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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County
Capital Action
Honorable R. Keith Kelly, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000505

**APPENDIX
VOLUME 11 OF 14
(PAGES 4858-5350)**

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1 counsel.

2 Q All right, sir. And so it doesn't necessarily go into
3 a prejudice analysis, it's presumed if you've abandoned your
4 client that the client is not getting his entitlement to
5 effective assistance of counsel.

6 A Right. As the word would imply, if counsel has
7 abandoned his client, his or her client, he didn't provide
8 any counsel, ineffective, effective or otherwise.

9 Q Okay. So that wouldn't necessarily then have a
10 prejudice assessment. You're a practicing attorney and you
11 keep up with trauma seminars and the breadth of trauma; is
12 that right?

13 A It is.

14 Q And you keep up with petitions for cert granted and
15 denied to the U.S. Supreme Court level?

16 A Yes, sir, I do.

17 Q And why do you do that?

18 A Because it can affect what issues I raise in my cases
19 and how I raise them.

20 Q Posturing your case to be eligible for a positive
21 ruling down stream by the Supreme Court, that sort of thing?

22 A Absolutely.

23 Q Okay. In that context, does the same diligence apply
24 through training to practicing attorneys as regards the
25 psychological and psychiatric fields?

1 A Yes. The science in those areas is constantly
2 evolving, and so necessarily the training and the
3 responsibilities of counsel evolve with the science that has
4 to happen for there to be effective representation.

5 Q All right, sir. And so you would be keeping up, for
6 instance, in trauma fields, and the umbrella of trauma is a
7 syndrome to be PTSD and other issues of that nature; is that
8 correct?

9 A Yes, sir.

10 Q And one of those has got to do with battered person; is
11 that correct?

12 A Yes, sir.

13 Q And in this state, State v. Lopez, 1981, recognizing
14 officially that Battered Child's Syndrome is an official
15 syndrome as long as it's diagnosed by a qualified expert. I
16 think I sent you that case.

17 A I don't believe so.

18 Q I'm sorry. But if you would take my word for that.

19 A I will.

20 Q Okay. Have you ever seen and consulted with or handled
21 a case that would have been a foregone conclusion, guilt a
22 foregone conclusion?

23 A No, sir. Certainly not at the inception of the case or
24 at any early stage of the case, no, sir.

25 Q Why is that?

1 A Well, until you've investigated fully you don't know.
2 Things are not always as they appear on first blush. That's
3 something that any competent defense attorney, much less
4 capital defense attorney, learns on a regular basis.

5 Q I'm handing you what's been marked for identification
6 as Petitioner's Exhibit Number 9. Again, this is the --
7 Mr. Boyd is the second chair trial lawyer, this is a trial
8 lawyer. If you'll look and publish -- well, Number 9,
9 paragraph nine, I think. No, Exhibit 9, paragraph eight,
10 first line of that.

11 A You want me to read that?

12 Q Yeah, if you would please.

13 A "Mr. Hancock and I believe that a conviction of murder
14 was a foregone conclusion."

15 Q All right, sir. Now, have you ever consulted with
16 lawyers who had cases where the client has an actual murder
17 and it is a foregone conclusion that that individual is, in
18 fact, the murderer?

19 A Not at the beginning of a case, and not until there's
20 been a full investigation of the case. It could be possible
21 that after full investigation a conviction -- I don't know
22 if a conviction for murder would ever be a foregone
23 conclusion. It might be a foregone conclusion that there
24 will be a conviction for some level of homicide offense, but
25 not necessarily murder.

1 Q All right, sir. But during the investigation,
2 development and presentation, the Wiggins standard, if it
3 becomes apparent that there are trauma issues such as
4 Battered Wife Syndrome, Battered Child -- we don't use those
5 anymore, we just say battered person, could that mitigate
6 murder?

7 A Absolutely.

8 Q And have you, in fact, been involved in a case
9 concerning a battered person where the verdict was not
10 murder but not guilty?

11 A I have. In 1986 in Jefferson County, Kentucky, I
12 represented a young woman who was arrested on the charge of
13 murder for her long-time boyfriend with whom she had lived
14 with for many years, and upon arrest she gave a lengthy and
15 very detailed confession to the officers who arrested her
16 about how she had plotted, arranged and effectuated the
17 killing of her boyfriend.

18 Q All right. And you presented, I presume, a battered
19 syndrome type defense?

20 A At that time it was called a Battered Woman Syndrome.
21 I understand that the terms have evolved. It was the first
22 Battered Woman Syndrome defense presented in Jefferson
23 County Circuit Court at that time, and I retained an expert
24 who did multiple and lengthy evaluations of my client,
25 testified at trial, and at the conclusion of the trial the

1 jury rendered a not guilty verdict.

2 Q All right, sir. Now, are you aware that this case
3 involves parricide?

4 A I am.

5 Q Do you understand what that means --

6 A Yes, sir.

7 Q -- the child killing parents?

8 A Yes, sir.

9 Q All right. So if you were assigned to defend a case
10 that you discovered was a parricide case, would that give
11 you -- how common is that in your practice that the murder
12 person would be someone that killed his parents?

13 A It would be zero times in my practice.

14 Q All right, sir. Would it be unique to the extent it
15 would cause you to reach out for some help?

16 A Absolutely.

17 Q And what type of help?

18 MR. EHLIES: Did I move this into evidence, Judge,
19 Number 9? Are you keeping score?

20 THE COURT: No. Number 9 is being offered.

21 MR. EHLIES: I think that's Boyd's affidavit.

22 MS. BROWN: We object on the same grounds, especially
23 if Mr. Boyd is going to be present to testify.

24 THE COURT: Thank you. Admitted over objection.

25 (The Boyd affidavit was received as Applicant's 9.)

1 Q All right, sir. If the testimony is consistent with
2 the affidavit, and Mr. Boyd testifies that they did nothing
3 at all about investigating, developing, presenting any
4 information about parricide and/or Battered Person Syndrome,
5 in these circumstances would that be consistent with
6 standard of care and training?

7 A It would deviate dramatically from the standard of
8 care.

9 Q All right, sir. Would it be okay if we took a little
10 break?

11 THE COURT: I'm stopping at 3:30 as a matter of fact.
12 We can stop now if you'd like. Every 90 minutes. It's
13 almost 3:30. Do you want to stop now?

14 MR. EHLIES: Thank you so much.

15 THE COURT: All right. Let's take about 15 or 18
16 minutes. Sir, you may step down and refresh yourself, get
17 some water, use the facility, don't talk to anyone about the
18 case.

19 (A recess was taken.)

20 BY MR. EHLIES:

21 Q Mr. Bailey, earlier in your --

22 MR. EHLIES: Are we ready, Your Honor?

23 THE COURT: Yes, sir.

24 Q -- earlier in your testimony you mentioned the task of
25 vetting a potential testifying expert witness, do you

1 remember that?

2 A Yes, sir.

3 Q Will you describe for the Court, please, the process by
4 which an attorney tasked with defending someone in a capital
5 case vet a potential expert witness?

6 A You would want to look for experts that were qualified
7 in the particular field that you were interested in. You
8 would consult with other trained qualified defense
9 attorneys, capital defense attorneys, who had presented
10 cases that included the issue that you were looking for an
11 expert for. You would compile a list of potential experts.
12 You would ask people either these days by email, used to be
13 by calling, now there are list serves. If other qualified
14 defense attorneys had used any of the these particular
15 witnesses you would want to look at transcripts of their
16 prior testimony and assess those transcripts, and also
17 listen very closely to what experienced counsel had to say
18 who had used that expert and come to a decision about the
19 best person for the job in your case.

20 Q All right, sir. And is that a task that the trial
21 attorney could delegate to some other person, non-attorney
22 person?

23 A Not normally. The only circumstance where it might be
24 partially delegated would be if your mitigation expert had
25 presented that defense in the case and had known experts or

1 worked with experts who testified on that particular issue.
 2 It's theoretically possible to delegate coming up with the
 3 list of potential experts to a well-qualified mitigation
 4 expert, but then the attorney would certainly want to review
 5 transcripts, talk with the experts, and talk with other
 6 attorneys who had utilized that expert.

7 Q Is it then the lawyer's ultimate responsibility to not
 8 only make the decision, but to make it in an informed basis?

9 A Very informed.

10 Q All right. A hands-on proposition; is that correct?

11 A Yes.

12 Q Now, under the Wiggins standard and the ABA Guidelines
 13 and all of the constitution significant cases that
 14 jurisprudence requires, an investigation developed and
 15 presentation of evidence; is that correct?

16 A Yes, sir.

17 Q And does that standard apply to post conviction counsel
 18 as well as trial counsel?

19 A Yes, sir.

20 Q So if there are witnesses in this case that dealt with
 21 documents like the Cascio narrative Night of Crime, and had
 22 their own set of notes, in this case that would be team
 23 members that did interviews, Catherine Smith being one,
 24 about the circumstances of the crime, would it be incumbent
 25 upon a PCR lawyer to interview those people?

1 A Yes, sir.

2 Q And is that something that could be disregarded?

3 A Not and comply with the standard of care required of
4 post conviction counsel in a capital case.

5 Q Is there a duty of care on the part of the practicing
6 lawyer and assigned counsel to defend them to also vet the
7 evidence he intends to offer as exhibits to the Court to
8 make certain of their authenticity and they are what he's
9 representing them to be?

10 A Absolutely.

11 Q Okay. Would it be a breach in the standard of care to
12 offer up notes representing that they were Cascio expert
13 witness notes when in that they were team member Catherine
14 Smith's notes?

15 A That's an egregious violation of the duty of care.
16 It's difficult to imagine counsel doing something like that.

17 Q And especially if it is apparent upon the face of the
18 handwriting that they're not the same person.

19 A It's hard to imagine how counsel could be that
20 careless.

21 Q Okay, sir. Well, they didn't -- the affidavits
22 suggests that they did not get interviewed by PCR counsel,
23 so that would be a breach of the standard of care as far as
24 investigation is concerned; is that correct?

25 A Absolutely. And it's referred to in my affidavit in

1 the Prince case, which I forget which number it was, maybe
2 35. There's an entire section in there about witnesses that
3 were interviewed by post conviction counsel that had not
4 been interviewed by trial counsel, and also a section on
5 witnesses that were interviewed by post conviction counsel
6 that had been interviewed by trial counsel but not
7 completely. And in those sections I talk about the standard
8 of care post conviction counsel and how it is incumbent -- I
9 talk about the standard of care for trial counsel and how
10 it's incumbent to interview all potentially relevant
11 witnesses and to interview them thoroughly as evidenced by
12 the interviews done by post conviction counsel.

13 Q All right, sir. Now, as far as the files are concerned
14 with these lawyers, are they obligated to maintain their
15 records?

16 A Yes, sir.

17 Q And if we were to subpoena records, subpoena PCR
18 counsel to obtain his file to see what work was done and was
19 not done and he could not produce the file, would that be a
20 violation of the standard of care?

21 A It would absolutely be a violation of the standard of
22 care, and it's very specifically annunciated in the ABA
23 Guidelines that counsel has an absolute duty to cooperate
24 with successor counsel.

25 Q And to maintain their records?

1 A Yes, sir. That's required in all cases is my
2 understanding, at least in the jurisdictions where I've
3 practiced.

4 MR. EHLIES: Thank you so much, Judge.

5 THE COURT: Thank you. Yes, ma'am?

6 MS. BROWN: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MS. BROWN:

9 Q Good afternoon. I want to go back to actually the
10 first part of your testimony when you were talking about
11 pleading and you look over the first PCR application here,
12 and I believe your testimony was that it just wasn't a very
13 good pleading, the issues weren't pled well.

14 A Completely insufficient, yes, ma'am.

15 Q Completely insufficient. Are you aware of the pleading
16 requirements in post conviction relief actions in South
17 Carolina?

18 A I have read the statutes that Mr. Ehlied has sent me.
19 I would not claim a comprehensive knowledge, no, ma'am.

20 Q Are you aware in South Carolina that there is a liberal
21 use of amendments in post conviction relief?

22 A I have been told that. I was also told there were no
23 amendments by original post conviction counsel.

24 Q Have you been provided a copy of the order of dismissal
25 filed March 24th, 2008?

1 A I would have to look at it to see. I've been provided
2 with a number of materials, I don't know if that was among
3 them.

4 Q This would have been an order of then Judge Few, now
5 Justice Few. And within that order there is one page --

6 MS. BROWN: Your Honor, the order is already in the
7 record at page 3652.

8 Q On page seven of the order it references the
9 application that you reviewed, March 1st, 2006, and it then
10 says, "Robertson amended his application at the outset of
11 the PCR hearing and proceeded on the following specific
12 grounds of ineffective assistance of counsel." And there
13 are 12 grounds. Do you recall ever being provided 12
14 grounds to review?

15 A I don't believe so. Was that a written or oral
16 amendment?

17 Q It was an oral amendment and it's memorialized in the
18 order.

19 MS. BROWN: And, Your Honor, if I may approach the
20 witness I would be happy to hand up this portion of the
21 order so he can review it.

22 THE COURT: I think that order is 106 pages long.

23 MS. BROWN: 106, yes, sir.

24 Q I'm going to hand up pages seven and eight of the
25 order. At the very top it talks about the one document that

1 you had mentioned earlier and it goes into the amendment.

2 A Okay.

3 Q Did you have an opportunity to look at those?

4 A Yes, ma'am.

5 Q As far as pleadings, those are some specific
6 allegations, are they not?

7 A Some of them are, some of them, I'll be honest, I don't
8 completely understand. Number nine, "Counsel failed to
9 request removal of a juror where the juror had made
10 statements on voir dire." That one I don't view as
11 specific, I don't understand. I thought there was another
12 one. "Counsel never pursued a proposed plea bargain
13 allegedly offered by the State." That one is a little
14 confusing to me, too, to be honest.

15 Q And I wanted to draw your attention hear to 10. And if
16 I may just read it into the record real quickly. "Counsel
17 did not adequately advise Robertson before he was evaluated
18 by the prosecution's psychologist, Dr. Jeffrey McKee."
19 That's pretty much the kind of allegation you were just
20 discussing, was it not?

21 A It's an allegation. It doesn't offer any facts in
22 support of that allegation.

23 Q And if the facts are offered at the hearing, in your
24 opinion that would be insufficient because it was not pled?

25 A It would depend. What facts were offered at the

1 hearing, how thoroughly investigated they were, how
2 thoroughly presented they were, whether it was a complete
3 presentation of the factual basis for that allegation.

4 Q Yes, sir. I'm taking from your response that you have
5 not been provided a copy of the post conviction relief
6 transcript.

7 A I believe I was provided portions of that but I'm not
8 sure. I'll be honest, I've been provided a lot of records
9 in this case, I don't have them all memorized.

10 Q Okay. Well, do you recall the 106 page order?

11 A No, ma'am.

12 Q I want to ask you, I know you do a lot of federal
13 practice, correct?

14 A Exclusively for a number years now, yes, ma'am.

15 Q Okay. Are you aware of a practice of filing a
16 placeholder petition in federal court?

17 A I have heard of it, I've never done it.

18 Q Are you aware of what that does?

19 A I haven't researched it enough to be able to say I have
20 a good understanding of that since I've never done it, so --

21 Q Okay. So in your jurisdiction -- and that would be
22 Arizona primarily; is that correct?

23 A No. I have primarily practiced in the Middle District
24 of Tennessee for quite some time now.

25 Q And they do not require placeholder petitions?

1 A Not to my knowledge.

2 Q Okay. So you have to plead immediately when you enter
3 federal court?

4 A In my experience I've done one noncapital habeas corpus
5 case in the Middle District of Tennessee, and from talking
6 with other people who do habeas corpus practice on a regular
7 basis my understanding of what is typically done is that the
8 defendant often files what is termed a bare bones pleading
9 and asked for the appointment of counsel to flesh out the
10 bare bones allegations in that pleading. I know that in the
11 case where I was appointed that is what happened, the
12 defendant filed a skeletal -- I don't know what the term you
13 prefer, but not a well-formed pleading, but asked for
14 counsel to be appointed to assist in fleshing it out and I
15 was appointed in those circumstances, and it's my
16 understanding that that is a fairly common occurrence.
17 Although sometimes district court judges do not appoint
18 counsel to flesh out, so I'm aware of cases where that has
19 happened as well.

20 Q And you were speaking of noncapital cases at that
21 point?

22 A Yes. In my only capital habeas case since ADPA came
23 into existence is in the Western District of Kentucky and
24 it's now in the 6th Circuit Court of Appeals. I did a
25 number of federal habeas corpus cases in Arizona, as you've

1 talked about, that was all before ADPA. That's when I was
2 with the Capital Representation Project From '89 to '91.

3 Q Okay. Well, in looking at the Exhibit 20 that you were
4 talking about, that's that initial post conviction relief
5 application that was dated March 1st of 2006. Does that
6 sound right from your recollection?

7 A I believe you.

8 Q Okay. The evidentiary hearing in the first PCR action
9 was not until January 29th of 2007. So, I mean, it seems
10 pretty logical, does it not, that counsel investigated and
11 then refined their allegations to put 12 allegations before
12 Judge Few. Is that reasonable?

13 A I don't know that that is. Unfortunately it would not
14 be unheard of for counsel to stand up and orally make
15 representations without having done the factual
16 investigation, and without having the facts to support those
17 allegations or to present to the Court to support those
18 allegations. So I agree with you to the extent that I would
19 like to believe that that would be the logical conclusion,
20 but it doesn't always match up with the actual practice.

21 Q Do you have any knowledge of any denial of funding or
22 something to that effect that would support that no
23 investigation was done during that time?

24 A I don't know that.

25 Q Are you aware South Carolina is very liberal with

1 funding for post conviction relief actions in capital cases?

2 Let me underscore.

3 A Well, that makes it considerably better than Kentucky,

4 I can tell you that. But, no, I did not know that.

5 Q I want to go back a little bit to talk about the

6 interplay between post conviction relief and federal habeas,

7 because I believe you were asked about default in federal

8 habeas. And an issue is defaulted in federal habeas when

9 it's not presented and the simplest terms; is that correct?

10 A Yes, ma'am.

11 Q Okay. So it's not simply that it wasn't in a piece of

12 paper somewhere, it's that it wasn't presented to a court

13 and you didn't get a court to rule on it and you didn't

14 appeal it.

15 A My review of the cases would be that an issue can be

16 defaulted if it is not sufficiently pled. Just making an

17 allegation without supporting it with facts and law in my

18 review of habeas jurisprudence would be that that can cause

19 an issue to be defaulted and, in fact, does cause issues to

20 be defaulted on a regular basis.

21 Q We may not be too far apart. What I'm getting at is

22 more of do you have to have it written somewhere or do you

23 have to present it?

24 A I don't know. I suppose if you presented it with

25 sufficient evidence and law orally that that might be

1 enough. I can't say that I've seen a case where that
2 happened, I'll just be honest with you.

3 Q That's all right. And you didn't have anything from
4 the PCR hearing in this case to refer to.

5 A About what was amended orally?

6 Q Yes, sir. What was said, what was presented, the
7 evidence presented, what the Judge considered, anything
8 along those lines.

9 A I don't know what, if anything, was presented.

10 Q Thank you, sir. I want to go on to something that you
11 mentioned about the experience as the investigator. Now, if
12 I understood your testimony you think that the best practice
13 is to go to an agency or an organization that can give you
14 some support to cite different studies or different theories
15 and to give you a list of experts if you need them; is that
16 correct? Like Justice 360, you mentioned that, in South
17 Carolina, and the predecessor Capital Resource Center, I
18 believe.

19 A The Death Penalty Resource Center would be an excellent
20 place to go to begin your search for experts, yes.

21 Q And if somebody goes there and they get a name of an
22 expert and they use that expert, that's sort of following
23 your advice, isn't it?

24 A Well, it's skipping several steps in the middle. I
25 understand what you're saying, that that's the beginning of

1 what I said and that's the end of what I said. There were
2 some steps in the middle that if you just blindly go "These
3 people are good folks, they said use this person, I'll use
4 them," no, I can't go with you on that. Even though you're
5 absolutely right that's a good start, and if you do the
6 intermediate steps to follow-up on it; look at what they've
7 done, if they've testified look at transcripts, talk with
8 other attorneys who have used them and go through a full
9 vetting process and then get to that conclusion, yes. But
10 if you go from beginning to end without the middle, I'm
11 sorry, I can't agree with you.

12 Q What about if we say the middle part is you have
13 someone who has worked for the Resource Center for years and
14 other capital defense people, litigators throughout the
15 years, what if that person well experienced shadows the
16 expert that you use? Isn't that a layer of protection?

17 A I'm not sure what you mean by shadows.

18 Q Well, let's say we have Ms. Cascio and with her is an
19 experienced mitigation investigator, stays during trial,
20 observes, helps where she can apparently if she's at trial.
21 I mean, that's a middle step, isn't it, to ensure that the
22 expert that you have hired is doing what she's supposed to
23 do?

24 A Well, maybe I'm missing the import of your question.
25 But skipping right to having somebody there at trial, I

1 mean, what we've talked about here, my understanding is that
2 no one went with Dr. Cascio for her interview with Mr.
3 Robertson. No one shadowed her, to borrow your phrase. No
4 one prepped her. No one explained to her what her role was
5 in interviewing Mr. Robertson. And I don't want to repeat
6 what I've said before, I know that you followed it all very
7 well, having someone shadow her work at trial is way, way
8 too late given what happened with the initial interview.

9 Q Okay. Well, let's talk about that a little bit more if
10 you don't mind. You were talking about in the interview the
11 reason you suggest that counsel should always be present is
12 there may be inappropriate information given, inappropriate
13 is in quotes. Is that correct?

14 A I believe I said, and maybe I misspoke, inappropriate
15 questions asked and/or inappropriate answers, which would be
16 information, as you just said, given. It could be one or
17 both.

18 Q Okay. What do you mean by that?

19 A I mean a mitigation investigator asking about the facts
20 of the crime of a defendant, that's an inappropriate
21 question, and if the defendant answered with a detailed
22 recitation of what happened at the time of the crime, that's
23 an inappropriate answer. That is not within the scope of a
24 mitigation investigator's duties. In fact, it's quite far
25 outside of it. So that would be one example germane to this

1 case.

2 Q Okay. But now the expert is chosen for the expertise.

3 So if the expert asks the question because he or she

4 believes it's important and it's not in court and it's not

5 in front of the State, what's wrong with the expert having

6 the independence to conduct his or own investigations?

7 A Respectfully I don't think it's a matter of

8 independence, I think it's a matter of lack of knowledge

9 about what the role of that particular expert, in this case

10 the mitigation investigator, some people call it the

11 mitigation specialist, what the role of that expert is. It

12 would not be independence, it would be going outside of the

13 scope of their expertise and what they were retained to do

14 in this specific case. My understanding is that it was to

15 do a life history, or there are other terms that are

16 sometimes substituted for life history. That would not

17 include the facts of the crime.

18 Q Well, if a mitigation expert thinks it would be

19 important and it may give them some information on who to

20 contact or other facts in the history, why is that

21 inappropriate? Again, not going to the State, not going to

22 the Court at that time but it's an investigation, why is

23 that inappropriate?

24 A There's no basis in fact given the mitigation

25 investigator's assigned task for that to be a part of their

1 questioning. And I understand what you're saying, that if
2 an experienced, well trained mitigation investigator who had
3 done hundreds of capital cases said, "I would like to talk
4 to the defendant about the facts of the case," one, I would
5 be there at that interview with the client to say, "No.
6 Let's talk about that later, let's go on with something
7 else." And then I would certainly talk to that experienced,
8 well trained mitigation investigator and say, "Now tell me
9 why it is that you think this is important to talk about?"
10 And yes, I would hash it out with them and I would listen to
11 their answers. I've never had a mitigation investigator do
12 that, and it's difficult for me to imagine that one could
13 convince me, but I would certainly, as to your question, I
14 would listen to their reasons. But that's why you're there.
15 You stop it. There's not just one -- and you know this very
16 well, I know, there's not just one meeting between the
17 mitigation investigator and the defendant, there's going to
18 be many, many, many meetings. So at this first meeting if
19 you're there you say, "No, let's don't talk about that right
20 now," and then you hash it out later to see if maybe, as you
21 suggest, there could be some possible reason for doing it.
22 But if you're not there and you don't stop it from happening
23 at that initial meeting obviously there's no one ringing
24 that bell.

25 Q Okay. I think I see the distinction that you're

1 drawing between maybe psychiatric, psychological experts and
2 mitigation. Mitigation can be used for in advocacy but a
3 medical opinion cannot be.

4 A No, it can be used in advocacy. The case that Mr.
5 Ehlied had me talk about, it was a medical expert testifying
6 that my client suffered from what was then called Battered
7 Woman Syndrome and that opinion was most definitely used in
8 advocacy in that case, and there were other examples. So
9 I'm sure you know of neurological disorders, organic brain
10 damage, medical diagnoses that are used in legal advocacy to
11 support either first phased offenses or mitigating
12 circumstances at the penalty phase of a capital trial.

13 Q But using in advocacy and shaping in advocacy is
14 slightly different, would you agree with that?

15 A I would agree with that.

16 Q Okay. So when you talk about a pattern in this case
17 with Cascio and Dr. McKee, they're not on equal footing, are
18 they? One is mitigation and one is a psychologist. So I
19 mean, we've got a medical expert and we've got mitigation,
20 they're not on the same footing.

21 A They were assigned to do different tasks in Mr.
22 Robertson's case, yes.

23 Q Okay. And you suggested that even with Dr. McKee
24 counsel should have either wanted to be there, requested to
25 be there, objected when they were told they couldn't, that

1 sort of thing, correct?

2 A Yes. And I've had to do that. I mean, that's a well
3 litigated area of the law. I mean, old attorneys like me
4 remember when we used to go to the ALR. There was specific
5 ALR annotation that I went to many times to see if it had
6 been updated. And yes, it does address the various forms of
7 litigation, which like you said, there are different ways
8 that you can litigate that.

9 Q So I believe you've mentioned that when you reviewed
10 the order for Dr. McKee to do his evaluation you recognized
11 that there was a provision that counsel couldn't be present.

12 A I did. I saw that.

13 Q So counsel had the order that they could not attend.
14 Does that change your opinion any?

15 A I would have to know if counsel litigated the issue of
16 whether they could be present, and after hearing factual
17 support and legal arguments for why counsel needed to be
18 present for that the Judge then made a determination that
19 counsel could not be present, or whether the Judge just
20 included this in the order without any litigation from
21 counsel, and I don't know the answer to that.

22 Q Okay. And let's talk about that a little bit. Are you
23 aware of State versus Hardy in South Carolina?

24 A No, ma'am.

25 Q If it supports that prohibition that's two strikes

1 against counsel. You've got the order and you've got the
2 case law that well supports it, that's going to be hard to
3 overcome.

4 A I understand what you're saying, and I'm sure you know
5 that the case law sometimes changes and that old ALR
6 annotation from way back when. There are a number of states
7 that initially prohibited counsel from being present where
8 there was a change in the law, either by court opinion or by
9 the legislature, it could be either way, but the law changed
10 and all of the sudden you were able to be present. And that
11 only happens if counsel -- prosecutors do the same thing. I
12 mean, any good advocate tries to get a change of law that
13 will allow them to do what they think they need to do to
14 advocate for their side in a case, and good prosecutors like
15 yourself do that, good defense attorneys do that.

16 Q But it kind of goes into something that you mentioned.
17 If you have that law against you, you've got the order
18 against you, then I think that you mentioned you would like
19 to see counsel try to take an interlocutory appeal or
20 somehow seek an original jurisdiction writ, something like
21 that. Is that what you were suggesting when the law is
22 against you that the counsel should try to stop the
23 proceedings and appeal it to some higher court?

24 A I've done it, so obviously it's hard for me to say I
25 don't think it's appropriate when I've done it. The case

1 that's referenced in my Prince affidavit, State of Arizona
2 versus Allen Nicholson, I had to take four -- in Arizona
3 they're called special actions, that's why I said it's
4 called different things in different places, in Kentucky
5 where I took them and Missouri where I took them they were
6 called writs. I'm completely ignorant of what it's called
7 in South Carolina. But I took four special action pretrial
8 appeals in Arizona in that case specifically about the
9 appointment and duties of mental health experts in that
10 case. So yes, I do believe that that's an important thing
11 to do.

12 Q And if I were to tell you that South Carolina does not
13 allow interlocutory appeals from such orders, and if I were
14 to tell you that it doesn't fall under our specific mandamus
15 rules, and you have State versus Hardy that says the Judge
16 acted correctly in saying counsel could not be in the room,
17 and you've got an order that says counsel cannot be in the
18 room, does that change your position on whether counsel
19 acted appropriately?

20 A Well, if there's no provision for taking an
21 interlocutory appeal regardless of what you want to call it,
22 obviously I don't advocate taking -- filing a pleading that
23 cannot be filed. But I would shift to what I talked about
24 earlier about the possibility of having it recorded and/or
25 having a defense expert appointed who could be present to

1 observe, not participate, but observe. And that's done in a
2 lot of states, maybe not South Carolina, but a lot of states
3 allow for a defense expert to be present but not participate
4 in a court ordered evaluation like that.

5 Q Okay. And this question goes to some of your
6 statements about the Dr. McKee interview. I believe you
7 said that there was essentially a 5th Amendment violation.
8 The first thing I wanted to ask you is true, that you can
9 waive your 5th Amendment rights, correct?

10 A A defendant can, yes.

11 Q Are you aware that at trial there was a discussion on
12 the fact that Dr. McKee advised Mr. Robertson of 5th
13 Amendment rights and the Court found -- and this is on page
14 3055 of the appendix, "As to the statements given by Mr.
15 Robertson I find that before he gave the statements he was
16 advised of rights under the 5th and 6th Amendment," and then
17 found that he had waived them. Were you aware of that?

18 A I was not aware of that. But that points out all the
19 more, in my mind at least, why it would be appropriate to
20 ask that it be -- that the evaluation be either recorded or
21 have a defense expert there observing. Because as you well
22 know, advising someone of their rights is one thing,
23 sufficiently advising them of their rights is another thing
24 entirely. And I take it from what you read, and perhaps I'm
25 wrong, but from what you read it sounded like the only

1 person who talked about that was the doctor himself, and
2 that would be suspect in my opinion.

3 Q And if counsel objected to Dr. McKee's testimony before
4 he was called, does that change your analysis of that?

5 A I would have to see the basis for the objection, how
6 they -- how defense counsel supported the objection and the
7 legal arguments raised in support of the objection.

8 Q But does it change your analysis at all if I were to
9 tell you that Dr. McKee was not a Court's witness but the
10 State's independent expert?

11 A I'm confused.

12 MR. EHLIES: Your Honor, I object. Most everything she
13 is recounting is inaccurate in the transcript itself,
14 because it is a Court ordered examination sent to the
15 Department of Mental Health and McKee was assigned in that
16 way to pick up the evaluation. The order itself says to
17 protect his 5th Amendment rights, it's in evidence now, and
18 that wasn't done. And that witness became the State's
19 witness in reply to the defendant's presentation of his
20 mental mitigation case. Thank you.

21 THE COURT: Well -- yes, ma'am?

22 MS. BROWN: The State was asking for the evaluation,
23 the Court allowed it. And, Your Honor, this is the exhibit
24 that was introduced earlier, Petitioner's 15A. The State
25 asked the Court to determine whether he should submit to an

1 independent psychiatric or psychological neurological
2 examination and became the State's witness. And I certainly
3 don't mind handing that up or anything.

4 THE COURT: I have it right here. It's dated
5 February 17th, 19 -- well, it's got 1999. That's it?

6 MS. BROWN: Yes, sir.

7 THE COURT: I have it. It's 15A. I have it. Do you
8 want to show it to him and ask him some questions about it?

9 MS. BROWN: Absolutely. May I approach?

10 THE COURT: Yes, ma'am?

11 BY MS. BROWN:

12 Q Particularly on pages three to four. If you would look
13 to see if there's some cautionary provisions on pages three
14 and four, it's right at the very end.

15 A Yes, ma'am. I think I understand your question.

16 Q Okay. Having seen those provisions, does that alter
17 your opinion at all?

18 A Which opinion are you referring to?

19 Q The protection within the order and to what extent
20 counsel would need to object or somehow take some
21 extraordinary action to overturn the order.

22 A I do think that it was incumbent on counsel to object
23 and to take any reasonable action. Because as I understand
24 what you're saying now, and I apologize for my
25 misunderstanding before, Dr. McKee was appointed as a Court

1 expert, but then at trial his testimony was presented by the
2 State. So he was a State's witness at trial even though he
3 had been appointed to be the Court's expert at the time of
4 his appointment.

5 Q Yes, sir. I wanted to ask you, sir, if you had
6 reviewed any South Carolina law on such evaluations such as
7 State versus Locklear or State versus Bigsby?

8 A I don't recall reading either one of those cases.

9 Q Okay. And I believe that you had said at one point
10 earlier in your testimony that you were not sure what South
11 Carolina procedure would allow or disallow.

12 A About the writs?

13 Q About the -- well, I understood, and please correct me
14 if I'm wrong, about the evaluation, about a challenge to the
15 evaluation, about the scope and about the limitations on
16 counsel. That was the way that I took that -- you know, I
17 will leave it to you to explain if that was not correct.

18 A No. I agree with you that all of those were issues
19 that counsel needed to explore.

20 Q Okay. But you were not familiar with the state law and
21 how that would either confine counsel or shape the way that
22 he handled these issues.

23 A I'm not aware of state law. I can't agree with you
24 completely about how that would shape counsel's reaction to
25 it. I'm sure familiar with the case, I want to say it's

1 Lowenfield versus Phelps, it's an early 1980's case and I
2 know that it was written by Justice Rehnquist, I don't
3 believe he was yet Chief Justice Rehnquist, in which he said
4 addressing a situation just like you've presented that it's
5 incumbent upon defense counsel to be aware of and to argue
6 any favorable cases from any jurisdiction, not just your
7 own. Now, that was a waiver case and Justice Rehnquist said
8 that by not -- I forget which state it came from, I want to
9 say Louisiana, I could be wrong, but by not arguing a case
10 that presented a defense argument from another jurisdiction
11 entirely, not Louisiana, that counsel had waived that issue.
12 And the language that I remember and has been seared into my
13 head at seminars and I've tried to sear it into other
14 attorneys at seminars where I've presented is that it is
15 incumbent, that is Justice Rehnquist's word, on defense
16 counsel to be aware of any positive law, any law that would
17 support the defense argument from any jurisdiction, not just
18 your own. So -- and I may be misinterpreting what you said,
19 but if you were saying that if South Carolina law was not
20 favorable to the defendant on this issue he should just let
21 it go, I have to disagree with you on that based on that
22 Supreme Court case.

23 Q And if there's a Supreme Court case that also says it's
24 not preferable for counsel to be in the room for a medical
25 evaluation?

1 A Supreme Court of the United States?

2 Q Uh-huh.

3 A What case is that?

4 Q It is in State vs. Hardy, sir, which I do not have in
5 front of me but it is referenced there.

6 A The Supreme Court of South Carolina.

7 Q No. The United States Supreme Court does have some
8 language, and quite frankly, sir, I do not have the case, do
9 not remember it off the top of my head, because I always use
10 State versus Hardy since we're in South Carolina. But I
11 guess my point is, and I really kind of want to look into
12 this just a little bit more, you're here to talk about the
13 standard of care for South Carolina cases. And, sir,
14 respectfully, wouldn't it be important to know South
15 Carolina law both for pleading and for substance?

16 A I'm familiar with South Carolina law and the statutory
17 requirements for post conviction counsel in a capital case,
18 and I am familiar with the federal constitutional standards
19 for capital defense attorneys and post conviction case. And
20 I believe that the overriding point of my testimony, at
21 least as I understand it, is that competent, qualified,
22 trained post conviction counsel, when looking at the
23 transcript of the trial in this case, would have issues jump
24 out at them that needed to be investigated, that needed to
25 be researched, that needed to be pled very specifically both

1 factually and legally. And I'm not aware of any South
2 Carolina law, you may tell me that there is some, that would
3 say that counsel should not do those things. It would be
4 hard for me to believe that there would be South Carolina
5 law saying that post conviction counsel in a capital case
6 shouldn't use their training and competency to look at the
7 trial transcript and see issues that fairly leap off the
8 pages and do sufficient constitutionally mandated
9 investigation into those issues.

10 Q Okay. Well, we're getting a little bit closer to a
11 meeting of the minds on where we are here because I wanted
12 to ask you, when you say function of counsel then you're
13 saying function of counsel globally or under the ABA but not
14 under South Carolina standards of care?

15 A I'm talking about under the federal constitution. I
16 don't know if that means globally or ABA or South Carolina.
17 I think that South Carolina's laws would be subsumed into
18 the federal standard.

19 Q I think you would agree with me that the Supreme Court
20 of the United States has said that the ABA Guidelines are
21 just that, they're guidelines, they're not mandatory.

22 A They have said that they're not mandatory, but they
23 have said that they are I want to say guiding principles,
24 what counsel should look at. There's been language in a
25 number of cases, and I know you and Mr. Ehliel have both

1 talked about them; Wiggins, Porter, Segars, all of those
2 cases mentioned the ABA Guidelines. And, yes, I agree with
3 you 100 percent, they did not say they were mandatory. They
4 also said that counsel should look at them and follow them.

5 Q But if they're not mandatory, if somebody does not
6 follow an ABA Guideline does not mean that they are not
7 functioning as counsel, or that they are deficient in a 6th
8 Amendment sense.

9 A Well, again, it depends on the specific facts and the
10 specific law that they're choosing to ignore by not
11 following the ABA Guidelines. It's difficult to imagine
12 that just turning a blind eye to what the Supreme Court has
13 said counsel should look at, and unless it was a factual or
14 legal issue that was incredibly insignificant, and there
15 aren't a lot of those in capital cases, it would have to be
16 incredibly insignificant for counsel to perform, it's not to
17 be deficient in the 6th Amendment sense. If they're just
18 saying, "I don't care what the guidelines say I'm going to
19 do it my way. I think I know more than the people who put
20 together these guidelines." And if you look at the
21 beginning of the guidelines and who all put those together,
22 that's a tough row to hoe to say that I know more than these
23 people. So you may present me with a factual scenario where
24 that would be true, but it's hard for me to imagine.

25 Q Do you have any evidence that a similar situation

1 happened in this case, that these attorneys said, "I reject
2 the guidelines?"

3 A They didn't appear to know the guidelines.

4 Q And you base that on what, sir?

5 A The fact that they looked at a transcript where a
6 witness was proffered as a mitigation witness and gave
7 testimony that was the most damning aggravating evidence in
8 the case and didn't specifically raise that issue in their
9 post conviction petition. That is not knowing the
10 guidelines, not knowing the law, and not knowing that you
11 need to investigate something that jumps off the pages like
12 that.

13 MS. BROWN: May I approach one more time, Your Honor?

14 THE COURT: Yes.

15 Q Sir, this is the listing of issues. I wondered if you
16 wouldn't mind reviewing and reading issue 12 into the
17 record, please.

18 A Yes, ma'am. "Counsel was ineffective for presenting
19 social worker Tonie Cascio as an expert witness because of;
20 A, Cascio's lack of experience; B, counsel's agreement to
21 provide Ms. Cascio's notes to the State; C, counsel's
22 failure to discover Robertson's admissions about the crime
23 in enough time to prevent counsel to employ a different
24 social worker; and D, counsel's -- of Ms. Cascio as a
25 witness."

1 Q Is that one of the claims that, in your opinion, jumped
2 off the page and should have been litigated?

3 A That's a part of it, yes. I think we discussed this
4 before, but maybe I'm mistaken, that includes some but not
5 all of the errors counsel made in regard to Dr. Cascio. But
6 as we discussed before I believe, I don't know what, if any,
7 factual presentation or legal argument counsel made in
8 support of that. Making statements like that with nothing
9 to back them up are kind of a prosecutor's dream I would
10 think, because counsel making an allegation without any
11 facts to support it, any law to support it is pretty easy
12 pickings.

13 Q Well, I'm not going to ask you a question about this
14 because I understand you don't have the order of dismissal,
15 but I think we have kind of gone over the ground that
16 evidence was presented, argument was presented and a
17 determination was made, but that determination was not given
18 to you. You have not seen the order of dismissal.

19 A Nor any transcript of any evidence or argument that was
20 made.

21 Q That's fair enough. Thank you. Thank you. Going back
22 to the idea of standard of review. I also understood you to
23 say in your direct examination that you believe that the
24 failure to, I think, attend Dr. McKee's evaluation and/or
25 the interviews by Ms. Cascio was abandonment "in your mind;"

1 is that correct?

2 A Definitely with regard to Dr. Cascio in that two
3 sentence letter to the prison saying, "Let Dr. Cascio in."
4 Yes. You have made clear to me that South Carolina law and
5 the Judge's order, whether or not it was litigated
6 adequately or not, indicate that counsel could not be
7 present. So I don't know that I would term not being there
8 with Dr. McKee -- is that right, Dr. McKee?

9 Q Dr. McKee, yes, sir.

10 A I don't know that I would term that abandonment. And
11 if I said that before, I don't recall saying it, but if you
12 say I said it maybe I did.

13 Q Well, it's always good to clarify so we don't have a
14 problem with that.

15 A No. I don't believe that I could say with Dr. McKee
16 that it was abandonment. With Dr. Cascio, yes, I definitely
17 could say.

18 Q Okay. And when you say abandonment, you're going back
19 to either the ABA Guidelines or teaching principles; is that
20 correct?

21 A I'm going back to, yes, ABA Guidelines training
22 materials, and also Maples versus Thomas.

23 Q Okay. And the abandonment in Maples actually prevented
24 an appeal, didn't it?

25 A Yes, it did --

1 Q Okay.

2 A -- I believe that's my recollection. I think counsel
3 moved away and didn't make any provision for someone in his
4 old office that he had left to file a notice of appeal. Am
5 I remembering that correctly?

6 Q That's my recollection without having the case in front
7 of me as well.

8 A It has been a few years since I cited it, maybe the
9 same with you.

10 Q I think you're right. And Maples kind of followed, I
11 believe, was it Holland versus Florida?

12 A Yes, sir.

13 Q So there is kind of an equitable if someone is
14 instructed to give you an appeal and you don't file that
15 appeal that's abandonment. Isn't that kind of following
16 that line of logic?

17 A I believe Holland, was it equitable estoppel --

18 Q Tolling?

19 A Equitable tolling. You're right, you're right. Yes.
20 And I'm not saying -- and I apologize if I implied this, I'm
21 not saying that the factual scenarios in Maples or Holland
22 are the same as in Mr. Robertson's case. There are
23 principles of abandonment articulated in those opinions
24 which I believe -- and I understand, people -- reasonable
25 people could disagree about this, but I believe they could

1 be argued as applying as principles in Mr. Robertson's case.

2 Q Okay. And I think you've said a couple times now that
3 it's very important for counsel to be up to date on the
4 decisions that are out there that may affect their case.

5 And you've mentioned a state case, State versus Lopez, as I
6 guess embracing a Battered Child Syndrome?

7 A I said State versus Lopez?

8 Q Perhaps you were answering a question when it was posed
9 to you, State versus Lopez, accepting a Battered Child
10 Syndrome. Does that ring a bell?

11 A I believe I recall Mr. Ehliess saying that the Supreme
12 Court of South Carolina had recognized in Lopez as a viable
13 defense. And I'm sure there was a lot of litigation in a
14 lot of different states about -- I'm sorry I keep saying
15 this, Battered Woman's Syndrome but that's how I learned it
16 years ago.

17 Q That's how I learned it as well, sir.

18 A There was a lot of litigation about whether that was a
19 viable defense or not. And there were states that, at least
20 for awhile, said no. The majority said yes, but there
21 were -- Arizona said no. And there was a lot of litigation
22 about that. And I guess I took Mr. Ehliess' statement to be
23 that South Carolina had come down on the side of the
24 majority of cases saying that it is a viable defense.

25 Q And I almost hesitate to ask you this because I realize

1 you're at a bit of a disadvantage, but if I were to tell you
 2 State versus Lopez does not recognize a Battered Child
 3 Syndrome for a behavioral characteristic of the child, but
 4 actually recognizes it as a doctrine to -- or a way of
 5 creating an inference that the child's injuries were not
 6 sustained by accidental means, that puts it on different
 7 footing, does it not?

8 A I honestly don't know. I don't know the facts of
 9 Lopez. I don't know the issue as it was presented in Lopez.
 10 And you're right, I am not in a position to make any
 11 statements about that case because I just don't know enough.

12 Q And if you're counting I have three more sticky pages
 13 here of notes and I think I'll be done so there's a little
 14 light at the end of tunnel, bear with me. A parricide case.
 15 I think you mentioned that you would rely on experts to look
 16 into different theories and investigate those theories, or
 17 at least suggest investigation of those theories.

18 A Yes, ma'am.

19 Q Have you reviewed the listing of what Tonie Cascio
 20 reviewed in her investigation?

21 A I believe I have.

22 Q Do you have that with you, sir?

23 A I don't have anything with me.

24 Q Okay.

25 MS. BROWN: Court's indulgence, Your Honor?

1 THE COURT: Yes, ma'am.

2 (Break in proceedings.)

3 Q Sir, you said that you reviewed a records listing from
4 Tonie Cascio?

5 A I said I believe I did.

6 MS. BROWN: Your Honor, may I approach --

7 Q -- and see if this is a listing you might have
8 reviewed. Does that look like the listing that you
9 reviewed, sir?

10 A I'm not sure. If I reviewed it it was a long time ago.
11 Just being as absolute honest with you as I can be, the
12 first three pages look familiar to me, the last two pages,
13 the listing of literature, does not look familiar to me.
14 But I cannot say 100 percent for sure that I saw the first
15 three pages and that I didn't see the last two pages. I'm
16 not sure. I can just tell you that those first three do
17 look familiar to me.

18 Q Okay. May I take this back? If reviewing what Tonie
19 Cascio had listed out for her sources there was something on
20 children who killed parents, wouldn't that suggest to you
21 there was at least some consideration of that?

22 A It would suggest that there was some, it would not
23 suggest that it was sufficient. And again, I'll defer to
24 the affidavit, which you have, that I did in the Prince case
25 where trial counsel most certainly did investigate and talk

1 to a number of witnesses, they also missed a lot of
2 witnesses. And the interviews that they did with the
3 witnesses that they spoke with were insufficient.

4 Q Okay. Just kind of a point of clarification, when you
5 talk about the ABA Guidelines and Wiggins, I thought that I
6 heard a suggestion that evidence should be investigated and
7 presented. Would you agree with that statement?

8 A Any potential evidence should be investigated.
9 Obviously there is a lot of investigation that does not turn
10 up positive information and you wouldn't want to present
11 that evidence, no, ma'am.

12 Q So investigation you would like to address as -- it's
13 got to be sufficient, but presentation, that is solely
14 within a strategic area for the attorney, correct?

15 A Like Strickland says, strategic decisions are
16 reasonable. I think it says exactly to the extent that they
17 are well investigated, well researched and thoroughly
18 considered, to that extent they are reasonable strategic
19 decisions. But not all decisions that some counsel like to
20 call strategic decisions, there hasn't be much strategy
21 involved.

22 Q And sometimes, I think you'll agree with me, there's a
23 gray area there, there is a level of investigation. But
24 then the question becomes did you investigate enough, and
25 that determination is for the Court to figure out did they

1 have enough to make the determination on strategy that they
2 may. Isn't that a little bit of a gray area, how much is
3 enough?

4 A Hopefully with a full factual presentation. And I'm
5 sorry to keep referring to this, but in the Prince case you
6 might have noted, there were numerous affidavits presented
7 from those witnesses that you would say fall into this gray
8 area where trial counsel did talk to them and decided not to
9 present them. Further investigation, further conversations
10 with those witnesses resulted in declarations or affidavits
11 from which the Court could determine whether that was a
12 reasonable strategic decision not to call them.

13 MS. BROWN: Your Honor, may I have just a moment to
14 consult with my cocounsel?

15 THE COURT: Yes, ma'am, sure.

16 (Break in proceedings.)

17 MS. BROWN: Thank you, Your Honor, for your indulgence
18 there. What I was looking for, just for a point of
19 clarification, was the United States Supreme Court case I
20 had talked about with State versus Hardy, and State versus
21 Hardy comes to mind because it's a South Carolina case that
22 I referred to quite often and I was not able to find that
23 cite. If I could I would like to provide it to the Court at
24 a later time. We just used it in Bobby Wayne -- and some
25 other things that we talked about but I'm afraid I don't

1 have it at my fingertips at the moment. Thank you for your
2 time, sir. No further questions, Your Honor.

3 THE COURT: Okay. Counsel, anything?

4 MR. EHLIES: Yes, sir.

5 THE COURT: Hold on one second, Mr. Ehliès.

6 (Break in proceedings.)

7 MR. EHLIES: I don't know where really to begin. I had
8 this in hand. On September the 20th and 2017 in the case of
9 2011-CP-46-0072, a motion for partial summary judgment was
10 filed and granted by this Court, and attached to that
11 document are exhibits that were relied upon in making the
12 ruling, and Exhibit 1, Plaintiff's Exhibit 1 -- there it is.

13 Q Okay. Mr. Bailey, I'm going to have to get kind of
14 close to you, I'm sorry. Exhibit 1 to that document, you
15 were asked, well -- the discussion on the cross examination
16 was, "Well, they got this stream of consciousness and
17 amended orally on the first day of the action." The written
18 pleading obligation, and you and I talked about the written
19 pleading obligation, the duty to plead your case. Okay.
20 And those amendments were made standing on their feet on the
21 opening day, the transcript reveals that, and they started
22 just articulating things from reading the record. Then it
23 came up, well, how do you know on the cross examination that
24 they didn't do this work? And did you look and reveal and
25 look and study their fee petition in filings for fees about

1 investigating and talking to expert witnesses? And I'm
2 showing you those documents. And this first one here is the
3 document for Mr. Matlock, if you see right here is his name,
4 and then I want you to take a look at this. Here are his
5 listings. Okay? Preparation for trial, review of trial
6 transcript. Can you see that review of transcript?

7 THE WITNESS: May I stand, Your Honor?

8 THE COURT: Certainly.

9 Q Date, January 19th, 2006. Prep for trial, review
10 transcript of case material, review transcript of case
11 material, on and on with only one thing, review transcript
12 of case material. There's nothing in there, is there? Do
13 you see anything that says they would have consulted,
14 investigated, developed any kind of inquiries into witnesses
15 in this case?

16 A I don't see any listing for that.

17 Q None. And then comes primary counsel, Mr. Brown. And
18 the fee petition for Mr. Brown, Michael Brown, is identical,
19 not only on dates but exactly what the listing of the
20 services provided. Do you see anything other than
21 transcript of case material, trial review, transcript of
22 case material?

23 A No, they're identical.

24 Q Okay. That's all they did as far as their billing is
25 concerned is they read the transcript.

1 MS. BROWN: Objection, that's --

2 THE COURT: Yes, sir, it -- let's don't make a comment.

3 Q Ms. Brown represented to you the U.S. Supreme Court's
4 case of State v. Hardy.

5 A Yes, sir.

6 Q It's State v. Hardy, which is a South Carolina Supreme
7 Court case at 283 South Carolina 590, a 1984 case that was
8 expressly done away with in the case of Arthur Bigsby, which
9 is 388 South Carolina 528, which set out this protocol
10 endorsing the Sartain Pennsylvania case at 561 Pennsylvania
11 526, "Thus the Court held that certain procedural safeguards
12 should be utilized to protect a defendant ordered to take a
13 psychiatrist eval., and the results of the ordered
14 evaluation be placed under seal until the commencement of a
15 penalty phase where the issues become relevant." And in
16 State v. Bigsby they authorized the attendance of the
17 defense counsel at the interview. Okay.

18 A That's what I would like to think would happen.

19 Q The --

20 MS. BROWN: Your Honor, I do want to object with the
21 mischaracterization of what I said about the United States
22 Supreme Court, I thought I made that pretty clear, and
23 according to West Law nothing has been overturned in State
24 v. Hardy, it has just been relied on. I just want to make
25 that point for clarification, and I thank you, Your Honor,

1 for that.

2 MR. EHLIES: I think we'll be briefing this whole thing
3 when it's over and we can bring those kinds of issues
4 together in the briefing. Okay.

5 Q You were asked about how you could get an expert like
6 Ms. Cascio information about the circumstances of the crime
7 and keep it secret, you know, not have it revealed. She's a
8 testifying expert, and under Rule 705, I believe you're
9 familiar because it's a uniformed rule of evidence,
10 uniformed across most of the states in the country, there
11 are no secrets from testifying experts, is that your
12 understanding?

13 A You're going to have to turn over any report and
14 memorandum notes.

15 Q Even if it's what trial counsel are telling her about
16 the history of the case, that can be revealed and must be
17 revealed as part of the information any expert witness
18 testifying under 705 must reveal, is that not true?

19 A Absolutely. That's why competent counsel has to be
20 very careful in consulting with experts about what reports
21 are made, what memorandums are written and what notes are
22 taken.

23 Q And who tells her anything? Even team members telling
24 the testifying expert facts are facts that have to be
25 revealed under Rule 705, is that your understanding?

1 A Yes, sir.

2 Q I want to show you, then it was said that, "Well, how
3 do you know that trial counsel didn't advise her?" Please
4 look at Cascio deposition affidavit number two and three.

5 A I am familiar with those.

6 Q Are you familiar with those? Well, I'm going to show
7 you again, about whether or not she was ever counseled about
8 what to do, what not to do by whoever attended with her.

9 A Yes, sir. I have seen these, I recognize these. And
10 Dr. Cascio could not have been more clear that she was given
11 no guidance whatsoever.

12 Q And no one was attending any of the meetings with her.

13 A No one.

14 MR. EHLIES: I'm going to put these in later, Judge, so
15 we can finish up. Yeah, I'm sorry. The reference should
16 have been to the first one of trial counsel, which is Cascio
17 Number 1. And then the second affidavit, Cascio Number two,
18 involves similar allegations and references made to
19 post-trial counsel, that nobody ever contacted her, nobody
20 ever asked her any questions or gave her any advice to
21 consult about what the limits were for her testimony. Those
22 are in evidence too by the way, Judge.

23 Q And as far as your testimony about other jurisdictions
24 and authorities of other jurisdictions, remember, you
25 were --

1 A Yes, sir.

2 Q -- relying on other jurisdictions. The rule for
3 practitioners in training, as I understand it, is the law is
4 never what the Court said it was, it is always what the
5 Court is going to say it is the next time they see it. Is
6 that your understanding of the positioning with cases?

7 A That's not just my understanding, I've observed it
8 happen firsthand.

9 Q And, in fact, so fast and fluid is the change in the
10 law that by the time you've made your original argument,
11 brief and get back to your office you have to file
12 supplemental authorities.

13 A I've just done that with the 6th Circuit. In my
14 federal capital habeas case from Kentucky we had oral
15 argument before the 6th Circuit the third week in June, and
16 I haven't filed anything in the last two weeks, but between
17 June 3rd and -- not June 3rd, excuse me, the third week in
18 June and the third week of July I had to file two post-oral
19 arguments supplemental authorities because new cases had
20 come down that directly impacted issues that we raised in
21 and argued in that case.

22 Q Okay, sir. Now, the limitations of counsel attendance
23 interviews was to McKee only, is that your understanding?

24 A Yes, sir.

25 Q The order applied to the psych eval.

1 A Yes, sir.

2 Q Okay. So they've gotten you confused, I think, on the
3 other psych eval. case -- order, I'm sorry, the second psych
4 eval. order, and it's 15, there are two. And this is
5 March -- it's 15B, it's March 1st. I want you to take a
6 look at that document. This is a --

7 MR. EHLIES: We move this into evidence also.

8 Q It's signed March 1st by Judge Hayes, and it's a three
9 page document, 15B. The Court has unpublished from the last
10 paragraph of page 29, "The Court has inherent authority in
11 appropriate circumstances as the Court here finds to order a
12 defendant to undergo independent mental evaluation," and he
13 cites the authorities on it -- he recognizes there weren't
14 any issues in this case. I would ask you a couple of
15 questions about that if you could read it real close.

16 A Yes, sir.

17 Q There is no particular reference to any specific
18 forensics psychologist doing the psych eval., the reference
19 in the directions is to the Department of Mental Health, is
20 that correct, at William S. Hall? I'm sorry, based on
21 records from William Hall. So he orders the psych eval.,
22 and does that not, in effect, make the person that does it
23 the Court's witness?

24 A In my experience, yes.

25 Q And so he should receive the report procedurally and

1 defense counsel, if that's not what happened, should be
2 objecting; is that correct?

3 A Yes, sir.

4 Q And then if he receives the report he can redact if
5 necessary, and he says even to protect the 5th Amendment
6 rights, correct?

7 A Yes, sir.

8 Q Okay. So the ultimate witness is McKee on this court
9 ordered eval., and that witness belongs to the Court, is
10 that your understanding of that order?

11 A The witness was appointed by the Court and the report
12 was to be to the Court. I don't know that it's anybody's
13 witness, the Court's or anybody else's, but maybe I
14 misunderstood.

15 Q Yeah. The Court has a court appointed expert to do a
16 psych eval.

17 A Yes, sir.

18 Q Even though he just sends it to the Department of
19 Mental Health to get it done it's McKee who is there to get
20 the assignment and does the job. So in those circumstances
21 that witness should report to the Judge that referred the
22 case for psych eval.

23 A Absolutely.

24 Q And the Judge should capture control of the data that
25 is the consequence of the interview and evaluation. Is that

1 procedurally what is the standard of care?

2 A Yes, sir.

3 Q Okay. And then the Judge can look at, for purposes of
4 protecting the 5th Amendment, what is necessary for the
5 parties based on what is an issue, or what comes to be an
6 issue; is that correct?

7 A Yes.

8 Q And then, if necessary, he can even redact what is not
9 necessary for them to know, 5th Amendment protective
10 details; is that correct?

11 A Yes. It happens all the time with regard to not only
12 this issue but other issues as well, Brady materials.

13 Q Okay. Well, there is a Brady issue in this case but I
14 don't think you asked you to do that, right?

15 A No, sir.

16 Q Okay. The matter about Lopez. The Lopez court, the
17 representation there is they acknowledged the condition of
18 Battered Child as an authentic medical condition if properly
19 diagnosed by an expert. Does that change anything in your
20 testimony and your understanding about Battered Child and
21 its recognition in South Carolina?

22 A Well, it leads me to believe that that is at least
23 potentially a viable defense.

24 Q Okay. And the questions about whether you present any
25 particular evidence. The Wiggins standard is to

1 investigate, develop and present obviously, and each of
2 those are heightened, that's a complete investigation, and
3 without it you can't make a strategic decision; is that
4 correct?

5 A Absolutely.

6 Q You develop it because it may appear on the record to
7 be one thing, but unless you develop it you really don't
8 know what it is and what it can become; is that correct?

9 A Yes, sir.

10 Q After you investigate and develop you decide
11 strategically whether or not it should be presented and
12 when; is that correct?

13 A After fully investigated, yes, sir.

14 Q And is that not the Wiggins protocol; investigate,
15 develop and present if appropriate?

16 A Yes.

17 MR. EHLIES: Thank you, Judge.

18 THE COURT: Thank you. Yes, ma'am, anything?

19 MS. BROWN: Just really quickly if I could, Your Honor.

20 RECROSS EXAMINATION

21 BY MS. BROWN:

22 Q One thing is we've thrown around a lot of cases and a
23 lot of concepts and I want to be clear, I don't want to
24 misstate something, I don't want anybody else to misstate
25 something, lawyer or witness so I want to kind of clarify

1 something. I understood the question on redirect was that
 2 there was a question that I posed to you that we don't know
 3 what trial counsel may have told Ms. Cascio, I don't recall
 4 posing that question. But what I wanted to pose, and I'm
 5 hoping that we're on the same page here, is there anything
 6 in your review of the documents that show you what Ms.
 7 Drucy Glass did to assist or help or guide Ms. Cascio?

8 A I believe Dr. Cascio's affidavit says that no one gave
 9 her any guidance about her interview with Mr. Robertson.

10 Q Okay. And did you --

11 A I'm sorry. I don't usually talk this much, I really
 12 don't.

13 Q Did you ask about any kind of involvement of Ms. Drucy
 14 Glass in this particular proceeding?

15 A Not that I recall.

16 Q And I also wanted to ask about the statements. We've
 17 gone on quite awhile about some of the information that
 18 applicant gave to Dr. Cascio, I believe that you corrected
 19 me and that is correct, it should be Dr. Cascio, and the
 20 facts about the crime in particular. Were you aware that
 21 applicant also talked about that crime to Dr. McKee, and he
 22 also talked about his crime in the last post-conviction
 23 relief proceeding?

24 A Yes.

25 Q Okay. So with all of that out there at this point in

1 time it's going to be kind of difficult to show prejudice,
2 isn't it?

3 A No, because all of that wasn't out there at trial. And
4 PCR counsel on putting together the PCR petition was only
5 focused on the information that was present at his trial.

6 Q But you make a good point, you're going back to trial
7 counsel, not PCR counsel, PCR deficiency, PCR issues. It's
8 the claim against trial counsel that is important for
9 prejudice, correct?

10 A I can't agree with that. I understand what you're
11 saying, but it starts a step before that with PCR counsel's
12 duty to investigate, research and present the ineffective
13 assistance of counsel at trial. So I understand what you're
14 saying, that the question of ineffective assistance of trial
15 counsel is critically important, I agree with you completely
16 about that, but as a necessary first step PCR counsel has to
17 be competent, qualified and trained to go back and look at
18 the record, interview witnesses, do whatever investigation
19 and research is necessary to make a hopefully persuasive and
20 thorough presentation to the post-conviction court.

21 Q And that goes to deficiency, not prejudice.

22 A No. Prejudice would be a part of -- because of PCR
23 counsel's ineffectiveness and not being qualified there was
24 not an adequate -- there wasn't really any, in my mind -- I
25 understand what you showed me that they said at the hearing,

1 but there wasn't really any substantive work done on the
2 issue of ineffective assistance of trial counsel, and thus
3 Mr. Robertson lost that opportunity before the PCR counsel
4 as a result of the lack of competency and not following the
5 standard of care of PCR counsel.

6 Q But we agree you don't get relief until you show trial
7 counsel was ineffective.

8 A In the post conviction court?

9 Q Right.

10 A In post conviction court you would have to show that
11 trial counsel was ineffective, yes, ma'am.

12 MS. BROWN: Thank you for your time. No further
13 questions, Your Honor.

14 THE COURT: Thank you. Sir, you may step down, please
15 be careful.

16 MR. EHLIES: Can he be excused, Judge?

17 THE COURT: Any objection to this witness be excused?

18 MS. BROWN: Oh, I'm sorry.

19 THE COURT: Any objection to excusing him?

20 MS. BROWN: No objection.

21 THE COURT: Without objection, sir, you may leave or
22 stay, whichever.

23 MS. BROWN: Thank you for your time, sir.

24 MR. EHLIES: Thank you, Judge. That's it for the day.

25 THE COURT: We're going to be in recess until 9:00

1 tomorrow?

2 MR. EHLIES: I need to talk about two things on that.
3 One is the fourth amended application I have with me that I
4 didn't get filed, and you might remember the problem I had
5 with that so I would like to get it filed and clocked, it
6 went in without objections. There was an objection to
7 amending the fifth application specifically as to Rule 11 so
8 we'll need to take that up tomorrow morning. And then my
9 client is going to be by video on your WebEx presentation,
10 he's in Naples, Florida.

11 THE COURT: The witness?

12 MR. EHLIES: I'm sorry, not my client my, witness, it's
13 getting late in the day. He has that thumb drive that's on
14 one of your exhibits. So if the technical person that helps
15 us in the courtroom can be present when we do him, and I
16 would suggest 9:30 to get that witness started and I'll call
17 him tonight and have him keyed up and the exact email
18 address to use to give him the invite and then we'll go
19 forward with it.

20 THE COURT: Okay. Well, do you want to meet at 9:00 to
21 talk about any other --

22 MR. EHLIES: Yes, that will be fine.

23 THE COURT: So we'll get on the record at 9:00, we'll
24 do any preliminary matters.

25 (Court recessed for the evening and resumed at

1 9:00 a.m. on Tuesday, August 10, 2021.)

2 THE COURT: I think you said there was something, Mr.
3 Ehliès, that we needed to take up this morning?

4 MR. EHLIES: Yes, sir.

5 THE COURT: Okay.

6 MR. EHLIES: Are you ready for that?

7 THE COURT: Yes, sir.

8 MR. EHLIES: These are just administrative things.
9 First off, we would like to call the Court's attention to
10 the State v. Hardy case which we talked about yesterday, and
11 I wanted to make sure you had the citation on that because
12 that is a very important case to the issues on the psych
13 eval. and how all of that happened and unfolded with
14 Dr. McKee. It's at 283 South Carolina 590, it's a 1985
15 decision.

16 MS. BROWN: And I may have some copies here I could
17 share. I was going to hand that up this morning.

18 THE COURT: Great minds think alike, don't they?

19 MS. BROWN: Exactly. And I have a copy for Mr. Ehliès,
20 too. May I approach?

21 THE COURT: Yes.

22 MR. EHLIES: Mr. Salter and I had talked earlier, it
23 has been a month or so maybe, and I got an email recently
24 before we started this case to -- I think maybe Sara picked
25 it up and it has to do with three transcripts that deal with

1 the psych eval. issues that were pretrial hearings and
2 somehow they've not been made part of the record. And I
3 have the dates of those transcripts. I think that Mr.
4 Salter had asked how you all want to deal with getting those
5 transcripts by Dropbox of some kind?

6 MR. SALTER: Right. I had sent an email we -- our
7 office doesn't allow us to use Dropbox unlike everyone else
8 in America we have to be different, so we use Kiteworks.
9 But one of the administrative assistants in our office could
10 walk you all through that and we could provide an electronic
11 copy of everything as opposed to another physical copy,
12 because I know you have a physical copy of the appendix.

13 THE COURT: Like you I don't think we can use Dropbox.
14 I don't think -- I think our firewall prevents that, but my
15 technical person here I'm sure can help me with that.

16 MR. EHLIES: Yes, sir. Basically the understanding is
17 that everything needs to be in the record and somehow these
18 particular transcripts didn't make it, not just appendix but
19 also -- I'll need to be in that also to get copies of those.
20 And the dates are 11/20/1998, 12/18/1998, and February the
21 12th of 1999.

22 THE COURT: All right. Well, how do you propose for us
23 to put it in the -- somebody that has got -- is more savvy
24 than I am. How do you --

25 MR. EHLIES: They have them and I don't.

1 THE COURT: So we can --

2 MR. SALTER: We can physically do that later. The
3 person that would know where all of this is not in the
4 courtroom right now but she'll be here in a little while.
5 She went to file something in the civil court.

6 THE COURT: Okay. We'll make sure we get it in the
7 record somehow, we'll figure that out.

8 (Break in proceedings.)

9 MR. SALTER: Your Honor, I have been told that Ms.
10 Collins can put it all on a disk for us if you would like.

11 MR. EHLIES: Any old way I can get it is fine with me
12 as long as --

13 THE COURT: Ms. Collins, thank you for your help.

14 MR. EHLIES: Okay. We're checking that off then.

15 THE COURT: Okay.

16 MR. EHLIES: Third is, or are, the original
17 transcripts, Mr. Salter?

18 MR. SALTER: Yes.

19 MR. EHLIES: You want to see them? They're sealed up.

20 MR. SALTER: No objection.

21 MR. EHLIES: These are three original depositions taken
22 in this case of Mr. Barrowclough, Mr. Pope and Mr. Brown.

23 THE COURT: Those were taken --

24 MR. EHLIES: In this case.

25 THE COURT: In this case.

1 MR. EHLIES: Yes, by me. Those are records depositions
2 and the transcripts of those proceedings, so I want to get
3 these in the record.

4 THE COURT: All right. It's without objection.

5 (The depositions were received as Court's 1-3.)

6 MR. EHLIES: On July the 20th of this year I filed a
7 motion with the Clerk of Court to amend a fourth application
8 by the 5th, and so that motion contains on the bottom the
9 Rule 11 mandatory declaration that I've talked with opposing
10 party. And Mr. Salter raised an objection to the 11L. And
11 we've been using that fifth amended application, which is
12 filed and clocked along with the motion. And Mr. Bennett,
13 if it's in that order, I don't know -- they've never filed a
14 response to the motion I don't think. I may be wrong about
15 that.

16 MR. SALTER: No, I did not. I was in the process of
17 drafting a return to the fourth amended application when I
18 was served with the fifth one.

19 MR. EHLIES: Okay. So whatever is required with the
20 timeline is fine with us, I'm just trying to clarify that we
21 have outstanding this motion to amend the fifth and we've
22 been using the fifth in the witness dialogues.

23 THE COURT: So the objection is to 11L?

24 MR. SALTER: 11L. Let me explain, Your Honor, it's
25 real simple. 11L alleges ineffective assistance of

1 appellate counsel. Well, Mr. Robertson was his own
2 appellate counsel. Originally Bob Dudek was appointed to
3 represent him, Bob is now head of appellate defense. They
4 had a disagreement, or Mr. Robertson was dissatisfied.
5 There was a hearing held before Judge Hayes, Mr. Robertson
6 was represented by Chris Wellborn at that hearing. Mr.
7 Wellborn indicated but prior to and in the record that there
8 was no question to Mr. Robertson's competency. Judge Hayes
9 relieved Mr. Dudek. The Supreme Court thereafter
10 appointed -- I believe this is correct now, the Supreme
11 Court thereafter appointed Mr. Savitz to represent him, they
12 had a falling out. Then there was another hearing before
13 Judge Hayes and a different attorney represented him at that
14 time. Mr. Savitz was ultimately relieved as counsel. He
15 was allowed to appear pro se, and Mr. Robertson failed to
16 comply with the court rules repeatedly with respect to
17 filing a record on appeal, and eventually he got frustrated
18 by this apparently and decided to abandon his appeal. We
19 had yet a third hearing in front of Judge Hayes. Judge
20 Hayes issued a report where he found that Mr. Robertson was
21 competent to make the decision and that he had knowingly,
22 intelligently and voluntarily decided to waive his appeal.
23 The Supreme Court filed an order adopting those findings and
24 dismissing the appeal. So Mr. Robertson was his own
25 attorney et pro se. And we go back to Faretta, and Faretta

1 talks about, as does subsequent cases, it talks about you
2 have to be able to comply with court rules and he didn't do
3 it. He just got frustrated by the process apparently and
4 decided to abandon the appeal, so that's why we object.
5 Because this is all res judicata, it has already been
6 litigated, our Supreme Court has already spoken, so --

7 THE COURT: Mr. Ehlires, how about that? Or
8 Mr. Bennett? Because not only does he drop his appeal, it's
9 my understanding, because I just read all of this, he wanted
10 to drop his appeals and desired to be executed and that's
11 why Judge Hayes had that other hearing and I think appointed
12 Chris Wellborn at that point to ensure he was competent
13 enough to do that.

14 MR. SALTER: That was the first, Your Honor.

15 MR. BENNETT: May it please the Court, Your Honor?
16 Bradley Bennett on behalf of the applicant. Your Honor,
17 part of that is true. However, to back up a little bit,
18 what we're here for today at this point in time is the fact
19 that we have made a motion to be able to amend our fifth
20 amended application, and as this state -- as this Court
21 knows this state allows for liberalized pleadings, and, in
22 fact, that otherwise a party may amend its pleading by leave
23 of Court or by written consent of the adverse party, and
24 leave shall be freely given when justice so requires and
25 does not prejudice the other party. Your Honor, we haven't

1 heard anything about prejudice. What we've heard is that
2 there are allegations about the fact that these are facts
3 that go towards our meritorious claims, or the fact that
4 they don't believe they are meritorious. But there's been
5 no prejudice alleged by the State in regards to any reply to
6 our motion, and the fact that we have provided them this
7 motion as early as July 15th in an email from my colleague,
8 Mr. Ehlires, to Mr. Salter in which the motion and the
9 amended fifth application was included. And going on
10 further, sir, is that a proper reason to deny a motion to
11 amend could be by bad faith, undue delay or prejudice.
12 That's in the Forester versus Smith Steel Builders, 295
13 South Carolina at 504. That case goes on to further state
14 that a denial of leave to amend is an abuse of discretion.
15 So our claim is, in fact, that there has been no allegation
16 of any type of prejudice, and that as such we should be
17 allowed under this liberalized pleading state to amend and
18 allow that application, the fifth application, to go
19 forward. And, in fact, we've already done so yesterday
20 during this case, that the entire proceeding with the two
21 experts yesterday were both asked about the fifth amended
22 application and their testimony reflects that. In addition,
23 Your Honor, I would like to just kind of touch on a few
24 brief background issues that I disagree slightly with my
25 colleague, Mr. Salter, on, and that is that these prior

1 competency hearings, they focus around an issue of Mr.
2 Savitz being the attorney of record for Mr. Robertson at
3 that time. Now, it is true that Mr. Savitz was the second
4 appellate attorney from the Office of Defense, Indigent
5 Defense and Appellate Defense. And at the hearing that
6 Judge Hayes had in the first 2002 competency hearing, Mr.
7 Savitz was brought on to the case and Mr. Dudek by name in
8 that order was relieved as counsel. It's an odd little
9 quirk, but at that time there were only two defenders in
10 that office that handled death penalty cases; Bob Dudek and
11 Joey Savitz. Mr. Salter is correct later on that there was
12 another hearing, because Mr. Robertson, the applicant, tried
13 to have Mr. Savitz removed as well. The Supreme Court in
14 that order, however, determined that Mr. Savitz, not by
15 name, was to be relieved, but that instead Mr. Robertson was
16 allowed to proceed pro se. That difference is distinguished
17 again by the fact that the Supreme Court said that the
18 Office of Appellate Defense shall remain in the case. It
19 did not, like the first order, dismiss or relieve Mr. Savitz
20 by name. Instead, it said that the office should remain in
21 the case and should be there in essence as stand-by counsel
22 even though the Supreme Court did not make mention of that
23 phrase stand-by counsel, instead the Supreme Court said
24 should help out in anyway that the applicant requests. What
25 transpired after that point is that Mr. Savitz, by default,

1 was left on the case as the only attorney left in the office
2 of defense who was qualified to handle that role that the
3 Supreme Court required to stay in the case and to assist
4 Mr. Robertson, the applicant, at any way that he saw fit or
5 chose to ask for help. The history of this case goes on for
6 years, and for years Mr. Savitz did, in fact, assist Mr.
7 Robertson. In fact, he helped him secure numerous
8 continuances. He helped him to file the direct appeal. He
9 helped him with trying to get the appeal reinstated to the
10 docket after it had fallen off at one point in time. So
11 that activity between Mr. Robertson and Mr. Savitz never
12 ceased. So Mr. Savitz was, throughout this period of time,
13 acting in part as Mr. Robertson's attorney. There were two
14 hearings of competency that were held, one in 2002 -- I'm so
15 sorry, I'll get the exact date for you, I believe it was
16 June or July 10th of 2002, and then a February of 2005
17 competency hearing. At that hearing Mr. Savitz elected at
18 both of those hearings not to attend them, so Mr. Savitz was
19 not present at either of those competency hearings. At
20 neither of those competency hearings was a court ordered
21 evaluation performed. In fact, nobody asked for one.
22 Nobody was there as an advocate on the behalf of Mr.
23 Robertson to ensure that this individual, who had a long
24 term life long history of mental illness, who had been
25 committed against his will to a mental institution just a

1 couple of years prior to the murders in this case. And the
2 Judge, Judge Hayes, even though he's an excellent Judge, he
3 just made his own determination that Mr. Robertson was, in
4 fact, competent to waive first at the 2002 hearing counsel
5 and proceed pro se, and secondly, at the 2005 hearing to
6 waive his right to appeal and to, in essence, volunteer to
7 be executed. Now, our legal argument based upon that
8 hearing of 2005 centers around South Carolina Code Section
9 16-3-25, which says that whenever a death penalty is imposed
10 and upon a judgment becoming final in the trial court, the
11 sentence shall -- start that over, shall be reviewed by the
12 Supreme Court of South Carolina. Mandatory language, Your
13 Honor, shall, not may but shall be reviewed on the record by
14 the Supreme Court of South Carolina. In section B of that
15 section goes on to state the Supreme Court of South Carolina
16 shall consider punishment as well as any errors by way of
17 appeal. Now, that's mandatory language that requires an
18 appeal to go forward to a death penalty sentenced
19 individual. That's the plain meaning of that statute, the
20 plain black letter law of the statute. Legislative intent,
21 and I feel as though I'm preaching to the choir here
22 realizing that the Court used to be a state legislature, and
23 I appreciate your service, but the fact is that the state
24 legislature had a reason to put 16-3-25 in mandatory
25 language. Part of that intent is the public's interest to

1 safeguard such a draconian and final punishment as execution
2 of its citizens. Now, if you're in favor of the death
3 penalty you would want it to be done correctly so that it
4 would not be susceptible to attack from the other side if it
5 was not carried out correctly. If you're against the death
6 penalty you would want the safeguard of an appeal to make
7 sure that a wrongly accused innocent person isn't put to
8 death. So the legislature had the intent to do what they
9 did, and did so in mandatory language requiring that an
10 appeal is not waivable in a death penalty case. Like the
11 statute says, "the Court shall have an appeal of the death
12 sentence." Separation of powers within the coequal branches
13 of government with the legislature providing that resource
14 of the statute to the Supreme Court, and then incumbent upon
15 the Supreme Court to follow it. That was not done here
16 because the order of the Supreme Court after Judge Hayes'
17 2005 competency hearing and the report that the Judge had
18 filed, the Supreme Court granted the waiver of appeal and
19 submitted the execution order of death. Your Honor, I
20 realize that it may be putting the Court in an awkward
21 position to have to answer too for what the Supreme Court
22 may have done that was in direct conflict with what the
23 state legislature had said in the statute, that's the
24 position that we're in with the record that we have, and we
25 have to go forward on that record. And we have to also

1 obviously protect the record for future bodies and future
2 venues and that's part of what we're doing here today, is
3 that the Court's order of remand to Judge Hayes was in and
4 of itself inappropriate because there cannot be a waiver of
5 an appeal. Now, the State argues res judicata issues and
6 that that is why that they are, in part, objecting. By its
7 very nature res judicata is a backward looking procedure.
8 That's what you do in a post conviction relief hearing is
9 you look backwards as to what has transpired, what errors
10 may or may not have occurred, what omissions may or may not
11 have occurred, and if it's defective you fix it. I would
12 like to take the Court's attention back to yesterday
13 afternoon, our second expert witness, Mr. John Bailey, was
14 on the witness stand. I find it a little humorous and
15 ironic that my colleague, Ms. Melody Brown, started
16 questioning in cross examination Mr. Bailey about Michael
17 Brown, the original PCR attorney's application to the PCR
18 Court, and the fact that it was, to use the phrase,
19 barebones. It just alleged ineffective assistance of
20 counsel to be determined later or to be filled in later, and
21 then yesterday afternoon during the cross-examination Ms.
22 Brown questioned Mr. Bailey about, well, Michael Brown came
23 up in the day of the hearing and orally moved to amend and
24 to allow 12, I believe, different claims orally to be
25 brought in to supplement that application. And Ms. Brown

1 went on about the fact that in this state that's allowed,
2 these are liberal pleadings and that you're able to do so if
3 you don't have a showing of prejudice, and that even though
4 it was on the first day of trial it still got amended, and
5 even though it wasn't in writing it was an oral application
6 and an amendment. You can't have it both ways, Your Honor.
7 You know, we have amended approximately almost one month in
8 advance of yesterday's first day of this hearing in writing.
9 They are silent on the record of any reply to that. If it
10 was good enough for Michael Brown to be able to allege
11 orally 12 amendments and the government didn't have a
12 problem with that, how can they have a problem with us
13 amending almost a month in advance in writing and not
14 objecting at the time on any kind of filing? And, Your
15 Honor, at this point in time we are approximately 20 percent
16 into this trial. One of the five days that we have set
17 aside for having this hearing potentially has already
18 transpired, and the witnesses who have been brought forward
19 have testified about that fifth amended application. The
20 fifth amended application is not vastly different from the
21 fourth amended application where there was no objection, the
22 fifth amended application has approximately two different
23 areas of concern to the State. One is grounds 11M1. In an
24 email from Mr. Salter to my colleague, Mr. Ehlied, again on
25 July 15th after Mr. Ehlied had sent Mr. Salter a copy of the

1 motion, a copy of the amended application, and an email
2 comporting with the Rule 11 requirement asking if there was
3 any objection, Mr. Salter wrote back and said, "Hank, I have
4 no objection to adding ground 11M1, however I have an
5 objection to the amendments in ground 11L. It is the
6 State's position that any claim your client received
7 ineffective assistance of counsel, of appellate counsel, is
8 not meritorious because counsel was relieved at Mr.
9 Robertson's request, and that Mr. Robertson's request was
10 completely, knowingly and intelligently made, as well as his
11 request to drop his appeal." So at the end of the day the
12 prejudice has not been alleged that would require us to not
13 be allowed to amend our application. And the State can't
14 make a prejudice argument because they already knew about
15 almost every aspect of the fifth amended application,
16 including allegations against the appellate counsel except
17 for these few additions to the appellate counsel area of
18 application found in 11F. And therefore, Your Honor, we
19 believe that it is incumbent upon this Court to find as the
20 case law demonstrates that, in fact, these pleadings should
21 be allowed to be amended and these causes of action should
22 be allowed -- or these claims should be allowed to be
23 litigated in this proceeding.

24 THE COURT: Well, let me ask you this: Whether or not
25 the Supreme Court made an error of law or not is certainly

1 not before this Court and will not be addressed by this
2 Court. But where the Supreme Court allowed the defendant,
3 the applicant, to proceed pro se, even if they kept Mr.
4 Savitz and Indigent Defense in the background, in the
5 shadows -- I know they didn't use the word stand-by counsel,
6 which I've never done, I've never appointed a stand-by
7 lawyer, you either are in the case or you're not in the
8 case, but that's not before me -- but in that particular
9 case where the applicant here is calling all of the shots,
10 and now the applicant wants to point the finger at Mr.
11 Savitz and say, "You should not have let me do that? You
12 should not have let me waive my right?"

13 MR. BENNETT: Your Honor, in this particular case we
14 have an applicant who has a long term history of mental
15 issues, who has been, in fact, not only prior to this case
16 involved in mental health professional -- with mental health
17 professionals and with problems due to his mental health,
18 but after being incarcerated and on death row for the number
19 of years, approximately 20 years that he has been, and at
20 the time of the 2005 hearing had been on death row for
21 approximately seven years, and the mental capacity of an
22 individual in that type of environment with that
23 constrictive of an ability to represent one's self and to
24 make informed decisions, and to have the capacity to act as
25 his own attorney is unable to be stated properly how

1 unbelievably difficult that would be. And therefore as an
2 advocate, as an attorney, it was incumbent upon Mr. Savitz
3 as his appellate counsel at that time, the only attorney
4 representing him at that time, to take a stand, to be
5 present, if nothing else to be present at the competency
6 hearings so that these types of facts and these types of
7 issues could be addressed so that the Court could be moved
8 to be on the record to make a determination should an
9 evaluation from a qualified medical expert be used to make
10 those decisions, to investigate, to test, and then to come
11 back to court and say whether or not the applicant, in fact,
12 has the ability to knowingly and intelligently make a motion
13 to proceed pro se, let alone to be able to carry out the
14 difficulties of an appeal as a pro se.

15 THE COURT: Yes, sir? Would the State like to be
16 heard?

17 MR. SALTER: Yes, sir, just briefly. We're not trying,
18 I guess, to have our cake and eat it too. The allegations
19 raised by Mr. Brown in a PCR hearing could result in relief.
20 There's no way that an issue that's already been litigated
21 and settled by our State Supreme Court 16 years ago, I might
22 add, after a series of hearings where two different lawyers
23 said there's no question as to competency. Now, competency
24 and mental illness is two different things as Your Honor is
25 obviously well aware, but there was never a question about

1 his competency. There was never any question about his
2 competency at the time of trial. We've heard about Mr.
3 Savitz not being present, how Mr. Savitz should have been
4 there. Well, the Supreme Court was very well aware of all
5 of that. Judge Hayes didn't decide to have the hearing on
6 his own, he had the hearing at the direction of the State
7 Supreme Court and responded back to them with his report and
8 they adopted his report. Again, this has all been
9 litigated, the question is competency cannot now be
10 litigated with respect to that period of time, and that's
11 our prejudice. If I didn't make that clear earlier I
12 apologize, that's the prejudice we're asserting. You can't
13 litigate something -- it's like following the road to
14 nowhere.

15 THE COURT: Yeah. Okay. I'm going to allow the fifth
16 amendment as to 11M as in Mike, 1, but not as to 11L as in
17 Lima. That's the law of the case. The Supreme Court has
18 spoken on that issue and I'm not going there. So we're
19 going to do 11-Mike-1 but we're not going to do 11-Lima
20 Anything further?

21 MR. EHLIES: Nothing.

22 THE COURT: Okay. Do we need technology here? I think
23 your first witness is going to be on WebEx.

24 MR. EHLIES: He is indeed.

25 MS. BROWN: Your Honor, I had one brief thing.

1 THE COURT: Yes, ma'am, I'm sorry.

2 MS. BROWN: When we left yesterday you were kind enough
3 to say that I could supplement with the case, the United
4 States Supreme Court case that I could not recall the name,
5 it's Buchanan versus Kentucky and I have copies, and I will
6 be happy to share one with opposing counsel and bring two
7 up.

8 THE COURT: Thank you.

9 MS. BROWN: And I appreciate you letting me supplement.

10 THE COURT: Yes, ma'am, thank you.

11 MR. SALTER: Your Honor, Ms. Collins provided a disk.
12 May I approach?

13 THE COURT: Is that going to be put in evidence?

14 MR. SALTER: Yes, sir. Why don't we do that.

15 (The disk was received as Court's 4.)

16 (Break in proceedings.)

17 (Parties are working through technical difficulties.)

18 The witness, CHARLES EWING, Ph.D., was first duly
19 Sworn and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. EHLIES:

22 Q Dr. Ewing, do you have your CV available?

23 A I don't have it right in front of me, no.

24 Q We need you to get it. It's been marked as Exhibit 36
25 for the Court's purposes.

1 A Okay. I'll get it.

2 (Break in proceedings.)

3 A I have it.

4 Q All right, sir. We're referring now to Dr. Ewing's
5 Exhibit 36, which is the CV. And it has the second group of
6 pages that are marked -- that are not marked, I'm sorry,
7 your CV is 13 pages. Dr. Ewing, is the CV current and
8 accurate for purposes of your background and information?

9 A Yes.

10 Q Okay. And I want to go through this slowly actually.
11 I want you to tell us about your education background,
12 please, sir.

13 A I graduated from Syracuse University in 1971 with a
14 B.A. in Psychology. I immediately went to Cornell
15 University where I graduated with a Ph.D in 1975. And I did
16 a postdoctorate fellowship at Yale University from 1976 to
17 1977. And I attended Harvard Law School from 1980 to 1983,
18 graduated with honors from Harvard Law School in 1983.
19 That's my educational background.

20 Q All right, sir. On the Ph.D at Cornell University in
21 1975, sir, what was your field of studies on that Ph.D?

22 A It's Psychology, but my particular field was Child and
23 Family Psychopathology.

24 Q Can you describe for us exactly what that is, what it
25 means?

1 A Well, it meant at that time understanding and worried
2 about children and their families and how there's individual
3 and familial mental illnesses, was a study of those mental
4 illnesses and their treatments. Part of that four year
5 program was a one year full-time clinical psychology
6 internship. I did mine in clinic in (inaudible)
7 Massachusetts, and I treated children, adolescents, families
8 and adults, and evaluated them through that year. It's sort
9 of a Ph.D program, I had to do a dissertation. My
10 dissertation, I did it with data that I gathered at my
11 clinical internship, it had to do with different treatment
12 modalities for children and families, which were more
13 effective and were more efficient.

14 Q All right, sir. Would we be understanding that program
15 and your graduate level degrees, Ph.D, to then emphasize the
16 family as a unit as well as the components particularly with
17 children?

18 A Yes.

19 Q And would that include the interfamily relationships
20 between the children and parents?

21 A Yes.

22 Q All right. Then the postdoctoral fellow at Yale
23 University, would you tell us a little bit more about that
24 program?

25 A I did clinical work at the General Health Center in New

1 Haven in the Connecticut Mental Health Center, also in New
2 Haven, and my work there was primarily with people of color.
3 I did short term psychotherapy. I did some psychological
4 evaluations and some consultations. So part of that
5 postdoctorate fellowship was the study of the efficacy of
6 various treatment modalities with adults, children and
7 families. And I also attended -- while I was there I
8 attended some classes in the school of public health that
9 had to do with the epidemiology of mental disorders.

10 Q All right. And did you then qualify, or are you a
11 clinical psychologist as well?

12 A Yes. I'm licensed in Florida and in New York. Neither
13 of those states have anything but a generic license so they
14 don't certify you or license you as any particular kind of
15 psychologist. My training -- my formal training is as a
16 (inaudible audio) a clinical psychologist, but I've
17 subsequently qualified as a forensic psychologist and become
18 board certified specialty.

19 Q And we're losing you a little bit. Did you say in
20 forensic psychology?

21 A Yes.

22 Q So can you give us your education background and
23 certifications with regards to forensic psychology separate
24 and distinct from the clinical psychology?

25 A Well, my education -- formal education in forensic

1 psychology is very little psychology, it was just starting
2 as a field of psychology when I was in law school. I went
3 to law school so that I could become a forensic
4 psychologist. So I completed law school, I took the bar
5 exam, I became an attorney, but my -- I did that as formal
6 education to complete that with my clinical training to
7 become a forensic psychologist, and then met the
8 requirements for a board certification in forensic
9 psychology. And I've been board certified in forensic
10 psychology since I think 1980 is when I passed written and
11 oral exams.

12 Q Okay, sir. And you were, in fact, licensed as an
13 attorney?

14 A Yes, in New York.

15 Q And did you transfer that license to any other state
16 ultimately?

17 A No. I'm still a member of the bar in New York but no
18 other states.

19 Q All right, sir. So in this area of training, have you
20 also practiced within all three of those areas?

21 A Well, I'm not sure you -- forensic, yes; clinical, yes.
22 I'm not sure -- are you talking about law?

23 Q In its interaction with law like as a lecturer or
24 presenter?

25 A Yeah. I've done hundreds of presentations regarding

1 legal topics, mostly for mental health professionals,
2 sometimes for legal professionals. I also for 34 years was
3 a professor at the State University of New York Law School,
4 and I started as an assistant professor, and was promoted
5 from assistant professor to full professor in 1988. I left
6 that position about two years ago, so I'm now -- my national
7 title is State University of New York --

8 Q Okay.

9 A -- Distinguished Professor and Emeritus.

10 Q And while there did you teach criminal law courses?

11 A Yes. I taught criminal law, I taught psychology,
12 psychiatry and criminal law. Those are the two -- well, I
13 also taught torts, I taught efficacy and I taught juvenile
14 law over the course of my career. My teaching load varied
15 from time to time because I also served for awhile as Vice
16 Dean for Legal Skills and as the Academic Dean.

17 Q All right. And I think also while you were at Buffalo
18 Law School, were you engaged in private practice to render
19 services to the public?

20 A Yes. I had a private practice in forensic psychology.
21 I did some clinical psychology occasionally, but for the
22 most part what I was doing was doing evaluations and writing
23 reports for (inaudible) and testifying in some cases.

24 Q All right, sir. And currently you live in Florida; is
25 that correct?

1 A Yes.

2 Q Are you still engaged and employed?

3 A Yes, I am. When I moved to Florida I had a more than
4 full-time private practice, and now because of the pandemic
5 and my own health issues I continue but only via Skype or
6 Zoom or some other computerized means. I still do
7 evaluations, I still do testimony, but it's all -- for the
8 last year and a half it has been by the internet.

9 Q Okay. Can you tell us a little bit about whether
10 you've been engaged to render competency evaluations?

11 A Yes, I did. I've been doing competency evaluations
12 since 19 -- I would say 1977, maybe. Yeah, '77 or '78. And
13 I've done hundreds. When I came to Florida and started my
14 practice here five years ago I did the mandatory training
15 for competency evaluations with the state, and I've done
16 hundreds since then.

17 Q I assume then you've been qualified as an expert in
18 competency evaluations?

19 A Yes.

20 Q And have you qualified previously as an expert in
21 forensic psychology?

22 A Yes.

23 Q Have you qualified previously as an expert in clinical
24 psychology?

25 A Yes.

1 Q Let's take a look in -- at this organization, I think,
2 that you've listed. You covered, I think, the current
3 positions and licensures.

4 A Yes.

5 Q I have American Board of Forensic Psychology. What is
6 your relationship there?

7 A I'm a diplomate of the American Board of Forensic
8 Psychology. That's -- the American Board of Forensic
9 Psychology is a national board that awards what is called
10 diplomate or board certified status to forensic
11 psychologists to meet their requirements.

12 Q All right, sir. And I think you also have a
13 relationship in a similar capacity with American
14 Psychological Association?

15 A I am a fellow of the American Psychological Association
16 with -- I don't know how many members they have today, but
17 probably fellows one percent of the membership, fellow
18 statuses. You're elected to that status by your peers, or I
19 think the certificate says something like standing and
20 unusual contributions to the science and practice --

21 Q Would you take just a moment and look through your CV
22 and make sure that what you're looking at is -- and tell
23 us --

24 A Well, it's the one I gave you.

25 Q All right, sir. And you have testified that it is

1 current and accurate.

2 MR. EHLIES: So we would move into evidence as an
3 exhibit Number 36.

4 THE COURT: Any objection?

5 MR. SALTER: No objection to the CV coming in, Your
6 Honor.

7 THE COURT: Okay. The CV is in without objection.

8 (The Ewing CV was received as Applicant's 36.)

9 Q Dr. Ewing, I want to move forward with the research and
10 publications --

11 A Okay.

12 Q -- that you've listed, which really start on page two,
13 and I wanted to emphasize a couple of those. In particular
14 you list the books that you've authored, or coauthored
15 first. I note that most of them do deal with juveniles, but
16 we see this Fatal Families, the Dynamics of Interfamilial
17 Homicide.

18 A Yes.

19 Q The sixth item there. Can you tell us what you did to
20 create that book and what its current standing is? Will you
21 just describe it for us basically?

22 A Well, it's a book that I published based on research
23 that I did with regard to family members killing one
24 another, or in some cases one family member killing an
25 entire family. It mostly was a study of cases. And what I

1 tried to do is extract from these cases some commonalities
2 with regard to the issue of interfamilial homicide. In
3 other words, why do people kill their family members. Why
4 do children kill their parents. Why do parents kill their
5 children. Why do spouses kill each other. Why do siblings
6 kill each other.

7 Q And I think you've got a number of titles in book form
8 that deal with that subject, but I note that on Fatal
9 Families Dynamics Interfamilial Homicides dated 1997, is
10 that accurate?

11 A Yes.

12 Q All right. The one just below that is When Children
13 Kill: The Dynamics of Juvenile Homicide.

14 A Yes.

15 Q Will you describe that for us, please?

16 A That's a more generalized look at that why children
17 kill, and it includes some interfamilial homicides as well
18 but its broader. It includes killings in the course of
19 their crimes; robberies, burglaries, killings that seem to
20 be related to the child's mental illness. So it's a much
21 broader scope.

22 Q All right, sir. And in the process of doing the
23 background studies for these books and articles, are you
24 actively engaged yourself personally in doing that?

25 A Yes.

1 Q Okay.

2 A I mean, I had some research assistants helping me at
3 the university, but mostly what they would do is track down
4 things that I asked them to track down.

5 Q All right, sir. Now, just below that we have in the
6 book category Battered Woman, do you see that?

7 A Yes.

8 Q I think that's in 1987. Can you tell us a little bit
9 about that?

10 A Well, that's how I became initially interested in
11 interfamilial homicide is I had studied and worked with and
12 written about battered women who kill their abusers, so I
13 published that book. The rest of my interests took off from
14 there and I became much more generally interested in
15 interfamilial homicide. So I've been studying interfamilial
16 homicide, I think, for probably 35 years maybe.

17 Q All right. This battering of people, is it unique only
18 to and limited in scope to women?

19 A No. In all of the books that I published, in all of
20 the articles I published in this area, it's clear that there
21 are children who are abused by their parents, by each other,
22 and there are parents who were abused by children. So
23 the -- when I talk about interfamilial homicide it's often
24 in the context of some form of abuse; parents abusing child,
25 child abusing child, spouse abusing spouse, et cetera.

1 Q And when you do that and study those types of
2 circumstances and situations, how do you define battered?

3 A Well, I define it, and I think the general consensus in
4 the field is that it includes physical abuse, it includes
5 psychological abuse, and it includes sexual abuse. It can
6 be any one of those, two of those or three of those. But as
7 a practical matter the cases that I've worked on, the cases
8 that I've been interested in and studied have all involved
9 significant use of one sort or another over a number of
10 years. So when we talk about battery we're not just talking
11 about a one off episode at something that happens once every
12 three years, it's something that's happening on a regular
13 basis.

14 Q All right, sir. And regular would be chronic, is that
15 a fair statement?

16 A I think so.

17 Q Is it living a lifetime under those stressors? Is that
18 a fair characterization?

19 A Well, it depends on what you mean by a lifetime. With
20 regard to children it often is, and with regard to women
21 it's often the duration of a relationship between a women
22 and a spouse or a paramour.

23 Q And do they share characteristics with those that end
24 up with this Posttraumatic Stress Disorder Syndrome?

25 A Yes, many do but not all. Many victims of child abuse,

1 spouse abuse end up with symptoms at least of Posttraumatic
2 Stress Disorder if not full blown Posttraumatic Stress
3 Disorder.

4 Q All right, sir. I'm going to look at the books that
5 you've been involved with on the next page, and those books
6 are books that you have edited. Would you tell us what that
7 means when you are an editor?

8 A Well, there are two of them. One of them I was asked
9 to basically edit a number of the articles that were
10 published in the book in my area of expertise. And the
11 second one is one that I edited the entire book, which means
12 that I invited the authors, I gave them assignments as to
13 what to write about, and then I worked in preparation for
14 the publication, which involved copy editing and editing
15 with regard to a substance of the chapters.

16 Q All right. And the books that have been translated, I
17 think you've -- in other languages, tthe Kids Who Kill,
18 themes seem to be prominent there; is that correct?

19 A Yeah. That is a list of books that were either
20 translated and published in another country or, you know,
21 separate edition. A couple of those books, Kids Who Kill,
22 one was published and republished in Great Britain, one was
23 published as a paperback in the United States. And two of
24 my earliest books, one was published, republished in Denmark
25 and the other in Sweden.

1 Q All right. Moving to the journal articles that you
2 authored. Are these peer reviewed article publications?

3 A Yes.

4 Q And tell us what that means when you get an article
5 published in a journal that is peer reviewed.

6 A It means that you've submitted into a journal and the
7 journal editor first and foremost has made a decision as to
8 whether it might be publishable, and then ordinarily it gets
9 sent out to two or more reviewers who are what we call the
10 blind review. They don't know who the author is, all they
11 have is the article, and they advise the editor as to
12 whether it should or should not be published. I happen to
13 be an editor of a journal and that's the process that we
14 follow, and I think it's a process most peer review journals
15 follow. One thing I do want to correct, though, is the last
16 two articles there, there on page five at the top, they -- I
17 don't believe that they were peer reviewed in that sense.
18 The first one, Doctor Death, that was published in a law
19 review, and I submitted it as part of an essay contest and
20 it was awarded first prize by the America Association of
21 (inaudible audio) Medicine, and with that prize came the
22 publication. So I can't really say that was peer reviewed.
23 Obviously it won an award but I don't know if this was peer
24 reviewed. The one right under that, Psychologist and
25 Psychiatrists in Capital Sentencing Proceedings, I submitted

1 that and I don't think that was peer reviewed other than by
2 the editor. I say that because the turnaround was so quick.
3 I submitted it and I got it almost immediately accepted, I
4 don't think it could have been peer reviewed. But the
5 others as far as I know were peer reviewed.

6 Q All right, sir. Under the category of publications
7 entitled book chapters --

8 A Yes.

9 Q -- the sixth chapter that you are credited with as I --
10 the sixth book down on chapter concerning parricide. Do you
11 see that one?

12 A Yes.

13 Q Tell us about that -- first off, in the medical -- in
14 the forensics psychology, clinical, in the psychiatric world
15 on PTSD, what does parricide mean? How is that understood?

16 A The killing of one's parent or parents.

17 Q Okay. Is that the same when you see close family
18 member?

19 A Yes. But parricide -- the actual term parricide speaks
20 to killings of one's parent, mother or father, matricide or
21 fratricide.

22 Q All right. Does the fact that the people may be living
23 under the same roof but not parent have any application to
24 the assessment?

25 A Of parricide?

1 Q Of parricide.

2 A No. Parricide, as I said, pertains to the killing of
3 one's parent or parents. It's related to other killings and
4 many of the killings have similar dynamics. But that
5 article -- I was invited to write that article and it was
6 published in the book, it was basically about evaluating and
7 understanding people who kill their parents.

8 Q Okay. And did you write the -- do I understand that
9 that's a chapter in a book?

10 A It's a chapter in a book, yes.

11 Q And you wrote that yourself then?

12 A Yes.

13 Q Okay. I have down below that six or so statements, the
14 1992 child abuse can cause youths to become violent. Do you
15 see that?

16 A Yes.

17 Q Now, is that also another chapter in the book?

18 A Yes. I was invited to contribute to that book and I
19 did. My chapter was on the causal link between child abuse
20 and violence.

21 Q All right, sir. All right. I have one more that I
22 want to ask you about that seems to be appropriate here, and
23 it's listed as 1992 in August, When Children Kill, the
24 Dynamics of Juvenile Homicide. Do you see that?

25 A Yes.

1 Q Do you see that? Can you tell us about that
2 publication?

3 A It was a paper that was accepted for presentation at
4 the American Psychological Association Convention. I had
5 put together a symposium at the APA and it was entitled
6 Victims to Victimizers, Child Abuse and Juvenile Homicide.
7 I was one of the -- I was chair of that symposium but I was
8 one of the contributors. I presented a paper -- that paper.

9 Q All right, sir. There are quite a few other
10 publications, and I suppose that they are accurately listed
11 as we picked out these few to be similar to what we've
12 discussed; is that true?

13 A Yes. Everything I've published is listed there.

14 Q And everything within that listing is authenticated and
15 peer reviewed or something of the sort of the equivalency?

16 A I have to take a quick look. There's a story on page
17 nine, there is a segment of my -- what's the publication, it
18 says other articles.

19 Q Yes, sir.

20 A And there's -- it goes into the next page. Those are
21 all articles that I wrote for the American Psychological
22 Association's newspaper, the American Psychological
23 Association, I was a columnist and I wrote those papers.
24 They were edited by people at the American Psychological
25 Association, but I would not call that peer review. Most of

1 the editing was copy and editing, I don't know if there was
2 any substantive of editing.

3 Q Okay. Well, thank you for that. And I'm down the next
4 page on lectures, testimony, public speaking.

5 A Yes.

6 Q Could you turn to that? Are you there?

7 A Yes.

8 Q And tell us what -- you can see the various
9 universities, et cetera. What type of presenter were you
10 basically, generally speaking?

11 A I was presenting on topics mostly related to violence
12 within the family, but occasionally it would be some broader
13 topic related to forensic psychology.

14 Q Okay. And how about the legislative segments there,
15 the legislative other invited public testimony?

16 A Well, I testified before a committee of the U.S. House
17 of Representatives on family violence, violence within the
18 family. And I testified before the New York State Senate
19 Committee on video violence. And then I testified by
20 invitation before the Lieutenant Governor's Commission on
21 Youth Violence. They all had to do with violence committed
22 by young -- some violence related to interfamilial homicide
23 generally, more general than that.

24 Q All right, sir. And your association on the last pages
25 here, the selected search past and present?

1 A Yes.

2 Q Will you just briefly describe those particularly as it
3 relates to the university settings?

4 A Well, I served as President of the American Board of
5 Forensic Psychology in 2013. I was elected to that position
6 by my peers. I also served on the board of directors of
7 that organization from 2008 to 2013. And I was a consultant
8 for a news bureau at the university. I did hundreds of
9 interviews with local, state, national, international media.

10 Q And what were the general subject matters there?

11 A Violence and -- mostly interfamilial violence.

12 Q All right. And your award section? Are those awards?

13 A Yes. I guess I must be on the next page.

14 Q Yes, sir.

15 A Yeah, I see that. Well, it's on honors, fellowships
16 recognitions. I was selected professor of the year one year
17 by our Asian law, black law students, and Black-American law
18 students. I was -- in 2003 I was promoted to the highest
19 rank in the suni system, a distinguished professorship,
20 distinguish service professor. Other -- awards from the New
21 York State Bar Association, from the American Academy of
22 Forensic Psychology. And I think that's -- I can go through
23 each of them but most of them are really old like me.

24 Q Okay, sir. On the last page on the affiliations. I
25 understand -- and actually on the editorial positions they,

1 again, involve children and violence of various types; is
2 that correct?

3 A Yes. I'm the editor -- Editor in Chief of the
4 Behavioral Sciences in the Law, which is a journal published
5 six times a year by Wiley Publishing. And until recently --
6 I don't think -- I'm not sure if I'm still on the editorial
7 board of the Journal of Child Sexual Abuse, I was for
8 decades. But recently because of illness and other issues I
9 stopped reviewing for them, so I don't know if I'm still
10 considered on their board, but I was. The other two really
11 don't relate too much to topic at hand.

12 Q Okay, sir. As regards to topic at hand, the James
13 DeJarnette Robertson homicide with his parents, is that the
14 type of evaluation that you have performed before?

15 A Yes.

16 Q Interfamilial evaluations concerning parricide?

17 A Yes.

18 Q And does it fit within particular confines,
19 descriptions and limits of the fields of practice that you
20 have identified for us in your history?

21 A Yes, it does.

22 Q Okay. Do you consider that it is a task in this
23 particular case that fits within your particularized
24 expertise?

25 A Yes. My understanding is that's why I was selected to

1 do it.

2 Q Okay, sir.

3 MR. EHLIES: So, Judge, we would offer Dr. Ewing in a
4 number of categories as an expert witness. We offer him as
5 a clinical psychologist. We offer him as an expert in
6 competency evaluations. We offer him as a forensic
7 psychologist with special emphasis in interfamilial
8 homicides. And we offer him as a lawyer with a license --
9 current good standing license to practice law.

10 THE COURT: Anything from the State?

11 MR. SALTER: Just briefly, Your Honor.

12 VOIR DIRE EXAMINATION

13 BY MR. SALTER:

14 Q Dr. Ewing, you said you first became interested in the
15 interfamilial homicides when writing Battered Women who
16 Killed; is that correct?

17 A Well, I became interested in it, yes, during writing
18 that book and immediately thereafter.

19 Q Okay. Would you agree with that there are significant
20 differences? I know you've testified about some
21 similarities, but aren't there significant differences
22 between a battered spouse and a battered child?

23 A Yes.

24 Q For instance, the dynamics of the relationship itself,
25 right, between two significant --

1 A Yes. Children are in a much more vulnerable position
2 than women.

3 Q And you are the editor, you say, of Behavioral Sciences
4 in the Law since 1991?

5 A Yes.

6 Q Okay. You would agree that Battered Child Syndrome is
7 a behavioral syndrome, would you not?

8 A It is a behavioral syndrome?

9 Q Yes, sir.

10 A Well, it's a behavioral and a medical syndrome. It was
11 initially written about by Dr. Henry Kemp, I guess, probably
12 back in the 70's maybe, maybe even the 60's, and it was
13 written -- it was labeled Battered Child Syndrome, and at
14 that point it was just a physical syndrome. My
15 understanding is I think Dr. Kemp may have been a pediatric
16 radiologist, and I have read his works but they were mostly
17 about injuries, physical injuries to children that might
18 have otherwise gone overlooked had it not been for his work.

19 Q All right, sir. That's what I was going to get at
20 next. It originally developed Battered Child Syndrome, did
21 it not, as a matter of -- a way of identifying the source of
22 injuries, correct?

23 A Correct.

24 Q Okay. It did not have anything to do with the type of
25 testimony you're going to be offering here today, did it?

1 A I don't know if I would say it didn't have anything to
2 do with it but it was certainly different. The primary
3 emphasis was on identifying physical injuries like things
4 like spiral fractures that were indicative of child abuse.

5 Q And your testimony will be related to an explanation
6 for why Mr. Robertson did what he did, correct?

7 A I believe so, yes.

8 MR. SALTER: Your Honor, I don't have any objection to
9 any of his qualifications, I just don't think that the
10 testimony concerning Battered Child Syndrome is admissible.
11 And that's in light of the opinion that they cite in their
12 application, State versus Lopez. Distinguished of Lopez
13 says and -- this would be 306 South Carolina at page 367,
14 the very first sentence is, "This Court has held the
15 testimony relating to the behavioral characteristics of
16 abused children is not admissible to bolster a child's
17 testimony that a crime actually occurred." It goes on to
18 say, "the rationale for its inadmissibility is that the
19 behavioral syndromes were not devised to determine the truth
20 of events leading up to their manifestation, but merely to
21 identify emotional problems. It goes on and says, "It is
22 generally held that behavioral based syndromes are not
23 sufficiently reliable as scientific evidence to justify
24 their use to prove that a crime occurred." So based on Lyle
25 we would say that that would be inadmissible. Now, the

1 remainder of his testimony may be admissible, but Battered
2 Children Syndrome I would say is not.

3 MR. EHLIES: On the Lopez case the conclusion is when a
4 properly qualified expert sees battering, whether it's
5 psychological or physical, and this is within the context of
6 that, then it is a recognized condition in South Carolina,
7 and that's in 1991. And since then things have progressed
8 to the point where battering, which is in this case, and
9 there are physical injuries as a child in this case that
10 Dr. Ewing will identify, combined with the psychological
11 trauma and abuse creates this syndrome of battering,
12 psychologically and physically. And that's sort of the
13 progression of science, which is Moore versus Texas in the
14 United States Supreme Court, that we have to be mindful of
15 how science progresses and as the legal profession must
16 incorporate those in such cases as this one, and mental
17 disabilities. That particular case was a mental disability,
18 had a bright line 70 on the IQ function, and in Texas cut it
19 off at 70 and the Supreme Court in Moore versus Texas
20 reversed that, because an affective act of the behavioral
21 aspects informs the IQ functioning. And so if you disregard
22 that that is not proper because it's not a proper
23 consideration of an advancing world in science. So we're at
24 2021, and I think that Dr. Ewing, and I'll pay particular
25 attention, will define this stress and interfamilial abuse

1 as it relates to James Robertson as a combination of
2 physical, emotional and other stressors that create this
3 environment for violence.

4 THE COURT: Do you want to be heard again?

5 MR. SALTER: Yes, sir, Your Honor. The Court in Lopez
6 goes on to say that the evidence of Battered Child Syndrome
7 in the Lopez case itself is distinguishable from evidence of
8 a behavioral syndrome. Defining a battered child syndrome
9 and shaken baby syndrome is made based on a number of
10 physical findings which are inconsistent with the history of
11 the injuries given by the parents or caretakers. These
12 syndromes have been developed as a result of extensive
13 research and have become accepted medical diagnoses in other
14 jurisdictions. Now, I heard mention of IQ. There's no
15 question about Mr. Robertson's intelligence level, that's
16 not an issue in the case. Our State Supreme Court has
17 not --

18 MR. EHLIES: Well, actually it is. He's
19 anticipating -- I think he's ahead of the actual testimony.
20 It may be more relevant when we hear the testimony from
21 Dr. Ewing.

22 MR. SALTER: If I might? Our Supreme Court has not
23 gone away from its opinion in Lopez or Hudnall in that
24 regard. I know that because I had a very hard time getting
25 the Court to allow testimony, or to affirm the admission of

1 testimony in the State versus Cutro where the State had
2 presented evidence of Munchausen syndrome by proxy, it's not
3 admissible as a matter of state law. And there's no federal
4 constitutional right to have this evidence presented, it's a
5 state law issue.

6 THE COURT: Again, in this case we're not here about
7 guilt or innocence, we're here as to whether or not he was
8 prejudiced. That's the sole question that I am to answer
9 for the Supreme Court after this hearing is whether or
10 not -- using the Strickland standard whether or not he was
11 prejudiced. So I'm going to give him at leeway, let him put
12 this testimony up, make the record complete because that's
13 my only question. We don't have 12 people here to be misled
14 by that.

15 MR. SALTER: Oh, I understand, Your Honor. Your Honor
16 is going to have to hear the evidence whether by way of
17 proffer or otherwise, I just wanted to make that clear that
18 that's our position.

19 THE COURT: Yes, sir. Thank you. He's so qualified as
20 an expert.

21 BY MR. EHLIES:

22 Q Dr. Ewing, tell us, if you will, please, what you were
23 requested to do in the case of James Robertson.

24 A To conduct a forensic psychological evaluation of Mr.
25 Robertson with particular emphasis on factors that may have

1 contributed to the crimes he committed, the two homicides
2 that he perpetrated against his mother and father.

3 Q All right. And were you able to do that and make that
4 assessment, forensic assessment?

5 A Yes.

6 Q And as a consequence, and we'll go through the process
7 of doing that and the materials you relied upon, but as a
8 consequence of doing that work, were you able to arrive at
9 an opinion?

10 A Yes, several.

11 Q Okay. And -- opinions. Will you provide us with those
12 opinions, please?

13 A Well, the first opinion is that Mr. Robertson has had a
14 virtually life long serious mental illness dating back to at
15 least grade school, and that this is an illness best
16 identified as Bipolar Disorder. It's also my opinion that
17 he had for much of his late teens, early adult life,
18 suffered from various forms of substance abuse and alcohol
19 abuse. It's also my opinion that he was a battered child,
20 and that the abuse of him went on from his early childhood
21 right up almost to the time he perpetrated these crimes.
22 It's my further evaluation that he was raised in a severely
23 dysfunctional family that contributed to and exacerbated his
24 mental illness. I think those are the basic (inaudible
25 audio.) Oh, one other opinion, I'm sorry, this is wrapped

1 up in the other opinions as well, but it's my opinion that
2 at the time that he committed these homicides he was both
3 mentally ill and under the influence of drugs.

4 Q Okay. Tell us how you went about putting together the
5 materials that you required in order to do this particular
6 forensic assessment.

7 A Well, I reviewed thousands of pages of documents;
8 family history documents, family health history, family
9 mental health history, employment documents. Any documents
10 that were available with regard to Earl Robertson, Sr., Earl
11 Robertson, Jr., Terry Robertson, and James Robertson. So I
12 reviewed those. And those continue to be provided to me
13 over time. I would say there is -- it's in the range of
14 several thousands documents. I also reviewed a summary of
15 those documents, which was provided to me by you, and I
16 reviewed an earlier summary that was provided by his
17 previous attorney. I reviewed photographs of the family,
18 obviously not all photographs, but photographs that were
19 provided to me. And I conducted a six hour evaluation, and
20 then later a two hour evaluation in person. The six hour
21 evaluation was in person, the two or two and a half hour
22 evaluation was by Zoom, I believe, one of the virtual
23 platforms. I also interviewed Earl Roberts, Jr., Chip
24 Robertson, James Robertson's brother. I conducted that
25 interview also virtually. And I took a look at -- I think

1 you sent me a copy of the most recent court decision case,
2 appellate court decision in the case State v. James
3 Robertson. I believe that's pretty much what I reviewed and
4 used to come to my conclusion.

5 Q All right, sir. Now, as regards the interviews, the
6 first interview of six plus hours, do you have a general
7 idea of when that occurred?

8 A Yes, it was in 2019. I can probably tell you the exact
9 date here.

10 Q That's close enough.

11 A Okay.

12 Q When was the two hour?

13 A 2021. It was a couple of weeks back.

14 Q All right. And over those eight or so hours, was that
15 sufficient contact with the client in order to form these
16 opinions with a certain degree of psychological confidence?

17 A Yes.

18 Q The records, the thousands of pages of records that you
19 have seen, are those records that are normally viewed and
20 considered by examiners in your fields that we've identified
21 and qualified you as an expert for rendering a decision and
22 opinions?

23 A Yes.

24 Q And were those materials that were provided for you
25 relevant to your actual opinions?

1 A Most of them were, not all of them.

2 Q Okay, sir. All right. So when we talk about viewing
3 these documents and thousands of pages of records -- let me
4 jump back for just a second and ask you to talk a little bit
5 about dysfunctional families and how that's defined.

6 A The word dysfunction means that something is going on
7 basically, it's not functioning properly, and it's
8 frequently used in my fields of expertise as a way of
9 describing troubled families. Not all troubled families are
10 dysfunctional. There are some people who have minor
11 problems and I wouldn't go so far as to say that they were
12 dysfunctional. I use the term to categorize families who
13 have significant problems in relating with each other within
14 family and problems related to others outside the family.

15 Q And is this a term dysfunctional that can be quantified
16 as to degree?

17 A Yes. Anywhere between mild and severe or extreme I
18 would say, mild/moderate. I can't put a number on it if
19 that's what you're asking. But, yes, there's a general
20 consensus that clinicians do characterize dysfunctional
21 families as mildly dysfunctional, moderately dysfunctional,
22 severely dysfunctional.

23 Q How would you characterize the Robertson family?

24 A Severely dysfunctional.

25 Q I'm sorry, I interrupted you.

1 A Severely dysfunctional.

2 Q Okay. Now, is the intra family severe dysfunction a
3 factor of the possible dysfunction of the individual members
4 of the family?

5 A Yes. Yes. It almost always is.

6 Q In this case I think there are four members living
7 under this roof; is that correct?

8 A Yeah. The nuclear family of four; mom, dad and two
9 sons.

10 Q Okay. Now, did you then look at records that
11 established any potential dysfunction with Earl Robertson,
12 the father?

13 A Yes.

14 Q Were you able to determine whether or not he displayed
15 symptoms of dysfunction?

16 A Yes.

17 Q Will you talk about that, please? And you might want
18 to mention the documents generally that related to that
19 opinion.

20 A Well, there are -- overall the most relevant documents
21 were his medical and psychiatric history, and his work
22 history, those are the documents that I relied upon. But I
23 also relied upon statements that were made to healthcare and
24 mental healthcare providers by his wife, and statements that
25 were made to various evaluators by his children. I think

1 those are the general categories I looked at.

2 Q Okay. And are those the types of records and
3 statements that are, again, usually reviewed by people
4 performing -- experts performing their function?

5 A Yes.

6 Q Okay. And how about for Ms. Terry Robertson -- excuse
7 me, let me back up. As far as the -- is it your opinion
8 that Earl Robertson was dysfunctional?

9 A Yes. He was dysfunctional individually and as a member
10 of the family.

11 Q In what particulars was he dysfunctional?

12 A Well, according to the records that I reviewed he was a
13 brilliant man intellectually and that he graduated the top
14 of his class from Georgia Tech. But his work records seem
15 to indicate repeatedly that he lacked communication skills,
16 had difficulty dealing with other human beings. And his
17 medical and psychiatric records indicate that he was
18 seriously depressed, that he was medicated for depression
19 from time to time, that he was self-described and described
20 by others as a very angry, bitter man. The records also
21 indicate that he was abusive to his wife, he was abusive to
22 his children, and that at times he didn't feel like his life
23 was worth living.

24 Q Okay. And can you categorize -- can you assess a
25 degree of dysfunction for Mr. Earl Robertson?

1 A I would say he was seriously dysfunctional, yes. The
2 one thing that he had going for him very strongly was his
3 work, but even there if you look, as I did, at his work
4 records, his performance evaluations, they were generally
5 negative with regard to the interpersonal relations aspects
6 of his job. He was an engineer by training and by work, but
7 in his engineering jobs he had to relate to other people,
8 and he appeared to be seriously deficient in his ability to
9 do that.

10 Q Okay. Moving on to Terry Robertson, as far as
11 identifying the features that would suggest to you that she
12 was dysfunctional.

13 A Yes. I looked at her medical records, her psychiatric
14 and psychological records, statements that she made to
15 others. It appears that she was severely depressed through
16 much of her adult life, that she was unhappy in her marriage
17 and that she said that she was abused, and that she had been
18 the victim of infidelity on the part of her husband, and
19 that she had failed -- she felt like she was a failure as a
20 mother. She had failed to protect her children from the
21 wrath of her husband, the physical and psychological abuse
22 from her husband. She was suicidal on a number of
23 occasions. She also suffered from a tremendous number of
24 illnesses, physical and mental illnesses, and I believe I
25 read at the time of her death she was taking 14 prescription

1 medications. So yeah, I would say she was seriously
2 dysfunctional as well.

3 Q All right, sir. And you said you had an opportunity to
4 interview Earl, Jr., who we referred to in the records as
5 Chip, the brother, the younger brother of James Robertson;
6 is that true?

7 A Yes.

8 Q From that interview and the documents that you've
9 accumulated and provided, do you have an opinion as to
10 whether or not Chip was demonstrating features of
11 dysfunction?

12 A Yes. From an early age -- not as early as his brother,
13 but from an early age, certainly from his teenage years on,
14 he was suffering from at the very least Attention Deficit
15 Hyperactivity Disorder. He was treated for it. He was a
16 long term substance abuser. And he had a number of
17 interpersonal problems getting along with people in his
18 family and outside his family. It appears from talking to
19 him most recently that he's overcome a number of these
20 challenges. I believe he got a college degree as an adult.
21 But I guess -- are you talking -- if you're talking about
22 his time when he was a part of the family and living at
23 home, yes, he was very dysfunctional for the reasons I've
24 just specified.

25 Q Okay. And can you characterize that by a matter of

1 degree?

2 A Yeah. I would say he was probably the healthiest of
3 all of them. He was at least moderately dysfunctional. But
4 he was able to get himself admitted to the University of
5 Pennsylvania, an Ivy League school. He wasn't able to
6 finish the school. He dropped out, became an alcoholic,
7 substance abuser. So I would say in his case someone
8 between moderate and severe, but he was better off in terms
9 of his functioning than most of the other family members.

10 Q All right. And then we have the
11 defendant/applicant/client, Mr. James Robertson. Did you
12 have any evidence or suggestions of dysfunction there?

13 A Severe, yes, a severe dysfunction. Beginning with
14 teachers observing as early as grade school that his conduct
15 was not appropriate, that he needed help in self control
16 issues. That he was -- had behavior problems at school, and
17 by the time he got to later grades in school, including high
18 school, he was, by his own admission, the class clown.
19 He -- although he's intelligent and he was able to get
20 decent grades in high school he really didn't learn very
21 much. He didn't make the use his God-given talents. He's a
22 very intelligent young man. But beyond that he was from an
23 early age on very impulsive, very likely to have difficulty
24 controlling behavior. He engaged in many reckless acts --
25 many irrational acts as a young adult, as a teenager, even

1 as a child. He clearly to me suffered from the early stages
2 of Bipolar Disorder as early as his early teens, although he
3 was recognized apparently and suffered from Attention
4 Deficit Hyperactivity Disorder, but I think that was because
5 his mother found that to be acceptable. His mother really
6 ran part for him on a lot issues in life, his bad behavior,
7 whether it occurred at school, at home or in the community.
8 My reading of the records is that she was okay within the
9 ADHD, but when people started talking about other serious
10 problems with his behavior she either denied it, covered up,
11 or did something that wasn't helpful in situations. With
12 regard to Mr. Robertson, I could probably go on for hours,
13 but in a nutshell he suffers from a severe mental illness
14 and has since he was a child. He still suffers from that
15 illness. At various points from about the age of 17 or 18
16 on until he went to prison he was an abuser of alcohol, an
17 abuser of multiple illicit substances. He was unable to
18 manage his own affairs, he couldn't manage his money,
19 couldn't manage his life. He skipped from job to job, could
20 barely hold a job for any length of time. Was almost
21 totally dependent on his parents to meet his needs. I mean,
22 he could do his activities of daily living, although there
23 was evidence that a lot of times he was substandard there
24 even. He could not live independently. He tried, went to
25 college, he couldn't even function in a dormitory situation

1 in college, although he tried it on several occasions. He
2 was unable to live with roommates, tried that and that
3 didn't work out, ended up coming home. He also ended up in
4 prison, another piece of evidence with regard to his
5 dysfunction. He and his brother and several others were
6 involved in some burglaries, and he, with the encouragement
7 of his parents, took the rap, refused to give the names of
8 the other participants, including his younger brother, Chip,
9 and I believe he went to prison for 13 months. When he came
10 out of prison he was back living with his family, and this
11 was in sort of the runup to the homicides. That's it in
12 kind of a nutshell.

13 Q All right, sir. That is the nutshell on one of your
14 five opinions, which is that this is a -- that James
15 Robertson was raised in a dysfunctional family. And we've
16 talked about the individual pieces of the family, which form
17 the overall functionality of the family unit, which I think
18 you said was severely dysfunctional also; is that correct?

19 A Yes.

20 Q Okay. We're going to bore down on that in a little
21 bit, but let me jump up to the serious mental illness. And
22 I think you mentioned Affective Bipolar Disorder.

23 A Yes.

24 Q And is that a biological condition?

25 A It's believed to be biological in two ways. One is

1 that there does seem to be some genetic component to make
2 someone at risk for developing that illness, but there is
3 also evidence that there is actual physiological markers in
4 the brain and it makes someone at risk for developing
5 Bipolar Disorder. But a number of people could have those
6 markers, have those vulnerabilities and not become bipolar
7 depending on what kind of life circumstances meet as a
8 child. There's evidence to suggest that people who become
9 severely bipolar are often people who've had very difficult
10 childhoods like Mr. Robertson.

11 Q Okay. And so is it fair to say then that physiology
12 may be present and the psychological stress source in the
13 life circumstances are the spring board that brings this
14 thing on as a full blown case of Bipolar Disorder?

15 A I think it's fair to say that, but in different cases
16 each side may be given different weight. I mean, I've dealt
17 with people who everybody in their family is bipolar going
18 back to two or three generations, so in a case like that you
19 think that it's primarily biological in its determination.
20 But then there are other cases where you don't see such a
21 long history, but you do see a social history, a familial
22 history that is consistent with the development of the
23 disorder.

24 Q And was that social familial history from Terry and
25 Earl present in this family?

1 A Yes, very much so.

2 Q Okay. Let me ask you about -- we're going to get into
3 this thumb drive that has the documents that you'd surveyed
4 and that sort of thing in forming your opinions, but let me
5 ask you about the history in this particular case concerning
6 the diagnosis of affective disorder and its treatment. Did
7 you find records pertaining to that?

8 A Yes, there are multiple records. Multiple doctors have
9 diagnosed Mr. Robertson, James Robertson, as suffering from
10 Bipolar Disorder. I think that's a given for me. What I
11 saw in his childhood history, school records primarily, but
12 some of the earlier psych records is someone who I would
13 consider to be pre-bipolar, someone who's starting to show
14 signs; poor judgment, poor control, poor impulse control,
15 behavioral outbursts, they were labeled Attention Deficit
16 Hyperactivity Disorder. And maybe -- I mean, I can't
17 totally second guess the people who made those diagnoses,
18 but time has shown us in this case and in many others that
19 often times those traits, those behaviors are early
20 manifestations of Bipolar Disorder. I think that's what we
21 saw here.

22 Q All right. And in that circumstance, would the
23 treatment for ADHD have -- if it was not ADHD, have any
24 impact upon the advance of Affective Bipolar Disorder?

25 A Yes, I believe so. In this case in particular Mr.

1 Robertson and his brother were both treated with stimulant
2 medications, and these stimulant medications are what the
3 word stimulant imply, they stimulate your central nervous
4 system, which if you are bipolar would tend to make you more
5 manic. If you're truly Attention Deficit Hyperactivity
6 Disorder then they have what's called a paradoxical affect.
7 Kids are hyperactive, they're treated with a stimulant, they
8 become less active. In both of their cases, in Chip's case
9 and in James' case, they were treated with these drugs of
10 Ritalin, Cylert, I believe maybe a couple other stimulant
11 drugs, they really didn't seem to be helping, but they ended
12 up both of these young men abusing these drugs, basically
13 powderizing them and snorting them to get high. So
14 treatment -- well, I said I don't want to second guess
15 people, but the treatment not only didn't work but it seemed
16 to hurt both of these young men.

17 Q So the treatment that was provided, is it your
18 testimony, did not -- wasn't -- did not control the
19 behavioral disorders for which it was intended?

20 A It didn't seem to. From all I could see, both of these
21 young men that as they aged and as they continued taking
22 this medication they felt worse.

23 Q All right, sir. And I think that you have touched upon
24 your second opinion that there's significant -- in the case
25 of James Robertson, significant history of substance abuse;

1 is that correct?

2 A Yes.

3 Q And that included Ritalin and other drugs; is that
4 right?

5 A Yes.

6 Q Okay, sir. One of your opinions is that James
7 Robertson suffered from a battered circumstance. And was
8 that also confirmed in your record review and interview with
9 Earl, Jr.? And I'm going to call him from now on Chip to
10 distinguish the younger son from the older one. Was that
11 also a circumstance that Chip had to deal with?

12 A Yes, but to a much lesser extent than James.

13 Q And why would that have been?

14 A Well, James is a couple of years younger, and he was
15 less --

16 Q Excuse me. James was the older and Chip --

17 A Yeah, I meant Chip. Chip is a couple of years younger
18 than James, so that was part of it. But James was much,
19 much more disturbed and disturbing as a child, adolescent
20 and young adult than Chip. Both Chip and James gave me
21 details of how beatings, the assaults, the various kinds of
22 physical abuse that Earl, Sr. inflicted upon them. And Chip
23 insisted that James got it much worse. In his opinion he
24 got it much worse because he would keep it going. In other
25 words, he would get into it with his father, his father

1 would beat him with a belt or fists or slam him up against
2 the floor or dangle him off of a second story balcony of
3 some sort, things like that. Whereas Chip learned to
4 basically let it go, James would keep going and arguing and
5 provoking his father and things would just get worse. So I
6 think that's why there's a difference.

7 Q Okay. And these things that you're talking about are
8 physical insults to the bodies of the children; is that
9 correct?

10 A Yes.

11 Q And they -- the records reflected that that started at
12 an earlier age; is that correct?

13 A Yes.

14 Q And as far as both of those children are concerned it
15 persisted I think Chip said up until something with a cue
16 stick at age 17?

17 A Yeah. He said that his father was attacking him, or
18 attempting to attack him physically, he fought back with a
19 pool cue -- cue stick and that's the last time his father
20 ever laid a hand on him. James told me that I believe when
21 he was around maybe 15 or 16 the physical abuse stopped but
22 the psychological abuse continued right up to the time he
23 killed his father and his mother.

24 Q Is there any way to distinguish an ultimate outcome of
25 the mental health characteristics of an individual resulting

1 from physical abuse as distinguished from psychological
2 abuse?

3 A Well, they're both abuse. In my experience and the
4 research that I've read abused children frequently define
5 psychological abuse that is more harmful than physical
6 abuse. I don't know if that's what you're asking.

7 Q Yes. And do you ascribe to that theory?

8 A I think it depends. I mean, I've seen children who
9 have been beaten to death, it's kind of hard to say that the
10 psychological abuse was worse than the physical abuse there.
11 But in the more typical case where you've had ongoing
12 physical abuse and ongoing psychological abuse on a pretty
13 much weekly basis if not more often than that over a number
14 of years, yeah, I would say the psychological abuse takes
15 the greater toll.

16 Q And is it more likely that the psychological abuse
17 persists as opposed to the physical battering as a matter of
18 circumstances of where people are and --

19 A Well, as a matter of size, if nothing else. It's
20 easier -- it's pretty easy to beat a five, six, seven,
21 eight, nine, ten, 11, 12, early teen person, but when kids
22 become 15, 16, 17, 18, they may no longer be as easy to
23 physically abuse because they're bigger and they can fight
24 back.

25 Q Okay. Is psychological abuse include denigrating

1 statements that can occur anywhere, even in public?

2 A Yes.

3 Q And is there a record in this case where those kinds of
4 remarks are made by Earl?

5 A Yeah. Earl, Sr., according to the records and
6 according to Chip and James, frequently referred to James as
7 an idiot, a moron, worthless, shiftless, no good, a failure,
8 nothing he could do was right. I mean, they both talked
9 about this bringing home a paper, a math paper, I guess, and
10 he got a 98 out of 100 and his father's response was, "What
11 happened to the other two points?" That sort of
12 psychological abuse that was almost constant. But there
13 was -- there were other instances where the psychological
14 abuse was on the one hand say, "Oh, you're good, you can do
15 it, you're doing it," and then on another end say, "No.
16 You're a total failure, you can't do it." That kind of
17 double bind communication, I think, happened a lot in this
18 family, especially from Earl to James.

19 Q In that category of insults, physical and
20 psychological, is it a fact that both of these children
21 expressed both in the documents and to you in the interview
22 a desire to satisfy their father or to be compliant and seek
23 his approval?

24 A Yeah. Both boys, I think, wanted nothing more than get
25 approving comments, or some kind of approval from their dad,

1 James especially. On a couple of occasions I would ask him
2 like, "Well, did you ever get any approval from your dad?"
3 And he thought about it for a long time and he said he had
4 worked at a bagel store and that he used to bring a bagel
5 home every night for his father and leave it out for his
6 father to have for breakfast, and that his father once wrote
7 him a little note saying he appreciated that. James thought
8 that that was probably the most approval he got from his
9 dad.

10 Q Is there some significance to that, to the feature of
11 children seeking approval of their parents?

12 A We're often asked in my field why abused children stick
13 up for their parents, why they want to return home, why they
14 do return home, why they don't leave home, and it's because
15 they have a deep attachment to their parents and they're
16 trying so hard to get some kind of approval from their
17 parents. I think that's what you see with both of these
18 men, Chip and James.

19 Q Okay. And you've mentioned that you reviewed school
20 records, drug treatments --

21 A Yes, sir.

22 Q -- and you had hospitalizations, I think, from William
23 Hall in 1995.

24 A Yes.

25 Q And did you also have the forensic evaluations of

1 Dr. Pincus and Evans as far as the biology of the brain was
2 concerned?

3 A Yes.

4 Q Okay. And have you incorporated those findings and
5 test results into your opinions in this case?

6 A Yes. They both seem to indicate that they believe that
7 there was some kind of underlying brain malfunction in
8 James' case that would be related to the physical abuse that
9 he suffered either as a direct result or an indirect. And
10 by indirect what I mean, this is my opinion, the literature
11 with regard to the serious child abuse seems to indicate
12 that it's not just a concussion or a contusion of the brain,
13 but that being abused as a child can actively change the
14 functioning of someone's brain. And I took their opinions
15 into account, including that that may have been a
16 contributing factor here for James Robertson.

17 Q All right. So you have, in fact, considered the
18 biology and physiology of the brain, and in particular you
19 talked about the bipolar, that those formed your opinions
20 that you gave us, the five various opinions; is that
21 correct?

22 A Yes.

23 Q There's a note, and I don't know that you've seen it,
24 but do you remember the bedwetting history until age 12 or
25 13?

1 A Yes. I remember some mention of it in the materials
2 that I read, yes.

3 Q And was that particularly significant in the case of
4 James Robertson?

5 A Well, bedwetting -- I've worked with many bedwetting
6 children. I don't think I've ever worked with or heard of a
7 child that age still wetting the bed on a regular basis. To
8 me it was just another red flag. There were a lot of red
9 flags with regard to James and that was just another one
10 that there was something significantly wrong with this boy.

11 Q And what did the records show, in your opinions, about
12 the mother, Terry's, reaction to a condition in either of
13 her children that the public would perceive as demeaning?

14 A She was concerned about the way the public viewed her
15 and her family. She comes from a family where her father
16 was a military Colonel, had a lot of authority and respect
17 for other people, and she seemed to be someone who herself
18 didn't have much self respect, had some self esteem issues,
19 so she was very cautious about what other people felt and
20 thought about her and her family. I remember a few episodes
21 where reading about where she kind of went out of her way --
22 I'm sorry -- she went out of her way to avoid having James
23 labeled mentally ill. I think when he was in the eighth or
24 ninth grade one of the teachers made some comments to her
25 that were -- as it turns out they were pretty accurate, that

1 he was heading for some pretty serious trouble, and she
2 disputed that, didn't want to hear about it. The punishment
3 that he was given at the time was to clean the bathrooms at
4 school, and she went to the school and cleaned the bathrooms
5 herself to meet the requirements of the punishment.

6 Q Okay. I think the history of that particular thing is
7 in the appendix at 2850.

8 A Yes, sir.

9 Q And so you would have been provided with many
10 documents, all of which are also in the trial record, is
11 that correct? I'm sorry.

12 A Yes, it is.

13 Q Okay. All right. So if I can give you this very brief
14 summary of the mother, the medical records establishing the
15 potential diagnosis of Bipolar Disorder, depression,
16 hallucinations and cutting behaviors, are those consistent
17 with your impressions of the records?

18 A Yes, all of those are. She's a woman with a
19 longstanding severe mental illness.

20 Q All right. And tell us what a cutting person is.

21 A A person who -- well, in her case she would, with a
22 razor or knife, cut her arms and breasts. It's usually
23 reflective of some deep-seeded personality disorder, often
24 borderline personality disorder. I did not see her with
25 that diagnosis, but that certainly would raise the

1 possibility of that as another diagnosis of her.

2 Q Okay. And did you have also her hospital record --
3 hospitalization record of December 5th, 1995, and the
4 diagnosis -- I'm sorry.

5 A I recall it, yes.

6 Q And the diagnosis, I believe, was depressed and very
7 suicidal?

8 A Yes.

9 Q In fact, it was quantified and described as sort of the
10 spectrum of severity is very suicidal; is that correct?

11 A Correct.

12 Q She had hallucinations. And somebody referred to her
13 as having a suicide bag?

14 A Yes.

15 Q And tell me what the components are of a suicide bag.

16 A My understanding was items that could be used to take
17 your own life, whether they be pills, knives, razors, other
18 implements that could be used for a suicide.

19 Q Hanging devices like extension cords?

20 A Yes.

21 Q Was there an indication that Mr. James -- the client,
22 James Robertson, was concerned for his mother's health and
23 protective and seeking her approval as well?

24 A He was concerned with her health. And I think that
25 both he and his brother had much more positive regard for

1 their mother than their father. She acknowledged that she
2 was psychologically abusive to both of the boys as they were
3 growing up, but both of them to this day don't regard her as
4 having been all that abusive. I think it's when they
5 compare her abuse with that inflicted on them by Earl that
6 they reach that conclusion. She herself on a number of
7 occasions is reported to have said that she felt guilty and
8 depressed because she hadn't protected her sons from Earl.
9 But I think the sons do tend to feel that she was somewhat
10 protective.

11 Q Okay. Was James, the client, did he relate to you any
12 particular concern for his mother's wellbeing after the
13 death of his mother's mother, I believe?

14 A Yeah. Both he and his brother -- and the records seem
15 to bear this out -- after her mother had died, I think maybe
16 both of her parents had died by then, that she was described
17 as severely depressed, suicidal, not going out, sometimes
18 taking to the bed for days on end, engaging in behavior.
19 Like her son, Chip, told me that she would stay in bed and
20 watch basketball games, something she had no interest in
21 whatsoever. And James had similar concerns that she would
22 kill herself. He said -- James said to me that he felt like
23 it was only a matter of time before his mother killed
24 herself.

25 Q All right.

1 MR. EHLIES: Judge excuse me, I'm sorry, I don't mean
2 to interrupt your writing. I understand that we're going to
3 break for lunch somewhere around 12:30. And I'm about to
4 integrate this thumb drive, which is a significant aspect of
5 the presentation, it has the records that he's been
6 summarizing now in a little better summary form. And also
7 for your information, there's a hyperlink to the actual
8 documents, so anytime you want to see the document from
9 which those summaries were made we can just do the hyperlink
10 to that. So that's going to take some time and I would
11 suggest that we consider a lunch break at this point if
12 that's all right.

13 THE COURT: Yeah. Any objection to that? My note was
14 to put everybody on notice so we could get to a stopping
15 place, so if we're --

16 MR. EHLIES: I think we're there.

17 THE COURT: Okay.

18 MR. SALTER: No objection.

19 THE COURT: All right. Very good. We're going to
20 recess -- and I don't know if he can hear me, but tell him
21 we're going to recess until 2:00. Okay? Be back at 2:00.
22 Everybody get some lunch and refresh yourselves, but please
23 leave everything running, don't turn off my computer.
24 Please don't turn anything off, not even the lights.

25 (A lunch break was taken.)

1 MR. EHLIES: Are we good to go?

2 THE COURT: We're good. Everybody?

3 CONTINUED DIRECT EXAMINATION

4 BY MR. EHLIES:

5 Q Dr. Ewing, I need to backpedal a little bit when we
6 were talking -- do you recall when you were talking about
7 dysfunction and grading dysfunction and the component family
8 members that are themselves dysfunctional?

9 A Yes, I recall that.

10 Q Okay. Does the amount of familial dysfunction increase
11 exponentially as the number of the family members
12 dysfunction increases?

13 A I would say that it does, I don't know that it is in
14 every case. In most cases that I've seen it does.

15 Q Okay. And that said I want to go then and get you
16 involved now in a little more detail about your testimony.
17 You had made references -- and we're kind of really focusing
18 on the client at this point, Mr. James, I'm going to call
19 him Jimmy, and you referenced photographs that you had
20 referred to.

21 A Yes.

22 Q If you will just tell me to scroll down when you want
23 to do that, because I now have -- that's what was
24 anticipated, that you would control it but now I have to do
25 that. I'm at page one. You made reference to his childhood

1 photographs. Are these the photographs you were referring
2 to?

3 A Yes, they are.

4 Q Okay. And I'm just going to scroll down. If you see
5 something that you want to remark about just do so.

6 A See, the one thing that I saw in these photographs is
7 relating not to James but to Earl, Sr., he never seems to
8 look happy, and it's sort of consistent with the way he's
9 described in the records. It's not a major observation but
10 it's something. Never smiling.

11 Q Is that what they call a flat affect?

12 A It could be, yeah. I wouldn't say that necessarily
13 about him because I had never seen him in person. But it's
14 just -- it struck me in these photos, people in the family
15 are smiling typically for a photograph and he's not.

16 Q I think this photograph had a little significance
17 somewhere in the documents. This is Chip's graduation, I
18 believe; is that correct.

19 A I think so, yes, high school graduation.

20 Q This is the codefendant. We're in the summaries now.
21 And just tell us about how these particular summaries of the
22 records animated or informed your opinions that you found
23 significant. For instance, the Meyers, Julius Meyers, is
24 the therapist for the entire family. But if you can direct
25 me to where you would like to start we'll go there.

1 A Sure. Well, the beginning of these has a lot to do
2 with the family background of Terry and Earl, Sr. On page
3 29 there's discussion of what appears to be -- have been an
4 instance of adultery by Earl, but according to other later
5 notes it turned into, I guess you would call it, swinging
6 that the mother and father in this case were sexually
7 involved with another couple. To me that was just one more
8 signal of dysfunction in the family.

9 Q Do you see that in this particular window on page 29?

10 A Yes. It's the largest note on that page, it says early
11 marriage.

12 Q Yeah.

13 A Mother, Terry, reveals to her therapist in a
14 handwritten note. This is the note.

15 Q And you recognize that, then, as the note that provided
16 you with that information?

17 A Yes. On the next page of the summary is something I
18 thought was particularly important. This is on page 30.
19 Again, it's the largest note on the page, it's 11/17/73,
20 which is your client's birthdate.

21 Q Okay, sir. Tell me how that's significant.

22 A Well, there was a premature rupture of the membrane
23 transverse arrest. I think that arrest may be a typo, but
24 anyway, labor progressed slowly, delivery accomplished, made
25 forceps delivery, eight pound male, good condition. Cord

1 around neck twice for (inaudible audio). These are issues
2 that you sometimes see in people who later develop
3 biologically based mental disorders. By biological I mean
4 some kind of birth damage or brain damage. It stood out to
5 me. I'm not saying that that's necessarily the case, only
6 that it's something that stood out to me. And that is the
7 page. And then on the bottom -- toward the bottom of that
8 page, I don't know much about this, but I was struck by the
9 fact that the mother's medical record indicates that she's
10 going to Indonesia for six to eight weeks while James is 1.3
11 years old. I don't know if that occurred, it apparently did
12 according to other notes. That struck me as a difficult
13 time to leave a baby, an infant, for the mother to be absent
14 for six to eight weeks.

15 Q And what date is that? I'm on 29, page 29.

16 A Yeah, it's on page 29. It's 2/14/75, mother's medical
17 record indicates that she's going to Indonesia for six to
18 eight weeks. I don't know anything more about this. But
19 attachment theory suggests that it's -- that kind of break
20 in that maternal binding of with a child can be problematic.
21 Again, I'm not saying that it is, I don't know what happened
22 but it struck me as potentially important.

23 Q Is this the medical record you're referring to?

24 A Yes. Going to Indonesia for six to eight weeks.

25 Q All right, sir.

1 A The next thing that struck my attention is on page 31
2 October 1975, and this is a handwritten note from Terry's
3 daily planner, it refers to Earl's affair and a swinging
4 type relationship.

5 Q And is this the notes you're talking about?

6 A Yes, it is.

7 Q How is that significant?

8 A Well, again, it's just one more piece of the puzzle.
9 We were looking at how dysfunctional this family is. On the
10 next page, on 32, it's 9/10 of '76, we have again a
11 handwritten notation from Terry's planner, which you just
12 showed, mother said "Earl told me that Lynn was a better
13 lover." This is, yes, in the handwritten notes. It has
14 been -- by itself it's not anything significant, but it just
15 adds one more piece of weight to the pile of evidence
16 suggesting dysfunction in the family. And they're saying --
17 as you move down at that page at the end you have more
18 handwritten notes from your daily planner, started with Lynn
19 and Don again, beach trip with Lynn and Don. The same,
20 basically they're to me an indication that this swinging
21 relationship or open relationship is still going on. On
22 page 33 there's a note, this is -- it says age five to 15,
23 this is from Dr. Pincus' report, which you referred to
24 earlier. Post-arrest site reports indicate he was beaten
25 about once a week between age five and 15, thrown against

1 the wall. This is more evidence of child abuse, physical
2 child abuse by Earl against Jimmy, James.

3 Q And I think the reference is to demeaning
4 characterizations seen in the top part of the medical
5 records. Is that part of the source for --

6 A Yes. The whole -- that whole record is pretty
7 important.

8 Q And this is -- okay.

9 A On page 34 we have -- this is 9/1/81, and so this is
10 regarding James in school. He would have been eight years
11 old, seven or eight years old. Dr. Moulder (phonetically)
12 says, "Jim needed to improve in the following areas:
13 Exercises self-control, assumes responsibility, is attentive
14 in class, uses his time wisely." Those are all indications
15 there are some red flags with this kid that he needs to work
16 on his self-control responsibility, attentiveness and time
17 management and skills. On the next page there's another
18 reference to Dr. Muller's (phonetically) notes. He
19 describes, "Jim is a nervous child and it is important to
20 give him support." That is in 1980, so when Jim would have
21 been about nine years old.

22 Q Is this the note?

23 A Yes. At the bottom of that same page, 35, this is,
24 "Jim needed to improve in all areas; self-control, follows
25 directions, goes to work promptly, respect for persons or

1 property (inaudible audio.)" So that's 1982, June of '82, so
2 that's a few months later. On page 36 there's -- this is
3 all from one of Terry's journals handwritten journals.

4 Q All right, sir.

5 A "Earl had an affair, I guess I haven't gotten over it.
6 I am scared of Earl's temper. Earl is dictatorial, manic,
7 not sleep a lot, starts lots of stuff all at once.
8 Entertains a lot. I'm mad at Earl for all of the anger he
9 has but I wasn't always a good wife. He scares me. I feel
10 I have to protect boys." Those are pretty significant
11 disclosures made by the mother. And this was -- I don't
12 think there's -- I'm not sure there's a date on this. But
13 it was certainly before the homicides, and judging by the
14 chronology of the notes it was somewhere around 1982. Also
15 in that same note she says, "Earl can't take care of me, he
16 can barely take care of himself," which I found significant.
17 There's a -- on page 37 there's a note at the very bottom of
18 that page talking about the summary.

19 Q Hold on a second. You were, I think, on 37; is that
20 right?

21 A Yes, page 37. Okay. The last note, 1982 through
22 adult, this is a description for Dr. Tonie Cascio in 1999.
23 "Jimmy was beaten by both parents. Terry hit Jimmy and
24 pulled his hair. Earl's abuse is more severe. And if you
25 go to the next page it's continued, "Jimmy went to position

1 himself on his hands and knees in bed and banging his head
2 against the headboard as a way of rocking self to sleep. If
3 he continued banging after he has fallen asleep Earl came in
4 the room and beat Jimmy with a belt. Earl's beatings were
5 sometimes unexpected and unpredictable. Jimmy was thrown
6 against the wall, tackled and beaten with a belt. Earl held
7 Jimmy off the deck by his neck. Earl pushed Chip down a
8 flight of stairs or steps. Jimmy had three head injuries.
9 Jimmy had anger towards mother because she never protected
10 him or Chip from their father." And then discusses
11 emotional abuse. "Earl would get up in Jimmy's face and
12 call him stupid and worthless. Mother told Jimmy in an
13 argument that she wished he'd never been born."

14 Q Tell me what page you're on. I'm sorry.

15 A That moves on to page 38, but it's just a continuation
16 of the note that begins on page 37. This is a report from
17 Dr. Tonie Cascio.

18 Q All right.

19 A That chronology, that description fit with what I had
20 understood happened with James. On page 39 there's one --
21 there's a reference to one of the many employment or
22 personnel records of Earl, Sr. "He rubbed people the wrong
23 way. He needs to work on this and be a better listener.
24 Needed to work on his person to person skills. He needs
25 work on getting along with others." That's a (inaudible

1 audio) frequently throughout these employment records, and
2 it's consistent with what Chip and James both told me about.
3 At home they really never -- they didn't talk to their
4 father. He didn't communicate with them unless he was
5 yelling or angry. He just sat in his chair and they walked
6 on egg shells to try to avoid him and any verbal interaction
7 with him. So it seems consistent to me. On page --

8 Q Give me a date on that reference, if you would.

9 A It is 11/15/83, and 2/14/84.

10 Q This is Springs Industry records that you are referring
11 to.

12 A Yeah, personnel records from the place he worked.

13 Q And then give me the other one.

14 A The other one is right below it, it's 2/14/84, it's
15 another personnel record. On the next page, page 40, there
16 are a couple of notes that I took particular interest in.
17 Earl is -- in January -- or February 27 of 1984 in therapy
18 notes, 9:11:17, "Earl stated to the therapist he has a
19 history of being an angry person." That's consistent with
20 other things Earl said about himself, Terry said about him,
21 and then both of the sons said about him is that he was a
22 very angry, bitter person.

23 Q Is it significant in doing these evaluations that you
24 look for collateral support for any statements instead of an
25 isolated history of one particular statement that's not

1 supported and corroborated by another source? Is that a
2 function --

3 A Yes, I think it's important. Otherwise I would just be
4 relying upon people's memories, which are not always correct
5 or accurate. And sometimes people shade the truth. But if
6 you can look back and see what people said at the earlier
7 time it seems to me it's a better indication of what
8 happened.

9 Q Were you able to get corroboration of the major pieces
10 of that family's dysfunction from multiple sources?

11 A Yes. Like I said, there's over 300 documents -- 3,000
12 documents. And on that same page I didn't -- I don't know
13 what to make of this and I didn't discuss it with either
14 James or Chip, but this is a notation that client and
15 brother, Chip, would take showers with their parents until
16 the age of 11 or 12, client would be James. That seems to
17 me to be quite unusual that parents would be taking showers
18 with a child that age. Most parents that I have worked with
19 feel uncomfortable certainly by the age of five or six or
20 thereabouts showering with children. It may be nothing, but
21 it struck me as a possibility that there may have been some
22 sexual abuse in this family.

23 Q All right, sir.

24 A On page 42 there were a couple of things that were
25 informative. You see the largest note there toward the top,

1 client's childhood. This is a note from mother's therapy
2 section with her psychotherapist. She talked about her
3 reasons why she's a bad mother. She hit the kids, she
4 verbally abused them. She didn't always build up their
5 self-esteem. She didn't teach them right from wrong. She
6 didn't protect them. The boys failed in their schoolwork.
7 She was not a good role model. That's all consistent with
8 what the other records and Jim and Chip said about their
9 mother.

10 Q All right.

11 A And then there's -- this struck me as kind of
12 interesting in terms of James. 1/7/86 he took a Otis Lennon
13 Mental Ability Test and he scored 134, which in the superior
14 range of functioning, that's a very high IQ. And looking
15 back at his date of birth there, he was born 3/10 of '75, so
16 when he took that test he was ten years old, and that's --
17 it says it's a 97 percentile, which is very, very high. But
18 then if you look at the bottom of that page it says ERB
19 Achievement Test, scored the lowest 67 percent in verbal, 74
20 percent in reading comprehension, and then 74 in english
21 expression. So this is a somebody with a very high IQ, but
22 for some reason he's not functioning at the level that his
23 intelligence would allow him to function.

24 Q And what type of -- were you able to get any suggestion
25 of what type of issue might be inhibiting the development

1 the advantage of the IQ?

2 A Well, I think it was the mental illness. By then he'd
3 already been shown -- showing signs of at least ADHD. He
4 had trouble paying attention, trouble controlling behavior,
5 trouble respecting others and their property. He was having
6 problems at school. So I think that's -- also we know that
7 at that time things were not going all that well at home.
8 There was a lot of dysfunction at home. On page 43 we
9 have -- there are another couple of notes about Earl from
10 his work records there toward the bottom of the page, 1987
11 and 1987 end. "His leadership at work is not quite extent,
12 is exclusively from communication weakness, poor
13 communicator, not a leader, although he may think he is.
14 Described at work as a one way communicator." That's kind
15 of consistent with what James and Chip said about him,
16 essentially that you hear from him but he doesn't hear from
17 you, that's the way I took that. And it continues at the
18 top of the next page, his work evaluations are talking about
19 poor management, communication skills, speak under the guise
20 of honesty and others find his approach confrontational.
21 Well, certainly his kids found his approach to communication
22 to be confrontational, so that's consistent.

23 Q Could you pause there just a minute? Okay. That's
24 another Springs Industry document?

25 A Yes, personnel record.

1 Q Are these -- did you look at the actual court documents
2 in some regularity as we prepared these summaries?

3 A Yes.

4 Q Okay. Go ahead.

5 A On that same page, 44, there is reference right below
6 the one we just looked at, mother told her therapist, "Jimmy
7 used to be a severe head banger." I note that for a couple
8 of reasons. One is because it's potentially consistent with
9 Dr. Pincus' and Dr. Evans' theory about there may be organic
10 brain damage with James. But also it talks about his -- or
11 it speaks to his emotional disturbance. Head banging is
12 something that you usually see in very disturbed children.
13 I mean, head banging is a pretty serious
14 psychological (break in audio) so --

15 Q All right. And this --

16 A And this is in 1997 she's telling the therapist this,
17 that he used to be a head banger, so it was certainly before
18 then. At the bottom of that page there's another work
19 reference to the network evaluation that -- this is Earl --
20 "His biggest fault is his inability to communicate. He
21 turns off the listener." It was just more of the same.
22 There are many, many references to his inability to
23 communicate, and that's consistent with what his wife says
24 about him and what his sons have said about him. On the
25 next page is another reference to mother telling therapist,

1 "I'm furious at Earl when I think of what he's done to the
2 kids." Again, it's portraying him as somebody that's been
3 detrimental or harmful to their children.

4 Q On your interviews it says, "Client's childhood"
5 directly below the bright line, "Client's 15 birthday."

6 A Yes.

7 Q Is this not also consistent in the independent
8 recollections of both Chip and Jimmy when you did the
9 interviews a couple of weeks ago about having to pass
10 through the living room to get from the --

11 A Yeah.

12 Q Would you tell us a little bit about that and how that
13 connects to this 1996?

14 A Well, they basically said that to get anywhere in the
15 house, to get to the lower level where they had some play
16 area or to get to their bedrooms they had to pass by the
17 living room and that's where Earl sat most of the time when
18 he was at home. They felt like -- they literally say it
19 felt like they were walking on eggshells, because if they
20 disturbed him he was likely to yell at them or start in, you
21 know, psychologically or physically abusing them. But this
22 is consistent -- I mean, this is from 1988 -- I'm sorry,
23 1996, the mother told the therapist this.

24 Q So how does that inform your decisions, this walking on
25 eggshells at this earlier date?

1 A Well, first of all it's consistent with corroborative
2 of what these men told me when I interviewed them. But
3 beyond that it says that there's something awfully
4 dysfunctional going on with this family when you have kids
5 afraid to walk through the living room because dad is in the
6 living room. That's how I took it when they said it and
7 that's how I took it when I read this.

8 Q And did you get an impression from the interviews and
9 the documents as to exactly what they might have been afraid
10 of?

11 A From what they said they were afraid that they would
12 set him off. In any one of the documents, in fact, that's
13 what we've just gone through, talks about how his abuse of
14 them was unpredictable, it could come from something that
15 they did or said or nothing at all. I saw it as
16 significant.

17 Q Okay.

18 A The next area of significance in these that I referred
19 to was on page 49, it says, "Jim returned from Germany."

20 Q Can you give me a date?

21 A It's 6/19/92. It's on page 49 of the document.

22 Q It's on page 42? 49?

23 A 49, yes. Should be the next page.

24 Q Okay.

25 A I think you just passed by it. If you can scroll up a

1 little bit. There it is. This is consistent with what
2 James told me himself. He spent a year on a foreign
3 exchange program in Germany, and that in Germany he was old
4 enough to drink and he was allowed to drink, he could drink
5 legally in bars, in fact. When he came home that became a
6 source of friction with his parents. He felt that he had
7 learned to drink responsibly in Germany and his parents said
8 he couldn't drink at all at home and he felt that his
9 parents were being overly restrictive. But if you go to the
10 next page, page 50, you'll see that it says, "Client's 19th
11 birthday his arrest records indicate that he started around
12 1992 he'd been treated with ADD and manic depressive illness
13 and Depakote and Trazodone. And then it starts talking
14 about crack cocaine, cocaine, weed, acid, his abuse of
15 Ritalin. He reports he was high on Ritalin at the time of
16 the crime for which he was accused. So this is more
17 indication, I think, that this substance abuse problem
18 seemed to have begun when he went to Germany and came back.
19 He begins drinking in Germany, then he's back, and by his
20 19th birthday he's taking two medications; Depakote, which
21 is a mood stabilizer, and Trazodone, which is used in the
22 treatment of a variety of serious mental illnesses. But he
23 says he had done most street drugs except speed, but he
24 didn't need to use speed, he was snorting Ritalin. And he
25 was high on Ritalin, he says, at the time of the homicides.

1 To me that's just more evidence that he was a serious
2 substance abuser as well as mentally ill. And the next
3 page, 51, there is a discussion in a number of these
4 documents of his being suicidal. He had a gambling
5 addiction, his impulsivities and argumentative as a child,
6 very distractable, accepts no responsibility. This is all
7 consistent with what I saw of him in meeting with him and
8 also reviewing the records, discussing it with his brother.
9 It's more of the same. On the next page, page 52, there is
10 discussions from his psychiatrist to his pediatrician in a
11 letter, and basically talking about some of the problems
12 that he had. As he would sit there he would have
13 spontaneous firing of his nervous system occasionally, which
14 would be evidenced by muscle twitch, muscle group or a
15 finger. He describes himself as being able to think about
16 1,000 things at once. These are pieces of evidence of his
17 bipolar disorder. And then on the next page, page 53, date
18 10/05/94, this is a letter to an official at Georgia Tech.
19 from Dr. McCoy about James' lack of response to Ritalin as
20 he grew older. He became more harassable, more impulsive,
21 more and more trouble with fitting in, several bouts of
22 behavior, he showed poor judgment with dangerous
23 consequences. This is what I was talking about this
24 morning. Those are all symptoms of Bipolar Disorder. But
25 at this point we don't know, but he may well be abusing

1 Ritalin. I don't know that he ever got any therapeutic
2 benefit from it, but he certainly got a high from it by
3 using it for purposes other than for which he was
4 prescribed. In the next note there it's the same. Katie
5 Landers from Georgia Tech., she writes that James has been
6 exhibiting poor behavior such as bouncing checks and
7 wrecking his car. Again, consistent with a manic episode of
8 Bipolar Disorder. And then finally on the next page, page
9 54, this is Dr. McKee, the psychiatrist, in his notes he
10 says, "James is probably a long bipolar." It seems to be an
11 acknowledgment that he's had bipolar for a long time. He
12 says, "When you have him sit in front of you and try to be
13 normal he would twitch as a result. He had racing thoughts,
14 cold hands (inaudible audio) panic attacks, anxiety," and
15 other things like that. "It can be kind of a manic picture
16 or it can be a kid who wants to do what he darn well wants
17 to do." In my opinion it was both, that he was suffering
18 from Bipolar Disorder, he lacked impulse control. He
19 basically did what he wanted to do, said what he wanted to
20 do and never really faced the consequences of his behavior
21 except the time that he went to prison.

22 Q All right. Let me interrupt you just a second. On
23 this 12/21/94 note at the bottom of page 54 --

24 A Yes.

25 Q -- I think I need a little clarification. This long

1 bipolar, it that a temporal reference to the length of time
2 that he has been bipolar?

3 A That's how I read it. It's not a term of art if that's
4 what you mean. I took it to mean that he probably had
5 bipolar for a long time. I say that because the other
6 records indicate in his own history, his brother's
7 accounting, would suggest that his disease is Bipolar
8 Disorder was rapid cycling. That it quicks -- very quick up
9 and downs, not slowly moving up and slowly moving down, but
10 even within a matter of minutes or hours that his cycling
11 could occur. He could go from depressed to manic, and manic
12 back to depressed.

13 Q And how does that rapid cycling affect his impulsivity
14 and poor judgment?

15 A Well, when he's in a manic state his judgment is
16 terrible. His impulse control is terrible. I mean, the
17 documents, the history, it's all replete with poor judgments
18 that he's made while in a manic state and/or under the
19 influence of drugs, maybe both. The next is on page 58.
20 This is a note from Dr. Meyer, it says, "Jim left for work,
21 took some coworkers with him, stopped and drank beer at
22 their house and then reported he fell asleep." And
23 Dr. Meyer says he thinks James is going through a manic
24 phase when this occurred, and he encouraged him to take
25 Lithium. Lithium is a naturally recurring substance that's

1 used primarily, if not exclusively, for the treatment of
2 Bipolar Disorder. So it was one more way of saying that
3 he's bipolar. On page 60 at the top, this is from mother's,
4 Terry's, first appointment with her psychiatrist. She notes
5 there is a family history of Bipolar Disorder. That's why I
6 see the likelihood that James was probably born with a
7 predisposition for the potential to develop Bipolar
8 Disorder, and based on his childhood experience and
9 adolescent experience seemed to tip the scales and result in
10 a full blown Bipolar Disorder. Similarly on page 62, I'm
11 sorry, there is a reference to his civil commitment. He was
12 involuntarily civilly committed. This was on eight --
13 August of 1995. And this -- my understanding from the
14 records is that the mother thought Jim had threatened to
15 kill himself and to kill her and she had him civilly
16 committed to the Hall Institute. And there are a number of
17 diagnoses, but the one that stands off the books is -- I see
18 at least three references to it there, is Bipolar Disorder,
19 and treatment with Tegretol and Depakote, which are both
20 commonly used to treat bipolar illness. And on page 64 in
21 the middle of the page there's a reference to family history
22 for defective disorder in mother's and father's family. So,
23 again, that's another piece of evidence to suggest that
24 there's a biological aspect to this as well. And then on
25 page 65 --

1 Q Let me interrupt you and go to the center column on the
2 bottom of page 64.

3 A Yes.

4 Q There's a reference, and it's in quotes, that the
5 degree of severity is severe attention and this is
6 psychological from the patient and the mother and father.

7 A Correct.

8 Q Is that something that shows we're approaching any kind
9 of tipping point in the management of anger and this is an
10 involuntary commit process?

11 A I think so, I mean, if he's threatening to kill his
12 mother. He denied that. But I don't know his mother would
13 have reason to say that unless she was fearful, because she
14 didn't seem to be the type of person who would easily admit
15 such things.

16 Q All right. So here we're just a little over two years
17 before the actual murders --

18 A Right.

19 Q -- and we have got this admission. And as far as your
20 legal experience and knowledge as a lawyer, you know that
21 provocation is an instrumental component of the difference
22 between murder and manslaughter; is that correct?

23 A In some jurisdictions, yes.

24 Q Okay. In these cases of intra-family dysfunction,
25 homicides and familial dysfunctions, is there such a thing

1 as remote provocation or cooldown periods?

2 A No. At least in my experience it tends to work the
3 other way, is that family members are hurt, they hold
4 grudges, they stew, they become obsessed with negative
5 things that have happened in the family. I can't say that
6 that's necessarily what happened here but it could be.

7 Q All right.

8 A On page 65 this is -- again, I think this is from the
9 Hall Institute notes. It says, "Manic rapid cycler,
10 previously unresponsive to Lithium." That's another
11 indication that he suffered from the rapid cycling form of
12 Bipolar Disorder with very quick changes in mood. And at
13 the bottom of that page there's a reference to another note
14 along the same lines, it says, "One previous suicide
15 attempt." And then below that, this is on the next page,
16 66, diagnosis on 8/28/1995, Bipolar Disorder manic. Longing
17 for sleep, pressured sleep, impulsive, self destructive
18 behavior, flight of ideas. Those are all the criteria that
19 I used, and apparently the person who made this diagnosis
20 used, to diagnose Mr. Robertson with Bipolar Disorder.

21 Q Okay. And in the state of this manic feature of rapid
22 cycling, is the impulsivity increased or decreased?

23 A It's hard to say. In my experience it's more likely to
24 be increased but I don't know. I'm not sure that there's
25 any empirical basis in the field to say that. Again, I can

1 only say that based on my experience. I've seen a lot of
2 bipolar individuals, and their -- as noted there, self
3 destructive behavior, impulsivity. I think there is a
4 tendency for it to increase, but again, I can't say that
5 here, I don't know for sure.

6 Q But to the extent he's in a manic state, would his
7 discretion and control, not just impulse control, the
8 thought control, become more pronounced?

9 A Yeah. For sure, yeah. If that's your question I don't
10 think there's any doubt about that. I thought you were
11 asking -- comparing rapid cyclers to slower cyclers. But
12 certainly when he's in a manic state that's when the
13 judgment is likely to be poor as self-control is likely to
14 be poor, everything is likely to slide. I find it
15 interesting it is reported in that same document, it's
16 referenced on page 66, mental status exam, "Thought content
17 notable or prominent things of persecution from his family,
18 especially his mother, with severe anger at her." He was
19 extremely angry according to him about the Hall Institute
20 episode where he was civilly -- he felt that his mother had
21 had him committed when he didn't pose any danger and didn't
22 need to be in the hospital.

23 Q Is that a sign of poor judgment in itself?

24 A I think it is. Because from what I can read from the
25 Hall records, Hall Institute records he did need to be

1 there. He was -- he needed to be stabilized and that's what
2 they tried to accomplish with various medications with him.
3 When somebody is threatening to kill himself or herself or
4 threatening to kill someone else and they're in a manic
5 state, that person needs to be hospitalized in my opinion.

6 Q All right, sir. Thank you.

7 A I think that the mother did the right thing, but he
8 felt that it was an awful thing that she did to him. On
9 page 70 there is Dr. McKeekin's (phonetically) entry, it's
10 in the middle of the page, he says James was diagnosed with
11 a history of ADD with bipolar and a question mark. And then
12 he says, "Father ADD with depression, mother OCD with
13 depression, the younger brother ADD. Family had tolerated
14 sociopathic behavior for many years, they attempted to set
15 limits." They did attempt to set limits, but it was when
16 these kids were no longer kids, when they were young men, or
17 late teens or early 20's. On page 73 there is -- there's
18 this part of the mother's medical record, her
19 hospitalization. She was taking 11 medications, one of
20 which was Aspirin, so I guess I would say one less, but she
21 was taking two -- no, four or five psychiatric medications
22 at the time. That's a heavy dose of psychotropic
23 medications for anybody. It indicates that she was very
24 severely mentally ill. And then on page 74, I didn't count
25 these personally, but it states that the mother threatened

1 to kill herself in therapy sessions 25 times. Again, that
2 refers that the mother was severely mentally ill. On page
3 75 this is psychiatric notes of the mother, mother has OCD
4 behaviors. She says, "Earl is a bully," which I found
5 significant with everything else I'd heard about Earl and
6 his interaction with his family.

7 Q And this reference to the left about hallucinations in
8 the left hand column of page 75, in '96, this is a year or
9 so before the murders. Can you explain or interpret the
10 five times, the reference?

11 A Well, apparently she reported visual hallucinations on
12 five occasions. I looked at that and I didn't really know
13 what to make of it, because visual hallucinations are
14 extremely rare. Visual hallucinations are almost
15 exclusively in patients who are intoxicated, who have come
16 into contact with some toxic substance, or who have some
17 kind of brain injury, brain trauma, and I really don't know
18 what to make of it. The other time someone might believe
19 that there's hallucinating visually is if they're in some
20 kind of dissociative state, like post-traumatic stress
21 disorder, but that's not what she was diagnosed with so I
22 don't really know what to make of that. But I seriously
23 doubt that she was experiencing visual hallucinations five
24 times, or any times whatsoever. Did you want me to go on?

25 Q Yeah. As soon as I can get out of this page.

1 A Oh, okay. Sorry. There's a large note at the bottom
2 of the page, March of 1996. This is a quote of Terry, she
3 says, "Earl and I had horrible fights before; punching,
4 shoving, clawing. Earl mostly tries to keep me off of him
5 instead of hurting me." I found that significant because it
6 helps document the dysfunction in the family, but both Chip
7 and James told me that they never witnessed any significant
8 physical altercations between their parents. So if they are
9 correct and this is correct then this was done behind their
10 backs or while they weren't around. But it adds fuel to the
11 fire of family dynamics and family dysfunction. At the
12 bottom of page 81 there's a note that continues to the next
13 page, "Jim was arrested, he was charged with larceny,
14 forgery," et cetera. At the bottom of that page it says --
15 bottom of page 82, "He pled guilty, was sentenced to
16 judge -- by Judge Hayes to one to six years as a youthful
17 offender, plus 15 years suspended, five years of probation.
18 This is the instance in which James says that he was
19 encouraged by his parents to take the fall and to protect
20 his brother, not to identify his brother. He says that the
21 police and the prosecutors offered him a deal if he would
22 basically rat on the other young men, the boys who were with
23 him, and he refused to do it, and his parents encouraged
24 him. Because they said basically his life, James' life, was
25 already ruined and Chip still had a chance, and if he was

1 dragged into this that his life, too, would suffer. In any
2 event, James did pled guilty to a crime that he could have
3 gotten one to six years. It turns out he got 13 months in
4 prison and was 15 years suspended and five years probation.

5 Q And when he got released, when he was released, do you
6 know where he went to live?

7 A He went back home.

8 Q And what does that indicate as far as his adaptive
9 functioning was concerned even at this age?

10 A Well, it's like I said earlier, both of these young men
11 were so dependent on their parents they felt like they had
12 nowhere to go. And especially James, James couldn't even
13 manage his money. At one point around this time he had to
14 hand over his paycheck to his parents and they would deal
15 with it and give him money as they saw fit. It says that it
16 his adaptive functioning was still pretty low and being in
17 prison didn't help that any.

18 Q Well, is the adaptive functioning in this case a
19 consequence of parenting that results in dependency instead
20 of independence?

21 A Yes, I believe so. Because although the parents were
22 abusive, especially the father, Earl, they always came to
23 the rescue, always bailed him out. James bounced checks,
24 they fixed that. He wrecked the car, they fixed that. He
25 got in trouble at school, they fixed that. They never

1 really let their kids face any consequences until they
2 really had no choice and that was when James was charged
3 with this crime, and it was a crime that his brother was
4 involved in and could equally have been charged with. Their
5 way of dealing with that was to say, well, somebody has got
6 to do time and that it'd better be James, not Chip, because
7 Chip may still be salvageable. This's my impression.

8 Q All right. When assessing interfamilial dysfunction
9 there are several, if not many, different components, not
10 just physical or psychological abuse, but parenting
11 techniques --

12 A Yes, of course.

13 Q Are there other categories that you look to; physical
14 abuse, psychological abuse, the parenting techniques, that
15 enabled dependence or independence? Are there others?

16 A Well, this -- what I referred to this morning,
17 double-bonding or double-messaging; "You're no good. You
18 don't do anything right. Look what you've done now." And
19 then, "What am I going to do? I'm going to bail you out."
20 To me that's a double message that creates problems for kids
21 and it also enhances the dysfunction in the family.

22 Q And is that even more complicated in this case because
23 of the biology of the brain?

24 A I think it is, yeah. Because all of the parents are
25 suffering from an affective disorder of some sort. Mom and

1 James are bipolar, Earl is -- he may have been bipolar, too,
2 for all we know. He was depressed and was diagnosed with
3 and treated for depression.

4 Q All right, sir. Thank you.

5 A On page 86 this is -- it starts on page 85. This is a
6 letter that Dr. McMeekin (phonetically) wrote to a doctor at
7 the correctional institute where Jimmy was doing his time,
8 James, and I thought this was critical. On page 86 it
9 refers to theis doctor, the psychiatrist, having said, "the
10 dynamics of the family are that it was quite dysfunctional.
11 As you can imagine, though, he has fallen down with
12 intelligence. The mother was highly guilt-ridden and the
13 children were able to manipulate her with ease. They were
14 able to do as they wanted whenever they wanted, and as you
15 can imagine that created lots of problems. It was somewhat
16 difficult to know with Mr. Robertson where pathology began
17 and character pathology ended. At any rate, good luck with
18 him." I found that significant for a couple reasons. One,
19 it's a mental health professional who's been treating the
20 family says they're quite dysfunctional and the mother is
21 highly guilt ridden, and that James and his brother were
22 easily able to manipulate their parents. It's what I would
23 have expected to find and so I wasn't surprised by it, but I
24 flagged it because I thought it was significant. It
25 corroborates my findings and it corroborates what I know

1 about this family.

2 Q Dr. Ewing, on the reference to manipulating the mother,
3 does that fit equally for the father, Earl?

4 A Less so I would say in my opinion. I think that the
5 father put up a hard facade, and his way of reacting was to
6 yell and scream and threaten and punch or slam, whereas the
7 mother was more likely to try to figure out some way to
8 placate everyone, including the sons, along with her
9 husband. So that's my reading on it. This seems consistent
10 with that to me. The mother -- he's talking about the
11 mother and they were able to manipulate her with ease. I
12 don't think they could manipulate Earl so easily, but that's
13 just my opinion.

14 Q Yes, sir.

15 A On page 96 there is a reference with regard to Terry,
16 that she's overwhelmed with family conflict, she's dejected,
17 hopeless about her sons. She's taking them to AA meetings
18 but still having counseling problems. I wasn't aware of the
19 AA meetings so I don't know what that means. But
20 overwhelmed with family conflict, yeah, that's totally
21 consistent with the picture that I see throughout these
22 documents. And then there are a couple of references in
23 these documents that are at or around the time of the
24 homicides. The first on page 100, this is James' birthday.
25 Again, we see on the left side a huge list of the mother's

1 medications. James described to me his family home was like
2 a pharmacy, that there were pills everywhere, all kinds of
3 pills, and that the mother was actively drug shopping or
4 doctor shopping with Chip to get more Ritalin, which he and
5 Jimmy were both abusing. But this in the second column
6 there, this is the father, Earl, thinks Jimmy is
7 deteriorating, questions how well spouse is doing. Fears
8 she will overcommit with the holidays. That's 18 days
9 before the homicide the father is saying that Jimmy is
10 deteriorating. Then on the next page, this is 101, again,
11 it is -- this is -- I believe this is the father.

12 Q Excuse me just a minute. You referenced drugs on page
13 100 --

14 A Yes.

15 Q -- in the left hand column. Is this on the next page a
16 continuation of the drug that the mother was taking?

17 A Yes. And the last three are psychotropic medications,
18 the other ones are not. On page 101, this is four days
19 before the homicides quote, "Jimmy kicked out of apartment,
20 doesn't want a fellow living there so he may have to come
21 home." This is in notes from Earl to his therapist. I'm
22 sorry, the therapist's notes about Earl. This is four days
23 before the homicides. Then on the next page this is, again,
24 from the same doctor. This is Earl saying son kicked out of
25 apartment, doesn't want a fellow living there so he may have

1 to come home. This creates anger, fear and resentment. It
2 doesn't say anger, fear or resentment from -- or to whom. I
3 assume that Earl is talking about self, that he's afraid of
4 what's going to happen and he resents that his son is going
5 to have to come back home. There are a couple more
6 references in here that I flagged. On page 104, this is
7 after the crimes evaluation conducted by (inaudible audio)
8 who is a neuropsychologist. He used the Wechsler Adult
9 Intelligence Scale Three, which is sort of the gold standard
10 for intelligence testing, and James scored a total IQ of
11 112. So from the time years earlier, maybe ten years
12 earlier or more when he was in 134 in intelligence, now he's
13 dropped down to 112. I don't know what that means, but it
14 seems to me it could well mean that the illness has taken
15 its toll on him even intellectually, somebody who tested in
16 middle school at 134 now is testing at 112, but it could
17 also mean a function of the tests. The WAIS is a much
18 better test than the one he took at age ten or 11. On page
19 106, this is again notes from Tonie Cascio, one of the
20 doctors who evaluated Mr. Robertson after the killings, she
21 says, "Terry would hit Jimmy and pull his hair. Earl's
22 abuse was much more severe, it began in early childhood.
23 Jimmy resorted -- reported having a habit of positioning
24 himself on his hands and his knees banging his head against
25 the headboard rocking himself to sleep and Earl would come

1 in with a belt and try to stop him from making noise." She
2 says, "This type of violence is especially damaging because
3 it is unpredictable and unexpected." And I think the final
4 reference I have is on page 107, and I think this is also
5 from Dr. Cascio, she says in the middle of the page,
6 "Emotional abuse is the most troubling theme in Jimmy's
7 family life. Emotional abuse results in feelings of anger,
8 helplessness and despair in children that is often acted out
9 in criminal behavior. Jimmy reported that he never felt
10 loved by his father and believes his mother only loved him
11 because she had to." From all I can glean from all of this
12 material, that's true.

13 Q All right, sir.

14 MR. EHLIES: Judge, would it be time for a short break?
15 We're about to wind up here.

16 THE COURT: Yes, sir. Within the next five or six
17 minutes?

18 MR. EHLIES: No, sir, a summary sort of thing. We're
19 finished with the documentary evidence. I'm sorry.

20 THE COURT: Okay. You want to break now?

21 MR. EHLIES: If you don't mind.

22 THE COURT: I don't mind at all, we were going to break
23 at 3:30. Roughly about 90 minutes we'll take a break. All
24 right. Let's take our afternoon break, this would be a 15
25 or 16 minute break, everybody refresh yourselves. Please

1 don't even turn off the light switch.

2 (A recess was taken.)

3 FURTHER DIRECT EXAMINATION

4 BY MR. EHLIES:

5 Q Thank you, Dr. Ewing. We're back together here now. I
6 want to bring together the evidence as you've identified it
7 that was -- some of the evidence that is, in forming your
8 five different opinions that you gave us at the beginning of
9 your testimony. And I want you to give us some sort of a
10 summary yourself about the evidence and how that informs
11 this family and the defendant personally and led ultimately
12 to this problem in the murders. Can you do that for us,
13 please?

14 A I will try.

15 Q Yes, sir. Okay. You can begin.

16 A Oh. Well, I think that repeating the opinions, I think
17 it's clear that --

18 Q I'm sorry, keep those thoughts.

19 MR. EHLIES: We've got this phone call from SCDC.

20 (Break in proceedings.)

21 BY MR. EHLIES:

22 Q Dr. Ewing, are you ready?

23 A Yes.

24 Q Okay. Let me go back for the court reporter and
25 restate what I'm asking you to do. In the beginning of your

1 testimony you gave us five bullet point opinions that you
2 derived from the case histories here in the materials, some
3 of which you have shared with us in the summaries, and then
4 looking at those materials in support of your opinions I'm
5 now asking you to tell us how this severely dysfunctional
6 family influences a dysfunction member, Jimmy Robertson,
7 resulting in the tragedy of the murder of his parents.

8 A Well, I think there were a lot of factors. To begin
9 with there is the family history of Bipolar Disorder, which
10 seems to have been passed along to James as we talked about
11 his childhood and adolescence, adulthood. He was physically
12 abused up until the age of about 15 or thereabouts. He was
13 struck almost once a week, maybe more on some occasions. He
14 was the subject of a lot of verbal or psychological abuse
15 from both of his parents. He became full blown bipolar, and
16 he was also unfortunately what we call a self medicator. He
17 didn't want to take the medications as they were prescribed.
18 He used some illicit drugs. He used the prescribed drugs in
19 a way that they were not prescribed for him, he was abusing
20 those drugs. It was an awful lot of I would say threatening
21 or -- yeah, threatening is probably the word, from his
22 father. Even when his father wasn't abusive you have to
23 walk on eggshells to be around the guy. I think all of
24 those factors created a kind of hostility and anger in
25 James, and probably -- well, I don't know. One of the

1 things that seems to me was a major contributory factor to
2 the killings was the way his mother had handled his civil
3 commitment. He felt very angry about that. It seems like
4 before that he wasn't all of that angry with his mother, his
5 hostility was towards his father. I think ultimately the
6 reason this death occurred -- these deaths occurred was sort
7 of a perfect storm of events. He had gotten out of prison,
8 he was having a hard time adapting. He didn't want to be at
9 home but he really had no place else to go. He was
10 struggling with his mental illness, using multiple illicit
11 drugs and snorting legal drugs, but that's the way it's --
12 in an illegal manner. And then along comes Ms. Moon, who we
13 haven't talked about, and she suggests to him that -- she's
14 heard him talk about killing his parents and maybe this
15 would be the most opportune time to do it. At that time he
16 was also extremely angry with his father, but his mother as
17 well, because they had made it clear it was Thanksgiving and
18 his brother, Chip, would not be allowed to come home for
19 Thanksgiving. That relationship that James and Chip had is
20 an interesting one the way I see it. They had each
21 protected each other, had each other's back throughout the
22 years, both in school, not in school, at home and away from
23 home. They have all of these factors that lead to an
24 irrational -- well, more than one irrational act, but
25 certainly two irrational homicidal acts, and no -- from what

1 I can tell there's no rational basis for which to kill your
2 parents in this situation. I don't know if that's what
3 you're looking for. That's sort a summation from me of why
4 this occurred.

5 Q All right, sir. And in what way would the rapid
6 cycling of the bipolar impact the global tensions that
7 you've mentioned, which are the jail sentence that he was
8 sort of the fall guy, and then you mentioned a little more
9 than two years before the killings the involuntary
10 commitment to the hospital, and then the other exacerbations
11 about coming, home not succeeding. You talked about as
12 resident apartment that had co-tenants, and then also the
13 Thanksgiving day prohibition of talking to Chip on the phone
14 and he's not coming home, not going to have him in the
15 house. If those are the circumstances, in fact, are they
16 going to impact his ability to reason and his control of his
17 impulses and that sort of thing?

18 A I think so, yes. This rapid cycling is reflected in
19 the way he describes himself on the night of the killing is
20 that he went back and forth, sometimes he was up, sometimes
21 he was down. But I think what happened then especially
22 significant is that he had someone saying to him, "Well,
23 you've been talking about this for a long time, now is an
24 opportune time to do this." It's obviously a gross error of
25 judgment, a gross inability to control your impulses. I

1 don't see it in any way as an excuse legal or otherwise, I
2 just see it as an explanation of why he did these
3 unspeakable acts against his parents.

4 MR. EHLIES: Thank you. That's all, Judge.

5 THE COURT: Okay. Counsel?

6 MR. SALTER: Yes, sir, Your Honor.

7 CROSS EXAMINATION

8 BY MR. SALTER:

9 Q Doctor, can you hear my questions?

10 A I can hear you, Your Honor.

11 THE COURT: It the State's lawyer.

12 Q My name is Ed Salter. Can you hear me, sir?

13 A Not perfectly but a little bit, yes.

14 Q Is this a little better?

15 A Little bit.

16 Q I'll try to speak loudly then. Did you prepare a
17 report?

18 A No, I didn't.

19 Q Were you asked not to?

20 A No, I wasn't asked to. I generally do not prepare a
21 report for an attorney who didn't ask for it, that's for two
22 reasons. One is obviously for the attorney/client, and also
23 it's (inaudible audio) it is very time consuming (inaudible
24 audio.)

25 Q Well, as an attorney you also understand that it's a

1 strategic advantage not to have a report, isn't it?

2 A Yes, I believe it is.

3 Q You keep the opposing party in the dark as to your
4 findings.

5 A Well, I don't know about that. I don't know what the
6 attorneys share with other attorneys. I agree with you that
7 it is a strategic advantage, and over the course of doing
8 this for 40 years I've had -- probably had more people not
9 ask for a report than ask for one.

10 Q Do you have any notes?

11 A Yes, I do.

12 Q Can I see --

13 A It's my handwritten notes from my interview with Mr.
14 Robertson, with his brother, and my second interview with
15 Mr. Robertson.

16 Q All right. Is there anyway I can see a copy of those
17 notes?

18 MR. SALTER: Mr. Ehliès, do you have a copy?

19 MR. EHLIES: I do not.

20 MR. SALTER: Okay.

21 A I don't know, there's probably 50, 60 or 70 pages here.

22 MR. EHLIES: Can I intervene on that question? I don't
23 have a copy of the notes. He has the thumb drive which
24 constitute the summaries from the documents that are in
25 evidence pretty much.

1 MR. SALTER: So the Judge has that.

2 MR. EHLIES: And you have a copy of that and there's
3 the one that's in evidence.

4 Q Dr. Ewing, in what year were you first permitted to
5 render an opinion on Battered Child Syndrome?

6 A What year?

7 Q Yes, sir.

8 A Oh, gee, I would have to think about that. Probably in
9 the mid-80's, I think, in a criminal matter. In civil
10 matters like child abuse cases in court, family court, was
11 before that, it was probably late 70's or early 80's.

12 Q So the mid-80's before you did so in a criminal case,
13 correct?

14 A Yes, sir.

15 Q All right, sir. Do you remember what jurisdiction that
16 was in?

17 A Do I know what?

18 Q What jurisdiction.

19 A I'm sorry, I can't hear the question.

20 Q Do you know the jurisdiction in which you were able to
21 testify to that in the mid 1980's?

22 A I would guess it would be New York. I testified in 15
23 states, I couldn't really say off the top of my head, but I
24 am guessing New York because I lived in New York for --

25 Q Do you remember the name of the case?

1 A Pardon me?

2 Q Do you remember the name of the case?

3 A No, I don't.

4 Q Okay. You're aware that some courts have prohibited

5 opinion evidence on Battered Child Syndrome, correct?

6 A I don't know that.

7 Q You don't know that.

8 A I know it from the argument that you raised earlier by

9 listening, so I gather that there is some dispute about it

10 in South Carolina. I didn't know it until you raised it.

11 Q You've reviewed the trial transcript in this case,

12 correct?

13 A I believe portions of it. I don't think I was ever

14 provided with the entire transcript, but portions of it,

15 yes.

16 Q All right. But you reviewed the evidence presented by

17 the defense in mitigation of punishment.

18 A Yes.

19 Q Okay. So you would review the testimony of Tonie

20 Cascio.

21 A I believe so, yes.

22 Q Dr. Pincus.

23 A Yes.

24 Q Dr. James Evans.

25 A I don't remember that name, but if I reviewed the

- 1 others I probably reviewed that, too.
- 2 Q Well, Dr. Evans was a neuropsychologist.
- 3 A Dr. Evans or Adams?
- 4 Q Evans.
- 5 A Oh, I thought you said Adams. Evans, yes, I reviewed
- 6 his work.
- 7 Q Dr. Alex Morton, Pharmacologist.
- 8 A Alex Morton?
- 9 Q Yes.
- 10 A I don't remember that.
- 11 Q Okay. Did you review the testimony of the treating
- 12 therapist, Skip Meyer?
- 13 A I think so, yes.
- 14 Q Okay. Now, Dr. Cascio conducted a social history
- 15 assessment of Mr. Robertson?
- 16 A It's my understanding, yes.
- 17 Q And she testified she looked at the medical records and
- 18 psych records of the family, right?
- 19 A Right.
- 20 Q And she also looked at Earl Robertson's work documents,
- 21 and some of Mr. Robertson's incarceration documents,
- 22 correct?
- 23 A I think that's true, yes.
- 24 Q And she also reviewed Terry Robertson's notebooks and
- 25 she conducted a number of interviews, correct?

- 1 A I'm sorry, I couldn't hear your question.
- 2 Q She reviewed Terry Robertson's notebooks and conducted
- 3 a number of interviews?
- 4 A Yes, that's true.
- 5 Q And I take it you agree with her assessment that the
- 6 Robertsons had a very chaotic home.
- 7 A Yes.
- 8 Q There was physical and emotional abuse.
- 9 A Yes.
- 10 Q And definitely mental illness throughout the family.
- 11 A Correct.
- 12 Q Relying on Mr. Meyer's notes, he testified that he
- 13 found a variety of indicators suggesting that Terry
- 14 Robertson had been sexually abused as a child. You would
- 15 agree with that, correct?
- 16 A Well, I would agree that she said that, I don't know if
- 17 it happened.
- 18 Q Right. But there's some evidence suggesting that
- 19 perhaps it did happen.
- 20 A Yes.
- 21 Q Okay. She went through several indicators and
- 22 explained why she -- they suggested the abuse had happened,
- 23 correct?
- 24 A I'm sorry, I couldn't hear your question.
- 25 Q She went through several indicators, including

1 statements on September 19th of '96 by Terry Robertson that
2 "It makes me mad and sad to think what daddy did." Then she
3 made another statement on September 24, 1996, "Why didn't
4 she protect me?" Referring to her own mother. And on
5 September 18th of 1997 "She fears what mom knew about her
6 childhood." And I believe Ms. Cascio indicated that those
7 indicators suggested to her that there was sexual abuse of
8 Terry Robertson as a child, correct?

9 A Yeah. And I would agree they could, but not
10 necessarily.

11 Q Dr. Cascio also discussed Earl Robertson's work
12 history, correct?

13 A Yes.

14 Q And I believe she testified similar to you that
15 although he rose quickly at first he started having
16 communication problems that kept him from doing quite well
17 on his job as he could have, correct?

18 A Yes.

19 Q She also testified that the work records show that Earl
20 had a domineering nature and was very confrontational.

21 A Yes, I saw that.

22 Q All right. You agree with that assessment, do you not?

23 A Well, I agree that his employer and his supervisors
24 thought that and thought it's serious enough to write it
25 down.

- 1 Q They were in his records, correct?
- 2 A Pardon me?
- 3 Q That information was in his records, correct?
- 4 A Yes, records, employment records.
- 5 Q Did the work records that you were provided include a
- 6 positive review of him on March 19, 1993?
- 7 A I don't know about the date. He did have some positive
- 8 reviews, they weren't all negative.
- 9 Q All right. Another one on February 24, 1996, another
- 10 positive review?
- 11 A I don't know any of them by date.
- 12 Q Okay. Did you see any information in his work records
- 13 stating that "Over the last year you have improved
- 14 tremendously in your ability to work with all groups?"
- 15 A If I did I don't recall it.
- 16 Q Okay. Based on the information that you have reviewed,
- 17 would you agree with Dr. Cascio's finding that there
- 18 appeared to be poor attachment between Mr. Robertson and his
- 19 parents at a very young age?
- 20 A An attachment between his parents?
- 21 Q No, an attachment between him and his parents.
- 22 A Well, there was an unhealthy attachment, yes, I would
- 23 say.
- 24 Q Would you agree that children who are unable to form
- 25 attachments have a lot of problems later in life?

1 A Yes. There's -- some people call it Reactive
2 Attachment Disorder. I don't see evidence of that in this
3 case.

4 Q You do not?

5 A I don't.

6 Q So the problems with attachments weren't that severe?

7 A Well, these boys -- I keep calling them boys -- these
8 men shared in themes. They had an unhealthy attachment.
9 They had a very strong attachment to their parents, even to
10 the point of being willing to defend them and defend their
11 abuse of them, but it was not a healthy attachment.

12 Q All right. Would you agree with Dr. Cascio's
13 assessment that children who have difficulty forming
14 relationships tend to be angry and aggressive and have
15 problems with self-control?

16 A Sometimes, yes.

17 Q And that seemed to be present in this case, did it not?

18 A What seemed to be present?

19 Q Problems with anger and self-control, particularly with
20 Jimmy Robertson.

21 A Yes.

22 Q Would you agree that it's a very strong association
23 between maternal depression and poor attachment in children?

24 A Yes.

25 Q Okay. Now, in conducting your interviews with Mr.

1 Robertson I believe you said there was a six hour interview
2 in person?

3 A Yes.

4 Q And then another two hour remote interview?

5 A Yes.

6 Q This is obviously conducted after -- both interviews
7 were conducted after he had been sentenced to death,
8 correct?

9 A Yes.

10 Q Okay. And you understood the purpose of your
11 interviews, correct?

12 A Yes.

13 Q The same is true to Chip, he understood the purpose of
14 his interviews with him, did he not?

15 A I couldn't hear you, I'm sorry.

16 Q I'm sorry. Chip Robertson also understood the purpose
17 of your interviews with him, did he not?

18 A I believe he did, yes.

19 Q All right. Did the evidence you reviewed show that
20 Chip and James Robertson were close?

21 A Yes. I believe they were close.

22 Q Were you aware that James Robertson testified at his
23 last PCR hearing that between the time of the murders and
24 the time of that PCR hearing that Chip had sent him 45 and
25 \$50,000?

1 A Yes. Well, I don't know the exact amount, but I know
2 that his brother supports him to this day financially.

3 Q So he's continuing to support him now.

4 A Yes.

5 Q Now, I believe your testimony was consistent with that
6 of the experts at trial that Terry Robertson struggled with
7 depression for years?

8 A Yes.

9 Q And you agreed with the testimony by Dr. Cascio that
10 there was psychological abuse in the family by both parents?

11 A Yes.

12 Q This included degradation, name calling?

13 A Yes.

14 Q And I believe you testified earlier that Mr.
15 Robertson's mother once told him that she wished he'd never
16 been born, correct?

17 A Yes.

18 Q But didn't she apologize immediately after that?

19 A I believe she did.

20 Q All right, sir. I believe you testified earlier that
21 Mr. Robertson and Chip never once witnessed the domestic
22 abuse between Terry and Earl Robertson; is that correct?

23 A Yes.

24 Q Okay. Now, with respect to physical abuse of Mr.
25 Robertson or Chip, how many specific instances are you aware

1 of?

2 A Well, it happened, according to them, basically on a
3 weekly basis if not more often. So I would imagine that the
4 number would be somewhere in the hundreds, maybe a thousand
5 times or more. 50 weeks in a year, that wouldn't be a
6 thousand, but there's a lot of instances. Hundreds.

7 Q Were there any Department of Social Services records to
8 substantiate this?

9 A No. I asked about that and no one ever called the
10 Department of Social Services. The kids were -- when they
11 were kids when they were young were afraid to call. I asked
12 them specifically about who knew that this abuse was going
13 on, and what they told me was a handful of people in the
14 neighborhood must have had some inkling, but to my knowledge
15 no one ever reported it.

16 Q All right. So there's no school records or anything
17 like that that would support the allegations of abuse.

18 A I don't see any school records that say it was abuse,
19 no.

20 Q Okay. Now, despite the allegations that Earl
21 physically abused his sons, the record reflects, and I
22 believe you've testified earlier, that Earl Robertson
23 repeatedly bailed Mr. Robertson out financially, correct?

24 A Correct.

25 Q He also allowed him to move back home when Mr.

1 Robertson was kicked out of an apartment for using drugs,
2 correct?

3 A Correct.

4 Q He previously paid for Mr. Robertson to live in that
5 apartment, correct?

6 A Yes.

7 Q And at that point he was allowed to move back home and
8 the murders occurred several days later.

9 A Correct.

10 Q Now, the records you reviewed reflected that Terry
11 Robertson had been diagnosed as having Obsessive Compulsive
12 Disorder, Bipolar Disorder and very severe depression,
13 correct?

14 A Yes.

15 Q But there's no diagnosis of Borderline Personality
16 Disorder, is there?

17 A No.

18 Q What are the essential features of Borderline
19 Personality Disorder?

20 A Well, cutting can be one. But it's usually a person
21 who has, for want of a better way to put it, a love/hate
22 relationship with those nearest her, and usually it's a her.
23 And it's somebody who wants to be the center of attention,
24 somebody who wants to be loved unquestionably yet doesn't
25 love unquestionably. One day she hates you, the next day

1 she loves you. Very shallow affect, shallow emotions. And
2 for some people with Borderline Personality Disorder, they
3 actually suffer periodic bouts of psychosis. That's why it
4 was originally was called Borderline Personality Disorder
5 because it's on the line so to speak between personality
6 disorder and psychosis.

7 Q And again, you agree with the statement by Dr. Cascio
8 that basically everyone in the family had a history of
9 mental illness.

10 A Yes.

11 Q Okay. Earl Robertson had been diagnosed as having
12 depression and ADHD?

13 A Yes.

14 Q And Mr. Robertson had been diagnosed as having Bipolar
15 Disorder and ADHD, correct?

16 A Right.

17 Q And Chip had ADHD and possibly Bipolar Disorder?

18 A Correct.

19 Q Okay. You would agree that a great deal of evidence
20 was presented at trial as to Terry Robertson's various
21 visits to the family therapist, correct?

22 A There was evidence of multiple visits to the family
23 therapist, is that what you're asking?

24 Q Yes, sir.

25 A Yes. She saw him many times, as did the other members

1 of the family.

2 Q And there was evidence presented about her suicidal
3 behavior?

4 A Yes.

5 Q The hallucinations as well?

6 A Yes.

7 Q And did the information provided to you reflect that
8 Mr. Robertson started using illegal drugs at Georgia Tech.,
9 in college?

10 A He was 19, and I think that would be correct.

11 Q And he also began engaging in like other inappropriate
12 activities such as gambling, correct?

13 A Compulsive gambling.

14 Q Compulsive gambling and running up huge debts, correct?

15 A Correct.

16 Q These were signs of mania?

17 A Yes. Not necessarily every time, but yes. That kind
18 of behavior is consistent with mania.

19 Q What else is it consistent with?

20 A What else is it consistent with?

21 Q Yes, sir.

22 A You're talking about in terms of a mental illness?

23 Q I'm just talking about why he would engage in such
24 behavior. You said it's not necessarily consistent with

25 mania, I'm trying to figure out what else it was consistent

1 with in your estimation.

2 A In my view that's consistent with Bipolar Disorder,
3 yes.

4 Q Okay. Now, the records provided to you reflect that
5 the majority of counseling sessions for both Earl Robertson
6 and Terry Robertson were in '95 through '97; is that
7 correct?

8 A I think that's correct.

9 Q This was when Mr. Robertson was between 21 and 23, and
10 Chip was between 19 and 20.

11 A Sounds about right.

12 Q This would coincide with Mr. Robertson's escalating
13 drug use as well as his rather serious criminal behavior?

14 A Yes.

15 Q Now, Dr. Pincus opined that his neurological testing
16 supported the earlier diagnosis of Bipolar Disorder.

17 A Yes.

18 Q And he opined that Mr. Robertson was possibly manic at
19 the time of the murder.

20 A Yes.

21 Q Okay. Now, did you ask Mr. Robertson any questions
22 related to his mental state at the time of the offenses?

23 A Yes.

24 Q Okay. He talked to you about those, correct?

25 A He did.

1 Q And based on his conversation with you, you related
2 upon those conversations in forming your opinions, correct?

3 A In part, yes.

4 Q Okay. Would you not agree that if you were able to do
5 that it would also be appropriate for Ms. Cascio to ask
6 similar questions of him in reaching her conclusion?

7 A Well, I don't know exactly what her task was to be
8 honest. I thought she was like a mitigation expert or
9 something.

10 Q All right. If the prior testimony is that she was
11 brought in to tie everything together in a mitigation
12 case --

13 A Okay. That sounds right.

14 Q Okay. That was her role. Again, I would ask you,
15 would that not be appropriate for her to have the same
16 information that you relied upon in reaching your
17 conclusions?

18 A Well, I don't know, offhand I don't know what she
19 relied upon. But I do know that there's a difference
20 between doing the kind of evaluation that I did and being a
21 mitigation expert. I've been a mitigation expert but that
22 wasn't my role in this case.

23 Q Now, the diagnosis of Bipolar Disorder was given to
24 Mr. Robertson when he was involuntarily committed to the
25 Hall Institute in 1995; is that correct?

1 A That's one place, yes.

2 Q Is that the first place?

3 A Pardon me?

4 Q I said is that the first place. I'm sorry.

5 A That's one place.

6 Q But is it the first.

7 A I don't know, it's one of many.

8 Q Now, you reviewed records of Mr. Robertson's present
9 incarceration?

10 A Some of them, not all of them.

11 Q Not all of them. Did you review records relating to
12 his medical records and his mental health records?

13 A Yes.

14 Q Okay. Are you aware that he's received other diagnoses
15 other than Bipolar Disorder since he's been incarcerated?

16 A I believe he has. In the notes that I read there was
17 some different diagnoses entertained.

18 Q Okay. For instance, on January 25th of 2008 he was
19 given a diagnosis -- excuse me, a diagnosis of Antisocial
20 Personality Disorder, correct?

21 A If you say so. I don't recall but I'll take your word
22 for it.

23 MR. SALTER: Well, Your Honor, the problem I'm going to
24 have, I can't pass the witness up the documents.

25 THE COURT: If you have the document we can make it

1 shareable from --

2 MR. SALTER: Let's do that. I've got a series of these
3 documents, so I'll just provide a copy to opposing counsel.

4 MR. EHLIES: We may have these documents in the
5 documents -- these are the SCDC medical records?

6 MR. SALTER: Yes.

7 MR. EHLIES: Okay. Hang on just a second.

8 (Break in proceedings.)

9 BY MR. SALTER:

10 Q And Doctor, isn't the diagnosis impression, excuse me,
11 Antisocial Personality Disorder with polysubstance
12 dependence and mood disorder?

13 A Yes. Diagnostic depression, Antisocial Personality
14 Disorder, polysubstance dependence and mood disorder. Yes.

15 MR. SALTER: Now, Mr. Ehlied, if you would go to page
16 72.

17 Q All right. Doctor, do you see an encounter number 183,
18 mental health clinic, March 4th of 2003?

19 A This looks like 12/8/10.

20 Q No, sir, I'm not talking about at the top of the page.
21 It looks like the second paragraph down, it says encounter
22 number 183.

23 A Yeah. But it can't be Mr. Robertson because they're
24 talking about --

25 Q Oh, a black male. Yes, sir.

1 A Yeah, he's not a black male.

2 MR. EHLIES: And yet it says James D. Robertson.

3 MR. SALTER: Yes, it does.

4 MR. EHLIES: So what's the reliability of these

5 documents?

6 A Is that a question to me?

7 Q No, that was Mr. Ehlied.

8 A Oh, okay. Sorry.

9 MR. SALTER: Going to page 66, Mr. Ehlied.

10 Q Encounter number 211.

11 A Yes.

12 Q That's dated July 18th of 2003?

13 A Yes.

14 Q All right. Right below that is one dated July 17, 2003

15 as well, correct?

16 A These seem to be July 17th -- there's 2003?

17 Q Yes, sir.

18 A Yes.

19 Q And the encounter number 209, which is July 17th of

20 2003, states that "Myself, clinical counselors and

21 correctional staff have not witnessed clinically significant

22 mood swings that would fulfill the diagnostic criteria for

23 Bipolar Disorder."

24 A Yes.

25 Q "Some suspicion of secondary gain must be considered,"

- 1 correct?
- 2 A Yes.
- 3 Q Now, if you could go to page one.
- 4 A Page one?
- 5 Q Yes, sir. About midway down to the page encounter
6 number 857, mental health clinic, March 9th, 2017.
- 7 A What was encounter number?
- 8 Q Encounter number 857, mental health --
- 9 A We seem to be in the 400's.
- 10 MR. EHLIES: Yeah. We don't have that on page one. We
11 are on 481.
- 12 MR. SALTER: This is what was provided to me. The date
13 I'm looking for, Mr. Ehlied, is a March 9th, 2017 encounter.
- 14 MR. EHLIES: How about giving me the encounter number.
- 15 MR. SALTER: Encounter 857.
- 16 MR. EHLIES: And this is March 9th of 2017?
- 17 MR. SALTER: Yes, sir.
- 18 MR. EHLIES: Dr. Ewing, I think we have that right here
19 in the middle.
- 20 THE WITNESS: Yes.
- 21 MR. EHLIES: Do you see that?
- 22 THE WITNESS: Yes, I do.
- 23 Q Okay. So there's a statement in that document by a
24 psychiatrist by the name of Dr. Lee, correct?
- 25 A Yes.

1 Q And Dr. Lee says, "I do believe there is more of a
2 personality disorder versus traits of a disorder to his
3 presentation and recommend psychological testing;" is that
4 correct?

5 A Yeah. I had a couple of thoughts -- I remember reading
6 that and I had a couple of thoughts about it. One is that I
7 never saw any evidence that any psychological testing was
8 ever done. And my second thought was that well before and
9 well after that the prison was prescribing for
10 Mr. Robertson, an antipsychotic medication, which would be
11 totally inappropriate for somebody who had only a
12 personality disorder.

13 Q You answered my next question, which was that there's
14 no evidence that any further testing was done, correct?

15 A I never saw any, no.

16 Q Would you agree that two competent psychiatrists can
17 reach a different conclusion as to a diagnosis of an
18 individual?

19 A Yes.

20 Q Okay. Now, I'm going to ask you about some statements
21 that Mr. Robertson made while incarcerated in corrections.
22 This would be --

23 MR. SALTER: Mr. Ehli, this would be encounter number
24 79, it's on page 93 of what I have.

25 (Break in proceedings.)

1 MR. EHLIES: Can you see it?

2 THE WITNESS: Yes, sir, I can see it.

3 Q All right, sir. With respect to this May 8th of 2001
4 encounter, doesn't it say -- isn't he quoted as having said,
5 and point to where the cursor was, that he appeared to enjoy
6 his general anger and authority?

7 A Yes, that's what it says.

8 Q That would be consistent with what you found, correct?

9 A That's consistent -- it's consistent with what I found,
10 yeah.

11 Q All right, sir.

12 A I see what you're getting at. But, yeah. I don't find
13 any inconsistency. One thing you notice that is you have
14 another diagnosis thrown into the hopper. Throughout these
15 records there are multiple diagnoses. When I review these
16 diagnoses I look at the context. I'm looking at this one
17 for example, saying nicotine dependence, Narcissistic
18 Personality Disorder with intellectual features, but if you
19 go down just a little further you'll see that he's being
20 treated with Lithium, which is the major treatment at that
21 time for people with a Bipolar Disorder. I agree with you
22 that there are diagnoses all over the place, but the one
23 thing that is consistent throughout these notes is that Mr.
24 Robertson was treated with a medication regimen appropriate
25 with somebody with Bipolar Disorder.

1 Q And the same entry then, above where you just read,
2 there's a quotation from Mr. Robertson, "I don't think
3 murder is addictive. Murder is an impulsive act. It's not
4 speeding or jaywalking. Speeding is flagrant. The
5 speedometer is right there in front of you and you chose to
6 ignore it. Jaywalking is also purposeful, you think before
7 you get ready to cross that street. Now, when it comes to
8 murder it just happens. When I did it my mind was set, no
9 one could have talked me out of it," correct?

10 A That's what it says, yes.

11 Q But you would agree that there's a great deal of
12 evidence that the murder was, in fact, planned, correct?

13 A I don't know about that. I know that there was
14 discussion of it between Robertson and Meredith Moon over
15 time, that's true.

16 Q All right, sir. Doctor, on encounter number 414,
17 mental health clinic dated March 23rd of 2009. Do you see
18 in that entry where Mr. Robertson asked that he be allowed
19 to enter another inmate's cell so he can kill the inmate?

20 A Yes.

21 Q It says, "He doesn't care, that he's tired of the
22 yelling and kicking the door all night."

23 A Yes.

24 Q That has nothing to do with Battered Child Syndrome,
25 does it?

1 A I don't think it has anything to do with -- directly
2 with Battered Child Syndrome, but it's a kind of poor
3 judgment that you would expect to see from somebody who is
4 in a manic state.

5 Q All right. So even though there's no indication in
6 SCDC records he was in a manic state when he did that?

7 A Well, he certainly was not acting in a rational manner.
8 He is basically incriminating himself by saying he wants to
9 kill this guy.

10 Q Where did you get the information that Meredith Moon
11 suggested that November 25, 1997 would be the time to kill
12 the Robertsons?

13 A I don't think she said it was the time to kill, she
14 said it would be a good time -- I think she did say a good
15 time, yeah. I heard that from Mr. Robertson.

16 Q So Jimmy Robertson told you that.

17 A Yes.

18 Q And you considered him to be a reliable reporter?

19 A On some issues, yes.

20 Q How about that issue?

21 A I didn't have any reason to doubt it. He wasn't trying
22 to lay the blame on her. In fact, he specifically said he
23 wasn't trying to blame her. He said he used her. I thought
24 he was being quite honest and accurate. They were both
25 intoxicated at the time.

1 Q Now, turning to Chip Robertson. Are you aware of any
2 information that Chip may have thrown parties at his
3 parents' house after the murder when --

4 A May have thrown what?

5 Q Threw parties in the Robertson household after the
6 murders.

7 A That Chip did?

8 Q Yes.

9 A Yeah.

10 Q And that in the course of those parties he would show
11 people where luminal was still on the walls?

12 A No. I had no knowledge of any of that.

13 Q Okay. Now, where did you get the information that Mr.
14 Robertson's parents persuaded him to take the rap for the
15 burglaries?

16 A Two sources. One -- oh, for the murders?

17 Q No, for the burglaries.

18 A Oh, burglaries. Yeah, there were two sources. One was
19 Mr. Robertson himself. When I asked Chip Robertson about it
20 he was -- he basically pled the 5th with me indicating that
21 he -- on advice of counsel he was not to discuss that with
22 me. But he did say that sounds like something my parents
23 would have done. I took it to mean "I don't want to
24 incriminate myself in this, but yeah, that's what happened."

25 Q All right. Now, going back to the trial testimony.

1 You would agree with the conclusion that Mr. Robertson never
2 received proper treatment for either his drug problems or
3 his Bipolar Disorder?

4 A I don't know about the drug problems, but certainly for
5 the Bipolar Disorder he never got appropriate treatment
6 until he was in prison. the problems with the treatment that
7 he was getting was anything that he said in individual
8 sessions with the therapist appeared to go right back to his
9 parents, and his mother had some kind of work relationship
10 with his therapist in his office. And the therapist was, in
11 my estimation, was acting inappropriately by seeing him
12 under that circumstance because it was a dual relationship.
13 It sounds like at least at some point in prison he got the
14 appropriate medication regimen.

15 Q All right. Would you agree that his abuse of Ritalin
16 was a major factor that influenced what happened?

17 A Yes.

18 Q Okay. Do you agree with the assessment that he
19 probably has frontal lobe damage?

20 A I can't really say. It's not my particular area of
21 expertise. All I can say is that other people have
22 theorized that that may be the case.

23 Q Okay. Did the materials that were provided to you for
24 your review include a five page document prepared by Dr.
25 Cascio entitled Records Review by Tonie Cascio, Ph.D?"

1 A I believe I saw that.

2 Q Are you aware on page four of that document that she
3 cites -- and under professional literature consulted your
4 book Fatal Families, the Dynamics of Interfamilial Homicide?

5 A Yes.

6 Q Down on that same page she lists the publication by
7 Kathleen Heide.

8 A Yeah, Kathleen Heide.

9 Q Okay. Why Kids Kill Parents, Child Abuse and
10 Adolescent Homicide.

11 A Right.

12 Q Now, who is Dr. Heide?

13 A Dr. Heide is a criminologist with a Ph.D, and she also
14 in the State of Florida is licensed as a counselor. She's a
15 colleague of mine. She's at the University of South
16 Florida, she's a full professor in criminology. She's also
17 evaluated many people who killed their parents. She and I
18 worked on a case together a couple years ago where a young
19 woman killed both of her parents.

20 MR. SALTER: Your Honor, I would like to move the
21 records reviewed by Dr. Cascio, this five page document,
22 into evidence.

23 THE COURT: Any objection?

24 MR. EHLIES: No. But I would like to point out that
25 this is also in the thumb drive, so we're getting a lot of

1 duplications. But these are authenticated as part of the
2 record, so I think that we have no objection on that basis.

3 THE COURT: Okay. It's without objection.

4 (The list was received as State's 1.)

5 Q So in preparing for her testimony, Dr. Cascio consulted
6 literature of by two experts on parricide, correct?

7 A Yes.

8 Q And how child abuse relates to adolescent homicide,
9 correct?

10 A I'm sorry, I couldn't understand the question.

11 Q And how child abuse relates to a homicide by an
12 adolescent.

13 A I still can't hear -- I can't understand what you're
14 saying.

15 Q I apologize. Let's see if I can yell into this.
16 Additionally how child abuse relates to homicide by an
17 adolescent.

18 A The last couple of words I'm losing each time. I'm
19 sorry, maybe if you could rephrase the question for me.

20 Q All right. She reviewed both of those publications,
21 correct?

22 A Yes.

23 Q And you're both experts on parricide?

24 A Yes. We both have been recognized by courts around the
25 country as experts in that field. I think that Dr. Heide is

1 more of an expert than I am.

2 Q Now, she wrote a book in 2013, I believe, called
3 Understanding Parricide?

4 A I don't know. I have read some of her books, I don't
5 know about that one. I may have read it.

6 Q Well, if I told you you reviewed the book and said that
7 no one knows the field of parricide better than Dr. Heide or
8 presents in it in such a thoughtful, compelling and
9 comprehensive manner, would that refresh your recollection?

10 A Yeah. I probably gave a blurb for the book jacket it
11 sounds like.

12 Q And I believe you also wrote --

13 A It's true.

14 Q -- understanding parricides, clearly the definitive
15 work on parricide?

16 A I would say Dr. Heide's work generally is the best when
17 it comes to experience. She has done more of these cases
18 than anybody in the world.

19 Q Now, she has developed a description of parricide
20 offenders as having motives and characteristics of three
21 different types, correct?

22 A Yes.

23 Q Severely abused children.

24 A Right.

25 Q Severely mentally ill children.

- 1 A Yes.
- 2 Q And dangerously antisocial children, correct?
- 3 A Yes.
- 4 Q Dr. Heide's description of severely abused children is
- 5 that they killed their abusive parents to end their abuse.
- 6 "These individuals have been abused by their parents for
- 7 years and the abuse is typically known by others," correct?
- 8 A That sounds like something they wrote.
- 9 Q She also states that they sought help from others but
- 10 the abuse has continued, correct?
- 11 A Yes.
- 12 Q And they killed the abusive parent because they were
- 13 terrified that they or other family members will be
- 14 seriously harmed or killed.
- 15 A Yes. Some cases, yes, I would agree with that.
- 16 Q All right. Is there evidence that Mr. Robertson was
- 17 severely abused as a child?
- 18 A That he was severely abused at the trial?
- 19 Q As a child.
- 20 A Oh, as a child. Yes. There's plenty of evidence to
- 21 say he was severely abused as a child.
- 22 Q That mainly coming from Mr. Robertson himself, correct?
- 23 A Really more in the records, but partly from him.
- 24 Q All right. What records?
- 25 A These 3500 records in this thumb drive.

1 Q All right. Where are the 3500 pages?

2 A Well, I just went through them on direct with Attorney

3 Ehlied.

4 Q All right.

5 A If you want I can go through them again with you.

6 Q I'm trying to find where he was severely abused as a

7 child -- all right.

8 A Was that a question?

9 Q Yes, sir.

10 A Then I don't understand the question, I didn't hear it.

11 Q You don't understand the question? Okay. Well, I'll

12 move on. Dr. Heide characterizes severely mentally ill

13 children is those who kill the parents largely as a result

14 of severe mental illness, and the diagnosis that commonly

15 include psychosis and severe depression, right?

16 A Yes.

17 Q And she says that a longstanding history of mental

18 illness is generally easy to document in these cases.

19 A Yeah. As it was in this case with Mr. Robertson, yes.

20 Q "They may kill their parents," she says, "for example

21 because they have delusions that the parent is the devil and

22 they may report hearing God's voice commanding them to

23 kill."

24 A That's one example, yes. I have seen that, I know she

25 has.

1 Q All right. Did you find any evidence that Mr.
2 Robertson had some characteristics of severely mentally ill
3 children?

4 A Yes.

5 Q Okay. Can we go through those examples?

6 A Repeatedly he was diagnosed with Bipolar Disorder.
7 Bipolar Disorder is not something that just comes out of
8 nowhere. If you look back in his history the behavior
9 that's documented by the schools, by his family and others
10 is consistent with Bipolar Disorder, which is a severe
11 mental illness.

12 Q One of the books that you've written was called Kids
13 Who Killed, which was originally published in 1990?

14 A That's true, yes.

15 Q I had the pleasure of reading that and I just want to
16 ask you a question or two based on what I read. I believe
17 on page five of that book you said, "Some of the killings
18 are crimes of premeditated violence motivated by greed, lust
19 or desire for revenge," correct?

20 A Yes.

21 Q You would agree that there's evidence in this record
22 that Mr. Robertson may have been motivated by revenge,
23 correct?

24 A He may have, yes.

25 Q You would agree there was also statements by him that

1 wanted their money.

2 A I'm not so sure about that.

3 Q You were not presented with any evidence that he was
4 motivated to get their money?

5 A What was the evidence?

6 Q Statements to other people that he wanted to collect
7 the insurance money, that his father was going to build a
8 golf course and he was unhappy about that.

9 A I don't remember seeing that. I know that he and his
10 brother talked with other people about it, I don't remember
11 that being a motive.

12 Q All right.

13 A I did discuss it with him.

14 Q Okay. What did he tell you his motive was?

15 A He said that some people claimed that his motivation
16 was to get money, and he said if that were his motivation he
17 wouldn't have done what he did because his father was at the
18 peak earning stage of his career and it wouldn't be long
19 before he could have been at a peak economic point in his
20 career. In other words, he felt like if that were my motive
21 I could have waited and benefited a lot more than I
22 benefited or stood to benefit this time the time of the
23 killings.

24 Q Okay. Again, Mr. Robertson was not a juvenile at the
25 time of the murders, he was 24 years old, correct?

1 A Yes.

2 Q He was emancipated and had lived elsewhere?

3 A Well, I don't know about emancipated, that's a legal
4 term. I don't know what it means in your state. Usually it
5 means either you're under a certain -- over a certain age or
6 a court has declared you emancipated.

7 Q But he had lived on his own, had he not?

8 A Very briefly he did, yes.

9 Q And had a series of jobs.

10 A Yeah, again, very briefly.

11 Q I believe he was arrested in 1993 for vandalizing three
12 cars. Is that information --

13 A Yeah, that's my understanding.

14 Q And there was also evidence that he previously stalked
15 three girls?

16 A I don't know if it was three, but there was evidence of
17 stalking behavior for at least a couple of teenagers.

18 Q Is that evidence of staking or the vandalizing of the
19 cars anyway explained by your findings here today?

20 A I think to a certain extent, yes.

21 Q How?

22 A What he was showing was very poor judgment and very
23 poor impulse control, both of which are seen in many people
24 who suffer from Bipolar Disorder.

25 Q It is also seen by many people who don't suffer from

1 Bipolar Disorder, correct?

2 A That's true, yes. But I don't know what your issue is
3 with regard to the diagnosis. Diagnosis of Bipolar Disorder
4 is everywhere in the records, it's all over the place.

5 Q That would include the records from the trial, correct?

6 A Yes. It's all -- as far as I can see it's all over
7 these records, these thousands of pages of records. If
8 people agree on one thing it is that he was suffering and is
9 suffering from Bipolar Disorder.

10 Q Okay. You testified earlier that both Mr. Robertson
11 and Chip Robertson engaged in many irrational acts as
12 teenagers.

13 A What kind of acts?

14 Q Irrational.

15 A Yes.

16 Q They also engaged in a number of criminal activities,
17 correct?

18 A Yes.

19 Q I believe you testified earlier that some information
20 that was provided to you was to the affect that Mr.
21 Robertson was concerned for his mother's health?

22 A Yes.

23 Q And that both Mr. Robertson and Chip indicated that
24 Terry Robertson was not that abusive, correct?

25 A Right.

- 1 Q Did Mr. Robertson's concern for his mother's health
2 lead him to short circuit her suicide?
- 3 A You mean kill her?
- 4 Q Yes, to expedite her suicide.
- 5 A You broke up on the question, sorry.
- 6 Q Okay. Did his concern for his mother's health cause
7 him her suicide? Because there was information she was
8 suicidal.
- 9 A I don't think so.
- 10 Q Okay. And I believe you testified earlier to some of
11 the mental health testing done by Mr. Robertson.
- 12 A Yes.
- 13 Q Like a WAIV's test.
- 14 A Yes.
- 15 Q And I believe you testified that the WAIV's test full
16 scale result was 112; is that correct?
- 17 A Yes.
- 18 Q And I believe you indicated that was a better test than
19 the test that he'd been administered when he was younger,
20 correct?
- 21 A Yes.
- 22 Q Okay. And when he returned from Germany where he had
23 been able to drink, he and his parents fought other their
24 refusal to allow him to drink here in the United States?
- 25 A Yes.

1 Q And he didn't like it.

2 A Well, if you believe him.

3 Q If you believe him. That's because he did not like the

4 fact that they wouldn't allow him to drink, correct?

5 A Correct.

6 Q Even though it was illegal for him to do so, correct?

7 A I don't know at that time what the law was like in your

8 jurisdiction. He made it sound like they would have to buy

9 it for him, he couldn't buy it. And I honestly don't

10 remember when the drinking age changed from 18 to 21.

11 Q All right, sir.

12 MR. SALTER: I don't believe I have anything further.

13 One moment, please.

14 (Break in proceedings.)

15 BY MR. SALTER:

16 Q Now, is it your opinion that Mr. Robertson's murder of

17 his parents was an impulsive act?

18 A Yes.

19 Q But you agree he left a note, correct?

20 A About the car and taking off to Philadelphia?

21 Q Yes, sir.

22 A Yes, he left a note.

23 Q Was it impulsive when he was waiting on his parents --

24 or waiting on his father to awaken before attacking his

25 mother?

- 1 A Yes.
- 2 Q It was?
- 3 A He agreed to that.
- 4 Q Okay. It was not impulsive, was it?
- 5 A I believe it was impulsive in the sense that had he not
- 6 had that impulse at that time he wouldn't have done it. He
- 7 had plenty of times he could have done it if he really
- 8 wanted to. Actually the time that he did it wasn't a very
- 9 good time if he wanted to get away with it.
- 10 Q Well, he waited until his father was in the shower and
- 11 his mother was alone, correct?
- 12 A Yes. He told me that, yes.
- 13 Q He told you that? Okay.
- 14 A Pardon me?
- 15 Q Was it impulsive for him to use Tilex -- to spray Tilex
- 16 on his father so he could have control over his father when
- 17 attacking his father?
- 18 A I'm not sure what you said. Did you say Tilex?
- 19 Q Tilex. The product Tilex, the cleaning products Tilex.
- 20 A I don't know what that means.
- 21 Q T-i-l-e-x.
- 22 A Oh, tiles?
- 23 Q Like Tilex. It's a product used to clean tiles, yes,
- 24 sir.
- 25 A Oh, okay. So what is your question?

1 Q I was asking if it was impulsive to use that, to spray
2 that chemical on his father in order to gain control of his
3 father when he attacked him.

4 A I don't know whether that was impulsive, I believe it
5 was. It's not a very sound method of immobilizing someone.

6 Q How about fleeing the jurisdiction after staging the
7 house to look like a robbery -- a burglary had taken place,
8 excuse me.

9 A I think that happened.

10 Q Yes, sir. Was that an impulsive act?

11 A It didn't seem like it to me, that sounded more
12 rational planned out.

13 Q All right.

14 A He's given it more thought.

15 MR. SALTER: Nothing further, Your Honor.

16 THE COURT: Anything at all?

17 MR. EHLIES: Yes, sir, Your Honor. I get the
18 messaging, yes, sir.

19 REDIRECT EXAMINATION

20 BY MR. EHLIES:

21 Q You were asked questions about Dr. Cascio's function,
22 and you suggested that your understanding was a mitigation
23 specialist. In fact, she was a social historian. Are you
24 familiar with that task of creating a social history?

25 A Yes.

1 Q And from the perspective of a social historian, it
2 would be looking backwards in the life of Mr. Robertson,
3 James Robertson, from before the crime all of the way back
4 to birth; is that correct?

5 A That's what it looked like to me.

6 Q And she would have no business or reason to be
7 questioning him about the details of the crime. She would
8 have been looking forward and not backwards in preparing a
9 social history; isn't that correct?

10 A That's the way I have seen it done. I've never seen
11 anybody in that kind of role inquire about the offense.
12 Obviously it's problematic if a lawyer retains someone in
13 that capacity and they do something that they shouldn't do.

14 Q All right, sir. And your role was entirely different,
15 is that correct, from a social historian?

16 A Yes. I mean, I had to look at his history but my role
17 was not as a social historian. My role was as a forensic
18 psychologist to help determine why these awful crimes
19 occurred.

20 Q All right, sir. And that is your ultimate opinion, and
21 because Dr. Cascio may have relied upon the same medical
22 records and other details, that doesn't mean that her social
23 historian presentation was the same as the forensic
24 psychologist's presentation that you were preparing; is that
25 correct?

1 A That's right.

2 Q So there were different functions but they may have
3 relied and crossed over using the same information basis; is
4 that right?

5 A Yes.

6 Q Okay. Now, I have on the screen -- and I don't mean to
7 cut you off, I'm sorry. You were asked about this and I'm
8 publishing it now, it's number 857. Okay. It was encounter
9 857. It says, "I do believe there is more of a personality
10 disorder versus traits of a disorder to his presentation,
11 and recommend psychological testing." Do you see that?

12 A Yes.

13 Q Okay. That psychological testing has never been
14 discovered by the Robertson team. Have you ever seen any
15 psychological testing that was done in this follow-up with
16 SCDC's recommendation?

17 A No.

18 Q Okay. You were asked about Dr. Cascio's reference in
19 her materials of the bibliography sort of thing, do you
20 remember that? And she used a book or two of yours?

21 A Yes.

22 Q Dr. Heide, although she lists it, do you know how she
23 used, it if at all?

24 A No, I don't know.

25 Q And, in fact, sometimes we list things we intend to use

1 and rely on and never get around to actually reading it;
2 isn't that true?

3 A Yes.

4 Q And I think you did the same you said a blurb on a book
5 jacket for Dr. Heide?

6 A Yes.

7 Q And that's similar -- we have no evidence of how she
8 used these particular materials, if at all.

9 A Correct.

10 Q Another one --

11 MR. SALTER: Your Honor, I'm going to object based on
12 speculation.

13 THE COURT: Well, he doesn't know how she handled it,
14 that's fair, but I got it.

15 Q You were asked about competency on a page and a
16 question about underlying score here, it's on page 94. And
17 it says, "He is fully competent and well-spoken except for
18 occasional prison slang." This is at a time where we were
19 dealing with medications to trying to get him adjusted. You
20 are qualified as a competency expert. What is an
21 appropriate competency examination eval. for someone of
22 James Robertson's mental state at that time?

23 A Regardless of his mental state at that time it was
24 known that he had a history of mental illness, not only did
25 he have it but his family had it, they were all mentally ill

1 one way or another. So in order to conduct a competency
2 evaluation they would need first of all to do a
3 psychological or psychiatric evaluation to determine what
4 the appropriate diagnosis is, and then you would have to
5 look at the elements of competency and go through them one
6 by one and make an assessment of -- a forensic psychological
7 assessment of whether he had the capacity, for example, to
8 understand the charges against him, to understand the nature
9 of the potential penalties, to know how the courts operate
10 generally, things that some mentally ill people simply don't
11 have. They don't have the knowledge.

12 Q Okay. So in this particular context she may have been
13 actually thinking as you are that the diagnosis is not clear
14 and she needs a further evaluation and actually requests the
15 psycho testing.

16 A That's how I would read it. I think that's the only
17 rational way to read it.

18 Q And you identified the elements necessary given his
19 mental state to do an evaluation, psycho evaluation, it
20 isn't something you would do just looking at him; is that
21 correct?

22 A No, that's not correct. You can't -- I mean, you can
23 look at a person but you can't determine their legal
24 competency by looking at them.

25 Q Okay. And you were asked about the IQ that he was an

1 adult. But, in fact, isn't it now known that the brain
2 continues to develop well after 18?

3 A Yeah. The best science that I have been made aware of,
4 it says the brain is not fully developed in most people
5 until about age 25.

6 Q And what is your opinion, or if you have an opinion,
7 concerning his motive?

8 A I think it was irrational. I think it was spontaneous.
9 If there's any reason or rhyme to it it would be anger.

10 Q And would that anger have been over a lifetime?

11 A Yes. It's the kind of anger that builds up over the
12 course of a long period of abuse. I've written about this
13 and Dr. Heide has written about it, and many people have
14 written about the concept of overkill and that is what we
15 have in this case. These were brutal killings. There were
16 killings beyond any need to be that brutal. If he just
17 wanted to kill his parents he could have dispatched them
18 pretty quickly, but these were brutal killings of an
19 overkill nature, which usually reflects anger, frustration
20 and it's usually found in people that have been abused by
21 the person they're killing.

22 MR. EHLIES: Thank you very much, Dr. Ewing. Judge,
23 that's all that we have, sir.

24 THE COURT: Okay. Yes, sir?

25 MR. SALTER: Might I ask one question?

1 RECROSS EXAMINATION

2 BY MR. SALTER:

3 Q Doctor, would you have written a blurb on a book jacket
4 that you had never read if you've never read the book?

5 A No, I didn't say I didn't read the book. I've done
6 many book blurbs. The publisher sends me the manuscript, I
7 read it and I write a blurb if I like it.

8 Q Thank you.

9 A That's what happened here. I'm sure I read the book
10 but I'm not sure I read it after it came out. I probably
11 read either the galleys or the manuscript.

12 MR. EHLIES: One question.

13 THE COURT: No, we're done. I've got it. Doctor,
14 thank you very much.

15 MR. EHLIES: Doctor, we're going to release you.

16 MS. BROWN: No objection.

17 MR. EHLIES: One thing before we leave. This thumb
18 drive we've been using is admissible as a summary of all of
19 the 3800 pages of documents in large part in the record, so
20 we would introduce it, it's already listed as Exhibit 38. I
21 think it's 38.

22 THE COURT: Any objection to 38 coming in if it hasn't
23 already come in? We've been using it all day.

24 MR. SALTER: No, sir, Your Honor.

25 (Court adjourned for the day and resumed at 9:00 a.m.)

1 On Wednesday, August 11, 2021.)

2 MR. EHLIES: We had just a couple of things, Judge.
3 One thing that we've been talking about, the State and
4 myself and the court reporter, is somewhere along the line
5 soon this morning we're going to get a consensus of all of
6 us about what's in evidence, and we're moving everything
7 that's in the originals all of the way through, 1 through 39
8 into evidence and a lot of them are in evidence that the
9 court reporter and I have marked off. So we're going to go
10 through the rest and move everything in and let's see if
11 there are any objections or whatever, I don't think there
12 are but we'll see, and then we'll have an accurate statement
13 for the records what the exhibits are from the applicant's
14 view. So that's one thing. It will take a little while to
15 pull each one.

16 THE COURT: Okay.

17 MR. EHLIES: The other thing is you remember that I
18 filed a motion to amend the third application by a fourth
19 application, and I got the motion filed that there was -- by
20 clocking in the actual application, that was with consent of
21 the State. So I'm going to run to the courthouse and get it
22 clocked, because I don't think -- okay. We have them. So
23 that's the historic application that didn't get filed
24 because the policy was not to accept them so I didn't get it
25 clocked.

1 THE COURT: Okay.

2 MR. EHLIES: Then we had a motion and you ruled on
3 restraints.

4 THE COURT: Yes, sir.

5 MR. EHLIES: All right. And I don't want to revisit
6 that. But I do want to offer photographs of the condition
7 for the few hours he was in restraints while being
8 transported here and put these in the record.

9 MR. SALTER: Your Honor, I don't have any objection to
10 the photographs coming in. I would like some sort of
11 foundation as to when those photographs were taken,
12 precisely when. Were they taken here or were they taken
13 after he was transported back or --

14 THE COURT: Mr. Ehlied?

15 MR. EHLIES: Yes, sir. For the record, I will be happy
16 to state under oath if you want that --

17 THE COURT: You're an officer of the Court, Mr. Ehlied.

18 MR. EHLIES: As soon as you ruled, Judge, which wasn't
19 unexpected, so when they took him into the cell, the holding
20 cell that's behind this door here and I snapped these
21 pictures on my cell phone at that time while we were all
22 here, this is before the lunch break. And then I ran down
23 to Walgreens and through their system we got these
24 photographs. So I am offering just in support of the motion
25 these five photographs. Any objection?

1 MR. SALTER: No objection, Your Honor.

2 THE COURT: Without objection.

3 MR. EHLIES: Okay, sir. So I'm going to have my folks
4 put evidence stickers on here, and it will be the last
5 exhibit number is I think for us is -- I believe that's
6 39 -- 40. Judge, I would also note for the record that
7 these photographs have not been in any way edited or
8 photo-shopped or whatever you can do to change them. And I
9 would like for you to look at them at your leisure so we
10 don't bog this process down any further. the State is
11 offering some evidence through witnesses, three of them as I
12 understand it. The former prosecutor in this case was Mr.
13 Pope and he is present, and the current Circuit Solicitor is
14 Mr. Brackett and he is present, and then my client. And I
15 would point out that all three of them have testified in the
16 PCR twice, and they've had my client and cross examined him,
17 Mr. Salters did twice, different days in the same
18 proceeding, so I don't understand why we need my client back
19 to rehash what's already in the record and done. And I'm
20 assuming they've got new matter since the application has
21 been amended, so I don't know that we need our client at
22 all. But if I could get some representation from the State
23 about why they want him as a witness for another time it
24 would be helpful to frame up our objections to reopening
25 what's already been done and closed.

1 THE COURT: All right. State?

2 MR. SALTER: Well, Your Honor, he specifically has
3 raised at least two allegations that were not raised last
4 time, the first of which is that counsel were ineffective in
5 failing to argue that the State didn't prove the identity of
6 the victims of the homicides. In other words, they didn't
7 prove that the victims were Earl and Terry Robertson.

8 MR. EHLIES: Right.

9 MR. SALTER: There's another allegation about failure
10 to explain possible defenses.

11 MR. EHLIES: On the appellate lawyer rule -- the 11L.

12 MR. SALTER: No. I'm talking about -- there's an
13 allegation that trial counsel were ineffective in failing to
14 explain defenses under McCoy.

15 MR. EHLIES: Okay. All right.

16 MR. SALTER: Those are two primary reasons I wish to
17 call -- it will be very short. I may ask him some other
18 questions, but yeah, for the most part those are the two
19 main allegations I want to talk to him about.

20 MR. EHLIES: That would be fine. I was just worrying
21 we were going to open up and go back into all the things --
22 on new matters it's appropriate, fine, we'll get it done.
23 Okay.

24 THE COURT: All right.

25 MR. SALTER: And I also, just so you know, I'm going to

1 ask him about some questions -- I'm going to ask him some
2 questions related to some information that was provided
3 yesterday from Dr. Ewing.

4 MR. EHLIES: Okay. Dr. Ewing wasn't available in the
5 first one so I think that's appropriate as well. But I just
6 wanted to keep this thing under control as far as past tense
7 and things that were available then, and I thank you. The
8 only other thing has to do with your ruling on Mr. Bennett's
9 motion to amend and he'll address that.

10 THE COURT: Okay.

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

12 THE COURT: Yes, sir.

13 MR. BENNETT: Good morning.

14 THE COURT: Good morning.

15 MR. BENNETT: Your Honor, I apologize, I'm easy to
16 confuse, I admit that, and I'm a little confused. The
17 Court's ruling yesterday excluding 11L, I would like to
18 revisit that just briefly to get some clarification. In our
19 fourth amended application we had four separate claims,
20 Romans numerals one through four in 11L. Those four claims
21 have been repled in the fifth amended application, also,
22 again as Roman numerals one through four. So in other words
23 they were not objected to when they were in the fourth and
24 they are the same as they were in the fifth. There are six
25 additional claims in 11L in the fifth, Roman Numerals five

1 through 11. Is it the Court's intent just those new
2 additional claims in 11L, specifically Roman Numerals five
3 through 11, are to be excluded, but those remaining one
4 through four Roman Numeral claims that were in the fourth
5 and brought into the fifth, that those four remain, or was
6 it the Court's intent that all 11 would be taken out with
7 the Court's ruling?

8 THE COURT: Let ask the State that, because the State's
9 objection was to the fifth. So it is five through --

10 MR. SALTER: Well, it gets kind of complicated, Your
11 Honor. Before I could file a return to the fourth amended
12 application I got the fifth amended application.

13 THE COURT: Right.

14 MR. SALTER: So that's why there was no objection
15 because I was in the process of drafting that, and that
16 document is approximately 100 pages long right now. So
17 that's why we do object on the same basis, yes, sir, Your
18 Honor.

19 THE COURT: So everything that's in 11L.

20 MR. SALTER: Yes, sir.

21 THE COURT: Okay. And so that's my ruling. Because I
22 understand -- I understand that the wording that the Supreme
23 Court used. Okay. And thank you for pointing that out to
24 me yesterday, it really, really didn't maybe dismiss -- but
25 they let him go pro se, him being the applicant, right?

1 MR. BENNETT: I'm sorry, James.

2 THE COURT: I'm talking about the lawyer, Joe Savitz.

3 MR. BENNETT: I'm so sorry, Your Honor, yes.

4 THE COURT: After I looked at that again, you're right,
5 they kind of left him in there. They didn't just out right
6 boot him to the side. And you also correctly pointed out to
7 me, and thank you, about that he continued to help him a
8 little bit along. But to me it looks like he was the guy in
9 charge, he being James, he being the applicant. He's the
10 guy in charge, and that's what they let him proceed, pro se.
11 And I just -- I had a little heartburn about being able to
12 blame the lawyer when he wanted to be pro se, hearings were
13 held, competency hearings were held and he gets to proceed
14 pro se. He can't have it both ways, either the lawyer is in
15 charge or he's not.

16 MR. BENNETT: Appreciate that, Your Honor. If I may
17 then I would like to put the proffer on.

18 THE COURT: Sure.

19 MR. BENNETT: Thank you. In our exhibit notebook under
20 tab 12, 12 has multiple components, 12A through 12F. Twelve
21 itself is a two page affidavit from attorney Joseph Savitz.
22 A is a Supreme Court order dated November 15, 2001, in which
23 Judge Hayes now filed a second report indicating he wants
24 Dudek relieved and another attorney appointed to represent
25 him. Dudek is hereby relieved as counselor for petitioner,

1 and Deputy Chief Attorney Joseph L. Savitz, III, of the
2 South Carolina Office of Appellate Defense is appointed to
3 represent petitioner in this matter. B of 12 is a letter
4 from Mr. Joseph Savitz from the South Carolina Office of
5 Appellate Defense, I won't read it into the record, Your
6 Honor, but the salient point is "I should point out that I
7 have not explained the dangers of self representation -- I
8 cannot remember what that word is called, but the slash --
9 "his likely execution/to Mr. Robertson." C is an order of
10 the Supreme Court of South Carolina dated November 21, 2002.
11 In this order, "We grant petitioner's motion to relieve
12 counsel and proceed pro se in this matter. The Office of
13 Appellate Defense shall forward a copy of the transcripts in
14 this matter to the petitioner, and petitioner shall within
15 45 days from the date of this order serve and file his
16 initial brief and designation of the matter to be included
17 in the record on appeal and provided within Rules 208 and
18 209 of the South Carolina Rules of Appellate Court Review."
19 In addition to that it goes, the quote says, "The Office of
20 Appellate Defense shall remain associated for the purpose of
21 paying for the necessary transcripts, providing copies of
22 the briefs and record on appeal, and providing petitioner
23 with whatever assistance he may desire in preparing his
24 appeal." D is the report from Judge Hayes to the Supreme
25 Court. I make mention and special note, Your Honor, of

1 footnote one which deals with Judge Hayes', I hate to use
2 the word confusion, but Judge Hayes' difficulty in the
3 history of what has transpired in relationship to Mr. Savitz
4 being potentially stand-by counsel or potentially being
5 counsel of record. 12E, Your Honor, is a second affidavit
6 of Mr. Savitz. And 12F are the colored photocopies of notes
7 from Mr. Savitz related to issues potentially that he had
8 found in the record for the appeal. Your Honor, this direct
9 appeal was, in fact, subject from our argument to 16-3-25's
10 mandatory language. That statute is written in mandatory
11 plain English, four corners of the document, plain meaning
12 of the words, and the fact that the statute itself
13 contemplates not just a direct appeal and an appeal to be
14 heard by the Supreme Court, but also anticipates an
15 attorney. By its very language it indicates that the
16 attorney's name, address, phone number and contact
17 information should be provided. Appreciate the Court's
18 indulgence.

19 THE COURT: Yes, sir. Anything from the State?

20 MR. SALTER: Yes, sir. Just for clarification on the
21 record, I've been practicing appellate law since 1986, March
22 1986. Typically what happens in cases where someone appears
23 pro se, or for that matter when outside counsel represents
24 an appellant, appellate defense is left on to handle such
25 matters as copying costs and those matters so that no one

1 else can be stuck with it. They are not left on the counsel
2 in any regard. Now, with respect to Mr. Savitz's affidavit,
3 the position in the affidavit that he had not explained the
4 dangers of self representation to his client was in the
5 letter that he submitted to the Supreme Court that's, I
6 believe, 12B. I would note that there are also, in addition
7 to these orders, there were also two -- there were a total
8 of three hearings; the first for the removal of Mr. Dudek,
9 the second for the removal of Mr. Savitz, and the third to
10 determine whether or not he was competent to be executed
11 because he wanted to raise his right to appeal. Now, we
12 have had other inmates waive their rights to appeal and be
13 executed; Michael Torrence is one of them, Passaro is
14 another one, State versus Passaro was another. The third
15 thing I would point out is 12B only has one page of Judge
16 Hayes' order. We think the entire order should come in and,
17 in fact, I believe that was part of the materials that we
18 had provided to the Court, or if not we were going to, that
19 included the entire direct appeal file, which would have had
20 the hearings before Judge Hayes, the orders in their
21 entirety and correspondence related to those matters.

22 THE COURT: I have a pretty big box that I received and
23 I brought some of it with me. Okay. Anything further?

24 MR. BENNETT: Your Honor, no objection to the full
25 report coming in, it was just a matter of ease to try to

1 keep the trial notebook and exhibit notebook down to a
2 limit. Your Honor, I would like to point out, if I may,
3 that Dr. Ewing's testimony yesterday in regards to the
4 competence of this applicant, Mr. Robertson, demonstrated
5 that his ability to be able to make a knowing and
6 intelligent waiver -- or, I'm sorry, not a waiver, but a
7 knowing and intelligent decision to proceed pro se in that
8 first hearing. And I apologize again, yesterday I said I
9 thought it was in June or July, it was actually in October
10 of 2002, that he did not have the ability, the capacity to
11 be able to giving his knowing and voluntary consent for his
12 decision to proceed pro se.

13 THE COURT: All right. Well, going back to 12 as you
14 pointed out and I highlighted it, on 12A -- I'm sorry, 12 --
15 12C, where the very last sentence says, "And providing
16 petitioner with whatever assistance he may desire in
17 preparing his appeal." Again, the Court is allowing him to
18 go forward. He has a lawyer standing in the shadows, but
19 the lawyer apparently from the Supreme Court's order is
20 without any ability to make any kind of strategic decision
21 or give advice where he's not asked. The footnote itself to
22 Judge Hayes, "The Court was unaware that Joseph L. Savitz,
23 III, had been appointed as stand-by counsel for Robertson.
24 This information was developed at the hearing. The Court
25 was informed by Robertson that Savitz was aware of the

1 incident proceeding. At the hearing Robertson made no
2 request to have Savitz present, nor did Robertson request a
3 need to discuss matters with Savitz or consult or
4 communicate with him." So, again, he's only there to do
5 whatever he's asked to do by his client, if you can call him
6 a client, I guess he's still the client within the meaning
7 of the word. So, again, I'm -- and as to the mandatory
8 review required by state statute, I gave a lot of thought
9 about that last night, and most of you know I'm an early
10 riser so up this morning I was thinking about that, and I
11 thought if a man can waive his constitutional right under
12 the United States Constitution and a constitutional right
13 under the State of South Carolina's Constitution, certainly
14 he can waive a statutory right according to him by our
15 general assembly. So he waived it, he was found competent
16 to do so and he waived it. If I'm wrong somebody will
17 change my mind.

18 MR. SALTER: Your Honor, if I might, in light of Your
19 Honor's last comment I would point out that while at the
20 time this was ongoing, Your Honor was correct, there were
21 conflicting opinions by the Supreme Court as to whether or
22 not a waiver of the review under 16-3-25C could be made by
23 the applicant. But in State versus Motts where Mr. Motts
24 was waiving his appeals and wanted to be executed, they
25 resolved that conflict and determined from that point

1 forward that, in fact, that could not be waived, that that
2 was the review of the Court and not something that the
3 defendant himself could waive. I just want to correct
4 any --

5 THE COURT: I appreciate the correction, I had
6 forgotten about Motts. But that was after this as I
7 understand it.

8 MR. SALTER: Yes, sir.

9 MR. BENNETT: And, Your Honor, one final thing, and I
10 appreciate the Court's patience. The statutory affect of
11 16-3-25, the statutory intent, it does not contemplate what
12 is the public's right as I discussed yesterday. In fact,
13 the public has a vested interest in determining and knowing
14 that feeling confident that a punishment as severe as the
15 killing of a citizen by the government, that that process is
16 without any corruption or any malfunction so that there's
17 not some wrongly accused person being executed. Thank you.

18 MR. EHLIES: Judge, I am handing up what has been
19 admitted into evidence without objections, it's marked
20 Petitioner's Exhibit 40, one through five. I'm also handing
21 the Clerk of Court the original and two copies to clock on
22 the fourth amended application.

23 (Break in proceedings.)

24 MR. EHLIES: Judge, we're going to call Mr. James Boyd.
25 The witness, JAMES BOYD, was first duly sworn and

1 Testified as follows:

2 THE COURT: Mr. Boyd, if you'll tell us your name and
3 spell your last name for the court reporter.

4 THE WITNESS: It's James W. Boyd, B-o-y-d.

5 THE COURT: Thank you. Counsel?

6 MR. EHLIES: Thank you so much, Judge.

7 DIRECT EXAMINATION

8 BY MR. EHLIES:

9 Q Mr. Boyd, it's good to see you again. I understand you
10 had a little encounter with your dog that might have injured
11 you a bit.

12 A That's correct.

13 Q And I hope you recover from those injuries. I'm
14 handing you what's been previously marked as Exhibits 9 and
15 10, and ask you if, in fact, if you recall these documents?

16 A I do.

17 Q And have you had an opportunity even as recent as today
18 to review the documents?

19 A I have.

20 Q And I think on 10 they include some exhibits attached,
21 page 2749 of the trial transcript, and 2953. And then the
22 letter to Mr. James Hancock is page three of the exhibits.
23 Have you had an opportunity to read those?

24 A Yes.

25 Q All right, sir. Now, who was Mr. Hancock?

1 A He was my cocounsel in the trial of this case, he is
2 now deceased.

3 Q And as regards these affidavits 9 and 10, do you
4 recognize them to be in the form of an affidavit?

5 A I do.

6 Q And did you sign those under oath?

7 A Yes.

8 Q And are they -- were they at the time that you signed
9 them, the 22nd day of July, 2020, and then the 25th of
10 March, 2021, were they accurate?

11 A Yes, they were.

12 Q And truthful?

13 A Yes, that's correct.

14 Q Okay, sir. Have they currently changed in your opinion
15 in any way?

16 A They have not.

17 Q All right, sir.

18 MR. EHLIES: I would offer these into evidence, the
19 originals.

20 THE COURT: Any objection?

21 MR. SALTER: No, Your Honor.

22 THE COURT: Without objection.

23 (The affidavits were received as State's 9 and 10.)

24 Q Mr. Boyd, if there is any occasion in answering the
25 questions, I don't have a whole lot for you, where you need

1 to refer or it will aide and assist you to refer to any
2 document you think I might be able to get for you please
3 don't hesitate to ask me.

4 A Okay. Certainly.

5 Q Okay. You, of course, were the second -- a little
6 history, sorry -- you were the second attorney on the case
7 of State versus Mr. Robertson, James DeJarnette Robertson;
8 is that correct?

9 A That's correct.

10 Q And you represented him for quite a time, a couple of
11 years leading up to from the date of your appointment to the
12 trial in March of 1999; is that correct?

13 A That's correct.

14 Q And I don't expect you to remember all of the dates, so
15 if you have any problem with that just alert us. Okay?
16 Have you received from me as recently as last week the fifth
17 amended application in this case?

18 A I have.

19 Q And I think I might have included a couple of
20 clarifying pages of transcript; is that correct?

21 A I think that's correct. I don't remember the details
22 but I did read the application.

23 Q Okay. So you've had an opportunity then to kind of
24 consider those.

25 A I have.

1 Q Okay. And you understand that they have some
2 allegations that are and do pertain to the trial lawyers'
3 participation in the actual jury trial; is that correct?

4 A That's correct.

5 Q Okay. In the claim concerning the questions that were
6 asked to Terry Robertson, who is the mother of James
7 Robertson, particularly at the appellate transcript, the
8 appendix transcript page 2792, the State asked Skip Meyer,
9 who I'll refresh your recollection was the therapist for the
10 family, including for Terry, a question or two that led to
11 the response that she would have been mortified to know what
12 is going on in this courtroom. Do you recall that testimony
13 at all?

14 A I do recall that.

15 Q And there is no recorded objection to that testimony
16 contemporaneous with the remark, and I'll tell you that.
17 Was there any particular reason that y'all discussed that
18 you were not going to object to that?

19 A Well, we didn't know in advance that there would be
20 that question so there was no discussion beforehand. I
21 can't -- I believe Mister -- I mean, Dr. Meyer, was Mr.
22 Hancock's witness and I don't know why he didn't object. I
23 can say my thinking at that time was I misinterpreted the
24 question and the answer at the time. I was wondering why
25 that question was asked that she would be -- I forgot if it

1 was mortified or horrified by what was happening in the
2 courtroom. I took it that the thing that was happening in
3 the courtroom that her son was on trial for capital murder.
4 It was after the objection I realized that the question
5 dealt with the -- her being -- her personal data being put
6 out in public in a trial. So basically I misinterpreted
7 what the question was about.

8 Q Okay, sir. And I think you made a reference in that
9 answer to the objection. There was no objection, sir.

10 A There was no objection.

11 Q By the time you came to grips with what was an issue it
12 was not contemporaneous with the question or the answer.

13 A That's correct.

14 Q Okay. The next thing I wanted to ask you for
15 clarification, please, refers to a very similar question
16 that follows just right behind it, and this is on the
17 appendix at 3142 and 3144. Terry was -- the statement and
18 the question during the penalty phase, the solicitor made
19 two statements and they were at 3142, the solicitor told the
20 jury that the defense case had dragged Terry through the mud
21 up and down, and there was -- Terry being the mother -- and
22 there was no objection entered in that. Do you know -- do
23 you recall that argument, whether or not there was a reason
24 for not making an objection?

25 A I do not have an independent recollection of that

1 argument, and I cannot say why there was no objection to
2 that.

3 Q And the next one occurred two pages later on 3144,
4 "Terry has been raped. She was raped in this courtroom when
5 they take her through this base of action." Do you recall
6 whether any objection -- there was no objection in the
7 record. Was there any discussion among the team about
8 objecting to that?

9 A Not that I recall. Again, I don't have an independent
10 recollection of that, but I know of no reason there wasn't
11 an objection.

12 Q All right, sir. There is no strategic because you were
13 not -- could there have been no strategic reason for having
14 not objected at the time of the contemporaneous remark?

15 A I can't think of a strategic reason not to object.

16 Q And sitting here today if you had heard those words in
17 the context of the mother being raped in the courtroom
18 during a trial, would you have objected?

19 A I think there should have been an objection, yes.

20 MR. SALTER: I'm sorry, I didn't hear the last
21 question, I apologize.

22 MR. EHLIES: I'm sorry. I had asked him if sitting
23 here today if he would have heard that question being asked
24 about the mother being raped in the courtroom whether he
25 would have imposed an objection, and his answer was yes.

1 MR. SALTER: I'm sorry I didn't hear it in time to
2 object, Your Honor, but that's beyond Strickland. Because
3 Strickland talks about the fact you don't judge in hindsight
4 and that's what that question elicited.

5 THE COURT: Yes, sir. I'm going to allow the answer
6 but I understand the case.

7 MR. SALTER: Thank you.

8 Q There was another allegation that was renewed in the
9 fifth amendment and it's 11B9. And if you need any of those
10 documents, again, just tell me. And it pertained to
11 developing the full panoramic view of the mitigation history
12 for your client, and in particular it deals with Ms. Cascio.
13 And I think we've established in your earlier testimony that
14 she was not really your best witness for mitigation purposes
15 in light of cross examination; is that true?

16 A That's correct.

17 Q Okay. And has that changed your opinion that --

18 A No, it has not.

19 Q -- has that changed at all? And also for background to
20 this question I think you include Dr. Pryor, Dr. Pincus --
21 and Meyers is not a Ph.D, but just for the record he was a
22 therapist for the whole family, Skip Meyers okay. And you
23 had Meyers, you had Pincus, Evans, Miller, and some friends,
24 and that the final substantive witness was Terry Cascio.
25 And I believe that she was retained as the social -- the

1 biopsychosocial historian, that's the technical name,
2 biopsychosocial historian, all one word, that we
3 short-handed the name social historian. Do you remember
4 her?

5 A I do.

6 Q And do you remember what her function was, why she was
7 put on the team?

8 A Yes.

9 Q And what was it?

10 A She was -- she basically took all of the data and put
11 it together. It was basically a summary of the whole
12 psychological and other family history data and to put it
13 together to present.

14 Q All right, sir. Would you have understood at that time
15 that a social historian, for short-hand method, does not do
16 that? The social historian's function is not to pull
17 together and summarize the mitigation case, including the
18 medical evidence, they're doing a history of the family
19 dynamics that do include medical.

20 A Yeah.

21 Q So did you have a clear understanding of what the role
22 of a social historian was at the time she was retained?

23 A Well, I'm not sure at this point.

24 Q Okay. In fact, the role that you were assigning or
25 thinking she was playing is a forensic psychologist in this

1 particular case with expertise and parricide cases. Did you
2 all ever consider retaining somebody in that role to pull --
3 to do the function that you were thinking a social historian
4 was going to do?

5 A There was no discussion of an expert in that field.

6 Q At the time you found out you were a part of the team
7 and got the order of appointment, were you aware then that
8 it was a what we call parricide case, that the defendant had
9 killed his parents?

10 A We were aware of that, yes.

11 Q How many of those cases had you handled before that
12 time? And I mean killing parents cases, not murder cases.

13 A I can't think of one I handled before that time. I've
14 handled a number of murder cases. I can't think of one
15 before that time of a child killing the parent.

16 Q Can you think of a case that was contemporaneous with
17 this case? Tried in 1996, this crime is in November the
18 25th of '97, had the same issues, killing the parents, and
19 it was published nationally, actually internationally, it
20 was the Menendez brothers?

21 A I remember the Menendez brothers.

22 Q Okay. So if you remember the Menendez brothers, do you
23 know that the verdict -- that they tried that case to the
24 jury three separate times? Were you --

25 A I don't remember that.

1 Q You remember the Menendez, M-e-n-e-d-e-z, case in
2 California; is that correct?

3 A I remember the case.

4 Q And so that should prime your awareness that this is
5 kind of an unusual case, killing the parents, is that a fair
6 assessment?

7 A Yes.

8 Q And, in fact, did you follow on that case at all,
9 follow the national trend?

10 A I mean, I read about it in the paper, saw it on the
11 newscast, I didn't follow the details of it.

12 Q Were you aware that the first two verdicts were hung
13 eight to four for acquittal over abuse of the children?

14 A I may have been at that time but I don't remember that
15 now.

16 MR. SALTER: Your Honor, I'm going to object. This is
17 going way too far afield.

18 THE COURT: We're getting a little off track, I think.

19 MR. EHLIES: Well, we have Ewing as a brand new witness
20 and I'm asking him to respond to the Ewing testimony, and he
21 has recollection of the Menendez case to trigger knowledge
22 that he should acquire some help in a specialized way for
23 parricide cases. That's the point.

24 THE COURT: I don't want to pit -- witness pit, now.
25 Whatever Dr. Ewing's opinions are are his opinions, but I

1 don't want him giving an opinion about that. We're not
2 going to pit witnesses.

3 MR. EHLIES: Right. And I'll avoid doing that, I don't
4 intend to do that.

5 Q The point of my question is whether or not you were
6 alert to the issue that killing parents is a unique position
7 for a murder case.

8 A I think it's -- it's not an unheard of but it's an
9 unusual thing to happen.

10 Q Okay. And you were aware of the Menendez case.

11 A I was aware of that case, that was national news.

12 Q Yes, sir. Did you or Mr. Hancock in the use of Dr.
13 Cascio ever form with her a referring question in writing to
14 narrow the scope of her inquiry?

15 A Not that I recall.

16 Q Do you remember anyone -- any lawyer, that is, either
17 you or Mr. Hancock, being present with Dr. Cascio when she
18 did the exam, or her interviews with the client?

19 A I was not.

20 Q Okay, sir. There's some confusion in the record about
21 those visits. Okay. You wouldn't have any independent
22 knowledge, would you, of how many times she visited with the
23 client?

24 A I do not.

25 Q You were present during her cross examination, were you

1 not, in the jury trial?

2 A During the trial jury?

3 Q Yes, sir.

4 A Yes, I was present.

5 Q On page 2919 of that transcript of the jury trial she
6 was asked about her visits from Mr. Pope's questions, and
7 she identified that she visited with the client on November
8 the 30th, December the 7th and December 9th, and those are
9 the only times that she visited with the client. Do you
10 have any way of verifying whether that was true?

11 A Not at the moment. I would have no way of verifying.

12 Q Do you have any reason to believe it was not true?

13 A No. I have no reason to believe it was not true.

14 Q Since your last time in the first PCR we have spent
15 quite a bit of time over the delivery of the notes, the
16 handwritten notes, and we have recovered the December 7th
17 notes only. Okay, sir? Those are the notes that were
18 entitled Night of Crime and they contained the details of
19 the actual murder. And I showed you, did I not, the
20 supporting transcript that identifies the evening of March
21 the 24th at the close of court as Mr. Pope is raising the
22 issue that he had not received those notes at that time, do
23 you recall that?

24 A I do, I have seen that transcript.

25 Q And then the transcript references your remark that I'm

1 going to fix that -- that's not the word you used -- but you
2 had that available to you and you were going to do it right
3 then. Do you remember --

4 A That's correct.

5 Q Do you recall now having refreshed your recollection on
6 there whether the affidavit that you gave, Number 10,
7 pertaining to that timeline, is really accurate in light of
8 the affidavit of Dr. Cascio and Smith-Hendrix, who was Mr.
9 Hancock's paralegal on this case, that what happened was you
10 got the notes and you delivered them to Mr. Pope in the
11 hallway behind the courtroom on the evening of March the
12 24th?

13 A Based on reviewing the transcript and reviewing those
14 affidavits, I believe that is when the notes were given to
15 Mr. Pope.

16 Q Okay, sir. In evidence 22A. I want to show you
17 four -- page five of the 22A and see if you recognize that
18 document as the start of it that's -- you have all of the
19 pages but that's just the first page.

20 A I mean, I don't have an independent recollection of the
21 handwriting or anything at this point. I believe this is
22 Ms. Cascio's notes.

23 Q All right, sir. The reason I'm handing it to you now
24 is that I have not shared that with you before, and I call
25 your attention to the fact that across the top of that page,

1 unlike any of the other copies we've obtained, there is no
2 fax crawl indicated that it had been faxed to anybody. And
3 there's no indication in the page itself that it had been
4 folded and mailed, and I find that that may support your
5 recollection that what happened was you --

6 MR. SALTER: Your Honor, I'm going to object to
7 testifying.

8 THE COURT: Yeah, ask him some questions.

9 MR. EHLIES: All right, sir.

10 Q Does that help you recall the history of your delivery
11 of those notes to Mr. Pope? Prosecutor Pope?

12 A Well, I mean, it appears there is no fax or folding,
13 but they didn't appear to be mailed. Again, based on when
14 it was -- my recollection I gave, I do have a vague
15 recollection of giving the notes to Mr. Pope in the hallway
16 behind the courtroom, based on that I believe that's when it
17 was given to him.

18 Q And that would have been on March the 24th, the evening
19 close of court, March 24th of 1999; is that correct?

20 A It appears so.

21 Q Yes, sir. Thank you.

22 MR. EHLIES: Judge, it is my understanding and
23 recollection that all of the PCR transcript is in the
24 appendix.

25 MR. SALTER: That would be correct.

1 MR. EHLIES: If there is anything missing we could get
2 you to supplement --

3 MR. SALTER: If there's a page missing or what have
4 you, yes.

5 MR. EHLIES: So the rest would be rehashing what was in
6 the first. I thank you, Mr. Boyd, and I want to put on the
7 record you've been stellar in your cooperation with us.

8 THE WITNESS: Thank you.

9 THE COURT: From the State?

10 MR. SALTER: Yes, sir, briefly.

11 CROSS EXAMINATION

12 BY MR. SALTER:

13 Q First off, Mr. Boyd, I'm sorry to hear that your dog
14 kind of got at you. I used to have a dog that would do the
15 same thing so I can relate.

16 A Well, it didn't deliberately do, it was -- we were
17 giving it medicine and it jerked back and headbutted me.

18 Q You previously testified in 2007.

19 A That's correct.

20 Q And you testified at length at that time.

21 A That's correct.

22 Q And you testified as truthfully as you could, correct?

23 A That's correct.

24 Q So I won't bother to go over most of what happened back
25 in 2007 in terms of your testimony, but just very briefly, I

1 believe by the time you were appointed in this case you had
2 represented, I believe, five different people in capital
3 cases?

4 A That is correct.

5 Q And that would include Sylvester Adams who was tried
6 twice?

7 A That is correct.

8 Q And I believe you testified the last time you had
9 assisted in the prosecution of a capital case?

10 A That is correct.

11 Q And your cocounsel, Mr. Hancock, he had a great deal of
12 criminal experience?

13 A Yes, he did.

14 Q And y'all had a great deal of assistance in terms of
15 like trying to gather information, correct?

16 A That is correct.

17 Q For instance, you had Mr. Hancock's paralegal and you
18 also had an investigator?

19 A That's correct.

20 Q And you relied at least in part upon Tonie Cascio.

21 A She was one of the experts, yes. There was a number of
22 experts that -- basically we had associated the Death
23 Penalty Resource Center and they were the ones who actually
24 referred the experts.

25 Q All right, sir. I was going to ask -- that was my next

1 question which was y'all actually had them as consultants,
2 right?

3 A That's correct, yes.

4 Q And that would include Lucy Glass, would it not?

5 MR. EHLIES: Judge, we're back into history.

6 MR. SALTER: Yes, we are, just briefly, though.

7 THE COURT: He's on cross. Go ahead.

8 Q That would include Ms. Glass, correct?

9 A That's correct.

10 Q And she was part of the resource center.

11 A That's correct.

12 Q And she was present throughout the trial, right?

13 A She was present during the trial. I don't recall if
14 she was present during the entire trial, she was present
15 during the trial.

16 Q Did you or other members of the defense team
17 investigate to determine whether or not there was a possible
18 guilt phase defense or defenses?

19 A Yes. To the extent -- we went through the discovery,
20 and based on the discovery and the forensic evidence it
21 appeared to me that -- well, to both of us that it was a
22 foregone conclusion, that guilt was a foregone conclusion.

23 Q All right, sir. And you explained that to Mr.
24 Robertson, correct?

25 A That's correct.

1 Q And you previously testified that he had admitted his
2 guilt to the crimes to both of y'all.

3 A That's correct.

4 Q So that presented its own problems with offering a
5 defense, right?

6 A To the extent that he couldn't have been put on the
7 stand and denied it, yes.

8 Q And you couldn't have offered an alibi or anything like
9 that.

10 A That's correct.

11 Q Did Mr. Robertson agree with your strategic manner of
12 handling the case?

13 A Well, yes, to the extent -- I think I would have
14 preferred to basically concede guilt and just argued the
15 penalty. He did not want to concede guilt, and he wanted --
16 though, he agreed that there was a very small chance of a
17 not guilty verdict he did not want to concede that issue.

18 Q All right, sir. The trial transcript reflects that the
19 defense presented a great deal of evidence of mental health
20 history of the family, correct?

21 A Correct.

22 Q And drug abuse by your client.

23 A That's correct.

24 Q And his brother.

25 A That's correct.

1 Q Did you uncover evidence of significant physical abuse?

2 A Depends on the word significant. I think there was
3 some evidence of some physical abuse. It's hard for me to
4 remember after this length of time. I think there were
5 several occasions perhaps of physical abuse.

6 Q All right, sir. Did the defense present the evidence
7 that you found physical abuse through its experts?

8 A I think so. I would have to look at the transcript to
9 know that.

10 Q All right. But if, for instance, Ms. Cascio testifies
11 to abuse then, in fact, you did present that evidence,
12 correct?

13 A I think so, yes.

14 Q Okay. Did either you or Mr. Hancock withhold any
15 information from any of your experts?

16 A Not that I recall, no.

17 Q Did they ever ask for anything that you hadn't provided
18 to them?

19 A Not that I recall.

20 Q One of the things I would like to now ask you about,
21 shifting gears here a little bit, the State presented Dr.
22 Jeffrey McKee, do you remember him?

23 A I do.

24 Q He was a reply witness, right?

25 A That's correct.

1 Q And was he the Court's witness or had he been allowed
2 to perform an independent evaluation for the State of South
3 Carolina?

4 A My recollection is that Dr. McKee -- that the State
5 moved for an evaluation be done. I don't recall how Dr.
6 McKee was chosen as the person to do the evaluation so I'm
7 not sure of the answer to that.

8 Q Okay. But it was, in fact, an independent evaluation.

9 MR. EHLIES: I object to that, the fact -- the word
10 fact. The history that's in evidence will determine that
11 from the order.

12 THE COURT: Okay. You want to rephrase that?

13 Q Do you remember filing a return to the State's request
14 for an independent evaluation?

15 A I remember we -- I think we did and we argued that
16 issue.

17 MR. SALTER: Your Honor, may I approach the witness?

18 THE COURT: Sure.

19 Q Mr. Boyd, I would hand you a document that was filed
20 November 30th of 1998, and ask you if you recognize this
21 document, sir?

22 A Yes. This is the return we filed to a motion.

23 Q All right. In that document, sir, to save some time,
24 will you just read the various argument headings that you
25 have there?

1 A There's a request for clarification. "Two, the defense
2 is no under no obligation to disclose the results of reports
3 of mental or physical examination or scientific tests.

4 Three, the prosecution is not entitled to have the defendant
5 undergo an independent psychiatric evaluation." That's all
6 of the headings.

7 Q All right, sir. So in your return you're responding to
8 the efforts to have an independent evaluation, correct?

9 A That's correct.

10 Q And pardon me for turning my back. Going back to that
11 document, did the Judge ever rule on it?

12 A I would have to look at the transcript to be sure. I
13 would think so. I think there was a ruling.

14 MR. SALTER: Your Honor, I'm going to move this in as a
15 respondent's exhibit.

16 THE COURT: Any objection to the document?

17 MR. EHLIES: No. I'm sorry, I'm trying to shorten time
18 by getting ready. No. That's the defendant's motion?

19 Yeah, no objection.

20 THE COURT: It's without objection.

21 (The motion was received as State's 2.)

22 Q Why did the defense oppose the State's efforts to have
23 an independent evaluation?

24 A Well, after this length of time I probably can't think
25 of all of the reasons. But one reason is that the -- there

1 was no good that could come out of it for the defense I felt
2 like, or we felt like, to get someone who would be able to
3 possibly contradict our witnesses. Another reason is that
4 we didn't want the defendant to be giving details of the
5 crime to the expert.

6 Q All right, sir. Before the independent evaluation --
7 before the evaluation was made by Dr. McKee, did you explain
8 the purposes of the evaluation to your client?

9 A I don't have independent recollection of discussing
10 that with Mr. Robertson. Based on my review of my prior
11 testimony in the last PCR it appears that we informed him
12 that he was going to be evaluated and informed him to take
13 the 5th Amendment as to any questions concerning the details
14 of the crime.

15 Q All right, sir. But it's clear that he didn't do that.

16 A It appears he did not.

17 Q And in the course of discussing the matter with Dr.
18 McKee, your client revealed many of the same facts that he
19 revealed to Ms. Cascio.

20 A I'm not able to answer that question at this time
21 without reviewing --

22 Q If I showed you part of the record, please?

23 A Certainly.

24 Q I'll hand you Volume 7 of the State Court Appendix in
25 case. I'll ask you to turn to page 3067.

1 A Okay. I'm there.

2 Q Beginning around line 13.

3 A Okay. All right. I'm there.

4 Q Okay. If you would read between 3068, line 21, through
5 2072, line 16, to refresh your recollection.

6 MR. EHLIES: Could I -- I didn't hear that, Judge. Can
7 I get those pages?

8 MR. SALTER: Certainly. 3068, line 21, through 3072,
9 line 16.

10 A Okay. I have read it.

11 Q All right, sir. After having reviewed those pages,
12 does it appear that he revealed many of the facts to Dr.
13 McKee that he revealed to Ms. Cascio?

14 A Perhaps. In 3067 there's a question, "Are the comments
15 in Dr. Cascio's notes consistent with the details related to
16 you by the defendant?" When he goes into the information
17 that he has of the details of the crime he doesn't detail
18 what he got from Dr. Cascio's notes and what he got from his
19 own interview. He does say they are consistent with details
20 related to him by the defendant. I'm not completely clear
21 on this as to what was revealed directly to Dr. McKee and
22 what was revealed -- Dr. McKee was getting from Dr. Cascio's
23 notes.

24 Q All right, sir. Now, had you and/or Mr. Hancock worked
25 with Ms. Cascio to prepare her for what would happen on

1 cross examination?

2 A I don't remember the details. I mean, I know we met
3 with her on a number of occasions, but the details of the
4 conversations that were had with her I don't recall at this
5 time.

6 Q All right, sir. Going back to the questions relating
7 to the failure to object to the sentencing phase closing
8 argument, and to the question relating to the eliciting
9 testimony from Mr. Meyer, are you familiar with Payne versus
10 Tennessee?

11 A I've been familiar with that case but that's been a
12 long time since I've dealt with it, you'll have to refresh
13 my memory on it.

14 Q Do you have any -- what is your understanding about the
15 State's ability to present evidence of victim impact
16 evidence?

17 A The last -- I haven't had a capital case since then.
18 Basically the State is allowed to introduce evidence of
19 victim impact evidence.

20 Q All right. With respect to your not objecting to
21 providing Dr. Cascio's notes, had the Judge not ordered
22 reciprocal discovery?

23 A Yes.

24 Q And had he not made clear that unless the data
25 underlying an expert's opinion was disclosed, then the

1 expert would not be allowed to testify?

2 A I think that was the case. I don't remember the
3 specifics of the ruling, I would have to rely on the
4 transcript for that.

5 Q All right. But if he had made such a ruling then there
6 was no basis for you to object, was there?

7 A No, there wouldn't be.

8 Q Because you couldn't put the witness up if you didn't
9 comply with his ruling.

10 A That's correct.

11 Q Your affidavit, Applicant's Exhibit 10 I believe it is,
12 indicates you didn't recall reviewing Ms. Cascio's notes
13 before you disclosed them?

14 A That is correct. I don't have a recollection of when I
15 first reviewed those notes.

16 Q All right. But in 2007 -- you are aware that in 2007
17 you testified that you were sure you did before you
18 disclosed.

19 A Yes. I saw that when I reviewed the transcript. The
20 answer to that question I'm sure I did basically was based
21 on that would be my practice before I gave anything up to
22 review it and see it. The actual -- the question do I have
23 an actual independent recollection of sitting down and
24 reviewing those notes, I do not have a recollection of when
25 I first reviewed those notes, whether it was before or after

1 they were presented.

2 Q But your common practice would be to review any
3 document you're going to hand over to the State that would
4 provide information that could be used adversely to your
5 client, right?

6 A That would be my usual practice, yes.

7 Q And probably been that way since you started practicing
8 criminal defense work.

9 A That's correct.

10 Q All right, sir. You were present during Mr. Hancock's
11 testimony in the 2007 PCR, correct?

12 A I was not.

13 Q No, you were not?

14 A I don't think I was.

15 Q All right, sir. And I believe you indicated earlier
16 you thought it was necessary to present Ms. Cascio because
17 she tied things together for the mitigation case?

18 A That's correct.

19 Q All right. And I believe you testified in 2007 that
20 you were not overly concerned about her lack of experience?

21 A That's correct.

22 Q And, again, she had been recommended by the Death
23 Penalty Resource Center.

24 MR. EHLIES: Judge, we're really hearing a lot of
25 history, and that's my objection.

1 THE COURT: Okay. I'll give him a little leeway, he's
2 on cross. Go ahead.

3 MR. SALTER: Thank you, Your Honor.

4 Q In your -- pardon me. How many years have you been
5 practicing law?

6 A Now 43.

7 Q Yes, sir. All right, sir. In your 43 years of
8 practicing law, has it ever been your practice to instruct
9 an expert that you've employed as to how to practice in his
10 or her field of endeavor?

11 A No.

12 Q One of the allegations that has been raised is that
13 trial counsel were ineffective in failing to object to Mr.
14 Brackett's closing in the guilt phase. Now, would it be
15 fair to say you probably don't recall the closing argument?

16 A I recall some of it. I think I reviewed -- at some
17 point reviewed some of what he said.

18 Q Okay. Do you recall him saying -- telling jurors that
19 they did not even need to spend five minutes deliberating?

20 A I do remember that.

21 Q And prior to making those comments, had he not reviewed
22 the various pieces of evidence that the State offered
23 establishing guilt?

24 A I believe so.

25 Q All right. So all he was really doing is arguing that

1 the State had proved its case.

2 A Well, it's hard for me to answer what he was really
3 doing. I think what he said speaks for itself.

4 Q All right, sir. Do you recall the State introducing a
5 number of Mr. Robertson's prior offenses through a SCDC
6 records custodian?

7 A I have a vague recollection of that, yes.

8 Q Were you aware of any objection that you could have
9 made at that time that it violated his confrontation rights
10 for that to occur?

11 A Not that I recall at this time.

12 MR. SALTER: Your Honor, I think that's going to be it.
13 Thank you, sir.

14 THE COURT: Anything at all as to this witness?

15 MR. EHLIES: Yes, sir.

16 CROSS EXAMINATION

17 BY MR. EHLIES:

18 Q Mr. Boyd, I hope you can recall back in the trial in
19 keeping with the questions the State has asked you today
20 whether or not it was a major battle over the Court's
21 finally ordering for a psych evaluation. Do you remember
22 that?

23 A I remember -- well, it was a battle, yes. In fact, I
24 think at first it was denied and then later it was approved.

25 Q And do you remember advocating in memoranda otherwise

1 on the record with Judge Hayes that competency and insanity
2 were never an issue and would not be an issue?

3 A Yes, that's correct.

4 Q And until such a time as that became an issue a psych
5 eval. was inappropriate.

6 A That's correct.

7 Q And then do you recall reading an order, which is in
8 evidence, 15B, that when Judge said, "the Court has inherent
9 authority under appropriate circumstances as the Court here
10 finds exists to order a defendant to undergo a psych eval."
11 Do you remember that?

12 A I think that's in the record, yes.

13 Q But do you have a recollection of it?

14 A I remember the Judge ordering it, the exact words that
15 were used I don't recall.

16 Q Okay. He ordered a psych eval.

17 A Yes.

18 Q And do you recall that he relied in part on the
19 hospitalization -- involuntary hospitalization of the
20 defendant at William Hall for mental disorders about two
21 years before the crime.

22 A I recall that he had been admitted. I don't recall
23 whether or not the Judge used that as the basis for his
24 ruling.

25 Q Okay. I think it's detailed in the orders, though. Do

1 you also recall that the Judge said every effort should be
2 made and, in fact, the 5th Amendment rights should be
3 protected?

4 A I don't recall that language, but again, I think that's
5 in the record.

6 Q And you asserted that with your oral arguments and your
7 resistance to the idea of a psych eval. anyway.

8 A That's correct.

9 Q Is that what happened, the 5th Amendment rights were
10 protected, in fact, or were they disclosed to the jury?

11 A Through Dr. McKee's testimony the details were
12 disclosed to the jury.

13 Q All right. And I would represent to you that we filed
14 discovery motions, including Rule 5 and expressly other
15 Brady materials, do you recall that?

16 A Yes.

17 Q They are in these records as well. And also there was
18 a major battle about underlying data and whether it should
19 be disclosed. Do you remember that?

20 A I remember there was some motion argument about that.

21 Q And that was part of the stress about getting the
22 document together, and it was a consistent problem about
23 getting underlying data to the record, is that your
24 recollection?

25 A I don't recall whether it was a problem or not. I

1 mean, it certainly could have been, but that's a common
2 problem with experts period.

3 Q And so you rely on the notes of the experts in
4 preparing your cross examination or direct examination; is
5 that correct?

6 A Sometimes, yes.

7 Q Is it not your standard practice to review the reports
8 and the notes of any expert, whether it's your expert or the
9 opposing party's expert?

10 A Yes, that's correct.

11 Q And you made a discovery motion.

12 A That's correct.

13 Q And I'm going to show you what's 11A -- 11 and 11A,
14 which are established in the record. These are Dr. McKee's
15 notes. He was the reply witness?

16 A That's correct.

17 Q And those notes supported what he testified to about
18 the client's statements concerning circumstances of the
19 crime.

20 A That's correct.

21 Q I'm going to show you these and ask you if you
22 recall -- we may need your affidavit -- but whether you
23 recall ever having received from the State those notes in
24 preparation of cross-examinations of Dr. McKee?

25 A I don't recall receiving these notes. I can't testify

1 for certain that we did not receive the notes. I don't have
2 a recollection of receiving them.

3 Q All right, sir. They are rather unique in appearance,
4 are they not?

5 A They are.

6 Q And does that, in fact, prompt your memory about
7 whether you would have received those prior, at anytime,
8 before I gave them to you in the history of our
9 relationship?

10 A I don't recall seeing them before that time. Again,
11 we've reviewed a lot of documents during that trial so I
12 can't say for certain that we didn't see these, but I don't
13 recall seeing them. They are very small, it's pretty hard
14 to go through. I mean, they seem pretty unique. It doesn't
15 stand out to me that I've ever seen them before.

16 Q If they contained information about statements by your
17 client, would it have been helpful to prepare for his cross
18 examination?

19 A Yes.

20 Q Would you have wanted to see it and have it interpreted
21 by a qualified expert as to what were in it, what remarks
22 were in the notes?

23 A That would be yes, that's correct.

24 Q When you discussed the details of the State's case I
25 understand that you said really it's a foregonegone

1 conclusion and you took that up with the defendant, your
2 client; is that correct?

3 A That's correct.

4 Q And he resisted the idea of surrounding on guilt.

5 A That's correct.

6 Q But not necessarily on being the murderer. He wanted
7 an investigation, is that correct, and find some defense
8 mechanism to the charge, the guilt phase charge, not the
9 mediation case, the sentencing phase.

10 A The discussions with him was more about whether he did
11 it or not. I mean, I think he was looking for anything that
12 could be a defense.

13 Q Okay. In light of that, any way to defend the case,
14 and with your knowledge of Menendez, and that this was a
15 parricide case, did you then investigate and develop the
16 idea of presenting specific testimony and evidence about the
17 unique features of children killing parents?

18 A We did not.

19 Q The history about the psych eval. Do you recall Judge
20 Hayes saying if the defendant doesn't cooperate on a psych
21 eval. on the issue of insanity, then he will not be allowed
22 to present his experts on mental state?

23 A I think that was stated, yes.

24 Q Did you -- when you found out that the examiner had
25 finished the report, did you make any objection to the State

1 or -- or the Judge ordered psych eval. going to the State
2 and not to the Judge?

3 A No, sir, I don't believe so.

4 Q And did you ask the Judge to hold that insanity inquiry
5 by the examiner confidential until such time as it became
6 relevant?

7 A We did not.

8 Q Do you know that it actually did go to the State, the
9 McKee reports?

10 A It appears to, yes.

11 Q And that you may not have received his notes where the
12 interview involved the details of the crime; is that
13 correct?

14 A That's correct.

15 Q Okay. Did you then when they presented McKee object
16 and ask to redact any of the 5th Amendment protected
17 information from his testimony?

18 A No, I don't believe so. That would be in the
19 transcript, I don't believe we did.

20 Q Did you form any objection advancing the investigation
21 and an objection to the State prosecutor using the Court's
22 witness as its own in reply?

23 MR. SALTER: Objection, Your Honor. It's contrary to
24 the record itself.

25 MR. EHLIES: Well, then they'll have a reason to come

1 back and --

2 THE COURT: Rephrase that, please.

3 Q Okay. When you were involved in the trial and received
4 the notes, the report -- not the notes, your testimony is, I
5 understand, that you never saw those notes before; is that
6 correct?

7 A Well, I don't recall seeing the notes.

8 Q You don't recall seeing those notes before. Did you
9 ever ask for a redaction of 5th Amendment statements by the
10 client to Dr. McKee?

11 A No, we did not.

12 Q Now, you testified that it is your usual practice to
13 look at your expert's reports before surrendering them; is
14 that correct?

15 A That's correct.

16 Q Sometimes exigencies bend the rules in usual practice;
17 is that correct?

18 A That's possible, yes.

19 Q And is this one of those occasions?

20 A I don't know. I mean, I can't recall when I actually
21 first read those notes. I know there was -- it appears to
22 have been late in the day, I was under pressure to give up
23 those notes. I can't actually remember reading the notes or
24 not reading the notes before giving them to Solicitor Pope.

25 Q Okay. And once they're in Solicitor Pope's hands

1 control of the witness is kind of out of your domain; isn't
2 that true? Once he knows he can bring her as his own
3 witness.

4 A That's correct.

5 Q 611.

6 A That's correct.

7 Q So delivering the notes to the prosecution is the
8 tipping point, that's where things change and not a decision
9 whether to call her as a witness; is that correct?

10 A That would be -- I think he could call her as a witness
11 himself after reading the notes, yes.

12 Q Okay. So the notes were remarkable for their content,
13 is that a fair statement?

14 A That's fair.

15 Q In fact, it was a key testimony for a sentence of death
16 in the State's case is Cascio's cross examination; is that
17 correct?

18 A That's correct.

19 Q Okay. So you would have been surprised -- had you read
20 them before you gave them to Mr. Pope you would have been
21 surprised about their content, right?

22 A Yes, that would have caused concern.

23 Q And you would have called counsel and team members
24 together and you would have said at that moment, March 24th
25 in the evening, we've got a problem, and had a conference to

1 make a strategic decision. Do you recall doing that?

2 A I don't recall doing that.

3 Q Is it your practice in capital litigation with two
4 lawyers the need for strategic decisions and investigations
5 to make those decisions by yourself and isolate it?

6 A No.

7 Q It is a team effort in your mind?

8 A Yeah, that's correct.

9 Q And do you make important decisions s a group?

10 A Generally, yes.

11 Q But it's one of those rules?

12 A Yes.

13 Q Did it get bent in this case?

14 A I don't know. I don't recall having a discussion with
15 Mr. Hancock about the notes, so I'm not sure.

16 Q Thank you. One other thing. Do you remember that the
17 State's theory of the case was money?

18 A I do.

19 Q Okay. Did you all ever challenge that with any
20 investigation, development and ability to present evidence
21 that it was a rage and anger killing?

22 A I think the whole basis of the defense was that it was
23 rage and anger over built up tension from what had happened
24 to Mr. Robertson over the years.

25 MR. EHLIES: Okay, sir. And we thank you.

1 THE COURT: Anything from the State?

2 MR. SALTER: Just briefly, Your Honor.

3 RECROSS EXAMINATION

4 BY MR. SALTER:

5 Q Mr. Boyd, I would like to again --

6 MR. SALTER: Your Honor, may I approach the witness?

7 THE COURT: Yes.

8 Q I would refer you to appendix page 3068, line 25, going
9 on over to line one on the next page.

10 A Page 3068?

11 Q Yes, sir. Line 25.

12 A Okay. I see.

13 Q And at that point you objected to Dr. McKee testifying
14 from his notes.

15 A That's correct.

16 Q So you would have obviously had to have the notes in
17 order to understand he was testifying from them, would you
18 not?

19 A In the context of this objection I can't tell. It
20 would seem if I'm objecting to him revealing information
21 from his notes he would be -- I would know that what he's
22 testifying to is from his notes. I would have to have that.
23 I'm not sure.

24 Q All right, sir. I'm going to refer you back now to
25 page 3043, excuse me, 3044 through 3045, and ask you, does

1 it not reflect there that you objected to Dr. McKee's
2 testimony? I'm sorry, it's highlighted in pink, it begins
3 there.

4 A That's an objection -- that's an objection to Dr.
5 McKee's testimony.

6 Q All right, sir. And you previously -- you incorporated
7 a previously filed memorandum, did you not?

8 A That's correct.

9 Q All right, sir. And what was the ruling? It was
10 overruled, correct?

11 A It was overruled, yeah.

12 Q Did the Judge not thereafter go on and make findings
13 with respect to the statements made by your client?

14 A Can you point that out to me? I'm not sure.

15 MR. SALTER: Your Honor, if I -- Your Honor would bear
16 with me for just a minute.

17 THE COURT: Certainly.

18 MR. SALTER: I withdraw the question. I can't seem to
19 find that in the record right now.

20 THE COURT: Okay. Anything further?

21 MR. SALTER: No, sir, Your Honor.

22 THE COURT: Thank you. Sir, you may step down, please
23 be careful. Okay. We're past our time a little but let's
24 take our morning break, let's reconvene at 11:00.

25 (A break was taken.)

1 MS. BROWN: Mr. Ehliès and I talked earlier, this is
2 just an appellate kind of let's make sure nothing happens if
3 they have to do an appendix in this case. We agreed to have
4 the sealed depositions entered into evidence, and if they're
5 going to be in the record they probably should be opened by
6 Your Honor in court, and that's on the record. That way
7 when we do the appendix we can just put papers copies in, we
8 don't have to transport sealed documents and say we don't
9 know when these were opened who that sort of thing. And so
10 if they're intended to be opened, and I believe Mr. Ehliès
11 has told me --

12 MR. EHLIES: Without objection.

13 MS. BROWN: -- intends to open them. I don't have a
14 problem, I just want to make sure it's on the record if it's
15 going to be opened.

16 THE COURT: You want them opened now on the record?

17 MR. EHLIES: Just go ahead and open them up, Judge,
18 without objection. There should be three of them, Judge.

19 THE COURT: I have opened the original depositions of
20 Bryson Barrowclough, Thomas Pope and Michael Brown.

21 MR. EHLIES: Yes, sir, that's it.

22 THE COURT: They're in evidence without objection.

23 MR. EHLIES: Without objection.

24 MR. SALTER: Without objection.

25 THE COURT: Okay. They're in evidence without

1 objection. I think we're going to call a witness out of
2 order because you've not yet rested.

3 MR. EHLIES: Yes, sir.

4 THE COURT: Okay. State?

5 MR. SALTER: Your Honor, before I call Mr. Brackett I
6 would like to direct the Court's attention to pages 3055
7 through 3057. At the end of my cross-examination with
8 Mr. Boyd I was trying to find this portion of the record, I
9 did not find it until after I sat down. At that point the
10 Judge, the trial Judge, Judge Hayes, made findings that
11 before any statements were made by Mr. Robertson to Dr.
12 McKee he had been advised of his right under Miranda and the
13 U.S. Constitution that he freely, voluntarily and knowingly
14 waived those rights, he therefore found that any statements
15 that Mr. Robertson had made were admissible. I would now
16 call Solicitor Brackett.

17 The witness, KEVIN BRACKETT, was first duly sworn and
18 Testified as follows:

19 THE COURT: Solicitor, if you will tell us your name
20 and spell your last name for the court reporter, please.

21 THE WITNESS: Yes, sir. Kevin Brackett,
22 B-r-a-c-k-e-t-t. Solicitor, 16th Judicial Circuit.

23 THE COURT: Counsel?

24 DIRECT EXAMINATION

25

1 BY MR. SALTER:

2 Q All right. How long have you been Solicitor in the
3 16th Circuit, sir?

4 A This November will make 15 years.

5 Q Prior to then how were you employed?

6 A I was the Deputy Solicitor under then Solicitor Tommy
7 Pope.

8 Q You were Deputy Solicitor during Mr. Robertson's trial?

9 A Yes.

10 Q Okay. Do you recall your duties during the trial?

11 A Yes. Solicitor Pope and I divided the case up. We
12 divided the witnesses up, who was going to take which
13 witness, and there were certain issues that we would handle
14 throughout the trial, legal issues and that sort of thing.
15 We tried many cases together and so we had sort of a routine
16 and this case was no different. We went through all of the
17 evidence and just kind of figured, "Okay. I'll take this
18 guy, you take that guy." But we tried the case together.

19 Q All right. Did the State not also investigate whether
20 or not Chip Robertson was involved in the murders of his
21 parents?

22 A There was some concern about that, and to the extent
23 that it could be investigated we did, but there was not a
24 lot we could do. He was in Philadelphia at the time of the
25 murder, so any theory that we would have been able to charge

1 him under would have either been as an accessory before or
2 after, because he could not have been principal.

3 Q All right, sir. What evidence of physical abuse did
4 the State's investigation undercover, if you remember?

5 A Physical abuse of who?

6 Q I'm sorry, James Robertson by his parents.

7 A Most of the evidence we had from that, I believe, came
8 from the defense. We spoke to neighbors and friends of the
9 family, friends of Chip and Jimmy that, you know, other boys
10 that they had grown up that were their age, I don't recall
11 specifically anybody making that an issue. It sort of
12 surfaced when the defense provided us with some of the
13 materials that they had developed during their
14 investigation.

15 Q One of Mr. Robertson's allegations is that the trial
16 attorneys were ineffective because they did not object to
17 the State's failure to prove identify of the victims. In a
18 nutshell, what evidence did the State have that the two
19 victims in this case were, in fact, Terry and Earl
20 Robertson?

21 A Well, as I recall some of the early witnesses we put up
22 focused on how the bodies were discovered. They were
23 friends of Terry's who came by to see her who went into the
24 house looking for her, found the back door opened and went
25 in and found Earl's body in the hallway. The fact that his

1 work place said that he was supposed to be in at work at a
2 certain time and had not shown up, and they had actually
3 called the police, I believe, to look into his whereabouts
4 because they were concerned, and I believe when the police
5 officer arrived -- I'm just having to go back, and I
6 apologize, I'll say up front, I have not read the entire
7 transcript and reviewed all of the materials in the file so
8 I'm doing the best I can to recollect -- but I believe the
9 police officer arrived the after the friend of Terry's
10 arrived. She was there like to pick up some baked goods or
11 something, and the friend of Terry's had discovered Earl's
12 body and panicked, as anybody would, and fled trying to get
13 out of the house but the lock on the inside -- she couldn't
14 get through the door. So I think she ultimately had to
15 climb out a window, but the police officer arrived right
16 about that time. I believe she identified Earl, if I'm
17 correct, I can't recall, but that was part of it. Obviously
18 the photographs. Some of the photographs were seen by some
19 of the witnesses. They knew who Terry and Earl were.
20 Neighbors, like Mr. Langley, who lived across the street,
21 and I believe there was an autopsy done that identified the
22 bodies.

23 Q All right. Reading from the trial record it appeared
24 one of the most highly contested issues was whether or not
25 the State would be entitled to an independent psychiatric

1 evaluation.

2 A Yes.

3 Q Do you recall when you first made -- when the State
4 first made a request for an independent psychiatric
5 evaluation?

6 A I believe we started talking about it in the fall or
7 maybe even the summer, and we filed the motion for an
8 independent evaluation. I believe the first hearings on
9 that were held in November and the first discussions about
10 that. But if you have the actual motion it would refresh my
11 recollection, the filing date.

12 MR. SALTER: Your Honor, may I approach the witness?

13 THE COURT: Yeah.

14 A November 19th is the date that motion concerning the
15 motion Rule 5 and mental evaluation was filed. This
16 concerned a number of issues pursuant to Rule 5, but one of
17 the issues that was implicated in this motion was our
18 request for an independent psychological evaluation of the
19 defendant. In the event that he wished to assert a mental
20 status defense, and this had been an issue that we had been
21 working on since Susan Smith is when it first sort of
22 surfaced in our world, and the gist of it if I had to
23 distill it down to a sentence or two is that we felt it was
24 unfair that the defense should be allowed to insert into the
25 trial as part of their defense the statements of the

1 defendant to their psychiatric and psychological experts by
2 calling those experts to the stand and having them say "and
3 then she told me this and he said this," and basically
4 putting in what the defendant had told them, but then
5 shielding us from our ability to examine the defendant
6 ourselves with our own expert. Because you can't really
7 challenge that type of testimony and that type of evidence
8 if you don't have access to what is the heart of the
9 evidence, which is the defendant's mind. So they would hide
10 behind the 5th Amendment and say, "Well, he's not going to
11 talk to our expert but we're going to put our expert up who
12 he will talk to, and he's going to lay out all of the things
13 he would want to say from the stand but he won't actually
14 take the stand, and that's what happened in Smith. We
15 started in Susan Smith, that was first time we did it but
16 then in several cases afterwards, and it ultimately
17 culminated in this one, and this is the first case I believe
18 we were able to get an order. It was right around the same
19 time that Judge Cole did the order in State versus Locklear,
20 which was a pending capital case in the 7th Circuit. And
21 the argument for this boiled down to looking at a number of
22 U.S. Supreme Court cases; Estelle versus Smith, Buchanan
23 versus Kentucky, a South Carolina case, State versus Sloan,
24 which I think was a 1982 case; a 4th Circuit Court, U.S.
25 versus Albright, that should all be in my briefs, and so

1 forth. But all of that, basically it went to the heart of
2 what we were trying to do was if you want to put up a mental
3 status defense that is based in part on your expert's
4 evaluations of the defendant then it's only fair that we
5 have the ability through our experts to examine the
6 defendant as well, and that way we can challenge and verify
7 if it's accurate, and we can assess the quality of that
8 evidence ourselves. But if you don't allow us access to the
9 defendant how would we be able to do that? So ultimately
10 Judge Hayes agreed. But at the outset he declined to give
11 us an independent evaluation, not because he disagreed with
12 our thought and our position on it, but because the defense
13 wasn't sure and they were not asserting that they were going
14 to have a mental status defense, they were not clear on that
15 point in November and December. It wasn't until February
16 that they indicated yes, and they gave us some information
17 about experts that they had retained; Pincus and Evans and
18 Morton and some psychological folks that they were going to
19 employ as experts in the case. And at that point when Judge
20 Hayes heard, okay, now we know you're going to put up a
21 mental status defense of some kind on either guilt or
22 penalty, it's only fair that the State be allowed to have
23 their expert evaluated.

24 MR. SALTER: Your Honor, I would have the motion
25 concerning Rule 5 and mental evaluation in as an exhibit

1 respondent.

2 THE COURT: Any objection?

3 MR. EHLIES: I'm so sorry. Please tell me again, Mr.
4 Salter, if you don't mind one more time.

5 MR. SALTER: No, it's quite all right. The motion
6 concerning Rule 5 mental evaluation.

7 MR. BENNETT: Without objection.

8 THE COURT: Without objection. Thank you.

9 (The motion was received as State's 3.)

10 Q Mr. Brackett, I'm going to hand you Respondent's
11 Exhibit Number 3 and ask you -- you also had a request under
12 Rule 5 for reciprocal discovery.

13 A Yes.

14 Q Was that a problem, also?

15 A Yes. Because we were hoping to get reports and the
16 evidence. Obviously our ability to prepare our case is
17 dependent, just as the defense, they can't prepare their
18 case without us complying with discovery, we have the same
19 concerns. That was sort of like a running issue throughout
20 this stage of the case. We were looking for any reports
21 that might be generated by their experts and any evidence
22 that they might intend to use. And I believe at some point
23 that's, as I mentioned earlier, the allegations pertaining
24 to the family dynamics and that sort of thing came to us, I
25 believe, as part of that, I believe. The defense eventually

1 tendered a large box of like social history type stuff.

2 Q Did the trial judge ultimately order reciprocal
3 discovery?

4 A Yes.

5 Q Do you recall when he would have done that?

6 A I believe the Judge was -- I can't recall exactly when,
7 but I believe the Judge was basically saying turn it over.
8 You know, you have an ongoing duty to do this, the rule says
9 you have to do it. But the problem was the defense was
10 saying we're not exactly sure what we're going to do so we
11 can't turn things over until we know we're going to use
12 them. So the Judge kind of -- at one point I just remember
13 Judge Hayes was kind of sort of, "Well, what do you want me
14 to do if they don't know they're going to use it yet?" So
15 that was sort of the problem as I recall.

16 Q Mr. Brackett, I'm handing you a document entitled Order
17 for Reciprocal Discovery and see if you recognize that?

18 A Yes, sir. This was an order entered by the Court dated
19 December the 7th, I believe, or December the 4th, I'm sorry,
20 and filed December the 4th, 1998 by Judge Hayes ordering the
21 defendant to permit the attorney for the State to inspect
22 and copy any results or reports of physical or mental
23 examinations, scientific tests or experiments made in
24 connection which the defendant tends to introduce as
25 evidence in chief at the trial, or which were prepared by a

1 witness whom the defendant intends to call at trial and the
2 results, of course, led to his testimony by December 7th.

3 MR. SALTER: Your Honor, I would move this order into
4 evidence as Respondent's Exhibit 4.

5 MR. BENNETT: Without objection.

6 THE COURT: Without objection.

7 (The order was received as State's 4.)

8 Q Now, Mr. Brackett, you testified earlier that the trial
9 Judge initially denied the request for an independent
10 evaluation?

11 A Yes. The Judge said until he had an affirmative -- a
12 clear understanding that the defense did intend to assert
13 some sort of mental status defense in the case in either the
14 guilt or the penalty phases he felt it was premature. But
15 he gave us leave to file a motion for reconsideration in the
16 event that if that issue came into focus that the defense
17 did intend to do that.

18 Q And did you thereafter move to reconsider?

19 A Yes, sir. In February as we -- in the course of
20 discussing with Mr. Hancock and Mr. Boyd we came to learn
21 about Mr. Pincus, one of the neurologists, maybe Mr. Evans,
22 I can't remember which, but it became clear that there was
23 going to be some mental status defense. And, of course, we
24 also, I think by that time, became aware that he had been
25 evaluated previously, maybe committed, had mental health

1 issues, we had received some of the material from the
2 defense by that point, so that also became relevant in a
3 judicial inquiry and raised the Judge's concern about mental
4 status as well. So based on that he did order in February
5 that the defendant should undergo a mental examination by an
6 expert of our choosing, not -- this wasn't the Court saying
7 we're sending him down to DMH for the standard court
8 examination. This was an expert that was to be hired by the
9 State and used by the State for the purposes of conducting
10 our own evaluation. But he conditioned it and said that the
11 defendant's 5th Amendment rights were to be preserved. The
12 defendant should be advised of his 5th Amendment rights,
13 nothing would abridge them. The defendant was not forced to
14 talk to our expert. But the defendant was advised that if
15 you do not cooperate then you cannot later assert these
16 mental status defenses, so you have to make a choice
17 basically, which is what Estelle versus Smith, Buchanan
18 versus Kentucky and those line of cases all say. The
19 defendant has an absolute right to present these defenses,
20 but then you can't present them and then say, "I'm not
21 talking to the State's expert," so you have to make that
22 choice and that's what Mr. Robertson ultimately did. And
23 his attorneys, they submitted to the evaluation by Mr. McKee
24 and he was able to form an opinion. And we chose Mr. McKee,
25 Dr. McKee. We did hire Dr. McKee as our expert to assist us

1 in the preparation of our case and meeting the mental status
2 defenses that we anticipated the defense was going to
3 present.

4 Q All right, sir. I'll hand you an order -- a document
5 entitled Order for Evaluation as to Competency and Criminal
6 Responsibility. See if you recognize that.

7 A Yes. This is Judge Hayes's order of February 17th
8 granting our motion for an independent evaluation and
9 basically indicating that we would not be allowed to use
10 anything that Dr. McKee developed, we could not use any
11 information obtained through this evaluation unless and
12 until the defense first interjects the mental status of the
13 defense as an issue in either the guilt or the penalty phase
14 of the trial. And also our motion within our larger motion
15 that if the order was granted we asked that the doctor
16 conducting the examination be able to do it one on one
17 without anyone else in the room. That was under U.S. versus
18 Albright which was cited, I think, in the order.

19 MR. SALTER: Your Honor, I move this order in as the
20 next Respondent's exhibit.

21 MR. BENNETT: Without objection.

22 THE COURT: Without objection.

23 (The order was received as State's 5.)

24 Q I will hand you the order, which is now Respondent's
25 Exhibit Number 5, and ask you, the very first sentence, how

1 does that read?

2 A It says, "This matter comes before the Court on the
3 State's motion to reconsider its earlier order denying the
4 State's request for an independent mental evaluation of the
5 defendant."

6 Q All right, sir. So this order wasn't for a Court's
7 witness.

8 A That is correct.

9 Q It was for the State to have someone independently
10 evaluate Mr. Robertson.

11 A Yes.

12 Q Okay. He was thereafter evaluated by Dr. McKee?

13 A Yes. There was -- obviously this issue was hotly
14 contested by the defense. From November on they objected to
15 the independent evaluation, they did not think it was
16 appropriate. And even after this order was entered I
17 believe they made a motion to reconsider this order, and
18 that was filed and ultimately Judge Hayes issued his order
19 denying their motion to reconsider, denying the defense's
20 motion to reconsider in March. And I believe that was the
21 order that counsel for the defense referenced earlier
22 yesterday I think he was talking about, it was dated
23 March 1st or 2nd, something like that.

24 Q Mr. Brackett, I now hand you a March 12th, 1999 letter,
25 along with some attached notes, and ask you if you recognize

1 that document?

2 A Yes, sir. This is going to be Dr. McKee's report to
3 us, the test booklet for the Neuro Behavioral Cognitive
4 Status Examination, and then some handwritten notes of Dr.
5 McKee that were received by our office, I believe, the day
6 before trial started on March the 14th.

7 MR. SALTER: All right. I move to introduce this
8 document as Respondent's Exhibit 6.

9 THE COURT: Any objection?

10 MR. BENNETT: No objection, Your Honor.

11 THE COURT: Without objection.

12 (The documents were received as State's 6.)

13 Q Mr. Brackett, if you would look at the fax information
14 on -- at the top of that document.

15 A Yes, sir.

16 Q Does it indicate when you would have received it?

17 A It says 3/14/99. And then the part of the time is
18 cutoff, I can't tell if that's 15:25 or 18:25, and then a
19 fax number, which is partially cutoff, and it looks like it
20 says Kinkos Bush River, which I think Dr. McKee lived in
21 Columbia. So I think he must have faxed this from a Kinkos.

22 Q And the trial began the next day?

23 A Yes.

24 Q Do you recall whether or not you had disclosed not only
25 Dr. McKee's report but the underlying data as well?

1 A Yes. Once we received this -- and I can't recall -- my
2 guess is we were working on Sunday. Because if the trial
3 started on Monday it was our habit we worked all weekend.
4 And I believe I was in discussions with Dr. McKee when I
5 received this, because I talked to him at some point or
6 asked him when he told me -- because I said, "I'm going to
7 turn this over to the defense," and he had a concern about
8 turning over the test booklet. Because apparently this is
9 like some sort of -- within the realm of psychologists and
10 psychiatrists these instruments they use to conduct the
11 tests are sort of privileged, confidential, they don't like
12 them getting out in the wild because they don't want people
13 studying on the test that they're about to take, it can skew
14 the results. And I honestly don't remember -- I remember
15 him asking me not to reveal that, and I can't recall, I
16 probably would have told the defense I have it but he's
17 asked me not to turn it over. But there's nothing in this
18 test booklet that is pertinent to the test, it's all
19 questions that are important to a psychologists but not to
20 the lay person. But we would have turned this over. I
21 turned this over the next day when we were in court. But
22 the -- I was confused at first. When I was speaking to Mr.
23 Ehlied earlier this year we were talking about this, because
24 typically all discovery is run through Merry Collins who is
25 seated over there, she's sort of our discovery maven, and

1 she hands it over to one member of the defense investigators
2 and they initial the back so we have some proof that it was
3 turned over. And it took me awhile to figure out, we
4 received this the day before trial. So it didn't go through
5 Merry, we just handed it over to -- I can't remember whether
6 it was Mr. Hancock or Mr. Comer or Mr. Boyd, but we gave it
7 over to them the next day because we were turning the stuff
8 over. The only thing I can't remember is how at the time of
9 this the issue of the test booklet resolved. And I spoke to
10 Mr. Ehlied earlier and we actually talked to Dr. McKee and I
11 can't recall that particular aspect of it. But the report
12 itself and the notes would have been turned over, they were
13 turned over the very next day.

14 Q Do you recall your guilty phase closing argument?

15 A Yeah, not specific detail.

16 Q Do you recall telling jurors it shouldn't take them
17 five minutes to deliberate?

18 A Yes, I do.

19 Q What were you trying to communicate to the jurors?

20 A That wasn't a comment on how they should take -- you
21 know, that they shouldn't take their responsibility as
22 jurors seriously, it was meant as a comment on the strength
23 of our case, which, you know -- I mean, the case was
24 overwhelming. As Mr. Boyd testified to, guilt really was a
25 foregone conclusion in this case. I think the final,

1 you know, the final piece of my closing after we'd gone
2 through all the DNA, the testimony of Meredith Moon, all of
3 the evidence that implicated Mr. Robertson. I held up the
4 shirt -- because at the end of the murder after he'd killed
5 his parents he took the bat, the hammer, his clothes, he had
6 some Ritalin paraphernalia that he'd been crushing the
7 Ritalin with to snort, all of that stuff went in a garbage
8 bag. He carried it with him in his car and they threw it in
9 a dumpster behind a restaurant at a rest area in Maryland.
10 We know that because as soon as they were arrested in
11 Philadelphia Meredith Moon immediately revealed that and the
12 Maryland trooper went to the location -- there was only --
13 it was a rest area in the middle of the interstate and
14 that's how she remembered, and she remembered there was a
15 chicken restaurant. So we called the highway patrol in
16 Maryland and they said, "That could only be two places." So
17 they sent a trooper out, looked in the dumpster and find
18 this big plastic bag with the bat and the blood, all of that
19 stuff, and one of things in there was Jimmy's shirt he had
20 worn while he killed his parents. And it was a shirt that
21 when you go to these tourist places you can get your picture
22 put on a T-shirt. He had gone to Stone Mountain, Georgia
23 and it was a picture of him with his arms around his two
24 buddies and he's smiling, and where the DNA guys cut it out
25 his mother and father's blood was all over the shirt. It

1 was like he left a picture of himself covered with his
2 parents' blood in the bag with all of the murder weapons. I
3 mean, it was one of these cases that was just, as Mr. Boyd
4 said, a foregone conclusion. It was overwhelming evidence.
5 So what I was highlighting to them was, you know, this is a
6 powerful case. This is not a case like a who done it and
7 you have to sit back there and scratch your head and figure
8 out what really went over here, this was an overwhelmingly
9 strong case.

10 Q Do you recall when the State received Dr. Cascio's
11 notes?

12 A I know it was right around the time of her testimony.
13 That was Solicitor Pope's witness and we received it shortly
14 before her testimony, I believe. I don't think I was there
15 so I have no independent recollection of that.

16 Q One of the other allegations that Mr. Robertson has
17 made was that trial counsel were ineffective in failing to
18 object to sentencing phase testimony that you elicited
19 through the Robertsons' therapist, Skip Meyer, to the fact
20 that Terry Robertson was a very private person and would
21 have been very upset to know that her counseling records
22 would have been revealed. Could you explain why you
23 elicited that testimony?

24 A I think it was just to highlight the fact that nobody
25 expects when you're speaking to a therapist for all of this

1 information to come out. I mean, that's supposed to be one
2 of the most -- as confidential as your conversations with a
3 lawyer. It was just she was a very private person, and what
4 was taking place was trips through conversations that she
5 had in private with her therapist.

6 Q And what is your understanding about the State's
7 ability to elicit victim impact evidence?

8 A You can do it but it's very limited.

9 Q Okay. How so?

10 A Well, it's got to be very closely focused. It can
11 easily -- you've got to be careful about what you can say
12 and what you can do.

13 Q Okay.

14 A You have to be careful in that.

15 MR. SALTER: I don't believe I have anything further.

16 THE COURT: Thank you. Counsel?

17 MR. BENNETT: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MR. BENNETT:

20 Q Good afternoon, Solicitor Brackett.

21 A Good afternoon.

22 Q Sir, we have never met. My name is Bradley Bennett,
23 I'm the second chair in this trial on behalf of Mr.
24 Robertson.

25 A Good morning.

1 Q Sir, I want to take you back a little bit. Today is
2 Wednesday, correct?

3 A Yes.

4 Q And you've been here in the courtroom for the last
5 three days; isn't that true?

6 A Yes, mostly. I've stepped out a few times, but yes.

7 Q You're still the solicitor here, correct?

8 A I am.

9 Q So you've been about working these past three days, but
10 you've been here in the courtroom pretty much everyday all
11 day long these last three days; isn't that true?

12 A This case has been the focus of my week, yes.

13 Q Let's talk about some other things that you focused on
14 in regards to this case. Have you met with Mr. Salter about
15 your testimony here today?

16 A Yes, briefly. As I've learned what the issues are and
17 I recollect various things, I reached out to him and said,
18 "Wait a minute, you might want to look at this or that."
19 Yes, I've had some conversations with him.

20 Q And when did those begin?

21 A Probably around the time this was scheduled when he
22 first reached out to me to tell me this case is being
23 scheduled to be held in August and we're going to have a PCR
24 hearing, just want to give you a heads up. Then throughout
25 some of the process of discovery I think I've worked with

1 you and I've spoken with Mr. Ehlied -- I haven't spoken with
2 you but I've spoken with your team, primarily Mr. Ehlied, in
3 the course of making sure that we got you copies of all of
4 the discovery. I think you've spoken with Merry Collins and
5 come by and picked things up with her. We've tried to work
6 with you as them.

7 Q Thank you, sir. What my focus and my question more
8 specifically is if I didn't make that clear, is just your
9 communication with the government, State's attorneys,
10 Mr. Salter.

11 A I have spoken with him, yes.

12 Q Okay. You said that you began that process back when
13 this case got set for this hearing, correct?

14 A That's the first recollection discussing it with him,
15 yes.

16 Q So fair to say it's been about a four or five month
17 long process that you've been communicating Mr. Salter about
18 your testimony here today?

19 A I would say probably since January. You guys were
20 involved in December, I remember you came by, so it might
21 have been then, yeah.

22 Q Again, sir, what I'm trying to do is I'm trying to
23 focus your attention not to how you've negotiated with
24 myself or anybody on my team. What I'm trying to do is I'm
25 trying to focus your attention over to your communication

1 with the State. Specifically I think that you've already
2 testified that you have spoken to Mr. Salter back about the
3 time that this case got set for this hearing, and I'm just
4 trying to focus your attention on to that length of time.
5 Do you think that that's about January of this year?

6 A Yes. And I understand what you're trying to, I do.
7 And when you said four or five months I was trying to
8 clarify it might have been as far as seven or eight months,
9 back as far as December.

10 Q Well, I appreciate that, sir. I don't necessarily
11 agree that you know what I'm trying to do --

12 A Okay.

13 Q -- but I appreciate your desire to try to communicate
14 as much as you can. What I'm trying to, though, is I'm
15 trying to make sure that you and I are communicating well.

16 A Very good.

17 Q And what I'm talking about is your communication
18 specifically with Mr. Salter about your testimony here
19 today.

20 A Okay.

21 Q Have you received documentation from Mr. Salter in
22 regards to your testimony here today?

23 A Documentation as in --

24 Q Well, sir, documentation is paper, it is things that
25 would be put into evidence, documents as the root word for

1 documentation.

2 A Things that would be put into evidence I don't
3 believe -- well, we've received some copies of transcripts
4 and then received your filings, the petitions that you
5 filed, your amended motions and so forth he's forwarded to
6 alert us to what the issues are.

7 Q And you've read those I would assume?

8 A Yes.

9 Q In regards to anybody else on the State's legal team,
10 Ms. Melody Brown, have you communicated with her about your
11 testimony here today?

12 A I talked to her about the issues. I wouldn't say I
13 have talked to her about my testimony per se, but I've
14 talked to her about the issues that are coming up, yes.

15 Q So the individual from the State that you've had the
16 most communication with, who would that be, sir?

17 A Probably Mr. Salter I would say.

18 Q Okay. What other documents have you reviewed in
19 preparation of your testimony?

20 A Transcripts. Everything that y'all asked me for I've
21 tried to pull together and we've worked with Merry Collins
22 to get that scanned to you, some of those documents I've
23 look at. Just various items. Because there's a lot of
24 material, so as things have come up and occurred to me I've
25 tried to find. I can't specifically recollect every

1 document.

2 Q Let me see if I can focus your attention to
3 Exhibit 286. You're familiar with that exhibit, are you
4 not?

5 A You could help me by showing it to me and then I could
6 tell you.

7 Q We wish we could, but see, we've had about three
8 different versions of that provided by your office. And
9 what those are is those are the Dr. Cascio notes and the
10 report, and the notes sometimes have an evidence sticker and
11 sometimes have not. Are you familiar with that process,
12 those Exhibits, 286?

13 A 286 being Cascio's report?

14 Q It's the combination sometimes of the notes and the
15 reports, and other times it's just been the notes.

16 A I don't know what was provided to you by Ms. Collins.
17 I do know that she has been requested to provide several
18 times to you because you said you had lost those materials,
19 and so I know she's given you those, but I don't know
20 precisely what she sent.

21 Q Well, let's take a step back. You were asked by Mr.
22 Ehlied, my colleague, via a subpoena to go ahead and provide
23 your entire file, correct?

24 A Yes.

25 Q And, in fact, Mr. Ehlied had sent out an email to you

1 asking that you follow the same procedure that has been
2 followed in his office for the past 40 something years
3 obtaining these types of materials through discovery,
4 correct?

5 A I don't know what his procedures are for the past 40
6 years, but when he asked for a copy of our file we retrieved
7 the copy from the basement, pulled it up, it was a lot of
8 documents and we sorted through that, got it scanned and
9 sent it to you as quickly as we could.

10 Q But you didn't do what was asked as far as just turning
11 the whole file except for any privileged material and
12 provide any privileged log; isn't that correct?

13 A We did it to the best of our ability, I believe.

14 Q Okay. Does the best of your ability entail that it
15 took over a year for you to provide the privilege log in
16 this case to your offices?

17 A Well, there was some confusion. I've never actually
18 provided a privilege log so I needed some help understanding
19 what exactly that was supposed to be. And I believe I
20 conferred -- I believe we involved the Court at some point
21 in time and I turned over what -- I identified as early as I
22 could the documents that I contended were privilege but
23 apparently that was not what was considered a privilege log.
24 I didn't know that. But I believe -- and I would have to go
25 and look at the email back in February some time, I sent you

1 something saying you've got everything except the following
2 things, and I identified like seven different documents.
3 But that apparently wasn't a privilege log and so there was
4 some back and forth on that. Ultimately, I believe, in
5 April or May we resolved that.

6 Q Sir, my question again was a little bit more specific,
7 and that was the time that elapsed from the request versus
8 when you finally did produce a privilege log, and that was
9 over a year; isn't that correct?

10 A It may have been. I don't recall exactly when the
11 first request was.

12 Q Do you believe that it's closer to a year than it is a
13 month?

14 A Yes.

15 Q And, in fact, didn't it take the Court getting involved
16 to get the privilege log finally turned over?

17 A Well, it didn't take the Court getting involved to get
18 me to cooperate. It got the Court involved to help me
19 understand exactly what it was I was supposed to turn over.
20 Because I believe the item I ultimately turned over as a
21 privilege log contained a listing of the same documents that
22 were in the email I sent at the outset saying, "I've turned
23 over everything except those things." And ultimately as I
24 recollect sitting here, I think I even turned some of the
25 items over that I listed as privileged and ultimately

1 concluded this doesn't matter, I don't care, and we gave you
2 some of the those items anyway, I believe.

3 Q So in other words is that a yes, that the Court got
4 involved and then a privilege log got produced and turned
5 over?

6 A Yeah. It was more a comment on your characterization
7 of the didn't have to compel me, but we had to come to an
8 understanding of what exactly --

9 Q Sir, I'm sorry, I didn't say compel. I think that you
10 are editorializing and I would like you to focus your
11 attention instead to --

12 MR. SALTER: Your Honor, I object. He's asked and
13 answered the question several times.

14 THE COURT: Let's don't be argumentative, just ask him
15 some questions.

16 MR. BENNETT: Thank you, Your Honor.

17 THE COURT: Thank you.

18 Q Focusing your attention on to not any claim that you're
19 making that I said compelled, but instead that it was
20 produced after judicial intervention, correct?

21 A Yes.

22 Q Where is 286 today?

23 A The actual exhibit?

24 Q Correct.

25 A Was it introduced into evidence?

1 Q I'm asking you where it was.

2 A I have no physical -- I have no current understanding
3 of its precise location at this point in time.

4 Q I would like to focus your attention now to psych
5 evaluation that Dr. Hayes -- I'm sorry, that Judge Hayes had
6 ordered. Now, that psych evaluation, that was based on an
7 evaluation for sanity and competency, correct?

8 A If I can look at the actual order I can tell you.

9 Q I believe that was Exhibit 5.

10 A Yeah, State's Exhibit 5.

11 Q I apologize. I'm sorry.

12 A It says that the defendant shall be examined and
13 observed by independent examiners designated by the State
14 for a period not to exceed 15 days relative to his mental
15 capacity. It doesn't really limit it to competency or
16 criminal responsibility, it just said relative to his mental
17 capacity.

18 Q Mental capacity. You have been solicitor for over 15
19 years, or right at it, correct?

20 A Yes, sir.

21 Q And mental capacity involves what two factors?

22 A Well, mental capacity can involve a variety of things.
23 Mental capacity, the phrase itself, is pretty broad.

24 Q In this case with Judge Hayes sanity was one of those
25 components, correct?

1 A It could have been, yes.

2 Q I'm sorry, it could have been or was?

3 A Well, I'm looking further into the order. "the report
4 shall contain at a minimum the following: A diagnosis of
5 defendant's mental condition," which is again very broad.
6 "And, B, clinical findings bearing on the issues of: 1A,
7 whether or not the defendant is capable of understanding the
8 proceedings against him and assisting with his own
9 defenses," which would be competency. "And, B, if there is
10 a substantial probability that he/she will attain such
11 capacity in the foreseeable future in the event that they
12 determine he is incompetent. And two, whether or not under
13 the McNaughten Standard the defendant is criminally
14 responsible for his actions on or about November 25th of
15 1997." So that is criminal responsibility. "And three, if
16 the defendant is found responsible in the McNaughten
17 Standard whether or not because of mental disease or defect
18 the defendant lacked sufficient capacity to conform his
19 conduct to the requirements of the law on or about
20 November 25th of 1997," which would go to the issue of
21 guilty but mentally ill. So this really allows for three
22 various -- there's competency, criminal responsibility,
23 embracing GBMI under that as well as insanity. And then the
24 first area under A, diagnosis of the defendant's mental
25 condition, which would necessarily include such things as an

1 axis two diagnosis potentially, which is not usually
2 involved in either competency or criminal responsibility.

3 Q So you would agree therefore that sanity was an issue
4 that was being ordered in this Judge Hayes order?

5 A It was one of them, yes.

6 Q Correct. And competency as well.

7 A Yes, one of them.

8 Q Now, during the pretrial phase of the case sanity was
9 never brought up as an issue by the defense, was it?

10 A No, I don't believe it was.

11 Q And during the pretrial phase competency was never
12 brought up by the defense as an issue, was it?

13 A No, I don't believe it was. I can't recall.

14 Q During the trial phrase sanity was never brought up by
15 the defense as an issue, was it?

16 A No.

17 Q During the trial phase competency was never brought up
18 as an issue by the defense, was it?

19 A No. I can't remember whether the Court conducted a
20 Blair hearing at the beginning of the trial to establish on
21 the record that the defendant was competent, but that would
22 have been typical. Other than that I don't believe
23 competency was raised by the defense as a problem.

24 Q And, in fact, since competency and insanity were not
25 raised by the defense the order should have never been

1 allowed to go forward to have that evaluation be performed;
2 isn't that true?

3 A No, sir, I don't think that is accurate. I think under
4 44-22 or 23-410 or 420, if you look there the provisions of
5 Title 44 allow for a Court to order competency or criminal
6 responsibility, or such other orders as the Court deems
7 necessary, when the Court has reason to believe that there
8 may be mental issues at play, or the Court has reason to
9 question the competence or sanity. So I think the fact that
10 the defendant had been involuntarily committed at a previous
11 time would have reasonably given Judge Hayes pause and
12 allowed him on his own initiative without request of the
13 State or the defense to have such an evaluation done.

14 Q But we've just seen that this was a request by the
15 State, by your office currently, back at the time Mr. Pope's
16 office, correct?

17 A Yes.

18 Q Not the Judge but the State.

19 A Yes.

20 Q Just to be clear, Mr. Brackett, that was not the
21 Court's order, that was the State's order, correct? It was
22 the Court's order granting your motion to be able to have
23 the psych eval.

24 A Yes. The State has no power to order anything.

25 Q That's what I said, my fault, thank you for clarifying.

1 And it was that eval. that turned out to give the State the
2 information about what the defendant had said in violation
3 of his 5th Amendment rights, correct?

4 A No. The defendant's 5th Amendment rights were
5 protected. And I believe in State's Exhibit 6 if you look
6 past the test booklet, the test booklet -- four pages after
7 the start of the test booklet there is a page that says
8 "Comprehension of Miranda rights, Robertson, James" and then
9 it goes through, and he actually wrote what his
10 understanding of each of his rights under the Constitution
11 were. So he was certainly afforded his 5th Amendment rights
12 and agreed to talk to Dr. McKee, which he didn't have to.
13 He was --

14 Q Well, you say he didn't have to. Isn't it true if he
15 didn't agree to that he wouldn't be able to have in his own
16 defense the evidence that he had obtained from his experts?

17 A That is correct.

18 Q So in other words, he's pretty much in a position where
19 he has to agree to sign that waiver or he does not have the
20 benefit of his counsel's defense, correct?

21 A I disagree with that, I think he was given a choice.
22 He could either choose to assert his mental status defenses
23 through experts of his choosing, but in doing so it created
24 the opportunity for us to respond by an expert of our
25 choosing who had the opportunity to evaluate him. And this

1 is not a constitutional violation pursuant to Estelle versus
2 Smith, Buchanan versus Kentucky, and now, I believe, State
3 versus Bigsby and State versus Locklear. Judge Cole's
4 original order in Locklear has been affirmed by the Supreme
5 Court, I believe, so this is now standard law. You have to
6 make a choice. You're not allowed to assert this sort of
7 information in your trial in your defense and then retreat
8 behind the 5th Amendment and prevent the State from being
9 able to conduct it's own inquiry into the validity of this
10 evidence.

11 Q So you would agree, wouldn't you, sir, that without
12 signing that Miranda waiver Mr. Robertson would not have
13 been able to have his defense expert's testimony come in in
14 you all's case, correct?

15 A He would have made that choice at that point in time.
16 "I am not going to cooperate with the State's expert and
17 therefore waive my ability to put my own psychological
18 experts up," that is correct.

19 Q Let's talk a little bit about Exhibit 6 that you just
20 referenced.

21 A Yes, sir.

22 Q You say that you guess you were working on a Sunday and
23 I don't want you guessing. Obviously you're witness under
24 oath so guessing is not what we're after here. But as you
25 recollect and all of the time that you spent preparing for

1 your testimony here today, please tell this Court what have
2 you got that you can demonstrate in addition potentially to
3 your somewhat, I think you would agree, fuzzy recollection
4 if you were guessing at one point in time that you did, in
5 fact, turn those documents in Exhibit 6 over to the defense?

6 A The key to my recollection of that was the instrument
7 inside there. When I realized that that was a piece of what
8 he'd sent to us and then I recollected, I believe, in
9 conversation with Mr. Ehlires that he had asked that that not
10 be given over, that he did not want that just generally
11 publicized because it's sensitive, confidential testing
12 material that is relied on by experts, and it compromises
13 the integrity of other exams if it's out there just on the
14 internet and anybody can look it up and look at the
15 questions they're going to be asked, it compromises the
16 results of other exams. So when I remembered that I was
17 like, "Okay." Because I had that conversation. And what I
18 can't remember is whether I got him to agree that we would
19 turn it over with the understanding they would not reveal it
20 to anybody or whether I just withheld it, I can't recall
21 that. But I do recall having that discussion in the course
22 of, you know, preparing to turn this over.

23 Q So that was important enough that it is something that
24 you recollect but you don't recollect the resolution?

25 A Of that aspect of it.

1 Q What about proof of service? Did you get a proof of
2 service?

3 A No. I handed it to them directly.

4 Q Who's them?

5 A The defense.

6 Q Okay. Well, there are two, right, Mr. Hancock and Mr.
7 Boyd?

8 A No, there were several. Because it could have been
9 Mr. Hancock, could have been Mr. Boyd. It could have been
10 Mr. Comber, their investigator. It could have been
11 Catherine, Mr. Hancock's paralegal, she was there in court
12 the whole time. I believe to the best of my recollection it
13 was Mr. Hancock.

14 Q Back track just a moment. In regards to your file that
15 you provided to us in this case, you provided that on a
16 thumb drive, correct?

17 A Yes. My first attempt to turn it over was actually I
18 uploaded it to a Google Drive, sent a link to Mr. Ehliess,
19 and that would have been back in July of last year, and
20 there was some difficulty getting that material downloaded.
21 I think he was unable to log on or something. So at some
22 point he sent another paralegal by with a hard drive and we
23 put the material on a hard drive.

24 Q Okay. So hard drive, not thumb drive? Is that the
25 difference?

1 A That's the best of my recollection, but Mr. Ehliès may
2 have a better recollection.

3 Q Whether it was a thumb drive or a hard drive, you mean
4 an external hard drive like a --

5 A Yes.

6 Q Whether it was a thumb drive or a hard drive that was
7 your entire file; is that correct?

8 A No. There was some items that I had held back, and I
9 think that there may have been some additional things that
10 we found and sent to you. I would have to go back and look
11 at our email exchange. I know that I sent you additional
12 matters over the course of the next few months. As I said,
13 earlier there was some items that I originally thought were
14 going to be privileged, the statement that was taken in the
15 middle of a trial for a witness we never used, but I think I
16 ultimately turned some of that stuff over. So that wasn't
17 everything I gave you if that's your question.

18 Q I'm not trying to be nitpicky here but let me just
19 rephrase that a little bit then. If it was on the thumb
20 drive or the external hard drive then it would have been on
21 the privilege log, or it would have been something that you
22 sent subsequent to the thumb drive or the hard drive,
23 correct?

24 A Yeah, I believe so. Merry Collins was really the
25 person who was handling that. She is very detail oriented

1 and would probably have a better recollection.

2 Q Ms. Collins works for you, correct?

3 A She does.

4 Q I think you phrased that she was the maven of discovery
5 or the maven of the office.

6 A Yes, very detailed.

7 Q You as her superior are responsible, correct?

8 A I am ultimately responsible, yes.

9 Q And so you're on the witness stand here right now so
10 obviously I'm asking you. What I'm trying to get at is if it's
11 on the hard drive or the thumb drive, or it's on the
12 privilege log, or it was something that you had provided
13 subsequent to the drive, it is everything that would be in
14 your file, correct?

15 A Well, and what I'm telling you is that I didn't scan
16 all of that stuff, Merry Collins did, and Merry Collins
17 assures me that you have everything that we have less
18 whatever I left on that privilege log, and I believe Merry
19 Collins.

20 Q And you're responsible for Ms. Collins, correct?

21 A I am responsible for Ms. Collins.

22 Q The victim impact testimony from the trial that Mr.
23 Salter asked you about earlier, you said it has to be very
24 limited, correct?

25 A Yes.

1 Q And, in fact, it should be limited to family members,
2 correct?

3 A I don't know if Payne versus Tennessee and subsequent
4 limit it expressly to family members, I don't know that that
5 is accurate.

6 Q Okay. As the solicitor for this county, how would you
7 feel about eliciting victim impact from non-family members
8 to a capital murder case today?

9 A I would need more information to know the nature of the
10 relationship between the deceased individual we would
11 propose to tender. Because there are people who are as
12 close as brothers and sisters, and people who are, you know,
13 extremely close that the relationships that develop over
14 time that can be every bit as strong as family, and these
15 people are impacted just as --

16 Q You would agree that in the Robertson trial that there
17 was no one who met your definition that was not a family
18 member that gave that victim impact testimony.

19 A I can't recall. I did not look back over that section
20 of the transcript.

21 Q Does it refresh your recollection to know they were
22 neighbors that lived in the neighborhood?

23 A Yes. I know there were friends of theirs that lived in
24 the neighborhood, the Langleys across the street and
25 Weavers, I believe.

1 Q But that no family members of Earl or Terry gave
2 impact -- victim impact testimony?

3 A I don't recall.

4 MR. BENNETT: One moment please, Your Honor.

5 THE COURT: Yes, sir.

6 MR. EHLIES: Excuse us just a minute, Judge.

7 THE COURT: Yes, sir.

8 (Break in proceedings.)

9 MR. BENNETT: Your Honor, may I approach?

10 THE COURT: Sure.

11 BY MR. BENNETT:

12 Q Mr. Solicitor, I'm going to hand you what's been
13 premarked as Petitioner's 22. I would like to draw your
14 attention, please, specifically to the second page of 22,
15 second to the bottom line. 286. Do you see that?

16 A Yes.

17 Q And you would agree, would you not, sir, that 286 was
18 identified at the trial but was never entered into evidence
19 at the trial; isn't that correct?

20 A It appears that way.

21 Q Okay. I'll hand you the third page of 286, and that is
22 the --

23 MR. SALTER: I'm sorry, I didn't hear the page number?

24 MR. BENNETT: I'm sorry, Mr. Salter, I apologize. 286
25 the third page.

1 Q That's the listing from the Clerk of Court during the
2 trial of the introduction of evidence, correct?

3 A Yes.

4 Q And it demonstrates that 286 was not put into evidence,
5 doesn't it?

6 A It says not put in evidence, that's correct.

7 Q Thank you. Now, I am directing Court and counsel to
8 22A. If you will take a look at those documents, sir. Do
9 you recognize those?

10 A The report of Tonie Cascio and what appears to be four
11 pages of handwritten notes with the top of the first page
12 being marked "night of the crime." I recognize the notes
13 and I recognize the report, yes.

14 Q And those came from your office, correct?

15 A I don't know where these came from, sir.

16 Q Well, let's go back then. Let's think about -- we've
17 already seen that 286 was identified by y'all's office at
18 the trial, correct?

19 A 286 was apparently offered by us at trial for
20 identification purposes.

21 Q But never brought into evidence.

22 A That's correct.

23 Q And then it was returned to y'all after not being put
24 into evidence.

25 A I presume so. I have no independent recollection of

1 that or what happened to 286.

2 Q And then the report in 22A has -- it precedes the notes
3 entitled "night of the crime," the fourth to the last page,
4 correct?

5 A Yes.

6 Q And those are Dr. Tonie Cascio's notes, correct?

7 A Yes, that is correct. And this appears to be -- can I
8 see that other one, please, your 22? I believe that's my
9 handwriting in the column there.

10 Q On the third page on the left-hand side.

11 A On the third page on the next left-hand said next to
12 the heading sexual abuse.

13 Q Therefore demonstrating more of the fact that these
14 were y'all's documents since it's in your handwriting,
15 correct?

16 A Well, demonstrating -- this is a photocopy that at one
17 point in time this document was in my hands, but I don't
18 know where it came from, this is 20 years, Counselor. And
19 then at the top of four page handwritten notes it says,
20 Night of Crime, and he would have to confirm that, but that
21 does look like Tommy Pope's handwriting. So -- but whether
22 these were all together, where these pages came from, I
23 don't know when we got them, when I made those notes,
24 whether they left my possession and went to previous PCR
25 counsel and then came to you through some other avenue, I

1 don't know what the -- of those notes.

2 MR. BENNETT: One moment, please, Your Honor.

3 (Break in proceedings.)

4 MR. BENNETT: I apologize, again, Your Honor, thank
5 you.

6 BY MR. BENNETT:

7 Q Directing Court and counsel to 22B. Mr. Brackett, I'll
8 hand this to you. Please look at the bottom of the page,
9 line I believe it's 23.

10 A Okay.

11 Q Have you had a chance to look at that?

12 A Yes.

13 Q Thank you. So looking at that, quote, "Yes, sir, Ms.
14 Cascio, I'm going to hand this back to you, State's Exhibit
15 286 for identification and allow you to refer to it." So it
16 was -- 286 was the State's exhibit, correct?

17 A Yes, sir.

18 Q Now, did you have some discussion with Ms. Collins
19 about producing 286 to us?

20 A I believe she told me that you had come by, or Mr.
21 Ehlied had come by looking for that, and I believe she said
22 she gave you a copy in December. And then on one or two
23 other occasions you emailed saying you had lost it and you
24 wanted another copy. And I think the most recent time was
25 within the past couple of weeks I think she mentioned that.

1 Because we found it curious that this document that seemed
2 to be so important to you kept getting lost.

3 Q Isn't it true that the documents that were provided the
4 first time from your office, and the documents that were
5 provided the second time from your office were different?

6 A I don't know what documents were provided to you the
7 first time because I did not personally provide you with any
8 documents, so I cannot say or speak to the distinction
9 between those sets the documents, sir.

10 Q Would that be an odd situation that the same request
11 from defense counsel would warrant two different submission
12 from your office?

13 A I wouldn't hazard a speculation. Because it's possible
14 that, you know, there could be multiple copies of it that
15 have been made over time and there may be perfectly
16 reasonable explanations for why that might occur. Again,
17 without understanding more about what was specifically
18 provided to you and doing in-depth inquiry to where these
19 came from I couldn't say.

20 Q Well, it's your responsibility to maintain the file; is
21 it not?

22 A It our responsibility to maintain our file, yes, sir.

23 Q Especially in a capital murder case, correct?

24 A Yes.

25 Q You would have to maintain that basically forever,

1 wouldn't you?

2 A Yes.

3 Q And if someone had requested a specific exhibit that
4 had been returned to your office and then received two
5 different submissions in request to that document, as the
6 solicitor that doesn't concern you?

7 A I don't know what happened to that document after
8 Solicitor Pope handed 286 back to Dr. Cascio. I --

9 Q Yes, sir. But I'm asking you about your concern.
10 Would that concern you as the solicitor?

11 A It may or may not depending on circumstances outside
12 your hypothetical. I don't know.

13 Q My hypothetical that someone gave two different
14 versions of a requested document?

15 A That there could be multiple versions of the same
16 document out there in the world is not unusual in and of
17 itself.

18 Q In the thumb drive or the external hard drive that you
19 provided, if there were multiple 286's in your office you
20 would have put them on that thumb drive or hard drive,
21 wouldn't you have?

22 A Multiple 286's as in we pulled the file open, we opened
23 it and sometimes you make five copies of the same case
24 because you're going to hand it out to counsel. I would not
25 have made five copies to give to you and said, "Here is five

1 copies of the same case." I would have said, "We have U.S.
2 versus Albright and here it is, one copy," because it's the
3 same case. Now, I didn't do the scanning, I don't know how
4 many different copies there may exist of 286. Whether notes
5 were written on some by me because I had a copy, Solicitor
6 Pope had a copy and an investigator had a copy, and these
7 were varied from one person to the next and they somehow
8 landed in different places in the file, I don't know, sir, I
9 just can't say.

10 Q You would agree, sir, wouldn't you, that if there were
11 notes outside of certain copies and not others it would be
12 incumbent upon you to provide multiple copies?

13 MR. SALTER: Your Honor, I'm going to object, it's been
14 asked and answered several times.

15 THE COURT: I think it has. I get the gist of it.

16 Q As you sit here today, Mr. Brackett, you do not know
17 where 286 is in your office, do you?

18 A The actual exhibit with the physical stamp on it, the
19 original 286 as I sit in this chair --

20 Q Correct?

21 A -- I do not.

22 (Break in proceedings.)

23 Q I direct the Court and counsel to 22D. Mr. Brackett,
24 take a look. These are a series of emails, I've given you
25 all three pages. The one I am going to ask you a question

1 about is the latest one, which is the top one on the first
2 page in regards to 286, correct?

3 A This is an email dated Wednesday, May 26th, from Mr.
4 Ehlied to me, and it's dated May 26, 7:45 a.m. on the top.
5 But it is a string of emails that goes down through several
6 dates starting with May 24th.

7 Q Right. And I'm directing your attention to the very
8 top one of the first page in reference to 286. Okay.

9 A All right. Mr. Ehlied's email to me?

10 Q Do you recognize that email?

11 A The one that starts, "Best to all?"

12 Q Yes.

13 A Yes.

14 Q And this is in reference to the subpoena that Mr.
15 Ehlied's office had put on your office to get these
16 documents, correct?

17 A Yes.

18 Q And in reply to that you will see that Ms. Merry
19 Collins from your office provided us these documents as part
20 of 22D. So took take a look at those.

21 A In reply to that where? I don't see. This was dated
22 May 26th at 7:45 a.m., and it is the last email on this
23 string, so if there's another email after that --

24 Q I'm sorry. I'm talking about the documents that are in
25 your hands.

1 A Yes, sir. This is just a document, it doesn't have an
2 email. I don't know that this document came from Merry
3 Collins or when it came to you, it's just a document.

4 Q It's all part of 22D I just handed to you in two
5 different stages.

6 A Okay. But again, I don't know when this document came
7 into your possession, and I don't know that Merry Collins
8 sent it. She may have, I don't know is what I'm saying. I
9 don't know what took place after Mr. Ehli's email of
10 May the 26th, I don't know what happened after that. So if
11 you say that she gave this to you then that would be your
12 testimony, but I can't testify to that because I have no
13 knowledge of it.

14 Q Sir, I'm asking you about the documents, though.

15 A Yes, sir.

16 Q And those documents are Dr. Cascio's notes.

17 A This appears to be the same documents that you showed
18 me previously --

19 Q However there's a difference, isn't there?

20 A -- there's no notes. This is just the four page report
21 of Dr. Cascio.

22 Q And, in fact, there's no Night of Crime at the top as
23 there was in the others, is there?

24 A Well, the Night of Crime is written at the top of the
25 four pages of notes. This is not the notes, this is just

1 the four pages of reports. It wouldn't be on the first the
2 because it wasn't on the other one.

3 Q The other page I'm asking you is there any night of the
4 crime on there?

5 A On this page?

6 Q Sir, I'm asking you from these documents that you just
7 testified that you reviewed there is no notation night of
8 the crime at the top of those, is there?

9 A On the four pages you have just handed me, which are
10 all type written and not handwritten notes, there is no
11 Night of Crime written anywhere on these four pages. The
12 Night of Crime on the previous exhibit you showed me was
13 written at the top of a handwritten note.

14 Q And the other page, please?

15 A That's the receipt for the exhibits.

16 Q Again, part of what was originally given.

17 A I don't know what was originally given.

18 MR. BENNETT: Your Honor, I don't want to get the
19 originals out of order or confused or commingled, and I
20 realize that we're at our break here at 12:30, I would ask
21 that we be able to take that break now and then get this all
22 straight and finished up afterward.

23 THE COURT: That's fine. I don't know what that's
24 going to do to your SCDC arrangements, though, because I'm
25 not going to break a --

1 MR. BENNETT: I understand.

2 THE COURT: All right. We'll break until 2:00.

3 MR. BENNETT: Thank you, Your Honor.

4 THE COURT: Solicitor, don't talk to anybody about your
5 case.

6 THE WITNESS: Yes, sir.

7 (A lunch break was taken.)

8 THE COURT: All right. I believe we're ready to go.

9 MR. BENNETT: I appreciate the Court's indulgence and
10 patience. I've gotten my documents back together and
11 organized and hopefully my brain, too, now, so I appreciate
12 your patience.

13 THE COURT: Yes, sir.

14 CONTINUED CROSS EXAMINATION

15 BY MR. BENNETT:

16 Q Solicitor, I'll show you Exhibit 22 C. That's page
17 2919 of the transcript. I want to draw your attention,
18 please, and have you publish lines 20 through 23.

19 A This is the cross of Dr. Tonie Cascio by Solicitor
20 Pope. "Question: Okay. I think that's reflected in your
21 notes, is it like November? Answer: November 30,
22 December 7th, December 9th. Question. November 30th.
23 December 7th, December 9th. Okay. You related his history
24 that we've heard including Bipolar Disorder, Obsessive
25 Compulsive."

1 Q Thank you. I'll take that back and hand you 22A. 22A
2 is -- that is the disclosures that your office produced in
3 response to our subpoena for Exhibit 286. All right. Now,
4 nowhere --

5 A I can't confirm that but I'm accepting that
6 representation.

7 Q Thank you very much. As an Officer of the Court I
8 wouldn't lie to you, I wouldn't lie to this Court. And in
9 relationship to the fact that we subpoenaed those records in
10 reference to 286, nowhere in those disclosures that y'all
11 produced are there any notes from November 30th from Dr.
12 Cascio; isn't that true?

13 A In the four pages of handwritten notes?

14 Q The whole series of documents, the entire thing there
15 is nowhere within there that references November 30th notes;
16 isn't that true?

17 A My quick review of them do not reveal the date
18 November 30th anywhere in there, but I'm not sure these are
19 the extent of her notes.

20 Q I appreciate your understanding but I'm asking you just
21 about what I've given you in 22A.

22 A Yes, sir. I do not see November 30th written anywhere
23 on these pages.

24 Q In addition there's no notes in there from
25 December 9th?

1 A I did not see that either.

2 Q And there's no identifying sticker that the Court would
3 have had affixed showing 286, is there?

4 A The only sticker appears to be the sticker appears to
5 be the sticker Petitioner's Exhibit 22A.

6 Q That we had put on there. Thank you. I'll take those
7 back. And I'm going to show you Exhibit 22F. I will relay
8 to you that those are your office's second series of
9 disclosures to our subpoena for 286. Sir, in those
10 disclosures, again, there's no November 30th notes, are
11 there?

12 A This appears to be the same report from Tonie Cascio
13 dated March 1, 1999. It is her report without the
14 handwritten notes at the back of it.

15 Q But I asked you about the November 30th note, sir.
16 There are no November 30th notes in those documents, are
17 there?

18 A I see no reference to November 30th anywhere in those
19 documents.

20 Q And there are no December 9th notes in those documents
21 either.

22 A No, sir.

23 Q And there's again no 286 sticker, is there?

24 A Correct.

25 MR. BENNETT: Thank you. Thank you, Your Honor. No

1 further questions.

2 THE COURT: Thank you. Anything?

3 MR. SALTER: No, sir, Your Honor. Ask that the witness
4 be excused.

5 THE COURT: Solicitor, you may step down. Any
6 objection to him being excused?

7 MR. BENNETT: No, sir, Your Honor.

8 THE COURT: You may be excused.

9 The witness, JAMES ROBERTSON, was first duly sworn and
10 Testified as follows: (via WebEx)

11 THE COURT: Counsel?

12 MR. SALTER: Thank you, sir.

13 BY MR. SALTER:

14 Q Mr. Robertson, on November 25th of 1997 you were 25
15 years old; is that correct?

16 A Twenty-four, yes, sir.

17 Q Okay. You had just moved back home about three or four
18 days earlier?

19 A That's correct.

20 Q Okay. Were you employed while you lived there?

21 A Yes.

22 Q How so?

23 A I worked in the food court at Winthrop University.

24 Q You were going to the university?

25 A No. I worked at the food court at the university.

1 Q Okay. I'm sorry, I misunderstood.

2 A No problem.

3 Q All right, sir. In 2007 you testified that you had

4 deliberately flunked out of Georgia Tech. University?

5 A That's correct.

6 Q All right, sir. And I believe at a hearing before

7 Judge Hayes you testified that you had an IQ of between 110

8 and 120; is that correct?

9 A That's what I've been told.

10 Q All right, sir. So you could have passed the courses

11 if you would have applied yourself.

12 A That's likely true.

13 Q All right. Would you like to explain why you didn't

14 pass those courses?

15 A I didn't want to be there.

16 Q Okay. You didn't want to be there. You thought you

17 would rather do something else?

18 A I just didn't want to be a student at Georgia Tech.

19 Q What did you want to do?

20 A I wasn't sure.

21 Q Okay. You just knew you didn't want to go to college?

22 A I didn't want to go to college at that time, that's

23 correct.

24 Q Did you change your mind at all about that?

25 A I mean, not concretely. Over time I started rethinking

1 going back to school, but obviously I didn't.

2 Q All right, sir. Now, I believe you testified in 2007
3 that there was a battle literally between you and your
4 father pretty much from the time you were ten or 11; is that
5 correct?

6 A I would say that's correct.

7 Q Could you explain what you meant by that?

8 A I meant that we were always at odds over something. It
9 was always something. Nothing was ever good enough.

10 Q Nothing was ever good enough?

11 A Nothing was ever good enough.

12 Q Is that because they wanted you to do things and you
13 thought you knew better how to live your life?

14 A No. They just expected what I believed was too much of
15 me.

16 Q Okay. How so?

17 A They expected the grades to be better than they were.
18 They expected me to be better behaved.

19 Q Is it fair to say that you thought you should be able
20 to make those kind of decisions for yourself?

21 A Not at that age, not at 11, no.

22 Q No. I'm talking about later on, sir.

23 A By the time I got to college, yes.

24 Q All right. Because you had already gone through high
25 school, and like you said, you had a reasonably high IQ and

1 you thought you knew better, right?

2 A I didn't think I knew better. I just felt like I knew
3 what I wanted to do better than they knew what I wanted me
4 to do.

5 Q And I'm not going to go through everything we went
6 through in 2007 so I'm going to try to jump forward a little
7 bit. I believe you -- but I do believe you testified then
8 that you agreed with me that most of the problems in your
9 family stemmed from actions by you and Chip; is that
10 correct?

11 A I think that's an accurate description.

12 Q All right, sir. And did this play a part, you think,
13 in your mom's mental illness?

14 A I think my mom's mental illness was driven by the death
15 of her parents.

16 Q Okay. When did that occur?

17 A 1986 and 1990.

18 Q Do you feel like the trouble that you and Chip got in
19 to maybe added on to that or made it worse?

20 A I think a lot of our behavioral problems started at
21 about that time.

22 Q Why is that?

23 A My mother became more distant. I think she was dealing
24 with problems of her own and we lacked the necessary
25 discipline at that time.

1 Q Okay. You didn't get the discipline you needed at the
2 time, correct?

3 A Or the attention necessary as a teenager.

4 Q The lack of attention. How so?

5 A Well, things just changed in the house, they weren't
6 the same. She spent time in her room alone in bed crying.
7 There were days that she didn't get dressed. She stopped
8 cooking, she stopped cleaning. It just -- it became a
9 different household by the time I was 13 or 14.

10 Q And what year would you have been, 13 or 14?

11 A 1986.

12 Q Okay. One of your claims that you raised today is
13 counsel was ineffective for not advising you of any guilt
14 phase defenses; is that correct?

15 A That's correct.

16 Q What defense or defenses do you think they should have
17 advised you on?

18 A I'm not an expert in defenses, but I do believe that
19 they should have put up a defense. I asked them to defend
20 me in the guilt phase.

21 Q You asked them to defend you.

22 A I did.

23 Q And what did they tell you?

24 A It was a foregonegone conclusion, that there was no
25 point in wasting our time on that. And everything had been

1 given to the jury that they were going to need during the
2 guilt phase, I mean, the penalty phase.

3 Q And you understood your discussions with them?

4 A I understood my discussions with them.

5 Q And at the time did you agree with them.

6 A I did.

7 Q Now, I believe by the time of the 207 proceeding you
8 felt they should have advised you of a plea of guilty but
9 mentally ill; is that correct?

10 A That was never discussed.

11 Q Did you think it should have been?

12 A I'm not a lawyer so I don't know the particulars of
13 what guilty but mentally ill would entail.

14 Q But you alleged that last time, did you not?

15 A My lawyer alleged that, yes.

16 Q But now you've changed your mind and you think your
17 lawyer should put up a defense?

18 A Yes, I do.

19 Q Okay. Again, but you don't know what defense they
20 should have presented.

21 A No. I just believe that I deserved to be defended.

22 Q All right. Just real briefly. In 2007 I believe you
23 testified your lawyers explained they intended to present a
24 mental health case in mitigation?

25 A That's correct.

1 Q And they explained that they couldn't present that case
2 unless you cooperated with an independent evaluation?

3 A That's correct.

4 Q All right. Now, they advised you of your rights,
5 though, you still had the right to remain silent. They
6 explained that to you, did they not?

7 A My attorneys?

8 Q Yes.

9 A No. My attorneys told me to tell them -- to answer
10 every question and tell him everything that he asked,
11 otherwise we would not be able to present a defense.

12 Q Now, Dr. McKee, he advised you of your right to remain
13 silent, did he not?

14 A He advised me.

15 Q And you waived your rights, correct?

16 A I was told I had no choice.

17 Q You went ahead and waived that right, did you not?

18 A I waived them because I wanted to put up a defense.

19 Q Okay. Another one of your allegations is your trial
20 attorneys should have objected to the State's failure to
21 prove that the two bodies found in your family's home were
22 your parents. Do you have any evidence that the bodies
23 weren't those of your parents?

24 A No, but the burden is not on me.

25 Q Well, this is your proceeding, sir, you understand

1 that, right?

2 A Yes, but not at the trial. The burden was not on me at
3 the trial.

4 Q But you have no evidence that those weren't your
5 parents, correct?

6 A I have no evidence one way or the other.

7 Q All right, sir. Now, you were present throughout your
8 trial, correct?

9 A I was.

10 Q And you were present throughout the whole PCR
11 proceeding, were you not?

12 A I was.

13 Q And at trial you were able to talk to your trial
14 attorneys, were you not?

15 A I was.

16 Q And you were able to talk to your PCR attorney during
17 that proceeding, were you not?

18 A I was.

19 Q So you could communicate with them, and you're
20 obviously an intelligent enough man. You could have told
21 them anything you needed to tell them, correct?

22 A I could have.

23 Q Did you do so?

24 A I did at trial. At PCR I tried my best to relay a key
25 piece of information but was told to hush.

1 Q All right. At trial you did not testify, correct?

2 A I did not.

3 Q That was something that bothered you, correct?

4 A It was a disagreement I had, yes.

5 Q And why did you disagree with the decision for you not
6 to testify?

7 A Because I felt like a witness had testified before that
8 had testified to certain aspects that she shouldn't have and
9 I could have rehabilitated the story with me on the stand.

10 Q How would you -- how would you have rehabilitated the
11 story?

12 A I don't remember exactly everything that she spoke
13 about, but it felt like it was taken out of context instead
14 of just reading off the note cards.

15 Q Okay. When you say taken out of context, what
16 specifically was taken out of context?

17 A Details of the crime.

18 Q Oh, the details of the crime. Okay. Again, how would
19 you have rehabilitated that and cleaned that up?

20 A Like I said, I think I could have put things in the
21 context that she didn't.

22 Q Can you explain how you would put them in context?

23 A No.

24 Q All right. Going back to the claim that the State
25 failed to prove that the bodies were those of your parents.

1 I believe you testified in 2007 that Chip had sent you
2 approximately 45 or \$50,000 by the time of the PCR hearing?

3 A That was an estimation.

4 Q All right. You're not saying he did anything wrong by
5 inheriting that money, are you?

6 A Am I saying did my brother do anything wrong?

7 Q Yes.

8 A My brother did absolutely nothing wrong.

9 Q All right. You were present for the testimony of Mr.
10 Hancock and Mr. Boyd at the original PCR?

11 A I was.

12 Q And you heard them both testify that you admitted your
13 guilt to them and that you killed your parents, correct?

14 A I don't remember if they testified to that or not.
15 It's been 15 years, sir.

16 Q All right, sir. I believe that when we were talking --
17 and this is the only question I'll ask in this regard, but
18 when we were talking last time I had asked you a series of
19 questions about the crime and I believe you said that you
20 didn't have any problems admitting that you had committed
21 the murders but the details I had wrong; is that correct?

22 A Like I said, it's been 15 years, but if you tell me
23 that that was the exact conversation then that's possible,
24 yes.

25 MR. SALTER: One moment, Your Honor.

1 (Break in proceedings.)

2 A I have a quick question. Am I supposed to be seeing
3 someone else on this screen other than just me and you?

4 Q No, sir, not at this moment.

5 A Okay.

6 Q In 2007 -- on November 25th of 2007 there was a
7 memorial service, I believe, at one of the churches up here,
8 and you provided flowers in memory of your parents; is that
9 correct?

10 A I don't remember the exact date, but yes, I did send
11 flowers to the church.

12 Q Why did you do that?

13 A In memory of them.

14 Q You thought it was important?

15 A I thought it was important, yes.

16 Q All right. And you've been quoted as saying that you
17 were upset with some of your parents' friends because they
18 didn't think about how the death of your parents impacted
19 you; is that correct?

20 A I assume they did in some setting, yes.

21 Q Okay. And that's because you were troubled by their
22 deaths, correct?

23 A Yes. At the time, yes.

24 Q Now, yesterday we heard testimony from Dr. Ewing who
25 suggested that you told him that Meredith Moon may have

1 suggested it was a good time for you to kill your parents or
2 something to that effect; is that correct?

3 A I heard testimony from Meredith Moon -- I'm sorry, ask
4 the question again, please?

5 Q All right. Yesterday we heard testimony from an expert
6 hired but your current lawyers, a Dr. Patrick Ewing.

7 A Yes.

8 Q Okay. Do you remember talking to Dr. Ewing?

9 A Yes, I do.

10 Q All right. Well, he testified yesterday you told him
11 that Meredith Moon may have suggested it was a good time for
12 you to kill your parents or something to that effect, and
13 I'm just trying to ask you what precisely that conversation
14 was.

15 A Yes. She said something along those lines.

16 Q Okay. Did she thereafter assist you in anyway up to
17 that point?

18 A I'm going to plead the 5th there.

19 Q Another thing that Dr. Ewing testified to yesterday was
20 that you were angry with your parents because they had you
21 involuntarily committed back in, I believe, it was 1995; is
22 that correct?

23 A At the time, yes, I was vaguely.

24 Q Were you still angry about that in 1997?

25 A It's entirely possible. I still have feelings about

1 that.

2 Q Okay. And those feelings are negative, correct?

3 A They are.

4 Q You didn't think it was necessary, did you?

5 A No, I did not.

6 MR. SALTER: I believe that's all of the questions I
7 have at this point, Your Honor.

8 THE COURT: Counsel?

9 (Break in proceedings.)

10 CROSS EXAMINATION

11 BY MR. EHLIES:

12 Q Jimmy, do you see me or hear me? I know you were
13 disconcerted earlier because you didn't see anybody else in
14 the room. Do you remember that statement?

15 A Yes.

16 Q I want to let you know that we've been here all the
17 time, the three of us have been here but the system is a
18 little limited and -- so we have been here and participated
19 in this proceeding on your behalf. Okay?

20 A Okay.

21 Q I want you to have comfort with that. And I don't have
22 any questions for you at all so we're going to close this
23 out, all right?

24 A Thank you.

25 THE COURT: Anything from anybody?

1 MR. SALTER: No, sir, Your Honor.

2 (Break in proceedings.)

3 THE COURT: Over lunch, did you have time to go through
4 everything -- you have not rested at this point.

5 MR. EHLIES: No. And if we could continue out of order
6 because that will take a little while, no sense in going
7 down, she can call her witness. I think it's her last
8 witness, isn't it?

9 MS. BROWN: Well, actually Tommy --

10 MR. EVANS: Yes, Your Honor, it will be our last
11 witness.

12 MR. EHLIES: Then I'll know whether to release Mr.
13 Boyd, he's here on reply potentially.

14 THE COURT: Any objection to calling a witness out of
15 order?

16 MR. EVANS: No, Your Honor.

17 THE COURT: Okay. All right.

18 MR. EVANS: The State at this time would like to call
19 Mr. Tommy Pope to the stand.

20 The witness, TOMMY POPE, was first duly sworn and

21 Testified as follows:

22 THE COURT: Sir, tell us your name and spell your last
23 name for the court reporter, please.

24 THE WITNESS: It's Thomas E. Pope, P-o-p-e. I go by
25 Tommy, T-o-m-m-y.

1 THE COURT: Thank you. Counsel?

2 MR. EVANS: Thank you, Your Honor.

3 DIRECT EXAMINATION

4 BY MR. EVANS:

5 Q Mr. Pope, how are you doing today?

6 A Good, sir.

7 Q My name is Tommy Evans, I'm an Assistant Attorney
8 General at the Attorney General's office, glad to have you
9 here today.

10 A Yes, sir.

11 Q Where are you currently employed?

12 A At the Elrod Pope Law Firm in Rock Hill. I'm a partner
13 there, and I'm also in the South Carolina Legislature.

14 Q And how long have you been in private practice?

15 A Since 2006.

16 Q Okay. Before you entered private practice where did
17 you work?

18 A I was Solicitor of the 16th Circuit.

19 Q And how long were you the 16th Circuit Solicitor?

20 A I was elected in '92, took office January of '93, so a
21 little over 13 years, I believe.

22 Q Okay. And part of your duties as solicitor is the
23 prosecution of the affiant, Mr. James Robertson, for the
24 murder of his parents, Terry and Earl Robertson; is that
25 correct?

1 A Yes, sir.

2 Q Okay. Did anyone assist you in this litigation?

3 A Of course, my entire office anytime we have a case of
4 that magnitude, but Kevin Brackett, who is the current
5 solicitor, was my deputy solicitor at the time, and he and I
6 were the primary attorneys on the case.

7 Q And Mr. Robertson was represented by Mr. James Hancock
8 and Mr. James Boyd, correct?

9 A Yes, sir.

10 Q Now, did you give them all of the discovery material
11 once they filed their Rule 5 motions?

12 A Yes, sir. We have an open file discovery policy, and
13 honestly both with the rules and court cases and based on
14 experience our best practice was to give them everything we
15 had.

16 Q And at that time as solicitor, who was the only person
17 that had the authority to offer a plea offer in a death
18 penalty case?

19 A That would be me. Most like you spoke earlier to
20 Solicitor Brackett, the buck stops with the elected
21 solicitor.

22 Q Okay. And were there any offers ever given to plead
23 guilty to Mr. Robertson?

24 A No, sir. I think it was clear to Mr. Hancock and
25 Mr. Boyd in our casual conversations that we were proceeding

1 with the death penalty and intended to do so.

2 Q Did defense counsel ever ask for a plea offer?

3 A To my knowledge I don't believe they did, I think
4 because we had made our position clear.

5 Q Okay. And when you decided to seek the death penalty
6 did you believe that you had sufficient evidence to prove
7 the affiant guilty beyond a reasonable doubt?

8 A Yes, sir. As you know in a death penalty I always tell
9 people that the death penalty is a murder case plus, so
10 you've got to have a strong, strong guilt case to even
11 consider the jury -- taking the jury to the second phase.
12 And we had a tremendously strong case in this circumstance.

13 Q In a nutshell, could you explain exactly what type of
14 evidence did you have against Mr. Robertson?

15 A We had Ms. Moon as an eye witness. We had DNA evidence
16 recovered both from the scene and most importantly from the
17 items that Mr. Robertson disposed of in Maryland. It was a
18 trash bag that contained a number of the murder weapons; I
19 believe a baseball bat, a claw hammer, maybe several knives,
20 some of his Ritalin bottles, a T-shirt and a number of other
21 items. And again, they were arrested up in -- Mr. Moon and
22 Mr. Robertson -- Ms. Moon and Mr. Robertson were arrested in
23 Philadelphia, and shortly thereafter Maryland police were
24 able to recover those items. We had a tremendous amount of
25 evidence.

1 Q And during the case you sought the Court to order a
2 State independent psychiatric evaluation; is that correct?

3 A Yes, sir.

4 Q Why did you do that?

5 A It was clear -- and again, as has been explained
6 earlier, pretty much we -- the Susan Smith case we attempted
7 to do the same thing, and based on more than anything the
8 fundamental fairness argument. As you know, when an expert
9 testifies they're able to come in and rely on things that
10 would not be admissible, or things that were not before the
11 Court in basing their opinion, and so if we're not able to
12 in essence get an independent evaluation they're able to put
13 up testimony that we're not sufficiently able to cross. And
14 so we had pursued that, again, unsuccessfully in Smith, we
15 had continued to pursue it subsequently and pursued it in
16 this case. And as you're well aware, the Court initially
17 denied it because Mr. Boyd and Mr. Hancock could not
18 determine what they were going to actually use or not. But
19 as discovery -- reciprocal discovery was coming through we
20 were constantly seeing mental health experts and Doctor, I
21 think, Pincus, Evans, Cascio's information, it was clear
22 that mental health was going to be injected in the case most
23 likely in the guilt phase, and so that's why we continued to
24 pursue that.

25 Q Okay. And did you ultimately get the Court to rule in

1 your favor regarding the independent evaluation?

2 A Yes, sir. And again, it was with the caveat that we
3 would have that. And if these items did not come up, even
4 though we had that information we would be prohibited from
5 using it. It was only if these items were interjected.

6 And, of course, a look at the defense case in mitigation
7 they were interjected in spades. There were a number of
8 times that they were, and so we were granted that and able
9 to use that.

10 Q Now, prior to the Court ruling, did the defense offer
11 an objection?

12 A They consistently offered. And again, I've, you know,
13 refreshed my recollection with the transcripts, but
14 throughout the course, as you've seen in this hearing, we'll
15 be dealing with items and then you'll kind of be about to
16 take a break and you'll talk about scheduling or you'll talk
17 about various things. Numerous times we would bring up, for
18 example, that we still were requesting that. They fought
19 hard to both keep it out and to keep it out even after it
20 was done.

21 Q And Dr. Jeffrey McKee was the actual physician that
22 conducted the State independent evaluation.

23 A Yes, sir.

24 MR. EVANS: Your Honor, may I approach the witness?

25 THE COURT: Yes, sir.

1 Q Mr. Pope, do you recognize that letter?

2 A Yes, sir, I do.

3 Q Okay. And that's the bill that was sent by Dr. McKee
4 to your office for services rendered regarding the
5 evaluation.

6 A Yes, sir. He had initially requested a retainer. I
7 guess us being the State he wanted to make sure we were good
8 for it, so he had requested an initial retainer, I believe,
9 of \$1,500, and then this reflects the balance, and also
10 documents the various time spent doing the work he did.

11 Q And I'll show you State's Exhibit Number 8. Do you
12 recognize that?

13 A Yes, sir, I do.

14 Q Okay. And that is the actual receipt from your office
15 to Dr. McKee for payment of the retainer?

16 A We had an account from Bank of York. And this was a
17 Melissa Woods-Saltzman (phonetically) who was my
18 administrative assistant at the time, and she would have
19 written this check for the retainer of \$1,500 to Dr. McKee.

20 MR. EVANS: Your Honor, at this time I would like to
21 introduce State's Exhibit 7s and 8 as evidence.

22 MR. BENNETT: Without objection.

23 THE COURT: Without objection admitted.

24 (The documents were received as State's 7 and 8.)

25 Q Now, Mr. Pope, you were solicitor at the time.

1 A Yes, sir.

2 Q So any funds, even though your administrative assistant
3 wrote out the check, any funds coming out of the solicitor's
4 office had to meet your approval; isn't that correct?

5 A Yes, sir.

6 Q So you approved the payment for Dr. McKee on those
7 bills he sent to you.

8 A Yes, sir.

9 Q Okay. So the State, the solicitor's office, actually
10 paid for Dr. McKee's services, not the defense.

11 A Correct. And not the State either. This wasn't a
12 state hospital doctor either, this was the independent
13 payment.

14 Q Independent psychiatrist.

15 A Yes, sir.

16 Q Let's change gears here, Mr. Pope. How many death
17 penalty cases have you tried in your career?

18 A Probably in the range of eight to ten. Unfortunately,
19 as you know, sometimes you try them more than once, but
20 probably I would say eight.

21 Q So you have the distinct knowledge of death penalty
22 litigation, correct?

23 A Yes, sir.

24 Q Can you explain the job of a social historian?

25 A You know, I've heard them called them many different

1 things, but in my experience every death penalty case I've
2 had when the defense does -- we would call them a mitigation
3 expert or something of that nature, but you normally have
4 somebody like Tonie Cascio did in this case, or I've seen
5 Drucy (phonetically) Glass or other folks. And they
6 basically take all of the testimony, which is normally a
7 combination of background of social history, family history,
8 psychological information, really anything in the realm of
9 mitigation that they would want to share to the jury, and
10 they normally review all of those records. Because again,
11 an expert can review other people's reports and then testify
12 based on that and would kind of tie up or summarize
13 basically all of what the jury heard. In other words, some
14 of the experts, we had Evans and Pincus, the other guy's --
15 the pharmacological guy escapes me now -- Morton. But
16 sometimes their testimony would be so kind of highbrow or
17 detailed that, you know, I think what often times these
18 folks do is tie that together in perhaps more relatable or
19 layman's terms.

20 Q So in other words normally a death penalty case you
21 have a guilt phase, penalty phase.

22 A Yes, sir.

23 Q Okay. After the guilt phase we know the who --

24 A Yes, sir.

25 Q -- the social historian's job is to explain to the jury

1 why.

2 A I think that's a fair assessment. You know, on the
3 prosecution side you're looking -- you can tell more about
4 the victims, you can -- as discussed earlier, the pain
5 testimony, you can tell more about the nature of the crime.
6 For example, there may be pictures that come in and guilt
7 that wouldn't come in in penalty. And then on the defense
8 side, again, normally they're painting a picture of the
9 defendant of what brought them to this spot for either
10 explanation or sympathy.

11 Q Okay. And Dr. Tonie Cascio was the social historian in
12 this particular case; is that correct?

13 A Yes, sir.

14 Q Okay. And who was responsible for the cross
15 examination for Dr. Cascio, you or Mr. Brackett?

16 A Me.

17 Q I would like to show you, this is Volume 6 of the
18 appendix, the trial transcript, page 2896. And can you --
19 now, let me ask you first, you heard a lot of testimony
20 about Exhibit 286.

21 A Yes, sir.

22 Q Okay. And do you remember about that exhibit during
23 the trial?

24 A Yes, sir. Again, in fairness, you know, it's been a
25 number of years. I refreshed my recollection from what I

1 remembered and then what I read in the transcript.

2 Q Well, I'm going to show you the transcript to refresh
3 your memory. Can you read from line one to line 21?

4 A Yes, sir. We're on page 2896. Dr. Tonie Cascio
5 crossed by Mr. Pope. Question. Line one. "Okay. I'll
6 show you this document, then I'll have it marked for
7 identification. I'll ask you if you can look at that and
8 tell me if that is the report and if that accurately
9 reflects your findings." Answer. "Yes. Your Honor, this
10 is State's for identification 286 and I would move it into
11 evidence."

12 Q Now, that's the report, nothing else.

13 A That's the four page like summary report that she had.
14 That was not the notes, it was her report.

15 Q Okay.

16 A Mr. Boyd says, "Your Honor, I don't think that document
17 itself is admissible, if he wants to cross her on it that's
18 fine." the Court said, "Let me see it." the report was
19 shown to the Court. "Why would it not come in? She has
20 identified it as a report she generated for trial?" Mr.
21 Boyd: "My understanding is the report itself is not
22 admissible, there are particular portions that you can cross
23 examine from, but --" The the: "Well, just go ahead at
24 this point so I don't have to let the jury go out, just
25 cross examine on it and I'll make a decision later." And

1 then I handed it to Ms. Cascio for identification and she
2 was allowed to refer to it.

3 Q Okay. Did the Court ever put 286 into evidence?

4 A The Court didn't. Because looking at the evidence log
5 it appears the solicitor, Mr. Pope, never asked that it
6 ultimately be admitted after I crossed examined.

7 Q Speaking of the evidence log, do you recognize this?
8 Is that the evidence log he was referring to?

9 A Yes, sir. This would have been the evidence log that
10 the court reporter keeps as they go through the case.
11 Normally what we would do is -- and by then we were in the
12 later stages, this wasn't always the case, but we would
13 pre-mark and mark for identification just to help the court
14 reporter out. I think by this time in the trial as it gets
15 to the later numbers as you noticed I was marking it kind of
16 on the fly. But they always mark for ID, and what they will
17 do is strike out the word ID when it is ultimately admitted.
18 Again, recognizing that this is not struck out apparently I
19 never moved it in.

20 Q Okay. For the record what does that say, 286?

21 A 286 is the report of Ms. Cascio and it says "not put
22 into evidence" and it had ID.

23 Q Just the report, it doesn't say notes or anything like
24 that on it, does it?

25 A No, sir. That was not the notes, that was the initial

1 report. And I know that also from the structure of the way
2 I did my cross examination.

3 Q Now, let me ask you a question about the notes. Did
4 the Judge give an order regarding experts and their notes?

5 A We had a reciprocal discovery agreement. And again,
6 what would happen each day, we would kind of report at the
7 end of court or whatever time, during a break where we were
8 at. In regard particularly to Ms. Cascio we had received
9 that report at some time and the notes themselves were back,
10 I believe, in her office in Columbia. I know somewhere in
11 the transcript -- I believe Mr. Boyd was who I was dealing
12 with, Mr. Boyd or Mr. Hancock said she's gone back to
13 Columbia to get them and she would be bringing them back. I
14 know then at the end of that day, which if I'm getting it
15 straight I believe was a Wednesday, at the end of that day,
16 you know, the Judge will say anything further before we
17 adjourned. And I said, "Your Honor, we're still looking for
18 those notes." And at that point Mr. Boyd said that he did
19 have them in hand, Ms. Cascio's notes, and he gave them to
20 me. He says he remembers the hall, I don't remember that
21 particularly, but I do remember I received them that night
22 before she testified the next day.

23 Q Okay. So you had the notes prior to cross examination.

24 A Yes, sir.

25 Q Okay. And when you first received the notes what did

1 you do with them?

2 A I took the notes and went through them. Of course, I
3 based primarily my cross, or my preparation for cross
4 already. Because, again, you know, as you're presenting the
5 case you don't know when the defense witness will come up,
6 so that day before I received them I was still preparing for
7 her cross. I had based it primarily on her report. If you
8 look at the record, you know, I would go through who she
9 talked to and what they said, and then I would drill down a
10 little deeper. What we did with her notes was actually
11 highlight, you know, the point she made. Of course,
12 ultimately there were several different stages of notes for
13 the different days she talked to him, and you see in the
14 transcript I kind of walked through those with her, and then
15 ultimately say the day where she discussed the crime itself
16 and kind of used that toward the end.

17 Q Okay. Now, during only cross-examination you did ask
18 for a short recess in order for Dr. Cascio to retrieve her
19 notes.

20 A Yes, sir. Again, and again, refresh my recollection.
21 From looking I thought when I first looked at that that that
22 was when I got the notes, but going back it was clear that
23 Mr. Boyd gave them to me the night before. So what this
24 was -- at the old courthouse we were on -- she was on the
25 stand and I asked if she had you a copy of her notes and she

1 said, "No, I don't have them with me, they're in," I think,
2 the law library or something. So the break that we took
3 then, and the clerk's record should reflect that, too, was
4 fairly short, literally just enough time for her to go out
5 the door, go to the library and get her notes. And I think
6 it's indicated on the record, I had a copy in my hand and I
7 was just wanting to make sure as I went through them that
8 she had one to refer to herself.

9 Q And in backing up, when you got the reciprocal
10 discovery ordered by the Court regarding notes, did the
11 defense object to that?

12 A Yes, sir. Again, from my recollection they objected on
13 every front at every time they got the chance. But they
14 also recognized when the Judge ruled, much like you see in
15 any circumstance, that they were going to have to provide
16 them and they complied with the Judge's order. In other
17 words, for example, Ms. Cascio not having the notes here
18 initially that previous day, clearly they must have
19 instructed her to go get them, because she went and got them
20 and we were given them at the end of the day.

21 Q And during cross examination you used these notes to
22 aid yourself in cross examination; is that correct?

23 A Yes, sir.

24 Q And during your cross examination you asked pinpoint
25 questions regarding statements made by the defendant to her

1 that she placed in those notes.

2 A Yes, sir.

3 Q Statements regarding the actual incident, the violence,
4 the blows, things of that nature that the defendant pretty
5 much told her or confessed to her.

6 A Yes, sir.

7 Q Okay. I'm going to show you the transcript once again,
8 Volume 6 of the appendix, this time page 2973. If you look
9 at line 10 there's a question you asked Dr. Cascio and it
10 says, "I apologize. Okay? It says a lot here 'learning a
11 lot from Drucy'".

12 A Yes, sir.

13 Q And her answer is, "Uh-huh. I guess reflecting, yes."

14 A Yes, sir.

15 Q Okay. Now that statement, "Learning a lot from Drucy,"
16 was that in her notes? Did you get that out of her notes?

17 A Yes, sir. That was something that Jimmy had said to
18 her. Because if you follow on down I asked who was Drucy
19 and she said an investigator, and I said what kind. Drucy
20 Glass and the Death Penalty Resource Center for some reason
21 I believe are who recommended Cascio, because they were
22 working with Mr. Boyd and Mr. Hancock, and so we saw Ms.
23 Glass we knew from other cases, we saw her constantly, and
24 so I knew when I read that who Drucy was. But, again, the
25 point I was trying to make is Jim saying he's learning a lot

1 from Drucy, I'm trying to determine is Drucy educating Jim
2 for his testimony or for his participation.

3 Q If you look on page 2974, line nine, read that. There
4 was an answer -- well, first read your question six.

5 A Yes, sir. He said, "And as he indicated, I'm sorry,
6 ma'am, November 30th of this last year that he was learning
7 a lot from Drucy; is that correct?" And she answered,
8 "Uh-huh, about his mother."

9 Q Okay.

10 A And again, I said, "About his mother?" She said,
11 "Yes."

12 Q So exactly who is Drucy Glass?

13 A My understanding is she was -- whatever her title was
14 was she did mitigation type things for the Death Penalty
15 Resource Center back during that time.

16 Q Okay. And did you ever have an opportunity prior to
17 this trial to cross examine Ms. Glass?

18 A To the best of my ability either I have or Solicitor
19 Brackett, or one of us. I think we've encountered her
20 before. What would often happen is there would be one, two
21 or even three of these mitigation specialists that would
22 attend the trials, and sometimes you would have different
23 ones based on, you know, maybe who you would want. And I
24 assume that was their strategy with Cascio, maybe you would
25 want somebody who didn't have such a track record being

1 crossed, or maybe Solicitor Meyers in Columbia or Lexington
2 had crossed them, and so you wouldn't have as much
3 information to be able to cross them with.

4 Q Okay. So if Ms. Glass testified and she said something
5 about this case similar to what she did in the past case
6 that you actually litigated you can use that against her.

7 A Right.

8 Q But you couldn't do that with Dr. Cascio because she
9 hadn't testified before.

10 A That is correct.

11 Q So you never cross examined Dr. Cascio in the past.

12 A No, sir.

13 Q And if you did that to Ms. Glass on cross-examination
14 that can hurt her credibility for the jury, couldn't it?

15 A I would hope so. If you would say, "Well, it's ironic,
16 here is another death penalty case and you're saying the
17 same four things you said about Mr. Robertson today."

18 Q Okay. Now, Dr. Cascio testified in the penalty phase,
19 correct?

20 A Yes, sir.

21 Q And she was one of the last witnesses that testified;
22 is that correct?

23 A Yes, sir.

24 Q Now, Dr. Joel Sexton performed the autopsy in this
25 case?

1 A Yes, sir.

2 Q And he testified in the guilt and penalty stages,
3 correct?

4 A Yes, sir.

5 Q And during the guilty phase he testified about the
6 manner of death, the actual weapons that were used, things
7 of that nature, correct?

8 A I think, and identity of the victims too, if I recall.
9 That was part of his job, too, to identify who he's doing an
10 autopsy.

11 Q Yeah, I meant to ask you that also. He did identify
12 Mr. and Mrs. Robertson as the person that was murdered.

13 A To the best of my knowledge I believe he did.

14 Q Now, in the penalty phase he also testified about the
15 gruesomeness of the murder; is that correct?

16 A Absolutely, yes, sir.

17 Q And during that time in the penalty phase did you offer
18 into evidence the photographs of the autopsy?

19 A Again, having reviewed the kind of list that you and I
20 looked at a minute ago, the evidence, to the best of my
21 ability and seeing when they come in, I know that would have
22 been our standard procedure and I believe that to be the
23 case. In other words, you limit it in the guilt phase
24 because you're just proving guilt and you don't want to
25 inflame the passions of the jury. In the penalty phase you

1 get to show the nature of the crimes. The suddenly autopsy
2 pictures, and as I recall it was matching up the claw hammer
3 and the head, the knife wounds, the baseball bat mark down
4 the father's back, all of those things would then come in to
5 show, as you said, the gruesome nature of the crime.

6 Q And Brett Baird (phonetically) of SLED, who was he in
7 this case?

8 A I believe that to be SLED crime scene but I may be
9 incorrect on that.

10 Q He was the crime scene investigator in this case. Did
11 he offer into the evidence in the penalty phase the actual
12 crime scene photos?

13 A I'm sure.

14 Q Wouldn't he have been the person who would have done
15 that?

16 A Yes, sir. I'm sure it would have been the father
17 laying in the hall the blood spatters on the wall and he was
18 in his underwear, mother in the side of the bed where you
19 had the defensive wounds and various wounds where she was
20 cut. Again, to the extent those are in evidence those would
21 have come in in the penalty phase.

22 Q And so the jury was aware of the heinous and the
23 violence that the applicant committed on his parents.

24 A Absolutely.

25 Q And both of these individuals testified before Dr.

1 Cascio; isn't that correct?

2 A To the best of my knowledge she was the last -- we
3 would have put our case up first, then defense would
4 respond, and she would have been one of the last defense
5 witnesses.

6 Q Okay. So in your opinion was Dr. Cascio's testimony
7 key to your case?

8 A I think the case was overwhelming. As you heard many,
9 many times, you know, I want to be humble about it, but I
10 had as good an opportunity to cross at Cascio as I ever had
11 without her notes, with her report. Because what we were
12 able to do is go through and everything that she would
13 say -- for example, there was battering. Well, if you drill
14 down a little bit there would be one incident with Jim or
15 one incident with Chip. If there was sexual abuse she would
16 say it's because nobody reported it. But then I would say,
17 "So if they don't report it it means there wasn't." So if
18 you look with her testimony again -- and I think in closing
19 arguments I called it a house of cards, each thing was so
20 small that even without getting to her notes I thought it
21 would have been effective. In other words, if we would have
22 had to end right now I think the jury result would have been
23 the same. Fortunately with her notes I was able to go back
24 through further and bring additional information to light.

25 Q Now, you said earlier the job of a social historian is

1 to bring everything together and to explain to the jury why
2 a person could have done something like this.

3 A Yes, sir.

4 Q Could anybody else involved in this case do that other
5 than Dr. Cascio?

6 A Based on my experience in other death penalty cases her
7 role is a pretty standard role, again, as I alluded to
8 earlier, for tying up expert testimony. I think the use for
9 the defense of any expert like that is, again, they can rely
10 on the findings that all of the other experts have and wrap
11 them all together without having to have done that work, you
12 know what I'm saying? In other words you had the guy
13 talking about drug psychosis or you had the straight mental
14 health, Dr. Pincus, or you had Dr. Evans and his QUEG, all
15 of those things. Because, again, she was very well
16 presented in the way she testified and she did a very solid
17 job, I believe, of presenting the picture that Mr. Boyd and
18 Mr. Hancock wanted to present of Jimmy Robertson in
19 mitigation prior to me cross examining her.

20 Q And you said earlier in testimony that you tried
21 between eight to ten death penalty cases in your career?

22 A Yes, sir.

23 Q Have you ever tried a death penalty case where the
24 defense did not offer a social historian?

25 A To my knowledge, no. Every time -- and what they're

1 trying to do is get behind the human question of why does
2 somebody do that, and so invariably it was painting the
3 picture of granny whipped him too much or whatever the case
4 may be. And so in my experience I have always seen that and
5 always anticipated that in our prosecution of the case.

6 Q You realize there was a previous post conviction relief
7 trial, a hearing on this case.

8 A Yes, sir.

9 Q Did you testify in that hearing?

10 A That was in 2006 with Judge Few, I believe?

11 Q Yes, sir.

12 A Yes, sir, I did.

13 MR. EVANS: Beg the Court's indulgence.

14 (Break in proceedings.)

15 MR. EVANS: Mr. Pope, I have nothing further, thank
16 you. Please answer any questions defense counsel may have.

17 THE COURT: Let's go ahead and take a quick 15 minute
18 break.

19 (A recess was taken.)

20 MR. EHLIES: I have always wanted a politician to
21 question but I have no questions.

22 THE COURT: Anything from the State?

23 MS. BROWN: Just briefly. We do have a few things.

24 Your Honor, as you recall when we began the hearing we
25 started off with discussions of a couple of allegations on

1 prejudice and we maintain our position on that, but we would
2 like to offer up just a few cases for the Court's
3 consideration in our case. The first one is Woodford versus
4 Garceau, and specifically this goes to ADPA and the purpose
5 and intent. And, Your Honor, I have this sort of sketched
6 out in a small outline, if I could hand that up to the Court
7 with the cases.

8 THE COURT: Sure.

9 MS. BROWN: And just briefly, Your Honor, to give you
10 an idea of why the State wishes to rely on these; one,
11 purpose and intent of ADPA in Woodford. Basically Congress
12 enacted ADPA to reduce delays in the execution of state and
13 federal criminal sentences, in particular capital cases.
14 And again, in ADPA Williams v. Taylor talking about ADPA's
15 purpose to further the principles of comity, finality
16 federalism. Then going on to the ABA Guidelines, also
17 mentioned earlier in the presentation, we would like to rely
18 on Bobby versus Van Hook and there this is a United State
19 Supreme Court case. The United States Supreme Court said
20 Strickland stressed that the America Bar Association
21 standards and alike are only guides to what reasonableness
22 means, not its definition. Later in that same case the
23 Court wrote, "the Federal Constitution imposes one general
24 requirement, that counsel make objectively reasonable
25 choices. We also rely on Wong versus Belmontes, and this is

1 again talking about ABA Guidelines as something discussed
2 earlier in the hearing. But in Wong versus Belmontes the
3 Supreme Court considered both prongs of Strickland without
4 any reference whatsoever to any guidelines from the ABA or
5 other organizations. Lastly, Your Honor, we have the case
6 of State versus Blakely, that's a South Carolina Court of
7 Appeals case. And in that case the court of appeals
8 addressed several of the then existing Supreme Court cases
9 from our State Supreme Court and came to their understanding
10 that while the ABA standards may be useful or may offer
11 assistance in the analysis of an issue, they resolved the
12 "These standards are not controlling or dispositive." And
13 they also made reference to, in particular, the Supreme
14 Court's decision in Ard, which you heard about a little
15 earlier today, I guess Monday. And that's it, Your Honor.
16 We would rely on those cases in response to those
17 allegations previously presented. And with that, Your
18 Honor, I believe that is the State's case.

19 THE COURT: Is there going to be a rebuttal?

20 MR. EHLIES: I'm asking -- I have him, Mr. Boyd, under
21 subpoena so I'm asking that he be relieved and there is no
22 rebuttal.

23 THE COURT: Any objection?

24 MS. BROWN: No objection, Your Honor.

25 MR. EHLIES: That would be the applicant's case.

1 THE COURT: Okay. So applicant has now rested.

2 MR. EHLIES: Is now rested.

3 THE COURT: And the defense -- the State is now rested.

4 MS. BROWN: Yes, sir.

5 THE COURT: Okay. And there's no rebuttal witness?

6 MR. EHLIES: No rebuttal witness.

7 THE COURT: Okay. So we have everything.

8 MR. EHLIES: Well, there are some housekeeping things.

9 THE COURT: I know you've got to do this --

10 MR. EHLIES: But we need you for a little longer.

11 THE COURT: Yes.

12 MR. EHLIES: Normally what we do, and I know it may add
13 more under your belt, for instance the recitation of
14 authorities and all, we have some also but I haven't pulled
15 all of those together. So what I normally do is suggest you
16 allow me to do in this case, is go ahead and order the
17 transcript, get the transcript together, get the exhibits
18 together, get my authorities together and pull together the
19 post-trial memorandum brief, and that will cite to all of
20 the testimony in literal form exactly as it was stated so
21 there's no room for error from my notes, and it will allow
22 me to refer to the exhibits that are in support of those
23 particular claims and specifications of error. And I think
24 that is the best way and safest way to proceed at this point
25 if you don't have a problem with that.

1 THE COURT: Let's see what the State says?

2 MS. BROWN: It's up to Your Honor. If you would like
3 to wait for a transcript, if you want to direct us to do
4 briefing or you want to direct us to do any kind of proposed
5 orders that's up to you, but briefing is fine with us,
6 however you would like to. We would just like to ask that
7 it be somewhat expedited since it's a rather old case.

8 THE COURT: It is.

9 MR. EHLIES: Can I say one other thing?

10 THE COURT: Sure.

11 MR. EHLIES: We have to have a transcript, can't go to
12 the next step without the transcript. So the transcript has
13 to be done and it would aide our efforts greatly.

14 THE COURT: Let me just inquire.

15 (Break in proceedings.)

16 THE COURT: In the meantime if you would like to send
17 me something to read that is fine.

18 MS. BROWN: Something along the lines of a post-hearing
19 memorandum perhaps?

20 THE COURT: Suits me fine, it doesn't have to be
21 anything important.

22 MS. BROWN: When would you like those, Your Honor?

23 THE COURT: Well, before I get the transcript.

24 (End of the hearing.)

25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	
James D. Robertson, #5067,	)	C/A 2011-CP-46-00072
	)	
Applicant,	)	
v.	)	ORDER
	)	(DENYING RELIEF)
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter can before the Court upon an application for post-conviction relief filed by Applicant, James D. Robertson. Robertson is under a sentence of death and is currently confined in the Secure Facility at Broad River Correction. This is his second post-conviction relief (PCR) action. The action was originally dismissed as successive and untimely. However, on appeal, the Supreme Court of South Carolina remanded to this Court for a hearing to determine if prior PCR counsel met the statutory qualification for appointment, and, if not, did this “deficiency” result in prejudice to Robertson. *Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016).

This Court held the remand hearing on Monday, August 9, 2021 through Wednesday, August 11, 2021. The Court heard testimony from Robert Burke, John Bailey, Dr. Charles Ewing, James Boyd, Sixteenth Circuit Solicitor Kevin Brackett, former Solicitor Tommy Pope, and Robertson. Robertson was represented during the hearing by appointed counsel, William Henry Ehliès, III, Esq., and Joseph Bradley, Esq. The State was represented by Senior Assistant Attorney General Ed Salter, along with Senior Assistant Deputy Attorney General Melody Brown, and Assistant Attorney General Tommy Evans. Robertson was initially present but he waived his presence after complaints concerning the security measures enforced by the Department of

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S.C. SUPREME COURT

Corrections.¹

At the conclusion of the hearing, the Court directed the parties to submit concise post-hearing memoranda while the transcript was being produced. The parties submitted their memoranda and this Court has considered the testimony, exhibits, the transcript from the August 2021 proceedings, and all other submissions including the prior PCR Order and transcripts from the prior proceedings. The Court finds that Robertson has failed to show prejudice. As a result, the Court denies relief. The Court finds that he had full and fair PCR proceedings in the prior PCR action, and he is due no more.

Scope of Proceedings on Remand

As an initial matter, the parties disagreed on the scope of the remand. Respondent submitted a memorandum concerning the scope of the remand on August 5, 2021, filed August 10, 2021. In essence, Respondent argued that “a trial court has no authority to exceed the mandate of the appellate court on remand.” *Prince v. Beaufort Memorial Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (2011) (quoting *S.C. Dep’t of Soc. Servs. v. Basnight*, 346 S.C. 241, 250-51, 551 S.E.2d 274, 279 (Ct.App.2001)) (citing 5 Am.Jur.2d *Appellate Review* § 784, at 453 (1995)). Thus,

¹ At the outset of the hearing, Robertson’s counsel asked that the restraints be removed from his hands so that “he [would] be more comfortable and [be] allowed to communicate with us with his hands” Counsel asserted that shackling was improper under *Deck v. Missouri*, 544 U.S. 622 (2005) (the due process clause prohibits routine use of visible physical restraints during criminal jury trial, unless the trial court determines they are justified by state interest specific to particular trial without “a factual showing of a risk or danger to the people in this courtroom or flight risk.”). **PCR Tr. 5-11**. Both Respondent and SCDC opposed this request. The Court denied his motion and deferred to courtroom security, as it had in the April 2019 conflict hearing. **PCR Tr. 5-11**. This Court notes that in the prior hearing, Robertson left his seat without permission and walked to the door leading to the hallway outside the courtroom where the holding area is maintained, expressing his desire to leave the courtroom. During the direct examination of Mr. Burke, Robertson expressed a desire to return to prison and not be present in light of the Court’s refusal to remove the restraints in the present hearing. The Court addressed Robertson and ensured that he was making a knowing, intelligent, and voluntary waiver of his right to be present. **PCR Tr. 69-73**. This Court finds the waiver was knowing, intelligent and voluntary.

the remand limited the scope of these proceedings. The Court agrees with Respondent.

While the Court accepted evidence at the August 2021 proceedings that Robertson offered as a basis for finding “deficient performance” over Respondent’s objection, *see PCR Tr. 18-24; 42-45; 103-04*, the Court has only considered such evidence in resolving the ultimate question of prejudice. Our Supreme Court remanded solely to allow Robertson a restricted opportunity for further litigation. The Court found summary dismissal was proper on all grounds except one: the Court found that the allegation that PCR counsel was not statutorily qualified for appointment in a capital PCR pursuant to S.C. § 17-27-160 was a cognizable claim in a successive PCR Application. *Robertson*, 418 S.C. at 522, 795 S.E.2d at 38. The Court specifically rejected all other possible allegations of deficient performance. *Id.* The Court not only *affirmed* the summary dismissal of all claims apart from the statutory qualification allegation; the Court *ruled* that a failure to meet the statutory qualifications is *per se* deficient, *i.e.*, by itself, no other proof at issue. *See PER SE, Black’s Law Dictionary* (11th ed. 2019) (“Of, in, or by itself; standing alone, without reference to additional facts. This phrase denotes that something is being considered alone, not with other collected things.”). Thus, the initial question before this Court was whether counsel was deficient under this narrow circumstance. By Order dated November 21, 2017, this Court granted summary judgment in Robertson’s favor on that issue, finding prior PCR counsel did not meet the statutory qualifications.

Consequently, this left only the possible prejudice from the established deficiency to be determined. In short, at the time of the hearing, Robertson was only required to demonstrate that had prior PCR counsel pursued an allegation during the litigation of his first PCR action, there is a reasonable probability of a different result, *i.e.*, Robertson would have been entitled to post-conviction relief, whether a new trial or new sentencing proceeding. *Id.*, at 520-21 (embracing the

“*Strickland* test” and placing the burden on the applicant to show “non-compliance with section 17-27-160(B)” and prejudice).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Allegations of trial counsel error are evaluated under the familiar test found in *Strickland v. Washington*, 466 U.S. 668 (1984). To be entitled to relief on an ineffective assistance claim, Robertson had to show that (1) trial counsel’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel’s error, the result of the proceeding would have been different. *Id.*, at 694. The Supreme Court of South Carolina instructed in the prior appeal that prejudice in this context should be guided by the *Strickland* prejudice test. *Robertson*, 418 S.C. at 521, 795 S.E.2d at 37. Therefore, the question is whether Robertson has shown a reasonable probability of different result. This Court concludes he has not.

10(a). Ineffective Assistance of Trial Counsel – Guilt Phase

Robertson raised four issues of ineffective assistance of trial counsel for acts or inaction during the guilt phase that were not raised to Judge Few in the prior PCR action. As to each claim, he asserted that former “PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience.” The allegations are those in 11(a) of the Fifth Amended Application, and they are rejected as follows:

11(a)(i) *Counsel failed to object to the Solicitor’s improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166(1998).*

Robertson first claims that trial counsel were ineffective for not objecting to then-Deputy Solicitor Brackett’s “improper” guilt phase closing argument. Citing to *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998), he contends that Mr. Brackett encouraged jurors to rely on their own emotions and passion, rather than the evidence presented, by telling them that they did

not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty.” The Court finds that Robertson has not proven either deficient performance or prejudice under *Strickland* because the closing argument was not so prejudicial that it deprived him of due process.

The United States Supreme Court has held that “[the] central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citing *United States v. Nobles*, 422 U.S. 225 (1975)). “To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.” *United States v. Robinson*, 485 U.S. 25, 33 (1988). Therefore, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (“Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument”); *State v. Brisbon*, 323 S.C. 324, 332, 474 S.E.2d 433, 438 (1996) (“The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial”).

The *Donnelly* standard is a very high standard for a defendant to meet. “[I]t is not enough that the remarks were undesirable or even universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Parker v. Matthews*, 567 U.S. 37, 47-48 (2012); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). Further, “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting

through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” *Donnelly*, 416 U.S. at 647.

Mr. Brackett, who is now the Sixteenth Circuit Solicitor, testified credibly before this Court that he was not suggesting that jurors “shouldn’t take their responsibility as jurors seriously, it was meant as a comment on the strength of our case, which, you know -- I mean, the case was overwhelming.” *PCR Tr. 408, lines 20-24*. Also, he had reviewed the State’s overwhelming proof of guilt immediately before making the challenged remark. *PCR Tr. 408-10*.² The Court finds that the record supports this assessment of his comments.

When placed in context, he argued that:

LADIES AND GENTLEMEN, I SUBMIT TO YOU THERE CAN BE NO DOUBT THAT THE HORRIBLE CRIME THAT OCCURRED AT 2506 WESTMINSTER DRIVE ON NOVEMBER 25TH, 1997, THE BRUTAL BEATINGS THAT WERE ENDURED BY TERRY AND EARL ROBERTSON WERE INFLICTED BY ONE PERSON. THE EVIDENCE CAN LEAVE NO ROOM FOR SPECULATION AS TO WHO THAT PERSON IS. THE BLOOD WAS NOT JUST UP AND DOWN HIS CLOTHING, BUT UP AND DOWN THE EAST COAST IN A BAG WITH HIS BROTHER’S PRESCRIPTION BOTTLE, ON MEREDITH’S SWEATER, ON HIS PANTS, ON HIS HANDS.

BUT JUST IN CASE, JUST IN CASE THERE IS ONE OF YOU SITTING IN THE BOX THAT SAYS I’M STILL NOT CONVINCED, MAYBE THERE’S ROOM FOR DOUBT, THERE IS ONE LITTLE PRESENT THAT THIS MAN PACKED AWAY IN HIS LITTLE BAG OF TRICKS BEFORE HE RAN UP THE COAST TO PHILADELPHIA, STATE’S EXHIBIT 53, ... THE GRAY T-SHIRT THAT CLIPPINGS WERE TAKEN FROM. EVERYBODY HAS BEEN TO MYRTLE BEACH AND GATLINBURG AND SEEN THE T-SHIRT SHOPS THAT YOU CAN GO TO AND HAVE A PHOTOGRAPH PUT ON THERE. WHAT SHIRT DID MR. ROBERTSON CHOOSE TO WEAR WHEN HE

² Mr. Boyd testified before this Court that the State’s evidence of Robertson’s guilt was so strong that he and co-counsel, Mr. Hancock, felt guilt was “a foregone conclusion.” So, the defense focused most of its efforts on the case in mitigation. *PCR Tr. 369-71*. Robertson testified that counsel had explained this to him and that, although he disagrees with this strategy in retrospect, he had agreed with counsel’s strategy at the time of trial. *PCR Tr. 448-49*. See *Bell v. Evatt*, 72 F.3d. 421, 429 (4th Cir. 1995) (While “a defendant’s consent to trial strategy in itself, [does not vitiate] all claims of ineffective assistance of counsel ... [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel’s performance”).

BUTCHERED HIS PARENTS? A T-SHIRT WITH HIS PICTURE ON IT. A BLOOD SOAKED T-SHIRT WITH HIM ON IT HAVING A GOOD TIME WITH A COUPLE OF HIS BUDDIES.

LADIES AND GENTLEMEN, THEY PUT CHAIRS IN THE JURY ROOM SO THAT YOU CAN SIT DOWN AND DELIBERATE OVER THE EVIDENCE, SO THAT YOU CAN HAVE A PLACE TO SIT COMFORTABLY AND TALK ABOUT THE EVIDENCE THAT YOU'VE HEARD. I SUBMIT TO YOU THAT IN THIS CASE YOU DON'T NEED TO USE THOSE CHAIRS. YOU GO IN THERE, TAKE A VOTE, YOU DON'T NEED TO SEE ANY OF THIS, YOU KNOW WHAT HAPPENED; YOU KNOW IN YOUR HEARTS THIS MAN IS GUILTY. DON'T YOU ... GIVE HIM THE SATISFACTION OF FIVE MTNUTES OF THINKING THAT MAYBE YOU'RE OUT THERE WONDERING WHETHER HE'S GUILTY. DON'T YOU GIVE HIM FIVE MINUTES. YOU GO BACK THERE; YOU TAKE YOUR VOTE; YOU COME BACK IN HERE AND YOU TELL THIS FILTHY MURDERER THAT' YOU KNOW HE KILLED HIS PARENTS. YOU TELL HIM HE'S GUILTY AND YOU DON'T GIVE HIM FIVE MINUTES SATISFACTION.

LADIES AND GENTLEMEN, WE'VE CARRIED OUR BURDEN OF PROOF; WE'VE DONE OUR JOB. WE ASK THAT YOU DO YOUR'S. HURRY BACK TO THIS COURTROOM AND TELL THE WORLD THAT THIS MAN IS A MURDERER. THANK YOU.

App. 1915, line 8 – 1916, line 23.

The record shows nothing improper in the State's closing argument. At trial, Robertson's attorneys attacked Meredith Moon's credibility and the State's failure to prove Robertson's guilt beyond a reasonable doubt. ***App. 1920-40.*** The prosecutor's comments were merely to the effect that – even though the State had presented numerous exhibits and lengthy testimony in the guilt phase demonstrating Robertson's guilt of the murders, this one exhibit (State's Ex. 53) conclusively proved that he brutally and murdered his parents beyond any *reasonable* doubt. As such, it should not take the jurors long to arrive at their verdict. A fair reading of the contemporaneous record shows the argument was fairly based upon facts in evidence and was proper. *See, e.g., Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such

testimony”) (citing *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999)). See also *United States v. Young*, 470 U.S. 1, 12 (1985) (“In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor’s remarks, but must also take into account defense counsel’s opening salvo”).

Robertson’s reliance on *Simmons* is misplaced. In *Simmons*, “[t]he solicitor misstated the law in his closing argument by improperly injecting parole considerations into the jury’s sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence or an acquittal.” 331 S.C. at 338–39, 503 S.E.2d at 167. Our Supreme Court found that because the jury could either recommend mercy or not in the burglary conviction, even though the evidence against Simmons was “overwhelming,” the comment “prevented the jury from fairly considering the guilty with a recommendation of mercy” thus was still prejudicial. Here, Mr. Brackett’s closing did not misstate the law or the record, and there was no effort to appeal to jurors’ emotions. Second, his argument merely commented on the strength of the prosecution’s case. Third, the consideration of “mercy” in capital proceedings rests in the sentencing phase, not in the guilt phase. Fourth, the judge correctly charged that the jury was to make its determination on the evidence and “not ... based on passion, prejudice, sympathy, sentiment, public feeling, public opinion, conjecture, speculation or any matters outside the record in this case.” See *App. 1958*.

Finally, any alleged impropriety could not have deprived Robertson of a fair determination of his guilt or innocence in light of the overwhelming evidence of his guilt of the charged offenses. This evidence included statements evincing express malice and motive (*i.e.*, such as his greed and his refusal to accept parental control over his misconduct), the extensive testimony of Meredith Moon, and copious forensic evidence, not the least of which was Robertson’s t-shirt bearing his

own picture framed with his parents' blood. *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process"). As a result, Robertson cannot prove any prejudice under *Strickland* arising from the failure of his original PCR attorneys to raise this claim.

11(a)(ii) Counsel failed to challenge the State's theory of the case that the killings were motivated by a desire for financial gain.

The Court rejects this claim because Robertson has failed to prove deficient performance or prejudice under *Strickland* on the part of trial counsel.

The evidence at trial including Robertson's own statements of what he wanted to do with his parents' money; his use of his father's card immediately after the murder; and the testimony showing that he and his brother stood to inherit his parents' substantial estate, which was valued at over \$2,000,000.00, supports the State's theory that he had a financial motive for murdering his parents and that this was at least one reason for the murders. *See App. 1527-28; 1533.*

When asked what challenge the defense team made this theory, Mr. Boyd testified that "I think the whole basis of the defense was that it was rage and anger over built up tension from what had happened to Mr. Robertson over the years." *PCR Tr. 389*. His testimony before this Court was consistent with his testimony and that of Mr. Hancock at the original PCR hearing that their investigation led them to conclude that the prosecution had overwhelming evidence of guilt, that counsel did not find anything leading them to the conclude that either Meredith Moon or anyone else committed the murder, that they therefore primarily focused their efforts on the sentencing phase of the trial, and that they attempted to secure a sentence of life imprisonment without parole (LWOP) for Robertson. Both attorneys testified about their other steps to develop a mental health defense and to present evidence of physical and psychological abuse by the victims, while

attempting to not alienate jurors by doing so. See *App.* 3331-45; 3348-49; 3354-55; 3362-74; 3416-39; 43-47; 3497-3507; 3514-16; 3536-44; 3546-52.³

Based on counsel’s reasonable investigation, they made an extensive presentation of evidence of Robertson’s mental illness (bipolar disorder, alcohol abuse, and poly-substance abuse), the interplay of his mental illness with his use and abuse of Ritalin and alcohol, and the dysfunctional elements within his family. Additionally, he presented evidence through a neurologist and neuro-psychologist that he has frontal lobe damage. The reasonableness of counsel’s evidence presented in mitigation is discussed more fully in Ground 11(b)(ix).

The Court finds that it was reasonable for counsel to present this evidence in sentencing to disprove the State’s theory of motive for the murders, even if a different attorney might have chosen a different strategy because *Strickland* emphasizes that “[t]here are countless ways to provide effective assistance in any given case,” and “[e]ven the best criminal defense attorneys

³ The Court notes that counsel had the assistance and the opinions of the following experts:

- Dr. Ronald Pryor, a psychiatrist who had diagnosed Robertson at the William S. Hall Institute in 1995 (*App.* 2420-46);
- Dr. Jonathan Pincus, a neurologist (*App.* 2458-2530);
- Dr. James Evans, a neuropsychologist (*App.* 2535-89);
- Dr. Alexander Morton, a psycho-pharmacologist (*App.* 2610-2736);
- Toni Cascio, a social worker (*App.* 2852-3031);
- Julius “Skip” Myer, the treating therapist (*App.* 2753-65);
- John Blume, Esquire, who was the head of the Center for Capital Litigation at the time of trial; and
- Mr. Blume’s wife, Drucy Glass, a mitigation specialist. (*App.* 3426).

would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. Further, the absence of prejudice on this allegation is demonstrated by Robertson’s failure to present the Court with credible evidence of a different strategy to attack the State’s theory of financial gain as a motive for the murders. Finally, to the extent Robertson intends to blend this allegation into his allegation of a “battered child syndrome” element to the crime, that claim is addressed in Ground 11(a)(iii).

11(a)(iii) Trial Counsel failed to investigate, develop and present guilt phase defenses involving battered child syndrome (see State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (S.C. 1991)). Counsel failed to consult with an expert in parricide who was familiar with the psychological theory of internal family systems. Specifically, that children who kill their parents after a prolonged period of abuse may result in a self-defense claim to murder and, alternatively, may be guilty only of voluntary manslaughter.

In support of Ground 11(a)(iii), Robertson presented evidence from Dr. Charles P. Ewing, PhD, on evidence of abuse in Robertson’s background, his mental health diagnoses, and the availability of a defense centered around abuse by parents. Dr Ewing testified that he had reviewed “thousands of pages of documents; family history documents, family health history, family mental health history, employment documents” for Earl Robertson, Sr., Terry Robertson, Earl “Chip” Robertson, Jr., and Robertson. Likewise, he had reviewed photographs and a summary of documents prepared by Robertson’s current attorneys, and he had interviewed both Robertson and Robertson’s younger brother, Chip. **PCR Tr. 233-34.** After reviewing these matters and conducting the interviews, Dr. Ewing reached the following conclusions: (1) “Robertson has had a virtually [life-long] serious mental illness dating back to at least grade school, and that this is an illness best identified as Bipolar Disorder;” (2) Robertson in his late teens and into early adulthood “suffered from various forms of substance abuse and alcohol abuse; (3) Robertson was battered as a child and the abuse continued from early childhood until the murders; (4) he was raised “in a severely

dysfunctional family,” and this contributed to and worsened his mental illness; and (5) that “at the time that he committed these homicides he was both mentally ill and under the influence of drugs.”

PCR Tr. 232, line 13 – 233, line 3.

The Court finds that the absence of prejudice is readily apparent for several reasons. First, the background information was taken from a review of records that were not only available at trial, but were obtained and reviewed during trial counsel’s investigation. Counsel thereafter presented much of the information contained in those records through the sentencing phase testimony of Julius “Skip” Myer (see **App. 2750-2817**), and Toni Cascio, the defense’s social worker. See **App. 2852-3031**. Further, Dr. Ewing agreed with the mental health diagnosis of record, *i.e.*, bipolar disorder, and that Robertson’s Ritalin abuse was a “major factor” that influenced his mental state at the time of the crimes. **PCR Tr. 320**. In fact, when pressed on cross-examination that battered child syndrome could not account for a number of criminal acts before the murders or his actions while incarcerated on death row, Dr. Ewing replied, “I don’t know what your issue is with regard to the diagnosis. [The] [d]iagnosis of Bipolar Disorder is everywhere in the records, it’s all over the place,” including the trial record. **PCR Tr. 328, line 14 – 329, line 7**.

He also agreed with the results of sentencing phase testimony of Drs. Pincus and Evans that Robertson had brain damage and explained that “the literature with regard to serious child abuse seems to indicate that ... being abused as a child can actively change the functioning of someone’s brain.” **PCR Tr. 251**. Cross-examination revealed that he likewise agreed with many of the conclusions reached by Ms. Cascio⁴ and Mr. Meyer, although he felt that Mr. Meyer was

⁴ Ms. Cascio’s “Records Reviewed Toni Cascio, Ph.D.” (Respondent’s Ex. 1) indicates on page 4 that, prior to testifying, she consulted Dr. Ewing’s publication “*Fatal Families: The Dynamics of Intra-familial Homicide*,” as well as a publication by another nationally recognized expert on parricide, Kathleen Heide, titled “*Why Kids Kill Parents: Child Abuse and Adolescent Homicide*.” **PCR Tr. 320-24**. See also **PCR Tr. 314-15**.

“acting inappropriately by seeing [Robertson] under that circumstance because it was a dual relationship.” *PCR Tr. 298-302; 304-09; 320*.

Second, Dr. Ewing was terribly imprecise in his testimony regarding instances of abuse – at one point estimating a thousand or more times, but almost immediately reducing the number down to “hundreds.” *PCR Tr. 305, lines 2-6*. He also admitted that no abuse was ever reported to DSS, and no school or other records supported the claims of abuse. *PCR Tr. 305, lines 7-19*.⁵ Of note, the record reflects, as trial counsel noted in his PCR testimony, only a few instances.

Third, while Dr. Ewing seemed to think South Carolina recognized “battered child syndrome,” he was simply wrong. Robertson’s reliance on *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991) is misplaced for the reasons stated by Respondent at the evidentiary hearing. See *PCR Tr. 228-31*. The trial judge in *Lopez* admitted testimony of the pathologist who performed the autopsy that based on the injuries he observed, the victim was a “ ‘battered child’ and this was the cause of the child’s death,” as well as testimony by the neurosurgeon that the injuries found were consistent with shaken baby syndrome. *Id.* at 365, 412 S.E.2d at 391-92. In affirming the trial judge’s ruling and holding that the evidence was admissible, the Court observed that behavior based syndromes are generally held to be insufficiently “reliable as scientific evidence to justify their use to prove a crime occurred.” *Id.* at 367, 412 S.E.2d at 393 (citing

⁵ This makes questionable whether Dr. Ewing or a similar expert even could have testified at trial about the syndrome apart from deciding its relevance. See *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005) (“MacLennan’s offer of proof demonstrated a tense relationship between him and his father, but there was little demonstrable evidence of the type of relationship described by MacLennan’s own expert that would give rise to battered child syndrome. Therefore, we conclude that MacLennan did not meet his burden of establishing the relevance of the expert testimony on battered child syndrome to his claim of self-defense.”).

People v. Pullins, 145 Mich.App. 414, 378 N.W.2d 502 (1985)).⁶

The Court found, however that “[t]he finding of battered child syndrome and shaken baby syndrome is made based on a number of physical findings which are inconsistent with the history of the injuries given by the parents or caretakers. These syndromes have been developed as a result of extensive research and have become accepted medical diagnoses in other jurisdictions.” *Id.* The evidence that Robertson seeks to introduce, however, is a “behavior based syndrome” and its introduction would be novel, if permitted at all. *See State v. McLennon*, 782 N.W.2d 219, 230-31 (Minn. 2005).

In sum, trial counsel could not be *Strickland* deficient in failing to present a novel theory of defense that had not been accepted by the South Carolina appellate courts at the time of Robertson’s trial, and has, even today, very little acceptance. Requiring counsel to anticipate changes in the law would hold trial counsel ineffective based upon counsel’s failure to utilize a

⁶ Dr. Ewing was quite clear that his theory was separate and apart from, and thus not to be confused with, the recognized “battered spouse syndrome” which may be admitted in support of claims of self-defense, necessity, or duress. *State v. Hill*, 287 S.C. 398, 400, 339 S.E.2d 121, 122 (1986); S.C. Code § 17-23-170(A). There is no similar recognition for parricide or battered child syndrome. Moreover, to the extent Robertson made reference to the *Menendez* case, the mere fact that he reaches to one California case from 1995 pushes to remote the viability of finding counsel ineffective for failing to consider parricide evidence as a way to establish self-defense. It is of no little note that, though the media reports of the *Menendez* case focused on the brother’s allegations, the case law shows that the California courts denied (and the federal courts found no error in the denial of) a charge for imperfect self-defense, and limitation of the evidence received to prevent confusion and/or misleading of the jury. *See Menendez v. Terhune*, 422 F.3d 1012, 1030-34 (9th Cir. 2005). At any rate, even since that trial, the concept has had little acceptance as a defense. See Kristi Baldwin, *Battered Child Syndrome As A Sword and A Shield*, 29 Am. J. Crim. L. 59, 79-80 (2001) (“While courts have allowed the prosecuting attorney in Courtroom A to introduce battered child syndrome to prove a caretaker’s intent to kill his child, they have largely prohibited the defense attorney in Courtroom B from introducing battered child syndrome to prove a child’s justification for killing his abuser.”); see also F. Lee Bailey and Kenneth J. Fishman, *1 Criminal Trial Techniques* § 36:3. *Battered child syndrome*, (May 2021 Update)(“One court has held that battered child syndrome is the functional and legal equivalent of battered woman syndrome and the same reasons which justify the admission of battered woman syndrome apply equally to the battered child syndrome.”).

crystal ball, which is inconsistent with *Strickland*, which unerringly admonishes that “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. *See also Burger v. Kemp*, 483 U.S. 776, 789 (1987) (quoting *Strickland*); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (“*Skipper* was on appeal to the Supreme Court at the time of Kornahrens’s trial, and Runyon testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney’s assistance is not rendered ineffective because he failed to anticipate a new rule of law”). Accordingly, counsel **cannot** be held ineffective for failing to raise issues based on anticipated changes, *even where there were indications at the time that the issues were questionable and under review by appellate courts. E.g., id.* at 1357-60; *Jameson v. Coughlin*, 22 F.3d 427 (2nd Cir. 1994); *Lilly v. Gilmore*, 988 F.2d 783 (7th Cir. 1993); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990).

Further, counsel did investigate for evidence of physical violence by the parents. Mr. Hancock testified in the first PCR proceeding that the defense’s investigation did not uncover “any real physical abuse or tremendous physical abuse by Earl.” Instead, there were “some isolated incidents over periods of time.” Mr. Hancock characterized the family as “very confrontational” and he personally investigated the peril Earl placed Robertson in by holding him over a balcony in the house. They presented the evidence of abuse they found through their experts. **App. 3430-31.** This is consistent with Mr. Boyd’s recollections at the remand hearing. *See PCR Tr. 368-71.*

Also, the record from the first PCR hearing shows Mr. Hancock explained that:

WE WERE TRYING TO INDICATE THAT THE PARENTS WERE THE CAUSE [OF THE MURDERS] AND THAT THEIR PREVIOUS PROBLEMS. I THINK WE HAD EARL AND CHIP’S RECORDS. THERE WAS COUNSELING THERE. AND THAT THE FAMILY WAS DYSFUNCTIONAL

AND BECAUSE OF THAT JIMMY HAD TURNED TO SOME ALCOHOL, DRUGS, RITALIN, AND THAT IT WAS BASICALLY THE PARENTS' FAULT FOR JIMMY HAVING KILLED THEM. I THINK THAT'S WHERE IT CAME OUT, IT FINALLY LANDED.

WE WERE TRYING TO BALANCE BETWEEN HAVING TOTALLY TRASHED THE PARENTS AND SHOWING THAT THERE WAS SOME SYMPATHETIC PROBLEMS THAT COULD BE ASSOCIATED WITH THE FAMILY THAT THE JURY COULD FIND SOME SYMPATHY TOWARDS JIMMY.

App. 3434, l. 11-22.

However, the defense had to be careful not to alienate jurors by “trashing” the victims because “you can’t go but so far in saying that a mama and daddy had made a son kill them.” He also focused on the fact the trial was in York County, as opposed to a big city, and he testified that “we’ve still got some values that are there and things that people want to think about parents and what their role is.” So, the defense presented evidence of the abuse that they uncovered in the manner that was done. ***App. 3434, l. 23 - 3335, l. 11.***

With the benefit of hindsight and its unerring superb visual acuity, all Robertson has done is suggest that trial counsel should have followed a different strategy. Instead of presenting evidence of how his substance abuse and bipolar disorder impacted his mental state at the time of the murders, he now suggests that counsel should have placed more emphasis on how the parents’ psychological and physical abuse of Robertson may have impacted his mental state when combined with his bipolar disorder. Yet, as noted, *Strickland* emphasizes that “[t]here are countless ways to provide effective assistance in any given case,” and “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. The Court finds that trial counsel’s chosen defense was reasonable under *Strickland*. Indeed, the Louisiana Supreme Court has stated that blaming the victim in a capital case is “an offensive argument to the jury” where there is “overwhelming evidence of the defendant’s guilt.” *See State*

v. Hoffman, 768 So.2d 542, 577 (La. 2000).

Finally, the Court finds that this allegation and Robertson's Ground 11(b)(x) are inconsistent with his attacks on counsel's decision to present Ms. Cascio in the sentencing phase of the trial, in light of Robertson's various admissions to her about the facts of the case. Dr. Ewing interviewed Robertson for a total of eight and a half hours. **PCR Tr. 235**. Their conversations included statements by Robertson concerning his mental state and his actions at the time of the murders, and these statements were part of the basis for Dr. Ewing's conclusions. *See PCR Tr. 293; 309-10*. Had Dr. Ewing testified before a jury, the prosecution could have, and quite obviously would have, elicited Robertson's various statements to him about the murders on cross-examination, as it had on cross-examination of Ms. Cascio. The State would have also been able to cross-examine Dr. Ewing on statements that Robertson has made while incarcerated. These statements include his March 23, 2009 statement to a correctional officer asking to be let out of his cell so that he could kill another inmate, and his March 8, 2001 statement that

I don't think murder is addictive. Murder is an impulsive act. It's not [like] speeding or jaywalking. Speeding is flagrant. The speedometer is right there in front of you and you chose to ignore it. Jaywalking is also purposeful, you think before you get ready to cross that street. Now, when it comes to murder it just happens. When I did it my mind was set, no one could have talked me out of it[.]

PCR Tr. 317.

Therefore, the Court finds that Robertson has failed to show prejudice by PCR counsel for not raising a trial counsel error claim based on the same.

11(a)(iv) Trial Counsel failed to challenge the State's case concerning the lack of positive identification of the two bodies found at the scene.

Robertson failed to directly present any specific evidence on this claim. To the contrary, he admitted in his video testimony that he had no evidence for this claim. *See PCR Tr. 450-51*. Additionally, the Court notes that the State presented forensic pathologist Joel Sexton who testified

that he performed autopsies on Earl and Tammy Robertson. **App 1784-1808**. As a result, Robertson has failed to demonstrate any prejudice under *Strickland* from the failure of his original PCR attorneys to raise this claim.

10(b). Ineffective Assistance of Trial Counsel – Penalty Phase

11(b)(i) Trial Counsel incorrectly advised Applicant that any information he gave to testifying experts would be kept confidential and would NOT be admissible at trial. Applicant relied on this erroneous advice and told testifying experts extremely prejudicial, self-incriminating information that was later admitted into evidence at trial.

Robertson has failed to show the initial requirement of demonstrating prejudicial error because this allegation was not missed in the prior PCR. Judge Few’s Order reflects that the allegation was presented in Issue 10 of the prior action in that Robertson alleged “Counsel did not adequately advise Robertson before he was evaluated by the prosecution’s psychologists, Dr. Geoffrey McKee,” (Order p. 7, **App. 3658**). Judge Few ruled on the merits of that allegation. Order pp. 58-69, **App. 3709-20**. Further, to the extent Robertson asserted at the hearing that Dr. McKee was actually the court’s witness and not a state’s witness, his assertion lacks merit for the reasons set forth in Ground 11(b)(vi-vii).

11(b)(ii) Because Trial Counsel failed to attend the interviews between testifying experts and the client, Counsel did not discover that Dr. Toni Cascio, their novice testifying expert, had questioned the defendant about the circumstances of the crime and that the defendant had answered those questions. Counsel also failed to discover that she memorialized those details in her notes. Counsel failed to read the notes of Dr. Cascio before surrendering them to the prosecutor. Dr. Toni Cascio 's interview notes with the client included detailed and confidential, extremely damaging and prejudicial, self-incriminating statements. Trial Counsel did not make an informed strategic decision whether to surrender the notes to the State as a prerequisite to calling Dr. Cascio as a witness because Counsel did not know that the notes memorialized prejudicial, self-incriminating statements made by the defendant. As a result, the confidential and extremely damaging self-incriminating statements contained within the notes were entered into evidence for the jury's consideration through the testimony of Dr. Cascio on cross-examination. Ingle v State. 348 S.C. 467, 560 S.E.2d 401 (2002).

The Court finds that these complaints were addressed in Judge Few’s Order of Dismissal. Issue 12 addressed in that Order was “Counsel was ineffective for presenting social worker Toni

Cascio as an expert witness because of (a) Cascio’s lack of experience; (b) counsel’s agreement to provide Ms. Cascio’s notes to the State[]; (c) counsel’s failure to discover Robertson’s admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel’s presentation of Ms. Cascio as a witness.” See Order p. 8, **App. 3559**. Judge Few specifically addressed these claims at length and rejected them on the merits. Order pp. 77-106, **App. 3728-58**. Further, the Supreme Court of South Carolina rejected them on certiorari. Because Robertson has not presented this Court with any evidence that undermines the accuracy of Judge Few’s findings,⁷ the Court finds that he has not shown prejudice based upon this claim.

11(b)(iii) Trial Counsel abandoned the client. Counsel did not provide legal assistance during the client's critical interviews with testifying expert witnesses because they did not attend those interviews. (See Hancock November 23, 1998 letter). As a result, experts obtained damning confidential information about the details of the crime otherwise protected by the client's assertion of his Fifth Amendment right not to be a witness against himself. Trial Counsel's failure to be present resulted in testifying experts (Dr. Cascio being only one) asking questions that should not have been asked or answered.

⁷ Robertson’s primary complaint in this allegation is that counsel presented Cascio without knowing the damaging nature of Robertson’s various admissions contained in her notes. However, the record supports the contrary conclusion. Specifically, Mr. Hancock testified in 2007 that he and Mr. Boyd knew about the notes when they made the decision to call Cascio, that he had personally read them before turning them over to the State, that he knew she would be cross-examined about the notes, and that the defense balanced the harm from cross-examination on the notes against the benefit of her testimony to the mitigation case in making the decision to call her. **App. 3452-54**. Mr. Boyd’s 2007 testimony was that counsel felt that it was necessary to present her as a witness because she was able to pull things together to which the other experts had testified. **App. 3550, lines 2-7**. (Mr. Hancock testified similarly). Mr. Boyd again stressed the need for her testimony before this Court. See **PCR Tr. 360; 378**. Also, in 2007, he testified that he was “sure” he read her notes before presenting her as a witness. Before this Court he clarified that although he had no independent recollection, it has always been his practice to review a document before providing it to opposing counsel in the course of his forty-three year career. **PCR Tr. 377-78**. See also **PCR Tr. 379**.

Moreover, as Judge Few correctly found “before the State began cross-examining Ms. Cascio about Robertson’s admissions related to the murders, she was specifically asked whether she took Robertson’s statements about the crime into consideration informing her evaluation of him. Ms. Cascio replied, “I was looking at early childhood history that could have led him to that point;” and she agreed that she factored Robertson’s statements into her assessment.” See Order p. 80, **App. 3751** (citing **App. 3010, lines 10-22**).

*The horrendous and damning details, which the State would otherwise have never known, were then published to the jury.*⁸

11(b)(iv) Trial Counsel failed to instruct, supervise, and manage, testifying expert witnesses. In particular Dr. Toni Cascio, who had never served as a testifying expert witness, to ensure that she, and all others, complied with the client's constitutional right and decision to remain silent concerning the details of the crime. Because Trial Counsel made an informed strategic decision to hire an inexperienced expert, Counsel incurred a heightened duty to instruct, supervise and manage her work.

(11)(b)(v) Trial Counsel failed to supervise and manage Applicant's interviews with all the testifying defense experts to ensure that Applicant's Fifth Amendment rights against self-incrimination were protected from disclosure to the jury.

The Court finds that issues (11)(b)(iii) through (v) raise the same basic complaints and may be addressed together. The essence of Robertson's claims is that trial counsel were ineffective for not attending all interviews *with the defense experts and Robertson*, in an effort to prevent disclosure of facts that are unfavorable to his defense. Robertson cites no authority identifying a duty on counsel's part to attend a pretrial interview conducted by a defendant's own expert, in this case, a social worker who was recommended by experts in the development and presentation of mitigating evidence in capital sentencing proceedings. Further, Mr. Boyd's testimony before this Court and in the original PCR hearing, is particularly compelling in resolving this issue, as he noted in his decades of experience, it has never been his practice to instruct an expert he has employed how to practice his or her field of expertise because this is the expert's role. *See PCR Tr. 3379; App. 3551, lines 1-6.* Moreover, the Court again notes that although original PCR counsel did not allege ineffective assistance based on counsel's failure to attend Ms. Cascio's various meetings with Robertson, they did not entirely miss this issue, as discussed in the preceding claim. *See Order, pp. 88-106; App. 3739-58.* In the course of rejecting Issue 12(c), Judge Few specifically found that "*Strickland* does *not* require counsel to instruct defense experts on how they

⁸ Robertson's claim in this and any other Ground that trial counsel "abandoned" him is addressed in Ground 11(g), *infra*.

should conduct their evaluations in their areas of expertise.” Order p. 89, **App. 3740**. This Court agrees with his reasoning and rejects Robertson’s argument to the contrary.⁹

11(b)(vi) Trial Judge Hayes ordered Applicant to submit to a psychological evaluation to determine whether he was competent to assist with his defense and was sane at the time of the crime. Those were issues that were never raised by the defense at any time. Doing an evaluation of the Applicant on those issues required the Court's examiner to ask Applicant about the circumstances of the crime. The examiner was the Court's witness and was performing a function for the benefit of the Court. Trial Counsel failed to insist that the examiner's report be retained by the Judge alone thereby protecting the Applicant's right not to be a witness against himself, and protecting the contents within the report being kept from the prosecution unless and until issues of competency or sanity were raised by the defense. As a result of Trial Counsel's failure, Applicant's statements in violation of his Fifth Amendment rights came into evidence when the prosecution called the Court's examiner, Dr. McKee, as its rebuttal witness.

11(b)(vii) Trial Counsel failed to object to allowing the State to utilize the Court's examiner as its rebuttal witness to the client's case in mitigation. The separate functions of serving the Court to determine competency and sanity became commingled within one witness. Trial Counsel's failure to object resulted in the Court's witness, armed with Constitutionally protected information, to also serve as the State's rebuttal witness and, in that role, to testify about the circumstances of the crime in violation of the client's Fifth Amendment rights to remain silent.

The Court addresses Grounds 11(b)(vi) and (vii) together as they share the same factual basis. The Court finds that Robertson fails to show prejudice as he has failed to show a meritorious issue. First, as established at the hearing before this Court, Robertson is simply wrong that Dr. McKee was the court’s examiner. The contemporaneous record reflects Dr. McKee was requested and retained by the prosecution, as does the State’s motion for an independent psychological

⁹ The only testimony presented in PCR proceedings is that the defense hired Ms. Cascio as a social worker because Ms. Drucy Glass (a social worker with experience) and the Center for Capital Litigation, which specialized in providing assistance to defense lawyers trying capital cases, recommended that they hire her. Counsel were well aware of Ms. Cascio’s limited experience and that she had never testified as a forensic social worker but were not overly concerned about her lack of experience. See **App. 2852-55; PCR Tr. 368-69; 472-73**. Also, counsel had met with Ms. Cascio a number of times over the course of a year to prepare her testimony, and Mr. Hancock did not report any problems in terms of her gathering information for Robertson’s social history. Nor were counsel able to locate a more experienced social worker. **App. 3428-31; 3497-3501; 3504-05; 3510-11; 3529-41; 3546-47**. The Court finds no prejudice to Robertson arising from counsel’s decision in this regard.

evaluation and reciprocal discovery (Respondent's Ex. 3), the Return opposing the motion (Respondent's Ex. 2), the trial judge's February 1999 Order authorizing the independent evaluation (Respondent's Ex. 5), Dr. McKee's report faxed to Solicitor's Office (Respondent's Ex. 6), the bill from Dr. McKee (Respondent's Ex. 7), the receipt for payment to Dr. McKee (Respondent's Exhibit 8), as well as the testimony of Solicitor Brackett, Mr. Pope, and Mr. Boyd. See **PCR Tr. 372-74; 397-408; 461-64.**

Second, Robertson's position is not supported by clearly established law. See *State v. Sloan*, 278 S.C. 435, 440, 298 S.E.2d 92, 94 (1982); *State v. Locklair*, 341 S.C. 352, 363-65, 535 S.E.2d 420, 426-27 (2000) (rejecting defendant's argument the trial judge abridged his Fifth Amendment rights by ordering him to submit to a psychiatric examination where he did not assert an insanity defense and did not give notice that he would plead GBMI and holding that "[t]he trial judge in this case has the inherent, discretionary authority to order an independent psychiatric evaluation of Locklair if he believed Locklair was not fit to stand trial or if he believed that Locklair's mental competency would be an issue at trial. The mental competency of the defendant to stand trial is a baseline inquiry by the court. In order to protect the legal process and preserve the integrity of the trial, a trial judge has the authority to order a psychiatric evaluation of the defendant when his or her competency may be in question"); *State v. Bixby*, 388 S.C. 528, 558-59, 698 S.E.2d 572, 588 (2010).

11(b)(viii) *Trial Counsel failed to insist that the State produce the notes of Dr. McKee in advance of his testimony. Because Trial Counsel did not have Dr. McKee's notes, they were unable to effectively cross-examine him and demonstrate that McKee's notes did not include all of the details of the crime to which Dr. McKee testified. Specifically, some of Dr. McKee's testimony came only from the contents within Dr. Cascio's notes. Therefore, McKee was not testifying from his own personal knowledge about all of the details of the crime, as represented to the jury, but also from some of Dr. Cascio's notes about the details of the crime which he had just been provided by Respondent and read moments before taking the witness stand. (App. Trans, pps.3046-3083; 3067).*

The Court finds that Ground 11(b)(viii) lacks merit because the uncontroverted evidence

is that Mr. Brackett received Dr. McKee's report and notes on the afternoon before the trial began and that he immediately turned over the report and notes to either defense counsel or a member of the defense team. The only portion of this information that he could not remember disclosing was the booklet containing actual test questions, which did not contain information related to Dr. McKee's opinions. **PCR Tr. 407-08.**

Mr. Boyd had no independent recollection of whether the State disclosed the notes. **PCR Tr. 387.** However, the record shows that at one point, Mr. Boyd objected to Dr. McKee reading from his notes, **App. 3068, line 25- 3069, line 6**, and he testified before this Court that it was reasonable to assume from his objection that he had Dr. McKee's notes. **PCR Tr. 389-90.** Because the State provided the notes to defense counsel, any objection that the notes had not been provided would have been frivolous and *Strickland* does not require counsel to make a frivolous objection or motion. See *United States v. Wright*, 573 F.2d 681, 684 (1st Cir. 1978); *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) (counsel cannot be ineffective for failing to raise a meritless claim); *Kelly v. Lazaroff*, 846 F.3d 819, 831 (6th Cir. 2017) (“[C]ounsel cannot be considered ineffective for failing to raise a meritless claim”).

11(b)(ix) *Trial Counsel failed to develop and present all available mitigation evidence from Applicant's life and background. Counsel did not retain a social historian that was familiar with internal family systems which was necessary to build an effective mitigation case for the defendant. This includes evidence regarding Applicant's long-standing, severe, improperly treated mental health issues; his family members' mental health issues; and the Robertson's internal family system dynamics.*

Trial counsel's failures left the State's aggravating portrayal of Applicant un rebutted and prevented the jury from understanding and giving mitigating effect to the long history of severe dysfunction that pervaded the family. The mitigation history as presented at trial failed to incorporate this social history, and other relevant mitigating evidence.

The Court finds that Robertson cannot show deficient performance or prejudice under *Strickland* because the credible evidence presented at the 2007 hearing and before this Court reflects that trial counsel made an objectively reasonable investigation for and an extensive

presentation of evidence of Robertson's mental illness (bipolar disorder, alcohol abuse, and poly-substance abuse), the interplay of his mental illness with his use and abuse of Ritalin and alcohol, and the dysfunctional elements within his family. Additionally, he presented evidence through a neurologist and neuro-psychologist that he has frontal lobe damage. The Court notes that Judge Few relied upon much of this evidence in rejecting original PCR counsel's claims that counsel were ineffective in failing to present Dr. Hayne McMeekin, a treating psychiatrist who over-prescribed Ritalin (Issue 10(a)(1), Order of Dismissal, **App. 3659-71**); that trial counsel were ineffective for neither advising Robertson to plead guilty but mentally ill (GBMI) or for not requesting that the trial judge submit a verdict of GBMI to the jury (Issue 10(a)(3), Order of Dismissal, **App. 3675-88**); that trial counsel were ineffective for not adequately and properly advising Robertson before Dr. Geoffrey McKee, the State's forensic psychologist evaluated him (Issue 10(a)(10), **App. 3709-20**); that counsel were ineffective for failing to introduce sufficient evidence of the Robertson family's mental health history (Issue 10(a)(11), Order of Dismissal, **App. 3720-28**); and that counsel were ineffective for presenting their social worker, Ms. Cascio (Issue 10(a)(12), **App. 3728-57**).

The Court finds that Robertson did not present the Court with any admissible evidence that is substantially different in kind or degree from the evidence presented in his original sentencing proceeding. Rather, as stated above, he has merely changed the emphasis that he thinks should have been placed on this evidence. Instead of presenting evidence of how his substance abuse and bipolar disorder impacted his mental state at the time of the murders, he now suggests, in hindsight, that counsel should have placed more emphasis on how the parents' psychological and physical abuse of Robertson may have impacted his mental state when combined with his bipolar disorder. Yet, this does not show prejudice from counsel's performance because *Strickland* emphasizes that

“every effort be made to eliminate the distorting effects of hindsight, ... and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689 *Strickland* also states that “[t]here are countless ways to provide effective assistance in any given case,” and that “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* Again, the Court finds that trial counsel’s chosen defense was reasonable under *Strickland*.

11(b)(x) Trial Counsel failed to investigate, develop and present penalty phase defenses involving battered child syndrome (see *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (S.C. 1991)) and parricide. Counsel failed to consult with an expert in parricide who was familiar with the psychological theory of internal family systems. Specifically, that children who kill their parents after a prolonged period of abuse have substantial mitigating circumstances that when presented properly reduce culpability for murder. See also *Simpson v. Moore*, 367 S.C. 24; 51 1 S.E.2d 689 (S.C. 2006).

This claim lacks merit for the reasons set forth in Ground (11)(a)(iii). Additionally, because counsel’s reasonable investigation for evidence revealed only a small number of acts that constituted physical abuse, it was not unreasonable under *Strickland* for counsel to focus the mitigation case primarily on Robertson’s mental illness (*i.e.*, the diagnosis of bipolar disorder), his drug abuse, both before and on the morning that he murdered his parents, and his family history of mental illness and drug abuse. This decision was reasonable even if other attorneys would have focused on physical abuse, instead, because *Strickland* recognizes that “[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. Further, there clearly cannot be any prejudice from counsel’s decision to rely heavily on Robertson’s mental illness. In addition to the previously-stated reasons, Respondent notes that Dr. Ewing testified at the end of cross-examination that the diagnosis of bipolar disorder was “all over the record.”¹⁰

¹⁰ To the extent that Robertson is claiming that trial counsel failed to adhere to the ABA Guidelines, the Court finds his claim lacks merit. “*Strickland* stressed ... that ‘American Bar Association standards and the like’ are ‘only guides’ to what reasonableness means, not its definition.” *Bobby v. Van Hook*, 558 U.S. 4, 8-9 (2009)). “[W]hile States are free to impose

(xi) Trial Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).

The Court finds that Robertson has waived this claim because he did not present any evidence to support it. Alternatively, the Court finds that the claim lacks merit.

The State introduced evidence of several of Robertson's convictions through SCDC's records custodian, Mike Stobbe. The trial judge overruled Mr. Hancock's objection that the records concerning Robertson's misconduct while incarcerated were hearsay narratives. In response to an objection that the incident dated October 3, 1996 was dismissed, the State agreed to inquire only about infractions for which he was convicted. ***App. 2127-30.***

The State introduced evidence through Mr. Stobbe that between Robertson's admission on September 3, 1996 and his conditional release on Youthful Offender Act parole on July 31, 1997, he had a December 15, 1996 conviction for "damage, destroying property" (State's Ex. 201); a February 11, 1997 conviction for fighting without a weapon (State's Ex. 202); a February 11, 1997 conviction for lying to an employee and damage, destroying property (State's Ex. 203); and a September 11, 1998 conviction for refusing or failing to obey (State's Ex. 204). ***App. 2130-33; 2141-43.***

Mr. Hancock established on cross-examination that the charge of fighting without a weapon reflected in State's Ex. 202 was "a minor infraction" and that no one actually saw a fight. Rather, a correctional officer apparently heard a loud noise and, upon going into the dayroom to investigate, saw Robertson getting up off of the floor with a small cut on his cheek and swelling under his eye. Also, nothing in the report said that he hit or beat or threatened anyone else. ***App.***

whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Id.* at 9 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

2133-35.

Mr. Hancock’s cross-examination also established that the charges in State’s Exhibit 203 included possession of contraband, which was cigarettes, and that the damage to property charge resulted from Robertson tearing a hole in his jacket so that he could hide the cigarettes. Counsel likewise established that the incident documented by State’s Ex. 201 resulted from Robertson breaking a window on a door by knocking too hard on the door. The trial judge sustained the State’s objection when counsel attempted to establish that Robertson’s motive for knocking on the door was to get assistance for another inmate. ***App.* 2136-43.**

First, counsel was not ineffective for failing to anticipate at the time of Robertson’s March 15-26, 1999, trial that the Supreme Court would overrule *Ohio v. Roberts*, 448 U.S. 56 (1980), five years later in *Crawford v. Washington*, 541 U.S. 36 (2004). Under the rule in *Roberts*, the Confrontation Clause did not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears “adequate ‘indicia of reliability.’ ” The *Roberts* test was met when the evidence either fell within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” *Id.* at 66.

Crawford overruled *Roberts* and held that:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.”

Crawford, 541 U.S. at 68.

As noted, under *Strickland*, an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *See Strickland*, 466 U.S. at 689; *see also*

Kornahrens, 66 F.3d at 1360; *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004); *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grds.*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

Further, a Confrontation Clause objection would not be well-founded even post-*Crawford*. “Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). In *Melendez-Diaz*, the Supreme Court held that certificates or affidavits that had been signed under oath by forensic analysts affirming that a substance found in the defendants’ possession was cocaine were inadmissible because they fell within the “ ‘core class of testimonial statements’ ” described in *Crawford*. See *Melendez-Diaz*, 557 U.S. at 310.

The Court explained that “not only were the affidavits “‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’” ... but under Massachusetts law the *sole purpose* of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance We can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves.” *Melendez-Diaz*, 557 U.S. at 311 (citations omitted) (emphasis in original). Notwithstanding Robertson’s allegation, however, it is clear that the records of his prior convictions are business records and, therefore, nontestimonial statements under *Crawford*. See *People v. Moreno*, 192 Cal.App.4th 692, 710-11 (Cal. Ct.App. 2011).

In fact, a similar issue was presented and rejected in *State v. Owens*, 378 S.C. 636, 640-41, 664 S.E.2d 80, 82 (2008). *See also State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996) (holding prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510). Accordingly, the Court finds that Robertson has failed to show reasonable probability that relief would have been granted had former PCR counsel pursued the issue.

(xii) Trial Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.

The Court finds that this claim lacks merit.

Robertson contends counsel were ineffective for not objecting to the following exchange on the State's cross-examination of Terry Robertson's therapist, Julius "Skip" Meyer:

Q. AND IT'S HARD TO BE HERE TODAY FOR YOU, ISN'T IT?

A. YES, SIR.

THE COURT: KEEP YOUR VOICE. LEVEL UP.

Q. YES, SIR. THIS GOES AGAINST THE GRAIN OF EVERYTHING A COUNSELOR IS TAUGHT IN TERMS OF CONFIDENTIALITY AND PRIVACY.

A. THIS IS CORRECT.

Q. AND TERRY ROBERTSON WAS AN EXCEEDINGLY PRIVATE WOMAN, WASN'T SHE?

A. VERY MUCH SO.

Q. SHE WOULD BE MORTIFIED TO KNOW WHAT IS GOING ON IN THIS COURTROOM TODAY, WOULDN'T SHE?

A. YES, PERSONAL APPEARANCES MEANT A GREAT DEAL TO HER.

App. 2792, lines 5-19.

Robertson contends that this evidence should have been excluded under Rule 403, SCRE. The Court disagrees. Rather, the Court finds that this was properly admitted as victim impact evidence under *Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991). In *Payne*, the United States Supreme Court partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805, (1989), and held that the Eighth Amendment does not prevent juries in capital cases from hearing evidence and arguments regarding the victim and the impact of the murder on the victim's family. *Payne*, 501 U.S. at 825. See also *id.* at 830 (O'Connor, J., concurring) ("A State may decide also that the jury should see 'a quick glimpse of the life petitioner chose to extinguish,' ... to remind the jury that the person whose life was taken was a unique human being") (citation omitted).

In *Stone v. State*, 419 S.C. 370, 381-82, 798 S.E.2d 561, 567 (2017), *cert. denied*, 138 S.Ct. 392 (2017), the South Carolina Supreme Court explained that:

Under South Carolina law, "victim impact evidence is relevant for a jury to 'meaningfully assess the defendant's moral culpability and blameworthiness.'" *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730-31 (2000) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720, 735 (1991)), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). The State may present victim impact evidence for the purpose of demonstrating "the 'uniqueness' of the victim and the specific harm committed by the defendant." *Hughey*, 339 S.C. at 457, 529 S.E.2d at 730 (quoting *State v. Rocheville*, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993)). In *State v. Bennett*, we explained that evidence of "the specific harm caused by the defendant" can "includ[e] the impact of the murder on the victim's family and 'a quick glimpse of the life which the defendant chose to extinguish.'" 369 S.C. 219, 228, 632 S.E.2d 281, 286 (2006) (quoting *Payne*, 501 U.S. at 825, 822, 111 S.Ct. at 2608, 2607, 115 L.Ed.2d at 735, 733). Under *Payne*, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736. However, when victim impact "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825, 111 S.Ct. at 2608, 115 L.Ed.2d at 735.

Here, the State’s cross-examination only offered a “brief glimpse” of one aspect of why Terry Robertson’s death represented a unique loss to society, her family, and friends. Accordingly, it was properly admitted under *Payne*.

The Court further finds that Robertson cannot show any conceivable prejudice from counsel’s failure to object to this line of cross-examination. This was an extremely brief exchange in the course of an extraordinarily voluminous record. Also, the Solicitor used this evidence in closing to attack the sentencing phase presentation of evidence suggesting that Robertson’s parents were responsible for their own murders. See *App. 3141-44*. Further, the challenged cross-examination merely elicited testimony that was corroborative of and cumulative to evidence that was already properly before the sentencing jury.

Specifically, Linda Weaver testified that she had known Earl and Terry Robertson since May or June of 1978 and that she was a very close friend of Terry’s. They talked daily for years. *App. 2340; 2346*. Beginning in 1992, while Robertson was at Georgia Tech, Ms. Weaver noticed a change in Terry’s personality. Terry would not call Ms. Weaver as often, they would not talk as much, and Terry stopped sharing the detail of her life.

THEN SHE BEGAN TO TELL ME THAT JIMMY WAS HAVING PROBLEMS AT GEORGIA TECH, HE WAS FLUNKING MOST OF HIS COURSES. SHE WAS AFRAID HE WAS GOING TO GET KICKED OUT OF SCHOOL. HE HAD GAMBLING DEBTS. SHE WAS EMBARRASSED BECAUSE OF HER SON. SHE WASN'T THE TERRY I KNEW; SHE WASN'T AS TALKATIVE. SHE BEGAN TO GAIN WEIGHT.

App. 2347, line 7 – 2348, line 3.

The State later revisited the changes in Terry that Ms. Weaver had observed. Over trial counsel’s unsuccessful objection (*App. 2362, line 25 – 2363, line 3*), Ms. Weaver testified that:

TERRY, DIDN'T TALK AS MUCH; SHE DIDN'T DISCUSS HER FAMILY. WE COULDN'T GO, EAT AT CERTAIN RESTAURANTS BECAUSE SHE WAS EMBARRASSED. SHE WOULDN'T GO TO THE GROCERY STORE

BECAUSE SHE WAS EMBARRASSED. ON OCCASION I'VE BEEN TO THE GROCERY STORE WITH TERRY THAT SHE WOULD ACTUALLY LOOK DOWN THE AISLE TO SEE WHO WAS COMING BECAUSE SHE WAS EMBARRASSED ... ABOUT THE THINGS THAT HER SON HAD DONE THAT OTHER PEOPLE KNEW ABOUT.

App. 2363, lines 5-15.

Also, Mr. Meyer gave similar testimony on direct examination of how Earl was embarrassed by the conduct of his children and in particular by Robertson. ***App. 2761-65.*** Because the challenged cross-examination of Mr. Meyer only elicited evidence that corroborated and was cumulative to other evidence already before the sentencing jury, there was no prejudice under *Strickland* in failing to object to it. See *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding the petitioner was not prejudiced by improper witness pitting in light of the other evidence presented in the case); *State v. Haselden*, 353 S.C. 190, 19697, 577 S.E.2d 445, 448-49 (2003) (admission of improper evidence is harmless when the evidence is merely cumulative to other evidence); *Hutto v. State*, 387 S.C. 244, 249, 692 S.E.2d 196, 198 (2010) (“No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt.”); *Forde v. State*, 289 Ga. App. 805, 809, 658 S.E.2d 410, 414 (2008) (“Although Forde’s trial counsel performed deficiently in failing to raise a hearsay objection to the admission of B.F.’s statements contained in the videotaped interview, Forde has not shown that counsel’s error prejudiced his defense. The statements made by B.F. during the videotaped interview were merely cumulative of the testimony she offered at trial, regarding which she was cross-examined by Forde’s trial counsel, and were therefore harmless”).

Moreover, this victim impact evidence could not have inflamed the jury nearly as much as the brutally malicious facts of the murders did. See *Payne*, 501 U.S. at 832 (O’Connor, J., concurring) (“I do not doubt that the jurors were moved by this testimony—who would not have

been? But surely this brief statement did not inflame their passions more than did the facts of the crime”). This evidence showed how Robertson brutally and maliciously murdered his parents and that the murder was motivated, at least in large measure, by his greed to obtain money from their estates or life insurance policies. In light of this evidence, including numerous statements by him evincing express malice, “there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

Finally, the trial judge further instructed the sentencing jury that it could only impose a death sentence if it first found the existence of one or more aggravating circumstances beyond a reasonable doubt. He also instructed jurors that they could only consider the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon, while in the commission of larceny with the use of a deadly weapon, physical torture, that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value, and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. ***App.* 3203-26**. Given these sentencing phase instructions, which precluded jurors from sentencing Robertson to death based upon anything other than proof beyond a reasonable doubt of a *statutory aggravating circumstance*, the Court finds that the challenged evidence was not prejudicial. *See United States v. Olano*, 507 U.S. 725, 740 (1993) (“[It is] the almost invariable assumption of the law that jurors follow their instructions”) (citation omitted); *Strickland*, 466 U.S. at 694 (“a court should presume ... that the judge or jury acted according to law”).

Accordingly, Robertson is not entitled to relief because he cannot show prejudice from original PCR counsel’s failure to raise this allegation.

(xiii) Trial Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson, and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144,3142). Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Robertson further claims that counsel were ineffective for not objecting to the Solicitor's sentencing phase closing argument, which he contends was improper. Again, however, the Court finds that counsel's performance was not deficient and that there was no prejudice.

In closing argument, the Solicitor suggested that Mr. Myers' testimony was that even though "Terry went through hell during the last three years of her life," she was beginning to come out of it, and she and Earl were "starting to put some structure on those kids." *App. 3141-42*.

He then juxtaposed this evidence with Ms. Cascio's testimony:

BUT THIS LADY [MS. CASIO] WANTED TO TALK ABOUT ... TERRY, SHE SELF-MUTILATED HERSELF. TERRY, SHE WAS SUICIDAL. TERRY EVEN WENT SO FAR AS TO HAVE TO BE CHECKED IN THE HOSPITAL. AND THEY DRAG TERRY THROUGH THE MUD AND UP AND DOWN AND TALK ABOUT ALL THE MEDICATIONS, ALL THE THINGS THAT ARE HAPPENING PILED TOGETHER, ALL THE MEDICATIONS THAT CAME INTO THE HOUSE. BUT WHEN YOU PULL THEM APART, WHAT IS IT THAT YOU SEE. THREE YEARS. YES, SHE LOST HER MOTHER; SHE LOST HER FATHER; SHE WAS GOING THROUGH A ROUGH TIME. BUT IN THE MEANTIME SHE WAS HAVING TO DEAL WITH HIM; SHE WAS HAVING, TO DEAL WITH CHIP. AND IT WAS CAVING IN ON HER.

MS. CASCIO SPENT A GREAT DEAL OF TIME GOING THROUGH AND TELLING YOU BASICALLY WHAT A HORRIBLE SITUATION WENT ON AT THE ROBERTSON'S HOUSE. AND NO FAMILY IS PERFECT, AND I REALIZE THIS, AND THEY ALL HAVE PROBLEMS, THEY ALL HAVE SITUATIONS. YOU ALL HAVE PRIVATE MATTERS THAT YOU DON'T WISH TO BE PLAYED OUT IN THE COURTROOM. I THINK HE SAID THAT TERRY WOULD HAVE BEEN HORRIFIED IF SHE HAD KNOWN ALL OF HER PRIVATE THOUGHTS WERE LAID OUT HERE.

BUT FROM ALL THAT, WHERE DOES MS. CASCIO GO WITH IT? BECAUSE OF ALL OF THAT AND BECAUSE OF THE PHYSICAL ABUSE AND THE MENTAL ABUSE AND THE DETACHMENT AS A CHILD AND ALL THESE DIFFERENT THINGS, VIOLENCE WAS HIS ONLY

ALTERNATIVE. AND I KEEP SAYING THAT WRONG. SHE SAID HE PERCEIVED VIOLENCE AS HIS ONLY ALTERNATIVE. AND THEN I THINK SHE SAID HE MAY PERCEIVE VIOLENCE AS HIS ONLY ALTERNATIVE. BECAUSE THE TRUTH OF THE MATTER WAS WHEN I STARTED QUESTIONING MS. CASCIO, AND I APOLOGIZE, I KNOW IT TOOK A LONG TIME, BUT THERE WAS SO MUCH. WHEN YOU SEPARATED THE WHEAT FROM THE CHAFF, IT WAS ONE INCIDENT, ONE INCIDENT OF PHYSICAL ABUSE. TWO INCIDENTS OF FIGHTING WITH THE BOYS. BUT FROM THAT, STUDIES SHOW AND IT'S CLEAR THAT THAT MUST BE THE CASE.

SO EVERY TIME THEY FOUND ONE INCIDENT OR TWO INCIDENTS OVER, WHAT, TWENTY-SOMETHING YEARS OF MARRIAGE, TERRY WAS CRUCIFIED OR EARL WAS CRUCIFIED. THAT FAMILY, THAT EXPLAINS IT. BECAUSE AGAIN THEY'RE STARTING AT THE END, THEY'RE STARTING WITH THE BAT, THEY'RE STARTING WITH THE CLAW HAMMER AND TRYING TO WORK BACK AND SAY WHY DID THIS HAPPEN TO POOR JIMMY, WHY DID THIS HAPPEN TO HIM.

WELL, I'LL SUBMIT TO YOU AS I WENT THROUGH WITH MS. CASCIO YOU SAW THAT EVERY SINGLE CARD SHE HAD STACKED WAS JUST THAT, A HOUSE OF CARDS. AND AS I'D POINT OUT ONE, IT WOULD FALL; I'D POINT OUT ANOTHER, IT WOULD FALL. AND WE WENT THROUGH EVERYTHING SHE SAID THAT ULTIMATELY LEADS TO THIS CONCLUSION THAT JIM ONLY HAD THE ALTERNATIVE FOR VIOLENCE. IT'S JUST NOT THERE.

SO, I SUBMIT THAT ALL THAT REALLY HAPPENED -- YOU KNOW, SHE TALKED ABOUT TERRY BEING SEXUALLY ABUSED. TERRY HAS BEEN RAPED. SHE WAS RAPED IN THIS COURTROOM WHEN THEY TAKE HER THROUGH THIS BASED ON HIS ACTIONS.

App. 3142, line 5 - 3144, line 6.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. [However, a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. As stated earlier, a criminal defendant is not entitled to relief based on the

closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly*, 416 U.S. at 643. *See also Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 (“Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument”). “[I]t is not enough that the remarks were undesirable or even universally condemned.” *Darden*, 477 U.S. at 181. *See also Parker*, 567 U.S. at 47-48.

Applying this standard to the present case, it is clear that Robertson cannot show either deficient performance or prejudice under *Strickland* resulting from counsel’s failure to object to the Solicitor’s sentencing phase closing argument. The Supreme Court in *Darden* held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief. *See Darden*, 477 U.S., at 180, n. 11 (prosecutor referred to the defendant as an “‘animal’ ”); *id.*, at 180, n. 12 (“‘I wish I could see [the defendant] with no face, blown away by a shotgun’”). Further, when the Solicitor’s argument is placed in proper context, see *Young*, 470 U.S. at 12; *Donnelly*, 416 U.S. at 647, the Court finds that the Solicitor was merely addressing the defense’s sentencing phase presentation of evidence through Ms. Casio.

Her testimony suggested that Robertson’s parents were in large part to blame for their own murders and that Robertson may have perceived killing them as his only course of action. The Solicitor’s comments were supported by evidence in the record concerning Terry’s embarrassment over the behavior of Robertson and his brother. *See App. 2347, line 7 – 2348, line 3; App. 2363, lines 5-15* (Ms. Weaver); *App. 2347, line 7 – 2348, line 3* (Mr. Meyer). Also, Mr. Meyer gave similar testimony on direct examination of how Earl was embarrassed by the conduct of his children and in particular by Robertson. *App. 2761-65*.

Additionally, and in spite of Robertson's attack on the challenged comments, the Court finds that the Solicitor's argument fairly characterized Ms. Casio's expert testimony, since she attributed the murders in large part – if not totally - to Robertson's parents and, more specifically, to Terry Robertson. **App. 2852-3031**. Also, the Solicitor was merely contrasting the defense's presentation with the contrary evidence presented by the State. He had the right to do so.

The Court in *Payne* expressly observed that 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 this family." *Payne*, 501 U.S. at 825 (citation and internal quotation marks omitted). *See also Humphries v. Ozmint*, 397 F.3d 206, 225 (4th Cir. 2005) ("the *Payne* Court recognized that some comparisons would be made between the defendant and the victim") (citing *Payne*, 501 U.S. at 825). The Court further finds that Robertson's claim ignores that the Solicitor's comments were made in anticipation of the closing arguments of trial counsel.

Although trial counsel Hancock stated in closing that the defense was not saying that Earl and Terry Robertson were "bad people," he emphasized that "they could not control the lot the Good Lord gave them." **App. 3174**. He thereafter argued that jurors needed to ask themselves why the murders occurred. He also contended that Robertson was not a diabolical criminal as the State had contended, he pointed out that Robertson did not suddenly decide one day to be bad or to have bipolar disorder, he responded to the State's suggestion that Dr. Pincus' opinion should not be believed because Dr. Pincus was retained by pointing out that Dr. McKee and many other prosecution witnesses were also paid, he pointed to the evidence supporting a diagnosis of bipolar disorder and explained that it was a mental disorder, and he emphasized that the defense experts

had testified to how Robertson's problems associated with bipolar disorder were exacerbated by drug and alcohol use, which was provided to Robertson. *App.* 3175-82.

After then telling jurors, "We're not shifting the blame" away from Robertson, he made the following comments:

WE STARTED WITH THE BASIC PREMISES UPON TESTIMONY OF WITNESSES THAT THE SOLICITOR PUT UP. I BELIEVE MRS. GEORGE, MRS. CISSY GEORGE, WE STARTED WITH THAT TESTIMONY AND I ASKED THEM QUESTIONS BECAUSE I KNEW WHAT WAS COMING. WE ESTABLISHED THAT TERRY WAS DOING ALL OF THESE WONDERFUL THINGS, AND SHE WAS. BUT SHE MIGHT NOT HAVE BEEN DOING QUITE IN THE MANNER IN WHICH HER FRIENDS PERCEIVED THEM BECAUSE I WILL TALK ABOUT MR. FAULKNER A LITTLE LATER.

SHE'S DOING THESE THINGS, YET THEY DON'T KNOW WHAT'S GOING ON. BUT I ASKED THEM ONE THING. I SAID, TERRY IS A TRUTHFUL PERSON, ISN'T SHE? I DIDN'T RELISH IN PUTTING MR. MEYER UP HERE. I KNOW HE FELT UNCOMFORTABLE, BUT MR. MEYER SAW TERRY 170 TIMES IN THREE YEARS.

WHEN WE GO TO LOOK AT WHAT WAS HAPPENING IN THE FAMILY AND WITH WHAT WAS GOING ON BEHIND CLOSED DOORS, AND I'M NOT SURE ANY OF US COULD SURVIVE THE SCRUTINY OF WHAT GOES ON BEHIND CLOSED DOORS IN A COURTROOM OF THIS MANNER, BUT HOPEFULLY WE WILL NEVER BE THE VICTIM, HOPEFULLY WE WILL NEVER BE INVOLVED IN A MURDER THAT LOOKS TO THE DEATH PENALTY.

SO, IT'S SOMETHING THAT WHILE I DID NOT RELISH, YOU HAVE TO LOOK AT. YOU HEARD FROM MR. MEYER THAT TERRY WAS A VERY PRIVATE PERSON. AND SO THIS IS NOT AN EASY TASK FOR ANY OF US.

THE PERSON THAT SPEAKS TO US IN THIS ENTIRE MATTER AND GIVES US SOME INSIGHT AS TO WHAT IS THERE IS TERRY ROBERTSON. AND I ASK, AND I ASK THAT YOU LOOK AT MORE THAN THE RECORDS THAT I SHOWED YOU. ALL OF MR. MEYER'S RECORDS ARE IN EVIDENCE; THEY ARE IN EVIDENCE, SO YOU DON'T HAVE TO JUST LOOK AT THE SELECTED THINGS THAT I BROUGHT UP. BUT I THINK FROM THEM ... WHAT WE PRESENTED TO YOU IS THAT THERE WAS INHERITED BIPOLAR MENTAL DISEASE WITH GENETIC OR

OTHERWISE-- THEY SAID MORE THAN LIKELY IS GENETIC, IF I REMEMBER CORRECTLY.

WE ALSO PRESENTED TO YOU THE RECORDS OF DR. MEYER THAT INDICATE THAT TERRY ROBERTSON HAD MANY, MANY PROBLEMS BEFORE ALL OF THIS BEGAN.

App. 3182, line 15 – 3184, line 6.

Mr. Hancock then argued at length about Terry’s problems that were in Mr. Meyers’ records and to which Ms. Cascio testified. Mr. Hancock likewise urged that her problems, as well as Robertson’s own mental health issues impacted him and his commission of the murders. ***App. 3184, line 7 – 3191, line 11.*** Mr. Boyd made similar comments in his closing argument. ***App. 3194 – 3203, line 4.***

Because the challenged remarks were part of the Solicitor’s broader response to the anticipated argument that the murders were somehow the result of Terry’s psychological and personal issues, the comments were proper and counsel’s failure to object was not deficient under *Strickland*. See, e.g., *Parker*, 567 U.S. at 47-48; *Rogers v. State*, 957 So.2d 538, 549-50 (Fla. 2007), *as modified on denial of reh’g* (May 24, 2007) (defense counsel not ineffective for failing to object to prosecutor’s sentencing closing that defendant was ““a violent, aggressive person and brain damage has nothing to do with it.”” Those remarks were not improper since they were made in response to defense counsel’s argument that defendant’s “aggressive behavior was due to a history of head trauma, a brain contusion, and damage to the frontal and temporal lobes of his brain”); *People v. Brooks*, No. 338267, 2019 WL 573049, at *5 (Mich. Ct. App. Feb. 12, 2019) (finding that counsel was not ineffective for failing to object to the prosecutor’s closing argument that the defense was “victim blaming” in response to the defense closing that the action of the male manager to allow the female delivery person to approach the house with the pizza was an example of chivalry being “dead”).

Further, Robertson was not prejudiced by counsel's failure to object. As discussed, the State's evidence showed how Robertson brutally and maliciously murdered his parents and that the murder was motivated, in large part, by his greed to obtain money from their estates or life insurance policies. In light of this evidence, including numerous statements by him evincing express malice, "there is [no] reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537. Thus, he is not entitled to relief because he cannot show prejudice from original PCR counsel's failure to raise this claim.

11(b)(xiv) Trial Counsel failed to investigate, develop and present evidence to challenge the prosecution's theory of the case. The State's theory was that the murders were financially motivated when the evidence of severe rage as documented in Dr. Sexton's autopsy reports demonstrated otherwise.

This claim lacks merit for the reasons stated in connection with Ground 11(a)(ii).

11(b)(xv) Trial Counsel failed to investigate, develop and present evidence supporting a defense based upon battered child syndrome (*State v. Lopez*, 306 S.C. 362, 412 S. E.2d 390 (1991)).

This claim lacks merit for the reason stated in connection with Grounds 11(a)(iii) and (x).

11(b)(xvi) Trial Counsel failed to challenge the State's case concerning the lack of positive identification of the two bodies found at the scene.

This claim lacks merit for the reasons set forth in connection with Ground 11(a)(iv).

11 (c), (d), (e), (f), (h), (i), (j) and (k) Allegations of Trial Errors Other than Ineffective Assistance of Counsel.

Robertson raises a series of alleged trial errors independent of a claim of ineffective assistance of counsel. He has failed to show prejudice by any error not so alleged by PCR counsel in the first PCR action as free-standing claims of error, apart from undiscovered violations, are not appropriate for PCR. "Under the doctrine enunciated in *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first

time, or reasserted, in post-conviction proceedings.” *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993). Robertson cannot show prejudice regarding free-standing claims that could not have been properly raised in the prior PCR. While these general considerations may relate to prejudice of his ineffective assistance of counsel claims, they do not show prejudice because the freestanding claims are not appropriate for PCR.

To the extent that Robertson alleges in 11(c) that counsel “abandoned” him during interviews with “testifying experts,” the Court finds that the evidence at the remand hearing conclusively demonstrated that counsel was prohibited by the trial court’s order, consistent with state law, from attending the evaluation by the State’s witness, Dr. McKee. *See State v. Hardy*, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985) (finding counsel’s presence at psychiatric examination “is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would undoubtedly hinder the psychiatrist from effectively examining the defendant.”). Further, the Fifth Amendment is not implicated where, as here, the evaluation is necessary because counsel intends to put on a “mental status” defense. *Buchanan v. Kentucky*, 483 U.S. 402, 423-25 (1987) (State’s use of psychiatric report solely to rebut defendant’s “mental status” defense did not violate defendant’s Fifth or Sixth Amendment rights).

At any rate, the testimony from the prior PCR hearing is telling. Robertson testified in 2007 that his attorneys met with him before the evaluation by Dr. McKee. They advised him that he should meet with Dr. McKee and talk with him. Otherwise, they would not have a defense. Robertson later spoke to Dr. McKee. **App. 3583-85**. He gave similar testimony on these same matters before this Court. **PCR Tr. 449-50**.

It is clear from the testimony of trial counsel that because their investigation revealed overwhelming evidence establishing Robertson’s guilt, they decided not to strongly contest guilt

and, instead, to focus mitigation. To this end, they made a strategic decision to present a mental health defense and eventually presented extensive evidence concerning the mental health history of Robertson and his family. They explained to him that the State had the right to an evaluation and that the defense could not present a mental health defense if he did not consent to the evaluation. (Mr. Boyd advised him not to make admissions about the crime in the evaluation). *App.* 3545; 3555-56). Also, Robertson agreed with this decision to present such a defense and to participate in the evaluation. See *App.* 3333-37; 3419-35; 3441-43; 3497-98; 3503; 3506; 3537-38; 3544-45.¹¹

As to Robertson’s suggestion of “structural error” in 11(f), he claims a “right to control his defense” concerning a “guilt phase defense.” (Fifth Amended Application, p. 8. Robertson misconstrues *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) (holding that the defendant, personally, has the right to determine whether to concede his guilt or maintain his innocence), and he ignores both that counsel did not concede his guilt in the guilt phase¹² and that he agreed with counsel’s decision to focus primarily on sentencing rather than his guilt or innocence. See *Bell*, 72 F.3d. at 429 (While “a defendant’s consent to trial strategy in itself, [does not vitiate[] all claims of

¹¹ As in 2007, Mr. Boyd testified in 2021 that counsel explained to Robertson that he would be evaluated by the State’s expert and advised him to take the Fifth Amendment “as to any questions concerning the details of the crime. However, Robertson did not follow counsel’s advice. *PCR Tr.* 374.

¹² Mr. Boyd testified that he would have “preferred to basically concede guilt and just argued the penalty.” Yet, Robertson did not want to concede guilt, “even though he agreed that there was a very small chance of a not guilty verdict” *PCR Tr.* 370. So, counsel abided by his decision and did not admit his guilt in the guilt phase. *Accord McCoy*, 138 S.Ct. at 1510 (“we agree with the majority of state courts of last resort that counsel may not admit [their] client’s guilt of a charged crime over the client’s intransigent objection to that admission”); see also *id.* at 1512 (“The trial court’s allowance of [counsel’s] admission of McCoy’s guilt despite McCoy’s insistent objections was incompatible with the Sixth Amendment” and constituted structural error).

ineffective assistance of counsel ... [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance”).

However, under *Simmons* and *Drayton*, and the jurisdictional limitations of the PCR statute, these claims would not be cognizable. Therefore, Robertson has failed to show prejudice.

10 & 11(g) Trial Counsel's failure to manage and supervise their expert witnesses and failure to be present during all of the Applicant's experts' interviews resulted in the Applicant being without counsel at a critical stage of his case, thereby denying Applicant his Sixth Amendment right to effective assistance of counsel. *See United States v. Cronin*, 466 U.S. 648, 659 (1984). Counsel's systemic errors and omissions also caused a breakdown in the adversarial process that was violative of Applicant's Sixth Amendment right to effective assistance of counsel. *See id.* Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See* S.C. Code Ann. § 17-27-160; *Robertson*, 418 S.C. 505, 795 S.E.2d 29.

Robertson asserts that trial counsel did not “manage and supervise their expert witnesses and” did not attend his “experts’ interviews” of him; thus, he was denied counsel and prejudice should be presumed under *United States v. Cronin*, 466 U.S. 648, 659 (1984). He further argues that counsel’s performance caused a “breakdown in the adversarial process” such that he should be relieved of showing prejudice. Defendants have the right to counsel at all critical stages of a criminal proceeding. *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 80 (2004). Defendants also have the right to effective assistance of counsel under *Strickland*. The Court finds that neither right was abridged. Further, Robertson misconstrues *Cronin*.

The Supreme Court in *Cronin* held that prejudice is presumed only if the defendant can show (1) a complete denial of counsel at a critical stage of the trial, (2) a constructive denial of counsel, or (3) that “the [circumstances surrounding the case] made it so unlikely that any lawyer could provide effective assistance,” *Cronin*, 466 U.S. at 661. *See also Garza v. Idaho*, 139 S.Ct. 738, 744 (2019); *Nance v. Ozmint*, 367 S.C. 547, 553, 266 S.E.2d 878, 881 (2006) (finding that “the present case represents one of the rare cases where counsel “entirely fails to subject the

prosecution's case to meaningful adversarial testing"). "[U]nder the third scenario, ... the presumption of prejudice applies only in limited, egregious circumstances...." *United States v. Coleman*, 835 F.3d 606, 612 (6th Cir. 2016) (internal quotation marks omitted). Indeed, the Supreme Court in *Cronic* refused to apply the *per se* prejudice rule where "a young real-estate lawyer ... was allowed only 25 days of pretrial preparation in a complex mail fraud case." *Glover v. Miro*, 262 F.3d 268, 277 (4th Cir. 2001) (citing *Cronic*, 466 U.S. at 649).

The Court finds that neither the second nor third exceptions in *Cronic* are applicable and that Robertson's claim is fundamentally flawed because it ignores that interviews of a criminal defendant by retained experts and, for that matter, the defendant's participation in a court ordered psychiatric examination do not constitute a critical stage in the proceedings against a defendant. *See State v. Hardy*, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985). The Court in *Hardy* further found that counsel's presence at a court ordered evaluation "is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would undoubtedly hinder the psychiatrist from effectively examining the defendant." *Id.* Further, the Court has previously found that Robertson failed to prove that counsel were ineffective under *Strickland* in failing to attend any interview of him by any of the experts used by trial counsel. *See* Grounds 11(b)(iii-v).

11(l). Allegations of Ineffective Assistance of Appellate Counsel.

At the hearing, the Court sustained Respondent's objection to the amendment of Ground Five to include additional claims of ineffective assistance of appellate counsel (Robertson's Grounds 11(l)(i)-(ix) and his claim that Robertson did not knowingly and intelligently waive his right to appeal his convictions and sentence) because these are matters were conclusively decided by the Supreme Court of South Carolina on direct appeal.

The record reflects that Robertson successfully had two different appellate attorneys removed and ultimately proceeded *pro se* on appeal. One, Mr. Savitz, actually filed an Initial Brief of Appellant on Robertson's behalf. However, Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote the Supreme Court of South Carolina several times and asked the Court to relieve Mr. Savitz. Following an October 10, 2002 hearing before Judge Hayes on his competency to appear *pro se* and Judge Hayes' October 28, 2002 Report in the South Carolina Supreme Court, the Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*. Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003.

However, after the State filed the Initial Brief of Respondent on December 31, 2003, the Supreme Court dismissed and re-instated the direct appeal on several occasions because Robertson failed to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the Court that he wished to abandon his right to a direct appeal and after it was determined in a hearing before Judge Hayes that he was competent to do so,¹³ the Supreme Court filed an Order on June 3, 2005, in which it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review, conducted the proportionality review mandated by § 16-3-25, dismissed the appeal, and directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution, supra*.

In light of this history, this Court will not revisit the waiver issue that our Supreme Court heard and decided because it is law of the case. In *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545(1940), the Court stated that it was well settled in South Carolina that the rulings in a

¹³ Although he had been represented by counsel at each of his hearings to relieve his appellate attorneys, Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

case become the law of the case. The doctrine of “the law of the case” prohibits issues which have been decided in a prior appeal from being re-litigated in the trial court in the same case. 5 *Am.Jur.2d Appellate Review* § 605 (1995); *Sheppard v. State*, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case). The law of the case applies both to those issues explicitly decided and to those issues that were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957) (where Court granted a new trial in first appeal for errors in the charge, it logically determined trial court had not erred in refusing defendant’s motion for a directed verdict “for if there had been error in this respect it would have been unnecessary to consider any other questions”); *see also Warren v. Raymond*, 17 S.C. 163 (1882) (all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause); *Johnson v. Board of Com’rs of Police Ins. & Annuity Fund of State*, 68 S.E.2d 629, 633 (1952) (“[T]he rulings in a case even though admittedly wrong become the law of the case and res judicata between the parties).

Moreover, it is axiomatic that “a party may not complain on appeal of error ... which his own conduct has induced.” *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006). *See also State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996), *cert. denied*, 519 U.S. 1045 (1996) (party cannot complain of error which his own conduct has induced). It is well-established that knowing and voluntary waivers, even of constitutional rights, are proper and binding when the record supports the knowing and voluntariness of the waiver.¹⁴ *See, e.g., Pittman*

¹⁴ Prior cases allowed the waiver of both the direct appeal and the statutory review under Section 16-3-25(C) (the sentence review). In 2011, well-after Robertson’s direct appeal, our Supreme Court resolved that a death-sentenced inmate can most certainly “waive his personal right to a direct appeal” however, “he cannot waive this Court’s statutorily-imposed duty to review his capital sentence.” *State v. Motts*, 391 S.C. 635, 649, 707 S.E.2d 804, 811 (2011).

v. State, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999) (“A defendant’s knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant’s counsel, or both.’ ”). Further, this Court has disallowed further amendment to these claims against appellate counsel as further amendment in these circumstances would be futile.

Therefore, Robertson’s pending ineffective assistance of appellate counsel claims should be summarily dismissed. Robertson cannot show prejudice as his underlying claims of error could not be heard because Roberts chose to represent himself on appeal, and he then voluntarily, knowingly, and intelligently abandoned the appeal himself.

11(m). Allegations of Deficiency: Original Post-Conviction Relief Counsel.

In Section 10(m) of his application, Robertson submits individual allegations of deficiency by prior PCR counsel. However, our Supreme Court has limited cognizable allegations to one – counsel’s qualification under the statute. The remainder of the opinion specifically *rejects* that any other allegation of deficiency may be raised:

...we hold that *Martinez* [*v. Ryan*, 566 U.S. 1 (2012)] does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.

However, Petitioner’s 2011 Application also alleged, ***as a separate and distinct ground not addressed by Aice***, that prior PCR counsel were not qualified under section 17-27-160(B). We conclude Petitioner’s allegation that he was denied a state-created right to qualified counsel constitutes a “sufficient reason” to permit a successive PCR application under section 17-27-90.

Robertson, 418 S.C. at 516, 795 S.E.2d at 34–35 (emphasis added).¹⁵

¹⁵ Further, the Supreme Court’s concept of “permit” was also constrained. The Court noted that a hearing was allowed for the applicant to present evidence to demonstrate non-compliance, and, if so, *then* the opportunity to present evidence in support of prejudice, if any. Stated differently, an applicant who makes a timely, *prima facie* showing of support for the exception to the bars of successiveness or the statute of limitations is permitted the opportunity for a hearing to

Thus, this Court lacks jurisdiction to entertain any allegations of deficiency beyond qualification (which it has already ruled upon). The Supreme Court’s opinion provides that once that finding is made, the first prong is met: “...we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance per se.” *Robertson*, 418 S.C. at 521. Consequently, the ability to entertain and rule on allegations of deficiency other than statutory qualification is beyond the jurisdictional limitations of remand.

“[A] trial court has no authority to exceed the mandate of the appellate court on remand.” *Prince v. Beaufort Memorial Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (2011) (quoting *S.C. Dep’t of Soc. Servs. v. Basnight*, 346 S.C. 241, 250–51, 551 S.E.2d 274, 279 (Ct.App.2001)) (citing 5 Am.Jur.2d *Appellate Review* § 784, at 453 (1995)). “The mandate of the appellate court is jurisdictional.” *Id.* The trial court has a duty to follow the appellate court’s directions. *Id.* (citing *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct.App.1996)). The reversal and remand in this case was qualified and specific. The Supreme Court *affirmed* the summary dismissal of all claims apart from the statutory qualification allegation. The Court *ruled* a failure to meet the statutory qualifications is per se deficient, *i.e.*, by itself, no other proof at issue. *See PER SE*, *Black’s Law Dictionary* (11th ed. 2019) (“Of, in, or by itself; standing alone, without reference to additional facts. This phrase denotes that something is being considered alone, not with other collected things.”).

prove the limited exception. *Robertson*, 418 S.C. at 519, 795 S.E.2d at 36 (citing *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2014)). If the applicant shows that counsel were not statutorily qualified, he then has the opportunity to demonstrate prejudice. *Id.* at 520-21, 795 S.E.2d at 36-37. It is a stepped process, and one correctly followed by this Court in the instant litigation, first finding *Robertson* carried his burden of proof in demonstrating non-compliance under Section 17-27-160, then conducting a hearing to allow him the opportunity to demonstrate prejudice.

Robertson presented two attorney witnesses at the evidentiary hearing to testify as experts in training and issue presentation to establish his alleged deficiencies of PCR counsel's representation from which prejudice would flow. This Court overruled the objection and allowed Robertson to make a record. Rather than aiding Robertson in any cognizable claim, though, the Court finds that their testimony demonstrates its irrelevance.

Respondent objected to Robertson's experts under Rule 702, SCRE as the proffered attorneys could offer no testimony that would aid this Court as the fact-finder because the Court had already determined the only allegation of deficiency that is allowed on remand and that the "prejudice" for the Court to determine necessarily must stem from trial counsel performance, not PCR qualification and/or perceived "best practices" in collateral litigation. *See McKnight v. State*, 378 S.C. 33, 56, 661 S.E.2d 354, 365–66 (2008) (finding expert testimony properly excluded regarding "prevailing professional standards" when testimony "not designed to assist the PCR court to understand certain facts, but rather, was a legal argument as to why the PCR court should rule that McKnight's trial counsel was ineffective."); *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) (PCR applicant not entitled to present expert opinion on whether "trial counsel's actions fell below an acceptable legal standard of competence"). *See also Isom v. State*, No. 45S00-1508-PD-508, 2021 WL 2678553, at *24 (Ind. June 30, 2021) ("Although Rule 24 requires trained counsel in death-penalty cases, Isom's conclusion that the effectiveness of such attorneys is beyond the ken of post-conviction courts does not follow from his premise."); *Provenzano v. Singletary*, 148 F.3d 1327, 1331 (11th Cir. 1998) ("Even if the [public defender's] affidavit had said that its author would have insisted on a change of venue, it would establish only that two attorneys disagreed about trial strategy, which is hardly surprising. After all, '[t]here are countless ways to provide effective assistance in any given case,' and '[e]ven the best criminal defense

attorneys would not defend a particular client in the same way.’ ”) (quoting *Strickland*, 466 U.S. at 689).

Moreover, Robertson presented some testimony on federal habeas litigation. Yet, in Robertson’s own appeal, the Supreme Court *rejected* the concept that federal law on procedural default and excuse procedures in federal habeas corpus proceedings allows an applicant to file a successive PCR. *Robertson*, 418 S.C. at 512, 795 S.E.2d at 32–33. The offered testimony did not center on South Carolina rules or even the facts of this case. Critically, the Court finds that Robertson did not provide his experts with a copy of the comprehensive 106 page Order by Judge Few for reference to the scope and decisions in the prior proceedings. Further, comments concerning the scope and applicability of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) were likewise irrelevant to these proceedings as AEDPA applies only to federal habeas corpus proceedings.¹⁶ As to the “heightened requirements” for collateral counsel encouraged by AEDPA, Robertson’s offered expert admitted nothing was specifically required such that South Carolina’s provision could be contrary. Even so, the provisions regarding

¹⁶ The witnesses at times spoke to the purpose and intent of the AEDPA as to having a goal of improving legal representation, and the ABA Guidelines as potential norms. Respondent submitted and relied upon these cases in countering the assertions: *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (“Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases”); *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (“AEDPA’s purpose to further the principles of comity, finality, and federalism”); *Bobby*, 558 U.S. at 8-9 (“*Strickland* stressed, however, that ‘American Bar Association standards and the like’ are ‘only guides’ to what reasonableness means, not its definition.”); *Wong v. Belmontes*, 558 U.S. 15, 25 (2009) (Court considered Sixth Amendment ineffective assistance claim without addressing ABA Guidelines); *State v. Blakely*, 402 S.C. 650, 664–65, 742 S.E.2d 29, 36–37 (Ct. App. 2013) (“while the ABA standards may be useful or may offer assistance in the analysis of an issue, these standards are not controlling or dispositive”). The Court finds that the witnesses placed far too much emphasis on varied goals and presumed “best practices,” which do not control in a Sixth Amendment effective representation analysis. Therefore, even if accepted, the testimony neither aids this Court in determining the only deficiency at issue (qualification under the South Carolina statute), or prejudice, which is controlled by *Strickland*.

heightened qualifications for state collateral attorneys apply to expedited timelines (shortening the statute of limitations from one year to six months), but if not afforded, federal habeas review still proceeds. *See Tucker v. Moore*, 56 F. Supp. 2d 611, 614 (D.S.C. 1999), *aff'd sub nom. Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000). Again, the testimony proved its irrelevance.

Therefore, Applicant's claims of deficient representation in 11(m)(i)-(xiii) are beyond the jurisdictional limitations of remand.¹⁷

10 and 11(n). Challenge to Judge Few's Order – unreasonable determination of facts.

¹⁷ To the extent that Robertson relies on allegations of misconduct resting on the Rules of Professional Conduct, his reliance is misplaced. *Jordan v. State*, 406 S.C. 443, 450, 752 S.E.2d 538, 541–42 (2013) (“The PCR judge cited a correct proposition of law in that the **“Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction.”** (citing *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993)) (emphasis added).

The Court further notes that none of the individual claims of ineffective assistance of original PCR counsel are of any moment, as they cannot establish both deficient performance and prejudice. For instance, his Ground 11(m)(ii) ignores that original PCR counsel did amend the original PCR counsel and that twelve specific allegations were addressed in the Order of Dismissal. *See App. 3658-59*. Also, Ground 11(m)(ii) states that “Applicant's #5 ... comingled Dr. Cascio's handwritten client interview notes with her typed report, and [Mr. Brown] represent[ed] to the Court that the report and notes were sent to trial counsel together on March 1, 1999.” Yet, Mr. Hancock identified the handwritten notes and testified that they may have been sent together with the typed report. *App. 3387-88*. Further, the Court notes that at the hearing before this Court, Robertson thought that State's Ex. 286, which was not introduced at trial, was Cascio's notes, whereas Solicitor Pope's testimony and the evidence log made it clear that State's Ex. 286 was her typed report, which he simply forgot to introduce. *Compare PCR Tr. 416-20; 431-37, with PCR Tr. 466-71*.

Ground 11(m)(vi) and (vii) lack plausible merit for the reasons stated. Ground 11(m)(viii) takes original PCR counsel's remarks out of context and ignores that the statement that Dr. McKee did not testify in as much detail about the facts of the crimes as did Cascio (*App. 3618*) is correct, since he did not relate any *verbatim* statement by Robertson (a matter with which counsel for Respondent, Mr. Salter, agreed) and merely stated that the information Robertson provided to him was consistent with that provided to Cascio. This claim likewise ignores that Judge Few was not misled and that the Order of Dismissal accurately summarizes Dr. McKee's trial testimony. *See App. 3714-18*. The other allegations in Ground 11(m) lack merit for the reasons previously discussed in connection with Roberson's other claims.

As with the claims on alleged deficiency other than qualification under Section 17-27-160, the Court finds that this allegation also fails outside of allowed litigation under the remand order. Robertson seeks to have this Court declare that Judge Few's Order reflects an "unreasonable determination of fact" in resolving the issues presented in the first PCR based on "clearly erroneous presentations by PCR counsel pertaining to critical facts upon which Judge Few relied." (Fifth Amended Application, p. 15.

The Court further finds that Robertson's free-standing challenge to Judge Few's Order in 10(n), is not cognizable in this action. Our Supreme Court did not vacate the Order. Also, the reasonableness of the fact-finding of the prior PCR judge exceeds the jurisdictional limitations of the PCR Act. See S.C. § 17-27-20. Additionally, a request to vacate the Order or make void the findings of facts *in toto* is inconsistent with the parameters of the narrow relief ordered and the goal of this remand proceeding.

The only direction from our Supreme Court – after finding that counsel were not statutorily qualified - is for this Court to make the determination of whether Robertson was prejudiced by that deficiency: "If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." *Robertson*, 418 S.C. at 522, 795 S.E.2d at 38. Thus, this Court is now tasked with making the factual determination of prejudice regarding cognizable PCR claims. That is all. Again, our Supreme Court neither vacated the prior Order of Dismissal, nor ordered a new post-conviction relief proceeding. However, and without doubt, this Court is free to accept the evidence it deems appropriate for the sole purpose of demonstrating prejudice.

The essence of this claim asks this Court to set aside the prior Order without Robertson making the necessary showing of actual prejudice.¹⁸ The Supreme Court directed that Robertson has the burden of showing prejudice. *Robertson, supra*. For the reasons argued above, Robertson has not done so, and is entitled to no relief.

PROPOSED ORDER PROCEDURE

This Court advised the parties of its ruling by email dated July 12, 2022, which reflected the following:

The claims of deficient performance of PCR are dismissed as they are beyond the jurisdictional limitations of the remand. This court accepted the evidence in a quest to determine prejudice resulting from lack of a certification as required by statute. No other issue is before the Court. Interestingly, the Court learned there does not exist a formal certification process for death penalty PCR, unlike the certification process for lead trial counsel for death penalty defense.

Further, this Court set out: “The question is whether or not Petitioner was prejudiced using the Strickland standard because his PCR lawyers were deficient where, as here, neither PCR lawyer complied with the statute rendering their performance deficient.”

Further still, this Court advised: “After careful review of all materials, including but not limited to, Judge Few’s order, transcripts, memorandums, statutes, live testimony and exhibits, the Court finds Petitioner failed to show that a reasonable probability exists that but for PCR counsels’ error, the result of the proceeding would be different.” The Court then directed the State to prepare a proposed order.

Robertson’s counsel objected to the Court’s request for the State to submit a proposed

¹⁸ Indeed, it would be quite incongruous with the Supreme Court’s opinion remanding this case for this Court to find that Robertson failed in his burden of proving actual prejudice from the failure of original PCR counsel to be statutorily qualified, yet grant relief based on a finding that the prior proceeding was “unfair” and the prior fact-findings “unreasonable.” He simply is not entitled to any relief if he fails to show prejudice on a specific claim.

order. Though the motion was denied,¹⁹ the Court notes that it invited opposing counsel to submit a proposed order, but Robertson’s counsel declined. At any rate, this matter has been fully briefed and the parties’ positions are fully before the Court. Both parties should be amply aware of the other’s position and the facts and law supporting those positions. There is no surprise in fact or law – just a difference of opinion. Further, counsel has the opportunity to request reconsideration of any fact or conclusion in this order by way of filing a timely motion under Rule 59, SCRCP. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). The undersigned finds no error in calling for the State to prepare a proposed order, which followed the arguments and evidence before the Court, especially after having expressed its ruling.

Additionally, the undersigned notes that he has carefully reviewed each and every assertion herein and adopts the language as its own since it wholly and accurately reflects the decision of the Court not only in light of the allegations and arguments, but also this Court’s independent review of evidence in this case – in particular, the prior PCR Order, the transcripts, memorandums, statutes, and live testimony and exhibits as presented in the August 2021 hearing. The Court affirms once again that it finds Applicant has failed to show that a reasonable probability exists that but for PCR counsels’ error, the result of the proceeding would be different

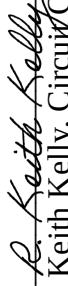
CONCLUSION

THEREFORE, Applicant, James D. Robertson, having failed to carry his burden of showing any prejudice from the finding of deficient performance by his prior PCR counsel (based solely on

¹⁹ Robertson has relied in part upon *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004). Yet, the Court did not prohibit the practice in *Hall* and affirmed finding “the PCR judge spent an adequate amount of time reviewing the order before adopting it.” 360 S.C. at 365, 601 S.E.2d at 341. *See also Richardson v. Kornegay*, 3F.4th 687, 406-407 (4th Cir. 2021) (noting North Carolina similarly allows proposed orders and, though acknowledging criticism of the practice, resolving to continue to honor “the state court judge[’s] exercise[of his] judicial discretion in adopting the State’s Proposed order”).

the failure to meet the heightened statutory requirements of S.C. Code § 17-27-160), is not entitled to a successive application or new proceedings in state court under the Post-Conviction Relief Act. Having had a full and fair “bite at the apple,” Applicant is entitled to nothing further.

IT IS SO ORDERED.



R. Keith Kelly, Circuit Court Judge
By Special Assignment

This 26 day of August, 2022

FILED-RECEIVED

STATE OF SOUTH CAROLINA 2022 SEP 15 AM 10:20 IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

James D. Robertson, #5067

C. A. No. 2011-CP-46-0072

Applicant,

**Applicant's Rule 59(e) Motion to
Reconsider, Alter, and Amend
Judgment**

v.

State of South Carolina

Respondent.

Applicant, James D. Robertson, respectfully requests, in accordance with Rule 59(e), SCRPC, that the Court reconsider, alter, and amend its order dated August 26, 2022, for the following reasons.

LEGAL STANDARD

Rule 59(e), SCRPC, allows a court to alter or amend a judgment upon a party's motion. Such a motion is appropriate in two basic situations. First, "[a] party may wish to file such a motion when [he] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Second, "[a] party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Id.

ARGUMENT

The absence of qualified counsel prejudiced the Applicant by preventing him from obtaining the statutorily guaranteed full and fair opportunity to present his case. The statute is intended to safeguard the integrity of the process and appointing counsel who were not qualified

creates a structural error that undermines confidence in the outcome. This Court previously ruled that PCR Counsel were not qualified to represent the Applicant. (See Amended Post-Trial Brief pps. 2-4). As a result of having unqualified and therefore deficient counsel,¹ the Applicant was prejudiced because he did not receive the guaranteed right to a “full and fair opportunity” to present all his claims.²

Applicant in no way means to waive any claims previously argued and would incorporate his application and post-trial memorandums in full into this motion for a more complete and detailed list of his complaints and the evidence to support them.

Deficient performance of PCR counsel resulted in the failure to challenge trial counsel’s decision not to challenge the guilt phase of his capital trial. Additional deficiencies of PCR counsel resulted by not challenging trial counsel’s failure to object to the Solicitor’s closing argument; and trial counsel failure to challenge the State’s theory of the case that the killings were for financial gain; and did not challenge trial counsel’s failure to investigate, develop and present guilt phase defenses including, but not limited to, battered child syndrome and the lack of positive identification of the two bodies found at the scene.

PCR counsel were deficient to the prejudice of the Applicant in these additional ways: by failing to challenge trial counsel’s incorrect advice to the Applicant that any information he gave to testifying experts would be kept confidential resulting in extremely prejudicial self-

¹ “Applying the *Strickland* test, we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance per se.” Robertson v. State of South Carolina, 418 S.C. 505, 521; 795 S.E.2d 29 (2016).

² “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Robertson v. State, 418 S.C. 505, 513 (December 14, 2016) citing to Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999).

incriminating information that was later admitted into evidence at trial; by failing to challenge trial counsel for abandoning the client when they did not attend hearings with experts which resulted in Dr. Toni Cascio questioning the Applicant about facts of the actual murders and memorializing those statements in her discoverable notes; by failing to challenge trial counsel for not reviewing Dr. Cascio's notes before they were turned over to the prosecution, meaning there was no way they could have made a strategic decision whether to call Dr. Cascio as a witness. The finding that Judge Few's Order of Dismissal addresses these matters fails to consider the evidence that the trial attorneys and PCR attorneys were incorrect regarding their knowledge of the notes and the commingling of the Cascio notes with trial counsels' paralegal's notes. This was an abandonment of the client resulting in extreme prejudice. PCR counsel failed to challenge trial counsel's failure to manage and supervise their expert witness in this regard and failed to supervise and manage all interviews between clients and their experts. The order fails to consider the facts presented in this regard. (See Applicant's Exhibit 19).

PCR counsel did not challenge trial counsel's failure to insist that the Trial Court's expert report regarding competency be retained by the Court and not shared with the State. As a result, statements made by the Applicant in violation of his Fifth Amendment rights came into evidence; trial counsel were not challenged for failing to object to this same Trial Court's expert testifying as an expert for the State in rebuttal and as a result the applicant's statements were admitted in violation of his Fifth and Sixth Amendment rights; Trial counsel were not challenged for failing to request Dr. McKee's notes prior to trial and were unable to cross-examine him effectively and also were unable to show that Dr. McKee was relying on Dr. Cascio's notes for much of his testimony. (See discussion of these issues commencing at page 19 of the Applicant's Amended Post-Trial Brief).

PCR counsel did not challenge Trial counsel's failure to develop and present all available mitigation evidence from Applicant's life and personal background; did not challenge Trial counsel failure to retain a social historian necessary to build an effective mitigation case, and failed to provide a witness that could address the State's aggravation with the severe dysfunction of the Applicant's family and resulting mitigation; PCR counsel did not challenge Trial counsels' failure to present the defense of battered child syndrome in the penalty phase which would have reduced the Applicant's culpability for murder.

Furthermore, the Court's order fails to consider the overwhelming evidence that the lack of PCR counsel's qualifications and education created prejudice during the initial PCR. They did not particularize any deficient performance of trial counsel in the PCR application. The post-conviction form instructions require the applicant to first, articulate a particularized statement of error and second, to state the facts supporting those allegations in writing.³ At a minimum, qualified counsel would have known that the failure to amend an application in advance can be fatal to the client's PCR. Love v. State, 428 S.C. 231, 834 S.E.2d 196 (2019). As demonstrated by the record at the PCR merits hearing, counsel simply iterated a disjointed stream of consciousness - listing items he found interesting from reading portions of the jury trial transcript. (Appendix 3268-3273). The failure to plead the case, even on the day of the merits hearing, is evidence that PCR counsel did not know what the issues were, how to develop the testimony, and how to present the case with their own expert witnesses. In fact, PCR counsel offered no expert witnesses and, as

³ "In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten) signed by the application (sic) and verified (notarized), and it shall set forth in concise form the answer to each applicable question." Instructions on the form itself. See also SC Code Ann. § 17-27-90, 1976 as amended.

a consequence, (as noted by Judge Few in Applicant's Exhibit 19) the Applicant was prejudiced as those issues became defaulted.

PCR counsel's billing records do not identify a single event undertaken to investigate the case. One example of prejudice from PCR counsels' failure to investigate, concerns Dr. Cascio's damning interview notes. Those notes memorialized confidential details of the crime which were later published to the jury through cross-examination. (See Applicant's Exhibit 19; original PCR transcript pages 3452-3456; 3631-3634; and Exhibit 37; 3480-3484). Obtaining and publishing those notes violated the client's Fifth Amendment right not to be a witness against himself. The Cascio notes only existed because trial counsel abandoned their client by not attending Cascio's interview of the client. (See Applicant's Exhibit 8-A). Had they been present during the Cascio interview they would have been able to stop inappropriate questions and prevent the client from answering them. Abandoning the client was an issue missed by PCR counsel. Furthermore, testimony and exhibits entered into evidence in this successive hearing presumptively prove that trial counsel never read Cascio's notes before they gave them to the prosecution and could not have made a strategic decision to turn over the notes. There is a lack of appropriate and sufficient parsing of the testimony in this Court's Order.

First, PCR counsel presented the combined notes of Cascio and Smith/Hendrix to the Court as solely Cascio's notes. (See Applicant's Exhibits 25, 26 and 27). The combined Smith/Hendrix notes contained even more devastating confidential details of the crime and were relied upon by the original PCR court in making its findings of fact and conclusions of law. Furthermore, it is the position of the Applicant that the State has spoiled this evidence, including State Exhibit 286 and the November 30th notes, and the legal inference is that the error that occurred at the PCR hearing was perpetuated from the State's trial exhibit 286 which contained both the Cascio and the

Smith/Hendrix notes. See State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015). Had the commingling not occurred, the outcome of the initial PCR proceeding would have been different. There is a lack of appropriate and sufficient findings of fact in this regard.

As a consequence of not being qualified by training and experience and of not investigating the facts and details of the case, PCR counsel failed to appreciate that the original tripartite sins of trial counsel were inseparable and led to a catastrophic, outcome determinative, prejudicial jury result. Had PCR counsel performed the tasks according to minimum published and existing standards, the PCR outcome of the initial PCR proceeding would have been different.

The PCR Court condemned PCR counsels' failure to offer any mitigation testimony: "You haven't put in any additional testimony, the records. And I will say that that is an insufficient basis, in my opinion, on which for me to conclude, under the second prong of Strickland, that the outcome of the trial could have been any different." (See Applicant's Exhibit 19 pps. 3631-3633). Judge Few found that initial PCR counsel prejudiced the Applicant by failing to provide any evidence at all. Failing to offer evidence precluded the initial PCR Court from making the required Strickland assessment on any issue before it. (See Applicant's Exhibit 19).

This Court's Order misconstrues the nature of the remand by holding that Judge Few's order could not be considered or challenged in this proceeding. The reasonableness of the prior order must be considered in light of initial PCR counsels' lack of qualifications which influenced the findings in that order. Judge Few's Strickland analysis was made without any mitigation evidence and without the true factual history of whether trial counsel made a strategic decision to use Cascio after reading her notes.

Applicant presented a 109-page summary of thousands of pages reviewed by Dr. Ewing, which was presented at trial and placed into evidence as Applicant's Exhibit 38. In contrast, Solicitor Pope was allowed to pigeonhole Jimmy's entire life of abuse down to the following argument: "For this whole crowd, this whole family, this whole life we've got two incidents for each of the boys there is no indication of but one [physical altercation] in their whole range of marriage."

A. DR. CASCIO OMITTED AND NEVER ADDRESSED:

1. Predisposition to mental health/bipolar – regarding mother's own diagnoses and illustrations of grandmother's behaviors [Terry spoke to therapist about her own mother and said she had "a lot of confusion why she didn't protect me." In the previous session with therapist, she reports "It makes me mad & sad to think what Daddy did... (JRDD 2807).
 - A. Jimmy's own hospitalization; cries for help; real diagnosed mental illness - not accepted or attended to by parents. More criticism. Earl still expected this mentally ill kid to go to college and fit in and excel. Too much stress for a child with Jimmy's limitations.
2. Birth trauma - "Premature rupture of membrane, transverse arrest: labor progressed slowly. Delivery accomplished by mid forceps delivery of an 8-pound male infant. Discharged 11-21-73; cord around neck twice (JRDD 2351).
3. Jimmy's Early medical issues (PDD) - Penis irritation age at 10 months, systolic murmur for life; not talking much; head injury at age 3, ear problems for life.
4. Chronic ear problems (Cascio testified Jimmy "definitely did not have" ear problems).
5. Mother's depression and bipolar makes her unavailable to "see" deeply into Jimmy's problems.
 - A. Mother's depression was severe. Suicidal often, searching for guns, etc. She said: "I feel like my whole life is a front." This means she is showing the world one face; and at home, she is deeply disturbed – effect on her caretaking abilities. Teaches secrecy.
 - B. Earl's (Father) depression. He admits never having been happy since high school. (JRDD 37).

6. Autistic features – “Jim is a nervous child and it is important to give him kindly support.” JRDD 846) “1982 – Jim walked almost entirely on his toes. Never had a great relationship w/girls; he would overwhelm them; Always able to talk w/adults; but w/kids his own age always difficult to relate to peers.” (JRDD 1584).

7. Multiple complex traumas (as explained by the cumulative effect of...):

Chronic physical abuse by father;
 Mentally ill mother;
 “Nervous child” (by teachers) this can only mean organic brain damage caused by chronic abuse;
 Rocking behaviors (like seen in children in orphanage);
 Father’s extreme social deficits;
 Brother’s similarly stressed behavior – as seen at school – “nervous child”;
 Father belittled and degrade mom and boys;
 Mother “scare” of Earl, his temper, and his constant bad mood;
 Boys early use of drugs and alcohol...;

Dr. Cascio was not asked to, and did not explain the signs or the cumulative effect of one condition overlaying another resulting in an exponential effect.

8. Battered child/battered person syndrome - the ongoing, chronic, non-stop features in #7 happening all the time. There was no mention of this syndrome at trial.⁴
9. Family secrecy leading to shame and guilt. Mother “putting on a front” for others; Father wants to move so people don’t associate him with his sons. Both sons “are failures.” (JRDD 37).
10. Marital affairs by Earl - family dysfunction - mother’s distress (JRDD 2418); mother’s affair... she said if she loses weight, she might have an affair. (JRDD 2784).
11. Good mitigation -- Jimmy’s attempts to work and make-good and his lack of need for luxury or extravagance to counter prosecution theory of the case that Jimmy is “just mean and greedy.” Rehab/trying to get better; relapses normal.
12. Youthfulness – Age 24 - In 1997, research showed brains not fully developed until age 25.

⁴ In State v. Lopez, the Supreme Court recognized battered child syndrome as a medical condition and that it is admissible when the diagnosis is made by a qualified expert. State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (S.C. 1991). In Moore v. Texas, 137 S. Ct. 1039 (2017), an intellectual disability case, the Court reversed while admonishing lower courts that, when dealing with scientific medical conditions, the courts must look to the then current and evolving standards of science. Battered person syndrome has, and in 1997, was recognized to include psychological abuse. (See testimony of Dr. Ewing).

13. Right Brain Trauma [Cascio said she failed to read Dr. Evan's neuropsychological report which explained severe right brain deficits; and she never related chronic head banging as possible cause/relationship].

14. Cascio Never offered Explanations or Context for:

The "stalking" testimony. (JRDD 2303);
Terry admitted several times that she failed to protect the boys.

15. On cross, Dr. Cascio often agreed with the prosecutor's misstatement of testimony and essentially agreed that nearly all the family-abuse details came only from Jimmy or Chip, when in fact, Terry or Earl had admitted to committing various forms of abuse.

PCR counsel did not challenge trial counsel's failure to object to the Judge's order commingling a psychological evaluation to benefit the prosecution with the M'Naghten evaluation to benefit the Court; the order made the same examiner serve both a testifying role and a confidential role for the Court. That resulted in inadmissible testimony concerning the details of the actual killings coming before the jury in violation of the Applicant's Fifth Amendment right to remain silent. See State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010).

Appellate counsel also abandoned Applicant. The order fails to parse the evidence that initial PCR counsel failed to investigate Appellate counsel's actions and failed to pursue any matters regarding the appeal. PCR counsel failed to articulate and pursue significant issues pertaining to appellate counsel performance which resulted in prejudice to the Applicant. During his direct appeal before the South Carolina Supreme Court, Robertson made multiple requests to proceed *pro se* and to abandon his appeal. As can be seen by letters, orders, transcripts, and a host of material, it is clear Robertson was vacillating as to whether he wanted to proceed *pro se* or to abandon his appeal. Robertson's long-standing unremitted mental illnesses including mercurial, rapid cycling transitions in mood, as well as the cognitive impairments resulting from his years on death row, make it clear that it was necessary to have him evaluated before he was allowed to

proceed *pro se* or abandon his appeal; in fact, a mental health evaluation was scheduled in that regard, but never conducted. (See Applicant's Exhibit 50). Appellate counsel abandoned Robertson during the appeal by failing to attend his competency hearing and his withdrawal hearing and PCR counsel failed to recognize this fatal abandonment. (See Maples v. Thomas, 565 U.S. 266 (2012); and Applicant's Exhibits 12 A, B, C, D, E and F).

The following language commences on page 53 of the Court's Order: "Robertson's counsel objected to the Court's request for the State to submit a proposed order. Though the motion was denied, [footnote omitted] the Court notes that it invited opposing counsel to submit a proposed order, but Robertson's counsel declined." This is not accurate.

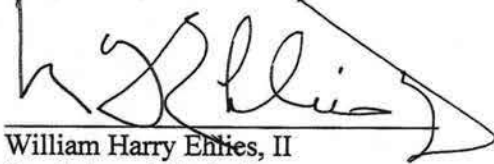
Applicant's counsel received an email on July 12, 2022, notifying him that the Court intended to deny him any relief. (See Attached Exhibit 1). In this email, the Court directed the Attorney General's office to draft a proposed order. Applicant filed a motion, with exhibits, objecting to the Attorney General drafting an order on behalf of the Court. (See Attached Exhibit 2). The Court never formally ruled on this motion. Rather, counsel only received an email from a law clerk stating that the motion was denied. (See Attached Exhibit 3). On July 19, 2022, Applicant's counsel was then invited, again by a law clerk, to submit a proposed order that was in keeping with the Judge's ruling denying relief. (See Attached Exhibit 1). For a host of ethical and procedural reasons, the Applicant's attorneys declined the offer to author an order denying their client any relief.

CONCLUSION

For the foregoing reasons, Mr. Robertson respectfully requests that the Court reconsider, alter, and amend its order dated August 26, 2022 and filed September 1, 2022.

Dated: September 12, 2022.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. Ehlers, II", written over a horizontal line.

William Harry Ehlers, II
Derek Joseph Enderlin
Timothy Maio
310 Mills Avenue
Building A, Suite 201
Greenville, South Carolina 29605
(o) 864-232-3503 (f) 864-232-4854
hank@ehlieslaw.com
Attorneys for the Applicant

FILED-RECEIVED

2022 SEP 15 AM 10:21

cl

DAVID HAMILTON

C.C.C.P. & GS

YORK COUNTY, SC

EXHIBIT ONE



Timothy Maio <timothy.m.maio@gmail.com>

Robertson v. State: 2011-CP-46-00072, Capital PCR Action

Kelly, R. Keith Law Clerk (Sarah Shugars) <kkellylc@sccourts.org>

Tue, Jul 19, 2022 at 2:37 PM

To: Ed Salter <ESalter@scag.gov>, Derek Enderlin <derek@rossenderlin.com>, "Maio, Timothy M." <timothy.m.maio@gmail.com>, Hank Ehliès <hank@ehlieslaw.com>, Melody Brown <MBrown@scag.gov>

Good afternoon,

By order dated January 28, 2022, the Supreme Court of South Carolina extended the June 15, 2021 Order permitting a trial judge to "elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers." (see paragraph (d) Minimizing Hearings on Motions).

The Motion to Disallow Attorney General to Draft a Proposed Order is **denied**. The Court is permitted to ask counsel to prepare a *proposed* order. Judge Kelly will closely review the proposed order to make sure it accurately reflects the ruling, and he would make any changes as needed.

Both sides may prepare proposed orders for Judge Kelly's review. The orders must be submitted no later than July 27, 2022.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

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

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 **Ltr Motion To Disallow AG to Prepare Proposed Order.pdf**  
1977K

**EXHIBIT TWO**

STATE OF SOUTH CAROLINA

COUNTY OF YORK

James D. Robertson,

☐ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-46-0072

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEETFILED-RECEIVED  
2022 JUL 18 AM 9:24  
DAVID HAMILTON  
C.C.P. & CS  
YORK COUNTY, SC

Plaintiff's Attorney:  
William Ehliel, Bar No. 1857  
Address:  
310 Mills Avenue Suite 201 Greenville SC 29605  
phone: 864-232-3503 fax: 864-232-4854  
e-mail: hank@ehlielaw.com other:

Defendant's Attorney:  
William Salter, Bar No.  
Address:  
POB 11549  
phone: 803-734-3734 fax:  
e-mail: esalter@scag.gov other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

## SECTION I: Hearing Information

Nature of Motion: To Prohibit AG From Preparing an Order

Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES / ☐ NO

## SECTION II: Motion/Order Type

- ☒ Written motion attached  
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

July 13, 2022

Date submitted

## SECTION III: Motion Fee

- ☐ PAID - AMOUNT:  
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support  
 (check reason) ☐ Domestic Abuse or Abuse and Neglect  
☐ Indigent Status ☐ State Agency v. Indigent Party  
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief  
☐ Motion for Stay in Bankruptcy  
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)  
☐ Proposed order submitted at request of the court; or,  
 reduced to writing from motion made in open court per judge's instructions  
 Name of Court Reporter:  
☐ Other:

## JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.  
☐ Other:

JUDGE

CODE: Date:

## CLERK'S VERIFICATION

Date Filed:

Collected by: \_\_\_\_\_

☐ MOTION FEE COLLECTED: \_\_\_\_\_



STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson, #5067

Applicant,

v.

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

FILED-RECEIVED  
2022 JUL 18 AM 9:24  
DAVID HAMILTON  
C.C.P. & C.S.  
YORK COUNTY, SC

**MOTION TO DISALLOW ATTORNEY GENERAL TO DRAFT A PROPOSED ORDER**

On July 12, 2022 the undersigned received a copy of an original electronic mail issued by the Court directing the Attorney General's Office to "prepare an order" denying any relief to Mr. Robertson. That email is attached as an exhibit. Mr. Robertson served upon the Court and the Office of the Attorney General a responsive letter objecting to the directive that the Attorney General prepare an order and that letter is attached as an exhibit.

**APPLICANT'S POSITION**

The Court intends to deny Mr. Robertson any successive post-conviction relief, and directs the Attorney General to "prepare an order." Mr. Robertson objects to this procedure. The Supreme Court of South Carolina does not approve of this practice and "strongly encourages" judges presiding in capital cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). This admonition is consistent with South Carolina law, which requires that courts, not parties, perform the critical function of objectively

assessing the evidence and law in PCR cases, and formulating even-handed conclusions based on the exercise of sound, independent judgment. *See* S.C. Code §17-27-80 (governing post-conviction relief cases generally) (“The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented”); S.C. Code §17-27-160(D) (governing capital post-conviction relief cases) (“the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue”).

The Supreme Court's disapproval of this practice is consistent with a nationwide consensus. Verbatim adoption of a party's proposed findings is widely condemned because it represents “an abandonment of the duty and the trust that has been placed in the judge,” *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (quoting Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* 166 (1963)), and leads instead to judgments that are self-evidently “not the original product of a disinterested mind.” *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *see also, e.g., Shaw v. Martin*, 733 F.2d 304, 309 n.7 (4th Cir. 1984) (“The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions.”).

Adoption of an order drafted by the Attorney General's Office would be particularly susceptible to the criticisms described above given that the Court has not provided any of its own reasoning—factual findings or legal conclusions—supporting its denial of Mr. Robertson's claims for relief.

## CONCLUSION

Mr. Robertson, therefore, respectfully requests that this Court draft its own order laying out its "own findings of fact and conclusions of law." *See Hall, supra.*

July 13, 2022.



---

ATTORNEY FOR THE APPLICANT  
Building A, Suite 201  
310 Mills Avenue  
Greenville, South Carolina 29605  
(o) 864-232-3503 (f) 864-232-4854  
hank@ehlieslaw.com

William Ehlied Wed Jul 13, 2022

Page: 1

## E-mail

From: Kelly, R. Keith Law Clerk (Sarah Shugars)  
 Date: Tue Jul 12, 22 - 2:04 PM - E-mail  
 To: 'Melody Brown'; 'Ed Salter'  
 CC: 'Derek Enderlin'; Hank Ehlied; 'Maio, Timothy M.'  
 Subject: Robertson v. State: C/A 2011-CP-46-00072, Capital PCR Action

File: Robertson; James D. v South Carolina -

Good afternoon,

The claims of deficient performance of PCR are dismissed as they are beyond the jurisdictional limitations of the remand. This court accepted the evidence in a quest to determine prejudice resulting from lack of a certification as required by statute. No other issue is before the Court. Interestingly, the Court learned there does not exist a formal certification process for death penalty PCR, unlike the certification process for lead trial counsel for death penalty defense.

Standard: The question is whether or not Petitioner was prejudiced using the Strickland standard because his PCR lawyers were deficient where, as here, neither PCR lawyer complied with the statute rendering their performance deficient.

After careful review of all materials, including but not limited to, Judge Few's order, transcripts, memorandums, statutes, live testimony and exhibits, the Court finds Petitioner failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different.

Ms. Brown or Mr. Salter, please prepare an order that reflects the above, share it with opposing counsel, and then email me the order for Judge Kelly review and signature.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

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WILLIAM H. EHLIES, P.A.
 ATTORNEY-AT-LAW
 BUILDING A, SUITE 201
 310 MILLS AVENUE
 GREENVILLE, SOUTH CAROLINA 29605
 864-232-3503
 FACSIMILE NUMBER 864-232-4854
 EIN: 57-0703576

July 13, 2022

VIA ELECTRONIC MAIL ONLY

Honorable R. Keith Kelly
 Circuit Court Judge
 125 East Floyd Baker Boulevard
 Gafney, South Carolina 29340

Re: *James Dejarnette Robertson v. State of South Carolina*
 C. A. No.: 2011-CP46-0072

Dear Judge Kelly:

In response to your email indicating your decision to deny Mr. Robertson any successive post-conviction relief, Mr. Robertson respectfully objects to your request that the Attorney General's Office prepare a proposed order for your review and signature. The Supreme Court of South Carolina does not approve of this practice and "strongly encourages" judges presiding in capital cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). This admonition is consistent with South Carolina law, which requires that courts, not parties, perform the critical function of objectively assessing the evidence and law in PCR cases, and formulating even-handed conclusions based on the exercise of sound, independent judgment. *See* S.C. Code §17-27-80 (governing post-conviction relief cases generally) ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); S.C. Code §17-27-160(D) (governing capital post-conviction relief cases) ("the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue").

The Supreme Court's disapproval of this practice is consistent with a nationwide consensus. Verbatim adoption of a party's proposed findings is widely condemned because it represents "an abandonment of the duty and the trust that has been placed in the judge," *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (quoting Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* 166 (1963)), and leads instead to judgments that are self-evidently "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *see also, e.g., Shaw v. Martin*, 733 F.2d 304, 309 n.7 (4th Cir. 1984) ("The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions.").

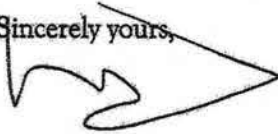
Adoption of an order drafted by the Attorney General's Office would be particularly susceptible to the criticisms described above given that the Court has not provided any of its own reasoning—factual findings or legal conclusions—supporting its denial of Mr. Robertson's claims for relief.

- 2 -

Mr. Robertson, therefore, respectfully requests that this Court draft its own order laying out its "own findings of fact and conclusions of law." *See Hall, supra.*

I will be filing this letter as an exhibit to a formal motion filed with the Clerk of Court to the same effect. An unfiled copy of that motion is included with this letter.

Sincerely yours,

A handwritten signature in black ink, consisting of a stylized 'W' followed by a large, sweeping loop that ends in a sharp point to the right.

WILLIAM HARRY EHLIES, II

/he
Enclosure
cc:

Ed Salter, Senior Assistant Attorney General
Derek Enderlin, Esq.
Timothy M. Maio, Esq.

State of South Carolina

In the Court of Common Pleas

County of York

James D. Robertson,

Applicant,

-vs-

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

FILED-RECEIVED
2022 JUL 18 AM 9:24
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Certificate of Mailing

The undersigned certifies that he placed the coversheet, Motion to Disallow the Attorney General from preparing an order and exhibits in the USPS addressed as follows:

William Edgar Salter, III
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
esalter@scag.gov

July 13, 2022.


 WILLIAM HARRY EHLIES, II
 ATTORNEY FOR THE APPLICANT
 Building A, Suite 201
 310 Mills Avenue
 Greenville, South Carolina 29605
 864-232-3503
 hank@ehlieslaw.com

EXHIBIT THREE



Timothy Maio <timothy.m.maio@gmail.com>

RE: RE: Robertson v. State: C/A 2011-CP-46-00072, Capital PCR Action

Hank Ehliès <hank@ehlieslaw.com>

Thu, Jul 21, 2022 at 6:50 AM

To: Melody Brown <MBrown@scag.gov>, "Kelly, R. Keith Law Clerk (Sarah Shugars)" <kkellylc@sccourts.org>

Cc: Derek Enderlin <derek@rossenderlin.com>, Ed Salter <ESalter@scag.gov>, "Maio, Timothy M." <timothy.m.maio@gmail.com>

Best to all on this email thread. Ms. Shugars, please know that, for a host of reasons, I will not file a proposed order. Respectfully, Hank Ehliès

-----Original Message-----

From: Kelly, R. Keith Law Clerk (Sarah Shugars)

Sent: Tuesday, July 19, 2022 9:33 AM

To: 'Melody Brown'; Hank Ehliès

Cc: 'Derek Enderlin'; 'Ed Salter'; 'Maio, Timothy M.'

Mr. Ehliès, please prepare a proposed order as well that reflects the Court's ruling.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

From: Kelly, R. Keith Law Clerk (Sarah Shugars) <>

Sent: Tuesday, July 12, 2022 2:04 PM

To: 'Melody Brown' <MBrown@scag.gov>; 'Ed Salter' <ESalter@scag.gov>

Cc: 'Derek Enderlin' <derek@rossenderlin.com>; 'Hank Ehliès'

<hank@ehlieslaw.com>; 'Maio, Timothy M.' <timothy.m.maio@gmail.com>

Subject: Robertson v. State: C/A 2011-CP-46-00072, Capital PCR Action

Good afternoon,

The claims of deficient performance of PCR are dismissed as they are beyond the jurisdictional limitations of the remand. This court accepted the evidence in a quest to determine prejudice resulting from lack of a certification as required by statute. No other issue is before the Court. Interestingly, the Court learned there does not exist a formal certification process for death penalty PCR, unlike the certification process for lead trial counsel for death penalty defense.

Standard: The question is whether or not Petitioner was prejudiced using the Strickland standard because his PCR lawyers were deficient where, as here, neither PCR lawyer complied with the statute rendering their performance deficient.

After careful review of all materials, including but not limited to, Judge Few's order, transcripts, memorandums, statutes, live testimony and exhibits, the Court finds Petitioner failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different.

Ms. Brown or Mr. Salter, please prepare an order that reflects the above, share it with opposing counsel, and then email me the order for Judge Kelly review and signature.

Best,

Sarah D. Shugars

Law Clerk to the Honorable R. Keith Kelly

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

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

FILED-RECEIVED

State of South Carolina

County of York

James D. Robertson,

Applicant,

-vs-

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

**Certificate of Mailing**

The undersigned certifies that he placed the coversheet, Rule 59, SCRCP by electronic mail and USPS postage paid to:

William Edgar Salter, III  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
esalter@scag.gov

September 12, 2021.

  
\_\_\_\_\_  
WILLIAM HARRY EHLIES, II  
ATTORNEY FOR THE APPLICANT  
Building A, Suite 201  
310 Mills Avenue  
Greenville, South Carolina 29605  
864-232-3503  
hank@ehlieslaw.com

|                            |   |                              |
|----------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS |
|                            | ) |                              |
| COUNTY OF YORK             | ) |                              |
| James D. Robertson, #5067, | ) | C/A 2011-CP-46-00072         |
|                            | ) |                              |
| Applicant,                 | ) |                              |
| v.                         | ) | ORDER DENYING APPLICANT'S    |
|                            | ) | RULE 59(e) MOTION            |
| State of South Carolina,   | ) |                              |
|                            | ) |                              |
| Respondent.                | ) |                              |
| _____                      | ) |                              |

On September 1, 2022, the Court filed an Order (Denying Relief) in the above-captioned capital Post-Conviction Relief action. Counsel for the Applicant, James D. Robertson, timely filed “Applicant’s Rule 59(e) Motion to Reconsider, Alter, and Amend Judgment” on September 12, 2022. Robertson previously raised most of the arguments in his Rule 59(e), SCRCF, motion either at the evidentiary hearing or in Applicant’s Amended Post-Trial Brief, and the Court rejected them in the September 1, 2022, the Court filed an Order (Denying Relief). Having reviewed his Rule 59(e), SCRCF, motion and considered it at length, the Court finds that Applicant has failed to demonstrate any material fact or principle of law that has been overlooked, disregarded, or misapprehended as to any claim raised by him. Accordingly, the Court stands by the findings of fact and conclusions of law in its previously-filed Order.

Applicant further contends that the Court has never formally ruled on his objection to the State drafting a proposed Order for the Court to consider. While the Court did not file a formal Order denying his motion, he acknowledges that the Court’s law clerk notified him via a July 12, 2022 email that the Court had denied his motion. The Court also observed that his motion had been denied and that Applicant had twice declined the opportunity to submit his own proposed Order.

See Order (Denying Relief) at p. 54. Further, as observed on pp. 54-55 of the Order (Denying Relief):

At any rate, this matter has been fully briefed and the parties' positions are fully before the Court. Both parties should be amply aware of the other's position and the facts and law supporting those positions. There is no surprise in fact or law – just a difference of opinion. Further, counsel has the opportunity to request reconsideration of any fact or conclusion in this order by way of filing a timely motion under Rule 59, SCRPC. See *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). The undersigned finds no error in calling for the State to prepare a proposed order, which followed the arguments and evidence before the Court, especially after having expressed its ruling

Additionally, the undersigned notes that he has carefully reviewed each and every assertion herein and adopts the language as its own since it wholly and accurately reflects the decision of the Court not only in light of the allegations and arguments, but also this Court's independent review of evidence in this case – in particular, the prior PCR Order, the transcripts, memorandums, statutes, and live testimony and exhibits as presented in the August 2021 hearing. The Court affirms once again that it finds Applicant has failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different.

The Court finds no error in this procedure.

WHEREFORE, Applicant's Rule 59(e) Motion to Reconsider, Alter, and Amend Judgment is denied.

IT IS SO ORDERED.

s/ R. Keith Kelly  
R. Keith Kelly, Circuit Court Judge  
By Special Assignment

This 2d day of March 2023

Spartanburg, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James Dejarnette Robertson,

Applicant,

-vs-

C.A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

**APPLICANT'S AMENDED MERITS HEARING EXHIBITS LIST**

**AFFIDAVITS**

1. Cascio Affidavit Trial Attorneys
2. Cascio Affidavit Post Conviction Attorneys
3. Cascio Supplemental Affidavit with Exhibit
4. Trial Jury Question
5. Hendrix Affidavit with Exhibits
6. Hendrix Second Affidavit
7. Hendrix Third Affidavit
8. Hendrix Fourth Affidavit with Exhibit
9. First James Boyd Affidavit
10. Second James Boyd Affidavit with Exhibit
11. Geoffrey McKee Affidavit with Exhibit 11-A
12. Joseph Savitz Affidavit including Exhibits A, B, C, D, E and F
13. McLaughlin Business Records Affidavit with Excel Spreadsheets 13-A

**TRIAL TRANSCRIPT**

14. Pages where McKee states he had read Cascio notes just prior to taking the witness stand. Appendix 3067

**JUDGE HAYES' ORDERS**

15. Psychological Evaluation Orders; 15-A; 15-B

**INITIAL POST-CONVICTION RELIEF MERITS HEARING TRANSCRIPT AND EXHIBITS**

16. PCR Transcript 3452-3456 Court questions Hancock on reading Cascio notes
17. Pages 3491-3494 Commingle Notes and Misrepresenting Visitation Dates
18. Pages 3552-3554 Brown to Boyd Cascio was not to get into details of crime
19. Pages 3631-3634 Few challenging Brown on McKee and Cascio

**BROWN MATERIALS**

20. Initial PCR Application

**JUDGE FEW'S ORDER OF DISMISSAL**

21. Pages 3730-3757

**TRIAL EXHIBITS**

22. State's 286 as given by Solicitor Brackett, Transcript pages confirming Cascio's notes of November 30 were part of Exhibit 286, email between Ehliess and Brackett regarding missing November 30 notes from Exhibit 286; 22-A; 22-B; 22-C; 22-D; 22-E; 22-F
23. Defense Brady Motions and Rule 5; 23-A; 23-B

**INITIAL POST-CONVICTION RELIEF APPLICATION**

24. Court Reporter Exhibit List
25. Applicant's #5 Cascio's Typed Report and Commingled Night of Crime
26. Applicant's #6 Cascio Cover Letter to Hancock Typed Preliminary Report Only
27. Applicant's #7 Catherine Hendrix Notes
28. Respondent's #8 Detention Center Visitation Log

**INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

29. Supreme Court of SC Order of Remand to Judge Hayes April 26, 2001
30. Order of Appointment of Bruce Poore by Judge Hayes July 16, 2002
31. October 28, 2002 Letter from Judge Hayes re: Robertson Competency Hearing

- 32. Transcript pages Oct. 10, 2002 Competency Hearing
- 33. Transcript pages Feb. 22, 2005 Competency to waive Appellate Review

**EXPERT CURRICULUM VITAE**

- 34. Robert Burke
- 35. John Bailey
- 36. Charles Ewing, Ph.D.

**THUMB DRIVES**

- 37. Pope Cascio Cross Examination
- 38. Robertson Summary of Records
- 39. Bracket File
- 40. Photos of Restraint Injuries

**APPELLATE COUNSEL IAC EXHIBITS**

- 41. Letter Robertson to Dudek February 10, 2000
- 42. Judge Hayes to Hancock May 2, 2000
- 43. Letter Robertson to Dudek July 6, 2000
- 44. Letter Dudek to Shearouse August 22, 2000
- 45. Letter Robertson to Shearouse August 28, 2000
- 46. Dudek Return to Motion September 11, 2000
- 47. Letter McRight to Chief Justice Toal September 12, 2000
- 48. Letter AG to Judge Hayes January 12, 2001
- 49. Letter AG to Judge Hayes February 13, 2001
- 50. Letter AG to Dr. Pamela Crawford March 2, 2001
- 51. Letter DMH to AG March 28, 2001
- 52. Letter AG to DMH April 2, 2001
- 53. Letter AG to SCDC April 2, 2001
- 54. Letter Judge Hayes to Chief Justice Toal



55. Letter SCSC to Dudek November 15, 2001
56. Letter Chief Justice Toal to Robertson May 16, 2002
57. Letter Savitz to Shearous June 12, 2002
58. Letter and Report from Judge Hayes to SCSC October 28, 2002
59. Order SCSC December 30, 2002
60. Letter and Order from SCSC to Robertson February 5, 2003
61. Letter Robertson to SCSC March 19, 2003
62. Order of Dismissal May 27, 2003
63. Letter Savitz to SCSC May 30, 2003
64. Letter and Order SCSC to Robertson June 25, 2003
65. Letter to SCSC from Robertson June 30, 2003
66. Letter and Order SCSC to Robertson July 9, 2003
67. Letter Savitz to SC Court of Appeals January 30, 2004
68. Letter and Record on Appeal from Robertson to SCSC May 6, 2004
69. Letter and Order SCSC to Robertson May 13, 2004
70. Letter Robertson to SCSC May 17, 2004
71. Letter Robertson to Savitz June 7, 2004
72. Letter Savitz to Clerk Richstad January 30, 2004
73. Initial Brief of Robertson *pro se* July 28, 2003
74. Letter Supreme Court to Robertson May 13, 2004
75. Letter Robertson to Supreme Court May 17, 2004
76. Letter Savitz to Robertson June 7, 2004
77. Justice Toal to Robertson September 28, 2004
78. Zalenka to Judge Hayes (with ORDER) October 13, 2000

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson,

Applicant,

-vs-

C.A. No 2011-CP-46-0072

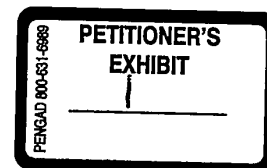
State of South Carolina,

Respondent.

**AFFIDAVIT OF TONI CASCIO, PHD  
TRIAL ATTORNEYS**

Dr. Toni Cascio being duly sworn, states and deposes as follows:

1. The attached *curriculum vitae* accurately states my educational background.
2. I was retained by Mr. Robertson's trial counsel to provide expert witness services. I was not interviewed for the position, nor was I asked about whether I had any trial experience. In fact, at the time I was retained in the Robertson case, I had only provided expert services in one other capital case and I did not testify in that case. I had little to no experience and had just graduated from my doctorate program a year earlier.
3. I was never told by trial counsel what to do or how to do it. For instance, I was not given a Referring Question. Also, I was not warned to avoid questions about the circumstances of the crime.
4. Furthermore, I was never warned that my notes would be (and were) shared with the prosecutor.



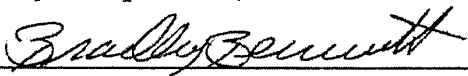
5. As a consequence of these omissions, I made copious notes that included details of the crime that the prosecutor would otherwise never have known about and therefore, those details would not have been published to the jury or used during my cross-examination.

6. I submitted an initial report to trial counsel looking for, and expecting feedback. But none was given and in fact we had very few meetings and no phone calls.

7. That lack of communication extended to the actual trial. The attorneys spent no more than an hour preparing me for testifying, and that primarily concerned only my direct examination. That briefing occurred at the courthouse while I was waiting to be called to the stand.

8. Having now seen pre-trial documents never before shared with me, based upon my doctorate education at the University of Pennsylvania, I would have suggested to trial counsel additional expert services and testing to include expanded neuropsychological batteries.

Sworn to before me this the 22<sup>nd</sup>  
Day of September, 2020.

  
Notary Public for SC  
My Commission Expires: 10/12/24

  
Toni Cascio, PhD

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson,

Applicant,

-vs-

C.A. No 2011-CP-46-0072

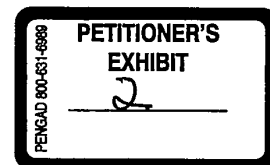
State of South Carolina,

Respondent.

**AFFIDAVIT OF TONI CASCIO, PHD  
INITIAL PCR COUNSEL**

Dr. Toni Cascio being duly sworn, states and deposes as follows:

1. The attached *curriculum vitae* accurately states my educational background.
2. I was retained by Mr. Robertson's trial counsel to provide expert witness services. I was not interviewed for the position, nor was I asked about whether I had any trial experience. In fact, at the time I was retained in the Robertson case, I had only provided expert services in one other capital case and I did not testify in that case. I had little to no experience and had just graduated from my doctorate program a year earlier.
3. I was never told by trial counsel what to do or how to do it. For instance, I was not given a Referring Question. Also, I was not warned to avoid questions about the circumstances of the crime.
4. Furthermore, I was never warned that my notes would be (and were) shared with the prosecutor.



5. As a consequence of these omissions, I made copious notes that included details of the crime that the prosecutor would otherwise never have known about and therefore, those details would not have been published to the jury or used during my cross-examination.

6. I submitted an initial report to trial counsel looking for, and expecting feedback. But none was given and in fact we had very few meetings and no phone calls.

7. That lack of communication extended to the actual trial. The attorneys spent no more than an hour preparing me for testifying, and that primarily concerned only my direct examination. That briefing occurred at the courthouse while I was waiting to be called to the stand.

8. Having now seen pre-trial documents never before shared with me, based upon my doctorate education at the University of Pennsylvania, I would have suggested to trial counsel additional expert services and testing to include expanded neuropsychological batteries. I also would have been able to use that information in forming my own expert opinions.

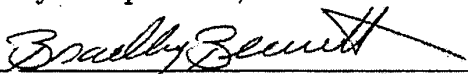
9. Those documents suggests that as a young child Mr. Robertson was known to head butt against the wall and other hard objects, that he sustained two concussions and a third "unexplained" head injury. These are very important details that required expert evaluation by a neuropsychologist and other experts associated with brain damage and injuries.

10. The new records also revealed details about Terry Robertson, who is Mr. Robertson's mother, that suggests possible borderline personality disorder. If verified by an expert in the field that would have provided me with explanations for many of Terry's behaviors that impacted the cognitive development of James Richardson.

11. The information about James Richardson's alcohol and Ritalin cycle of abuse would have provided a rich field for investigation and additional conclusions that I could have offered to mitigate Mr. Robertson's moral culpability for the crimes. That information would have supported battered child syndrome, intermittent explosive personality disorder and PTSD, with possible psychosis, which may have influenced the jury's guilt phase deliberation.

12. I would have provide this information to any attorney who would have reached out to me during the post-conviction stage of the case. I have had no contact with anyone concerning this case after leaving the jury trial courtroom until current attorneys Ehli/Bennett reached out to me.

Sworn to before me this the 22<sup>nd</sup>  
Day of September, 2020.

  
\_\_\_\_\_  
Notary Public for SC  
My Commission Expires: 10/2/24

  
\_\_\_\_\_  
Toni Cascio, PhD

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

James D. Robertson,

Applicant,

-vs-

C. A. No. 2011-CP-46-0072

State of South Carolina,

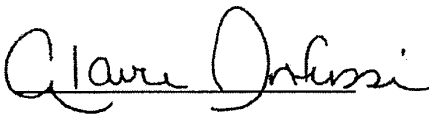
Respondent.

SUPPLEMENTAL AFFIDAVIT OF TONI CASCIO, Ph.D  
TRIAL ATTORNEYS

Dr. Toni Cascio, first being duly sworn, states and deposes as follows:

1. I have read my previous two affidavits and affirm that they are truthful and accurate to the best of my personal knowledge.
2. I have been provided with two pages of the jury trial transcript (2749 and 2953) and a copy of my letter to Mr. Hancock dated March 1, 1999 with which I attached my preliminary report.
3. I attest that my notes entitled "night of crime" were not included with the preliminary report sent to Mr. Hancock on March 1, 1991. Further, my "Night of Crime" notes were not provided to anyone until the evening of March 24, 1999 while I was waiting to be called as a witness in the Courthouse Library. On that occasion, Mr. Boyd came into the library and asked for a copy of my notes. Catherine Smith, the paralegal, made a copy, gave it to Mr. Boyd who then left the room.
4. When I was being cross-examined by Mr. Pope on March 25, 1999, he asked whether I had my notes. I did not. He asked that I get them. No defense team member offered me a copy of my notes and the Judge had to declare an unscheduled break while I went to retrieve my notes including "Night of Crime."

Sworn to before me this the  
16 day of March, 2021.

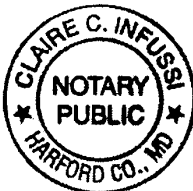




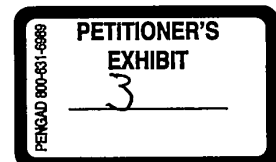
Notary Public for Maryland  
My Commission Expires: 10/19/23

TONI CASCIO, PhD

2



CLAIRE C. INFUSSI  
Notary Public, State of Maryland  
County of Harford  
My Commission Expires October 19, 2023



1 COURT'S ATTENTION, THERE WILL BE REPLY TESTIMONY, PROBABLY  
2 NOT EXTENSIVE, BUT I JUST WANTED TO TELL YOU.

3 THE COURT: WELL, HOPEFULLY WE CAN GET THROUGH  
4 WITH ALL OF THAT TOMORROW. BUT IF WE CAN'T, IF WE STILL  
5 HAVE A WITNESS OR TWO ON FRIDAY MORNING, THAT'S FINE.

6 MR. POPE: OUR PLAN WILL BE TO TRY TO HAVE IT  
7 DONE TOMORROW IF POSSIBLE.

8 ALSO, WHILE WE'RE ON THE RECORD OR OFF THE RECORD  
9 EITHER ONE ---

10 THE COURT: NO, WE'RE ON THE RECORD AND LET'S  
11 STAY ON IT.

12 MR. POPE: MS. CASCIO'S UNDERLYING DATA, I KNOW  
13 Y'ALL HAVE BEEN WORKING; I KNOW SHE HAD TO GO BACK AND  
14 FORTH, BUT WE STILL NEED TO TRY TO GET THAT SO THAT WE  
15 DON'T RUN INTO THAT PROBLEM TOMORROW.

16 MR. BOYD: WE'VE GOT A COPY OF THAT TO GIVE YOU  
17 RIGHT NOW.

18 THE COURT: ALL RIGHT; WE'LL BE AT EASE UNTIL  
19 9:30 IN THE MORNING.

20 MARCH 25, 1999 IN CAMERA:

21 THE COURT: IS THE STATE READY TO PROCEED?

22 MR. POPE: YES, SIR, YOUR HONOR.

23 THE COURT: LET'S GET MR. ROBERTSON IN HERE.

24 (THE DEFENDANT ENTERED THE COURTROOM.)

25 THE COURT: THE DEFENDANT IS PRESENT. ARE YOU



1 A. YES.

2 Q. MA'AM, I'M GOING TO SHIFT GEARS RIGHT HERE.  
3 HAVE YOU GOT A COPY OF YOUR NOTES?

4 A. WHICH NOTES?

5 Q. THE NOTES THAT YOU TOOK, THE UNDERLYING DATA FOR  
6 ALL THE THINGS YOU REVIEWED IN THIS CASE.

7 A. NOT WITH ME HERE NOW.

8 Q. DO YOU HAVE THEM PHYSICALLY HERE IN THE  
9 COURTROOM?

10 A. NO, NOT IN THE COURTROOM, BUT THEY'RE IN THE  
11 LIBRARY.

12 Q. YOUR HONOR, I WANT TO PURSUE THROUGH THE NOTES.  
13 I WOULD LIKE TO GIVE HER A BRIEF OPPORTUNITY TO  
14 RETRIEVE HER NOTES PLEASE, SIR.

15 THE COURT: ALL RIGHT. WE'LL TAKE A SHORT BREAK.  
16 I'LL LET YOU GO TO THE JURY ROOM WHILE WE GET THE NOTES AND  
17 GIVE THE SOLICITOR TIME TO LOOK AT THEM.

18 MR. POPE: YOUR HONOR, IT WON'T BE LONG. I'VE  
19 GOT THE NOTES, I JUST WANTED HER TO BE ABLE TO HAVE A COPY  
20 OF THEM.

21 THE COURT: WELL, WE'LL TAKE A BREAK ANYWAY.  
22 AFTER THE BREAK IN CAMERA:

23 THE COURT: MR. ROBERTSON AND COUNSEL ARE  
24 PRESENT. BRING IN THE JURY.

25 IN THE PRESENCE OF THE JURY:

THE COURT: YOU MAY CONTINUE.

Q. MS. CASCIO, HAVE YOU HAD AN OPPORTUNITY TO  
RETRIEVE YOUR NOTES?

A. YES.

Q. AND I BELIEVE YOU PROVIDED ME WITH A COPY OF  
THESE YESTERDAY?

A. YES.

Q. I'M GOING TO ASK YOU A COUPLE OF THINGS ABOUT  
YOUR NOTES. SOMETIMES YOU HAVE THINGS IN QUOTES  
AND, OF COURSE, I KNOW YOU HAD INTERVIEWS WITH  
JIMMY BUT THEN YOU HAD INTERVIEWS WITH OTHER  
PEOPLE, TOO; IS THAT CORRECT?

A. YES.

Q. WHEN IT IS IN QUOTES DOES THAT MEAN THAT WHOEVER  
YOU'RE TALKING TO SAID IT OR IS THAT FOR  
INFERENCES?

A. THOSE ARE DIRECT QUOTES.

Q. OKAY. I WANT TO CALL YOUR ATTENTION BEGINNING  
WITH YOUR INTERVIEW, I THINK THIS PROBABLY WOULD  
END UP BEING ON YOUR YELLOW SHEETS BUT THIS IS  
THE INTERVIEWS WITH THE DEFENDANT. IT SAYS 11-  
30, I GUESS NOVEMBER 30TH?

A. YES.

Q. I JUST WANT TO CUT THROUGH A COUPLE OF THINGS  
THAT HE HAD RELATED. YOU TOOK THESE NOTES AS

Court Ex # 20  
3-26-99 27

Judge Hayes

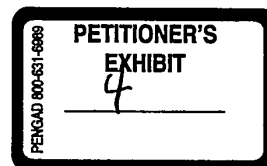
Was the report of  
Mrs Cassio ever considered  
for entry in to evidence

James B. Hauer

Mrs Cassio's report is not in evidence.  
(written report)

John Hayes

Please Turn this note in with  
the evidence at the end of  
deliberation.



STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson,

Applicant,

-vs-

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

**AFFIDAVIT OF CATHERINE SMITH HENDRIX**

Catherine Smith Hendrix, first being duly sworn, states and deposes as follows:

1. In 1997-99 I was employed full time at the James William Hancock, Jr., law firm in Rock Hill, South Carolina.

2 During that time, Mr. Hancock was appointed, and did represent James Dejarnette Robertson who was charged with murdering his parents in November of 1997. Mr. James Boyd was appointed and did serve as the second attorney for Mr. Robertson because the Circuit Solicitor had served notice to seek death.

3. I worked on the Robertson case as a paralegal for Mr. Hancock. On a number of occasions, I met with Mr. Robertson along with other defense team members. I often took notes concerning the meetings.

4. Attached to this affidavit as Exhibit One and further identified as "Applicant's 7" which contains twenty-six pages of notes that I made during defense team meetings with the client. The hand written notes appearing on page four of the

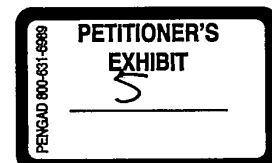


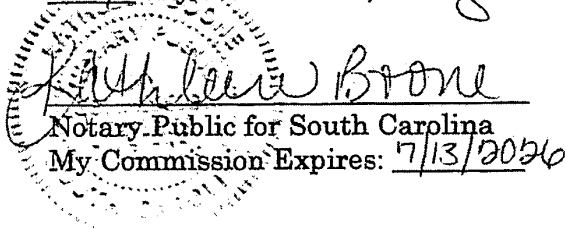
exhibit are those of my employer Mr. Hancock. I am and was familiar with his hand writing having worked closely with him for years.

5. Also attached to this affidavit as Exhibit Two is a letter to Mr. Hancock from Toni Cascio, PhD dated March 1, 1999. On this letter is what appears to be a post-it note upon which is hand written text. I recognize the hand writing as that of

myself.

SWORN to before me this

14 day of ~~December, 2020~~ January 21



Catherine S. Hendrix  
Catherine Smith Hendrix

## **EXHIBIT ONE**

~~school principal~~ ~~dept. of correction~~ ~~guidance counselor~~  
school principal  
dept. of correction  
guidance counselor

## List of Family Members

\* Christine Foberger - paternal grandmother  
paternal grandfather died - 5/96  
had been in home care prior to death  
404-853-5583  
(770)  
10 Lee Street  
Newnan Ga 30263  
→ Great Uncle -

Millersville  
Maternal grandparents - died years earlier  
full colonel / grandpa - 1989 died  
More 20th century - preferred these  
set up grandparents  
children used to do things w/ them

134/5/2  
→ "drove me crazy" - didn't get to see grandpa  
before his death - can never forgive  
momma -

Never experienced any freedom / outdoors -  
both parents only children

Parents close friends

Billy Hopper -  
George Hook -

Spring Kmas party



originally lived in H. Hill

1) William / Linda Weaver - H. Hill  
Ben; Janice Weaver

2) Lissy / Ken? George -  
Lauri Madonna George - Whitcomb  
Anna George - David Wake Forrest

friends 3) Jordan - Harlinsdale  
Liz Jordan -  
Sharon; Betty

4) Don / Yong -

5) George / Linda Hook -  
Lett  
Kyle - close since beginning of  
time -

7) Langley - across street neighbors

8) George Sullivan -



## Parents Employment

early  
life

Momma = not usually worked - lots of  
volunteer work / charity / PTA / League  
most quiet when Ed. was kid -

"Where Momma kept sentimental things?"

early years memories - attic  
address books - back of phone book

Jim's yearbooks - his room

Fishing Expedition:  
Bodily intrusion

Joan in Robertson; Kevin Brachett:

1. Roughly 5 weapons
2. Large amount of blood
3. Hair found in his land  
1.  
2. | Showing that  
there is some  
evidence it may  
have come from  
my shirt/  
2. Both doors blood on glass of both his car  
Indicated. Springfield, appears A but as obtained a cut.  
5. Clear indication:
6. Note -  
handwriting samples:
7. Large # of fingerprints:  
Major case palm prints.  
Let to be submitted

7/17/98 Interview w/ DR  
GWT, JB, EWC / MCS  
~~1st~~ ~~2nd~~ ~~3rd~~ ~~4th~~ ~~5th~~ ~~6th~~ ~~7th~~ ~~8th~~ ~~9th~~ ~~10th~~ ~~11th~~ ~~12th~~  
3:15 pm

Combined two bottles of Tixer -  
Moon combined them

explained as a Quacy class / center  
for Capital Migration  
# Order for prison -

clothing?

No physical harm -

Had hung him over balcony  
among 42 yrs of age

because wouldn't clean out tent  
from Eagle scout trip

Mom jumped in between -  
Momma supposed to

Jimmy had been gambling  
18 yrs of age / Dad hit him in  
chest

pushed Chip down stairs —

No reason for it to be that  
particular day —  
Chip not

[Dad didnt call police on me  
this time for stealing the  
family car & it was Chips car]

only thought @ killing them  
when really drunk [for several days]  
or be on Ritalin

would talk to friends @ killing them  
usually would ~~talk~~ release urge

11:30 pm / Mom : Chip would speak  
on phone - a

Ritalin = Chips prescription /  
Mom ordering it 5-600 at a time

Subpoena  
CVS / drugstore

Express Pharmacy - Springs End.

Mom kept Litalin @ house

Chip began using / gave him confidence

Northwestern Insurance Co -

Roadway Inn - 1st night Jimmy out  
of jail - night of Chip &  
chip high on Litalin - picked up a  
cable-knew it at Jimmy - called dad  
came to get chip -

Clay Robinson there  
Patie Martin - used at back

Chip introduced Jimmy to Litalin

Jimmy began using Litalin / Aug -  
Sept  
1978

Mom would mail chip Litalin  
10-15 tablets per week -

\* Juvenile Record - possible

Addicted to crack cocaine /  
40,000 - on credit card fraud  
Lacey / G. Lacey  
Bussary 150 / one / Hager  
Michael Brown -

Nov 1998

Stayed home most night / drinking beer  
outside  
not allowed <sup>to drink</sup> in house

Harold & Merideth came by - left  
@ 12:15 pm  
he was cleaning house / grandmother  
coming

Mom & Dad up in bed /

smoking pot / called Chip  
rule in house - no one can speak  
w/Chip if he's drunk - had to hang up

phone discharged - told Chip to let him  
charge phone @ 5th Ave -

called him @ 2<sup>30</sup> - 3<sup>00</sup> am / spoke only  
of getting him home / getting \$ for  
trip / asked to speak to him the  
next day -

was planning to get \$ for a ticket  
from clay / Meridith  
planning to go to work next day

called Meridith - had given her  
some pit / asked her for \$ but  
she offered to go get cash

called again /

called 3rd time @ 4<sup>30</sup> - 5 am told  
her to put on travelling clothes -

Meridith came over - told father that  
she had to take friend to hospital  
began speaking to her @ killing par.  
- what can i do to help -

told her to get black bag for anything  
he may need

both now still doing ritual  
150-180 ritual = money by  
time M.M. arrived. at 4<sup>30</sup> - 5:00 am

Arson = drug free /

Meredith = 10/20 mg. Then did  
@ 40 mg. When she returned  
at 5:00 AM

He can hear everything in house from  
his room -  
They in there talking - Mom offered to  
heard dad's alarm / listened to him  
get up & shave - heard shower  
start -

got & saw himself in mirror / looked like  
every experience a monster / saw the sweat rolling  
off his face / off his body  
jumped on Mom's bed / hands covered  
knife caught in covers - 2 pps of socks  
Mom turned / looked up &  
saw me - probably not  
to late to stop -  
Mom = "you're killing me, Jimmy" anything  
slashed her in back & Mom slashed  
"Earl help me" - screaming  
Jimmy jumped up to see that did  
not coming - went back to finish

had paper  
phone of  
look  
wished  
to  
face  
1.3



figured had a minute or two before  
dad got out  
ran downstairs — told mm that  
mom dead / got hammer & bb bat  
(mm outside smoking / No "know" then  
long outside

He went up w/ hammer / mm said  
call if need me —  
put bat at top of steps — closed door

They = left hand / stood  
hammer = right hand  
door opened

got second to let dad out

They = square in eyes —  
saw hammer close 1/2 in above  
left eyebrow

Dads eyes bulged / Dad charged  
out / grabbing for hammer / both  
are trying to get it  
screamed for mm — for help

[dad = fingers @ my throat —  
(turned at ref when showering)]  
→ Jimmy got control / dragged  
dad thru hall / tossed him to  
floor

nm @ hall / got in control of hammer  
chuck out of car / hit neck several  
times

standing over body - hitting in  
head

Gunny = moans - blood on  
these = chips from  
past fight

Gunny = ~~beat~~ during this - shaking  
feet

opened door - had been closed

nm went for bat -

nm standing / step up from bottom

beat him / was done - "killed him 10  
times"  
"24 yrs of anger built up in me"

sweat everywhere -

came downstairs -

somebody  
in this  
changed  
jacks

went into mom's bedroom / buried  
hammer in mom's head - make  
sure not one living - worst thing  
that could happen - 1 testifying  
1 dead

heard wheezing  
looked at him Could I be living  
went upst  
dad face down in blood / loud  
noise  
"whaled" on him for another 50-60  
times " made next <sup>to</sup> deep crevices  
lift in <sup>back</sup> <sup>up</sup> put hammer  
went down stairs  
heard noise again  
went into cool room / looking  
couldn't find drill bit  
went back up - hit him few more  
times -  
went thru got wallet, moms safe  
checked dad's leg - looking to see  
if body cooling  
and knife left on bed

got undressed - num right there  
threw away everything concerned a/cum  
file / nitroin bottle /  
took shower / checked neck really  
dangars well -  
took a thorough shower -

mm had ~~the~~ bag -  
put all in bag Then double tagged

~~the~~  
another pair of socks  
from parents bedroom -  
took \$, credit cards, took check  
books -

now had on noreoxins / avoided blood  
on foot / lifted up pants leg to  
avoid blood -

Ques  
1/4/78 Wrote checks - never cashed them

had not planned on anyone finding  
parents until he was back -

leaving - decided to break glass  
plate used - threw over in pile

mm "Rabbits knew what had happened"  
going after shift -

⇒ cut himself on glass - decided not  
to look for it -  
Mr. Wayne Langley drove up / waved

to him -

loaded car / sat in Harris' car  
staying for in Jimmy's car -

stopped at backyard -  
scrubbed hard - nasty cut / got  
bandaids, neosporin etc -

12:00 noon / crying uncontrollably  
"what have I done"

MM said - It's over now - they  
will never tell you what to do again

36 hrs - w/o sleep / only averaged  
2 hrs. of sleep per night

Scott Williams = parole agent -

→ want to sleep - in car

MM would keep her mother just for  
check for 50g.

Grandmother = doesn't blame you  
didn't raise you right -

Nancy Day

introduced as a psychologist

Dr. Barton / prison psychologist

When asked if he did it / he  
nodded —  
kept telling him - didn't write down  
what he said specifically but his  
appearance

Office used to <sup>be</sup> across from  
Nalle clinic  
Dr. in Charlotte / 10-11 yrs old  
family counselor  
saw Jimmy separately as well

Jabpoena Catawba school record

only 18th  
grader  
in  
class  
B in advanced  
Hicksa - not good enough  
threw him @ the room  
Hicksa 3 trig class - Mr. Smith  
still teaching

Had to ask permission to go  
outside to shoot basketballs  
even at 15-16 yrs. old

"words more harmful than his  
fists" - cut right in your  
face & scream

screamed at every little thing  
stuff average parents wouldn't  
worry about -  
teenage pranks - upset dad -

Blurred  
Lillian McLaughlin  
2989 DuPont Circle  
329-2039

Jimmy Robertson  
234979  
LCI

Auntie North  
Cell 2211  
1204 E. Church St  
Bishop 29010

7/22/98

Just advises him not to physically  
resist tests for blood, hair, urine  
etc but to vocally insist that  
a representative of our office  
is there.

★ 404 (170) 253-5583 Grandmother  
no known health problems



7/22/98

1992 - exchange student } had to call  
had neck problem again } Dr. Fleischer

Had underdeveloped bones in neck  
1988-89 1st time w/ problem - was in  
traction -

German dr's. treated him -  
contacted dr. fleischer on return

Momma = heart attack; hearing loss;

Jimmy denies any physical abuse w/in  
family

> @ other types of abuse - says ~~that~~  
mom did alot for dad; says relationship  
w/ dad was better than had been  
in awhile -

Good work record - says he is a wholistic

guards received

perfect attendance - high school

J. achievement: eagle scout @ 14; NADA;  
Mach team + key club; Pres. of student body @ 15;

Chp = top of his class; honor roll

known @ inheritance since 80's  
1 1/2 million = Jimmy's assessment of  
value of the estate

77-81 East Grand Rapids, Mich.  
was where Robert's lived prior to Rf  
before that in Fresno, Calif

Miller Dutton - Mr. Robert's closest  
supervisor  
→ moved to Rf when 7-8 yrs. old -

Aunt Margaret Ann Brenner  
outside of Milledgeville, Ga -  
Thomson Ga.

Jimmy's momma inherited lots from  
her mother's death

Orders = safe deposit boxes  
Nationalbank = wills; trusts etc -

---

Back = head & problems;  
shoulder; etc

7/22/98

Mom = volunteer work @ Skip Meyers  
traded secretarial work for counseling  
became best friends w/ Skip -  
Skip would routinely call Mom 11:30pm  
at night

Both people knew of these calls  
she - Jimmy used to joke @  
them - believed they are having  
an affair

Chip doesn't write nor accept calls  
- used to talk to him every day -

Chips # 215-382-3650 in Pa.  
"best friends" - closer than that -

Aug 25, 1995  
Jimmy = raped by man in car  
dad wouldn't take care

coming home from Concord - had just  
speeding ticket -  
in chip's court -  
car comes up behind him / flashing  
lights - wish man -  
wanted to Jimmy → Jimmy trying to

remember if movie horn - speeds up;  
Man signals JDR to pull over  
JDR does - <sup>passes</sup>  
Both men get out of car -  
Man walks in hotel -  
JDR in car -  
Man comes out of hotel / signals JDR  
to come here

*Memorandum*  
JDR comes into lobby - pushes JDR in  
bathroom - pulls knife  
propositions JDR - JDR refuses -  
Man pushed him back to wall  
pulls down JDR's pants -  
performs oral sex on JDR w/ knife  
at his chest -  
JDR ran out - in car - goes  
back to work - Man pulls up  
beside him - JDR gives license #  
911 - JDR says he was raped -  
Girl laughed & hung up - He called  
again - sent a car - JDR sent police &  
said couldn't find scene - JDR took <sup>notes</sup>  
them to find witness -  
called dad - told him -  
JDR went home - ~~gun~~ gun ~~finds~~  
the license ~~card~~ #  
JDR had to go back to Ga. Tech

Dad didn't want to pursue this  
wanted to let it go -  
didn't want going to go to lawyer  
for Robinette - his supervisor knew  
of incident -

→ Dad = pretend it didn't happen

Same thing from being in prison -  
Dad would complain @ me being there  
w/ me <sup>beginning</sup> thinking of suicide  
wanted to look down & see dad going  
to work after burying me

Dad yelling at you all the time  
too scared until 12 or 18 -  
finally stood up to him -

→ would get in your face -

<sup>Chad</sup>  
Brian Mills - practically lived w/us  
joined Air Force - on brother now

→ parents = Bill Mills. William  
Harry Mills Mills  
live in Wild & Pines ↑ over

Brian Mills -  
 Clay Robinson -  
~~Scott~~ Langley -  
 Josh Langley -  
 Kyle Hook -

Dorothy Davis / Camden  
met her when worked at Wirthrop  
→ 587 Charlotte-Thompson Rd  
Camden S 29020  
803 432-0466 —

1240 DORIS  
APR 306

Erin Knapp  
~~Maria~~ Knapp - on: JD for 3 yrs -  
985-7102  
RVSC / across from home  
Meredith Moore - sexually involved  
w/ Jimmy Robertson -

Monday → William Funder → DR told them  
Sunday Fuzz McWhright he had spoken  
ask them for what was morally right  
for him to do in cit room  
told them he wanted to make to see  
do his job -

Chips friends -

"Quinea pig" to family / Jimmie's  
description of himself /  
said way for Chip

Chip doesn't have right to know  
what went

- old him lies - told JR still in  
school; got @ Winthrop;
- May 98 Chip had given his life to God.  
gone to keep store - just drinking;
- now he back doing ~~got~~ drugs
- Chip = conspirator in this - told  
me he was going to come home; do  
it too -
- Chip having all his mail subpoenaed  
Pope got all Jim's letters /
- Halloween - go ahead - do it  
just be careful what you do -

Dad loved golf; work  
not me  
was always there for us -  
would attend our play, baseball  
games -  
Went out of his way to spend  
time w/ us when we were young  
Didn't last - activities didn't  
continue - Jingles would get  
bored go fishing  
Dad didn't do anything w/ us  
looked up to Mr. Jingley  
Mom: Dad there for us in little  
things but it stopped when  
we got older  
tried to play golf together but  
Dad would get too frustrated cause  
I would hold him up -



## **EXHIBIT TWO**

I HAVE ONLY ATTACHED  
A PORTION OF WHAT  
WAS USED BY DR.  
CASCIO / WILL GET  
REMAINDER TO YOU AS  
SOON AS POSSIBLE

James W. Hancock, Jr.  
246 East Black Street  
P.O. Box 2851  
Rock Hill, SC 29732

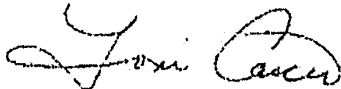
March 1, 1999

Dear Mr. Hancock,

Attached you will find my preliminary report for James Robertson. This report is based on in-depth interviews, medical and psychiatric records of the Robertson family, and school records of Jimmy Robertson. I hope you find this helpful.

If I can answer any questions for you, please do not hesitate to contact me at (803) 777-3912.

Sincerely,



Toni Cascio, Ph.D.  
Assistant Professor

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson,

Applicant,

-vs-

C. A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

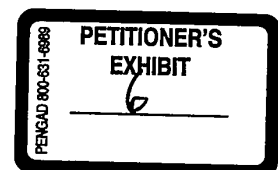
**SECOND AFFIDAVIT OF CATHERINE SMITH HENDRIX**

Catherine Smith Hendrix, first being duly sworn, states and deposes as follows:

1. In 1997-99 I was employed full time at the James William Hancock, Jr., law firm in Rock Hill, South Carolina. I was the paralegal assigned to the State v. James D. Robertson capital murder case.

2 One of my functions was to collect, organize, store and distribute case records and materials. This included providing and retrieving expert witness materials. I would receive the expert's reports, documents and notes, file them and distribute them to the attorneys and any other person who was on a need-to-know basis.

3. On Wednesday, March 24, 1999 the defense team was presenting the mitigation case. Dr. Toni Cascio was ready to go to the witness stand and was waiting in the courthouse library. Mr. Boyd asked for Dr. Cascio's notes. I copied the notes and gave them to him. That was the first time I had the Cascio notes.

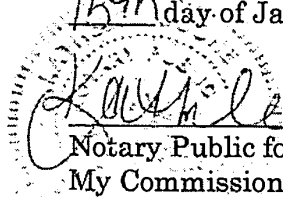


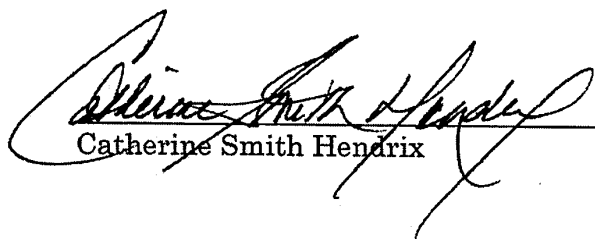
4. Dr. Cascio was not reached as a witness that day and returned on Thursday, March 25, 1999 and testified. I am sure that Dr. Cascio's notes were not reviewed by my employer Mr. Hancock or Mr. Boyd prior to delivering them to Tommy Pope on March 24, 1999..

5. The standard operating procedure regarding documents like expert witness reports, notes and attachments was to give them to me for filing and distribution. If Mr. Boyd had obtained Dr. Cascio's notes prior to Wednesday March 24, 1999 he would have given them to me in keeping with that procedure. He did not; I obtained the notes directly from Dr. Cascio while she waited in the courthouse library on Wednesday, March 24, 1999.

6. I was involved in the majority of the team meetings concerning investigating, developing and presenting the case for Mr. Robertson. At no time do I recall anyone suggesting that one of the attorneys should be present with the client when the client was being interviewed by an expert. I also do not recall any expert being told by defense attorneys that they should not inquire about the details of the crime itself.

SWORN to before me this  
15<sup>th</sup> day of January, 2021.

  
Kathleen Boone  
Notary Public for South Carolina  
My Commission Expires: 7/13/2026

  
Catherine Smith Hendrix

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson,

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-vs-

C.A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

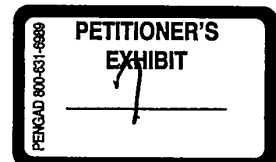
**THIRD AFFIDAVIT OF CATHERINE SMITH HENDRIX**

Catherine Smith Hendrix, first being duly sworn, states and deposes as follows:

1. In 1997-99 I was employed full time at the James William Hancock, Jr., law firm in Rock Hill, South Carolina. I was the paralegal in the *State v. James D. Robertson* capital murder trial.

2. On March 24, 1999, Toni Cascio, PhD., social worker, was in the library waiting to be called as a witness. At the close of testimony for that day she had not been reached as a witness. Mr. Boyd came into the room and asked for a copy of Dr. Cascio's notes which I provided to him. The transcript of the proceedings reveals that Mr. Boyd intended to deliver the Cascio notes to Solicitor Pope at that time.

3. The next day, Thursday, March 25, 1999, I was present in the courtroom when attorney James Boyd called defense witness Toni Cascio, PhD., to present a social history of James Robertson.



4. I assisted Dr. Cascio in retrieving her notes and had a photocopy made for Mr. Boyd to give to Solicitor Pope. Prior to this time no one on the defense team had a copy of Dr. Cascio's notes.

5. Mr. Boyd questioned Dr. Cascio about her educational background, work history and, through her, presented the Social History Assessment of James Robertson.

6. On direct examination, Mr. Boyd did not question Dr. Cascio about the notes she made during her interviews with James Robertson.

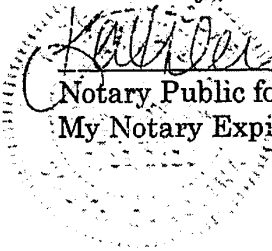
7. During the cross examination of Dr. Cascio, Solicitor Pope asked whether she had her notes with her. She did not, and therefore a recess was taken to allow her to retrieve her notes from the library. She did not retrieve them from any defense team member who were present in the courtroom at that time.

8. All the members of the defense team who were in the courtroom during Solicitor Pope's cross-examination were shocked by the many specific references to the intimate details of the actual killings that were imbedded in Solicitor Pope's questions.

9. In my opinion and experience as Mr. Hancock's Paralegal, I do not believe Mr. Hancock would have ever allowed Dr. Cascio to testify as a defense witness if he had known about the damaging contents of Dr. Cascio's notes prior to those notes being delivered and made know to Solicitor Pope.

SWORN to before me this 18<sup>th</sup> day  
Of ~~January~~ February, 2021.

Kelli Ann Boone  
Notary Public for S. C.  
My Notary Expires: 7/13/2026



Catherine L. Hendrix  
Catherine Smith Hendrix

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson,

Applicant,

-vs-

C.A. No. 2011-CP-46-0072

State of South Carolina,

Respondent.

**FOURTH AFFIDAVIT OF CATHERINE SMITH HENDRIX**

Catherine Smith Hendrix, first being duly sworn, states and deposes as follows:

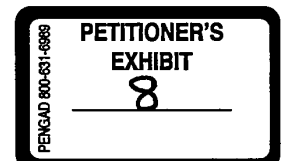
1. In 1997-99 I was employed full time at the James William Hancock, Jr., law firm in Rock Hill, South Carolina. I was the paralegal in the *State v. James D. Robertson* capital murder trial.

2. I had many occasions over the years of working for and with Mr. James W. Hancock to witness his signature. The signature on the attached exhibit is that of Mr. Hancock and I recognize the letterhead as authentic for the Law Office of James W. Hancock, Jr.

SWORN to before me this 5<sup>th</sup> day  
Of January, 2021.

Notary Public for S. C.  
My Notary Expires: 7/13/2026

Catherine Smith Hendrix





**JAMES W. HANCOCK, JR.**

ATTORNEY AT LAW  
246 EAST BLACK STREET  
P.O. BOX 2851  
ROCK HILL, SOUTH CAROLINA 29732

(803) 324-7681

Fax (803) 324-0710

November 23, 1998

VIA FAX (628-3084)

Attn: Gail Whisonant  
York County Detention Center  
Moss Justice Center  
1675-3 York Hwy.  
York, SC 29745-7431

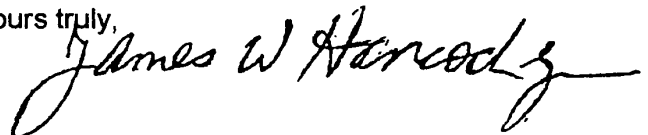
Re: James D. Robertson

Dear Gail:

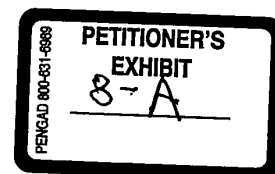
This letter authorizes Toni Cascio as a representative of my office to interview the above referenced client or potential client on my behalf.

Your cooperation in this matter is certainly appreciated.

Yours truly,



James W. Hancock, Jr.



STATE OF SOUTH CAROLINA

AFFIDAVIT OF JAMES W. BOYD

COUNTY OF YORK

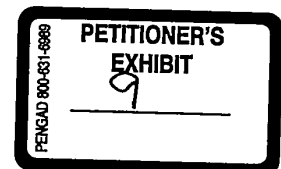
Now comes James W. Boyd who, after first being duly sworn, states and deposes as follows:

1. I am engaged in the full-time practice of law at the James W. Boyd Law Firm LLC located at 1544 Ebenezer Road, Post Office Box 36425, Rock Hill, South Carolina.
2. I graduated from the University of South Carolina School of Law in 1977 and was sworn in on November 9, 1977. I am a regular member in good standing.
3. I have a general practice but focus on criminal defense cases.
4. On November 25, 1997 Earl Robertson, Sr. and his wife Terry Robertson were murdered in a single event that occurred in their home. Their eldest son James DeJarnette Robertson was arrested shortly thereafter and charged with the offenses.
5. William "Bill" Hancock of Rock Hill, South Carolina, now deceased, was appointed to represent James Robertson and undertook to do so. The Circuit Solicitor noticed death and I was appointed the second attorney for James Robertson.
6. At the time of my appointment Mr. Hancock had already been in the case and had secured the assistance of at least one expert witness, Toni A. Cascio, PhD Social Work. Dr. Cascio was to develop and present the social history of the client for the jury's consideration during the sentencing phase of the trial.
8. Mr. Hancock and I believed that a conviction of murder was a foregone conclusion. We did examine the State's file to prepare for cross-examination but we did not conduct any independent investigation to develop and present issues pertaining to the guilt phase of the case. After reviewing the State's file, and talking with Mr. Robertson, we did not see any further investigation was necessary as to the guilt phase with the exception of consulting with a DNA expert. Although the client stated his objective was to contest guilt, we did not do so beyond what is reported in the trial transcript.

SWORN TO BEFORE ME ON THE 22 DAY  
OF JULY, 2020.

Kathy L. Carpenter  
NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES: 8/26/25

James W. Boyd  
JAMES W. BOYD, ATTORNEY



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

James D. Robertson,

Applicant,

-vs-

C. A. No. 201 1-CP-46-0072

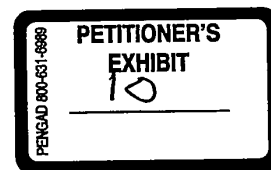
State of South Carolina,

Respondent.

AFFIDAVIT OF JAMES W BOYD

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1. I am engaged in the full-time practice of law at the James W. Boyd Law Firm LLC located at 1544 Ebenezer Road, Post Office Box 36425, Rock Hill, South Carolina.
2. I graduated from the University of South Carolina School of Law in 1977 and was sworn in on November 9, 1977. I am a regular member in good standing.
3. I have a general practice but focus on criminal defense cases.
4. On November 25, 1997 Earl Robertson, Sr. and his wife Terry Robertson were murdered in a single event that occurred in their home. Their eldest son James Dejarnette Robertson was arrested shortly thereafter and charged with the offenses.
5. William "Bill" Hancock of Rock Hill, South Carolina, now deceased, was appointed to represent James Robertson and undertook to do so. The Circuit Solicitor noticed death and I was appointed the second attorney for James Robertson.
6. Today I have been shown notes which are attached as Exhibit One to this affidavit. I do not recall ever being provided with these notes prior to today, March 25, 2021. I cannot ever recall seeing these notes prior to today, March 25, 2021.
7. It is represented to me that the notes are those of Geoffrey McKee, PhD who was the individual who performed the neuropsychological examination of James D. Robertson pursuant to Judge Hayes's order. Dr. McKee was called as a witness in reply by the State.
8. Regarding Dr. Toni Casio's notes "night of crime", my recollection is that I gave the notes to Solicitor Pope in the hallway behind the courtroom. I do not recall when I received the notes but after reviewing the trial transcript and the affidavit of Dr. Casio I believe I obtained the notes and gave them to him after



court adjourned on March 24, 1999. I do not recall whether I read the notes before giving them to Solicitor Pope but I had no strategic reason for not reading the notes before I gave them to him.

SWORN TO BEFORE ME ON THE \_\_\_\_\_ DAY  
OF MARCH 25, 2021.

*Kamilah L. Cannon*

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES: 10/21/26

**KAMILAH LUKE CANNON**  
Notary Public for South Carolina  
My Commission Expires 10/21/2026

*James W. Boyd*  
JAMES W. BOYD, ATTORNEY

1 COURT'S ATTENTION, THERE WILL BE REPLY TESTIMONY, PROBABLY  
2 NOT EXTENSIVE, BUT I JUST WANTED TO TELL YOU.

3 THE COURT: WELL, HOPEFULLY WE CAN GET THROUGH  
4 WITH ALL OF THAT TOMORROW. BUT IF WE CAN'T, IF WE STILL  
5 HAVE A WITNESS OR TWO ON FRIDAY MORNING, THAT'S FINE.

6 MR. POPE: OUR PLAN WILL BE TO TRY TO HAVE IT  
7 DONE TOMORROW IF POSSIBLE.

8 ALSO, WHILE WE'RE ON THE RECORD OR OFF THE RECORD  
9 EITHER ONE ---

10 THE COURT: NO, WE'RE ON THE RECORD AND LET'S  
11 STAY ON IT.

12 MR. POPE: MS. CASCIO'S UNDERLYING DATA, I KNOW.  
13 Y'ALL HAVE BEEN WORKING; I KNOW SHE HAD TO GO BACK AND  
14 FORTH, BUT WE STILL NEED TO TRY TO GET THAT SO THAT WE  
15 DON'T RUN INTO THAT PROBLEM TOMORROW.

16 MR. BOYD: WE'VE GOT A COPY OF THAT TO GIVE YOU  
17 RIGHT NOW.

18 THE COURT: ALL RIGHT; WE'LL BE AT EASE UNTIL  
19 9:30 IN THE MORNING.

20 MARCH 25, 1999 IN CAMERA:

21 THE COURT: IS THE STATE READY TO PROCEED?

22 MR. POPE: YES, SIR, YOUR HONOR.

23 THE COURT: LET'S GET MR. ROBERTSON IN HERE.

24 (THE DEFENDANT ENTERED THE COURTROOM.)

25 THE COURT: THE DEFENDANT IS PRESENT. ARE YOU

1 A. YES.

2 Q. MA'AM, I'M GOING TO SHIFT GEARS RIGHT HERE.

3 HAVE YOU GOT A COPY OF YOUR NOTES?

4 A. WHICH NOTES?

5 Q. THE NOTES THAT YOU TOOK, THE UNDERLYING DATA FOR  
6 ALL THE THINGS YOU REVIEWED IN THIS CASE.

7 A. NOT WITH ME HERE NOW.

8 Q. DO YOU HAVE THEM PHYSICALLY HERE IN THE  
9 COURTROOM?

10 A. NO, NOT IN THE COURTROOM, BUT THEY'RE IN THE  
11 LIBRARY.

12 Q. YOUR HONOR, I WANT TO PURSUE THROUGH THE NOTES.  
13 I WOULD LIKE TO GIVE HER A BRIEF OPPORTUNITY TO  
14 RETRIEVE HER NOTES PLEASE, SIR.

15 THE COURT: ALL RIGHT. WE'LL TAKE A SHORT BREAK.  
16 I'LL LET YOU GO TO THE JURY ROOM WHILE WE GET THE NOTES AND  
17 GIVE THE SOLICITOR TIME TO LOOK AT THEM.

18 MR. POPE: YOUR HONOR, IT WON'T BE LONG. I'VE  
19 GOT THE NOTES, I JUST WANTED HER TO BE ABLE TO HAVE A COPY  
20 OF THEM.

21 THE COURT: WELL, WE'LL TAKE A BREAK ANYWAY.

22 AFTER THE BREAK IN CAMERA:

23 THE COURT: MR. ROBERTSON AND COUNSEL ARE  
24 PRESENT. BRING IN THE JURY.  
25 IN THE PRESENCE OF THE JURY:

I HAVE ONLY ATTACHED  
A PORTION OF WHAT  
WAS USED BY DR.  
CASCIO / I WILL GET  
REMAINDER TO YOU AS  
SOON AS POSSIBLE

James W. Hancock, Jr.  
246 East Black Street  
P.O. Box 2851  
Rock Hill, SC 29732

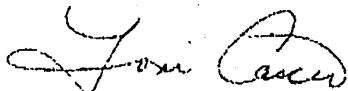
March 1, 1999

Dear Mr. Hancock,

Attached you will find my preliminary report for James Robertson. This report is based on in-depth interviews, medical and psychiatric records of the Robertson family, and school records of Jimmy Robertson. I hope you find this helpful.

If I can answer any questions for you, please do not hesitate to contact me at (803) 777-3912.

Sincerely,



Toni Cascio, Ph.D.  
Assistant Professor