cone. And then your question  
2 was?

3 Q You recall reviewing the testimony that  
4 was during that trial, correct?

5 A Yes.

6 Q And three cartridge casings were recovered  
7 from that porch, correct?

8 A Yes, as I recall.

9 Q And they were all inside the porch?

10 A Yes, sir.

11 Q Let me show you what was marked as State's  
12 Exhibit Number Twenty-Four in that trial.

13 A State's Exhibit Number Twenty-Four is what  
14 I call a close-up of a particular area, kind of a  
15 grassy area. Some of the grass has a red tinge to  
16 it. There's a cone with slots in the body of it.  
17 It's a pink to mauve color with a number five  
18 clearly on it.

19 In approximately the center, just left of  
20 center, at the top of the photograph is a pair of  
21 handcuffs which also have a red tinge in areas. In  
22 the center of the photograph is what I would  
23 commonly identify as a police service radio.

24 Q And the testimony at trial indicated that  
25 was Deputy Kubala's radio, correct?

1           A     Yes.

2           Q     And so that was painted with a five?

3           A     Yes.  It's my understanding the photograph  
4 was of his equipment as they found it on the ground.

5           Q     And just to go back to these photos in  
6 State's Twenty and Twenty-One, those are cones  
7 number five [inaudible] in the right portion of the  
8 photograph -- in the lower right portion of the  
9 photograph?

10          A     Lower right corner of both photographs,  
11 there is a group of three orange cones -- orange to  
12 reddish cones.

13          Q     Let me show you --

14          A     It may be the perspective of the  
15 photograph.  I would have to make note that this one  
16 looks solid.  That one has obvious slots.  Why that  
17 difference is I would say maybe just the photograph,  
18 the way the camera took the picture.  But that's the  
19 one difference I noticed between State's Twenty and  
20 State's Twenty-Four.

21          Q     Let me show you State's Twenty-Five.  
22 Those are cones number five, six, and seven?

23          A     That's why we do distant and one in close.  
24 In State's Exhibit Twenty-Five, the number five  
25 cone, which in State's Twenty-One, State's Twenty-

1 Four, and State's Twenty, the number five cone  
2 located next to the walkie-talkie, the police  
3 service radio which is visible in all three  
4 photographs -- or four photographs -- is a slotted  
5 cone. So in State's Twenty-One, it is just the  
6 perspective of the camera that makes it look  
7 different.

8 Q And State's Twenty-Three, that's cone  
9 number six, the handcuffs, correct?

10 A Yes, sir. And the handcuffs, again, have  
11 some red colorations on them that look like stains.  
12 If it's proper, I could speculate that that's  
13 probably bodily tissues.

14 Q Did you recall seeing any documentation of  
15 how much distance it was between the porch and where  
16 this occurred?

17 A I did, but I don't recall specifically at  
18 this time. It doesn't look to be more than ten  
19 feet.

20 Q You indicated in your testimony that  
21 normally when somebody is firing a pistol, they fire  
22 with their arms up, correct?

23 A They extend the arm, I guess you'd say.

24 Q And that's when they are firing at someone  
25 on their same plane, correct?

1           A     Yes, their plane.  If you're shooting at  
2     somebody, you're usually upset with them, and you  
3     kind of boom -- and I indicated a physical action of  
4     a punch style point.

5           Q     But, again, in this photograph, the porch  
6     is higher than the ground, correct?

7           A     Yes.

8           Q     And so in aiming, one would have to -- if  
9     you're aiming at something that's not on the same  
10    plane, you'd have to aim lower, correct?

11          A     That's correct.

12          Q     You testified that all indications were  
13    the porch light was not on at the time of the  
14    shooting, correct?

15          A     That's correct.  My best recollection from  
16    all the reports was that that area was not  
17    illuminated at all.

18          Q     There was also testimony that Deputy  
19    Kubala had a flashlight on, correct?

20          A     That's correct.  That's separate from the  
21    house that I was discussing.

22          Q     And there was testimony that he had the  
23    flashlight on when he was going around the side,  
24    correct?  Actually, let me take a step back.  There  
25    was testimony that when the next person arrived, his

1 flashlight was on, correct?

2 A The best I recall, they talked about it  
3 was illuminated when he hollered. That was, he lit  
4 up the subject up and hollered "Halt," and that's  
5 what I would expect. If you're coming -- as a  
6 trained police officer, if you're coming to a gun  
7 call like this, you don't make a target of yourself  
8 until you're tactically ready.

9 So you don't come running around the side  
10 of the house letting them know you're coming with  
11 that light going on. You get there, and then you  
12 bang, use it to actually startle him by the --  
13 you're temporarily blinding him.

14 You're knocking his night vision out so it  
15 gives you a better tactical advantage if he tries to  
16 do something. If you and I are in a dark room, and  
17 your eyes are adjusted, and I hit you with a bright  
18 light, that room is now a lot darker to you than it  
19 is to me.

20 So he hits him with the light to startle  
21 him, stop him from what he's doing, also distract  
22 him, so he takes the tactical advantage. That  
23 didn't work in this case.

24 Q I'm just trying to make sure I'm  
25 understanding what you're saying. You're saying

1 that Deputy Kubala would have waited until he got  
2 around the corner to turn the light on?

3 A That's what I would expect.

4 Q Okay. Why would you expect that?

5 A If you're coming to arrest me and you know  
6 I have a gun, you don't want to tell me that you are  
7 there until you're ready, because the minute I see  
8 your flashlight, I can shoot at you because I know  
9 where you're at.

10 So as you're coming around that house and  
11 not quite ready yet for the confrontation, however  
12 it turns, you don't have that light lit. You've got  
13 your quick picture here.

14 You've got yourself in position. Then you  
15 hit him with the light so when he turns around, the  
16 first thing he sees is a blinding light. And that  
17 takes his night vision down. He can't see you as  
18 well.

19 Q But you don't know that that's what  
20 happened in this case, do you?

21 A No, I said that's what I would expect.  
22 But that may or may not have happened.

23 Q And if he was just going behind the house  
24 to investigate, he could have just had the  
25 flashlight on, because it was dark outside, correct?

1           A     Can you start the sentence again?

2           Q     If the deputy was going beside the house  
3     to investigate and it was dark out, he could have  
4     just had the light on so he could see, correct?

5           A     If he got it as a gun call, he may have.  
6     I wouldn't expect him to have. You don't want to  
7     let a guy with a gun know where you are before  
8     you're ready to deal with him. And if you haven't  
9     found him yet, you're not ready to deal with him.

10          Q     Let's talk about the gun for a little bit.  
11     To fire three shots with that particular weapon,  
12     you'd have to fire it three times, correct?

13          A     You have to pull the trigger three times,  
14     yes.

15          Q     And did you test-fire the gun?

16          A     I examined the gun. I didn't fire it with  
17     live ammunition, but I pulled the trigger to feel  
18     it.

19          Q     So you haven't actually fired the weapon  
20     to see how it would react in real time?

21          A     With live ammo, no.

22          Q     Now, you indicated --

23                 MR. SIMON: Beg the Court's indulgence,  
24     please?

25                 THE COURT: Certainly.

1           I have one clarification for my own  
2 curiosity. This is a .22-caliber, is that correct?

3           MR. HILL: Yes, it's a .22-caliber.

4           THE COURT: What would recoil of a .22-  
5 caliber pistol be? I assume it would be a lighter  
6 recoil. And how would that affect the accidental  
7 discharge on two separate occasions? How does that  
8 affect --

9           MR. HILL: It's a very light recoil. It's  
10 enough to cycle the slide back -- and you felt the  
11 spring tension on that -- and it overcomes that.  
12 It's not what I would call hard recoil. It's not a  
13 .45 or a .44, but it did have a slight recoil.  
14 That's what it's got all that extra weight on the  
15 target, and that's why. It's not something to draw  
16 your arm out.

17           THE COURT: Mr. Simon, you're recognized.

18           Q     You say that the evidence -- it's possible  
19 that he turned suddenly. It's also possible that he  
20 aimed the gun, too, correct?

21           A     It's possible, but I'd say not on a high  
22 side.

23           Q     You're standing on a porch that's three  
24 feet higher than the ground, correct?

25           A     Correct.

1           Q     And you said where the cones where the  
2     deputy was located, those were about teen feet away,  
3     correct?

4           A     Correct.

5           Q     And you have shell casings that are on the  
6     porch on the corner, correct?

7           A     Correct.

8           Q     And you're saying now it's not possible  
9     that he could have aimed the gun?

10          A     Didn't say it wasn't possible. I said it  
11     was possible. I said I just don't think it's a high  
12     probability. The casings confirm that he was facing  
13     the door because that tends to eject them to the  
14     right rear. So they're over by the door. May I  
15     step for a moment, just for illustrative purposes?

16                 Now, if I face this door here, and I come  
17     up -- whichever way I come around, when I fire out  
18     here, it ejects to the right rear. So it's ejecting  
19     the cartridge cases where they found over here, is  
20     what I'm saying.

21                 So this confirms he actually was facing  
22     the door when he fired. Now, all those things were  
23     down here. The only people I know would shoot from  
24     the hip like that are cowboy shooters, what's called  
25     cowboy action shooting, and that's a target match.

1 And that is something you'd shoot hundreds of rounds  
2 before you accurately could do that. Does that  
3 answer you? I'll get back on the stand.

4 MR. SIMON: No further questions, Your  
5 Honor.

6 THE COURT: Any redirect?

7 MR. BLUME: Very briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. BLUME:

10 Q So, Mr. Hill, I'm not repeating your  
11 testimony. But we know that Sgt. Kubala was some  
12 distance away at the time. So at some point, if he  
13 aimed and shot from this level going through that  
14 hole, where would the bullet most likely have gone?

15 A That's the one thing that none has done,  
16 the State nor I. If we actually set this out on a  
17 scale diagram, with his height, Sgt. Kubala's known  
18 -- if you've got a specific known location, and put  
19 his specific height out there and then his specific  
20 wound heights as he's standing, we could diagram  
21 that shot through the screen and through his closer  
22 diagram of where the wound hit and have the angle  
23 that you move the two bodies until it matches either  
24 end, and you know exactly.

25 Q And that would be moving on a sharp

1 downward angle?

2 A Yes.

3 Q And so most likely, the bullet would have  
4 gone into the ground?

5 A Depending on where Sgt. Kubala was, yes.

6 Q As opposed to -- a waist-level shot from  
7 this level based on what we know generally about  
8 Sgt. Kubala's height is consistent with the evidence  
9 that we know?

10 A Yes.

11 Q Thank you.

12 THE COURT: Anything further, Mr. Blume?

13 MR. BLUME: Pardon me?

14 THE COURT: Anything further?

15 MR. BLUME: No, I'm sorry. May he be  
16 excused?

17 THE COURT: Yes, you may step down.

18 All right, we're going to stand at ease  
19 for about ten minutes.

20 Anything from the plaintiff before we  
21 recess for a moment, anything from the State? All  
22 right, we'll stand at ease.

23 (Court in recess.)

24 THE COURT: Mr. Blume, you may call your  
25 next witness.

1 MR. BLUME: Thank you. Your Honor, we  
2 would -- Mr. Kolp is going to be called by the  
3 State. And he has somewhere to be this afternoon,  
4 so we have agreed to allow Mr. Zelenka to call him  
5 out of turn --

6 THE COURT: Very good.

7 MR. BLUME: -- so he can go ahead and  
8 testify, and we'll expedite it if we can proceed.

9 THE COURT: Very good.

10 Mr. Kolp, you may come forward.

11 CLERK OF COURT: State your name, please.

12 MR. KOLP: Wade S. Kolp, Jr.

13 (The witness was sworn.)

14 THE COURT: Mr. Kolp, have a seat in the  
15 witness chair. How are you doing? I want you to  
16 speak loudly, clearly, and slowly in order that we  
17 can hear everything that you've got to say.

18 And let's start with your full name, and  
19 let's spell that one. That's tricky for some Court  
20 Reporters.

21 MR. KOLP: It's Wayne Stackhouse Kolp, Jr.  
22 The last name is spelled K-O-L-P.

23 THE COURT: Very good.

24 Mr. Zelenka, you're recognized.

25 MR. ZELENKA: Thank you, Your Honor.

1           WADE STACKHOUSE KOLP, JR., having first  
2     been duly sworn, testified as follows:

3                           DIRECT EXAMINATION

4     BY MR. ZELENKA:

5           Q     Mr. Kolp, in 1995 to 1997, what was your  
6     position?

7           A     Solicitor for the Third Judicial Circuit.

8           Q     And as the Solicitor for that circuit, did  
9     you come to know the case of State versus Bobby  
10    Wayne Stone?

11          A     Yes.

12          Q     And how did you become involved in that?

13          A     Well, when Deputy Kubala got killed, of  
14    course, when the arrest was made, we were aware of  
15    it from then on actually through today.

16          Q     And as part of that, were you involved in  
17    the trial prosecution?

18          A     Yes.

19          Q     And in that prosecution, were you involved  
20    in the selection of the jury?

21          A     Yes.

22          Q     As a part of your jury selection, did you  
23    require information concerning the jurors prior to  
24    their selection?

25          A     Yes, sir. We arranged with the Solicitor

1 for the Fifteenth Circuit, who had an office in  
2 Georgetown, and they handled that for us between  
3 their office and the Georgetown County Sheriff's  
4 Office. They did some jury research for us on the  
5 prospective jurors. And as I recall, members of the  
6 Sheriff's Department and Solicitor's Office were in  
7 the courtroom during jury selection.

8 Q Okay. And in that selection, you struck  
9 five jurors, is that correct?

10 A Yes, sir, for the 12-person panel. I  
11 think it was an additional one each for the  
12 alternates.

13 Q Okay. Prior to this hearing, did you have  
14 access to your files?

15 A Yes, sir. After the conviction and  
16 sentence, of course, all the official records were  
17 with the Clerk of Court. But everything that I had,  
18 my record of complying with Brady and so forth,  
19 copies of documents, trial preparation, and also the  
20 jury information was in a large box that -- I can't  
21 remember whether I turned it over to your office or  
22 to the Solicitor who's seated with you. But anyway,  
23 last week you and Mr. Simon still had those  
24 documents, and I did review them.

25 Q Okay. And did you have the opportunity to

1 review those documents?

2 A Yes, sir.

3 Q And did you review particular documents  
4 dealing with the preemptory strikes that you made at  
5 the time of that trial?

6 A Yes.

7 Q Okay. Did that refresh your recollection  
8 as to what you considered a basis for why you struck  
9 those five individuals?

10 A Yes, sir.

11 Q Okay. Let me ask you a question about the  
12 first strike that you did, an individual named  
13 Matthew Brunson. Did you review your materials on  
14 that?

15 A Yes, sir.

16 Q Do you have a recollection at this time as  
17 to why you chose to use your first preemptory  
18 challenge with respect to Mr. Brunson?

19 A Yes, sir.

20 Q And what is that?

21 A Mr. Brunson was a minister, and he  
22 actually said the things that made him a qualified  
23 juror. But it was our assessment that he was not a  
24 juror that would impose the death penalty.

25 Q Okay. And why is that?

1           A     Well, I had a prior personal knowledge of  
2     him.  And obviously, when you know somebody on a  
3     personal basis, you have a better chance to make an  
4     assessment of whether they are the type person that  
5     would be willing to send somebody to the electric  
6     chair.

7                     In addition to that, we had the assessment  
8     of the folks sitting with me.  The Georgetown County  
9     Sheriff's Department had reported that one of their  
10    deputies that knew him considered him to be a mental  
11    case.  That was in my notes, and I remembered that.

12                    And we just -- this was -- as I guess most  
13    death penalty cases are, you already knew who the  
14    jurors were going to be.  It wasn't like you were a  
15    blind frog.  They had already been drawn in order,  
16    and you were just going down that list.

17                    So you had the opportunity to look at who  
18    were the five that you thought were most likely to  
19    be unwilling to sentence to death, and he was in  
20    that five.

21                    Q     Okay.  And when you mean your notes,  
22    you're referring to the jury qualification sheets?

23                    A     Yes, sir -- you put it up here for me --  
24    the actual questionnaires that the jurors turned in,  
25    and then I had my personal notes on those.  And then

1       there was -- once the jury was drawn in order so we  
2       knew exactly what order they would be in for the  
3       strike process, I had a sheet that listed all of  
4       them.

5                   And all of us that were there together  
6       drawing the jury, my staff, the Fifteenth Circuit  
7       Solicitor's staff, and Georgetown County Sheriff's  
8       staff, had assessed those jurors and come up with  
9       who we felt were the five weakest on death.

10           Q       Okay. And on that sheet, in the upper  
11       left-hand corner, it reflects "GOST, one deputy says  
12       mental case," is that correct?

13           A       That's my writing, and that means  
14       Georgetown Sheriff's Office, one deputy says mental  
15       case, yes, sir. It's on there.

16           Q       And it also reflects on the right-hand  
17       side? Is that correct?

18           A       Yes, sir, that's my handwriting prior to  
19       the selection process. That's my handwriting during  
20       the individual questioning and then leading up, you  
21       know, as I go over the questionnaires leading up to  
22       the actual strike. That's my handwriting.

23           Q       Okay. In reference to your prior contact  
24       with Mr. Brunson, was that ultimately reflected on  
25       the record during the voir dire?

1 A Yes, sir.

2 Q And who brought that up?

3 A I did.

4 Q Okay. And why did you bring that up at  
5 that time?

6 A I was afraid that if I didn't, something  
7 would come up later. And it wasn't -- you know, as  
8 I recall, we had gone through the general voir dire  
9 of the entire panel -- "Do you know or have a  
10 relationship with any of the attorneys, any of the  
11 prospective witnesses?"

12 All that had been dealt with, and it had  
13 not come up. But during the course of his  
14 questioning and he was talking about his children  
15 and one of them had a problem with checks and all,  
16 that was when I realized that I had had a previous  
17 just a brief relationship with?

18 Q Okay. Let me ask you to look at Mr.  
19 Brunson's information.

20 A All right, sir.

21 Q Let me refer to what is another  
22 handwritten page of information that you had on Mr.  
23 Brunson. Do you recognize that handwriting?

24 A Yes, sir, this is Bernie Williams. He was  
25 the Assistant Solicitor that assisted me in the

1 case.

2 Q Okay. And among that information, review  
3 those last two lines of information he had written  
4 down.

5 A "Seems like he really wants to be on the  
6 jury" and "defense strike."

7 Q Okay. Did you have discussions about  
8 whether in fact this would be a good strike for the  
9 State or the possibility the defense in fact would  
10 be striking him?

11 A Of course, the State has to go first. So  
12 the fear was, you know, we think -- the overriding  
13 concern was that we -- it was my assessment, but all  
14 of us together felt that he would not sentence  
15 somebody to death when it came right down to it.

16 But I guess more of a threshold matter is  
17 could you use a strike on somebody else and not him  
18 because you fake the defense into striking him,  
19 because they're afraid he's got a personal  
20 relationship with me and that that would be an  
21 overriding concern from him.

22 I thought the relationship with me was  
23 basically a casual thing. I was the Solicitor. He  
24 son was in prison for multiple checks in multiple  
25 counties. He had come to me with some information

1 about his son doing well in prison.

2 He had been in prison for a while. After  
3 all, it was just checks. It's not like personal  
4 violence. You know, it was just sort of a political  
5 thing that I did quite frequently in non-violent  
6 cases like that.

7 I said I would be willing to write a  
8 letter saying I'm favor in parole for him. I didn't  
9 consider that to be the type favor that would cause  
10 undying allegiance. So I didn't think that any  
11 favorable feeling he had towards me was going to --  
12 he was a minister.

13 Just the idea that a minister is going to  
14 sit on a jury and sentence somebody to death is not  
15 really what your prospect is. And it was our  
16 assessment, the deputy that knew him said he was a  
17 mental case.

18 It was just our feeling, the main thing  
19 was he wasn't going to sentence to death. And so we  
20 decided not to take into account that the defense  
21 would strike because of the relationship.

22 Q Okay. Let me ask you to refer now to this  
23 strike list that you've got.

24 A All right, sir. Yes, sir.

25 Q After Mr. Brunson, the next individual who

1 was presented was Barbara Stewart, is that correct?

2 A Yes, sir.

3 Q And your notes reflect that she was a  
4 black female?

5 A Yes, sir.

6 Q That note also indicated "good pro-death  
7 and good defense strike," is that not correct?

8 A That was our assessment, and that is what  
9 occurred.

10 Q Okay. And you did not strike Ms. Stewart,  
11 did you?

12 A No.

13 Q Priscilla Ann Gore, black female, you  
14 didn't strike her coming down the strike list, is  
15 that correct?

16 A Yes, sir.

17 Q The next strike you did was of an  
18 individual named Joann Walker, a black female.

19 A Yes.

20 Q Reviewing your notes, do you recall the  
21 reason why you struck her?

22 A We assessed her as pro-life and decided to  
23 exercise one of our strikes with her.

24 Q Okay. Reviewing your notes on that jury  
25 information sheet, was there anything that stood out

1 about her, with the manner she answered questions on  
2 the voir dire?

3 A I had -- my notes said that she expressed  
4 reluctance. She showed reluctance on could she sign  
5 a death warrant. And then at some point, she said  
6 that she would always choose life.

7 At that point, she would not have been  
8 qualified. But Mr. Littlejohn questioned her and  
9 got her to back off of that and say that she would  
10 not always choose life. But because of the things  
11 she had said, we assessed her as a pro-life juror.

12 Q Okay. And that's reflected in your  
13 particular notes?

14 A Yes, sir. It's on the sheet I have for  
15 her.

16 Q Which would have been contemporaneous to  
17 the time of that jury selection, is that correct?

18 A Yes, sir. It says, "Could she sign?  
19 Reluctance." And then in my handwriting, "She said  
20 she would always choose life." And then later I've  
21 got "Littlejohn, could give life or death, not  
22 always choose life."

23 Q Okay. And if you would refer to the first  
24 handwritten page of the information on Ms. Walker,  
25 the last sentence there.

1           A     That was "would always pick life."

2           Q     Okay. Do you know whose handwriting that  
3 was?

4           A     That was -- I believe that was either my  
5 victim advocate or the victim advocate with the  
6 Georgetown Solicitor's Office.

7           Q     Okay. Was the next sheet done by another  
8 individual?

9           A     That's Mr. Bernie Williams' handwriting.  
10 He had made the note that said she would always  
11 choose life in prison over the death penalty.

12          Q     Okay. And the last sentence that was  
13 written there, whatever person was writing there?

14          A     "Hesitant when asked if she could stand  
15 and say that she had sentenced defendant to death."

16          Q     The next individual seated was Shirley  
17 Leggett, a black female, is that correct?

18          A     Yes, sir.

19          Q     And the next individual selected was  
20 Phillip Allen. He was a black male?

21          A     Yes, sir. We had assessed both of them as  
22 okay to good and definitely were not in the five  
23 that were least likely to sentence somebody to  
24 death.

25          Q     Okay. The next individual that you struck

1 was Ladonna Jordan, a white female, is that correct?

2 A Yes, sir.

3 Q Okay. And after that, there was a black  
4 female, Mary Armstrong, that you struck. Do you  
5 recall your reasons for striking her?

6 A I have "life" on my notes. I had notes  
7 that "If convicted of murder, should the punishment  
8 be death?" and she said, "No, he should get life."  
9 And then at one point, I quoted her as saying "I  
10 would rather give life in prison."

11 And could she impose the death penalty,  
12 "No. No circumstances." I'm assuming -- I have my  
13 notes on her individual sheet are "Always life,  
14 state strike."

15 Q Okay. In fact, did you move to qualify  
16 her for cause?

17 A Yes, sir.

18 Q Okay. Reflective of your opinion that not  
19 only was she potentially an individual that would  
20 not assess to what you were trying to do -- have an  
21 individual who could consider death -- but in fact  
22 would not ever consider it, would not have been  
23 qualified?

24 A Right.

25 Q The next strike was Eugenia Maybank. She

1 was a black female. Do you recall the reasons that  
2 you had for striking her?

3 A Again, I had "pro-life" next to her, and  
4 that was based on her voir dire. She said, "Well,  
5 life would be better than the death penalty. Said  
6 that she never previously discussed the death  
7 penalty with anyone," which how that's relevant to  
8 me is imposing the death sentence on someone is  
9 probably the hardest thing anyone would ever have to  
10 do.

11 It seems very unlikely to me that somebody  
12 who had never even thought about the possibility of  
13 doing it, never even discussed the death penalty  
14 even with her husband or best friend, that type  
15 person would be less likely to get in that position  
16 and be able to do it.

17 Q Did she also make a comment that you  
18 reflect on that, "Life would be better than the  
19 death penalty"?

20 A Yes.

21 Q The next juror that was seated was Tameka  
22 Gardener, and that individual, the last one seated,  
23 was in fact a black female, is that correct?

24 A Yes, sir.

25 Q And in your strike notes, you reflect on

1 that individual "good" --

2 A Yes, sir.

3 Q -- is that correct?

4 A Yes, sir.

5 Q So by striking Ms. Maybank, you ensured  
6 that Ms. Gardener was more likely to sit on the  
7 jury, is that not also correct?

8 A Yes, sir.

9 Q Who was also a black female?

10 A Yes, sir.

11 Q Now, Mr. Kolp, there are also issues  
12 related in this case concerning ineffective  
13 assistance of counsel for failing of counsel to  
14 object to the defendant's shackling while he was  
15 present in court. Do you have any recollection  
16 about the circumstances and the presence of Mr.  
17 Stone and the security that was done with him during  
18 that first trial?

19 A It was very strict, and very strict that  
20 that would not happen, that it would never be  
21 visible to the jury either outside the courtroom  
22 when he was coming and going or in the courtroom.  
23 And that was very strictly observed by the Court and  
24 by the officers who had custody, and that never  
25 occurred.

1           Q     Okay. Was he ever moved in the courthouse  
2     in the presence of the jury?

3           A     No, sir.

4           Q     Explain how that was done.

5           A     As I recall, he had -- in the courtroom,  
6     he had the kind of restraints that are under your  
7     clothes and you can't see them. It didn't mean he  
8     couldn't move. It just meant he'd be slowing moving  
9     if he tried to move.

10           And so when you're sitting there, nobody  
11     even knows you had them on. It becomes visible when  
12     you get up to like walk out of the courtroom, go to  
13     the restroom or whatever. Then you're kind of  
14     walking like Chester on "Gunsmoke," and it becomes  
15     obvious that something is there.

16           So what Judges always do is make sure that  
17     the jury is out of the courtroom before the  
18     defendant moves, even if he were to testify. When  
19     they come in, he's already in the chair, and they  
20     leave before he leaves the witness chair.

21           Q     Okay. And do you have any recollection of  
22     the defendant ever being visibly in restraints --

23           A     Absolutely not.

24           Q     -- in front of the jury?

25           A     I mean, he wasn't. I'm sure that he

1 wasn't.

2 Q Okay. There's also been an issue raised  
3 as to whether defense counsel was ineffective for  
4 failing to object to the presence of law enforcement  
5 officers in the courtroom. Are you aware of that  
6 allegation?

7 A I'm aware of that, and I've known Cam  
8 Littlejohn since at least 1972 or so, maybe 1973.  
9 And I've known Jim Babb since he's been in Sumter.  
10 They are both fine lawyers. They're top-notch  
11 criminal defense lawyers.

12 If anything would have been objectionable,  
13 they would have spotted it and they would have  
14 objected. They are regarded not just by me but by,  
15 far as I know, all of the lawyers in the state as  
16 being top-notch criminal defense lawyers.

17 Q Okay. With respect to the presence of law  
18 enforcement officers, can you describe the scene of  
19 the trial? We are aware that a law enforcement  
20 officer was killed in this situation. Were there a  
21 number of police officers hanging out in the  
22 courtroom?

23 A It was no more than normal, and it was not  
24 -- as I recall, the Judge took pains to balance  
25 security but also to balance that there wouldn't be

1 just a bunch of police officers hovering around  
2 there.

3 Q Okay.

4 A And if there were people there, it was no  
5 more than we were trying a DUI case as far as people  
6 in uniform. There might have been a few extra  
7 people in plain clothes around, but that wasn't  
8 really my focus. But I feel sure that Mr.  
9 Littlejohn and Mr. Babb, it was their focus.  
10 They're fine lawyers.

11 If there had been anything that created  
12 any kind of inference like that, they would have  
13 said so. And the Judge would have dealt with it,  
14 because Judge Dennis was very zealous about making  
15 sure that nothing like that occurred.

16 Q There's an issue raised about your closing  
17 argument in this case. Are you familiar with that?

18 A You tell me about it -- yes, sir.

19 Q Okay. No objection was made when you made  
20 those particular comments about the defendant  
21 retaining the weapon --

22 A Yes, sir.

23 Q -- and the potential of his retaining the  
24 weapon, is that correct?

25 A Yes, sir.

1           Q     And after his trial, the State's  
2     assertions were that the defendant killed the  
3     deputy, fled, and there was evidence in the record  
4     that there was another shot fired when another law  
5     enforcement officer came on the scene, is that  
6     correct?

7           A     Yes, sir.

8           Q     And the defendant was found in possession  
9     of the weapon after a number of hours in the woods,  
10    is that correct?

11          A     Yes, sir.

12          Q     At the time of the trial, you made a  
13    closing argument reflecting that he may have had  
14    reason for continuing to possess the weapon, is that  
15    correct?

16          A     Well, what I was trying to do is counter  
17    evidence in the record that the defense had brought  
18    out that it appeared to me that they would try to  
19    say, "Well, it was just an accident.

20                    "He didn't even know the guy was dead. He  
21    didn't know he had done anything wrong. That's why  
22    he still had the gun with him when the police got  
23    him. If he'd have thought he did anything wrong, he  
24    would have gotten rid of the gun.

25                    He'd have just thrown it in the woods and

1 run off. And when you eventually caught him, he  
2 wouldn't have had the gun." And so that was why I  
3 argued what I did, is in response to that.

4 Q In response to those questions that Mr.  
5 Littlejohn brought out on cross-examination --

6 A Yes, sir.

7 Q -- of one of the witnesses, is that  
8 correct?

9 No further questions, Your Honor.

10 THE COURT: Mr. Blume, you're recognized,  
11 cross-examination.

12 MR. BLUME: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. BLUME:

15 Q Former Solicitor --

16 A Yes, sir.

17 Q -- candidate Kolp.

18 A I'm a criminal defense lawyer now.

19 Q Mr. Kolp, you said that the Georgetown  
20 County Sheriff's Department did some of the jury  
21 investigation --

22 A Yes.

23 Q -- for you in this case? Can you tell me,  
24 what did they do?

25 A Checked their records, and they asked

1 around if anybody knew the jurors and what they  
2 thought of them for a juror in this case.

3 Q Who would they have asked? Did they go  
4 out in the community and ask people what they  
5 thought?

6 A I don't know about that. And actually,  
7 there was a lady -- I can't recall her name right  
8 now. But I had talked to the Solicitor to ask for  
9 help, and he said, "You just need to call Ms. So-  
10 and-So, and she'll take care of it." And as it  
11 turned out, what she had done is talked to some of  
12 the people in the Sheriff's Department and, of  
13 course, her own staff there.

14 Q But as far as the investigation that they  
15 did, you don't know what they actually did?

16 A Well, on each juror, I've got like "no  
17 record," and I didn't check their records.

18 Q Okay. So, then, on Matthew Brunson, that  
19 was one of the first jurors that Mr. Zelenka asked  
20 you about, he was the one whom you had I guess some  
21 pre-existing relationship with?

22 A Yes, sir.

23 Q And that's the individual for whom you  
24 wrote a letter I guess to the Parole Board?

25 A We perceived during his examination that

1 it was something like that.

2 Q That you had done something like that for  
3 him?

4 A Yes.

5 Q You didn't recall at the time exactly what  
6 you had done?

7 A Well, I think it came to my memory more as  
8 he was testifying. And I raised it because I  
9 thought that it was something like that. And then  
10 he confirmed it I think on the record that I had  
11 done that.

12 Q And Ms. Maybank was another juror that Mr.  
13 Zelenka asked about. And you said the primary  
14 reason that you struck her was because she had said  
15 she had never thought about the death penalty?

16 A No, I don't think that was the primary  
17 reason on her. The primary reason was that she said  
18 she would always prefer to give a life sentence.

19 Q When she was asked to classify herself,  
20 did she not say that she was a type three juror?

21 A Well, the Judge ruled that she did, but  
22 she was qualified. And that's where you get down to  
23 listening to what they say.

24 And you get an assessment, and other  
25 people sitting with you get an assessment. And what

1 she actually said was that in a decision between  
2 life and death that life would be better than the  
3 death penalty.

4 Q And so if a juror said that -- if a juror  
5 expressed in some form a preference for life, then  
6 that's a juror that you would want to get rid of?

7 A Right.

8 Q Regardless of race or regardless of  
9 whatever?

10 A Exactly.

11 Q But if you said that the juror said they  
12 had never thought about the death penalty, that was  
13 also a concern to you?

14 A That's a lesser concern. He was asking  
15 me, "What other notes do you have about her?"

16 Q Oh, I'm sorry. I thought he said that in  
17 deciding whether a juror could actually impose  
18 death, you were concerned if somebody said they had  
19 never thought about it. Then you indicated, "Well,  
20 maybe they wouldn't actually be able to do it at the  
21 time when they were in the jury room."

22 A That's not the overriding thing. The  
23 overriding thing is when they're questioning under  
24 oath that they prefer life or death, you get a sense  
25 that they're a pro-life juror.

1           One of the questions that I just  
2 mentioned, one of the questions that is meaningful,  
3 is whether they've ever discussed it before or not.  
4 And in her case, there was a notation that she said  
5 she had never discussed it with anyone.

6           Q     So, then, you're saying that it was a  
7 combination of the fact that she at least one point  
8 during the questioning indicated a preference for  
9 life --

10          A     Yes.

11          Q     -- and the fact, at least based upon your  
12 question, she said she never thought about the death  
13 penalty?

14          A     Well, it was primarily because she said  
15 that -- in making the decision between life and  
16 death, she said life would be better than the death  
17 penalty. That was the primary thing.

18          Q     And do you recall whether in this case you  
19 asked this juror whether she had ever thought about  
20 the death penalty?

21          A     Either I did or Mr. Williams. I'm not  
22 sure on that, which one.

23          Q     And was that a question you routinely ask  
24 all jurors?

25          A     I can't say that. I can't say that. I

1 mean, sometimes --

2 Q No, I'm asking.

3 A Sometimes they've already mentioned it or  
4 indicated in their examination with the Judge the  
5 feeling that the thoughts ever even occurred to  
6 them. And sometimes when they're testifying, you  
7 get the feeling, "Well, wonder if this person has  
8 ever even thought about imposing the death penalty,  
9 has ever even talked about whether they're in favor  
10 of it or against it?" And so when you get that  
11 feeling would be when you would ask that question.

12 Q So it's not a routine question that you  
13 ask?

14 A I doubt it. I wouldn't say every time,  
15 but it is something that's a factor that I think  
16 about.

17 Q And do you recall there was a juror  
18 qualified that you didn't strike, Dan Riegel. Do  
19 you recall why you didn't challenge him? He sat on  
20 the jury.

21 A His name was what?

22 Q Dan Riegel.

23 A My assessment on him was good. I don't  
24 have the actual -- my notes on him.

25 Q Well, I only asked because he indicated

1 during his voir dire that he was friendly with and  
2 knew one of the defense witnesses that was going to  
3 testify at trial, Tianne Ailer [ph]. And normally  
4 that would be, you know, an issue of concern.

5 A Who was the witness he was familiar with?

6 Q Tianne Ailer [ph]. She was a social  
7 worker who was going to testify at the trial.

8 A Probably had a social relationship with  
9 her. I can't remember that. That isn't one I  
10 reviewed. I'd be willing to look at it.

11 Q Well, I just didn't know if you had any  
12 notes and what you were going to say.

13 A I need to look at that in my notes and see  
14 if I can remember anything. Well, my notes say that  
15 regarding the murder of the law enforcement officer  
16 that he said he would be more inclined to lean  
17 towards death but could consider both.

18 So he'd be somebody we wanted. So the  
19 fact that Tianne Ailer (PH) lived seven houses down  
20 the street years ago when he was in Conway, that  
21 would have been a very far distant back seat to him  
22 stating under oath that he would lean towards death  
23 for the murder of a law enforcement officer.

24 Q So, of course -- is this basically your  
25 independent recollection, or you're just reviewing

1       these notes?

2               A     Well, that's my handwriting which I  
3       recognize on there, and I do actually remember now  
4       that you remind me about Ms. Ailer and him knowing  
5       her. You remember more once you see the notes,  
6       where he said that stuff about he and his wife  
7       invited her to a party a couple of times.  
8       Apparently, she didn't come, but they had invited  
9       her. But anyway, it struck me as to be a very  
10      casual relationship with her at best anyway.

11              Q     Well, when asked -- do you recall the  
12      testimony when he was asked if he could consider  
13      life? His immediate words were, "Yes, oh,  
14      absolutely." So he indicated a clear willingness to  
15      consider life in this case.

16              A     Yes.

17              Q     So, Mr. Kolp, let me turn to one other  
18      issue just briefly. Do you recall on the second day  
19      of jury selection at Georgetown that -- on the  
20      second day of jury selection, do you recall an  
21      instance in which Mr. Stone was brought into the  
22      courtroom -- this was before the trial -- but he was  
23      brought into the courtroom in leg irons?

24              A     No, sir.

25              Q     You have no recollection of that?

1 A No, sir.

2 Q All right, thank you. Nothing further.

3 THE COURT: Redirect?

4 MR. ZELENKA: Thank you, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. ZELENKA:

7 Q Just one follow-up on Mr. Riegel. On one  
8 of your strike lists, it reflects a defense strike  
9 under Mr. Riegel's name, is that correct?

10 A Yes, sir.

11 Q And what did that indicate to you or to  
12 the team your expectation was as to what would  
13 happen with Mr. Riegel at that time?

14 A We were expecting the defense would strike  
15 him.

16 Q And that was based upon your assessment of  
17 the manner that he answered questions during the  
18 voir dire?

19 A Yes, sir.

20 Q I have no other questions. Thank you.

21 THE COURT: Very good. You may step down.

22 MR. KOLP: Thank you, Your Honor.

23 THE COURT: Mr. Kolp, you're welcome to  
24 stay.

25 MR. KOLP: Thank you. I'll probably be

1 back later.

2 THE COURT: All right, very good.

3 All right, anything before we break for  
4 lunch?

5 MR. BLUME: No, sir.

6 MR. ZELENKA: No, Your Honor.

7 THE COURT: Very good. All right, we'll  
8 stand at ease until 1:30, 1:30 sharp.

9 (Court in recess.)

10 THE COURT: Mr. Blume, you're recognized.

11 MR. BLUME: Your Honor, we call Pete  
12 Skidmore.

13 CLERK OF COURT: State your name, please.

14 MR. SKIDMORE: Peter Skidmore.

15 (The witness was sworn.)

16 THE COURT: Take a seat and pull up real  
17 close to that microphone. Speak loudly, clearly,  
18 and slowly in order that we can hear everything that  
19 you've got to say. And let's start with your full  
20 name, again.

21 MR. SKIDMORE: Peter Skidmore.

22 THE COURT: Very good.

23 Mr. Blume.

24 DIRECT EXAMINATION

25 BY MR. BLUME:

1 Q Mr. Skidmore, how are you currently  
2 employed?

3 A I'm a licensed private investigator.

4 Q And as a licensed private investigator,  
5 did I retain you to assist in Mr. Stone's case?

6 A Yes.

7 Q And do you recall that I -- in 2009, did I  
8 ask you to go anywhere?

9 A Yes.

10 Q And on February 26, 2009, can you tell the  
11 Court what I asked you to do?

12 A You asked me to go back to the scene at  
13 approximately the same time of the incident and  
14 shoot video and see if it was light or dark out.

15 Q And what time did you arrive?

16 A Approximately 6:45 p.m.

17 Q And how long did you stay?

18 A A little over 30 minutes.

19 Q And can I show you what's been marked as  
20 Plaintiff's Exhibit Fifteen and ask you if you know  
21 what that is?

22 A Yes.

23 Q And can you tell the Judge what that is?

24 A That's a DVD of the recording that I did  
25 on the 26th of February.

1 Q And when you arrived at 6:45, was it dark?

2 A It was dark.

3 Q Not dusk, it was dark?

4 A It was dark.

5 Q And so the testimony is that Sgt. Kubala  
6 arrived at the address in question at 7:05. Were  
7 you present at 7:05?

8 A Yes.

9 Q And at 7:05 -- and I know it sound stupid,  
10 but was it dark at 7:05?

11 A It was dark.

12 Q And did you video the time from when you  
13 arrived till when you left?

14 A Yes.

15 MR. BLUME: Your Honor, at this point I  
16 would move the admission of Plaintiff's Exhibit  
17 Fifteen, which is the DVD that shows -- it documents  
18 that it was in fact dark at the address in question  
19 at the time in question of the anniversary of the  
20 event.

21 THE COURT: Any objection from the State?

22 MR. SIMON: No objection.

23 THE COURT: Plaintiff's Exhibit Fifteen is  
24 into evidence.

25 (Applicant's Exhibit Number Fifteen, CD,

1 Stone, was entered in evidence.)

2 MR. BLUME: Your Honor, I mean, I could  
3 play it. I could give it to you view on your own  
4 since this is a bench trial. I think if it's now  
5 played, you can see what Mr. Skidmore could see, and  
6 this is five minutes before in question.

7 THE COURT: Okay, very good. Thank you.

8 MR. BLUME: No further questions..

9 THE COURT: Cross-examination?

10 MR. SIMON: Yes, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. SIMON:

13 Q Good afternoon, Mr. Skidmore.

14 A Afternoon.

15 Q Now, in making this video, how did you  
16 have the camera set up in the car?

17 A I was sitting in the car shooting out the  
18 window, which was down, the driver's side window.

19 Q And you kept your lights on in the car the  
20 whole time?

21 A My lights weren't on. I cut my lights  
22 off. I actually pulled into a driveway that was  
23 right across from the residence.

24 Q Okay. So you didn't drive into the  
25 driveway of the residence?

1           A     No, sir.

2           Q     And you had the lights on when you drove  
3 into the driveway and did that video?

4           A     My lights were on when I drove in, but I  
5 cut them off after I set up.

6           Q     Okay. Well, what kind of car were you  
7 driving?

8           A     At that time, I believe it was an F-150.

9           Q     Now, did you go to the yard I guess where  
10 the incident occurred that night?

11          A     Did I -- I'm sorry, what?

12          Q     Did you go to I guess what was at the time  
13 of the crime this home? Did you go there when you  
14 made the video?

15          A     Yes, I was right across the street.

16          Q     What I'm asking is, did you go into the  
17 yard where the incident occurred?

18          A     Did I step into the yard?

19          Q     Yes.

20          A     No, I did not step into the yard.

21          Q     And you didn't go around to where the back  
22 porch was?

23          A     I did not go around to the back of the  
24 house. It was darker back at the back. You  
25 couldn't see anything.

1 Q But when you were doing this video, you  
2 didn't go to where the porch was, correct?

3 A No, sir.

4 Q And you didn't use a flashlight or  
5 anything when you walked back there either, did you?

6 A I didn't walk back there, sir.

7 Q And this video you took in 2009, correct?

8 A Yes, sir.

9 MR. SIMON: Beg the Court's indulgence?

10 THE COURT: Yes, sir.

11 Q What were the weather conditions the night  
12 you took the video?

13 A It was clear that night.

14 Q Do you know what the phase of the moon  
15 was?

16 A I didn't -- I don't know what the phase of  
17 the moon was, no.

18 Q Okay. And you didn't compare to see if it  
19 was the same phase as the night of the incident?

20 A No, I did not.

21 Q Do you know what the temperature was?

22 A No, I do not.

23 MR. SIMON: No further questions.

24 THE COURT: Redirect?

25 MR. BLUME: No, sir, Your Honor.

1 THE COURT: You may step down, thank you.  
2 You're free to leave.

3 MR. BLUME: May Mr. Skidmore be excused?

4 THE COURT: Yes, I said he's free to  
5 leave.

6 Mr. Luminack, you're recognized.

7 MR. LUMINACK: The applicant calls James  
8 Babb.

9 THE COURT: Mr. Babb.

10 CLERK OF COURT: State your name, please.

11 MR. BABB: James Babb.

12 (The witness was sworn.)

13 THE COURT: Mr. Babb, pull up real close  
14 to that microphone and speak loudly, clearly, and  
15 slowly in order that we can hear everything that  
16 you've got to say. And let's spell that last name,  
17 Mr. Babb.

18 MR. BABB: Yes, sir, it's James H. Babb --  
19 B-A-B-B.

20 MR. LUMINACK: Thank you, Your Honor.

21 JAMES H. BABB, having first been duly  
22 sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. LUMINACK:

25 A Good afternoon, Mr. Babb.

- 1 A Good afternoon, sir.
- 2 Q What are you doing now professionally?
- 3 A Retired.
- 4 Q Okay. And how long have you been retired?
- 5 A Since 2008.
- 6 Q And before 2008, what did you do?
- 7 A Private practice of law.
- 8 Q What type of law?
- 9 A Criminal, real estate, domestic.
- 10 Q How long had you been in the practice of
- 11 law?
- 12 A Since 1994.
- 13 Q And where did you primarily practice?
- 14 A In Sumter and in Federal Court in
- 15 Columbia.
- 16 Q I'm sorry, in Sumter and?
- 17 A Sumter and Federal Court in Columbia.
- 18 Q Okay. And were you appointed to represent
- 19 Bobby Wayne Stone before his first capitol trial?
- 20 A Yes.
- 21 Q And who was your co-counsel?
- 22 A Cam Littlejohn.
- 23 Q And did you and Mr. Littlejohn divide up
- 24 the kind of primary responsibilities for the case?
- 25 A Cam did most of the trial work. I did

1 more of the getting fund, investigating, pre-trial  
2 motions.

3 Q And when you say trial work, was Mr.  
4 Littlejohn primarily responsible for the culpability  
5 or the guilt or innocence phase of the trial, and  
6 you were more responsible for the mitigation phase?

7 A It kind of worked out that way, yes.

8 Q And did you also represent Mr. Stone in  
9 his resentencing trial after his death sentence had  
10 been vacated on direct appeal?

11 A Mr. Littlejohn and I both did, yes, sir.

12 Q If you could, just describe how you and  
13 Mr. Littlejohn prepared for voir dire at the first  
14 trial.

15 A Well, it wasn't a lot that we really were  
16 able to do. We asked the Court for funding for an  
17 expert to assist with jury selection. That would  
18 have included investigating potential jurors, etc.  
19 That was denied.

20 So we essentially had the jury  
21 questionnaires, list of jurors. And Mr. Littlejohn  
22 initially started out doing the questioning of  
23 individual jurors, and then I would pick up as he  
24 wanted me to.

25 Q And then at the resentencing trial, did

1 anything change in terms of your preparation for  
2 voir dire, or were you then also stuck doing it on  
3 your own?

4 A Doing it on our own.

5 Q And did you and Mr. Littlejohn strategize  
6 beforehand about what types of questions you were  
7 going to ask in voir dire or what types of jurors  
8 you wanted to seat?

9 A No -- I mean, other than obviously you  
10 want to see what the defense would call non-killers.  
11 But as far as a game plan, you know, set criteria of  
12 specific questions or making objections to leading  
13 questions by the Court.

14 Q And just to back up briefly, I take it Mr.  
15 Littlejohn was primarily responsible for the  
16 culpability stage. Does that also mean he would  
17 have been the person on the team responsible for  
18 dealing with any crime scene experts or kind of  
19 crime scene issues?

20 A Well, we both did that to an extent. I  
21 mean, you know, I would make the motions, request  
22 for the funding to get the funds to take care of the  
23 experts. Now, he and I would consult on who we  
24 hired to do the consulting on what we went over,  
25 what they said or the advisement as the result of

1 their investigation.

2 Q All right. And he was the one responsible  
3 in the courtroom for dealing with how to present  
4 that evidence, whether to present it, and then how  
5 to deal with the cross-examination of the  
6 prosecution's witnesses?

7 A Generally speaking, yes, sir. I mean, he  
8 was lead counsel. I did whatever he wanted me to  
9 do.

10 Q I know the feeling. Mr. Babb, the  
11 resentencing trial -- you obviously were here for  
12 Mr. Kolp's testimony -- how many law enforcement  
13 officers were present during the trial?

14 A I couldn't give you an exact count. The  
15 security was heavier than usual. In other words,  
16 there were more officers physically present in the  
17 courtroom. And then, of course, you had many  
18 witnesses who would be law enforcement officers.

19 And then those were, of course, in plain  
20 clothes. But there were more than normal. And part  
21 of that I think had to do with the situation that  
22 you had a local law enforcement officer who was the  
23 decedent in the case, the victim, if you will.

24 Mr. Stone, the State knew to have him held  
25 in safety. And I believe Mr. Kolp signed an

1 affidavit saying it was as much for his protection,  
2 in so many words, as anyone else because of law  
3 enforcement.

4 The jail had physical responsibility of  
5 him and provided security coming into the courtroom  
6 and going out and that sort of stuff to relieve some  
7 of the local law enforcement. So we had more than  
8 normal.

9 Q And let's talk about normal. Have you  
10 ever handled a DUI case or been present for a DUI  
11 trial?

12 A Other than in General Sessions.

13 Q All right. Were there more officers in  
14 this courtroom for Mr. Stone's capitol resentencing  
15 than there were for the DUI --

16 A Oh, yes.

17 Q -- in General Sessions Court?

18 A Yes.

19 Q Substantially more?

20 A At least double, I would say.

21 Q In uniform?

22 A Yes.

23 Q Easily identified as law enforcement?

24 A Yes.

25 Q And the record does not reflect that you

1 made an objection to that law enforcement presence.  
2 Did you have any strategic reason for not bringing  
3 that to the Court's attention and objecting to it?

4 A No, sir.

5 Q And is the same true of the first trial in  
6 the terms of the presence of law enforcement  
7 officers?

8 A That's correct.

9 Q Similar number?

10 A Yes.

11 Q In uniform?

12 A If anything, there would have been more at  
13 the first probably than the second.

14 Q And the record does not reflect an  
15 objection was made then, as well. Was there any  
16 strategic reason for not objecting to that at the  
17 first trial?

18 A None that I recall. I do know we had a  
19 conversation at some point during the first trial,  
20 and I don't recall if it was in Georgetown for jury  
21 selection or here, you know, concerned about the  
22 jury presence and seeing the security measures on  
23 bringing him and out of the courtroom.

24 And that's when we were advised -- and I  
25 think it was in the presence of the Judge -- that

1 we'd be using a set of braces. It's kind of like a  
2 body brace that goes under the clothing. And if you  
3 move too quickly or extend your legs too much, it  
4 locks so you can't run.

5 Q All right. Let's talk about kind of your  
6 preparation for the mitigation phase or the penalty  
7 phase of the capitol case. To the extent that was  
8 your responsibility and that you were more focused  
9 more on the penalty phase than the guilt phase on  
10 the team, were you responsible for seeing that  
11 records were obtained regarding Mr. Stone and his  
12 family members?

13 A Well, I mean, you could say that.  
14 Essentially, what we did is we would retain experts,  
15 and we talked with other attorneys around. I  
16 remember specifically talking to David. I talked  
17 with Jack Swirling. And then cam had a great amount  
18 of experience over his career in prosecuting as well  
19 as defending.

20 So we would select an expert, and I would  
21 basically receive records from them. In other  
22 words, I didn't -- if we hired a doctor, we hired an  
23 investigator, I didn't tell him how to run the  
24 investigation or what tests to run.

25 Q Right. But, you know, saying you hired

1 somebody to compile records?

2 A I would generally get those.

3 Q Right.

4 A We'd make copies. They would be shipped  
5 to Cam. We'd have meetings periodically, he and I  
6 both, with experts to review them.

7 Q So in the normal course, the records would  
8 come to you, and then you would make -- you know,  
9 because if you hire somebody, they're relying on you  
10 to provide some of the information at least to get  
11 started. And so that would be up to you to provide  
12 the records to a particular expert?

13 A Right, that's my recollection. I had a  
14 larger staff than Cam did.

15 Q And you obviously provided your file, as  
16 you were statutorily required to do, to Mr. Blume  
17 and I. Do you have any recollection of obtaining  
18 the TB records -- TB treatment records -- for Bobby  
19 Wayne Stone's mother and father?

20 A No, sir.

21 Q And do you have any recollection of  
22 obtaining DHEC and EPA records regarding the  
23 contamination of and around Turkey Creek?

24 A No, sir.

25 Q Now, you did obtain, I believe, at least

1 some of Mr. Stone's school records?

2 A I have since seen those. I do not have a  
3 present recollection of having reviewed that  
4 specifically during the case.

5 Q All right. So Mr. Simon met with you last  
6 week, right?

7 A Last week or week before.

8 Q For a significant length of time, right?

9 A Several hours.

10 Q And I met with you as well, right?

11 A That's correct.

12 Q And I showed you the psychological reports  
13 from Mr. Stone's school records, right?

14 A I remember seeing a record. I believe it  
15 had grades on it, and it also had his -- at least in  
16 one or more instances, the results of IQ tests.

17 Q And did you feel that that was the first  
18 time that you had actually reviewed those records  
19 and seen the IQ scores?

20 A To my recollection, yes. Now, I was aware  
21 that Mr. Stone's IQ had been diagnosed as below  
22 normal. But that's the first instance I recall  
23 actually looking at the records. In reading the  
24 transcripts, I note that Ms. Ailer did testify, I  
25 believe, that his IQ had dropped over a period of

1 time.

2 Q And was it also the first time that you  
3 had actually seen one record where the IQ score was  
4 significantly lower and was in the range of mental  
5 retardation, and he had been diagnosed as EMH? Was  
6 that the first time that you had actually seen that?

7 A To my knowledge, yes, sir.

8 Q And the first time that you had learned  
9 that information?

10 A Yes.

11 Q And if Ms. Ailer's file does not have that  
12 school record in it, is it possible and in fact  
13 probable that that was because it came to your  
14 office and for whatever reason it just didn't find  
15 its way to Ms. Ailer or you didn't give it to her?

16 A That's a possibility.

17 Q You said a moment ago that you were aware  
18 that his IQ was lower than normal, correct?

19 A Correct.

20 Q And you were also aware that he had  
21 suffered several head injuries, correct?

22 A Correct.

23 Q And yet there does not appear to have been  
24 a neuropsychological evaluation conducted. And I  
25 take it that you did not seek funding for or hire a

1 neuropsychological expert to conduct an evaluation?

2 A We did not request funding for any brain  
3 scans, no, sir.

4 Q Or a neuro --

5 A Or a neuropsych evaluation, no, sir.

6 Q And, of course, Ms. Ailer is a social  
7 worker, right?

8 A That's correct.

9 Q And so she can't administer any  
10 psychological testing of any kind, right?

11 A I wouldn't think so. I wouldn't expect  
12 to, wouldn't ask her to, and wouldn't rely on it.

13 Q Okay. And that's why we have different  
14 experts for different things?

15 A Correct.

16 Q And everybody's got their specific  
17 expertise?

18 A Correct.

19 Q And I take it, but I want to ask you, did  
20 you have any strategic reason after learning of his  
21 low IQ score and his head injuries for not hiring a  
22 neuropsych evaluation?

23 A No, sir.

24 Q And you'd agree with me that if a capitol  
25 defendant does suffer from brain damage, especially

1 significant brain damage, that that would be  
2 mitigating, right?

3 A Absolutely.

4 Q And that would be something if you  
5 learned, you would want to make sure you presented  
6 to the jury, right?

7 A Yes..

8 MR.. LUMINACK: Court's indulgence. I have  
9 nothing further, Your Honor.

10 THE COURT: Very good.

11 Cross-examination, Mr. Simon.

12 MR.. SIMON: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. SIMON:

15 Q Good afternoon, Mr. Babb.

16 A Good afternoon, sir.

17 Q How are you doing?

18 A Fine, thank you.

19 Q Can you tell us a little bit about your, I  
20 guess, background and practice? You said you  
21 started practicing around 1994?

22 A 1994, that's correct.

23 Q Okay. Before that, were you living in  
24 Sumter?

25 A I came to Sumter about the turn of 1990.

1           Q     And where were you before you were in  
2     Sumter?

3           A     Before that, I stayed in Columbia for  
4     about a month or two. Before that, I was in  
5     Washington, D.C.

6           Q     When you started your practice in 1994,  
7     did you start just in private practice? Did you  
8     start in private practice?

9           A     At that time, I did. I opened an office,  
10    hired staff. The way the Public Defender system in  
11    Sumter County worked then was that you had contract  
12    Public Defenders that were essentially private  
13    attorneys who would agree to represent a portion of  
14    defendants in General Sessions Court for a set fee.  
15    And I guess I started -- I think I opened my office  
16    in February of 1994, and sometime during the spring  
17    of '94 I took a contract to be a part-time contract  
18    Public Defender.

19          Q     And you were still a part-time Public  
20    Defender when you were appointed to represent Mr.  
21    Stone, correct?

22          A     Yes -- in 1996, that's correct.

23          Q     Now, in getting ready for the first trial,  
24    of course, it was you and Mr. Littlejohn, and y'all  
25    were the defense attorneys for Mr. Stone, correct?

1           A     Well, first, it was just me until he was  
2           noticed by the State that they would be seeking the  
3           death penalty. At that point, then you'd have to  
4           find another counsel truly from private practice.

5           Q     And y'all hired several people to help you  
6           out with preparing for a defense, correct?

7           A     Yes.

8           Q     One of those would been Don Grant (PH)?

9           A     Don Grant was hired, yes, sir.

10          Q     And what did Mr. Grant do?

11          A     Don was essentially a crime scene  
12          investigator. He had an expertise particularly in I  
13          think gunshots, blood splatter, fingerprints. But  
14          he at that time -- he's a former SLED agent -- was  
15          doing general services on looking at crime scenes  
16          and advising individuals about the crime scene.

17          Q     And what did y'all have him do in this  
18          case?

19          A     Well, I know he looked at the weapon that  
20          was used, the .22 high-standard Supermatic pistol,  
21          and I know he looked at the shotgun. I recall being  
22          at the scene at least once with him. He reviewed  
23          evidence. He sat with us during the presentation of  
24          a lot of the State's evidence, and we would discuss  
25          that, you know, as he had input, any questions that

1. we should ask.

2. Q So he gave y'all advice on things to use  
3. during cross-examination?

4. A Oh, yes, sir.

5. Q And you had him for both the first and  
6. second trial, correct?

7. A I believe that's correct.

8. Q Another person you had -- let me just kind  
9. of stick with the first trial for right now.  
10. Another person you had on your team was Tianne  
11. Ailer, correct?

12. A That's correct, on both trials.

13. Q And she was a social worker?

14. A Correct.

15. Q Also, you had Dr. Harold Morgan in the  
16. first trial, correct?

17. A Harold C. Morgan, yes.

18. Q And he was a psychiatrist?

19. A He is a forensic psychiatrist, yes.

20. Q And y'all had him -- I guess initially you  
21. had him look at Mr. Stone after -- in light of the  
22. questions that were raised regarding the interview  
23. you had with him, Dr. Morgan looked at him in  
24. regards to his physical injuries, correct?

25. A Yes, I had him conduct a physical

1 examination of Mr. Stone at one of the prisons there  
2 in Columbia.

3 Q And then you later also had him do a  
4 psychiatric evaluation, correct?

5 A Yes, sir. We had him evaluate Mr. Stone I  
6 know for competency, and I believe we also used him  
7 for adaptability.

8 Q Do you recall any kind of information he  
9 provided you in regards to Mr. Stone's I guess  
10 psychiatric make-up before the first trial?

11 A I know that he was indicating Mr. Stone  
12 was competent. That's a matter that we put on the  
13 record. I know he found and testified that it was  
14 his opinion he was adaptable to prison. I do not  
15 recall any other findings or recommendations being  
16 used.

17 Q Do you recall if Dr. Morgan advised y'all  
18 to speak with anyone else in regards to Mr. Stone's  
19 psychiatric health or psychological health?

20 A Not to my recollection, no, sir.

21 Q You also had several investigators that  
22 worked on the case too, correct?

23 A Yes.

24 Q And one of those was Tommy Davis, correct?

25 A Correct, former FBI agent.

- 1 Q And another was Leslie Sapp, correct?
- 2 A I believe that's correct.
- 3 Q And Scott Parker?
- 4 A That sounds correct.
- 5 Q And at some point in time, y'all did
- 6 utilize the services of Dr. Jeff McKee, correct?
- 7 A That's correct.
- 8 Q And he is a psychologist?
- 9 A He is a psychologist.
- 10 Q And he did IQ testing on Mr. Stone,
- 11 correct?
- 12 A I do not know. I know I received a phone
- 13 call from Mr. Littlejohn, and the information was
- 14 received that Dr. McKee indicated that we'd no
- 15 longer be using his services.
- 16 Q Do you recall what information that was
- 17 shared by Mr. Littlejohn in that conversation?
- 18 A The best of my recollection was that Dr.
- 19 McKee was of the opinion that Mr. Stone was not
- 20 adaptable to prison life and/or, you know, had like
- 21 an antisocial personality.
- 22 Q And that was information that you did not
- 23 want to come out at trial?
- 24 A No, I wasn't concerned that he would do
- 25 anything like that. That would be the State's

1 trial.

2 Q You indicated that basically in terms of  
3 dividing the labor, you handled some of the  
4 administrative and billing in the deal, correct?

5 A I handled the bulk of that, yes.  
6 Specifically, I remember Cam asking me to please do  
7 that during the second trial. I think he may have  
8 handled at least Dr. McKee.

9 Q And I guess in the first trial, in regards  
10 to the guilt phase, you primarily handled just two  
11 witnesses, correct?

12 A That sounds correct, yes.

13 Q One being Daniel Bethea, who lived down  
14 the street from Ms. Griffith, correct?

15 A That sounds correct, yes, sir.

16 Q And the other being Mary Griffith Powell,  
17 Ms. Griffith's daughter, correct?

18 A I don't have an independent recollection,  
19 to be honest, but I couldn't dispute that. If  
20 that's what the transcript indicates, I would  
21 certainly say that's what happened.

22 Q Now, you've had a chance to review the  
23 allegations in the application, haven't you?

24 A Yes, sir, I have.

25 Q The first allegation that they've raised

1 is in regards to the closing argument in the guilt  
2 phase?

3 A Yes.

4 Q Had y'all made a decision on who would be  
5 handling any objections during the closing argument?

6 A Well, unless Mr. Littlejohn specifically  
7 asked me to take a witness, he handled it. I mean,  
8 don't get me wrong. I'd have no problem nudging him  
9 and saying object to something. If I felt there was  
10 a need for an objection, I'd tell him that there  
11 was.

12 Q And you've had an opportunity to review  
13 that closing argument made by then Solicitor, right?

14 A Yes, sir.

15 Q And do you recall at any point in time and  
16 in looking at that, did you see anything  
17 objectionable about that statement?

18 A Nothing specific comes to mind. I mean,  
19 when you're in a trial, as we discussed, you've got  
20 a number -- your audience is multiple. You have a  
21 Judge that you really don't want to get on the side  
22 of and get him upset and cause him to perhaps agree  
23 with the State.

24 You have an appellate record that you have  
25 to protect. You've got a client sitting by you

1 that's anxious and wanting to talk to you while  
2 you're trying to listen, think, and write all at the  
3 same time. And then you, of course, have a jury  
4 that everything tends to be riding on.

5 So, you know, when I say you didn't  
6 object, I've always been one when we're not in front  
7 of a jury that I make as many objections as I can  
8 possibly think of because you don't know what was  
9 said. Now, once you're in a trial, you've got to  
10 temper that to some degree and make sure you're  
11 making the essential objections for the record,  
12 because, of course, as you know, in South Carolina  
13 it has to be immediate, and you have to state your  
14 grounds.

15 Otherwise, the objection is waived. But  
16 at the same time, you don't want to making this over  
17 and over and over objecting to everything. It  
18 aggravates the jury, and it tends to make them feel  
19 like you've got something you're trying to hide.

20 Q And to just move on to the second issue  
21 that was raised. We've discussed this a little bit.  
22 That's in regard to crime scene experts?

23 A Yes.

24 Q Y'all did retain those?

25 A Correct.

1           Q     And at some point, you did consider  
2 whether or not he should testify, correct?

3           A     I don't recall the discussion about that.  
4 But, I mean, I know we would have. Otherwise, why  
5 would we have hired him and had him there. Now, a  
6 lot of that we were able to get some of the points  
7 that we wanted to make, and Cam did a fairly good  
8 job of that in cross-examination.

9                     Like y'all were discussing this morning,  
10 the pull weight on the trigger, and I think that Cam  
11 handled the first trial to Mr. Parnell. He  
12 indicated and I believe agreed that it was a hair  
13 trigger, and I recall the 1.5 pounds of pressure  
14 that it would take to do that.

15          Q     Basically, anything he would have  
16 testified to, you believe that was covered in what  
17 you got from the State's witnesses on cross,  
18 correct?

19                     MR. LUMINACK: I object, and the record  
20 speaks for itself on this, based on the transcript.  
21 I think this is an issue on which the record speaks  
22 for itself based on how they questioned. That's in  
23 the record.

24                     THE COURT: Okay. I'm going to ask that  
25 you rephrase the question.

1           Q     What kind of information would you have  
2 proffered if you had Mr. Grant testify?

3           A     Well, that's hard to say. That was kind  
4 of Cam's bailiwick on the weapon and those sorts of  
5 things. Part of it would have been to rehash. I  
6 guess he could have amplified, you know, the hair  
7 trigger, that sort of thing, which, as I say, Mr.  
8 Parnell addressed the actual amount of pull that it  
9 takes, as I recall from the trial.

10          Q     The third issue in the application is in  
11 regards to whether or not y'all should have utilized  
12 a Batson motion in the first trial. Do you recall  
13 considering that?

14          A     I don't have an independent recollection  
15 of having considered that, no, sir.

16          Q     You have had an opportunity to review the  
17 jury strike, correct?

18          A     Yes, sir.

19          Q     And do you recall having any thoughts  
20 regarding the strikes that were used by the State?

21          A     During the jury selection, no. I mean,  
22 you know, a Batson motion is something that you can  
23 -- it's pretty easy to throw around. I recall when  
24 Batson came out and people started making a lot of  
25 it. That kind of died out over time just because of

1 the back and forth that goes. I mean, unless you've  
2 got a pretty clear pattern of some sort of  
3 discrimination.

4 Q What was your impression of the jury that  
5 y'all drew?

6 A To my memory, we were as satisfied as we  
7 could be. In other words, any objections we had to  
8 a potential juror, we put on the record.

9 Q During your direct examination, you talked  
10 about the law enforcement presence in the courtroom?

11 A Correct.

12 Q First, is this the courtroom where you  
13 tried the first trial?

14 A First and second, yes, sir.

15 Q And you said that there were numerous law  
16 enforcement people in the courtroom?

17 A There were more then than there are now.

18 Q Well, just to get it on the record, how  
19 many do you see in the courtroom now?

20 A I see one uniformed officer over by the  
21 defense table. Of course, you've got a lady with  
22 SCDC sitting directly behind Mr. Stone. Other  
23 individuals behind the State's table, of course, I  
24 recognize, and some are law enforcement or  
25 affiliated with law enforcement, but they're in

1 plain clothes, as I believe there were more or less  
2 during the trial.

3 And then there's two SCDC officers at the  
4 back of the courtroom, and I don't recognize the  
5 gentleman that's underneath the clock to my left to  
6 the clock. Now, before, there would have been a  
7 deputy over to the Judge's right at that door.

8 There was one to two deputies over at the  
9 table over by the Grand Jury box. I believe there  
10 was another jury over towards the jury box, and you  
11 had various law enforcement personnel either  
12 directly behind the Solicitor's table or behind the  
13 bar.

14 And, of course, you had -- my recollection  
15 is that the personnel with the law enforcement --  
16 excuse me, not the law enforcement, the jail, the  
17 jailers -- were also in and around the courtroom  
18 because of the concern over Mr. Stone's safety, as  
19 well as I assume security for everyone else.

20 Q And the witnesses, I guess the law  
21 enforcement personnel who testified, were most in  
22 plain clothes?

23 A Most were, I believe, yes.

24 Q And in your recollection, did you see --  
25 well, can you give an approximation of the number of

1 law enforcement personnel in uniform that were not  
2 part of the security staff?

3 A That would be fairly limited. I mean,  
4 most of the investigators or, you know, anyone above  
5 a uniformed patrolman would have suited up for the  
6 trial, and did. You know, like the SLED agents that  
7 would come in, they would be, of course, wearing  
8 suits.

9 Q And in your direct, you talked about the  
10 braces that were used instead of, I guess --

11 A Instead of shackles, yes, sir.

12 Q And those were under the clothes?

13 A They're under the clothes.

14 Q And did you have contact with the folks at  
15 the detention center regarding Mr. Stone's transport  
16 to and from the courtroom?

17 A Yes.

18 Q And did y'all have an understanding of how  
19 he was supposed to be I guess dressed and coming in  
20 and out of the courtroom?

21 A As I recall, and it's typical, I do not  
22 believe he dressed here. They would have dressed  
23 him at the jail, and he would have had braces on  
24 under the clothes. He would have been transported  
25 here, ready for court.

1           Of course, he would have been handcuffed  
2 as they bring him out of the van into the holding  
3 area and then unhandcuffed once he was in the  
4 courtroom. The braces would have already been in  
5 place. And there wouldn't been shackles.

6           I know we spoke with -- Mr. Littlejohn and  
7 I spoke with the Solicitor, the jail, law  
8 enforcement, and the Judge at some point, because  
9 the braces were something new at the time. And I  
10 can't recall if that was for the trial here or if  
11 that occurred in Georgetown.

12           Q     And do you recall if Mr. Stone would be in  
13 the courtroom before the jurors were scheduled to  
14 arrive for court?

15           A     Yes.

16           Q     And would that have been for both, I guess  
17 in the first trial and when you were down at  
18 Georgetown too, correct?

19           A     I'm less familiar with that courtroom and  
20 the facilities. I know the holding area wasn't as,  
21 as we say, convenient. It wasn't as close to the  
22 actual courtroom as it was here. But I don't recall  
23 anything out of the ordinary in terms of him being  
24 brought in. They unshackled him.

25           Q     After the case got sent back after the

1 direct appeal in the first trial, did you make  
2 changes in the defense team you had put together?

3 A Yes.

4 Q And in preparation for the second trial,  
5 you again had Don Grant, correct?

6 A Correct.

7 Q You also had Tianne Ailer again?

8 A Correct.

9 Q And the second time, you also had Tommy  
10 Davis again, correct?

11 A Correct.

12 Q But for the second trial, you had two  
13 munitions specialists, correct?

14 A I believe that's correct.

15 Q You had Terrell Brown?

16 A Yes.

17 Q And Paige Tar?

18 A Correct.

19 Q Then also, did you consider bringing back  
20 Dr. Morgan?

21 A No, we didn't redo the competency or that  
22 sort of thing. And we used Jim Aiken for  
23 adaptability, and I think we also used Alex Moore,  
24 if I recall it correctly, in the second trial.

25 Q Did you speak with Dr. Morgan before

1 deciding not to utilize him? Do you recall?

2 A I do not. I do not believe so. I think  
3 Dr. Morgan had retired at that juncture.

4 Q But you don't recall having any kind of  
5 consultation with him or anything?

6 A Not during the second round. We  
7 essentially just didn't do that part over.

8 MR. SIMON: Your Honor, is it all right if  
9 I approach the witness?

10 THE COURT: You may.

11 Q Do you recognize that document?

12 A Yes, sir.

13 Q What is it?

14 A It is a form used by the Office of  
15 Indigent Defense in which an attorney keeps up and  
16 submits their time in a case. When I say their  
17 time, they would submit one of more of these in a  
18 case, just depending how often they submitted bills  
19 for their time.

20 Q And is this the one that you submitted for  
21 representation of Mr. Stone in the second trial?

22 A It bears my signature, and it's dated July  
23 28, 2005, and it appears to be the -- and I'm just  
24 going by what's on here -- trial on 2/25/05 and then  
25 reviewing statutes, prepare final reimbursement

1 order. So I'm assuming this was either my total  
2 time for the last final submission that I would have  
3 made for myself.

4 MR. SIMON: Your Honor, at this time I'd  
5 like to move this in as Respondent's One.

6 MR. LUMINACK: No objection, Your Honor.

7 THE COURT: Respondent's One is into  
8 evidence without objection from the plaintiff.

9 (Respondent's Exhibit Number One, Time  
10 Sheet of Attorneys, Indigent Offense, was entered in  
11 evidence.)

12 Q Now, Mr. Babb, if I could have you --

13 COURT REPORTER: Just a moment.

14 MR. SIMON: Sorry.

15 Q If I could have you look at page two.

16 A Yes, sir.

17 Q Looking at entries four and five --

18 A Yes, sir.

19 Q -- those indicate you made calls to Dr.  
20 Morgan?

21 A It does. It indicates I made telephone  
22 calls to Dr. Morgan and Tianne Ailer, and I billed  
23 three-tenths of an hour.

24 Q And how about on line eleven?

25 A That is an 11/3/04 telephone call to Dr.

1 Morgan regarding continuance and rescheduling of  
2 resentencing hearing, one-tenth of an hour.

3 Q So you're maintaining some contact with  
4 Dr. Morgan, correct?

5 A Obviously, yes, sir.

6 Q And you made a determination not to  
7 utilize him in the second trial, correct?

8 A Apparently so.

9 Q While we are looking at the billing sheet,  
10 I just want to ask you to look at line 18.

11 A Of page?

12 Q Page two.

13 A Page two. Phone consult -- that was  
14 11/5/04. Phone consult with William Gammer  
15 regarding -- or "Re repeated accidental discharge of  
16 pistol," two-tenths of an hour.

17 Q You consulted with Mr. Gammer?

18 A Apparently so.

19 Q Do you have any recollection of what that  
20 conversation entailed?

21 A No, sir.

22 Q What was your opinion of the team you put  
23 together for the second trial as compared to the  
24 first trial?

25 A Well, my opinion is I think the same it

1 would have been at the close of that. I thought it  
2 was a better team -- in other words -- Jim Aiken is  
3 extremely knowledgeable, testifies well, has a  
4 wealth of information, as does Alex Moore.

5 And we didn't have either of those two  
6 before. And I think Carolyn Graham was certainly an  
7 asset in terms of doing medication investigation and  
8 helped to coordinate with various people, her and  
9 Ms. Tar coordinating with our experts.

10 Q In putting together your strategy for the  
11 second trial, would I be correct in saying that --  
12 actually, strike that question. Let's go to the  
13 allegations again in regards to the second trial.

14 A Yes, sir.

15 Q In regards to the first claim, Mr.  
16 Littlejohn was handling that one, correct? The  
17 first claim is in regards to the victim's widow's  
18 testimony and the objection that was made. That  
19 objection  
20 was --

21 A Mr. Littlejohn made that objection, yes,  
22 sir.

23 Q In regards to the second claim that  
24 involves victim impact testimony that was presented  
25 and basically regarding the impact that Deputy

1 Kubala's death had on law enforcement, did you  
2 consider making any objections during the  
3 presentation of the information from law enforcement  
4 --

5 A Well --

6 Q -- and thus the impact that it had?

7 A Unless I was doing the cross-examination  
8 and Cam would have been the lead so you're not, you  
9 know, kind of double-teaming on witnesses where  
10 you're both popping up and objecting. But if I'd  
11 had an objection, I would have made that known to  
12 him.

13 Q Would that be the kind of information you  
14 would normally object to in front of a jury?

15 A You're talking about the widow's  
16 testimony?

17 Q No, the testimony regarding I guess the  
18 impact that Deputy Kubala's death had on the law  
19 enforcement community in Sumter.

20 A Well, again, it depends on how far the  
21 State pushes them or how far you want to push it  
22 with your objections. I mean, impact is impact,  
23 unless it is -- I mean, they're given a certain  
24 amount of leeway in that, to talk about the officer,  
25 you know, the impact that he's had on his family.

1 Q And if they had gone beyond that, y'all  
2 would have objected, correct?

3 A Well, I have relied on Mr. Littlejohn.  
4 I'm certainly sure that he raised that particular  
5 objection. That's one of the issues here.

6 And he objected as he saw fit, and I  
7 can't, you know, recall any specific event where he  
8 refused to object if I said object, you know, where  
9 I thought he didn't, or vice versa. Again, it  
10 becomes a balancing act somewhat.

11 Q Now let's talk about the investigation  
12 into mitigation evidence for the second trial.  
13 First, you already had done some investigation in  
14 preparation for the first trial, correct?

15 A Yes.

16 Q And in doing that investigation, that's  
17 where you mainly used the investigator you retained,  
18 correct?

19 A Correct.

20 Q And you would meet with them?

21 A Periodically, yes, sir.

22 Q And would they also provide you with  
23 statements from what they did?

24 A When you say "statements," you're talking  
25 billing statements or written reports?

1 Q Written reports.

2 A I rarely ever asked for written reports,  
3 at least not from the experts. Now, you know, an  
4 investigator, often they put things more in writing.  
5 But he's working for me, so it's not opinion and not  
6 discoverable. Something discoverable, I tend not to  
7 ask for written reports.

8 Q But investigators going out and then  
9 talking to people on your behalf?

10 A Some would do reports, and some, you know,  
11 would have given it to me verbally. But I'm sure  
12 there are reports in the file.

13 Q And do you have any recollection of -- in  
14 preparation for the first trial, do you have any  
15 recollection of anyone saying anything about Mr.  
16 Stone's mother drinking?

17 A No, sir.

18 Q Did you talk with Mr. Stone about that?

19 A Not that I recall, no, sir.

20 Q In preparation for the first trial, in  
21 getting information about Mr. Stone's background,  
22 did you have any problems in doing that?

23 A In preparation for trial?

24 Q Yes.

25 A No. I mean, we hired people and told them

1 to go out and dig.

2 Q How about from Mr. Stone specifically?  
3 Given the family background, did he have any issues  
4 with providing any information?

5 A No, I mean, it takes -- with Mr. Stone,  
6 you know, as with any client, you have a period  
7 where you have to establish some sort of rapport and  
8 some sort of trust.

9 And most people are -- of course, you're  
10 talking about things that matter greatly with them,  
11 things that are very personal to them. So you kind  
12 of have some barriers to break down. But I think we  
13 established a reasonable relationship.

14 Q Going back to your preparation for  
15 mitigation in the first trial --

16 A Yes, sir.

17 Q -- do you recall receiving information  
18 from one of your investigators in regards to his  
19 interview with Bernice Perry?

20 A With, I'm sorry, who?

21 Q Bernice Perry.

22 A That would have been Mr. Stone's aunt?

23 Q Yes.

24 A I don't recall the specifics. There's  
25 obviously a few things, because I believe you called

1 her to testify.

2 Q I'll come back to that in a second. In  
3 leading up to the second trial, did you ever hear  
4 anything from any of the family members regarding  
5 Mr. Stone's mother drinking then?

6 A No, sir.

7 Q And in your discussions with Mr. Stone,  
8 did he ever say anything about that?

9 A Not that I recall, no, sir.

10 Q In your discussions with Tianne Ailer, did  
11 she ever make any mention of making any mention of  
12 making any findings that Stone's mother drank before  
13 he was born?

14 A Not to my knowledge or recollection, no,  
15 sir.

16 Q Did you ever have any -- in preparing and  
17 doing the investigation, did you rely on a  
18 mitigation specialist to go out and get other  
19 documents?

20 A Yes.

21 Q And is that because that's their  
22 specialty, that's what they do?

23 A That's correct.

24 Q And in preparing for the second trial, you  
25 had two?

1 A Yes.

2 Q And they also, when they would go out and  
3 do their investigative, they provided those  
4 documents to your experts, correct?

5 A Yes.

6 Q And you would be familiar --

7 A I mean, that would be part of their  
8 function to provide it to me and to make sure the  
9 experts got it. I know that's typically what  
10 Carolyn does.

11 Q And you relied on them to do their job and  
12 obtain all the documents that they could find,  
13 correct?

14 A Yes.

15 Q And to your knowledge, was your  
16 understanding that what they got -- what they  
17 provided to you was what they could find?

18 A Yes, sir.

19 Q And some of the information that you  
20 learned from those documents and from talking with  
21 your investigators and your experts, you presented a  
22 good bit of that at trial, correct?

23 A Things that we felt were important or  
24 relevant, yes, sir.

25 Q Do you recall anyone ever providing you

1 with any information that Mr. Stone would have  
2 played in Turkey Creek as a child?

3 A No, sir.

4 Q Then none of your investigators said  
5 anything or came across any information about that,  
6 did they?

7 A Not to my recollection, no, sir.

8 Q And that would have been for either the  
9 first or the second trial?

10 A Correct.

11 Q And during the second trial, you did  
12 present information regarding Mr. Stone's poverty in  
13 childhood, correct?

14 A I was thinking we did at both, but  
15 certainly at the second one, yes, sir.

16 Q And you also presented information about  
17 his family situation?

18 A Correct.

19 Q Specifically, the fact that his mother had  
20 a boyfriend who would come in and out of the home?

21 A Yes.

22 Q You also provided information about I  
23 guess just the living conditions of where he grew  
24 up?

25 A Yes.

1 Q And also information regarding I guess his  
2 father's involvement in raising Mr. Stone?

3 A Yes. Now, his father was deceased. So, I  
4 mean, that ended at some period of time, but, yes.

5 Q And you also presented information  
6 regarding his father's alcohol abuse?

7 A Yes.

8 Q And information about Mr. Miles'  
9 involvement in Stone's upbringing?

10 A Yes.

11 Q And the fact that Mr. Stone was fearful of  
12 Mr. Miles on occasions?

13 A Yes.

14 Q And also information regarding Mr. Miles'  
15 drinking?

16 A Correct.

17 Q And you presented the testimony of several  
18 family witnesses, too, correct?

19 A Yes, sir.

20 Q Did you also present information regarding  
21 -- do you recall if you presented information  
22 regarding Mr. Stone's intellectual function?

23 A If I recall, Ms. Ailer testified both in  
24 the first and the second trial. And her testimony  
25 at some point reflected that Mr. Stone had a lower

1 than average IQ. And I believe she indicated in her  
2 testimony that his IQ fell over a period of time.

3 Q Altogether, you presented -- did you try  
4 to present everything you could find that would help  
5 Mr. Stone in mitigation?

6 A Well, let me answer it this way. I  
7 certainly didn't come across something I thought  
8 would be helpful and then decide not to use it in  
9 terms of mitigation.

10 Q And I apologize for jumping around.

11 A That's fine.

12 Q Going back to discussions about the crime  
13 scene itself.

14 A Yes.

15 Q Did you talk with Mr. Stone about his  
16 recollection of what occurred?

17 A Yes.

18 Q And what did he tell you happened?

19 A That he turned and the gun went off. He's  
20 never told me anything other than it was an  
21 accident, and he didn't know that the officer was  
22 deceased.

23 Q Did he ever tell you anything about his  
24 positioning on the porch?

25 A Other than the fact that he spun around.

1 I mean, no, it was obvious from what he was telling  
2 me that he was facing what would be an entry door  
3 into the residence. And I believe the screen porch  
4 would have been to his left, if I'm recalling  
5 correctly.

6 MR. SIMON: Beg the Court's indulgence for  
7 just a second. Your Honor, may I approach the  
8 witness?

9 THE COURT: Certainly.

10 Q Is that your handwriting?

11 A It is, sir.

12 Q Okay. Are these your notes that you would  
13 have made --

14 A Yes, sir.

15 Q -- in preparation for -- I guess during  
16 your representation of Mr. Stone?

17 A Correct.

18 Q Would you flip through and go to page  
19 four, I guess the last page?

20 A Yes, sir.

21 Q And if you wouldn't, review that for a  
22 minute for me.

23 A I'm sorry, sir?

24 Q Could you please review that for a second?

25 A Oh, certainly. All right, sir.

1           Q     These are notes from an interview you did  
2 with Mr. Stone, correct?

3           A     Either they are contemporaneous with an  
4 interview, or they would have been after an  
5 interview, is what it would appear to be. I was  
6 looking to see if I have a date anywhere in here,  
7 and I don't see one. I note on the first page, it  
8 says "close to jail," which would indicate to me  
9 we're pretty to trial.

10          Q     Okay. Now, in looking --

11               MR. SIMON: First, at this time I would  
12 like to offer this document into evidence as  
13 Respondent's Two.

14               THE COURT: Any objection from the  
15 plaintiff?

16               MR. BLUME: No objection.

17               MR. LUMINACK: Mr. Simon is saying he  
18 wants to admit the last page. I don't think there's  
19 any objection to the last page. I don't see why we  
20 need to admit the other three pages just because  
21 they happen to be stapled to it.

22               MR. SIMON: I actually would, Your Honor.

23               MR. LUMINACK: I don't have any objection  
24 to the first and last page, if that's what he wants  
25 to enter.

1 THE COURT: Are you tendering all three  
2 pages?

3 MR. SIMON: Well, actually, Your Honor,  
4 what I'll do is I'll tender the last page as  
5 Respondent's Two and then the first page as  
6 Respondent's Three.

7 THE COURT: Very good.

8 (Respondent's Exhibit Number Two, Babb  
9 Notes re Stone; and Respondent's Exhibit Number  
10 Three, Babb Notes re Stone, were entered in  
11 evidence.)

12 Q Now, Mr. Babb, in regards to that last  
13 page --

14 A Yes, sir.

15 Q -- towards the bottom --

16 A Correct.

17 Q -- tell me if I'm reading this correctly.  
18 You have a note down here that says "Heard somebody  
19 holler, turned and squatted," then two dashes, "went  
20 off when he squatted"?

21 A Yes, sir.

22 Q Would that have been something that Stone  
23 would have told you?

24 A Well, there wouldn't be anybody else that  
25 could tell me that..

1 Q Now, I guess turn back to the first page.

2 A Yes, sir.

3 Q And if you would take a look at that.

4 A Yes, sir.

5 Q And these, again, are your notes, correct?

6 A Yes, sir.

7 Q And would I be correct in saying it  
8 indicates by number three psychiatric issues?

9 A Correct.

10 Q In this note, you have that there's a  
11 family history of known substance abuse, correct?

12 A Correct.

13 Q And you also have a note that says "Not  
14 retarded, but a low IQ"?

15 A That is correct.

16 Q And would that be information that you  
17 would have garnered from discussions you would have  
18 had with folks on your defense team?

19 A Yes -- and would be consistent with, yes.

20 THE COURT: While we're reviewing that,  
21 we're going to take about a five-minute recess.  
22 We'll stand at ease for five minutes.

23 (Court in recess.)

24 THE COURT: Mr. Simon, you're recognized.

25 MR. SIMON: May I approach the witness,

1 Your Honor?

2 THE COURT: You may.

3 Q Mr. Babb, is that a document you would  
4 have received from one of your investigators?

5 A It appears so, yes.

6 MR. SIMON: Your Honor, at this time I'd  
7 introduce that document as Respondent's Four.

8 THE COURT: Any objection from the  
9 plaintiff?

10 MR. LUMINACK: No objection, Your Honor.

11 THE COURT: It's into evidence, and let's  
12 give the Court Reporter an opportunity to mark it.

13 (Respondent's Exhibit Number Four,  
14 Inventory

15 Report, Perry, 9/9/96, was entered in evidence.)

16 Q All right, now, Mr. Babb, if you'd look at  
17 the second page of that document -- well, first,  
18 that's a report you got from one of your  
19 investigators, correct?

20 A It appears so, yes, sir.

21 Q And that investigator, was it Leslie Sapp?

22 A It says by "B. J. Johns and Associates,  
23 Leslie M. Sapp, Investigator."

24 Q And on the second page of that document, I  
25 believe it's the second full paragraph?

1           A     The second full paragraph is what you  
2 pointed out, yes, sir.

3           Q     Well, first, that's an interview that he  
4 did with Bernice Perry, correct?

5           A     It does indicate "Monday, September 9,  
6 1996, interview with Elizabeth Bernice Perry."

7           Q     And in that second paragraph, it indicates  
8 that Mr. Stone's mother did not tolerate him  
9 drinking in her household, correct?

10          A     Would you like me to read the whole  
11 paragraph or just -- it indicates that Maybell, who  
12 would be Mr. Stone's mother, was very intolerant of  
13 his drinking and would kick him out of the house.

14          Q     And her intolerance of his drinking,  
15 that's consistent with the lack of information that  
16 you received of her drinking, correct?

17          A     Yes.

18          Q     I just have a few more questions for you  
19 in regards to law enforcement presence in the  
20 courtroom during the second trial.

21          A     Yes.

22          Q     You've already indicated that there was  
23 less law enforcement in the courtroom for the second  
24 trial, correct?

25          A     I believe that would be correct, yes.

1           Q     At any point in time during the second  
2 trial -- at any point in time, did you feel that any  
3 of the participants in the trial would have been --  
4 like would have felt intimidated by the law  
5 enforcement presence in the courtroom?

6           MR. LUMINACK:  Objection, Your Honor, as  
7 to what other people may or may not have felt.  I'm  
8 not sure he can answer that.

9           THE COURT:  I think it's a relevant  
10 question if you phrase it perfectly.  But the way  
11 it's phrased, it isn't in a perfect question.

12          Q     At any point in time, did you feel  
13 intimidated by the presence of law enforcement in  
14 the courtroom?

15          A     No, sir.

16          Q     And do you believe anybody on your defense  
17 team felt intimidated?

18          MR. LUMINACK:  Objection again, Your  
19 Honor.  They wouldn't have called a witness that  
20 they could ask.

21          THE COURT:  I'll sustain the objection.  
22 You can ask him if it was an unreasonable amount of  
23 law enforcement.

24          Q     Well, did you believe there was an  
25 unreasonable amount of law enforcement in the

1 courtroom?

2 A Not given the history of the case. I  
3 mean, to be honest, if I thought it was totally  
4 unreasonable, I would have objected.

5 Q And did you ever believe there was a  
6 reason to have anyone from law enforcement excluded  
7 from the courtroom during the second trial?

8 THE COURT: That's a good question.

9 A Well, let me answer it in two ways, just  
10 to give a complete answer. In terms of the basis of  
11 their conduct towards the general public, no,  
12 towards my client, no.

13 There was one officer who made some  
14 comments to one of my investigators that I didn't  
15 appreciate. But, you know, that was just taking  
16 part of the issues at hand. In other words, Mr.  
17 Fowler wasn't very well-liked by many people.

18 He comes from a very fine family here and  
19 is greatly loved in Sumter by many people. But in  
20 terms of, you know, doing anything extraordinary or  
21 out of the way, no, I did not see anything like  
22 that.

23 Q And how about for the first trial?

24 A No, sir.

25 MR. SIMON: Beg the Court's indulgence for

1 just a second. No further questions, Your Honor.

2 THE COURT: Very good.

3 Redirect, Mr. Luminack.

4 MR. LUMINACK: Thank you, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. LUMINACK:

7 Q Mr. Babb, just generally, you talked a  
8 little bit about making objections. And, of course,  
9 there's more than one way to make an objection,  
10 right?

11 A Yes.

12 Q And more than one way to make sure that  
13 the record is protected?

14 A Yes.

15 Q And one of those ways is rather than  
16 object in front of a jury to state your objection is  
17 to ask to approach the bench, right?

18 A Yes.

19 Q And in fact, that's what Mr. Littlejohn  
20 did, I believe, during the victim's widow's  
21 testimony, right?

22 A That is correct.

23 Q All right. And so anytime you think  
24 something is objectionable, you can either stand up  
25 and say it in front of the jury, or if you're

1 worried about that, you can approach the bench?

2 A Correct.

3 Q And especially in the context of a  
4 resentencing where you've had a trial before, you  
5 can anticipate some things that may happen?

6 A Absolutely, yes.

7 Q And so for those things, you can actually  
8 file a motion in limine before the trial --

9 A Correct.

10 Q -- and litigate outside the presence of  
11 the jury actually?

12 A Correct, or with evidentiary matters as  
13 here, all previous objections were reserved, I  
14 believe.

15 Q All right. And so there isn't a time  
16 during this case that something objectionable was  
17 going on and you had a strategic reason for not  
18 objecting to it in some form?

19 A No.

20 Q There was no strategic reason for not  
21 protecting the record, right?

22 A No, sir.

23 Q The questions regarding Maybell's  
24 ingestion of alcohol, Bobby Wayne's mother, I think  
25 Mr. Simon asked you if Bobby Wayne Stone had

1 indicated anything about that. And, of course, she  
2 would be pregnant with him during the important time  
3 period, right?

4 A For fetal alcohol syndrome, that would be  
5 my understanding, yes.

6 Q So you couldn't ask him about that, right?

7 A No, sir.

8 Q Do you recall on the second day of jury  
9 selection in the first trial Mr. Stone being forced  
10 to wear shackles between his legs, not the ones  
11 underneath his clothing and straight down his leg,  
12 but his shackles connected to his ankles and sitting  
13 at a table when the -- during jury selection when  
14 the jury was there, and Judge Dennis coming into the  
15 courtroom and noticing that, and calling people up  
16 to the bench?

17 A I know I had seen Mr. Stone in shackles  
18 before. I do not have a specific recollection of  
19 Georgetown and the jury being present.

20 Q So you just don't recall?

21 A I do not recall, no, sir.

22 Q Now, regarding Harold Morgan --

23 MR. LUMINACK: Your Honor, may I approach  
24 the witness?

25 THE COURT: You may.

1           Q     -- Mr. Babb, I'm going to hand you what's  
2     been marked as Plaintiff's Exhibit Sixteen. That's  
3     a fax from Dr. Morgan to you, correct?

4           A     It appears to be, yes, sir. It has my fax  
5     number, and it's on Dr. Morgan's letterhead, and  
6     it's addressed to me regarding Mr. Stone.

7           MR. LUMINACK: Your Honor, I'd move to  
8     admit that exhibit into evidence.

9           THE COURT: Any objection from the State?

10          MR. SIMON: No, Your Honor, no objection.

11          THE COURT: All right, it's into evidence  
12     without objection from the State. That will be  
13     Plaintiff's Exhibit --

14          COURT REPORTER: Sixteen.

15          THE COURT: ☞ Sixteen is into evidence.

16          MR. LUMINACK: Thank you, Your Honor.

17          (Applicant's Exhibit Number Sixteen,  
18     Harold

19     Morgan Letter 1/25/97, was entered in evidence.)

20          Q     Now, I think you indicated this earlier,  
21     but you had Dr. Morgan visit with Mr. Stone shortly  
22     after he was arrested, just for the purposes of  
23     looking at physical injuries, right?

24          A     Correct.

25          Q     And then a week before the trial, you send

1 Dr. Morgan a retainer letter asking him to conduct  
2 an adaptability assessment, right?

3 A I believe that would be correct, yes, sir.

4 Q And your cover letter is actually part of  
5 that exhibit, and it's dated about a week before the  
6 trial?

7 A Yes, sir, it's dated January 17, 1997.

8 Q Okay. And then during the trial, Dr.  
9 Morgan sends a letter back to you, and that's what  
10 that fax is, and he indicates that he had not  
11 reviewed any records, right?

12 A Yes, sir, that's correct. The second  
13 sentence is, "I have not seen those records,"  
14 referring to the defendant's behavior in prison in  
15 the past. "But if Mr. Stone was able to adapt  
16 adequately in the past, he's likely to adapt even  
17 now better because he's not likely to have the  
18 energy to act out."

19 Q All right. And because you had focused  
20 and hired him just for the purposes of an  
21 adaptability assessment, those would have been the  
22 records most relevant to his evaluation, right, the  
23 prison records?

24 A Yes, sir, correct.

25 Q And so you didn't have a reason and in

1 fact did not provide him with social history records  
2 or school records?

3 A Not to my knowledge, no, sir.

4 Q And, of course, a week before trial, this  
5 was not an expert who was conducting a broad-ranging  
6 mental health mitigation investigation hired six  
7 days before the trial, right?

8 A No, sir.

9 Q And similarly, Dr. McKee was hired for the  
10 purposes of assessing Mr. Stone's adaptability to  
11 prison?

12 A That and possibly competency.

13 Q And competency. But, again, not a mental  
14 health mitigation assessment?

15 A No, sir. When I hire an expert, it may be  
16 for a specific purpose, or it may be for them to  
17 tell me what needs to be done.

18 Q You mentioned Carolyn Graham and Paige  
19 Tar. Those are simply investigators, right?

20 A Correct?

21 Q Not psychologists or psychiatrists or  
22 social workers?

23 A No, sir.

24 Q Okay. Now, you mentioned Tianne Ailer.  
25 And, Your Honor, may I approach the

1 witness?

2 THE COURT: You may.

3 Q I'm going to hand you what's been marked  
4 as Plaintiff's Exhibit Seventeen. Is that what is  
5 called or at least labeled as a psychosocial  
6 evaluation or psychosocial report from Tianne Ailer?

7 A It says at the top "Psychosocial  
8 Evaluation."

9 MR. SIMON: Objection, Your Honor. He's  
10 saying this is the report itself, but this a rough  
11 draft.

12 MR. LUMINACK: I don't care if it's a  
13 rough draft or a final draft. I'd like to admit it.  
14 It's her words and what she's reporting to Mr. Babb  
15 during the trial. And if they would like to come  
16 back and indicate that that is not what she really  
17 meant or if it was something different, that's fine.

18 In fact, the fact that it's a rough draft,  
19 I think it will become clear once I go into it and  
20 the relevance will become quite clear.

21 THE COURT: Well, I'll allow it in.

22 MR. LUMINACK: Thank you, Your Honor.

23 Q So that was provided to you during the  
24 actual resentencing trial. And if you could, look  
25 at the second page of that report, after the

1 handwritten part and the typewritten part starts.  
2 And you will notice that there are some words that  
3 are marked out?

4 A Yes, sir.

5 Q And if you look at the first paragraph  
6 where there are words that are marked out, and if  
7 you look really closely, you can see that that's a  
8 name of another person, correct?

9 A I can see looks like there are three  
10 words, the last word being "Pearson," "is charged  
11 with murder."

12 Q All right. And the first two words are  
13 Johnny Ringo. If you look closely enough, you can  
14 see the apostrophes around the word Ringo, right?

15 A Yes, sir.

16 Q All right. And what Ms. Ailer has done is  
17 scratched out that word and changed it and just  
18 changed the name, right?

19 A Yes, sir.

20 Q Okay. And throughout that typewritten  
21 part, she's scratched out a couple of things from  
22 Mr. Pearson's life history and Mr. Pearson's social  
23 history and changed a couple of facts here and there  
24 and then changed the name?

25 A Yes, sir.

1 Q Okay. And that was the report provided to  
2 you by Ms. Ailer?

3 A It appears to be. It's dated January 25,  
4 1997.

5 Q Okay. So that would have been the day  
6 before the sentencing verdict came down, right?

7 A Right. I believe he was sentenced on  
8 January 28, 1997.

9 Q All right.

10 A So this would have been during trial.

11 Q And apparently was based on somebody else  
12 and then adapted for Mr. Stone's case?

13 MR. SIMON: Objection, calls for  
14 speculation.

15 THE COURT: I'll sustain the objection.

16 Q Mr. Pearson wasn't related to this case,  
17 right?

18 A That name rings no bells for me, no, sir.

19 Q And Mr. Pearson's life history didn't have  
20 any mitigating weight in Mr. Stone's case, right?

21 A Not to my knowledge. I don't know a Ringo  
22 Pearson.

23 Q Now, and just to be clear, the school  
24 records that you indicated earlier that you had  
25 received but didn't review, if you had reviewed

1 school records that showed not only a decline in IQ  
2 score but then a marked decrease to the point that  
3 he was in the range of mental retardation, you would  
4 have remembered looking at that, right?

5 A I believe so.

6 MR. LUMINACK: Court's indulgence. No  
7 further questions.

8 Thank you, Mr. Babb.

9 THE COURT: All right, you may step down.  
10 You may call your next witness.

11 MR. BABB: May I be excused, Your Honor?

12 THE COURT: Yes, you're free to leave.

13 MR. LUMINACK: Your Honor, we don't have  
14 any further witnesses. Of course, we can't rest the  
15 case because we've got witnesses who are  
16 unavailable. We've got the team, and you know about  
17 Mr. Littlejohn.

18 I do have some housekeeping matters and  
19 evidentiary issues that I'd like to bring to the  
20 Court's attention. And then we can at least rest  
21 our case on that. The first is a housekeeping  
22 matter.

23 The sociogram that I admitted through Dr.  
24 Andrews was inadvertently provided to Dr. Andrews  
25 during her testimony. I think she left with it.

1 And the Court Reporter notified us of this issue.  
2 I've shown this copy to Mr. Zelenka. He has no  
3 objection to substituting this copy into the record.

4 THE COURT: Is that correct, Mr. Zelenka?

5 MR. ZELENKA: That's correct, no  
6 objection.

7 THE COURT: Very good.

8 MR. LUMINACK: The other issue, Your Honor  
9 -- two issues -- yesterday, Dr. Merikangas  
10 referenced three reports and affidavits, one by Dr.  
11 Shine, one by Dr. Gur, and one by Dr. Bookstein.  
12 Those were marked as Exhibits One, Two, and Three,  
13 respectively.

14 We had previously provided those in  
15 discovery and notified the State that we were going  
16 to move to admit those in lieu of their testimony.  
17 But now I've moved that those three affidavits, of  
18 course, be admitted into evidence.

19 THE COURT: Any objection, Mr. Zelenka,  
20 Mr. Simon?

21 MR. ZELENKA: We thought they were already  
22 admitted as part of the material that he reviewed  
23 and was made available at that time.

24 THE COURT: So there's no objection?

25 MR. ZELENKA: We don't have an objection.

1                   THE COURT: Very good. Well, they're into  
2 evidence.

3                   (Applicant's Exhibit Number One, Shine  
4 Affidavit and Report; Applicant's Exhibit Number  
5 Two, Dr. Gur Affidavit and Report; and Applicant's  
6 Exhibit Number Three, Dr. Bookstein Affidavit and  
7 Report, were entered in evidence.)

8                   MR. LUMINACK: The last issue, we've got a  
9 stack of DHEC records regarding the contamination of  
10 Turkey Creek and the surrounding area. Those have  
11 been provided in discovery.

12                   And I think that the State is willing to  
13 stipulate the authenticity. We would now move these  
14 into the record as a public record maintained by a  
15 public agency with a legal band-aid to create and  
16 maintain these records.

17                   MR. SIMON: Your Honor, we would object to  
18 the introduction of all of those on relevance  
19 grounds.

20                   THE COURT: Okay.

21                   MR. SIMON: There are a number of  
22 documents that are contained in there that I guess  
23 is stuff that was done by the EPA in '98 and 2000  
24 that doesn't affect what was going on in Turkey  
25 Creek at the time of Mr. Stone's youth. And we

1 would object to them entering it.

2 THE COURT: I think the dates will pretty  
3 much speak for themselves. I'm going to allow it in.  
4 And obviously, when it comes time to argue, both of  
5 you can refer to it.

6 And you're going to be given wide latitude  
7 with regard to explaining how any of those don't  
8 apply to this particular case. I think it all needs  
9 to come in, and I'm sure you'll do a very technical  
10 job of pointing out what's not relevant.

11 MR. LUMINACK: Thank you, Your Honor.

12 THE COURT: I'm going to allow all of that  
13 into evidence.

14 MR. LUMINACK: I have that marked. That's  
15 Plaintiff's Exhibit Eighteen, Your Honor.

16 THE COURT: Very good. Eighteen is into  
17 evidence over the State's objection.

18 (Applicant's Exhibit Number Eighteen,  
19 Records, DHEC, was entered in evidence.)

20 MR. LUMINACK: The applicant has no  
21 further evidence to present at this time.

22 THE COURT: Very good.

23 All right, Mr. Simon, you and Mr. Zelenka  
24 are recognized.

25 MR. SIMON: Your Honor, at this time we'd

1 like to call Director Simon Major to the stand.

2 THE COURT: All right, Mr. Major.

3 CLERK OF COURT: State your name, please.

4 MR. MAJOR: Simon Major, Jr.

5 (The witness was sworn.)

6 THE COURT: Watch your step and have a  
7 seat in that witness chair. Position yourself right  
8 in front of that microphone and speak loudly,  
9 clearly, and slowly in order that we can hear  
10 everything that you've got to say. And state your  
11 full name once again.

12 MR. MAJOR: Simon Major, Jr.

13 THE COURT: Very good.

14 Mr. Simon.

15 SIMON MAJOR, JR., having first been duly  
16 sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. SIMON:

19 Q Good afternoon, Director Major.

20 A Hello.

21 Q What's your current occupation?

22 A I'm the director of Sumter Regional  
23 Detention Center.

24 Q And how long have you been at the  
25 detention center?

1           A     Effective today, it's my 17th year.

2           Q     Before you were with the detention center,  
3 what did you do?

4           A     I worked at -- I came from the South  
5 Carolina Probation and Parole and Partner Services,  
6 where I worked for six years. Prior to that, I  
7 worked two years with the Sheriff's Department.  
8 Prior to that, I worked six years with the Sumter  
9 City Police Department. And prior to that, I was  
10 four years in the United States Air Force.

11          Q     Now, in 1997 when -- well, first, were you  
12 involved in the Bobby Wayne Stone criminal trial in  
13 1997?

14          A     I was over the transportation of him, yes,  
15 sir.

16          Q     And what kind of -- in transporting Mr.  
17 Stone, can you just give us an overview of what  
18 y'all did?

19          A     Basically, every morning we got him  
20 dressed, placed the -- with all the restraints. We  
21 were tasked to get him here prior to the jury in  
22 Georgetown, and we could not leave until the jury  
23 was gone.

24          Q     Do you recall what was the part of the  
25 transport? Do you recall where you had to take Mr.

1 Stone?

2 A Georgetown.

3 Q And during that transport -- was he housed  
4 at the Sumter County Detention Center at the time?

5 A No, sir. We housed him at Georgetown  
6 Detention Center.

7 Q And at any point in time, was he shackled  
8 during his transport?

9 A To the best of my knowledge, the answer is  
10 no. But you are asking me whether he was shackled.  
11 He was restrained in restraints.

12 Q Describe to me how you had him restrained.

13 A We would put him -- we would strap him  
14 into a set-up -- they were called braces -- that  
15 actually went for the total length of his leg, being  
16 sure that he got them on tightly, showed him how to  
17 walk in them and everything.

18 Q And that would have been done before he  
19 left the detention center?

20 A Yes.

21 Q And were those visible?

22 A No, sir.

23 Q And would he have shackles -- would you  
24 have restrained him the same way every time you took  
25 him to the Georgetown County Courthouse?

1           A     Yes, sir.

2           Q     Now, in being I guess involved in his  
3 transport, were you in the courtroom during the  
4 trial, the first trial?

5           A     Yes, sir. I think I had -- if I'm not  
6 mistaken, I had four or five officers with me, and  
7 we would rotate out, yes, sir.

8           Q     And do you have any recollection of I  
9 guess the presence of law enforcement in the  
10 courtroom for the first trial?

11          A     This courtroom or Georgetown, sir?

12          Q     Well, let's start with Georgetown.

13          A     Yes, sir.

14          Q     Do you recall how many officers in  
15 uniform?

16          A     No, sir. I know for a certainty that my  
17 five were in uniform, but they were not all in the  
18 courtroom at the same time.

19          Q     How about in this courtroom for the first  
20 trial?

21          A     I know for certain then that my folks were  
22 in uniform, but all of them were not in the  
23 courtroom at the same time.

24          Q     Do you recall any other uniformed officer  
25 presence in the courtroom?

1 A Yes, sir.

2 Q Do you recall approximately how many you  
3 would have seen?

4 A If I were -- well, from a factual  
5 standpoint, no, sir. Were there a number of people  
6 here? Yes, sir.

7 Q And do you recall whether they would have  
8 seated?

9 A Yes, sir -- the majority of the time, yes,  
10 sir.

11 Q Where in the courtroom?

12 A There was some sitting in the lobby area --  
13 I mean, I'm sorry, outside the area over there.  
14 There was -- I think I had two of my guys sitting  
15 over here, also. So I know some of us sat over  
16 there, also.

17 Q Were you also involved in his transport  
18 for the second trial?

19 A Yes, sir.

20 Q And were you in the courtroom for that  
21 trial?

22 A For an amount of the time, yes, sir.

23 Q And do you recall what the law enforcement  
24 presence would have been during the second trial?

25 A It wasn't that many at the first trial, to

1 my recollection, because I think I even narrowed  
2 mine down to four people.

3 Q Going back to the transportation for the  
4 first trial, did you have any specific instructions  
5 that were provided to you in regards to when and how  
6 you would have to have Mr. Stone at the courthouse?

7 A Basically, our only job, again, was to get  
8 him there prior to the start of court and get him  
9 back to Georgetown, and then get him here prior to  
10 the start of court. And when they went up to leave,  
11 then we would leave.

12 Q And when you say prior to the start of  
13 court, what do you mean?

14 A In other words, if the Judge was going to  
15 start court at ten, I tried to get him here, because  
16 we had specific instructions as to -- and we were  
17 trying to avoid basically people seeing him anyway.  
18 So we tried to get him here 30 minutes or whatever  
19 prior to it.

20 If his attorney needed to see him, we  
21 tried to be sure that he was here in plenty enough  
22 time prior to the start of court. But we knew  
23 specifically what time that the jury was told to be  
24 back, so we made sure that we got him here way in  
25 advance.

1           Q     Now, to go back to when you were taking  
2     him to Georgetown, on the second day, do you recall  
3     using any shackles, any restraints other than the  
4     brace restraints you described earlier?

5           A     No, sir.

6           Q     And would you have used any shackles in  
7     that transport?

8           A     No, sir. To my knowledge, no, sir, we did  
9     not.

10           MR. SIMON: Beg the Court's indulgence.  
11     No further questions, Your Honor.

12           THE COURT: Cross-examination.

13           MR. LUMINACK: Court's indulgence.  
14     Briefly, Your Honor.

15                           CROSS-EXAMINATION

16     BY MR. LUMINACK:

17           Q     Good afternoon, Director.

18           A     Good afternoon, sir.

19           Q     When you were describing your officers who  
20     would be in the courtroom, they would all be in  
21     uniform, right?

22           A     Yes, sir.

23           Q     Now, are you saying that Mr. Stone was  
24     never -- during two trials was never transported  
25     restrained in any way except for the leg braces that

1       straighten if he straightens his legs?

2               A     To the best of my knowledge, that I can  
3       remember, sir, we never -- we would utilize the  
4       brace, and I say this to explain -- let me go back  
5       and explain to you a lot better.

6               With the braces, it required that he had  
7       to have some mobility. And coupled with leg irons,  
8       he couldn't have had the mobility that he needed to  
9       even walk, because if there was any straightening  
10      out of his leg, the actual brace would lock up.

11              So we taught him how to actually walk with  
12      the braces. And for him to move out of the  
13      courtroom, he remained seated until such time that  
14      they were out of the courtroom, because we taught  
15      him how to pull the braces back in case they did  
16      lock up on him accidentally.

17              Q     And do you recall on day two of jury  
18      selection at the first trial an incident where the  
19      braces were forgotten, they weren't being used, and  
20      so you asked that shackles be placed on him instead;  
21      and when Judge Dennis came into the courtroom, he  
22      noticed them and called counsel up to the bench to  
23      discuss it? Do you recall that at all?

24              A     No, sir.

25              Q     And are you also saying that when you

1 transported him from the jail to either of the  
2 trials that his hands were never restrained?

3 A When -- initially, from Sumter County to  
4 Georgetown jail, we had restraints on his hands.

5 Q Okay. And what else did you have on him?

6 A And the braces.

7 Q And then what else?

8 A That's it.

9 Q So in the car or the van, he's restrained  
10 by his hands --

11 A Yes, sir.

12 Q -- and in the leg braces?

13 A Yes, sir.

14 Q And when he would get out of that van, he  
15 would be restrained in his hands and with the leg  
16 braces, correct?

17 A Yes, sir. And we taught him how to safely  
18 enter and exit.

19 Q Safely enter and exit what?

20 A The vehicle.

21 Q With the leg braces on?

22 A Yes, sir.

23 Q And his hands cuffed?

24 A Yes, sir. But we only did that on the  
25 initial transportation. If I remember correctly,

1 that was on the initial transportation.

2 Q What do you mean, initial transportation?

3 A When we first brought him from Sumter to  
4 Georgetown.

5 Q Okay.

6 Court's indulgence.

7 No further questions, thank you, Director.

8 THE COURT: Any redirect?

9 MR. SIMON: No, Your Honor.

10 THE COURT: All right, you may step down,  
11 and you're free to leave at this time.

12 MR. MAJOR: Thank you, sir.

13 THE COURT: Thank you.

14 Mr. Simon, you're recognized. You may  
15 call your next witness.

16 MR. SIMON: Your Honor, at this time we  
17 would like to call Kelly Jackson to the stand.

18 THE COURT: All right, Mr. Jackson, please  
19 come forward.

20 CLERK OF COURT: State your name, please.

21 MR. JACKSON: My name is Cecil Kelly  
22 Jackson.

23 (The witness was sworn.)

24 THE COURT: Mr. Jackson, pull up real  
25 close to that microphone, speak loudly, clearly, and

1 slowly. And state your full name once again, Mr.

2 Jackson.

3 MR. JACKSON: My name is Cecil Kelly

4 Jackson.

5 THE COURT: Very good.

6 DIRECT EXAMINATION

7 BY MR. SIMON:

8 Q Good afternoon, Mr. Jackson. How are you  
9 doing?

10 A Fine, Mr. Simon.

11 Q Back in the time between 2003 and 2006,  
12 how were you employed?

13 A I was the Third Circuit Solicitor.

14 Q And were you involved in the Bobby Wayne  
15 Stone case?

16 A Yes, sir.

17 Q How so?

18 A Myself and Mr. Dudley Saleeby tried that  
19 case.

20 Q And was that case tried in this courtroom?

21 A Yes, sir, it was.

22 Q One of the allegations that's been made is  
23 that there were numerous law enforcement personnel  
24 at any time in the courtroom. Do you recall what  
25 the law enforcement presence was in your trial?

1           A     There were a few more people in that  
2 particular case than in normal cases. How many  
3 more, I don't recollect. I do know that with the  
4 jury itself, there's an addition of three to four  
5 SLED agents, all of which are plainclothes.

6                     They're not in uniform, not showing guns.  
7 They're assigned to the jury, so they're in here.  
8 The law enforcement folks that are in uniform  
9 normally in the courtroom on a typical trial is  
10 probably one or two. They might have been doubled.  
11 Maybe there was four.

12                    There were a few more, but nothing  
13 unreasonable. There may have been more officers in  
14 and out because the officers -- it was an officer  
15 that was a victim. Most of them would have been  
16 plainclothes. The SLED agents who came were  
17 plainclothes. There would have been a few more, but  
18 nothing unreasonable.

19           Q     Now, another thing I want to ask you  
20 about, your closing argument. Well, first, I'll ask  
21 you, do you remember this screen door?

22           A     Yes, sir.

23           Q     In giving your closing argument, did you  
24 utilize the screen door?

25           A     We did. We actually used this witness

1 chair. We took the measurements of the porch,  
2 compared it to the measurements of this witness  
3 chair. And they are strikingly similar in size.  
4 And my recollection is that the crime scene  
5 investigator actually measured out around the  
6 witness stand what the size of the porch would be,  
7 also with the elevation from the ground.

8           It's very similar, if not almost exactly  
9 the same height off the ground here in the witness  
10 stand as it is out at the house. And we put the  
11 screen door here in the witness stand, coming to  
12 where Charlie's body would have been right over  
13 here, and it was strikingly similar to what would  
14 have happened actually at the scene.

15           Q     Could you just kind of show us how exactly  
16 you demonstrated that?

17           A     If the witness stand is the porch, I  
18 believe the door to the house would be here, the  
19 house would be to the left. I might have that  
20 backwards. This door would have been on -- you've  
21 got me pushing my recollection. Have you got the  
22 photographs?

23           Q     Yes, those are from the trial.

24           A     The door would have been about like this,  
25 just as in that photograph. The door to the house

1 is right here. The house is to the left.

2 And the screen door when elevated, I  
3 forget what the inches were, but the height of the  
4 witness stand is roughly very similar to the same  
5 height as the porch. You can reconstruct one to the  
6 other, and we did that.

7 Q And did you do part of your closing  
8 argument from the witness stand?

9 A Yes, as though you were standing in the  
10 porch as Bobby Wayne would have been standing.

11 Q And did you have somebody hold the door up  
12 to you?

13 A Actually, we had the door mounted here.  
14 We had something holding the door up itself.

15 Q And can you just point out for the Court's  
16 information where you had everything else, if you  
17 can recall?

18 A I believe Charlie's body would have been  
19 in this area. We had the -- the measurements were  
20 drawn and markers placed by the witness so that we  
21 could do that, even the height up. It's not a  
22 complete screen porch -- the bottom left wood so  
23 that you can hide in there, you can squat down in  
24 there, and nobody could see you coming around.

25 Q Just one last question for you. During

1 the second trial, do you recall seeing Mr. Stone in  
2 any kind of restraints?

3 A Well, he was -- he had the leg braces on,  
4 the leg irons. I'm not exactly sure what the  
5 terminology is for the different types of  
6 restraints. But whenever we were in the courtroom,  
7 he was always full dressed in civilian clothes.

8 He had the restraints on underneath his  
9 legs. And I never remember seeing him in restraints  
10 that would have been visible to the jury. Judge  
11 King was very good about having Simon Major bring  
12 Mr. Stone here before trial started.

13 We would all be in place before the Judge  
14 took the bench. Then they would bring the jury in.  
15 At the end of the day or on breaks, the jury would  
16 leave. And if Mr. Stone needed to be taken out, it  
17 was never in the presence of the jury.

18 MR. SIMON: Beg the Court's indulgence.  
19 No further questions, Your Honor.

20 THE COURT: Cross-examination.

21 MR. BLUME: Very briefly.

22 CROSS-EXAMINATION

23 BY MR. BLUME:

24 Q Good afternoon, Mr. Jackson.

25 A How are you, Mr. Blume?

1 Q How are you doing?

2 A Fine, sir.

3 Q You were not involved in trial number one?

4 A No, sir.

5 Q So anything that would have happened in  
6 Georgetown County would be something you'd have no  
7 personal knowledge of?

8 A No knowledge.

9 Q Okay. And then at trial two, as I  
10 understand your testimony, you said that there were  
11 more law enforcement officers in the courtroom than  
12 in an otherwise normal trial?

13 A Right.

14 Q And some of those were extra security  
15 because it was a capitol case. Some of them you had  
16 because of the jury?

17 A Had the SLED guys, yes.

18 Q Right. And some of it had to do because  
19 there were -- both because of the nature of the case  
20 and number of law enforcement witnesses --

21 A Right.

22 Q -- who would have been here in addition to  
23 the security and the other people. And some of them  
24 also were law enforcement officers who present  
25 because of the interest in the case because

1 basically one of their own had been killed?

2 A Yes, and that probably -- that wasn't as  
3 great as even I had anticipated, because it was the  
4 second go-round. And the conviction wasn't  
5 overturned, just the sentencing phase.

6 So the big question of whether or not he  
7 would be found guilty again was not on the table.  
8 So I guess the hype of the first one did not match  
9 the second one that I was involved in, and it had  
10 lost some of that.

11 Q Based on what you heard, there was more  
12 hype about it in the first trial?

13 A Well, yes. He had not been convicted yet,  
14 yes.

15 Q Okay, thank you.

16 A Sure.

17 THE COURT: Any redirect?

18 MR. SIMON: No, Your Honor.

19 THE COURT: You may step down.

20 MR. JACKSON: Thank you.

21 THE COURT: Thank you, Mr. Jackson.

22 Yes, sir?

23 MR. SIMON: At this time, we would like to  
24 call Ira Parnell.

25 THE COURT: All right, Mr. Parnell.

1 CLERK OF COURT: State your name, please.

2 MR. PARNELL: Ira Byrd Parnell, Jr. -- P-  
3 A-R-N-E-L-L.

4 (The witness was sworn.)

5 THE COURT: Mr. Parnell, watch your step  
6 and have a seat in the witness chair. Speak loudly,  
7 clearly, and slowly in order that we may hear  
8 everything that you've got to say. Thank you, Mr.  
9 Parnell.

10 MR. PARNELL: Yes, sir.

11 THE COURT: Very good.

12 Mr. Simon, you're recognized.

13 DIRECT EXAMINATION

14 BY MR. SIMON:

15 Q Good afternoon, Agent Parnell.

16 A Good afternoon.

17 Q Could you just place on the record your  
18 current occupation?

19 A I'm currently employed by the State Law  
20 Enforcement Division, also known as SLED.

21 Q How long have you been with SLED?

22 A Thirty-nine years.

23 Q And therefore, what are your current  
24 duties?

25 A I am assigned to the firearm and tool mark

1 identification laboratory at SLED headquarters where  
2 I have been for the last 38 years.

3 Q And what does your job entail?

4 A My job entails the examination of fired  
5 bullets, fired cartridge cases, firearms, tools and  
6 tool marks, cast of tool marks, and other evidence  
7 that is brought into our laboratory for comparison.

8 Q And can you just give the Court a bit of  
9 your background, your educational background and  
10 training?

11 A Yes, sir. I graduated from the University  
12 of South Carolina in 1975 with a degree in the area  
13 of criminal justice. At that time, the criminal  
14 justice program was only a two-year program.

15 During the last three years of my college  
16 career, starting about 1973, I was also employed at  
17 SLED and underwent training there during my last few  
18 years of college.

19 I had an extensive internship program  
20 under three court-qualified firearm and tool mark  
21 examiners where I assisted them in processing  
22 evidence, observing their techniques, doing  
23 microscopic work myself. And at the end of that  
24 internship program, I began to do examinations on my  
25 own and testify as to the results.

1           My first testimony was in 1975. I have  
2 graduated from the South Carolina Criminal Justice  
3 Academy, the FBI National Academy, courses that have  
4 been offered since graduation from the FBI Academy  
5 in Virginia, and numerous Association of Firearm and  
6 Tool Mark Examiners seminars where we discussed the  
7 latest techniques in firearm and tool mark  
8 identification.

9           I've testified approximately 627 times as  
10 a firearms examiner in Federal Court and State Court  
11 in North Carolina State Court.

12           Q     And I guess during that time at SLED, have  
13 you gone through any additional training?

14           A     That's pretty much it.

15           MR. SIMON: Your Honor, at this time we'd  
16 like to offer Agent Parnell as an expert in  
17 firearms.

18           THE COURT: Any query with regard to his  
19 qualifications?

20           MR. BLUME: No, he's qualified.

21           THE COURT: Very good. He is indeed  
22 qualified to testify in the area of firearms.

23           Q     Now, Agent Parnell, how were you involved  
24 in this case?

25           A     Initially, I was assigned to the tactical

1 team that responded to the shooting of Officer  
2 Kubala. After that, I was assigned the examination  
3 of the evidence which was later retrieved and  
4 brought to us.

5 Q And did you examine the weapon in this  
6 case?

7 A I did.

8 Q And did you also examine the cartridge  
9 casings that were recovered from the scene?

10 A I did.

11 Q And you testified as both trials, correct?

12 A Yes, sir.

13 Q What can you tell us about the gun itself?

14 A Well, the firearm was a high-standard  
15 Supermatic .22 long rifle caliber. It had a maximum  
16 capacity of eleven rounds. Ten in the magazine with  
17 one in the barrel, it would total eleven cartridges.

18 The trigger pull on the gun was light. I  
19 measured it at between 1.6 and 1.8 pounds of  
20 pressure. It's a target firearm, which the trigger  
21 pull was still light. But most target firearms do  
22 have light trigger pulls.

23 It also had a common setting weight at the  
24 end of the barrel which aids in steady shooting at  
25 targets. It was dirty when I got it. It had

1 excessive grit and oil in the action and was slow to  
2 operate at the end of my testing of it. It did  
3 operate fine for the safety function. And I made no  
4 major mechanical malfunctions.

5 Q Okay. And during the testing, did you  
6 actually fire the weapon?

7 A Yes, sir.

8 Q Do you recall how many times you fired the  
9 weapon?

10 A At least ten -- maybe more, but at least  
11 ten times.

12 Q And in firing the weapon, could you  
13 describe, if you can recall, how far you'd have to  
14 pull it back before a projectile would be fired?

15 A How far I'd have to pull what?

16 Q Pull the trigger.

17 A The distance of the trigger pull is less  
18 important than the amount of pressure required to  
19 pull it. As I said, the trigger pull was fairly  
20 light. And being a target firearm, the trigger  
21 would typically travel shorter -- a shorter distance  
22 -- than a sporting firearm, for instance, here  
23 again, to be steadier and more accurate at targets.

24 I don't know the travel, which is what  
25 you're asking me. The amount of travel, I did not

1       measure and I don't know. I can tell you it took  
2       between 1.6 and 1.8 pounds of pressure to make it  
3       pull or make it fire.

4               Q     And this was a semiautomatic weapon,  
5       correct?

6               A     Yes, sir, that's correct.

7               Q     And to fire three shots, how many times  
8       would you have to pull the trigger?

9               A     Three times, one for each shot.

10              Q     And to your recollection, how many shots  
11       were fired with this particular weapon?

12              A     I examined I believe five fired cartridge  
13       cases total from various locations, and two fired  
14       bullets. I know five cartridge cases and two fired  
15       bullets.

16                    Let me refresh myself on my notes, but I'm  
17       confident that's the case. If you've got a copy of  
18       my report, it will have that information on it.  
19       Yes, sir, that's five fired cartridge cases and two  
20       fired bullets and/or bullet fragments.

21              Q     Do you recall there being an issue about  
22       shots fired through the screen door?

23              A     Tests were requested for residue on the  
24       inside of the screen door that may potentially have  
25       been left there by firing the firearm inside the

1 porch. I assisted our agent from Trace, John  
2 Barron, in test-firing whatever State's Exhibit we  
3 have here, the firearm.

4 And I physically shot the gun through the  
5 screen door myself. And the area that's cut out at  
6 the top of the door, if we're looking at it here,  
7 the area of concern was the area down just below the  
8 handle, the small rectangular place that was also  
9 removed for testing by Mr. Barron.

10 MR. SIMON: May I approach the witness,  
11 Your Honor?

12 THE COURT: Yes.

13 Q Agent Parnell, I'm showing you State's  
14 Eight Fifty-Eight. Would that be the part of the  
15 screen that you utilized in your test-firing?

16 A Yes, sir. Now, State's Exhibit Sixty --  
17 or Fifty-Eight, excuse me, was actually intact in  
18 the screen door when we did our test. I simply  
19 rotated the door 90 degrees, laid it down against  
20 our indoor range backstop, and test-fired the .22  
21 high-standard pistol through the screen.

22 This piece of screen was subsequently  
23 removed. It has two remaining labels with my name,  
24 of my case number and specimen number, and initials  
25 written on it.

1           The other two have come off in the bag  
2 over time. But this piece of screen was actually  
3 part of the door when we tested it. And it was  
4 removed, and this is the piece of screen that was  
5 removed.

6           Q     I'll also show you what was introduced at  
7 trial as State's Exhibit Fifty-Seven.

8           THE COURT: Let me interrupt just one  
9 moment, while I'm thinking about it. Nobody has  
10 told me where the cartridges were found. I don't  
11 believe anybody has testified to that. Where were  
12 the cartridges found? Do you know, Mr. Parnell?

13           MR. PARNELL: The fired cartridge cases?

14           THE COURT: Right.

15           MR. PARNELL: They were found -- three of  
16 them were found inside the porch at the scene there.  
17 One was found in the woods at an area remote from  
18 the porch. The fifth one was removed from the  
19 chamber of the .22 pistol at the time it was  
20 recovered and processed for fingerprints. It's a  
21 total of five.

22           THE COURT: And that one was not fired?

23           MR. PARNELL: The one --

24           THE COURT: In the chamber.

25           MR. PARNELL: When it was removed, it was

1 fired. There was a fired cartridge case in the  
2 chamber when it was recovered.

3 THE COURT: Okay. I didn't mean to  
4 interrupt you.

5 MR. SIMON: That's okay. No problem, Your  
6 Honor.

7 Q I believe I looked at with you State's  
8 Exhibit Fifty-Seven?

9 A State's Exhibit Fifty-Seven.

10 Q And that would have been the cut-out from  
11 the screen where the shots in the incident were  
12 fired?

13 A Yes, sir. That's where the -- the small  
14 rectangular piece that's missing from underneath the  
15 door handle. It exhibits four areas of damage.  
16 These two that are plain here, this was cut out by  
17 Mr. Barron for examination for trace.

18 Q In your experience with firearms, to have  
19 four shots go through there, do you have an opinion  
20 as to whether or not that could have been done by  
21 accident?

22 A No, sir, I don't think it was done by  
23 accident.

24 Q And why not?

25 A It's too precise, too closely grouped, too

1 close together. One, maybe two possibly, but four  
2 of them, no, sir.

3 MR. SIMON: Beg the Court's indulgence.

4 Q Since you're involved with the tactical  
5 team, you were at the scene?

6 A I was.

7 Q Did you spend any time on the porch?

8 A After the arrest was made, I came back and  
9 assisted the crime scene personnel at the scene.

10 Q What did -- shots being fire in the part  
11 of the door, would that have been consistent with  
12 somebody squatting?

13 A It could be. It's a little lower than you  
14 would normally note in a standing position. But,  
15 here again, the distance we're talking about is more  
16 consistent, in my opinion, with being -- not  
17 standing bolt upright but being at least slightly  
18 squatting anyway, if not completely squatted.

19 MR. SIMON: No further questions, Your  
20 Honor..

21 CROSS-EXAMINATION:

22 BY MR. BLUME:

23 Q Mr. Parnell --

24 A Yes, sir.

25 Q -- you testified, obviously, previously at

1 the two trials?

2 A Yes, sir.

3 Q And do you recall, then, at those trials  
4 that you were asked about this gun, and you  
5 testified that this pistol could fire in the blink  
6 of an eye?

7 A It's what we would call a hair trigger. I  
8 mean, it's less than two pounds of trigger pressure  
9 that's required.

10 Q And, for example, a standard-issue law  
11 enforcement pistol has a substantially higher  
12 trigger pull?

13 A Yes, sir.

14 Q For example, in New York City, the  
15 standard trigger pull is 12 pounds. Are you  
16 familiar with that?

17 A Either eight or twelve.

18 Q And the reason for that is to avoid  
19 inadvertent discharge of the firearm, correct?

20 A That's correct.

21 Q Because there have been instances when  
22 officers have been startled or surprised by other  
23 people and have accidentally discharged the weapon  
24 when they didn't intend to?

25 A Yes, sir.

1           Q     And so that, you know, can happen. Now, I  
2     take it that as part of your certification for SLED,  
3     do you have to ever shot or go to the firing range?

4           A     Yes, sir, twice a year.

5           Q     Twice a year. And when you do that -- I  
6     don't mean anything by this -- I assume you don't  
7     drink before you do that, do you?

8           A     No, sir.

9           Q     And I assume there's a zero tolerance  
10    policy of drinking alcohol before shooting, going to  
11    the firing range?

12          A     Yes, sir, it would be.

13          Q     Or there's even kind of a policy about  
14    officers being on duty and responding to a scene if  
15    they've been drinking?

16          A     Yes, sir.

17          Q     And the reason for that, I assume the  
18    reason for that, is just because you don't want  
19    somebody armed with a gun who's intoxicated, because  
20    their ability to use the weapon is impaired?

21          A     That's a logical explanation, yes, sir.

22          Q     Okay. Now, you indicated that you said --  
23    well, when you were asked, "Do you think it's likely  
24    that this could have been accidentally discharged?"  
25    your answer was no to Mr. Simon, correct?

1           A     That's correct.

2           Q     But you indicated, "Well, it would be  
3 possible to fire more than one round  
4 unintentionally"?

5           A     Maybe two, but not four.

6           Q     And it would be -- evidence that was  
7 presented at trial about the number of holes in the  
8 screen would be more accurate than your recollection  
9 today?

10          A     It's possible, but the evidence, you know,  
11 three in the porch. And during my test-firing of  
12 the .22 in question here, it malfunctioned in that  
13 due to its dirtiness and extra oil and extra dirt in  
14 the way the slide was slow.

15                     And it would fail to extract occasionally,  
16 fail to reload an unfired cartridge occasionally,  
17 all due to the fact that it was just -- it was slow  
18 because of being dirty. The condition of the gun  
19 that night was dirty overall.

20                     The fired cartridge case that was found in  
21 the woods, you know, I don't know when that was  
22 fired or what. And there was also one in it when it  
23 was recovered. So I'm thinking it's not working  
24 properly all the time.

25          Q     Okay. But some of this, some of the dirt

1 and grime on the gun, could have occurred after the  
2 gun was shot on the porch?

3 A Could have, could be.

4 Q Right. Because he was out in the woods  
5 for a period of time while SLED was chasing him.  
6 And in fact, the gun was found in the dirt under his  
7 body at the time of his arrest?

8 A It was actually under the leaves under a  
9 log right beside his left hand.

10 Q But that's where it was at that time?

11 A Yes, sir.

12 Q And, again -- and I think you  
13 misunderstood me -- but as far as how many holes  
14 were actually in the screen upon the examination,  
15 the trial record is going to be the best record of  
16 what that was?

17 A There are two plainly showing here as I'm  
18 looking at --

19 Q Two plainly showing here, yes.

20 A Yes, sir. The tests which we fired, some  
21 of them are barely visible. And I know I shot holes  
22 through them, because I was there and photographed  
23 it. There are areas in this piece of screen that we  
24 cut from underneath the handle that are suspect. I  
25 can't tell you that there are one, two, or any. But

1 there's a myriad of damage there, and it could be a  
2 bullet hole on more than one.

3 Q Right. But the trial testimony from Mr.  
4 Barron, et al., would be the best estimation of what  
5 SLED -- how many holes SLED thought were put in  
6 there at the time?

7 A That would be correct.

8 Q And I believe you say you believe he would  
9 have testified accurately to the results of his  
10 tests?

11 A Sure, sure.

12 Q Thank you.

13 THE COURT: Any redirect?

14 MR. SIMON: Just a few questions, Your  
15 Honor.

16 REDIRECT EXAMINATION

17 BY MR. SIMON:

18 Q Agent Parnell, you were asked about  
19 inadvertent discharge?

20 A Yes, sir.

21 Q And you indicated that --

22 MR. BLUME: I object. This is outside the  
23 scope. This was not new matter for recross. This  
24 would generally be in response. He brought this up,  
25 and I cross-examined him about it.

1 THE COURT: Okay. Well, he hadn't  
2 finished the question yet. Let's hear the question.  
3 Go ahead.

4 Q I was just going to ask, why do you  
5 believe that once is explainable, but more than one  
6 is not?

7 A Well, for the gun to be fired initially,  
8 at least three things have to happen. There has be  
9 at least one cartridge in the gun that's unfired.  
10 The safety has to be taken off of the gun or not on.

11 And the trigger has to be pulled with at  
12 least between 1.6 and 1.8 pounds of pressure, okay.  
13 The thumb lever safety was functioning when I got  
14 it. In other words, if it was on, then, you know,  
15 it's working.

16 I did not have it shoot more than one time  
17 per pull of the trigger, didn't go full auto on me.  
18 So I'm thinking that, you know, an inadvertent jerk,  
19 once, maybe twice. I find it difficult to believe  
20 that three or four times would happen inadvertently.

21 MR. SIMON: No further questions, Your  
22 Honor.

23 THE COURT: Your objection previously was  
24 that this was not new material, not new form of the  
25 question?


STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

**COURT REPORTER'S CERTIFICATION**

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON AUGUST 23 AND 24, 2012, IN SUMTER, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE THIRTY-FIRST DAY OF JUNE, 2012.

  
REMA K. GANTT THOMAS  
OFFICIAL COURT REPORTER  
NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES 11/21/2013

1           MR. BLUME: It doesn't matter, Judge. The  
2 point was that generally on redirect, it's something  
3 I brought up during the examination. My questions  
4 were in response to his questions. But it doesn't  
5 matter.

6           THE COURT: Very good.

7           All right, you may step down.

8           MR. PARNELL: Thank you, Your Honor.

9           MR. BLUME: And, Your Honor, at this time  
10 we would have no further witnesses for right now.  
11 The only witnesses we would have would be, as was  
12 discussed earlier, Mr. Littlejohn and anyone else we  
13 would call in response to Dr. Morgan's testimony.

14           And that witness would be Dr. Sexton that  
15 we would call in response to Dr. Morgan. But at  
16 this time, we have no further evidence to present in  
17 court.

18           THE COURT: Okay. Might counsel approach  
19 the bench for just one moment?

20           We'll stand adjourned until we can find a  
21 mutually agreeable date to hear the conclusion of  
22 the testimony. We'll stand at ease. Thank you all.

23           - End of Transcript-

STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	CASE NO. 2008-CP-43-905
	)	
BOBBY WAYNE STONE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
	)	

August 10, 2012  
Florence, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, Judge

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

JOHN BLUME, Esquire  
ROBERT E. LOMINACK, Esquire  
Attorneys for the Plaintiff

ALPHONSO SIMON, Esquire  
DONALD ZELENKA, Esquire  
Attorneys for the Defendant

KRYSTAL J. SMITH  
Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	P-25	Death Certificate	45 50
4	P-26	Coroner's Report	45 50
5	P-27	TB Records	45 50
6	P-28	Medical Records - Jerry Stone	45 50
7	P-29	Medical Records -	45 50
8		Melinda Stone Parrott	
9	P-30	Medical Records -	48 50
10		Tammy Stone Windham	
11	P-31	School Records - Bobby Wayne Stone	46 50
12	P-32	School Records -	46 50
13		Melinda Stone Parrott	
14	P-33	School Records -	46 50
15		Tammy Stone Windham	
16	P-34	School Records - Bobby O. Stone	46 50
17	P-35	Criminal Records - Douglas Edwards	46 50
18	P-36	Criminal Records - Jerry Edwards	46 50
19	P-37	Criminal Records - Terry Edwards	47 50
20	P-38	Criminal Records - Baker Floyd	47 50
21	P-39	Criminal Records - Walter A. Floyd	47 50
22	P-40	Criminal Records - Michelle Lynch	47 50
23	P-41	Criminal Records - Lora Miles	47 50
24	P-42	Criminal Records - Wesley Miles	47 50
25	(continued on next page)		

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
2	P-43	Criminal Records -	47	50
3		Melinda Stone Parrott		
4	P-44	Criminal Records - Bobby O. Stone	48	50
5	P-45	Criminal Records - Anthony Turner	48	50
6	P-46	Criminal Records - Thomas Windham	48	50
7	P-47	Social Security Records	48	50
8	P-48	DJJ Records	48	50
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1 AUGUST 10, 2012

2 (WHEREAS this matter was scheduled for continuing a PCR  
3 hearing begun previously in Sumter County, all counsel  
4 appeared, as well as the plaintiff/applicant. The  
5 hearing begins at 2:09 p.m.)

6 **THE COURT:** All right, Mr. Lominack, you're recognized.

7 **MR. LOMINACK:** I'm not sure where my co-counsel went, but  
8 I'm sure he'll be back.

9 **THE COURT:** Very good. He just took the long way around.  
10 Very good.

11 **MR. LOMINACK:** Well, Your Honor, then we're ready to  
12 proceed. We'll call -- The applicant would call Jim Babb to  
13 the stand.

14 **THE COURT:** Very good. Mr. Babb, please come forward and  
15 I'm going to ask you, if you could, to place your left hand on  
16 the Bible and raise your right hand as the clerk administers  
17 the oath.

18 **THE CLERK:** Do you swear or affirm the testimony you give  
19 in this case will be the truth, the whole truth, and nothing  
20 but the truth, so help you God?

21 **WITNESS:** I do.

22 **THE CLERK:** Please be seated and then state your name for  
23 the record.

24 **THE COURT:** Mr. Babb, pull up real close to that  
25 microphone and speak loudly, clearly and slowly in order that

26

DIRECT EXAMINATION OF MR. BABB BY MR. LOMINACK

1 we can hear everything that you've got to say.

2 **WITNESS:** Yes, sir.

3 **THE COURT:** And start with your full name.

4 **WITNESS:** James H. Babb, B-A-B-B.

5 **THE COURT:** Good to see you, Mr. Babb. Mr. Lominack?

6 JAMES H. BABB, being first duly  
7 sworn, testifies as follows:

8 DIRECT EXAMINATION

9 **BY MR. LOMINACK:**

10 Q: Good afternoon, Mr. Babb. How are you?

11 A: Fine. Thank you, sir.

12 Q: Good. Just to set the scene, you testified at Mr.

13 Stone's -- the first part of this hearing in -- in April of  
14 this year, right?

15 A: In Sumter, yes, sir, I did.

16 Q: And during that testimony, I think Mr. Simon asked you  
17 about some notes that were in your handwriting; is that right?

18 A: That's correct.

19 Q: Okay and he specifically was asking you about a notation  
20 that says: turned and squatted, went off when he squatted. Do  
21 you remember that?

22 A: I do.

23 Q: Okay and -- and we don't have the exhibits here, but you  
24 remember that that's what he was asking you about?

25 A: I do, yes, sir.

DIRECT EXAMINATION OF MR. BABB BY MR. LOMINACK

1 Q: And had you met with Mr. Simon before that post-  
2 conviction hearing?

3 A: I had.

4 Q: And had he asked you about that particular notation?

5 A: I don't recall the particular notation or the particular  
6 sentence. We did -- He did show me a number of documents that  
7 I identified as being in my handwriting, but I did not read  
8 those.

9 Q: Okay and that was the first time at least leading up to  
10 these hearings that you had been asked specifically about that  
11 notation?

12 A: That's correct.

13 Q: All right and now let's back up for a moment. Do you  
14 recall Mr. Stone ever telling you that he squatted and then  
15 shot the gun?

16 A: No, sir.

17 Q: And, in fact, what did Mr. Stone tell you consistently  
18 throughout your representation?

19 A: He told me he heard a noise, he turned, and the gun went  
20 off.

21 Q: And had -- If Mr. Stone had ever changed that story to  
22 something like what these notes suggest, would you recall  
23 that?

24 A: I think I would for several reasons: one, it would have  
25 been a dramatic change in our understanding of the case; two,

DIRECT EXAMINATION OF MR. BABB BY MR. LOMINACK

1 if he had been -- decided to testify and go back to the  
2 statement that he had consistently told us who told law  
3 enforcement, then I would be in somewhat of a dilemma  
4 ethically as to how to handle that and I know I would have  
5 brought that to Mr. Littlejohn's attention or even if it had  
6 just been a change, I would have probably brought it to Mr.  
7 Littlejohn's attention and I don't recall ever doing so.

8 Q: All right and when you did -- When you did interview Mr.  
9 Stone and -- and took notes, was there a consistent way that  
10 you took those notes or indicated that it was an interview  
11 with Mr. Stone?

12 A: Yes, sir. In general, I've interviewed, I don't know, it  
13 would be hundreds of clients in the past and you kind of get  
14 into a routine of it, but I generally date it, I generally  
15 write that it's an interview, and very often I will use the  
16 delta sign referring to the defendant. I mean I -- I rarely  
17 talk to a client or refer to a client by their first name  
18 other than with counsel because we would know who we were  
19 talking about.

20 Q: And the document that Mr. Simon showed you at the last  
21 hearing, did it have -- did it have any of those notations  
22 that it was an interview or that it was dated or that it was  
23 something that Mr. Stone had said?

24 A: Now, I recall when he handed it to me and asked me to  
25 identify it. I noted that it was four pages. They were

CROSS EXAMINATION OF MR. BABB BY MR. SIMON

1 unnumbered, they were undated, but they were in my handwriting  
2 so I don't know that they go together or separate pages. I'm  
3 not sure about that.

4 Q: But there was nothing on those pages to indicate that it  
5 was an interview with Mr. Stone?

6 A: It didn't appear so to me because I recall on the first  
7 page it was talking about close to jail and, you know, things  
8 like that that wouldn't be something I would be discussing  
9 with a client.

10 **MR. SIMON:** I don't have anything further. Thanks, Mr.  
11 Babb.

12 **THE COURT:** All right. Cross examination, Mr. Simon?

13 **MR. SIMON:** Very quick.

14 CROSS EXAMINATION

15 **BY MR. SIMON:**

16 Q: Mr. Babb?

17 A: Yes, sir.

18 Q: What do you recall about making the note that I showed  
19 you at the last hearing?

20 A: I don't recall. In terms of what I was doing when I made  
21 that notation?

22 Q: Yes.

23 A: I don't -- I don't have any recollection of it.

24 Q: And so can you say for certainty that it wasn't part of  
25 an interview that you had with Mr. Stone?

CROSS EXAMINATION OF MR. BABB BY MR. SIMON

1 A: I can say for certain I never recall him ever telling me  
2 that he squatted to fire the gun.

3 Q: Do you recall anybody else telling that you he --- Do you  
4 have any recollection of anything that would have led you to  
5 write down ---

6 A: That was --- That was -- was going to be the prosecution's  
7 theory in the case that, you know, he was --- he was ambushing.  
8 That's exactly what they did argue to the jury and I --- I know  
9 we consulted with experts, you know, about what possibilities  
10 may be. So I don't know if it was something somebody was  
11 saying. It could be consistent with that or it could be  
12 consistent with something else. I don't know when --- In other  
13 words, I don't know the context of when I made that. I don't  
14 know when or the context of why or how I made that notation.

15 Q: Okay and so you're not sure exactly where that language  
16 came from, correct?

17 A: I don't know. No, I can't be sure. I can tell you that  
18 it did not come from Mr. Stone.

19 Q: Okay.

20 **MR. SIMON:** I beg the Court's indulgence just for one  
21 second.

22 **THE COURT:** Okay.

23 Q: Have you had a chance to review your testimony from the  
24 earlier hearing?

25 A: No, but I remember it.

**CROSS EXAMINATION OF MR. BABB BY MR. SIMON**

1 Q: Okay.

2 **MR. SIMON:** I beg the Court's indulgence for just one  
3 more second. May I approach the witness, Your Honor?

4 **THE COURT:** You may.

5 **MR. SIMON:** Well, before I approach the witness -- Okay.

6 Q: Do you recall in your testimony at the first part of this  
7 hearing in response to my question about that language in the  
8 -- in the document, do you recall answering there wouldn't  
9 have been anyone else that could have told you that?

10 A: Yes, sir, I do and I'd also testified -- I believe that  
11 before you asked me that, you asked what he had told me and I  
12 told you he'd consistently told me the same thing he had the  
13 police.

14 Q: Okay.

15 **MR. SIMON:** No further questions, Your Honor.

16 **THE COURT:** Any redirect?

17 **MR. LOMINACK:** No, Your Honor.

18 **THE COURT:** All right, you may step down. Thank you, Mr.  
19 Babb.

20 **MR. BABB:** Thank you, Judge.

21 (Whereupon, the witness leaves the stand at 2:17 p.m.)

22 **THE COURT:** All right, you may call your next witness.

23 **MR. BLUME:** Well, Your Honor, as we had mentioned, there  
24 might be an issue with some records as to whether we call a  
25 witness or not; but I think we could maybe talk about this and

DIRECT EXAMINATION OF MR. LITTLEJOHN BY MR. SIMON

1 handle it that way. We're going to call Mr. Littlejohn and  
2 then we'll deal with this at the conclusion of that.

3 **THE COURT:** Very good. Mr. Littlejohn, if you could,  
4 please come forward. If you could, place your left hand on  
5 the Bible and raise your right hand as the clerk administers  
6 the oath. For some reason, they've placed the Bible -- Let's  
7 put it up on the corner where it belongs.

8 **WITNESS:** Certainly.

9 **THE COURT:** I don't know why they moved that. There you  
10 go. Thank you.

11 **THE CLERK:** Do you swear or affirm the testimony you give  
12 in this case will be the truth, the whole truth, and nothing  
13 but the truth, so help you God?

14 **WITNESS:** I do.

15 **THE CLERK:** Please be seated and state your name for the  
16 record.

17 **THE COURT:** Mr. Littlejohn, pull up real close to that  
18 microphone and speak loudly, clearly and slowly in order that  
19 we can hear everything that you've got to say and let's start  
20 with your full name.

21 **WITNESS:** I'll speak a little louder than my soft-spoken  
22 friend, Mr. Babb.

23 **THE COURT:** There you go, all right.

24 **WITNESS:** My name is Cameron B. Littlejohn, Jr.

25 **THE COURT:** Very good.



DIRECT EXAMINATION OF MR. LITTLEJOHN BY MR. SIMON

1 A: Let me see. Let me think here. Mister -- I believe Mr.  
2 Stone's case was the first one I had defended. I had  
3 prosecuted approximately five prior to that when I was in the  
4 Eleventh Circuit Solicitor's Office.

5 Q: Okay and do you have a recollection of -- of around how  
6 many murder cases you had handled before that -- that first  
7 trial?

8 A: Mr. Simon, including prosecuting, it had to have been  
9 over a hundred.

10 Q: And how did you become involved in the -- in the Stone  
11 case?

12 A: Well, I had -- I had just hung out my shingle by myself  
13 and at the time, as I understood it, because of the victim in  
14 the case they were having a difficult time finding attorneys  
15 in Sumter County who would undertake the representation of Mr.  
16 Stone by court appointment. I got the word. I think Pete  
17 Strom approached me about it and he had someone call me and  
18 ask me if I would -- if I would undertake the representation  
19 and I told him that I would.

20 Q: Okay and when -- You were co-counsel with Mr. Babb,  
21 correct?

22 A: That's correct.

23 Q: And how did y'all decide how to split up the duties for  
24 the case?

25 A: Mr. Babb and I, over the course of -- of representing