

ORIGINAL

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LUZENSKI ALLEN COTTRELL,

APPELLANT

APPELLATE CASE NO 2015-000731

RECORD ON APPEAL

KEIR M. WEYBLE
Cornell Law School
Death Penalty Project
Myron Taylor Hall
Ithaca, NY 14853

SHERI LYNN JOHNSON
Cornell Law School
Death Penalty Project
Myron Taylor Hall
Ithaca, NY 14853

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ANTHONY MABRY
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit
P.O. Box 1276
Conway, SC 29526

ATTORNEYS FOR RESPONDENT

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

COURT’S EXHIBIT NO. 9 (PHOTOS)
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COURT’S EXHIBIT NO. 11 (PHOTOS)
COURT’S EXHIBIT NO. 12 (CD)
STATE’S EXHIBIT NO. 10 (CD)

1 COURT: If the jury has convicted on murder, you know,
2 it's sort of a two-edged sword as to discuss that, I mean,
3 that's additional punishment he's received. It might be
4 something you want in; I don't know.

5 How do you propose to handle it?

6 MS. ARMSTRONG: I don't want to shoot from the hip.
7 I'm honestly not sure.

8 COURT: Well, let's go back to the original question
9 which allows us to preserve that issue, and the original
10 question was, how are we going to address the indictment. It
11 would seem to me that he's being tried for murder, period, and
12 it would be to your benefit, the Defendant's benefit - and
13 this is just my view, you may have a different angle to look
14 at it, but it would be my view that we just agree to redact
15 any part of the indictment, prepare another indictment, you
16 know, whatever. We don't need that information. I think it
17 would be prejudicial to your client. We don't need that
18 information of those convictions in the guilt phase; do we?

19 MS. ARMSTRONG: No. And in fact, I agree with that
20 completely. My question is this. I'm just trying to
21 imagine ---

22 COURT: Well, isn't that the only issue we really have
23 to deal with today, or need to deal with today?

24 MR. HEMBREE: It was the only question I was looking
25 for guidance on, Your Honor, because we can do it two ways.

1 What we typically do, and the practice that has been the norm,
2 because we -- we frequently do multi-count indictments. Some
3 counties do separate indictments for every charge, we do
4 multi-count indictments regularly, and oftentimes we choose,
5 for whatever reason at trial, to pursue count number one and
6 count number three, but not count number two, and what we do
7 in those, what we've requested, and the Court has granted on a
8 regular basis, is the ability to just essentially redact that
9 second count, write it out, recopy it so that -- you know, so
10 it doesn't look squirrely, and if the jury, you know -- if
11 they say -- when they look at it all they see is count one and
12 count two, and ---

13 COURT: And that's what I was ---

14 MS. ARMSTRONG: And I think that's fine. The only
15 residual concern I have is this. When we present our defense
16 I don't -- I would hate to present evidence that would go
17 basically against a finding of guilt, say for instance,
18 resisting arrest with a deadly weapon, and having the State
19 say, well, you've opened the door, you are raising this issue
20 so we want to bring in evidence that he's already been
21 convicted of it, because you are arguing that it was an
22 unlawful arrest, for instance. I mean, that would be my
23 concern, is that in presenting our defense the State would be
24 giv -- would have the ability to just come in and, you know,
25 say well you opened the door ---

1 COURT: You know, that certainly raises a -- an issue
2 here, because South Carolina has a unique, or somewhat unique,
3 view of resisting arrest, and what force may be used to resist
4 an unlawful arrest, I mean, it's still the law in this State
5 that whatever force is necessary, including deadly force, may
6 be used.

7 If that was also a defense to a resisting arrest
8 charge -- and it's my understanding he was convicted of
9 resisting arrest ---

10 MR. HEMBREE: Yes, Your Honor.

11 COURT: ---In the initial trial.

12 MR. HEMBREE: That's correct, Your Honor.

13 COURT: Well, how does that -- is that Res Judicata?

14 MR. HEMBREE: I don't know the answer to that, Your
15 Honor. Probably not an issue we are going to be able to
16 resolve today, but it's one that's -- clearly we need to ---

17 COURT: It's clearly one that I need you to submit
18 proper argument after notice, because I have a problem with
19 that. The Court -- I mean, that jury, essentially, in
20 convicting for resisting arrest, rejected the defense.

21 MS. ARMSTRONG: And I would hasten to point out that
22 the reason the case got reversed in the first place is that
23 the defense never got to get a charge to essentially support
24 their defense, so it was almost a foregone conclusion, once
25 they never got to put it in ---

1 COURT: I thought the failure to charge was a voluntary
2 manslaughter, based upon the evidence -- the ambiguity in the
3 evidence as to who shot first, how many shots were fired, how
4 many weapons were fired, and that sort of thing, the theory
5 being it was possible that he may have fired in self-defense;
6 right?

7 MS. ARMSTRONG: Correct, Your Honor.

8 COURT: That's somewhat different from a resisting
9 arrest charge that would have occurred earlier; did it not;
10 the resisting occurred before the shooting, the facts that you
11 based your conviction on?

12 MR. HEMBREE: That's correct, Your Honor, but in all
13 fairness, it was a very, very short time frame.

14 COURT: I understand.

15 MR. HEMBREE: I mean, it was happening very, very
16 quickly.

17 COURT: I understand that it started and it just took
18 on a life of it's own and rolled, very quickly.

19 So, what we are going to have to do is look at that.
20 I'm not so sure that the defenses are separable. You know, I
21 could see an argument that one may be different from the
22 other, I don't know, but let's just see.

23 MS. ARMSTRONG: Thank you, Your Honor.

24 MR. HEMBREE: Thank you, Your Honor, and we'll work on
25 that.

1 MS. ARMSTRONG: Would you like to place a time frame on
2 producing briefs in support of ---

3 COURT: I'm going to let you folks decide when you want
4 that issue determined ---

5 MS. ARMSTRONG: Thank you, Your Honor.

6 MR. HEMBREE: Thank you, Your Honor.

7 COURT: ---Because I don't want to push you on that.

8 MS. ARMSTRONG: Thank you.

9 COURT: You know when we are looking at trial on this
10 case, folks.

11 MS. ARMSTRONG: Absolutely, Your Honor.

12 COURT: I want you to take all the time you need in
13 that issue, but we are still back to the issue of the
14 indictment.

15 MS. ARMSTRONG: Yes. We are fine with the State
16 redacting ---

17 COURT: From a base line, generally speaking, we are
18 talking about a situation when the indictment may be redacted.
19 Okay. Okay. Fair?

20 MR. HEMBREE: Thank you, Your Honor. That's great. We
21 will be -- that will work great for us.

22 The next matter, Your Honor -- and I'm -- I think I know
23 the answer, but I just want to make sure. The hearing today
24 is in place of the hearing that was scheduled for the 18th, or
25 in addition to?

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
2003-GS-26-00020

State of South Carolina,

PLAINTIFF,

vs.

TRANSCRIPT OF RECORD

Luzenski Allen Cottrell,

DEFENDANT.

October 14, 2011
Conway, South Carolina

Before:

The Honorable Larry B. Hyman

Appearances:

BY: J. Gregory Hembree, Esq.
Attorney for State

BY: Jimmy A. Richardson, II, Esq.
Attorney for State

BY: Melissa R. Armstrong, Esq.
Attorney for Luzenski Allen Cottrell

BY: Stuart M. Axelrod, Esq.
Attorney for Luzenski Allen Cottrell

Brenda R. Babb
Circuit Court Reporter

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J

Status Conference - October 14, 2011

3

1 The Court: Gentlemen, I think we have a
2 scheduled status conference this morning. Who wants to go
3 first?

4 Mr. Richardson: Your Honor, if you want to take
5 up the, I believe, scheduled for today was the jury
6 questionnaire point, I'm ready to take that up.

7 The Court: All right, I think that you probably
8 have a copy of the one that's been provided to me, do you?

9 Mr. Richardson: Yes, sir, I've got several
10 copies. First is the copy that we had provided that starts
11 off jury questionnaire. Your Honor, it was taken directly
12 from Judge Gary Clary's book on the issue, I believe, it's
13 the golden standard.

14 The Court: Let me make sure I've got, yes,
15 okay.

16 Mr. Richardson: It is forty-two questions, Your
17 Honor, I believe that has been approved by the Supreme
18 Court. This is the one, this is basically part what they
19 go off of now. We can always add to it or take away, well
20 I hate to take away from anything, but if there are other
21 specific questions to this that needs to be added we
22 certainly are willing to work off of that.

23 Also, Your Honor, I talked with our Clerk of
24 Court's office and I hadn't provided this earlier but I
25 believe you already have it, it's basically the same form

Status Conference - October 14, 2011

4

1 that they have used for the past twenty years. It is the
2 same questions as the one we had earlier submitted but
3 there are fifty in this as opposed to forty-two. Either of
4 these, Your Honor, would be fine by the state.

5 Mr. Axelrod had also ---

6 The Court: Submitted one that was twenty pages
7 long.

8 Mr. Richardson: He's submitted three, Your
9 Honor.

10 The Court: Well I have one I think, Mr.
11 Axelrod.

12 Mr. Richardson: The first was twenty-one pages
13 long, over a hundred and ten questions which we certainly
14 believe that that's too cumbersome.

15 The Court: And I might have, there's some
16 attachments ---

17 Mr. Axelrod: Yes, sir, Your Honor.

18 The Court: --- that I have from Mr. Axelrod
19 that might be different ones.

20 Mr. Axelrod: Your Honor, for the record I
21 believe the Court ordered on September 16th to provide to
22 the Court that was in the scheduling order the jury
23 qualifications questions which we provided on September the
24 16th, well we just received from the state today, right
25 now, theirs. I believe that this was not, this was not an

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1 issue to be argued today for the status conference, it
2 wasn't on there. We submitted ours; we were expecting to
3 receive theirs. We did not receive theirs. We would ask
4 that, I believe the court's scheduled November 7th for
5 motion hearings, that this be scheduled on that day. We
6 just received this, Judge, we didn't bring our package
7 today with us cause it wasn't on our roster.

8 The Court: How about that, Mr. Richardson?

9 Mr. Richardson: Your Honor, I was under the
10 understanding from the scheduling order, and we certainly
11 didn't meet in September and moved that over to today, but
12 it said that the deadline for the state and the defense
13 counsel to submit additional questions to the standard
14 questionnaire, this is the standard questionnaire, we
15 didn't add anything to it. I passed up the one that the
16 clerk has used for the last twenty years and I passed up
17 the one from the standard questionnaire form and then, of
18 course, for today's schedule was to go over, the court
19 would conduct a hearing to determine any additional
20 questions to be included on the standard jury
21 questionnaire. I guess from the state's standpoint we're
22 not asking that any additional questions go on from the
23 questionnaire.

24 The Court: I understand.

25 Mr. Richardson: Now Mr. Axelrod has passed up,

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1 of course, you've already hit upon it, he did turn in three
2 questionnaires. Of course the first one is twenty-one
3 pages long, it's over a hundred and ten questions, we
4 certainly believe that that's too burdensome. I'm sure ---

5 The Court: I'm saying would the jury answer
6 them is the problem I have, Mr. Axelrod, with that issue,
7 you know, whether or not we take it up on the 9th or take
8 it up today.

9 Mr. Axelrod: Your Honor, to respond to the
10 first I don't think it's too burdensome when a man's life
11 is at stake. Your Honor, furthermore we have, we thought
12 and the state agrees that anything that they were in
13 disagreement with us they would file a written response to
14 us so if the state was opposed to my burdensome motions we
15 would have expected a motion back to us in opposition to
16 that. We received none so we were under the impression
17 that they acquiesce to that today, Your Honor.

18 The Court: All right, well we'll take it up on
19 November the 9th, 7th, when is it scheduled?

20 Mr. Axelrod: It originally was the 7th, I'll
21 look ---

22 The Court: I believe it's the 9th.

23 The Law Clerk: We originally said that Thursday
24 the week of the 7th but it's the Wednesday afternoon of the
25 9th, PCR reviews that morning, so Wednesday afternoon on

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7

1 the 9th.

2 Mr. Axelrod: Is that when it's set for?

3 The Court Clerk: Yes, sir.

4 Mr. Axelrod: Okay.

5 The Court: And so we'll take it ---

6 Ms. Armstrong: The time on the 9th is that
7 12:30?

8 Law Clerk: Probably later than that, after
9 lunch

10 Mr. Axelrod: 2:00?

11 Law Clerk: Yes, sir.

12 Ms. Armstrong: Thank you, I appreciate it.

13 Mr. Richardson: So on the 9th we'll discuss the
14 jury questionnaire?

15 The Court: Right.

16 Mr. Richardson: Your Honor, if you want us to
17 I'll send out a short maybe ---

18 The Court: I just want to make sure that we can
19 get this questionnaire out early enough that we could get
20 responses back in. I mean we're talking about seven
21 hundred potential jurors and ---

22 Mr. Richardson: Yes, sir, Your Honor.

23 The Court: --- our Clerk of Court has got to
24 handle this administratively so we're going to have to get
25 this issue resolved on the 9th.

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1 Mr. Richardson: Your Honor, I have also an
2 order for additional jurors, I think you said seven
3 hundred, this is for four hundred additional jurors the
4 clerk would need to bring in more jurors for that panel.

5 The Court: Twelve hundred, I mean --

6 Mr. Richardson: No, sir, they usually ---

7 The Court: Eleven hundred jurors, a thousand
8 jurors.

9 Mr. Richardson: They usually bring in about
10 three hundred and this is for an additional four hundred.

11 The Court: So that makes it about seven
12 hundred.

13 Mr. Richardson: Yes, sir.

14 The Court: I've been talking about this with
15 the clerk administratively to find out what we're going to
16 need and we've anticipated about seven hundred. Any
17 objection to that, Mr. or counsel, I think that's probably
18 what we need to bring in?

19 Mr. Richardson: Stuart, he's asking if you have
20 an objection to this four hundred?

21 The Court: Okay, all right.

22 Mr. Axelrod: Your Honor, if the state feels
23 there needs to be more we can bring a thousand, of course,
24 Judge, you know, I do think that we're going to have
25 trouble getting a jury.

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1 The Court: Well that's why I'm going to have,
2 make sure we have plenty. That issue has been raised
3 already; we've discussed it and as I said I had a
4 conversation, a brief conversation with the clerk about the
5 administrative issues of what we had to do for her to get
6 her on line and get her ready and she's anticipated the
7 seven hundred.

8 Mr. Richardson: Yes, sir, Your Honor, well we
9 will, will look to renew, I'll send out a short email to
10 counsel stating our objections to the submitted jury
11 questionnaire.

12 The Court: All right, very well, well do that
13 then.

14 Mr. Hembree: Your Honor, the next thing we have
15 on our list is the, and I probably should just kind of hand
16 this off to Mr. Axelrod, but he has submitted a motion
17 dated September the 16th asking the court for clarification
18 regarding the court's prior ruling that Mr. Axelrod or the
19 defense team is going to be required to follow Rule 13 of
20 the rules of criminal procedure regarding subpoenas and the
21 court had made the ruling quite clear, exceedingly clear,
22 at the last hearing that Mr. Axelrod would need to, to go
23 through the normal discovery process and that subpoenas
24 were not appropriate except in accordance with the rule
25 which is subpoenaing people for court and documents with

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10

1 those people for court, so he had asked for clarification I
2 just ---

3 The Court: How much clearer do you need that?

4 Mr. Axelrod: Well we submitted an order to the
5 court and we asked the court to sign an order, gave them,
6 can we have that today, that order, proposed orders stating
7 that we were precluding from doing that.

8 The Court: And I have no problem with that, I
9 think the order of clarification says exactly that, I mean,
10 you know, have you sent a copy to ---

11 Mr. Hembree: I just haven't seen the order,
12 Your Honor.

13 Mr. Axelrod: Your Honor, we hand delivered it
14 to your clerk.

15 The Court: All right, show him a copy if you
16 would. Taylor, will get you one right now.

17 Mr. Hembree: Your Honor, if you don't mind
18 while we're waiting on that if you'd kind of move on to the
19 next issue.

20 At the last hearing there was an issue or a
21 concern about the indictments and how to present that
22 indictment to the jury because there were four counts in
23 that indictment initially. As the court knows the Supreme
24 Court only reversed one of those convictions and that was
25 the conviction for murder leaving the other three and there

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11

1 was a, there was a concern. We reached a conclusion that
2 we could just, we could just redact that indictment, leave
3 that material out, that was, that solved problem number
4 one.

5 The problem number two that we thought we might
6 have was a potential res judicata issue and we were asked
7 to brief the issue. Well the defense counsel and state
8 both went back reviewed the original indictment and we
9 realized that the charges that remain, the convictions that
10 were affirmed all had to do with, with someone other than
11 McGarry, the car was stolen, was stolen from Donnie Morgan,
12 the assault not resisting arrest was Guthinger and the
13 other assault was Guthinger so because of that it really,
14 it removed the res judicata issue. We both, we talked a
15 little bit, had just a chance this morning to talk a little
16 bit about that, I think we both agreed that that is no
17 longer an issue and we've sort of figured how to, how to
18 work around that and get to trial.

19 The Court: Well let's get an order then,
20 consent order saying how we're going to do it; I don't want
21 it to pop up at trial.

22 Mr. Hembree: Your Honor, as far we could do the
23 consent order regarding the indictment?

24 The Court: How do you propose to proceed with
25 that indictment.

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1 Mr. Hembree: Very good, we could ---

2 The Court: Or present it, whatever you,
3 whatever you've agreed to let's reduce it to writing in the
4 form of a consent order, that way that issue is laid to
5 rest, it's not going to come back up.

6 Mr. Hembree: Thank you, Your Honor, we'll,
7 we'll take care of that and have it ready before the 9th,
8 November the 9th.

9 The Court: All right, good.

10 Ms. Armstrong: Just going to say the defense
11 agrees with Mr. Hembree, I think we resolved it.

12 The Court: All right.

13 Mr. Hembree: I guess, Ms. Armstrong, would it
14 be best for us to work together on that to get that order
15 drafted?

16 Ms. Armstrong: That would be great, thank you.

17 The Court: All right.

18 Mr. Hembree: The next item, Your Honor, is
19 regarding, I know that defense counsel was to provide the
20 court the names of the experts that they intend to use at
21 trial, provide those names to the court by August the 18th
22 and although we don't need to know the names of those
23 experts at this point we just want to be confident that
24 that, that list has been --

25 The Court: I intend to have a meeting ex parte

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13

1 with counsel concerning some experts following this in
2 camera meeting and I believe at that time they'll be in a
3 position to let you know.

4 Mr. Hembree: Thank you, Your Honor.

5 The Court: I want to resolve the issues of
6 experts today. The ruling is in this order is after a
7 hearing on both sides and taking all matters into
8 consideration it is the ruling of the court that the
9 defense is not entitled to request the issues of subpoenas
10 from the clerk of court and must submit all requests for
11 documents through the solicitor's office in the form of a
12 motion for discovery, in accordance with this ruling the
13 clerk specifically didn't issue any subpoenas upon
14 application of the defense, and that's not exactly what I
15 said, Mr. Axelrod. I certainly would not want to sign that
16 except in compliance with the rule and for purposes of
17 trial, I'd like to have that added to that, okay. I want
18 it very clear you can issue subpoenas, you can request
19 subpoenas, you can have subpoenas issued as long as you
20 comply with the rule which in my view requires you to or
21 requires that the subpoena be issued for a specific hearing
22 or trial.

23 Mr. Axelrod: Okay, now I need to know what I
24 need to specifically put on to that cause according to that
25 something, can we do that today or do you want me to redo

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14

1 the order; whatever the court wants cause I tried to
2 prepare an order that ---

3 The Court: All right, I'm going to change it
4 and put in accordances the clerk is specifically forbidden
5 from issuing any subpoenas upon application from the
6 defense except in compliance, is it rule 13?

7 Mr. Axelrod: Yes, sir, Your Honor.

8 Mr. Hembree: Yes, Your Honor.

9 The Court: All right, what I've added to this
10 except in compliance with rule 13 for the purposes of
11 hearings or trial, satisfy you, Mr. Hembree?

12 Mr. Hembree: Yes, Your Honor.

13 Mr. Axelrod: I would note my exception to it
14 but respect the court's ruling, Judge.

15 The Court: All right.

16 Mr. Axelrod: And I will file it and provide
17 copies today.

18 Mr. Hembree: Your Honor, on this to kind of
19 wrap this issue up from the State's perspective I have
20 every confidence that Mr. Axelrod and Ms. Armstrong will
21 not issue subpoenas except in accordance with the rule now
22 that the court has clarified that point, however, if they
23 do obtain material through a subpoena that is, that is used
24 improperly we will be objecting to the, the introduction of
25 any evidence obtained in that manner and I just wouldn't

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15

1 want, you know, I don't want anybody misunderstanding what,
2 what position the state would take in such, in such a
3 circumstance, thank you.

4 The Court: Okay, what else do we have there,
5 Mr. Richardson, Mr. Hembree?

6 Mr. Richardson: Your Honor, I did receive some
7 supplemental discovery in the form of interrogatories from
8 Mr. Axelrod. I have completed those and have two copies
9 for Ms. Armstrong and Mr. Axelrod today. Many of them,
10 well the first few were specific to our office, the last
11 few dealt with cases back from 1972. I've answered that
12 and moved to try to help them in any way we could but it
13 basically calls for research that's outside of our office
14 and I have given that to them today as far as supplemental
15 discovery.

16 The Court: All right, Ms. Armstrong, Mr.
17 Axelrod, let me hear you on that, what are we talking
18 about?

19 Mr. Axelrod: Your Honor, we received this
20 today. I would ask the court we're unable to look at what
21 they're talking about right now. I understand if I file a
22 motion that they have to respond in writing if they're
23 against the motion. I would ask that they have a certain
24 amount of days to respond to us so that we can then make a
25 respond back and the court would have both sides of it.

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1 The Court: You mean discovery motions?

2 Mr. Axelrod: Yes, sir, Your Honor, any pretrial
3 motions. If I file a pretrial motion they're in opposition
4 to they have to file a motion back, a written motion. I'm
5 getting stuff back today ---

6 The Court: A reply.

7 Mr. Axelrod: A reply, I'm asking that they have
8 certain ---

9 The Court: All right, well I want this to move
10 to move along and I don't issues popping up at the last
11 moment that might cause this trial to be continued again.
12 Would it be unreasonable, Mr. Richardson, to reply say ten
13 days after service if there's an issue raised by a motion
14 that you simply reply we oppose this or we don't so that we
15 can move these things along?

16 Mr. Richardson: I have no problem with that at
17 all, Your Honor, and if Your Honor is willing again in
18 November if they're having any problems with that we can
19 take it up.

20 The Court: And there again it's just a
21 housekeeping matter, something that will help us keep on
22 track so we know precisely what's opposed and what's not
23 opposed so that we can move along more efficiently. All
24 right, Mr. Axelrod, if you would prepare a brief order to
25 that affect to make sure that it's served on the solicitor?

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1 Mr. Axelrod: Yes, sir, Your Honor.

2 Mr. Richardson: Your Honor, the other thing
3 that I would bring up is that earlier in this hearing I did
4 pass up earlier requests a transcript on the previous
5 trial.

6 The Court: Thank you.

7 Mr. Richardson: Yes, sir, I just wanted to put
8 that on the record.

9 The Court: I have it and I appreciate that,
10 okay. All right, is that --

11 Mr. Hembree: Getting on the short end of it,
12 Judge, we've got, I've got a stack of motions that Mr.
13 Axelrod has filed, they're kind of boiler plate motions we
14 typically see in death penalty cases and many of these we
15 can agree with but I've talked with Mr. Axelrod ---

16 The Court: I think they're typical to the
17 extent that I looked at some of them that had the wrong
18 defendants names on them.

19 Mr. Hembree: Well, Your Honor, be it as it may
20 ---

21 The Court: Cut and paste.

22 Mr. Hembree: We're, we're, I touched base with
23 Mr. Axelrod before the hearing today, quite frankly I think
24 if we can sit down and have a conversation about it we can
25 resolve the vast majority of these motions. I'd probably

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18

1 be in agreement on them; there may be a ---

2 The Court: Why don't we do this, why don't, I'm
3 going to be out of the country for about two weeks, why
4 don't the four, well let's say in the next fifteen days ---

5 Mr. Hembree: That will be fine, Your Honor.

6 The Court: Motions that have been served on
7 you, you make a response to those as well saying whether
8 you object to them or not.

9 Mr. Hembree: Fair enough.

10 The Court: So that we'll just know what we've
11 got.

12 Mr. Hembree: Fair enough, Your Honor, we'll
13 just do it that day but perhaps we can, we'll handle it
14 that way, I certainly quite frankly I feel like if I could
15 talk, if we could just talk about them there may be some if
16 I can get some clarification about them that I might be
17 able to agree to them and respond that way and I think that
18 conversation might have a lot of value. I know Mr. Axelrod
19 has got a pretty full schedule next week but we're willing
20 to make that happen.

21 Mr. Axelrod: Judge, Mr. Hembree discussed it
22 with me, as the Solicitor said anything we can discuss some
23 of these and we maybe iron out some points then when he
24 files that motion fifteen days it will be easier.

25 The Court: Okay, all right.

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1 Mr. Axelrod: And I'll make time.

2 The Court: And if you are in agreement, Mr.
3 Axelrod, they're your motions do a brief consent order that
4 the solicitor can sign.

5 Mr. Axelrod: Well I thought, Your Honor, just -
6 --

7 The Court: On any motion.

8 Mr. Axelrod: I just would, Your Honor, just ask
9 the Solicitor to provide a list of the motions where
10 they're opposed ---

11 The Court: He's going to tell you in the next
12 fifteen days in writing what he's opposed to. I would hope
13 that in that time you would have an opportunity to sit down
14 and discuss these immediately thereafter and I would hope
15 before November the 9th you would submit to me a brief
16 consent order where for my signature where the ones that
17 have been agreed upon are agreed upon.

18 Mr. Axelrod: We'll do that.

19 The Court: Okay.

20 Mr. Axelrod: Thank you, Your Honor.

21 Mr. Hembree: The last thing that I have on my
22 list, there was a concern that Mr. Axelrod had expressed at
23 our last meeting about receiving some material from SLED.
24 We made, it's my belief that SLED has complied with that
25 and has sent you the material that they, they, that he

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20

1 needed. This was, I spoke to Margaret Knox who's the
2 office of general counsel over at sled ---

3 The Court: What do you think they've got, Mr.
4 Axelrod, that you don't have, Ms. Armstrong?

5 Mr. Axelrod: Your Honor, we're not scheduled to
6 argue, we didn't bring that material with us today.

7 Mr. Hembree: It's not, it's not an argument,
8 Judge.

9 The Court: Well that's one of the things you
10 can work with Mr. Hembree on, if you think that there's
11 something out there that you don't know about let's give
12 everybody a heads up. It's much more efficient to enter
13 November the 9th motions hearing with everybody knowing
14 what's out there. If you don't have something Mr. Hembree
15 may not even know about it and he may be perfectly willing
16 for you to have it so just give him a heads up on it.

17 Mr. Axelrod: I will, Your Honor. Your Honor,
18 for clarification we're going to be on Wednesday the
19 afternoon of the 9th, if we continue beyond the 9th will it
20 be the 10th, if we go beyond that afternoon if that hearing
21 takes longer?

22 The Court: Absolutely we'll do it that
23 afternoon, I've got PCR's, we'll just send them back.
24 Taylor tells me that actually he's cleared it from
25 Wednesday on.

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21

1 Mr. Axelrod: Thank you, Your Honor.

2 The Court: For the purposes of this, okay.

3 Mr. Hembree: Your Honor, I don't believe the
4 state has anything else ---

5 The Court: Anything else that I need to address
6 ---

7 Mr. Hembree: --- for the status conference.

8 The Court: Okay, all right, Ms. Armstrong, Mr.
9 Axelrod, tell me what I can do for you today other than
10 matters that we need to take up ex parte?

11 Mr. Axelrod: Your Honor, I believe that's all.

12 The Court: Is that it?

13 Ms. Armstrong: Yes, Your Honor.

14 The Court: Nothing else I need to do?

15 Mr. Axelrod: No, sir, Your Honor.

16 The Court: All right, gentlemen, if you would
17 I've asked you for some orders. I'd like to have all of
18 this reduced to orders, that way there's no confusion down
19 the road as to what I may have said or I didn't say or what
20 we didn't do or did do so let's take care of those, get
21 them in to me, get them to Taylor, and he's going to have
22 them ready for me, okay, when I get back, all right.

23 Mr. Hembree: Thank you, Your Honor.

24 Ms. Armstrong: Thank you.

25 The Court: Thank you very much, all right, Ms.

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22

1 Armstrong, Mr. Axelrod, I want to see you in chambers.

2 End of requested transcript.....

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CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, official court reporter the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina.

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

August 15, 2015

Brenda R. Babb

Brenda R. Babb, CVR

OFFICIAL REPORTER

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS
2003-GS-26-0020

COUNTY OF Horry

STATE OF SOUTH CAROLINA,

-vs-

LUZENSKI COTTRELL,

Defendant.

November 9, 2011

B E F O R E:

HONORABLE LARRY B. HYMAN

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

JOHN GREGORY HEMBREE, Esquire
JIMMY RICHARDSON, Esquire
Attorneys for the State

STUART M. AXELROD, Esquire
LISA ARMSTRONG, Esquire
Attorneys for the Defendant

Henry P. Young
Court Reporter

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P-R-O-C-E-E-D-I-N-G-S

(Convened at 2:45 p.m.).

THE COURT: Is he here?

DEPUTY SHERIFF: They just walked in.

THE COURT: All right, we have everyone in the courtroom at this time and I'm ready to proceed with the motions. We'll take up the exparte matters after we take up the motions that need to be addressed by the Solicitor.

Solicitor, do you have any outstanding motions?

MR. HEMBREE: Your Honor, I don't believe we do, no, sir.

THE COURT: I haven't seen anything. I just asked you to be abundantly cautious, probably overly cautious.

All right. Miss Armstrong.

MS. ARMSTRONG: Your Honor, we do have one witness for our exparte matter who I believe --

THE COURT: We're not going to do the exparte matters yet, we'll go right into the other matters.

I understand you have many motions that are not exparte, is that correct?

MR. AXELROD: Yes, Your Honor. What we wanted to tell the Court was we need to get the

1 exparte done sometime today, that's all.

2 THE COURT: We're going to do them all today.

3 MR. AXELROD: Yes, sir.

4 THE COURT: Okay. We're already an hour late
5 getting started.

6 MR. AXELROD: Your Honor, we would ask that
7 the witnesses be sequestered until we call for
8 them, anyone that has been subpoenaed.

9 THE COURT: I don't think Mr. Hembree
10 subpoenaed anybody.

11 MR. HEMBREE: No, Your Honor.

12 THE COURT: If you want to sequester your
13 witnesses that's fine. Any person in this
14 courtroom that has been subpoenaed as a witness to
15 testify in any matter today please remove yourself
16 at this time but remain on this hall where we can
17 find you.

18 (Witnesses excused from the courtroom).

19 THE COURT: Okay.

20 MR. AXELROD: If I may, Your Honor, if it
21 pleases the Court, sir, we presented to the
22 Solicitor and the Court as well, we presented a
23 batch of pretrial motions. They are listed the way
24 we clocked them. The first set was clocked on
25 August 18, 2011. What we did was we Bates stamped

1 all those motions sequentially through that set.

2 The next set we'll speak about today was
3 clocked on September 16, that was jury
4 questionnaire. And the next one we clocked on
5 October 14th, 15 motions, and they are all stamped
6 with Bates stamps. The Solicitor and I and Miss
7 Armstrong discussed this at a meeting a week or so
8 ago, we thought this would be the best way that
9 everybody would be able to know what motion, what
10 page we're on.

11 THE COURT: All right. I have a notebook here
12 with all those motions.

13 MR. AXELROD: The first motion we would like
14 to bring up, Your Honor, is a motion for all the
15 evidentiary matters to be held in-camera.

16 Now, I believe that the Solicitor and our
17 side, the defense, has agreed on that motion and
18 what that motion would be, Your Honor, would be,
19 would prohibit media from being in the courtroom
20 when substantive evidentiary matters are being
21 argued and discussed.

22 THE COURT: Well, I have already tried to
23 protect the record in one other case by excluding
24 the media and that lasted for just about three
25 hours until I got a supersedeas from the Chief

1 Justice saying that I couldn't do that.

2 How do you propose I would do it?

3 MR. RICHARDSON: Your Honor, I can maybe
4 elaborate a little on that. South Carolina Supreme
5 Court, Hurst Television is a similar case on the
6 matter, Your Honor. There are opportunities
7 pretrial to close the courtroom to television
8 cameras as listed.

9 THE COURT: That is not what I was asking. I
10 thought he is asking to exclude the media.

11 MR. RICHARDSON: And I believe the only way
12 to do that is to pass a three part test. That is,
13 that there is a substantial probability that the
14 defendant's right to fair trial will be prejudiced
15 by publicity, there is a substantial probability
16 that closure would prevent that prejudice, and
17 reasonable alternatives to closure could not
18 adequately protect the defendant's rights.

19 THE COURT: That is exactly the standard that
20 I applied in my other case or thought I was,
21 anyway. It didn't work. I don't mind issuing an
22 order but expect it to be challenged and --

23 MR. RICHARDSON: Your Honor, one other thing
24 I would point out. That is additionally you must
25 list specific findings justifying the closure so

1 that the appellate court may review that decision
2 to determine its correctness.

3 THE COURT: And I will do that, we will have
4 to take some testimony, I would imagine, or I will
5 hear from counsel as to why.

6 MR. AXELROD: Your Honor, I will address what
7 Solicitor Richardson was talking about. I believe
8 the three prong test was, the first prong is the
9 nature and the extent of the pretrial publicity.
10 Your Honor, this is a case where a police officer
11 was killed. There is going to be lots of
12 publicity. There has been publicity for this case
13 from the time it happened in 2002. Every year in
14 December, the anniversary of the officer's passing,
15 they have a memorial. They have just started to do
16 a new award in Myrtle Beach where they are going to
17 have I believe the officer of the year award, it
18 will be given in the name of Joseph McGarry.

19 Your Honor, I think on that first prong, the
20 nature and the extent, it is going to be a huge
21 case, it is going to be in the newsppaer, it is in
22 the newspapers now. I think the Horry Independent
23 did an article a month ago. The headline was can
24 Cottrell get a fair trial. That was the headline.
25 The headline was three-quarters of an inch thick,

1 speaking about he is brought into court in
2 shackles. That article didn't help us, it just
3 didn't help the jury pool, but these are the people
4 that are reading this stuff. We're going to have
5 700 jurors out there, we're going to ask them,
6 "Have you been influenced by the media?" I think
7 anything, anything going out into the media right
8 now just poisons that pool more than it already is.

9 The second prong is whether other measures
10 would be more likely to mitigate the effect of the
11 unrestrained pretrial publicity. I don't know any
12 other way to mitigate, to mitigate that publicity.

13 And the third prong is how effective the
14 restraining order would operate to prevent
15 threatened danger. I think if we were to exclude
16 all media from speaking or writing about this case
17 it would solve that danger. I think the
18 Solicitor's office --

19 THE COURT: You can't preclude the media from
20 speaking or writing about this case. I mean,
21 that's way beyond what you're asking me to do.

22 MR. AXELROD: But excluding them from these
23 hearings and all the pretrial hearings, they would
24 only be able to write about what they know about
25 from the past and I think without the Solicitor's

1 office putting out any more press releases and we
2 be quiet on that front, that it would help the
3 pool. I think it would give Mr. Cottrell the fair
4 trial that he deserves or the fair playing field
5 that he is entitled to constitutionally.

6 THE COURT: Let me hear from you, Mr.
7 Richardson, in that regard.

8 MR. RICHARDSON: Well, Your Honor, definitely
9 we do seek to give him a fair trial and certainly
10 to cut down on pretrial publicity. I don't know
11 that there has been enough on the record at this
12 point and I certainly don't think --

13 THE COURT: I mean, I don't even know what
14 the evidentiary issues are. I don't know whether
15 any specific rights inuring to the defendant would
16 be violated.

17 MR. AXELROD: Well, an example, we're going
18 to have a motion today to exclude the Solicitor's
19 office for prosecutorial misconduct. I think that
20 would be an inflammatory article whether written in
21 the paper or television, I think it would for both
22 sides. I also think, Your Honor, Horry County is a
23 transitory place, people come and people go. I
24 think that if we precluded the media from having
25 the ability to write about this case now, about the

1 matters going on, that it would just help the pool
2 because a lot of people did not live here seven
3 years ago.

4 THE COURT: Mr. Richardson?

5 MR. RICHARDSON: Your Honor --

6 THE COURT: I mean, I haven't been provided
7 with anything other than your three prong test. I
8 mean, you tell me there is a significant
9 probability that the defendant's right to fair
10 trial will be prejudiced, okay? You tell me there
11 is substantial probability closure would prevent
12 the prejudice.

13 And number three, that the reasonable
14 alternatives to closure would not adequately
15 protect the defendant's rights. I mean, you made
16 these bareboned statements, Mr. Axelrod, but how am
17 I to make such findings?

18 MR. AXELROD: Well, the newspaper article, I
19 don't have it with me today -- do I? No, we didn't
20 bring it. We have a newspaper article from two
21 weeks ago --

22 THE COURT: What you have done is you have
23 told me there was an article that has already been
24 printed, that is already out there.

25 MR. AXELROD: But I'm trying to prevent the

1 additional ones.

2 THE COURT: Which ones?

3 MR. AXELROD: The ones that if they are in
4 this courtroom they are probably going to write,
5 the lady from the Horry County Independent.

6 THE COURT: Which one, about what, about what
7 issue?

8 MR. AXELROD: About whatever issues that we
9 bring to this Court prior to trial.

10 THE COURT: So what you want me to do is make
11 a finding that I should close the courtroom just in
12 case some sensitive matter might be mentioned that
13 the newspaper might print? I mean, how am I to
14 determine whether or not there is a substantial
15 probability that his right to a fair trial will be
16 prejudiced by publicity that I don't even know
17 about? I don't know what publicity you're talking
18 about. You're telling me, well, something might
19 come up, so let's exclude the press. It is pure
20 speculation. I have to make a finding --

21 MS. ARMSTRONG: Your Honor, may it please the
22 Court.

23 THE COURT: Yes.

24 MS. ARMSTRONG: What I would suggest, to give
25 Your Honor something to at least rule on that you

1 can read and review and consider for yourself is
2 what we should do is submit all the pretrial
3 publicity that was out there and that we have
4 copies of and give that to Your Honor with a brief
5 memorandum in support of our position so you could
6 look at the sorts of things that have been
7 published before the first trial and anything that
8 has happened subsequent, to even see what is out
9 there, or what was out there the first time and
10 determine for yourself --

11 THE COURT: That stuff has been presented in
12 the past, it is already out there. Some of it is
13 nine years old. What do you anticipate being
14 printed now? Give me some idea what you're seeking
15 to hide from the press, to prevent the press
16 knowing. I don't have a clue as to what
17 evidentiary matters you're going to approach. I
18 mean, do you want to give me a list of them and
19 tell me specifically how any reporting on these
20 issues would be prejudicial to Mr. Cottrell? I
21 mean, that is kind of what I need. I mean, you
22 can't just come in here, Mr. Axelrod, and say,
23 "Hey, everything that we want to raise that has got
24 anything to do or has in any way become an
25 evidentiary matter, we want the press excluded,"

1 that is what you're saying, "because it could have
2 a prejudicial effect on his rights to a fair
3 trial."

4 MR. AXELROD: I understand your logic, sir.

5 THE COURT: I don't know what you're talking
6 about, much less what the prejudicial effect would
7 be.

8 MR. AXELROD: The flip side would be if the
9 press was in here today and the press wrote an
10 article based on what we had here today on some
11 issue, whatever the issue might be, and that gets
12 published, then that issue, whatever it might be,
13 could be a prejudicial issue. Once the cat is out
14 of the bag it's hard to put it back in the bag.

15 THE COURT: Well, the motion is denied until
16 such time a more specific motion is made.

17 Okay.

18 MR. HEMBREE: Your Honor, I had conferred
19 with Mr. Axelrod prior to the hearing, just a
20 little while ago. There are two motions that are
21 in the group from October 14th, the first two
22 motions. Those motions, I know that there are a
23 number of witnesses that the defense counsel has
24 subpoenaed to court for purposes of those motions.
25 We would respectfully request that we take those

1 motions out of order so those folks can do what
2 they need to do and return to their normal duties.

3 THE COURT: What about that, Miss Armstrong?

4 MR. AXELROD: No objection, Your Honor.

5 MS. ARMSTRONG: No objection.

6 THE COURT: Okay, let's take those up, and I
7 would imagine that's the motion to dismiss on the
8 ground of prejudicial prosecutorial misconduct?

9 MR. HEMBREE: Yes, sir, that's the first one.
10 The second is the motion to disqualify our office.

11 THE COURT: Okay, let's go ahead and take
12 those up.

13 MR. AXELROD: Your Honor, our first motion we
14 clocked on October 14th, we seek to dismiss the
15 charges against the defendant based on the actions
16 of the Solicitor's office in wrongfully storing,
17 handling, packaging evidence from March 24th, 2005,
18 until May the 27th, 2011.

19 Your Honor, I would give the Court a
20 constitutional and statutory basis. The
21 Solicitor's actions in maintaining the evidence in
22 the way he did violates my client's Fifth Amendment
23 and Fourteenth Amendment right to due process.

24 Your Honor, at this time, because what
25 happened, I will give the Court a brief history

1 here. Evidence is sent to SLED and then SLED sends
2 back the evidence to the Solicitor's office in
3 2005. The Best Bags sent back from SLED were sent
4 back sealed. They arrived at the Solicitor's
5 office, I think we can show, in a sealed condition.

6 Over the next six years those bags were
7 opened. The evidence was absolutely tampered with
8 to some degree, the bags were cut open, there are
9 three bags that are now open. At that point, on
10 May 27th, 2011, we were scheduled to see the
11 evidence at the Solicitor's office and we called
12 the Myrtle Beach Police, my investigator called and
13 we were told, and we emailed Jimmy Richardson, we
14 were told that day there had been a mixup,
15 something to that effect, and they didn't have the
16 right manpower and could we come another day.

17 Well, what actually happen that day on May
18 the 27th, 2011, I believe that Solicitor Hembree or
19 somebody in his office requested that Geordie
20 Livingston, their investigator, package up that
21 material and they called Laura Rabin from the Horry
22 County evidence room, they asked her to come over
23 to his office and take all that material and all
24 the evidence that they had stored for the six years
25 to the Horry County evidence room.

1 Your Honor, clearly they were aware they
2 shouldn't have had it, clearly they were aware it
3 had been tampered with. Somebody in his office,
4 I'm not saying the Solicitor, I'm saying somebody
5 in that office must have had access to some closet
6 or wherever they stored it. They allowed somebody
7 to cut the bags open. We're asking for the case to
8 be dismissed for that purpose.

9 Also we want to know who cut the bags open
10 and why the bags were cut open, because a sealed
11 Best Bag from SLED is supposed to remain sealed.
12 The Solicitor never should have had that in his
13 possession.

14 The second motion, I will go to because it
15 dovetails into it, we go back to that first one for
16 the evidence, Your Honor. The second one is to
17 exclude the Solicitors office from the case. They
18 are in this chain now, they held important evidence
19 for six years, they are in the chain. Their
20 office, the Solicitor, the custodians in the
21 office, they have to be called to this trial --

22 THE COURT: Is any of this evidence fungible?

23 MR. AXELROD: Yes, Your Honor. The bags cut
24 open had fungible evidence in them.

25 MR. HEMBREE: Let me, Mr. Axelrod has got it

1 partially right. Evidence was brought back from
2 SLED -- I will go back a step. There was evidence
3 that -- SLED processed the crime scene in this case
4 because there was concern about Myrtle Beach doing
5 the crime scene since it was one of their own
6 officers that had been killed, so SLED was called
7 in to process that crime scene. They collected
8 certain items of evidence, they transported those
9 items of evidence to SLED in Columbia, they did
10 various tests on some of the evidence, some of it
11 they, much of it they did not. They held that
12 evidence for a period of time.

13 At one point prior, in preparation for trial
14 I know that myself and Fran Humphreys went to SLED
15 in Columbia to review, to look at, you know, kind
16 of see what we had there, try to make some
17 judgments about what might need to be done or not
18 done with those pieces of evidence. That evidence
19 at that time was kept in SLED custody.

20 About a week before trial we asked our
21 investigator Dale Long to go to SLED, which was not
22 an uncommon practice, it doesn't happen a lot but
23 we do this from time to time, we asked him to go to
24 SLED and retrieve that evidence, bring it back to
25 Horry County, take custody of the evidence, it was

1 in his custody and control, bring it back to Horry
2 County so it would be available at the trial just
3 in case.

4 There were a few items that we wanted to look
5 at for the possibility of putting them in evidence
6 at the trial but primarily our interest was to have
7 it available so in case anybody needed anything,
8 the defense or State, you know, we could go, we
9 would have it there, we wouldn't have to rush up to
10 Columbia and take half a day off to drive back and
11 forth down the road.

12 When it was brought back here myself and
13 Deputy Solicitor at the time Fran Humphreys did, we
14 did look at the evidence. We didn't open every
15 piece of evidence but there were, there were bags,
16 there were containers that we opened to physically
17 view the evidence that was contained in the
18 envelopes, what was stated to be contained in the
19 envelopes or containers. That was done in the
20 presence of Dale Long. He retained custody and
21 control of that evidence. We merely, you know,
22 viewed it in his presence, returned it, and my
23 recollection, there were a few things that we put
24 into the case at trial but the vast majority, a
25 great portion of it was never even opened. A

1 smaller portion was opened and looked at but never
2 introduced in evidence and just repackaged.

3 It remained in the custody and control of
4 Dale Long. He then stored it. We have a secure
5 evidence facility in our office, not many people
6 know that, but we have a room that has got a
7 secured steel door that is made for evidence
8 storage. That is the purpose --

9 THE COURT: I knew that as a defense lawyer.

10 MR. HEMBREE: We have the same thing,
11 obviously we don't have the room to store lots and
12 lots of evidence but we do have cases that we have
13 evidence stored in that locker and it is designated
14 to an investigator in that office, that is the
15 evidence custodian for that evidence. So, it
16 remained, that evidence was stored in the secured
17 locker by Dale Long, it remained there.

18 When Dale Long left the employ of our office
19 he ceded control of that evidence, custody and
20 control of that evidence to Geordie Livingston, our
21 chief investigator. He maintained custody and
22 control until recently this summer or late spring
23 when we were going through the process of trying to
24 provide the physical evidence to defense counsel
25 for their review and we knew that there was

1 evidence in different places.

2 There is a lot of different, you have got
3 crimes that occurs, you have three murders that
4 you're talking about that occurred in three
5 different jurisdictions, Horry County, Myrtle
6 Beach, Marion County, and we had some evidence
7 also, so we knew this was kind of spread out. We
8 were looking and trying to consolidate some of that
9 evidence to make it easier for defense counsel,
10 really for everybody but particularly for defense
11 counsel to have access to that evidence and look at
12 it and view it. So, we don't really have, although
13 it is in the custody and control of our office, we
14 don't really have the best facilities for viewing
15 evidence.

16 THE COURT: Well, Mr. Axelrod, a rule is a
17 rule. If the Solicitor's office can't establish
18 the chain of custody, then they can't establish the
19 chain of custody on any particular piece of
20 evidence. They are going to have to do it.
21 Regardless of where it is kept or who has it, they
22 still have the same burden of establishing the
23 chain of custody.

24 MR. AXELROD: Yes, sir, Your Honor, and that
25 puts them into the chain, puts them into the trial

1 and for that reason we think that the Solicitor's
2 office of the Fifteenth Circuit cannot possibly
3 prosecute the case.

4 Additionally, we have been provided with flow
5 sheets of --

6 THE COURT: How many times have we seen
7 investigators testify?

8 MR. HEMBREE: Many times, Your Honor, that is
9 very common.

10 THE COURT: It happens all the time --

11 MR. AXELROD: Your Honor --

12 THE COURT: -- in their chain of custody
13 witnesses.

14 MR. AXELROD: Your Honor, they had it for
15 seven years. They are not, they have to have some
16 type of licensing to even be, under 17-28-330 there
17 has to be registration as a custodian of evidence.
18 I don't believe Mr. Livingston reaches to that
19 level.

20 Now, it is one thing to say, "Well, it came
21 back from SLED, I got it this morning, I'm bringing
22 it with me." Dale Long left their office, Dale
23 Long left their office at some point and Geordie
24 has it.

25 THE COURT: Four or five years ago.

1 MR. AXELROD: I don't think they are able to
2 establish a chain from Dale Long to Geordie
3 Livingston.

4 THE COURT: If they can't they don't get
5 their evidence in.

6 MR. AXELROD: If they do establish the chain
7 the Solicitor's office is in the chain, therefore
8 they're in the chain for the fungible evidence,
9 they cut the bags open, Your Honor, they cut the
10 bags open with fungible material in it. I don't
11 know what they did. A Best Bag should have never
12 been cut open. Your Honor, if the Best Bag was not
13 cut open I could understand this Court's position.

14 THE COURT: Well, what did they cut open,
15 what piece of evidence do you intend to introduce
16 or did they introduce? Weren't all the bags cut
17 open at the trial?

18 MR. AXELROD: No, sir, Your Honor. These
19 bags, we have evidence --

20 THE COURT: No, I'm talking about other bags
21 of evidence that was introduced, it is quite the
22 procedure to, you have a Best Bag and it is usually
23 opened up.

24 MR. AXELROD: The ones that were opened up in
25 the trial remained with the clerk's office, all

1 that evidence seen at the trial remained at the
2 clerk's office. They have a nonsealed Best Bag
3 labeled number 40, it had impressions of
4 cartridges, latent impressions on cartridges,
5 latent impressions on drivers license and
6 fingerprint card.

7 There also is an unsealed bag, Laura Rabin,
8 entitled number 42, it was a sealed Best Bag
9 originally, now it is unsealed. It contained a
10 swab from the cartridge casing found in the parking
11 lot of Dunkin Donuts, it contained a swab from the
12 side of the barrel of the Smith & Wesson pistol.
13 And 43, it contained a swab from the grip of a
14 Smith & Wesson pistol. It contained a swab from
15 the outside of the trigger guard of the pistol. It
16 contained a magazine from the Ruger, it contained a
17 swab from the side of the barrel of a Roddy Model
18 pistol and a swab from the ID belonging to Mr.
19 Cottrell.

20 THE COURT: Well, are you afraid -- these I
21 would assume were DNA swabs, is that correct?

22 MR. HEMBREE: That's correct, Your Honor.

23 THE COURT: Are you afraid, Mr. Axelrod, that
24 if you want to introduce that swab or you want to
25 get a DNA report, if there was one, that the

1 Solicitor's office will now, would now have their
2 investigator say, "Well, we don't know about this
3 chain of custody, you know, we don't know who got
4 it." The Solicitor says he's not introducing it.

5 MR. HEMBREE: Your Honor, I can say, you
6 know, to set the Court's mind at ease, and defense
7 counsel's, we're not going to object at all to the
8 chain of custody as to the investigators in our
9 office that were in custody and control of that
10 evidence.

11 THE COURT: Since he is not going to, not
12 going to contest chain of custody at all --

13 MR. AXELROD: Here is my concern, Your Honor.
14 I want to put on the record one more item, item 49,
15 that Laura Rabin clocked, the suspect's blood, the
16 hair of the suspect, of Mr. Cottrell. I don't know
17 whether or not these items have been tampered with
18 since the bags have been opened. I don't know what
19 evidence would have been on these originally. They
20 have been cut open, Your Honor, and never should
21 have been cut open. It's a sealed Best Pack with
22 fungible material. The reason for the Best Bag is
23 to seal these bags.

24 THE COURT: When were these samples of blood
25 taken?

1 MR. AXELROD: These samples were taken in
2 2002.

3 THE COURT: After he was arrested?

4 MR. AXELROD: Yes, sir, Your Honor.

5 THE COURT: Well, then you can replace them
6 by getting new ones right now.

7 MR. HEMBREE: We would consent to, certainly
8 we would have no objection to them taking DNA
9 samples from their client.

10 MR. AXELROD: Your Honor, what we're trying
11 to --

12 THE COURT: You would get good fresh ones,
13 you are absolutely correct.

14 MR. AXELROD: Back to the first bag, Your
15 Honor, they are swabs from the cartridge casing. I
16 don't know whether the casings were wiped clean, I
17 don't know if DNA was put on there. That is why
18 the bag was sealed, it was sealed from SLED, given
19 back to Dale Long sealed. I think he would testify
20 today, we're going to ask him, "Did you receive the
21 bag sealed from SLED?" I believe he would say yes.
22 I'm going to ask him, "Did you cut the bag open?"

23 THE COURT: Could you concede that?

24 MR. HEMBREE: That he --

25 THE COURT: Stipulate that Mr. Long received

1 it from SLED sealed, it was opened in his presence.

2 MR. HEMBREE: Yes, sir, there is no question
3 about it.

4 THE COURT: You don't have to, Mr. Axelrod,
5 he will stipulate to that.

6 MR. AXELROD: I want to know who cut each of
7 these Best Bags open.

8 THE COURT: Okay.

9 MR. HEMBREE: Your Honor, I will say right
10 now I can't, I can't remember if Dale Long cut it,
11 if Greg Hembree cut, if Fran Humphreys cut it. I
12 know we gathered together to review this evidence
13 with Mr. Long. As far as the physical cutting of
14 the bag, if Mr. Long remembers, that is up to him
15 but I can tell you I sure don't.

16 MR. AXELROD: Your Honor, we would call Mr.
17 Long at this time.

18 THE COURT: All right, bring him in.

19 Come around, Mr. Long, and be sworn, please.

20 DALE LONG,

21 after being first duly sworn, testified as follows:

22 THE CLERK: Please speak into the microphone
23 and state your name for the record, spelling your
24 last.

25 THE WITNESS: My name is Dale Long, L-o-n-g.

1 DIRECT EXAMINATION

2 BY MR. ALEXROD:

3 Q Good afternoon, Mr. Long.

4 A Good afternoon.

5 Q Mr. Long, did you have the opportunity to
6 receive back in 2005, I believe March, before the
7 trial started did you go to SLED, in 2005, March --
8 who did you work for back in March, 2005?

9 A I worked for the Solicitor's office.

10 Q Did the Solicitor Mr. Hembree or someone on
11 his staff, did they send you to Columbia, to SLED
12 to pick up the evidence?

13 A Yes.

14 Q Who sent you there?

15 A I do not recall who actually told me to go.

16 Q When you went up there you saw the evidence
17 custodian from SLED?

18 A Yes.

19 Q You brought back certain items?

20 A Yes..

21 Q Do you remember the items you brought back?

22 A No. They were, it was quite a bit, several
23 boxes of things.

24 Q Did you look at the Best Bags? Do you know
25 what a Best Bag is?

1 A I do.

2 Q Okay. Did you look at the Best Bags?

3 A I did not.

4 Q Would it be fair to say to you that they were
5 submitted to you, according to SLED they were
6 submitted to you in a sealed condition?

7 A Yes.

8 Q Okay. Did you ever look at these bags, did
9 you ever look at the evidence when you brought it
10 back?

11 A Yes.

12 Q Did you ever open these SLED bags?

13 A As we brought them back, okay, they were
14 delivered to me intact, I brought them back. After
15 I brought them back, then we took them out to look
16 at the contents.

17 Q When you say we took them out, who is we?

18 A That was me in the presence of the Solicitor
19 and -- I'm not exactly sure who all was there, it
20 has been several years ago, but it was for them to
21 decide which items they wanted to use for evidence
22 at trial and maybe just needed to review, to look
23 at them, to be familiar with them.

24 Q The Best Bag, is it opaque, can you see
25 through the Best Bag?

- 1 A It is but it has, most of them have like a
2 cover on one side that you can write on, so you
3 cannot see every detail if it is up against that
4 cover, and then if there is anything that is inside
5 a container, obviously in the bag, you can't see
6 what is in the container.
- 7 Q So, after you cut the bag open, we'll just
8 use one bag, three bags were cut open, would it be
9 fair to say you remember cutting three bags?
- 10 A No, I specifically don't remember.
- 11 Q Okay. Did you cut more than one bag open?
- 12 A I remember opening many pieces of evidence
13 but I do not remember a number, no.
- 14 Q Okay. Now, after you cut the bags open and
15 you looked at the evidence did you use that
16 evidence for trial?
- 17 A Some pieces of it were decided was going to
18 be used for trial, yes.
- 19 Q And some were not?
- 20 A Some were not.
- 21 Q What did you do with the bags that you cut
22 open at that point?
- 23 A Well, it would depend. If the entirety of
24 that bag went into evidence, then we just, this is
25 the trial, I'm just generalizing, "This is the

1 stuff we use for trial, this is the stuff that is
2 not going to be used for trial." If it was an
3 entire bag that was going into the trial we would
4 have kept that stuff in the file we were using for
5 that. The other stuff was, you know, if it was
6 said this is not going to be used for trial and I
7 retained custody, I retained custody of all of it
8 until we went to court.

9 Q And the stuff that wasn't used for trial,
10 what did you do with it, where did you put it?

11 A I retained custody of that and I had a secure
12 storage facility at the Solicitor's office, the
13 items were locked up.

14 Q How many people have keys to that office or
15 closet? Is it a closet?

16 A No, it's a room. I mean, we have file
17 cabinets in it. I'm not sure the dimensions but
18 it's a room. I'm not exactly sure how many people
19 had keys. I know all the Solicitor's investigators
20 has a key, I know the Solicitor has a key, and the
21 office manager, so at the most I'm familiar with
22 five people having a key to it.

23 Q Okay. Now, is there a refrigerator in that
24 room?

25 A No.

1 Q So when you've got a sample -- one of the
2 items you had was a sample of my client's blood,
3 are you aware of that?

4 A No.

5 Q If you were aware of that would you have put
6 that in your refrigerator?

7 A You have to tell me how it came to me. I
8 mean --

9 Q When you picked it up from SLED.

10 A Is it a tube of blood, is it a dried smear of
11 blood?

12 Q It might be both.

13 A If it's dried it doesn't have to be
14 refrigerator. If it was a tube of blood, if it was
15 a tube of blood, then it would need to be
16 refrigerated.

17 Q Did you refrigerate all tubes of blood?

18 A That is the general protocol for it but we
19 didn't have any tubes of blood.

20 Q Where did you put the tubes of blood if you
21 didn't have a refrigerator?

22 A We don't. I have never taken any tubes of
23 blood, so I would not keep those. I don't have a
24 place for those.

25 Q So if there was a tube of blood in the stuff

1 you got back you should have refrigerated it?

2 A Yes.

3 Q All right. Now, did you create a chain of
4 custody form for this evidence?

5 A I don't remember. I would have to look at
6 the file to see what the paper trail would be. I
7 just don't remember.

8 Q You just showed it actually coming back to
9 you.

10 A Okay.

11 Q So I'm asking, as evidence custodian, you're
12 saying, for the Solicitor's office, how do you
13 establish your chain of this evidence? You
14 received it?

15 A Yes.

16 Q You put it in a room?

17 A Right.

18 Q Maybe on a shelf, maybe in a file cabinet?

19 A Yes.

20 Q How do you establish that chain from there?

21 A It is brought into court.

22 Q In 2005 there was some evidence that was not
23 used?

24 A Correct.

25 Q How did you establish that chain to be there

1 for -- did you leave their office?

2 A I did.

3 Q Okay. When you left their office who took
4 over your responsibilities?

5 A Our chief investigator Geordie Livingston, he
6 assumed all of my files and all the, anything that
7 I was working on, work in progress as well as any
8 of the things I had done.

9 Q All right. So, did you type up a paper form
10 to give to him or did you just say, "Here is the
11 keys to the closet," or to the room, "and it's
12 yours"?

13 A I just gave it up. I mean, it was not used,
14 so I didn't give him any chain on it.

15 Q And you said there was at least five people
16 you would know had keys to that room?

17 A Yes.

18 MR. AXELROD: That would be all for this
19 witness, sir.

20 MR. HEMBREE: Very briefly, Your Honor.

21 THE COURT: Yes.

22 CROSS EXAMINATION.

23 BY MR. HEMBREE:

24 Q Officer Long, when you were present -- were
25 you present when myself and perhaps others

1 reviewed, physically reviewed the evidence that you
2 brought back from SLED?

3 A Yes, sir. Everything was maintained in my
4 presence.

5 Q And do you recall who opened what bags?

6 A I don't remember who actually physically
7 opened any of the bags.

8 Q Can you tell this Court whether or not any of
9 that evidence that was opened and viewed by myself
10 or others, was it altered or tampered with in any
11 way?

12 A No, it was not.

13 Q And after we finished with that evidence,
14 taking a look at it, what did you do with the
15 evidence that was not used for court?

16 A Locked it up.

17 Q In the secure evidence --

18 A In the secure storage room.

19 Q -- facility? During the course of your
20 employment -- when did you leave the Solicitor's
21 office and turn this material over to Geordie
22 Livingston?

23 A The very end of 2006.

24 Q And during that course of time that that
25 evidence was in your custody and control did you,

1 did you ever remove it from the evidence storage
2 facility?

3 A No, I did not.

4 Q Did anyone in the Solicitor's office ask you
5 to remove it from the evidence storage facility?

6 A No, they did not.

7 Q To your knowledge did anyone else in the
8 Solicitor's office remove it from that storage
9 facility?

10 A To my knowledge they did not.

11 Q It remained in the same spot the whole time
12 until you left in 2000 and --

13 A 2006, December of 2006 is when I left.

14 Q 2006?

15 A Yes. It was there when I left.

16 Q So, it was in no way altered, changed,
17 tampered with by anyone?

18 A No.

19 MR. HEMBREE: I don't believe I have any
20 further questions. Thank you for your time.

21 THE COURT: You may step down.

22 (Witness excused).

23 MR. AXELROD: Call Geordie Livingston.

24 GERODIE E. LIVINGSTON,

25 after being first duly sworn, testified as follows:

1 THE CLERK: Please have a seat, please speak
2 into the microphone and please state your name and
3 spell it for the record.

4 THE WITNESS: Geordie E. Livingston, spelled
5 capital G-e-r-o-d-i-e, middle initial E,
6 Livingston.

7 DIRECT EXAMINATION

8 BY MR. ALEXROD:

9 Q Mr. Livingston, how are you today?

10 A Just great, how about yourself?

11 Q Good. How long have you worked for the
12 Solicitor's office?

13 A About 19 years.

14 Q In 2005 what was your duties?

15 A Chief investigator.

16 Q Did have any titles?

17 A Prior to that time?

18 Q After that time.

19 A No.

20 Q When Mr. Long left did you absorb any new job
21 titles?

22 A No.

23 Q What you are is a chief investigator?

24 A Yes.

25 Q Have you ever had any training, have you ever

1 had any training as an evidence custodian?

2 A No.

3 Q Have you ever been registered as an evidence
4 custodian?

5 A No.

6 Q Are you aware of any evidence that was stored
7 in your office concerning Mr. Cottrell's case?

8 A Yes.

9 Q What evidence do you have knowledge of?

10 A Just a bunch of boxes that had on it Cottrell
11 case. That was a disposed case.

12 Q It was a disposed case?

13 A Yes.

14 Q And why was your office holding evidence, if
15 you know?

16 A I don't know.

17 Q Okay. Now, describe to the Court, how was
18 the evidence kept in your office? Is it in a
19 closet, a file cabinet, is it in a room?

20 A No. It was in a secured storage room.

21 Q Okay. And how many people have keys to that
22 storage room?

23 A Me and my investigators and the office
24 manager as far as I know.

25 Q How many people would that be?

1 A Probably five people.

2 Q And which five are those people?

3 A Myself, and when Dale Long was there, him,
4 the other two investigators, Steve Brown is one,
5 Bob Rainey when he was there would have been the
6 other one.

7 Q Your title is chief investigator?

8 A Chief investigator.

9 Q Okay. And on May 27th, 2011, do you remember
10 having to handle that evidence?

11 A Yes.

12 Q Tell the Court how you came into handling
13 that evidence that day.

14 A I picked it up from Carmen Morodo, whom I had
15 asked to go in and inventory it, consolidate it
16 because we were given the order to get it
17 consolidated and have it all in one place. She
18 inventoried it and from that point I simply just
19 took her inventory and passed it on to Horry County
20 Police Department, Laura Rabin.

21 Q Up until that time was Laura Rabin involved
22 in this case?

23 A I'm not aware.

24 Q Did she mention it to you at all?

25 A No.

1 Q Was this a city of Myrtle Beach case or
2 County case?

3 A City of Myrtle Beach case.

4 Q How come you to return the evidence to the
5 city of Myrtle Beach?

6 A That wasn't my call. It was a disposed case.

7 Q Okay. And who instructed you to contact
8 Laura Rabin?

9 A Carmen.

10 Q And do you know who instructed Carmen to tell
11 you that?

12 A I would imagine that she got an order from
13 Mr. Hembree to consolidate all the items, find out
14 where they were.

15 Q Okay. And they were in your, they were in
16 your storage since 2005?

17 A At least, yes, secure storage.

18 Q For at least six years?

19 A Yes.

20 Q Did you ever look at that evidence in that
21 six year period?

22 A No. It was in a box, boxes.

23 Q But based on other people having a key to it,
24 you wouldn't know if anybody else looked at it?

25 A No. They usually would not.

1 Q And you're not a registered custodian of
2 evidence?

3 A No.

4 MR. AXELROD: I have nothing further.

5 MR. HEMBREE: Very Briefly, Your Honor.

6 CROSS EXAMINATION

7 BY MR. HEMBREE:

8 Q Investigator Livingston, when did you receive
9 this evidence from Dale Long?

10 A 12/21/06, I believe.

11 Q 12/21/06, and he didn't physically take it
12 down and hand it to you, said, "Here", he turned
13 over constructive possession from him to you?

14 A Right. He left.

15 Q Now, you turned it over at some point to
16 Carmen for purposes of inventory?

17 A That would have been on the 16th of May, I
18 believe, 2011.

19 Q Got you. Between December 31st, '06, and May
20 16th of 2011 did anyone, to your knowledge, open
21 any of those boxes, handle any of the evidence,
22 take custody or control of that evidence, other
23 than you?

24 A No, sir.

25 Q Did anybody, anybody at all mention to you

1 they were going to look -- it remained in the same
2 place where it had been --

3 A Yes, sir.

4 Q -- physically?

5 A Up on the shelves, up high, kind of out of
6 reach.

7 Q Got you. So it was not, it was in no way
8 altered, changed, tampered with while it was in
9 your custody and control?

10 A No, sir, not at all.

11 Q You turned it over to Carmen, and you have
12 indicated she did an inventory of that evidence?

13 A Yes.

14 Q And then made a list of it, then she packaged
15 it up, I believe, turned it over to you for
16 purposes of giving it to Laura Rabin?

17 A Exactly.

18 Q And when did she give it back to you to give
19 to Laura Rabin?

20 A On 5/27/2011.

21 Q That is the date you gave it to Laura Rabin?

22 A I gave it to Laura later in the evening, the
23 afternoon of that same day.

24 MR. HEMBREE: I have no further questions.

25 Thank you.

1 MR. AXELROD: Yes, sir, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. AXELROD:

4 Q The Solicitor elicited from you that the
5 evidence had not been altered or changed while in
6 your custody. You said correct to that?

7 A Yes. It has not been altered.

8 Q But you never looked at it?

9 A Never looked at it.

10 Q So if it had been altered or changed while in
11 your custody you wouldn't know?

12 A Well, I was looking at it from the standpoint
13 of the boxes, they were not tampered with, they
14 were up on the shelves there.

15 Q Were the boxes sealed?

16 A Some had been, they were closed.

17 Q Back to my question. If they had been
18 altered or changed while in your custody you would
19 not know that, would you, because you didn't know
20 what they were when you got them because you never
21 looked at them?

22 A I never looked at them.

23 Q So you wouldn't know if it was altered,
24 changed while it was in your custody?

25 A Generally I would know but I did not go

1 through the boxes.

2 Q I'm saying specifically in this case you do
3 not know whether the evidence was altered or
4 changed while in your custody, do you?

5 A They were not, it was not changed, altered
6 while it was in my custody as far as I know.

7 Q But you never looked at them originally, so
8 how could you know if they had been altered?

9 A Because the boxes remained in the same place
10 the entire time, over a period of years.

11 Q But they weren't taped?

12 A They were not taped.

13 Q And wasn't there some evidence in paper bags?

14 A Yes, at least one.

15 Q So, you don't know -- you never looked in
16 those bags or those boxes when you got the evidence
17 in your control?

18 A No.

19 Q So you don't know whether they were altered
20 and changed while in your control?

21 A I don't know absolutely but I would say not.

22 Q But you don't know, this is a court of law,
23 you don't know whether they were changed?

24 MR. HEMBREE: Your Honor, I object. The
25 question has been asked and answered several times.

1 THE COURT: That's right.

2 MR. AXELROD: I will move on, sir.

3 BY MR. AXELROD:

4 Q You were told the Solicitor's office wanted
5 to consolidate the material. Am I correct?

6 A Yes.

7 Q It was consolidated in your room, in your
8 closet, wasn't it?

9 A Just to make sure it was all present still.

10 Q But it was all right there?

11 A Yes.

12 Q Why didn't you just leave it there?

13 A Because we got the word to consolidate it and
14 then send it to Horry County P.D.

15 Q And do you know why?

16 A I don't know except to accommodate you, for
17 easy viewing for you.

18 Q But I was scheduled to look at it in your
19 office that day, wasn't I?

20 A Well, I don't know that.

21 Q Did anyone ever tell you that we had an
22 appointment on May 27th at 1:30 in the afternoon?

23 A I don't recall that specifically.

24 Q Okay. Did you ever look in the bag to see if
25 there was clothes in the bag?

1 A No.

2 Q So you don't know whether there was ever
3 clothes in the bag?

4 A No, except just to look at the inventory.

5 Q So, if somebody had tampered with and altered
6 the clothes that were in the bag you wouldn't know
7 that, would you?

8 A No.

9 MR. AXELROD: Thank you.

10 MR. HEMBREE: Nothing further, Your Honor.

11 THE COURT: Thank you. You may step down.
12 (Witness excused).

13 MR. AXELROD: Your Honor, if I can bring back
14 Dale Long for one question and then we'll release
15 him.

16 THE COURT: I will allow it.

17 MR. AXELROD: And, Your Honor, we would
18 release Mr. Livingston at this point.

19 THE COURT: All right, Mr. Livingston, you're
20 released from your subpoena.

21 DALE LONG,
22 having been previously sworn, testified as follows:

23 REDIRECT EXAMINATION

24 BY MR. AXELROD:

25 Q Officer I just have one more question to ask.

1 THE COURT: He's still under oath.

2 Q When you worked for the Solicitor's office
3 were you the evidence custodian?

4 A No. We didn't have a dedicated evidence
5 custodian. That was evidence that I was
6 responsible for because I signed for it, that's the
7 reason I kept it.

8 Q So are you saying that whatever officer
9 signed for evidence, they would be responsible?

10 A I can't speak for them, I don't remember any
11 other officers bringing evidence in like that.
12 This was a little bit different situation because
13 of the type case and they just needed to review the
14 evidence ahead of time.

15 Q Were you, have you ever registered as an
16 evidence custodian?

17 A I'm not familiar with any requirement that
18 says I have to register as one but I have been the
19 evidence custodian for Horry County Police
20 Department when I was there before I went to the
21 Solicitor's office, for approximately seven and a
22 half years I was evidence custodian there.

23 Q Let me ask you this question. Under Code
24 17-28-330 it is called Registration as Custodian of
25 Evidence and it says, "After a person is convicted

1 or adjudicated for at least one of the offenses
2 enumerated in 17-28-320, murder, a custodian of
3 evidence shall register with the South Carolina
4 Department of Corrections or the South Carolina
5 Department of Juvenile Justice, as applicable, as a
6 custodian of evidence for physical evidence or
7 biological material related to the person's
8 conviction or adjudication."

9 So, have you complied with that section to
10 register as a custodian of evidence.

11 A What is the date of the statute, sir?

12 MR. HEMBREE: That is January 1st, 2009.

13 Q Were you the evidence custodian January 1st,
14 2009?

15 A No. I was not employed then.

16 Q You were not employed then?

17 A No.

18 MR. AXELROD: Your Honor, that is all I have
19 for Mr. Long at this point.

20 THE COURT: You may step down, Mr. Long --
21 did you have any questions?

22 MR. HEMBREE: No, Your Honor. Thank you.

23 (Witness excused)

24 THE COURT: I believe you're done with Mr.
25 Long?

1 MR. AXELROD: Yes, sir.

2 THE COURT: You're excused from your
3 subpoena.

4 MR. HEMBREE: Your Honor, one matter. I
5 don't know, I just wanted to put on the record
6 Carmen Bray with our office, an investigator with
7 our office is subpoenaed. We informed defense
8 counsel she had an emergency surgery this morning
9 for a kidney stone, so she is not present for the
10 subpoena.

11 THE COURT: Bless her heart.

12 MR. HEMBREE: She would rather be here even
13 with Mr. Axelrod asking the questions. So, Your
14 Honor, defense counsel is aware of that, we
15 certainly would understand if they have some
16 questions for her we may have to defer this until
17 another day, although we strived to sort of build
18 it around her so it is pretty clear to the Court
19 what her role was.

20 MR. AXELROD: All right. My next witness I
21 would call would be Miss Eargle from SLED. I don't
22 know if she's out there. If she is here we can
23 call her.

24 THE COURT: Come around, please, and be
25 sworn.

1 DENISE EARGLE,
2 after being first duly sworn, testified as follows:

3 THE CLERK: Please have a seat and speak into
4 the microphone, state your name and spell it for
5 the record.

6 THE WITNESS: Denise Eargle, E-a-r-g-l-e.

7 DIRECT EXAMINATION

8 BY MR. AXELROD:

9 Q Miss Eargle, good afternoon. In March of
10 2005 where were you employed?

11 A South Carolina Law Enforcement Division.

12 Q And did you have the opportunity to come into
13 contact with some evidence and a Mr. Dale Long?

14 A Yes, I did.

15 Q And can you tell the Court how that
16 transpired and what evidence that was?

17 A It was a lot of evidence. I've got some
18 chain of custodies here. Do you need the item
19 numbers or how --

20 Q Let me, I will change it a little bit. There
21 were several Best Bags that were delivered to Mr.
22 Long?

23 A Okay.

24 Q They would be in the items, I will give you
25 some numbers of items that were in bags. Would

1 that help you?

2 A Okay, that would help.

3 Q Well, if I gave you item number, say, 54.1,
4 would that help you?

5 A Yes.

6 Q Okay.

7 A Okay. Okay, item number 54 was a cartridge?

8 Q Right. And let me see, now, were these items
9 put into a Best Bag?

10 A They were, it was in a box, sealed in a box.
11 Well, I would have to see the evidence.

12 Q Okay.

13 A I mean, I can't tell by looking at this. It
14 was -- I would have to actually see the evidence,
15 I'm sorry.

16 Q Okay. Let me ask you this question.

17 A Okay.

18 Q If I was to tell you that when the bags got
19 to the Solicitor's office at some point they were
20 unsealed, three of these bags, would it be fair to
21 say when you released all the evidence from SLED
22 the bags would have been sealed?

23 A Yes, sir.

24 Q And why do you seal evidence in Best Bags?

25 A That's just protocol. As soon as, as soon as

1 we get the evidence, I mean, we seal it, initial
2 and date it for security purposes.

3 Q To keep people from tampering with it?

4 A Yes, sir.

5 Q That is why we use sealed bags?

6 A Yes, sir.

7 Q And if a bag was unsealed at some point would
8 that give a person opportunity to tamper with what
9 is inside the bag, would it allow the opportunity
10 to exist that one could tamper with something if
11 the Best Bag was open?

12 A If it was not sealed, yes, sir.

13 Q And if it was cut open after it was sealed
14 the possibility could exist for tampering?

15 A Well, as long as it was sealed back, I mean,
16 as long as it was sealed in the presence of an
17 examiner, or an examiner --

18 Q If it wasn't sealed back after that, then
19 that would give rise for that someone could tamper
20 with the material?

21 A Yes, sir.

22 Q Thank you.

23 MR. AXELROD: The Court's indulgence.

24 Your Honor, the Court's indulgence. We might
25 have some pictures of those bags.

1 MR. HEMBREE: Your Honor, I don't believe we
2 have been provided a copy of any of these
3 photographs, if they are intended to be --

4 THE COURT: Well, show him what you have.

5 MR. AXELROD: May I approach, Your Honor?

6 THE COURT: Certainly.

7 MR. AXELROD: Would the Court like to see
8 them?

9 THE COURT: Okay.

10 BY MR. AXELROD:

11 Q Miss Eargle, I want to show you two pictures.

12 MR. AXELROD: Your Honor, should we mark
13 these for exhibits?

14 THE COURT: It's up to you.

15 MR. AXELROD: Could we mark them as --

16 MR. HEMBREE: No objection.

17 MR. AXELROD: -- Defense 1 and 2?

18 (Two photographs were marked as Defendant's
19 Exhibits 1 and 2).

20 BY MR. AXELROD:

21 Q Let me show you the pictures, look at them to
22 familiarize yourself. See if you can establish
23 these bags to your sheets.

24 A I can't see the container number on the bag,
25 I can't read the container number right there.

1 That is what we go by, is that container number.

2 This is --

3 Q That little number right there?

4 A Yes.

5 Q The last three numbers 364, E189364?

6 A Okay.

7 Q This is 364.

8 A Okay. These are items one and two.

9 Q This one is 363, this bag is 363?

10 A Yes,, sir.

11 Q Okay.

12 A Yes. This one, 363 is item number one.

13 MR. AXELROD: And for the Court, that would
14 refer to Defendant's Exhibit Number 2.

15 A And then 364 is item -- well, no, excuse me,
16 I'm sorry. This is the DNA.

17 Q 363 was the DNA?

18 A 363 was the DNA.

19 Q And that one refers to Defendant's Exhibit
20 Number 2. 363, I think you can see it.

21 A My eyes are not that good, I apologize.

22 Q Okay.

23 MR. AXELROD: Your Honor, I'm going to show
24 these to the Solicitor.

25 Q Now, the question, Miss Eargle, these bags,

1 these kind of bags, were they sealed when they left
2 your custody?

3 A Yes, sir.

4 MR. AXELROD: Okay, thank you.

5 Your Honor, we would like to move those into
6 evidence.

7 MR. HEMBREE: No objection.

8 THE COURT: All right. Without objection.

9 MR. AXELROD: I would like to mark this as
10 Defense 3.

11 (Photograph marked as Defendant's Exhibit
12 Number 3).

13 THE COURT: Have you shown it to Mr. Hembree?

14 MR. AXELROD: Oh, I'm sorry.

15 BY MR. AXELROD:

16 Q Miss Eargle, Defense Number 3, can you read
17 that number? It's a little bigger.

18 A It looks like a one on the end but --

19 Q I agree.

20 A But I can't be positive.

21 Q Would it be fair to say it could be 181031?
22 Can you see if we have a bag matching 181031?

23 A It would probably be easier to look at this.
24 Yes, sir, 181031.

25 Q What did that contain? Are you able to tell

1 that?

2 A It would be DNA. I will have to find it to
3 be sure.

4 THE COURT: It tell you what, Mr. Axelrod,
5 why don't you tell us what was in those bags and I
6 bet you Mr. Hembree would agree.

7 MR. AXELROD: I'm going to say DNA was in the
8 bag and the bag was sealed when it left Miss
9 Eargle's possession.

10 MR. HEMBREE: I'm very familiar with SLED's
11 procedure, I'm confident those bags were sealed
12 when they left SLED and were picked up by Dale
13 Long.

14 THE WITNESS: I found it.

15 BY MR. AXELROD:

16 Q Miss Eargle has determined what was in those
17 bags.

18 A One sealed item containing a swab.

19 Q Would that be DNA swabs?

20 A DNA swabs?

21 Q Thank you. It left you sealed?

22 A Yes, sir.

23 Q Is it sealed to prevent tampering?

24 A Yes, sir.

25 MR. AXELROD: I move that into evidence, Your

1 Honor.

2 THE COURT: What?

3 MR. AXELROD: Defendant's 3, if we may.

4 THE COURT: The photograph?

5 MR. AXELROD: Yes, sir, Your Honor.

6 MR. HEMBREE: Without objection, Your Honor.

7 THE COURT: All right, without objection.

8 BY MR. AXELROD:

9 Q Are you a registered evidence custodian?

10 A Yes, sir, I was. I'm retired now.

11 Q In March of 2005 were you a registered
12 evidence custodian?

13 A Yes, sir.

14 Q And can you tell the Court what made you a
15 registered evidence custodian?

16 A Experience.

17 Q And --

18 A I worked in evidence for nine years.

19 Q And did you have to get some kind of
20 certification?

21 A No, sir.

22 Q But you had to register as a custodian?

23 A Well, no. I was an evidence technician, I
24 was an evidence technician.

25 Q So you didn't store evidence yourself at

1 SLED?

2 A We had a locked area, our evidence room which
3 was locked, we put evidence back there.

4 Q So, was your primary function that day to
5 retrieve the evidence and give it to Mr. Long?

6 A That particular day.

7 Q Okay. And you gave it to him sealed?

8 A Yes, sir.

9 MR. AXELROD: I have nothing further, Judge,
10 Your Honor.

11 MR. HEMBREE: Very quickly.

12 CROSS EXAMINATION

13 BY MR. HEMBREE:

14 Q When did you leave SLED's employ, Miss
15 Eargle?

16 A Last year, last June.

17 Q There was a statute passed in 2009, retention
18 statute, passed by the General Assembly, that went
19 into effect January 1st, 2009. Are you familiar
20 with that?

21 A No.

22 Q Not really? So even though you were an
23 evidence custodian at SLED, you never went through
24 any registration or certification procedure after
25 January 1st of 2009?

1 A No, sir.

2 Q But you continued to work in that capacity?

3 A Well, I was in latent print and crime scene.
4 I left, I was upstairs in 2006, 2007.

5 MR. HEMBREE: Very good. Thank you very
6 much.

7 MR. AXELROD: Your Honor, one question.

8 REDIRECT EXAMINATION

9 BY MR. AXELROD:

10 Q You actually were not in charge of the
11 evidence at SLED?

12 A I worked in the evidence, I worked in the
13 evidence log-in.

14 Q But you weren't in charge of it?

15 A No, sir.

16 Q And you weren't the evidence custodian?

17 A Well, we had five people at the time that
18 worked in evidence and any given time we would be
19 logging in evidence or we would be --

20 THE COURT: Was evidence ever placed in your
21 custody, you logged it in and you logged it out?

22 THE WITNESS: Yes, sir. Not this particular
23 case but in my job duties.

24 THE COURT: In other cases?

25 THE WITNESS: Yes, sir.

1 BY MR. AXELROD:

2 Q Did you log this evidence in when it came to
3 SLED?

4 A No, sir, I did not.

5 Q You just logged it out?

6 A Yes, sir. I disposed the evidence.

7 Q In sealed containers?

8 A In sealed containers, yes.

9 MR. AXELROD: Thank you. We would release
10 Miss Eargle.

11 THE COURT: Any objection to releasing Miss
12 Eargle?

13 MR. AXELROD: No, sir.

14 MR. HEMBREE: No, sir, Your Honor.

15 THE COURT: Miss Eargle, you're released from
16 your subpoena.

17 (Witness excused).

18 MR. AXELROD: Your Honor, I would argue to
19 the Court that our motion to disqualify, by statute
20 the custodian has to be a registered custodian of
21 the evidence. There is no registered custodian of
22 this evidence. The Solicitor agreed the bags have
23 been cut open. Once they are cut open, we have
24 testimony from Miss Eargle --

25 THE COURT: Tell me what piece of evidence in

1 question that you intend to use at trial.

2 MR. AXELROD: Well, my concern is, my concern
3 is the casings, Your Honor the pants, the pants
4 labeled number 67.1 by SLED and number 22 by Horry
5 County Police Department, the pants that my client
6 was wearing the night of the incident. Item number
7 67.2, labeled by SLED, the shirt, it's number 23
8 labeled by Horry County Police Department. I would
9 submit to the Court that we plan to enter these
10 items. These items would have been paramount to
11 determine --

12 THE COURT: For what purpose?

13 MR. AXELROD: To determine, to show the
14 gunshot residue, to show the manner in which my
15 client was shot.

16 THE COURT: Were gunshot residue tests
17 performed on these items?

18 MR. AXELROD: I do not believe so at the
19 time, Your Honor.

20 THE COURT: Do you plan to have that done?

21 MR. AXELROD: Well, my concern, Your Honor,
22 if they had been sealed properly and kept properly,
23 because the Court is well aware that residue,
24 gunshot residue can just fall off. I mean, you can
25 take a pair of pants or a shirt and you can shake

1 it and you can shake off that residue. Clearly
2 when they were taken off, I would imagine it went
3 to SLED in some pristine form, SLED bagged it, SLED
4 sent it up there. When we got to see it in Horry
5 County's evidence room it was in I believe a box,
6 within a paper bag within a box. These are the
7 items that placed the Solicitor's office in the
8 chain, because we inquired of the Solicitor's
9 office how were these items kept, how are they
10 stored. We would --

11 THE COURT: They already told you there would
12 be no question as to chain.

13 MR. AXELROD: These are different items, Your
14 HONOR. Our first motion was prosecutorial
15 misconduct for cutting open these bags.

16 THE COURT: Denied.

17 MR. AXELROD: These items I'm mentioning are
18 for the chain of custody of the Solicitor. We're
19 going to have to call the Solicitor's office in
20 this case, have them testify that they didn't
21 tamper with the shirt or they didn't tamper with
22 the pants or they didn't --

23 THE COURT: In that case, again, their
24 investigator Mr. Livingston and/or Mr. Long who is
25 now with some other agency will testify. Again,

1 these people have testified, it has been the
2 practice to have them testify in various trials,
3 there is nothing wrong with these investigators
4 testifying.

5 MR. AXELROD: It is my position to the Court
6 that they have said these five people had keys to
7 this room, maybe there was more, maybe the room was
8 unlocked, we don't know, we don't know if somebody
9 went --

10 THE COURT: Mr. Alexrod, this is evidence
11 that the Solicitor says, "We don't intend to put
12 in, we didn't put it in in the first case."

13 MR. AXELROD: We're going to put it in.

14 THE COURT: You're wanting to put it in?
15 There is no problem with the chain of custody up
16 through the time that your experts take possession
17 for testing or whatever they intend to do. The
18 Solicitor has told you he has no question about the
19 chain of custody of those items that were placed in
20 his secured facility.

21 MR. AXELROD: Well, we think it is improper
22 for the Solicitor to remain on this case if he's in
23 the chain for six years on this important material,
24 Your Honor.

25 THE COURT: Will, it's denied.

1 Okay, let's move on to your next motion.

2 MR. AXELROD: Your Honor, I would like to put
3 on the record the rest of the items that I had in
4 question. I understand the Court's ruling.

5 THE COURT: Okay, go ahead and put them on
6 the record.

7 MR. AXELROD: Your Honor, I did the pants and
8 the shirt. There was a towel labeled number 67.5
9 and 67.6 by SLED, and it was labeled number 25 by
10 Horry County Police Department.

11 Item number 34 by SLED, a fired bullet from
12 the parking lot at marker two.

13 Item number 36 was a fired bullet jacket
14 fragment from parking lot, marker 39.

15 Item 37 was a fired bullet jacket fragment
16 from parking lot at marker 40.

17 Item 38 was a fired bullet core from the
18 parking lot, marker 41.

19 Item number 39, and the first numbers, Your
20 Honor, are the SLED numbers, item number 39 was a
21 fired bullet core from the driver's seat of a
22 Toyota parked at Dunkin Donuts.

23 Item 40 was a fired bullet jacket from
24 passenger side back seat of the Toyota parked at
25 Dunkin Donut.

1 44 was a metal fragment from the parking lot
2 at marker 28.

3 Item 42 was a metal fragment from the parking
4 lot, at marker 29.

5 Item 43 was a metal fragment from parking
6 lot, at marker 36.

7 Item 45 was a metal fragment from the parking
8 lot, at marker B.

9 Item 46 was an unfired .40 caliber Smith &
10 Wesson cartridge found in the rear driver's side of
11 the suspect Honda vehicle.

12 Items 54.1 and 54.2, 55.1, 56.1, and 58 were
13 from the SLED bags, I believe items in pictures
14 one, two and three, the three SLED bags.

15 Item numbers 3, 4, 5, 6 and 7 by SLED were a
16 swab from the parking lot, another swab from the
17 parking lot, another swab from parking lot, a swab
18 from the suspect vehicle, another swab from the
19 suspect vehicle, and another swab from suspect
20 vehicle.

21 The unsealed plastic bag had seven more
22 swabs, item numbers 24, 147, 148, 149, 2, 51, and
23 item 71. These were all SLED numbers of items that
24 were in the Best Bags.

25 Sealed bag item number 36, one fired bullet

1 jacket fragment from the parking lot at marker 39.

2 A sealed bag was labeled 1.1, this was
3 opened, this was the blood from Mr. Cottrell's
4 suspect kit. Your Honor, we have not opened that
5 kit yet to determine whether or not that was, we
6 will, we haven't opened those items yet to look but
7 we will.

8 There was an unsealed plastic bag, item 49,
9 contained, contained debris from a white bath
10 blanket labeled SLED item 67.5, and labeled item
11 67.6.

12 Your Honor --

13 THE COURT: Mr. Axelrod, apparently you're
14 reading the evidence numbers from every piece of
15 evidence that was turned over to the Solicitor's
16 office, not the ones that have been opened, is that
17 right?

18 MR. AXELROD: Just that the Solicitor kept
19 for the six years.

20 THE COURT: All right. Go ahead.

21 MR. AXELROD: I just want to put that in the
22 record, Your Honor.

23 THE COURT: Put it on the record.

24 MR. AXELROD: To show the Court the extent of
25 the evidence that they have.

1 THE COURT: All right, Mr. Axelrod.

2 MR. AXELROD: Okay. Thank you, Your Honor.

3 THE COURT: Okay.

4 All right, next motion?

5 MR. HEMBREE: Your Honor, we could probably
6 shift back to the motions of August the 18th now,
7 filed August 18th now. The second one, we dealt
8 with the first one, the second one is a motion for
9 an order compelling heightened scrutiny.

10 THE COURT: Heightened what?

11 MR. HEMBREE: Heightened scrutiny.

12 THE COURT: Okay.

13 MR. HEMBREE: Bates stamp number 8, Your
14 Honor.

15 THE COURT: Mr. Axelrod.

16 MR. AXELROD: Your Honor, it is explained in
17 our motion, heightened scrutiny, this motion asks
18 the State and Court, Your Honor, to take into
19 account the fact my client's life is at stake,
20 sir --

21 THE COURT: I'm fully aware of that.

22 MR. AXELROD: -- when ruling on all the
23 evidentiary matters.

24 THE COURT: I'm fully aware of that.

25 MR. AXELROD: We would ask the Court for the

1 highest scrutiny in reviewing all these matters
2 relative to trial and other proceedings to ensure
3 my client is not wrongfully convicted or sentenced.

4 THE COURT: All right, that's granted. The
5 Court will apply the law as it applies to each
6 motion and should be applied to each motion in this
7 case.

8 All right. Let's go to the next one.

9 MR. AXELROD: Your Honor, the next motion is
10 a motion for recordation. We're asking that all
11 hearings, conferences, bench conferences and
12 chambers conferences be put on the record to
13 protect my client's record for any future appeals.

14 THE COURT: Granted.

15 MR. HEMBREE: Your Honor

16 THE COURT: Do you have anything?

17 MR. RICHARDSON: On page six of that, Your
18 Honor, sixth bullet point down, I just would make
19 the Court aware that says all conferences, hearings
20 of every purpose between the Court and counsel,
21 including bench conferences. There will be certain
22 times over the period of this two weeks that we
23 will go up for ten words or less to say we're
24 scheduling lunch, you know.

25 THE COURT: We can do side bars but in that

1 vein I will not expect Mr. Axelrod to be back in my
2 office during the pendency of this trial, either.
3 If he wants them all on the record we'll put them
4 all on the record.

5 MR. RICHARDSON: Yes, sir, Your Honor. The
6 only other question that we have is on number 12,
7 the first of those bullet points, and it may just
8 be that I don't understand, but any contacts
9 between jurors and other persons except explicitly
10 allowed. I'm just unsure how we can do that.

11 THE COURT: I have no idea what he is even
12 talking about there. Within reason, this motion is
13 granted. Of course he has got some things in there
14 that I don't even understand, like all contact
15 between the jury and any other persons. I have no
16 idea how you intend for us to monitor that, Mr.
17 Axelrod.

18 MR. AXELROD: Yes, sir, Your Honor.

19 THE COURT: Any and all questions or written
20 statements made by jurors and any responses issued
21 by the Court, of course that will go in the record,
22 always does. To the extent reasonably possible,
23 that motion is granted.

24 MR. RICHARDSON: Yes, sir.

25 THE COURT: All right. Number 19, or page

1 19.

2 MR. AXELROD: Your Honor, I believe the
3 Solicitor, I think we agreed on that one.

4 THE COURT: Is that correct, Mr. Richardson?

5 MR. RICHARDSON: Yes, sir.

6 THE COURT: You agreed to that?

7 MR. RICHARDSON: Yes, sir.

8 THE COURT: Motion to prevent exparte
9 communication between the State and Court.

10 MR. RICHARDSON: The only thing that we
11 talked with Mr. Axelrod about is that, and I
12 believe he agrees, that the defense would also be
13 prohibited except on those circumstances that are
14 expressly exparte, such as --

15 THE COURT: Funding.

16 MR. RICHARDSON: -- funding, yes, sir.

17 THE COURT: Very well. Mr. Axelrod, you say
18 there is an agreement as to that?

19 MR. AXELROD: Yes, sir, Your Honor.

20 THE COURT: All right. On page 24, motion to
21 incorporate all state and federal constitutional
22 bases in support of all motions and objections
23 filed in these proceedings.

24 What do you want, Mr. Axelrod?

25 MR. AXELROD: Your Honor, what I ask the

1 Court is to incorporate all the precedent,
2 including state law, state constitutional
3 provisions, federal constitutional provisions into
4 the objections during these pretrial and trial
5 proceedings. That would allow for a smoother trial
6 process and one that would not require me to recite
7 verbatim every case or provision applicable because
8 so many times there are many of them and they are
9 intertwined. It would also prevent the jurors'
10 boredom in lapses of testimony which occurred due
11 to the defendant's lengthy objection and rationale.

12 THE COURT: What do you say, Mr. Hembree?

13 MR. HEMBREE: Your Honor, I don't have any
14 problem -- my problem is this.

15 THE COURT: What Mr. Axelrod is asking you to
16 do is to waive the requirement he state the ground
17 for his objections.

18 MR. HEMBREE: That is my concern. We would
19 require that the defendant state his ground for
20 objecting and be prepared to cite authority, and
21 certainly I don't expect to get 27 cases of federal
22 constitutional law on a simple motion.

23 THE COURT: I'm going to grant your motion to
24 the extent that you will not have to do it unless
25 required to do so by the State on a specific

1 objection.

2 Fair enough?

3 MR. HEMBREE: Fair enough. Thank you, Your
4 Honor.

5 THE COURT: Okay. All right, on page 28,
6 motion for an order sealing jail visitation logs
7 and ensuring their confidentiality is maintained.

8 By what authority do you ask me to do that,
9 Mr. Axelrod? You're asking me to seal jail
10 records, I mean logs, I would assume not only at
11 SCDC but also J. Reubin Long, which would require
12 that a separate log be maintained for any visitors
13 coming to see Mr. Cottrell or Mr. Cottrell's
14 visitors not be required to sign in on the
15 appropriate logs at either institution.

16 MR. AXELROD: Your Honor, we direct the Court
17 to Section 16-3-26(C), and that protects my
18 client's right to request investigators and experts
19 for purposes of trial ex parte, similar protection
20 regarding civilian visitation logs. The State can
21 gain access to information to which it is not
22 privy, so I would state to the Court so that my
23 client's right is protected as to investigators and
24 experts, I would ask that it just be enlarged to
25 civilian visitation logs.

1 THE COURT: It's denied in toto.

2 Page 32, motion for defendant to be present
3 at all proceedings. That is granted. I'm sure
4 without objection, is that right?

5 MR. HEMBREE: Without objection, Your Honor.

6 THE COURT: Motion for an order, on page 36,
7 motion for an order prohibiting Mr. Cottrell from
8 being exhibited in jail clothing or visible
9 shackles.

10 Any objection to that, Mr. Hembree?

11 MR. RICHARDSON: Your Honor, the only
12 objection would be if there was no media. We don't
13 want to create a rule where it is not necessary,
14 like today. Certainly if there is media, because
15 this is asking not only at trial but pretrial
16 conferences, within reason we're in total
17 agreement.

18 MR. AXELROD: Your Honor, to the point that
19 we don't know when media is going to be here.
20 Media could have been here today and he is back in
21 shackles, so that is where we're at at that point.
22 We would just ask that he be dressed in I believe
23 SCDC and be brought over in something like civilian
24 clothes.

25 THE COURT: You provide it once he arrives

1 here, Mr. Axelrod and I will grant your motion.

2 MR. AXELROD: May I ask SCDC if that is
3 permissible?

4 THE COURT: Can they dress him out once he
5 arrives here?

6 SCDC SECURITY OFFICER: I never did it for a
7 hearing, only for trial.

8 THE COURT: Well, I will allow you to do it
9 anytime the press might be in the courtroom. There
10 are not supposed to be cameras in this courtroom
11 without my knowing they are here. If I should
12 allow cameras in the courtroom at anytime Mr:
13 Cottrell is present I will allow you to dress him
14 out, okay?

15 MR. AXELROD: Thank you, sir.

16 THE COURT: Okay. Otherwise I don't know how
17 he could be seen.

18 On page 39, motion for an order declaring the
19 defendant's due process rights and right of
20 confrontation require that the defendant be allowed
21 to examine critical evidence in possession of the
22 State. I think that that has already been done,
23 has it not?

24 MR. HEMBREE: I believe it has, Your Honor.
25 We certainly don't have any objection to the

1 defense counsel looking at any crime scene
2 evidence, any evidence that is in possession of the
3 State. We have again worked very hard to try to
4 accommodate them on that.

5 The only thing about this motion that gave me
6 pause was it adopted this critical evidence
7 standard which is a standard that is recognized in
8 other states. I don't know, I don't know they are
9 really asking for the adoption of that. They talk
10 about it but what they ask for in their requested
11 order doesn't reference this critical evidence
12 standard, so I don't --

13 THE COURT: Hasn't your office always adopted
14 an open file policy?

15 MR. HEMBREE: We have, yes, sir, Your Honor,
16 we're providing anything, everything we can to the
17 defense in this case.

18 MR. AXELROD: Your Honor, what I would ask is
19 that the Solicitor on an ongoing basis, if he
20 would, as he gets new evidence, that he would keep
21 providing us with that evidence.

22 THE COURT: This is a case almost ten years
23 old.

24 MR. HEMBREE: We get new evidence on this,
25 Your Honor, it is unusual. However, we'll be happy

1 to do that.

2 MR. AXELROD: We believe it is, we think
3 they are receiving new evidence, I would just ask
4 it be given to us in a very timely basis.

5 THE COURT: If at anytime it should be
6 determined by your office or your staff that there
7 is evidence that you have in your possession that
8 has not been turned over to the defense, that they
9 be allowed to view it. Okay?

10 Page 44, motion for an order to preserve all
11 evidence. That would include any additional
12 testing or examination of evidence that would
13 alter, reduce or destroy the evidence without
14 notice to the defense prior to court approval.
15 What do you say about that, Mr. Hembree or Mr.
16 Richardson?

17 MR. HEMBREE: We don't have any objection to
18 that. We agree to that.

19 THE COURT: They have agreed to it.

20 Okay, very well, let's go to page 52. Motion
21 to require investigative agencies to preserve notes
22 on all interviews, investigative actions.

23 What is he asking for there, Mr. Hembree?

24 MR. HEMBREE: My guess, my belief is that he
25 is asking for them not to shred any documents.

1 THE COURT: Is that a no shred order?

2 MR. AXELROD: What I'm asking also, Officer
3 Guthinger, he must have had some, he does a typed
4 statement, prior to that typed statement he must
5 have had handwritten notes or something, there must
6 be handwritten notes of the events that occurred
7 that night, that we're not in possession of. I'm
8 asking the Solicitor's office to contact the police
9 and get us all handwritten notes that reports might
10 have been generated from.

11 MR. HEMBREE: Your Honor, it would be of help
12 to me, I'm glad to know, I'm willing and ready to
13 do that but it would be of help to me to have a
14 written order from the Court, for Mr. Axelrod to
15 prepare a short written order.

16 THE COURT: I'm going to have Mr. Axelrod
17 prepare an order on every one of these motions that
18 I grant.

19 MR. HEMBREE: We don't have any objection,
20 then I can forward that order to him.

21 THE COURT: And just provide that order to
22 you for review and then they'll submit it for my
23 signature.

24 MR. HEMBREE: We agree, we don't have any
25 objection.

1 THE COURT: All right. So, you don't have
2 any objection to that, okay.

3 All right, we're down to 9/16. I have been
4 on this bench almost three hours so we're going to
5 take a quick break.

6 (Recessed at 3:59 p.m.)

7 (Resumed at 4:12 p.m.)

8 THE COURT: All right, we'll continue with
9 the motions for, the group of motions filed
10 9/16/2011, start on page 1, motion for proposed
11 questionnaire.

12 All right. Where is Mr. Axelrod?

13 MS. ARMSTRONG: Your Honor, may it please the
14 Court?

15 THE COURT: Yes.

16 MS. ARMSTRONG: We are going to call, the
17 defense is going to call Donald Morgan, III., I
18 believe he is out in the hallway.

19 THE COURT: All right.

20 MR. RICHARDSON: Your Honor, for
21 clarification --

22 MS. ARMSTRONG: He is coming.

23 MR. RICHARDSON: Is this a different motion
24 than the jury questionnaire?

25 THE COURT: This is the motion for the

1 questionnaire?

2 MR. AXELROD: No.

3 THE COURT: I will go to any one you want. I
4 was just taking them in order.

5 MS. ARMSTRONG: This relates, actually, Your
6 Honor, to the issue of the evidence being kept by
7 the Solicitor. We had one more witness.

8 THE COURT: Oh, I'm sorry. All right, go
9 ahead.

10 MS. ARMSTRONG: Thank you, Your Honor.

11 Call Donald Morgan, III.

12 THE COURT: We are revisiting a motion?

13 MS. ARMSTRONG: Your Honor, respectfully, we
14 understand your ruling but I believe that Mr.
15 Morgan needs to be called.

16 THE COURT: Okay. . .

17 MS. ARMSTRONG: To complete the record.

18 DONALD MORGAN, III.,
19 after being first duly sworn, testified as follows:

20 THE CLERK: Please have a seat, please speak
21 into the microphone and state your name and spell
22 it for the record.

23 THE WITNESS: Donald Morgan, D-o-n-a-l-d,
24 Morgan, M-o-r-g-a-n.

25 DIRECT EXAMINATION

1 BY MS. ARMSTRONG:

2 Q Good afternoon, Mr. Morgan, how are you?

3 Nervous?

4 A Yes, ma'am.

5 Q Okay. All right.

6 A Sorry.

7 Q I just have a few questions, so nothing to be
8 nervous about.

9 Mr. Morgan, you were involved in the events
10 leading up to and surrounding the shooting of
11 Officer Joseph McGarry, is that right?

12 A Yes, ma'am.

13 Q Okay. And I believe you were also a witness
14 for the State?

15 A Yes, ma'am.

16 Q Okay. And I believe also --

17 MS. ARMSTRONG: If it is okay, I'm going to
18 do a little bit of leading here.

19 Q Your vehicle, I believe a Honda Accord, was
20 actually taken into evidence for a period of time?

21 A Yes, ma'am.

22 Q That was a 1996 silver Honda?

23 A Gold Honda, pewter.

24 Q Pewter, I'm sorry. And I believe it was
25 returned back to you on January 3rd of 2003?

1 A I don't know the exact date.

2 Q Okay. But you do recall getting your silver
3 or pewter vehicle returned after the McGarry
4 shooting?

5 A Yes, ma'am.

6 Q And do you remember it being returned to you
7 by Investigator Johnson?

8 A No, sir. It was me and my father along with
9 a local tow company went down to the police
10 department and drove the car from the back to the
11 front and had it removed by tow truck to the house.

12 Q Okay. I'm just looking at the paper here, so
13 you go with your memory.

14 Now, after you got your silver Honda, your
15 Honda back did you take an inventory of the
16 contents of your vehicle?

17 A Yes, ma'am, the following day.

18 Q And what did you find in your vehicle when
19 you got it back?

20 A The following day me and my father went to
21 the local paramedics and got gloves because of
22 biohazard written on the car. When we got back,
23 when we were going through the car we found a red
24 bookbag. I took it, threw it on the floor, or on
25 the ground and heard a noise and when I opened it,

1 one of the zippers was partially open and when I
2 opened it the rest of the way I found I think it
3 was one or two clips to a .45.

4 Q So you found actual firearm evidence in the
5 vehicle after law enforcement had processed the
6 vehicle and returned it to you?

7 A Yes, ma'am.

8 Q Did you call anyone after you discovered this
9 firearms evidence?

10 A I called Horry County Police Department.

11 Q Do you remember who you spoke to?

12 A No, ma'am.

13 Q What did you do next?

14 A I was told that an Horry County officer would
15 be there to pick up the evidence, so me and my
16 father and my mother waited for the officer. A
17 female officer eventually showed up.

18 Q Okay. So you found this evidence in the car
19 and you sent it with the officer back to the police
20 department?

21 A I don't know where it went to. She come, she
22 showed up at the house asking to speak with me, she
23 was advised she was there to pick up something from
24 me but didn't know what and was supposed to take it
25 back to Horry County.

1 Q Okay. And let me ask you this, Mr. Morgan.
2 After returning, or releasing that evidence back to
3 the Solicitor's office have you had occasion to
4 provide any other evidence to the Solicitor's
5 office recently?

6 A Yes, ma'am.

7 Q Can you tell me about that?

8 A That was a taser, I don't know what kind it
9 is, one of them hand held ones.

10 Q Tell me where you found the taser?

11 A The taser was at the safe house. The night,
12 I'm trying to think, that I was taken into custody
13 by Detective Allen and Detective Lang.

14 Q What year was this?

15 A I'm thinking it was the day I got released
16 from, the day after McGarry was shot.

17 Q Okay. So December 29th, December 30, you
18 were released?

19 A I think it was the 29th I was released from
20 Myrtle Beach, went home and a couple hours later
21 the detectives came.

22 Q The detectives came?

23 A Yes, ma'am, to my house.

24 Q And they came to your house for what?

25 A They asked me for information pertaining to

1 another homicide. I'm confused.

2 Q Okay, I'm sorry. Let me help you get back on
3 track.

4 A About the taser?

5 Q Yes sir. You just turned in this taser.

6 Does July 28, 2011, sound right to you?

7 A Somewhere around that time.

8 Q Okay. How long had you had this evidence,
9 piece of evidence?

10 A Shortly after the safe house that I was taken
11 there, North Myrtle Beach, along with myself, my
12 mother and father went there to get my clothes from
13 the house and that was in the house and we asked
14 North Myrtle Beach, because there wasn't Horry
15 County there at the time, just North Myrtle Beach
16 Police, North Myrtle Beach Police, we asked them if
17 they wanted to take it into custody and they said
18 no, so --

19 Q Where did the taser come from? Why did you
20 own it?

21 A I didn't own it. It was --

22 Q Would you repeat what you said?

23 A The taser belonged to Fred Holcomb and
24 Luzenski Cottrell.

25 Q This taser belonged to, you say belonged to

1 Mr. Cottrell and Mr. Holcomb and you had had it how
2 long?

3 A Since 2003.

4 Q Okay. So, for eight years you have had it
5 and so recently you gave it to the Soclicitor's
6 office?

7 A Yes, ma'am.

8 Q Okay. Where has it been?

9 A It has been locked up in a safe. I have had
10 no contact with it, it has been in my father's
11 safe, which I don't have the key or the
12 combination.

13 Q Okay. Let me ask you, recently have you had
14 any dealings with Pete Skidmore?

15 A Yes, ma'am.

16 Q Can you tell me about that? Did you meet
17 with Pete?

18 A No, I didn't meet with him. He come by my
19 house and tried to interview me on tape and that is
20 not what I wanted, I didn't want to be recorded.
21 If he wanted to record me he should have at least
22 asked, brought it to my attention.

23 Q Okay. So he came to speak with you and he
24 had a recorer and so that didn't go too well?

25 A No, ma'am.

1 Q Let me ask you this. Did you provide Mr.
2 Skidmore with anything?

3 A Pictures.

4 Q What were the pictures of?

5 A My car.

6 Q The Honda that was involved?

7 A Yes, ma'am.

8 Q What did those pictures show?

9 A It showed the inside of my car, showed all
10 the bullet holes on the exterior of my car, which I
11 think was four or five, I think three or four, I
12 can't remember how many bullet holes, but a picture
13 of the red bookbag, a picture of the gray
14 sweatshirt, one shoe and I think a pair of pants, I
15 think.

16 Q Okay. So you took pictures of the items you
17 found in your car after it was returned to you?

18 A Yes, ma'am.

19 Q Would this be the car involved in the McGarry
20 incident?

21 A Yes, ma'am.

22 Q You found this information, or you found this
23 evidence, you took photographs of it.

24 Now, Mr. Skidmore came to see you this past
25 summer, in July of 2011?

1 A I don't know the exact date.

2 Q Just to give you a time frame, does that
3 sound about right?

4 A Yes, ma'am.

5 Q Okay. It was this year?

6 A Yes, ma'am.

7 Q Okay. But these photographs you took in
8 2002?

9 A No, ma'am. I took them in 2000 and -- it was
10 after the car was released, I guess it was early of
11 '03.

12 Q Early, '03?

13 A Yes, ma'am. It was the day after my car was
14 released to me on a Friday, Friday night, and
15 Saturday morning is whenever the pictures were
16 taken.

17 Q Okay. All right. It was released on the
18 3rd, I see here, January 3rd, so you would have
19 taken the photographs January 4th?

20 A The next day, yes, ma'am.

21 Q Okay. So those photographs are about eight
22 years old?

23 A Yes, ma'am.

24 Q Okay. And so prior to giving the photographs
25 to Mr. Skidmore had you given the photographs to

1 anybody else?

2 A Yes, ma'am. I have given them to, at the
3 time my lawyer John Clark.

4 Q John Clark?

5 A Yes, ma'am. And I think he provided them to
6 the Solicitor, I think he did. I'm not sure if we
7 gave them to them or not.

8 Q Do you remember anybody asking you for the
9 negatives for those photographs?

10 A The only people that got the negatives, that
11 had the negatives was I think Pete Skidmore, he is
12 the only one has had the negatives, but he doesn't
13 have, I've got the negatives but he had them at one
14 time, the day he made the pictures, and I got them
15 back.

16 Q Okay. So he took the negatives to make
17 photographs?

18 A Yes, ma'am, because I had to be at work and
19 he, I couldn't wait for the pictures to be
20 developed, he had to wait until I got to work, I
21 had to go to work and he brought them to me at
22 work.

23 Q Okay. And has anybody else ever asked you
24 for the negatives?

25 A I'm trying to remember. I don't want to say

1 no but I don't want to say yes.

2 Q Did the Solicitor ever ask you for the
3 negatives?

4 A I don't think so.

5 Q Do you remember telling Pete Skidmore that
6 the Solicitor asked you for the negatives to those
7 photographs?

8 A I don't remember what I told Pete Skidmore.

9 Q Do you think you might have told him?

10 A I'm not saying I did, I'm not saying I
11 didn't. I'm not going to say I didn't because I
12 don't remember. Anytime somebody -- this is a big
13 stress for me.

14 Q Yes, sir.

15 A So I don't --

16 Q Well, getting back to really the real issue
17 at hand is did the Solicitor ever ask you to give
18 him those negatives?

19 A No, ma'am. No, ma'am. He got copies of the
20 pictures.

21 Q Uh-huh (Affirmative).

22 A And I give him, I'm not sure if I give them
23 to my lawyer John Clark, or my mother and me, my
24 mother and my father handed them to them, I can't
25 remember.

1 Q Okay. Did anyone, this is the last time I'm
2 going to ask this, then I will let it drop, did
3 anyone other than Mr. Skidmore, anybody who worked
4 for the Solicitor's office ever ask you for those
5 negatives?

6 A Are you asking to have them and copy them, or
7 are you talking about to hold them? I don't
8 understand what you're talking about.

9 Q Either one.

10 A I might have given the negatives at one point
11 to the Solicitor, I don't remember.

12 Q Okay. So --

13 A I don't know.

14 Q So you're saying you don't know whether or
15 not anybody from the Solicitor's office ever asked
16 you to give them those negatives?

17 THE COURT: Do you know if anybody from the
18 Solicitor's office ever even saw them?

19 THE WITNESS: No, sir, I don't. If they did,
20 I'm pretty sure -- I don't know.

21 THE COURT: You don't know, okay.

22 BY MS. ARMSTRONG:

23 Q But you do know the Solicitor's office has a
24 copy of the pictures?

25 A I'm aware of that through my lawyer.

1 Q Okay.

2 MS. ARMSTRONG: All right. Beg the Court's
3 indulgence briefly, Your Honor.

4 No more questions. Thank you very much, Mr.
5 Morgan.

6 MR. HEMBREE: No questions, Your Honor.

7 THE COURT: You may step down.

8 THE WITNESS: Sir?

9 THE COURT: You may step down.

10 (Witness excused).

11 THE COURT: Thank you, Mr. Morgan. Any
12 further need for Mr. Morgan?

13 MS. ARMSTRONG: No, Your Honor. We would ask
14 he be released.

15 THE COURT: Mr. Morgan, you're released from
16 your subpoena. You can go home.

17 THE WITNESS: I can't hear him.

18 MR. HEMBREE: You can go home.

19 THE WITNESS: Go home?

20 THE COURT: You can if you want, okay?

21 THE WITNESS: Thank you.

22 THE COURT: Thank you.

23 MS. ARMSTRONG: Your Honor, very briefly, one
24 final witness, Pete Skidmore.

25 PETER G. SKIDMORE,

1 after being first duly sworn, testified as follows:

2 THE CLERK: Please have a seat, please speak
3 into the microphone, state your name and spell it
4 for the record.

5 THE WITNESS: Peter G. Skidmore,
6 S-k-i-d-m-o-r-e.

7 DIRECT EXAMINATION

8 BY MS. ARMSTRONG:

9 Q Good afternoon, Pete. How are you?

10 A Good. How are you?

11 Q Good.

12 A Good.

13 Q You're familiar with Donnie Morgan, Jr.?

14 A I am.

15 Q Excuse me, Donald Morgan, III?

16 A I am.

17 Q Okay. And have you interviewed Mr. Morgan?

18 A I have.

19 Q Were you present for his testimony just now?

20 A Yes.

21 Q He mentioned -- were you present when he
22 responded to my question about negatives?

23 A Yes.

24 Q Did you have a conversation with Mr. Morgan
25 about the negatives?

1 A Yes. He actually brought the negatives up,
2 and the photographs, and he had said that he had
3 given the photographs to the Solicitor's office
4 but would not give the negatives to the Solicitor
5 because he wanted to protect himself, and he was
6 very clear on that.

7 Q He thought the negatives were a form of
8 insurance, protection, whatever you want to call
9 it?

10 A Yes.

11 Q Okay. Did he elaborate?

12 A No. He just said that he would never allow
13 the Solicitor's office to have the negatives but he
14 had provided them a copy of the photographs.

15 Q And he did this approximately when, or did he
16 say?

17 A He said right after he had taken the
18 photographs and returned whatever evidence back to
19 the proper authorities.

20 Q So, it was consistent with what he just
21 testified to here?

22 A Yes.

23 Q Okay. Is there anything else about that
24 conversation about the negatives that varies from
25 what you heard testified to today?

1 A Yes. He also told me that he had gotten rid
2 of two knives at the Dunkin Donuts that night and
3 had not told anybody else about that. Then we're
4 going through evidence and I see the photographs
5 that I had made copies of through his negatives in
6 evidence at Horry County, along with this stun gun
7 that has just popped up, and one other item, maybe
8 a knife.

9 Q Okay.

10 A And actually some of the evidence was already
11 in the Hartman evidence, which I believe were the
12 two knives that were found in Mr. Morgan's car,
13 from the bookbag.

14 Q Yes, sir, ended up in the Hartman file.

15 A Right, where we, had we not gone ahead and
16 looked through the Hartman stuff we wouldn't have
17 known that it was with McGarry or should have been
18 with McGarry stuff.

19 MS. ARMSTRONG: Thank you. Please answer any
20 questions the Solicitor may have.

21 THE COURT: Solicitor.

22 CROSS EXAMINATION

23 BY MR. HEMBREE:

24 Q Mr. Skidmore, you indicated you found
25 photographs of the car, photographs that Donnie

1 Morgan took of his car and the bookbag, in evidence
2 with the rest of the photographs that were in
3 evidence with Horry County?

4 A The photographs that I had made copies of
5 from the negatives that I gave to Donnie Morgan
6 were in evidence and logged in back in I believe it
7 was July the 27th, sometime back then of this year.

8 Q This year, okay.

9 A Yes, sir.

10 Q I got you. I got you.

11 MR. HEMBREE: I don't have any further
12 questions.

13 THE COURT: They were logged in this year?

14 THE WITNESS: Your Honor, I took, they were
15 never, they were never in evidence prior to July of
16 this year.

17 THE COURT: Okay, all right.

18 MS. ARMSTRONG: Thank you. No further
19 questions.

20 THE COURT: All right.

21 (Witness excused).

22 MS. ARMSTRONG: Thank you, Your Honor, for
23 letting me supplement the record on the issue. I
24 just want to raise one concern that I have.

25 THE COURT: Okay.

1 MS. ARMSTRONG: Frankly, the chain of
2 custody, that issue has been litigated and dealt
3 with. However, one of the concerns that I have
4 personally is the issue about spoliation of
5 evidence. Evidence wasn't being kept in the proper
6 manner and not every piece of evidence is, you
7 know, going to make or break this case but there
8 are some important pieces of evidence that hadn't
9 been stored properly. Specifically the clothing,
10 we need to have tested, we'll see what's there, but
11 I do know it has not been stored properly. And in
12 a gunshot case you've got to preserve evidence in
13 the right fashion and it hasn't been done.

14 Furthermore, this photograph that was handed
15 over from this witness to the Solicitor, to the
16 Solicitor's office apparently before the first
17 trial doesn't get logged into evidence.

18 THE COURT: I don't know if it was before the
19 first trial. I haven't heard anything that would
20 suggest that to me. Mr. Morgan doesn't even know
21 when he may have given it or when his lawyer may
22 have given it to the Solicitor's office or the
23 Solicitor's office ever got it. Mr. Skidmore says
24 it shows up in the Solicitor's office July, this
25 year. I never heard anything from Mr. Morgan as to

1 when, where, how. He thinks his attorney -- no, if
2 I remember his testimony, he has heard from his
3 attorney that the Solicitor's office did have it at
4 some time after the trial.

5 MS. ARMSTRONG: Well, it seems very unlikely
6 that a lawyer who was employed or appointed to
7 represent, whichever the case may be, a man in 2003
8 waits eight years to just finally give over what
9 was given him by his client. I don't know, but it
10 is very concerning to me that evidence hasn't been
11 stored properly and quite frankly I just --

12 THE COURT: It is quite clear to me that the
13 Solicitor has turned it over. I mean, your
14 investigator saw it in the materials that he was
15 shown.

16 MS. ARMSTRONG: In the wrong file.

17 THE COURT: And there is nothing to indicate
18 to me that it has any relevance whatsoever to this
19 trial.

20 MS. ARMSTRONG: The photographs, Your Honor.

21 THE COURT: Do they have any relevance? I
22 bet you that the police who processed that vehicle
23 have photographs showing exactly the same thing. I
24 bet you have those, I think you do.

25 MS. ARMSTRONG: Thank you, Your Honor.

1 There is just one other point and then we can
2 move on, Your Honor. The clothing that was found,
3 that belonged to, that was associated with the
4 backpack, those items, when they were turned over
5 the day after the car was returned, they are, the
6 way in which they have been stored, the backpack
7 has mold, these items were never tested, never sent
8 to SLED.

9 THE COURT: Weren't they turned over to
10 defense counsel in Mr. Cottrell's first trial?
11 Wasn't there every opportunity possible made to
12 allow him to do any testing he wanted?

13 MS. ARMSTRONG: Your Honor, I don't know what
14 Mr. Nettles did, but I do know that the way the
15 evidence has been stored is, I mean, it's in
16 horrible condition for testing. I mean, mold
17 and --

18 THE COURT: Have you got anyone can say that,
19 that it can't be tested?

20 MS. ARMSTRONG: I think we can find somebody
21 to test it. The question is what are the results
22 going to be. It hasn't been stored properly.

23 THE COURT: It is pure speculation.

24 MS. ARMSTRONG: Thank you, Your Honor. I
25 just wanted to put it on the record.

1 THE COURT: All right, it's said.

2 MR. AXELROD: Your Honor, on your previous
3 rulings, for the record, on disqualifying the
4 Solicitor's office and removing the Solicitor's
5 office from the chain, we take exception, for the
6 record, to your ruling.

7 THE COURT: All right. Mr. Hembree will
8 prepare an order and submit it to you or submit it
9 to me in that regard, okay?

10 MR. AXELROD: Your Honor, the next matter we
11 bring up, I talked about it several times, is the
12 motion to reconsider that October 14th order on the
13 issuance of subpoenas.

14 THE COURT: Mr. Axelrod, I have revisited
15 that twice and I have failed to change my ruling.
16 Now, we were back in here again a month ago and we
17 revisited the same, we had the same motions.

18 MR. AXELROD: Just a little latitude, Your
19 Honor.

20 THE COURT: Okay.

21 MR. AXELROD: Your Honor, I understand that.
22 What I'm trying to do, and basically I talked to
23 Appellate Defense and they asked me to do this
24 today because they said that I have not preserved
25 that properly. If the Court could just give me a

1 little latitude and let me put some stuff on the
2 record.

3 THE COURT: All right.

4 MR. AXELROD: Your Honor, we came before Your
5 Honor on the August the 12th hearing and we
6 discussed the defendant's Rule 13 subpoena power
7 pursuant to Rule 13 of the South Carolina Rules of
8 Criminal Procedure. We then filed a timely motion
9 for clarification and reconsideration. October
10 14th Your Honor signed a written order referencing
11 the August 12th, 2011 hearing.

12 Today, Your Honor, we're asking, to preserve
13 the record, we ask that we be heard on the motion
14 for reconsideration. Your Honor, since there has
15 only been one signed order, the defendant asks you
16 to reconsider that one signed order and issue a
17 separate order either granting reconsideration or
18 denying it, at which point the defendant has then
19 properly preserved that issue for appellate review.

20 Your Honor we ask you to reconsider your
21 October 14th order regarding defendant's ability to
22 issue subpoenas based on the following reasons.
23 Your Honor, the October 14th order is inconsistent
24 with the plain meaning of Rule 13 of the South
25 Carolina Rules of Criminal Procedure. It violates

1 the defendant's Fifth and Fourteenth Amendment
2 right to due process. Your Honor, it further
3 violates the Sixth Amendment right to compulsory
4 process. Your Honor, it also violates the Sixth
5 Amendment right to confrontation under the United
6 States Constitution. Your Honor, it violates his
7 right pursuant to Article I, Section 3 and Section
8 14 of the South Carolina Constitution.

9 Your Honor, my client, the defendant in this
10 case, is on trial for his life and feels without
11 the proper reconsideration he will be irreparably
12 harmed based on the order's requirement that the
13 defendant submit all requests for documents in a
14 discovery motion. Your Honor, this would
15 effectively prohibit the defendant from examining
16 documents obtained via subpoena duces tecum and
17 instead leaves the Solicitors as the sole arbiter
18 of what documents the defendant receives at that
19 point.

20 Your Honor, Rule 13 exists requiring the
21 defendant access to documents that exist outside
22 Rule 5. The Solicitor has no obligation to provide
23 any document to the defense outside of Rule 5 and
24 your order, Your Honor, enjoins the defendant from
25 obtaining them via compulsory process. This order

1 also gives the State knowledge of defendant's trial
2 strategies and theories of the incident, things to
3 which they would not normally be privy. It
4 requires either defense counsel hide his strategy
5 for trial by not requesting said documents or
6 giving the State an advantage before trial even
7 starts by laying out the framework of its case.

8 And, Your Honor, what I had done, I have
9 given Mr. Hembree a copy and I'm going to hand up
10 to the Court, I prepared a new motion that he has
11 some objections to but I also wanted to hand you up
12 what is the original one we filed, and
13 clearly --

14 THE COURT: Are you telling me you filed this
15 motion again?

16 MR. AXELROD: Well --

17 THE COURT: Or are you telling me that you're
18 formally, you are wanting me to formally issue an
19 order denying reconsideration?

20 MR. AXELROD: Yes, sir, Your Honor, that is
21 what I'm asking.

22 THE COURT: Which?

23 MR. AXELROD: We're asking you to do an order
24 where you're denying the formal reconsideration at
25 today's hearing.

1 THE COURT: Let me hear from you, Mr.
2 Hembree. I'm going to consider it, I'm going to
3 reconsider it.

4 MR. HEMBREE: Thank you, Your Honor. A
5 couple things. First off, I have got, my real
6 concern with the proposed order that Mr. Axelrod
7 just submitted to the Court is that he repeatedly
8 mischaracterizes what the State's position is and
9 what the Court's ruling is. He characterizes it as
10 we object to the defense requesting subpoenas. We
11 do not. We only require them to follow the rule.

12 The rule says you can get subpoenas for
13 witnesses and documents but only for hearings and
14 trial proceedings. You can't just issue, get
15 subpoenas issued in blank, which is what he has
16 essentially been asking the clerk to do, just sign
17 off on those, and then send them to whoever he
18 wants to send them to to grab these documents
19 whenever he wants to get them. The rule doesn't
20 allow him to do that.

21 So, I have objection, number one, with this
22 proposed order. I think it mischaracterizes it,
23 and the Court never ruled that defense counsel
24 couldn't get a subpoena. The Court said if you get
25 a subpoena you have to follow the rule and if you

1 want that material ahead of time you need to make
2 it through a discovery request. And it is my
3 recollection, Your Honor, that if the State refuses
4 to provide it or has some objection to it, then the
5 Court would be willing and eager to hear defense
6 counsel on that matter.

7 THE COURT: And that was my ruling.

8 MR. HEMBREE: That was your ruling.
9 Therefore, defense counsel's rights have in no way
10 been prejudiced because they have a path, they have
11 a method to obtain whatever documents they want to
12 obtain, whatever evidence they want to try to get
13 hold of. There is a process and a method. They
14 are using, I don't begrudge them asking for
15 materials that they feel is necessary for the
16 preparation of their defense, I encourage that, I
17 would be eager to help them with that, however I
18 have to do it within the rules and there is a
19 process available to do that. That process has
20 been made very clear to defense counsel. For
21 whatever reason defense counsel is fixated on a
22 belief that the rule should be different than what
23 it is. As a policy matter maybe's he's right but
24 as a legal matter he's wrong and, Your Honor, that
25 would be the State's position, that we have a

1 process.

2 His client furthermore is in no way going to
3 be irreparably harmed. He has a motion for
4 supersedeas that is in the background here, that he
5 has submitted to us, I think he may have sent it on
6 to the Court, which in my view is nothing more than
7 a dilatory tactic because there is no irreparable
8 harm because there is a process by which he can go
9 about getting the materials.

10 And I will go one further, Your Honor, and I
11 will sit down. If defense counsel has some
12 evidence that they need to get hold of and they are
13 truly concerned that by asking for it through
14 discovery that they will tip their hand, in some
15 way that it will tip us off, that we'll figure out
16 their trial strategy, all the secret stuff they are
17 trying to do will all now become clear to the
18 State, I have no objection, I have no objection
19 whatsoever to defense counsel coming before this
20 Court requesting an order from this Court to
21 determine whether or not they are entitled to that
22 material, without telling us. I have confidence
23 that the Court, if necessary, would say, it would
24 go this way in my view, "Yes, you're entitled to
25 that, I'm not going to tell the State about that,"

1 or, "I don't know if you're entitled to it or not
2 but either way the State is going to be involved in
3 that," and/or, "You may be entitled to that but
4 there is a third party involved, you're taking
5 somebody else's stuff and they have got a right to
6 be heard on it." It might be a bank, might be a
7 phone company, might be somebody else that says,
8 "Hey, that's my stuff, I don't want you snatching
9 my stuff without due process."

10 So, there are several different, you know,
11 variations that could come up with that request for
12 a court order but I guess I'm saying there are many
13 ways to get where they want to get and follow the
14 rules. I just ask they do that.

15 THE COURT: All right. I have reconsidered
16 my ruling, I looked at my order dated October 14th,
17 I very clearly in that order added a final sentence
18 or addition to a sentence where I said this order,
19 I mean, I was denying the issuance of subpoenas by
20 the defense except in compliance with Rule 13 and
21 for the purposes of hearing or trial. That is the
22 rule of this state as I know it. I know of no
23 authority for the issuance of subpoenas duces tecum
24 by the defense outside of those parameters. I am
25 going to stand by my ruling.

1 Solicitor, will you prepare an order denying
2 the motion to reconsider?

3 MR. HEMBREE: Thank you, Your Honor.

4 MR. AXELROD: Your Honor, at this point, and
5 I respect the Court's ruling, sir, that you denied
6 that motion for reconsideration, we would ask that
7 you grant the defendant supersedeas relief so that
8 this issue can be resolved in an appellate court
9 with the appropriate writ. Your Honor, the
10 defendant requests supersedeas relief be granted so
11 the status quo is preserved and the defendant's
12 grounds for appeal do not become moot. Your Honor,
13 we would base that on the ground supersedeas is
14 based upon his belief, my client's belief that an
15 appellate court would likely rule in his favor and
16 if relief is not immediately granted the defendant
17 would be irreparably harmed.

18 Your Honor, we would argue, we would suggest
19 to the Court that this violates the plain meaning
20 of Rule 13 of the South Carolina Rules of Civil
21 Procedure, Criminal Procedure, and again violates
22 the Fifth and Fourteenth Amendments, the due
23 process clause, violates the Sixth Amendment
24 compulsory process clause and Sixth Amendment
25 confrontation clause, again violating Article I,

1 Sections 3 and 14 of the South Carolina
2 Constitution.

3 Furthermore, Your Honor, my client would
4 likely suffer irreparable harm because of the work
5 product privilege violation and imposition of the
6 harmless error rule in post conviction appeal.

7 Your Honor, this point addresses one of the
8 purposes of supersedeas relief, the prevention of a
9 moot appeal. If this Court does not preserve the
10 status quo the Solicitor could voluntarily produce
11 some requested document outside of Rule 5 but not
12 all of the documents necessary for complete and
13 material defense. Your Honor, in that case an
14 appellate court could likely determine that the
15 appeal was moot, since the Solicitor had
16 voluntarily produced some documents outside of Rule
17 5 and a controversy no longer existed.

18 Your Honor, without a stay to preserve the
19 status quo there is no complete and appropriate
20 remedy that corrects the irreparable harm suffered
21 by the imposition of this order. Your Honor, we
22 ask the Court to grant supersedeas relief and stay
23 the proceedings so the defendant may appeal the
24 order of this Court and obtain the necessary remedy
25 for which he prays from a court of higher

1 jurisdiction, sir.

2 MR. HEMBREE: Your Honor, there is no need
3 for me to go back over our grounds. We oppose the
4 motion for supersedeas.

5 THE COURT: And it is denied.

6 MR. AXELROD: Thank you, Your Honor. We
7 would take exception.

8 THE COURT: All right.

9 MR. HEMBREE: Would you like me to prepare an
10 order on that?

11 THE COURT: Certainly.

12 I look at now on page 104, the next motion of
13 the group of motions filed October the 14th of
14 2011, the motion for production of firearms,
15 bullets, cartridge casings, magazines, ammunition
16 fragments. I think that is the next motion, is it
17 not?

18 MR. RICHARDSON: Your Honor, with regard to
19 three, four, five, six and seven on the October
20 14th motions we have previously met with defense
21 counsel. We have talked about a system whereby
22 they will request whatever they need. It may be
23 more, may be less than is listed in three, four,
24 five, six and seven, but they will request that
25 through Laura Rabin, Laura Rabin will gather that

1 information and those pieces of evidence if they
2 are not in her possession and then she will send it
3 to some location known by the defense, to some
4 address which would keep us from knowing their
5 defense experts.

6 THE COURT: Well, what about all these other
7 items? It looks like there are 52 items listed.

8 MR. RICHARDSON: Again, I talked with Mr.
9 Axelrod earlier about this. He said that they may
10 not need all those items but whatever they did need
11 it was currently at Myrtle Beach or some other
12 location.

13 THE COURT: All right. They want these for
14 inspection and testing of some type or are they
15 wanting to just see them? What exactly do you look
16 for here, Mr. Axelrod?

17 MR. AXELROD: Your Honor, specifically I
18 direct the Court to number 42 and number 43. What
19 those are is items 47 and 48, two Smith & Wessons.
20 Your Honor, those are the guns that were used by
21 Guthinger and McGarry. We have yet to be shown
22 those guns, we haven't seen those guns in evidence.
23 We need both those guns to send to our experts for
24 testing for numerous reasons.

25 THE COURT: Well, I don't know about giving

1 them, turning them over to you to send to some
2 expert. You did use the word send. What do you
3 propose?

4 MR. AXELROD: Well, as Mr. Richardson said, I
5 would like to relinquish the guns to, it can be
6 Laura Rabin and we have Laura Rabin send them to
7 the ballistics expert. I don't want to touch the
8 guns. We need to have both those guns tested. My
9 concern with this issue, we put everything in there
10 but the two primary things right now are the guns,
11 the guns which we have not been shown. We have
12 looked at Myrtle Beach, we have looked at the
13 courthouse and we have looked at Horry County.
14 Laura Rabin, both those Smith & Wesson are issued
15 guns by the Myrtle Beach Police, which is their
16 property, Myrtle Beach's property, property of the
17 police department, and they don't exist for us
18 right now, we need those.

19 THE COURT: All right. What about it, Mr.
20 Richardson, 42 and 46?

21 MR. AXELROD: Your Honor, it is SLED numbers
22 47 and 48, we listed them -

23 THE COURT: 47 is a magazine. 42 is a Smith
24 & Wesson.

25 MR. AXELROD: We list them as number 42 and

1 43 in our motion but they correspond to SLED
2 numbers 47 and 48, Your Honor.

3 THE COURT: Okay, all right, I see them now.
4 What do you say?

5 MR. RICHARDSON: From our standpoint anything
6 they need to test they made it very clear they
7 didn't want us knowing where it was going. To help
8 them and for us not to know, Laura Rabin was going
9 to consolidate that stuff and send it to whomever
10 they asked to be --

11 THE COURT: Anyone?

12 MR. RICHARDSON: Well, it is supposed to be
13 an expert, their expert. The main thing was us not
14 knowing who the expert was but someone who would be
15 able to keep the chain of custody on those items.

16 THE COURT: So, you have an agreement as to
17 that motion?

18 MR. AXELROD: The way we send it, but where
19 I'm at at this point, where are the guns?

20 THE COURT: Well, I think the fact he is
21 willing to produce them sort of goes along with the
22 fact that he's willing to allow you to send them
23 somewhere. It goes without saying, right, Mr.
24 Richardson?

25 MR. RICHARDSON: Yes, sir.

1 THE COURT: He says he will provide the
2 firearms and he will allow Miss Rabin to forward
3 them for testing at some appropriate lab or some
4 expert.

5 MR. AXELROD: I understand that, Your Honor.
6 What I'm asking first is be able to see the guns,
7 take pictures of them. We have taken pictures of
8 Mr. Cottrell's gun. That is in evidence. We took
9 a picture of that gun. We would like to see those
10 two guns and take pictures of them.

11 MR. RICHARDSON: And I can't tell you right
12 now where those guns are.

13 THE COURT: It is easy to get, I mean, to
14 identify the guns, Mr. Axelrod. You've got serial
15 numbers on them.

16 MR. AXELROD: Yes, sir.

17 THE COURT: So, I mean, if they are sent to
18 the expert I'm sure your expert is going to
19 photograph them.

20 MR. AXELROD: Yes. I would ask to be able to
21 see the guns. I can see them with Laura Rabin or
22 Myrtle Beach. We have seen the other guns. We
23 would like to see them before they are sent off for
24 testing.

25 THE COURT: All right, we can arrange that.

1 MR. RICHARDSON: That' fine. We had offered
2 to gather them all up and send everything to Horry
3 County but they didn't want us to do that, so it is
4 a hybrid, Laura Rabin will gather them and send
5 them to the appropriate lab.

6 THE COURT: Okay. All right, that takes care
7 of that.

8 Motion for production of items needed for
9 latent print testing. It looks like we have 45
10 items listed here.

11 MR. RICHARDSON: Your Honor, the State's
12 response for their third, fourth, fifth, sixth and
13 seventh motion would be if they need any of that --

14 THE COURT: That is where you lose me.
15 Third, fourth, fifth and sixth and seventh motion,
16 I don't know what those would pertain to, Mr.
17 Richardson, because they are not numbered evidence
18 in that fashion.

19 MR. RICHARDSON: Yes, sir. Your Honor, Bates
20 stamp pages 104 through 118.

21 THE COURT: Okay. All right, good. So
22 you're willing to produce those matters and allow
23 them to have them tested?

24 MR. RICHARDSON: My understanding, they will
25 go through Laura Rabin.

1 THE COURT: Is that right, Mr. Axelrod?

2 MR. AXELROD: Yes, sir, Your Honor. And I
3 bring the Court's attention, we'll move on to page
4 Bates stamp number 113, we're asking that blood, we
5 would like to have the blood from the autopsy, we
6 would like to have access to that blood. That is
7 something we were unable to find at this point.

8 THE COURT: Is there any?

9 MR. RICHARDSON: Your Honor, I don't know
10 that.

11 MR. AXELROD: It is a SLED number, Your
12 Honor, 9 and 9.1, so it did exist with SLED at some
13 point.

14 THE COURT: All right. To the extent it
15 exists, he's agreed to turn it over.

16 MR. HEMBREE: Your Honor, I hate to
17 interrupt. There is a genetic profile on Joe
18 McGarry that has already been developed by SLED, so
19 I don't know if there is a bottle of evidence
20 rolling around from the autopsy.

21 THE COURT: If you have a genetic profile
22 that has already been established --

23 MR. AXELROD: Your Honor, I'm sorry --

24 THE COURT: Do you want the blood sample or
25 do you want the genetic profile?

1 MR. AXELROD: I want the blood sample. I
2 want to do a full profile ourself on seeing what
3 was in the officer's blood. We have reason to
4 believe that there might be drugs within this
5 officer's blood. We want to determine that, Your
6 Honor.

7 THE COURT: All right, let's provide it,
8 then.

9 MR. RICHARDSON: Your Honor, if it is
10 available it will be provided.

11 THE COURT: Okay. It would seem to me that a
12 toxicology report was done at the time of autopsy
13 but if you want that, Mr. Axelrod, we can, the
14 Solicitor says he's willing to provide it.

15 MR. AXELROD: Thank you, Your Honor.

16 THE COURT: All right. That brings us to
17 119, motion for a hearing to determine probable
18 cause. Wasn't there a preliminary hearing held in
19 this matter?

20 MR. AXELROD: Your Honor, in the first trial
21 there was. We're asking the Court to conduct one
22 today because we don't feel --

23 THE COURT: Isn't that res judicata?

24 MR. AXELROD: Your Honor, it was overturned,
25 this case was overturned.

1 THE COURT: Not the preliminary hearing.

2 MR. AXELROD: Your Honor, I would submit to
3 the Court that there is new case law out there and
4 that would require another probable cause hearing.

5 THE COURT: I submit to you there is not.

6 MR. AXELROD: Your Honor, if I may put on the
7 record --

8 THE COURT: Yes.

9 MR. AXELROD: Your Honor, United States
10 versus Foster, and it was a case that was decided,
11 hold on one second, Your Honor, United States
12 versus Foster, Fourth Circuit Court of Appeals, it
13 was argued December 10th, 2010, was decided March
14 the 2nd, 2011. Your Honor, in this case the Court
15 decided that you need to have more than
16 articulatable and reasonable suspicion for an
17 officer to invoke a stop. In this case, Your
18 Honor, in the Foster case the police witnessed what
19 they thought was drug activity. They saw somebody
20 crouched in a car, they saw the defendant waving
21 his arms and --

22 THE COURT: Mr. Axelrod, you're confusing
23 this case. There was a shooting, your client had
24 been shot, an officer had been shot, that's what
25 led to the arrest. Does it make any difference

1 what occurred first? It may go to your self
2 defense defense, but it doesn't have anything to do
3 with probable cause that existed to arrest this
4 defendant.

5 MR. AXELROD: Your Honor, it goes to the
6 articulatable suspicion, that the officer had no
7 right to even question Mr. Cottrell that day.
8 Ultimately Mr. Cottrell was in Dunkin Donuts, he
9 was buying coffee.

10 THE COURT: I understand that. That is
11 before this offense occurred.

12 MR. AXELROD: Mr. McGarry decided to harass
13 Mr. Cottrell and whatever articulatable suspicion
14 that he had does not exist. He had no right to
15 even talk to Mr. Cottrell that night.

16 THE COURT: I'm talking about the officers
17 who later arrested Mr. Cottrell.

18 MR. AXELROD: I'm speaking before he was, I'm
19 speaking when the event occurred, Your Honor,
20 before Mr. McGarry was shot.

21 THE COURT: That may go to whether or not you
22 have a defense of self defense or that there was an
23 illegal arrest.

24 MR. AXELROD: I think it goes also to the
25 probable cause, that the Court can take judicial

1 notice what the officer did was wrong and illegal
2 at that time, forgetting the self defense that
3 occurred later, I don't think the officer had any
4 legal basis, based on the Foster case, that he
5 could even have talked to Mr. Cottrell that evening
6 and I think, I'm asking the Court to take judicial
7 notice that what Mr. McGarry did, what Officer
8 McGarry did that day was illegal based on case law,
9 that he had no right --

10 THE COURT: What would that have to do with
11 his later arrest? Are you saying that the facts
12 surrounding this case, you have one officer shot,
13 you've got the defendant who has been shot, you
14 have multiple witnesses, that probable cause did
15 not exist?

16 MR. AXELROD: I will draw an analogy to
17 drugs. In theory, if Mr. Cottrell had been done a
18 Terry frisk based on the reasons that McGarry
19 quotes, if a frisk had been done and drugs had been
20 found, according to this Fourth Circuit case those
21 drugs would have been suppressed and the case would
22 have been kicked. I'm saying to this Court that
23 his actions were impermissible at the time. I'm
24 asking the Court to take judicial notice and allow
25 us to tell the jury that what he did was

1 impermissible because he wasn't acting under an
2 articulatable and reasonable suspicion. We're
3 asking for another probable cause hearing to
4 determine that, and that is what I'm asking for,
5 sir.

6 THE COURT: Well, let me hear from you, Mr.
7 Solicitor.

8 MR. RICHARDSON: Your Honor, the first reason
9 would be that it is untimely. I think the Court
10 has already hit on it. This is really not a
11 probable cause hearing. This case has already been
12 true billed, the new case, by the Horry County
13 grand jury.

14 THE COURT: Absolutely.

15 MR. RICHARDSON: So, what Mr. Axelrod is
16 talking about would be perfect argument for
17 directed verdict at the end of the State's case and
18 that would be the time to bring up that the arrest
19 was unlawful. It is certainly not a probable cause
20 hearing. The Horry County grand jury has already
21 found probable cause.

22 THE COURT: And there has been a preliminary
23 hearing, I understand, in this case as well.

24 MR. RICHARDSON: Yes, sir, Your Honor.

25 THE COURT: Both.

1 MR. RICHARDSON: Yes, sir.

2 THE COURT: I deny your motion.

3 MR. AXELROD: Take exception, Your Honor.

4 THE COURT: All right. The next, on page
5 126, is a motion for hearing to determine
6 admissibility of all scientific evidence to be
7 offered by the State.

8 Now, what are you asking for there, Mr.
9 Axelrod, that as scientific evidence is offered,
10 that there is a hearing to determine its
11 admissibility?

12 MR. AXELROD: Yes, sir, Your Honor.

13 THE COURT: Well, wouldn't you expect the
14 Court to do that during the trial?

15 MR. AXELROD: Yes, sir, Your Honor. We just
16 filed this motion.

17 THE COURT: All right, that's granted.

18 MR. AXELROD: Yes, sir.

19 THE COURT: On page 128, defendant's motion
20 and memorandum in support of the defendant's motion
21 to exclude evidence of defendant's prior
22 convictions under rule of evidence 609 in the event
23 the defendant exercises his right to testify. And
24 tell me how you come to the conclusion that would
25 be appropriate, Mr. Axelrod.

1 MR. AXELROD: Your Honor, I would remind the
2 Court of the higher scrutiny standard, that my
3 client is on trial for his life. I think that any,
4 if my client is to testify and they want to bring
5 out the conviction for the murder, the Love murder
6 in Marion, that would unduly prejudice my client
7 under a 403 analysis, in no way could it be
8 probative.

9 THE COURT: Probative versus prejudicial?

10 MR. AXELROD: I would say under the
11 heightened scrutiny standard I believe the Court
12 should agree and we would ask the Court to exclude
13 that because it could force my client, it could
14 deprive the jury of hearing the testimony of the
15 most important witness in the case, which would be
16 my client, sir.

17 THE COURT: Solicitor?

18 MR. RICHARDSON: Your Honor, certainly I just
19 believe that this motion is untimely.

20 THE COURT: I certainly think it is as well
21 and I'm not going to rule on this motion at this
22 time. This is something for trial. I have to see
23 how the evidence develops. The probative value of
24 the prior conviction will be determined by what
25 evidence has been introduced in the trial and how

1 the State's case develops. I cannot make a ruling
2 where I must determine what the probative value is
3 until I have heard that. Your motion stands, I
4 will rule during the trial on that motion.

5 MR. AXELROD: Thank you, sir.

6 THE COURT: 139, motion for discovery of
7 exculpatory and impeachment evidence. You have
8 filed a Rule 5 motion, have you not, or a motion
9 under Brady versus Maryland? Have you, Mr.
10 Axelrod? Surely you have.

11 MR. AXELROD: Your Honor, the reason I bring
12 this motion up is because especially for the stun
13 gun. Your Honor, there is things I believe that we
14 were never even told about the stun gun. The only
15 way we stumbled onto the stun gun was I believe
16 Investigator Skidmore found that evidence, so there
17 is evidence that is coming into this case that
18 we're not even aware of.

19 THE COURT: He found it because the
20 Solicitor's office showed it to him.

21 MR. AXELROD: No, sir, Your Honor.

22 THE COURT: Didn't it come from law
23 enforcement?

24 MR. AXELROD: He went to Laura Rabin, he was
25 just looking at evidence and all of a sudden new

1 evidence appeared.

2 THE COURT: Who is she?

3 MR. AXELROD: Evidence custodian.

4 THE COURT: For who?

5 MR. AXELROD: For Horry County.

6 THE COURT: Okay.

7 MR. AXELROD: Nobody informed us that the
8 evidence existed.

9 THE COURT: I would remind the State of the
10 requirement of Brady versus Maryland, if there is
11 anything exculpatory or anything that would, could
12 be used for impeachment or otherwise it should be
13 turned over and I'm sure you're aware of that.

14 MR. HEMBREE: Yes, Your Honor.

15 THE COURT: Okay. Page 145, defense motion
16 to preclude or limit victims impact evidence. Do
17 you even know what the victims impact evidence will
18 be at this juncture, Mr. Axelrod?

19 MR. AXELROD: No, sir, Your Honor. What
20 we're asking the Court for in this case is the
21 personal characteristics of the victim and
22 emotional impact on the family will not prove or
23 make more or less probable propriety of a
24 sentence's effect, we're asking the State be
25 precluded from going into it and limit the victim

1 impact evidence at this trial.

2 THE COURT: Isn't that contrary to the law in
3 this state? Let me hear from you, Mr. Solicitor.

4 MR. HEMBREE: Yes, Your Honor. The
5 introduction of victim impact evidence in the
6 penalty phase of death penalty trials has been the
7 law of South Carolina since I believe the early
8 nineties. We adopted the Payne versus Tennessee
9 standard and repeatedly our Supreme Court has
10 repeatedly ruled on the admissibility of victim
11 impact testimony in the course of the penalty
12 phase. They have even gone so far in Humphries to
13 say we don't have to put the defendant on notice of
14 that evidence, it is not required, so that is the
15 law of the State.

16 THE COURT: Are you prepared to argue against
17 the precedent in this state?

18 MR. AXELROD: Your Honor, what I'm asking, in
19 the first phase of the trial.

20 MR. HEMBREE: Oh, no, Your Honor, we don't
21 intend to introduce any victim impact testimony.

22 MR. AXELROD: Just caution him that some
23 witness that would testify, would be on the stand
24 might bring out that information. I'm asking that
25 we caution the State on that.

1 THE COURT: I would propose you will know
2 when he puts up victim impact.

3 MR. HEMBREE: I appreciate that, however the
4 motion itself says, in the first paragraph it says
5 to preclude the prosecution from introducing victim
6 impact testimony at the sentencing phase, so I
7 assumed that he was talking about sentencing phase
8 and that is why --

9 MR. AXELROD: I'm speaking about both. I
10 understand the rule of our state and our case law
11 but I'm putting it out there to limit it, that's
12 what I'm asking.

13 THE COURT: Well, I'm not going to limit it
14 as to the sentencing phase. It is the law of this
15 state, this state has long since allowed that and
16 repeatedly allowed that.

17 All right, 159.

18 MR. HEMBREE: Is that denied, Your Honor?

19 THE COURT: Yes, sir.

20 Motion to exclude -- at least as to the
21 sentencing phase.

22 MR. AXELROD: I want to take exception to
23 that ruling, Your Honor.

24 THE COURT: Motion to exclude uniformed
25 police officers from attending the trial. How was

1 that handled in the first trial, Mr. Hembree?

2 MR. HEMBREE: Your Honor, I know that we did
3 not have a large group of uniformed officers in the
4 courtroom at any one time. We talked to the folks,
5 obviously there were folks at Myrtle Beach that
6 were interested in coming, we cautioned them about
7 that, not to have, you know, we didn't want to have
8 rows and rows of guys lined up, that we were trying
9 to avoid that, too. So we did have, occasionally
10 there were officers that were, that were just
11 getting ready to go on duty and they stopped by,
12 caught a little bit of the trial and then left.
13 So, it was sort of a, you know, as long as it was
14 reasonable it wasn't going to be a problem. I'm
15 certainly willing to caution --

16 THE COURT: My position on that is this, Mr.
17 Axelrod. Until it becomes a problem I will allow
18 uniformed officers. We have uniformed officers in
19 and out of the courtroom in every term of criminal
20 court we have. If it looks to me like that is
21 going to present a problem or I feel that the
22 police presence is becoming somewhat of an
23 overwhelming influence in the courtroom I will, I
24 will do something about it. Your motion is out
25 there, I'm not ruling on it at this time, I'm not

1 going to grant it or deny it, we just have to see.

2 Motion to adjourn at a reasonable time.

3 That is on page 163. What is that about, Mr.

4 Axelrod?

5 MR. AXELROD: Your Honor, we're asking the
6 Court if it could come up with some basis for
7 adjournment that we don't overburden the jurors,
8 whether we break at 5:30 or break at 6:00, I talked
9 with the Solicitor and he said that if the jury
10 wanted to go longer we won't object to that either
11 but I think it would be fair to have some kind of
12 break period for these jurors..

13 THE COURT: Mr. Axelrod, I'm the easiest
14 judge in the state on jurors. Very rarely will I
15 go an hour and a half. I allow the jurors to raise
16 their hand if they become uncomfortable, I always
17 take a break should they do that. I allow jurors
18 to raise their hand if there is ever a time when
19 they cannot see or hear what is going on in the
20 courtroom, and other than today I don't expect any
21 hearing we have to go past about 7:00 o'clock.

22 MR. AXELROD: Yes, sir, Your Honor.

23 THE COURT: I usually try to break at
24 convenient times. I do not try to break up a
25 witness' testimony. If it means we have to leave

1 at 4:00 o'clock we do it. If it means we have to
2 stay over until 6:30 or 7:00 we do that as well. I
3 try to keep the testimony or the flow of evidence
4 in the case in fact so that there is some rhyme or
5 reason about it. I promise you I will do that in
6 this trial as well.

7 Okay, page 166, motion to list witnesses and
8 request for criminal histories.

9 What about it, Mr. Hembree?

10 MR. HEMBREE: Your Honor, the witness lists,
11 here is what -- I would object. I object to the
12 State being required to provide their witness list
13 to the defense, as I'm sure the defense would
14 object if we requested their witness list. What I
15 would propose, the process that we have used
16 repeatedly in death penalty cases is tried and
17 true, worked very well, is that both sides submit a
18 complete witness list to the Court. The Court
19 then, we do it in a format that is compatible, the
20 Court then meshes those two lists and provides that
21 list to the jurors that are brought in for voir
22 dire so they can review that list when they are in
23 the waiting area before they come out and they can
24 take a look and see if they know any people on the
25 witness list. That way we can achieve fairness but

1 at the same time neither side has to sort of tip
2 their hand as to who they intend to call, what
3 their strategy is.

4 As to the NCIC, we will be glad to provide
5 NCIC on all of the citizens that may be called as
6 witnesses, the non law enforcement people that may
7 be called as witnesses in this trial and which
8 effectively will give them kind of an idea who our
9 folks are going to be. We'll provide that prior to
10 trial. We are willing to do that.

11 THE COURT: All right. Mr. Axelrod, that is
12 what he is willing to do. Give me some authority
13 for requiring him to do more.

14 MR. AXELROD: Your Honor, what I'm asking the
15 Court to do is, I know that the rule would be the
16 Solicitors does not have to provide an NCIC until
17 after a witness testifies.

18 THE COURT: He says he is going to do it
19 before court, right?

20 MR. HEMBREE: Yes, we'll do it if not before
21 that Monday, we'll have them ready certainly by
22 Monday.

23 MR. AXELROD: That will be fine, Your Honor.

24 THE COURT: Okay.

25 On page 168, motion to require the State to

1 disclose information that would be favorable to the
2 defense at the penalty phase. I mean, what would
3 that be, Mr. Axelrod?

4 MR. AXELROD: Your Honor, if they come up
5 with any favorable evidence we're just asking that
6 they provide it to us. As we go through this trial
7 evidence is still coming into the Solicitor's
8 office.

9 THE COURT: You said at the penalty phase?

10 MR. AXELROD: And in the penalty phase, Your
11 Honor.

12 THE COURT: You said at the penalty phase?

13 MR. AXELROD: Yes, Your Honor, at the penalty
14 phase, if they have evidence that would be
15 favorable to my client's position through their
16 investigation we ask that they provide that.

17 THE COURT: They're required to do it in the
18 guilt phase and I would think they would as well, I
19 can't imagine the penalty phase, what it would be
20 but, Mr. Richardson, can I hear you on that?

21 MR. RICHARDSON: We totally agree, Your
22 Honor. Anything --

23 THE COURT: They will, they will provide a
24 Brady analysis in the penalty phase as well. I
25 don't think they are required to, that is an

1 interesting question but it is moot because they
2 say they will do it.

3 All right. On 182, defendant's motion for a
4 more definite statement of evidence and aggravation
5 of punishment. I would assume the State will rely
6 on the death of a police officer in performance of
7 his duties. Killing more than one person, are you
8 even going to try to use that as well?

9 MR. HEMBREE: No, sir.

10 THE COURT: You're not, okay.

11 MR. RICHARDSON: No, sir, Your Honor.

12 THE COURT: It was broken up, I didn't know
13 if you would or not. Is that your aggravation?

14 MR. RICHARDSON: The other aggravation would
15 be that the offender by his acts of murder
16 knowingly created a great risk to more than one
17 person.

18 THE COURT: Because of the shootout?

19 MR. RICHARDSON: Yes, sir. And of course the
20 other one being a police officer.

21 THE COURT: Any reason you need that
22 explained, Mr. Axelrod? It is very clear they are
23 telling you right now and you can rely upon the
24 fact that it is going to be death of a police
25 officer and the exposure of others to great bodily

1 injury.

2 MR. AXELROD: We just ask that be put on the
3 record, Your Honor.

4 THE COURT: Well, you can do an order in
5 which they have said that, okay, put it in your
6 order that they concede those are the matters of
7 aggravation that they will rely on in the trial of
8 the case.

9 That brings us over to 262, a motion in
10 limine to limit the evidence of nonstatutory
11 aggravating circumstances at the sentencing phase.

12 Let me hear you on that, Mr. Axelrod.

13 MR. AXELROD: Your Honor, what we're asking
14 the Court to do, other Courts have done, is to
15 issue an order placing limitation on admission of
16 nonstatutory aggravating evidence.

17 THE COURT: Such as?

18 MR. AXELROD: Your Honor, basically that the
19 evidence offered does not unfairly prejudice the
20 defendant and guarantee the evidence offered is
21 sufficiently reliable.

22 MR. RICHARDSON: Your Honor, if that is their
23 motion we would certainly comply with the rules of
24 court. Now, it comes down to reliability. I'm
25 thinking if this goes to, at least there are some

1 past unadjudicated prior bad acts, which I think
2 we're fully entitled to do, but the way that he has
3 couched it, I don't see that that is any sort of a
4 problem.

5 MR. AXELROD: Well, there is also some crimes
6 that, adjudicated crimes that would not be
7 statutorily aggravating facts.

8 THE COURT: Are you talking about like clear
9 and convincing standard to nonstatutory aggravating
10 circumstances?

11 MR. AXELROD: Yes, sir, Your Honor.

12 MR. RICHARDSON: Your Honor, when it goes to
13 the credibility, and in his motion he talks about
14 beyond a reasonable doubt --

15 THE COURT: I think what he wants to do is if
16 they are nonstatutory, nonstatutory aggravating
17 circumstances and they are other bad acts or things
18 maybe did not result in a conviction, like we have
19 a Lyle exception where you have to show by clear
20 and convincing evidence.

21 MR. RICHARDSON: But it is not really even
22 Lyle.

23 THE COURT: I think that is what he is
24 saying. I know it is not a Lyle issue but --

25 MR. RICHARDSON: Certainly we wouldn't be

1 held to the standard of beyond a reasonable doubt,
2 which is in his motion.

3 THE COURT: Right.

4 MR. RICHARDSON: We don't even believe we
5 would be held to clear and convincing because what
6 he would be putting it up for would be character
7 evidence instead of a Lyle type issue.

8 THE COURT: And that is just something we're
9 almost going to have to deal with on an ad hoc
10 basis. I would have to look at it. I may, Mr.
11 Richardson, in fairness, ask you if we get to the
12 sentencing phase, if we get to a sentencing phase I
13 may ask you to give me at least some indication of
14 why you're going to go with nonstatutory
15 aggravating circumstances. I have always had some
16 concern about nonstatutory aggravating
17 circumstances. One of our prior Solicitors, Mr.
18 Dunn, was an expert slipping things in, isn't that
19 right?

20 MR. HEMBREE: We're not quite so clever, Your
21 Honor.

22 THE COURT: Yes.

23 MR. RICHARDSON: In fact, I know it really
24 doesn't have a lot of bearing but we provided all
25 our transcripts, and we certainly won't be limited

1 to that, in the first trial.

2 THE COURT: That's pretty much where you're
3 going.

4 MR. RICHARDSON: Yes, sir. We really don't
5 have a lot of secrets.

6 THE COURT: That should give you an idea of
7 specifics that you would object to, Mr. Axelrod, so
8 what I'm going to do, I'm sort of going to keep
9 this motion open. I see where we're going with it
10 and let's get to the trial and if you remind me I
11 may even ask the State to give me a heads up if
12 there is anything questionable they are going to go
13 into. The last thing we want to do is have a
14 reversal in one of these cases.

15 MR. RICHARDSON: Yes, sir.

16 THE COURT: Okay. Then 279, motion to
17 instruct Solicitor and State's witnesses to refrain
18 from alluding to certain matters in the presence of
19 the jury. Tell me where you're going with that,
20 Mr. Axelrod.

21 MR. AXELROD: Your Honor, and I probably
22 filed another motion basically on some common terms
23 that we'll discuss, that maybe we can keep from
24 being spoken at the trial. Your Honor, as an
25 example, that the Solicitor, that he not be able to

1 tell the jury that he represents the family of the
2 victim. South Carolina law holds that he only
3 represents --

4 THE COURT: He even represents you, Mr.
5 Axelrod.

6 MR. AXELROD: Absolutely, Your Honor, I'm
7 proud to have him represent me.

8 THE COURT: He represents the State.

9 MR. AXELROD: He is going to become a senator
10 probably, we're going to lose him. I tell him he's
11 going to win his election, I do.

12 THE COURT: He represents even Mr. Cottrell.

13 MR. AXELROD: And, Your Honor --

14 THE COURT: I'm just not sure about that
15 motion, it is so general.

16 MR. AXELROD: I will give the Court another
17 example. Your Honor, in the opening statement I
18 believe that the Solicitor said that Allen murdered
19 Officer McGarry, I believe it comes out at some
20 point in the opening statement. We say a statement
21 like that using the word murder, that is a fact
22 that is not in evidence until he is actually
23 convicted. He shot Officer McGarry but --

24 THE COURT: How would you have me describe to
25 a jury the charge?

1 MR. AXELROD: The charge is one thing, Your
2 Honor, to say what he is charged with but I think
3 the Solicitor --

4 THE COURT: What about voir dire?

5 MR. AXELROD: I think the Solicitor should be
6 precluded from saying that, in his opening
7 statement or his closing argument, that Mr.
8 McGarry, Officer McGarry was murdered by Mr.
9 Cottrell. That is for the jury to decide. He was
10 shot and he was killed and I think --

11 THE COURT: Well, aren't you going to say it?

12 MR. AXELROD: What I'm saying is, I think
13 that we should be able to keep, whether I say he
14 did is one thing, but what I'm saying is I don't
15 think the Solicitor should be permitted to say he
16 did it.

17 THE COURT: Well, again, Mr. Axelrod, you
18 have just got a motion here that is really so
19 general as to make it impossible for me to issue a
20 ruling except as we develop this case.

21 MR. AXELROD: Your Honor, we ask, I will go
22 through some of these, number 10, any and all
23 evidence concerning violence in South Carolina
24 Department of Corrections. We're saying that --

25 THE COURT: Isn't adaptability still a

1 mitigating factor?

2 MR. AXELROD: I'm not speaking -- I'm
3 speaking of an aggravating factor, they might put
4 up somebody from the South Carolina Department of
5 Corrections saying when people such as Allen go to
6 prison they create more problems.

7 THE COURT: But aren't you, if we get to a
8 sentencing phase aren't you going to put someone up
9 as to adaptability?

10 MR. AXELROD: Yes, Your Honor, but I'm asking
11 they be precluded --

12 THE COURT: They not be able to respond to
13 it, is that essentially it?

14 MR. AXELROD: Yes, sir, Your Honor.

15 THE COURT: Mr. Axelrod, you can't do that.

16 MR. AXELROD: Well --

17 THE COURT: They certainly have the right to
18 respond to your mitigating circumstances.

19 MR. AXELROD: I would just point out to the
20 Court that admission of the evidence, I put in the
21 motion, is unconstitutional based on Gerrard versus
22 Texas and Woodson versus North Carolina.

23 THE COURT: All right.

24 MR. AXELROD: And all the other ones that I
25 did, I put in case law. I understand that it is a

1 lot but they are there, Your Honor, that we
2 specifically ask that, you know, the Solicitor not
3 tell the jury that the Solicitor takes an oath that
4 justice is done, I'm not saying we do that.

5 THE COURT: I don't think the Solicitor would
6 say that.

7 MR. AXELROD: And I'm putting --

8 THE COURT: If he did I would be disappointed
9 so I'm sure he won't now.

10 MR. AXELROD: Yes, sir, Your Honor. And any
11 reference as to the punishment during the innocent
12 phase of the trial, they call it the guilt phase,
13 Your Honor, I'm calling it the innocent phase.

14 THE COURT: Well, that is just semantics.

15 MR. AXELROD: And we would ask that the State
16 be precluded from calling it the guilt phase. I
17 would ask them to call it the trial phase because
18 the first part, there is two phases of this trial,
19 first there is the trial phase and the second phase
20 is the aggravation.

21 THE COURT: What does our Legislature call it
22 in the statute?

23 MR. AXELROD: Excuse me, Your honor?

24 THE COURT: What does our Legislature call it
25 in the statute?

1 MR. AXELROD: Your Honor --

2 THE COURT: I mean, shouldn't we follow the
3 law and use the terminology of not only the
4 Legislature but the Supreme Court as well?

5 MR. AXELROD: Your Honor, it still gives a
6 predisposition to my client's guilt by calling it
7 the guilt phase. I'm asking the Court to take
8 notice of that and say we're not going to call it
9 the guilt phase. Why call it the guilt phase?

10 THE COURT: How about the guilt or innocence
11 phase?

12 MR. AXELROD: I would not be opposed to guilt
13 or innocence phase. I would ask it that way or the
14 trial phase. I'm asking the Court that we not call
15 it the guilt phase. His life is on the line.
16 We're just asking the Court for these type issues.

17 THE COURT: Well, Mr. Axelrod, I'm going to
18 again reserve ruling on that. I'm not going to
19 change the terminology for this trial. It has been
20 called the guilt phase or the penalty phase for
21 years and years. Our Legislature has called it
22 that, our Supreme Court refers to it in such a way,
23 I just don't see a problem with that.

24 I will give you number five, no witness is
25 going to indicate whether he has taken or refused

1 to take the polygraph. I have struggled with that
2 one enough.

3 I just don't want to rule against you on all
4 of these now, I think they are very general, if I
5 see a problem coming up I will, I just don't want
6 to rule on this at this juncture.

7 MR. AXELROD: Yes, sir, Your Honor.

8 THE COURT: Okay, 283, request the defense be
9 allowed to occupy counsel table nearest the jury
10 box. Why would we divert from the precedence?

11 MR. AXELROD: Your Honor, I don't think there
12 is any precedence, it is just why can't we sit
13 there, under the heighened scrutiny?

14 THE COURT: Because I will be calling you the
15 prosecutor.

16 MR. AXELROD: I don't think so, Your Honor.

17 THE COURT: Throughout the trial I will be
18 calling you Mr. Solicitor.

19 MR. HEMBREE: Please don't do that, Your
20 Honor.

21 THE COURT: It is tradition of this Court, at
22 least, that that's the way it is and I see no
23 reason to divert. Do you know of any situation or
24 any trial in this state where they reversed it?

25 MR. AXELROD: Your Honor, I ask the Court

1 under heightened scrutiny that this Court reverse
2 that and be the first court to say, "You can sit
3 near that jury box."

4 THE COURT: You should have made that motion
5 and I should have been on the bench when I was
6 about 30, I'm 62 now, so I guess I'm a little more
7 steeped in tradition than I was at 30.

8 MR. RICHARDSON: I see no reason to divert
9 from tradition and the precedence of this Court.

10 THE COURT: I'm not going to do that.

11 Motion for disclosure of all photographic
12 evidence the State intends to introduce at trial.

13 Have you given him all your photographs, Mr.
14 Hembree?

15 MR. HEMBREE: If we haven't we will and we're
16 in agreement with that.

17 THE COURT: There will be nothing introduced
18 photographically that he has not had ample time to
19 review. Is that correct?

20 MR. HEMBREE: That's correct, Your Honor.

21 THE COURT: There you go.

22 MR. AXELROD: And, Your Honor, on that, and
23 I'm just asking, will we be able to see the
24 photographs they intend to present at trial maybe
25 thirty days prior to the trial?

1 THE COURT: You've probably already got them.
2 I mean, that is probably -- well, let's do this.

3 MR. HEMBREE: There are many pictures, Your
4 Honor, and so it may be, we have talked a little
5 bit about that, it is sort of our intention to get
6 together with them sometime in advance of trial.

7 THE COURT: Let's say this. No less than
8 fifteen days before trial.

9 MR. HEMBREE: Fair enough.

10 MR. AXELROD: And the reason, Your Honor, in
11 case we have a problem with some of the pictures we
12 can have a motion maybe prior to, a hearing prior
13 to trial.

14 THE COURT: All right. Motion in limine on
15 page 290 to preclude testimony about violent acts
16 of others.

17 What precisely do you --

18 MR. AXELROD: Your Honor, number three.

19 THE COURT: -- seek to have suppressed there?

20 MR. AXELROD: Your Honor, number three, under
21 number three it says that we anticipate the State
22 will offer evidence concerning the potential for
23 violence in South Carolina Department of
24 Corrections. It will include isolated instances of
25 violence in maximum security facilities.

1 THE COURT: Violent acts?

2 MR. AXELROD: Yes, sir, Your Honor, to show
3 when they are in prison violence occurs. I believe
4 that Mr. Cottrell has been a model prisoner, I
5 don't think he has gotten in any trouble. I think
6 to show violent acts of others would just be
7 prejudicial to my client.

8 MR. HEMBREE: Your Honor, it would not be our
9 intention to present it like, "Well, this is the
10 case of Joe Jones who was there and he did this and
11 did he that and he did that." If we were to offer
12 that type evidence to rebutt --

13 THE COURT: I'm not sure I would even allow
14 that, specific as to some inmate.

15 MR. HEMBREE: It may be more. What we might
16 foresee, though, Your Honor, is something more
17 statistical or general, you know, that sort of
18 thing, that --

19 THE COURT: And I would allow that, Mr.
20 Axelrod, but I don't believe that I would allow, I
21 would not allow him to speak as to any specific
22 incident that occurred in the Department of
23 Corrections or a particular individual. However,
24 if adaptability to prison life becomes an issue in
25 the case I would certainly allow him to offer

1 counter-evidence but there again in general terms.

2 MR. AXELROD: And, Your Honor, I just say to
3 the Court I believe it should be individualized as
4 to my client based on the Gerrard versus Texas
5 case, 428 U.S. 262, 1976, that it actually be to
6 Mr. Cottrell, not to even some type of general
7 violence.

8 THE COURT: That very well may limit him but
9 I don't know at this point. It depends on how you
10 approach it, if we get there, how you approach it
11 and how he must approach it, because it is going to
12 be dictated in great part by what you do on it and
13 if we reach a sentencing phase.

14 MR. AXELROD: Yes, sir.

15 THE COURT: Motion in limine, 293, guarantee
16 of no violence. What is that?

17 MR. AXELROD: Your Honor, I would argue in
18 this motion that it's the burden --

19 THE COURT: Dangerousness, is that what we're
20 talking about, the State's argument that there is
21 no guarantees?

22 MR. AXELROD: I would argue that the State
23 would have to prove beyond a reasonable doubt, Your
24 Honor, that the probability exists that the accused
25 would commit criminal acts of violence that

1 constitute a continuing threat to society. Any
2 attempt by the Solicitor to shift that burden
3 through introduction of evidence, direct or cross
4 examination of witnesses, argument to the jury is a
5 violation of the rights of the accused guaranteed
6 by the Fifth, Sixth, Eighth, Fourteenth amendments.

7 THE COURT: You just said he had the burden
8 of proof, then you said that any evidence that
9 would shift that burden. Exactly what are we
10 talking about there? Are you talking about
11 something that would shift the burden to him to
12 prove that he was not a danger? Is that what
13 you're talking about?

14 MR. AXELROD: Yes, sir, Your Honor.

15 THE COURT: Give me an example of what that
16 would be like or what kind of evidence that would
17 be, something that would shift the burden to Mr.
18 Cottrell.

19 MR. AXELROD: Well, what I'm saying is the
20 State might put up evidence that people who get
21 sentenced to life in prison after not receiving a
22 death sentence, as an example, become a danger
23 within the prison system, they become, they become,
24 you know, a danger to society, with the inference
25 to be, well, the easiest way to deal with it is

1 execute him rather than commute it to life sentence
2 in the penalty phase.

3 THE COURT: Hasn't that testimony, hasn't
4 that testimony been admitted, doesn't it go to
5 adaptability?

6 MR. AXELROD: Your Honor, I don't think that
7 we have to present evidence he is not violent. I
8 think the State has to produce evidence that he
9 would be violent himself, not through extraneous
10 evidence of other people. I think that they have
11 to prove the violence through my client.

12 THE COURT: Let me hear from you on that, Mr.
13 Hembree.

14 MR. HEMBREE: Your Honor, this motion, of all
15 these motions, this one sort of, I have seen a lot
16 of these motions in a lot of this cases and this is
17 the first of this type I have reviewed. That being
18 said, it seems to me it is something that would not
19 be, is it not, now is not the time to raise this
20 issue. If we attempt to introduce some sort of
21 evidence that would burden shift that would be the
22 appropriate time to object. I just don't know
23 what -- I can't get a good picture, I mean, what it
24 means.

25 THE COURT: I'm having difficulty getting my

1 arms around it, too, as to exactly what he is
2 saying. I think he is saying that any evidence of
3 future dangerousness relate directly to the
4 characteristics of this particular defendant. Is
5 that what you're saying?

6 MR. AXELROD: Yes, Your Honor. I would not
7 have to prove he would not be, I would not have to
8 prove he would not be a danger. They would have to
9 prove beyond a reasonable doubt that he would be a
10 danger.

11 THE COURT: Well, what if they put up an
12 expert in the field of prison violence and that
13 expert expressed an opinion and gave his reasons
14 for that opinion?

15 MR. AXELROD: But, Your Honor, that is what
16 I'm saying, it has to be individualized, I think,
17 to my client, not a generalization.

18 THE COURT: What is your authority for that?

19 MR. AXELROD: Your Honor, I'll withdraw this
20 motion.

21 THE COURT: All right.

22 Motion in limine on page 296, inconsistent
23 theories of prosecution. Tell me what you seek
24 there, Mr. Axelrod.

25 MR. AXELROD: Your Honor, relating to Fred

1 Holcomb in the Love murder, we're trying, we're
2 trying to keep a lot of things, we're trying to
3 keep everything to the one murder. We had three
4 murders really on the days here, we had the Love
5 murder and Hartman murder and the McGarry murder,
6 and we're trying to keep, we're trying to keep the
7 other two murders out of this case, Your Honor.

8 THE COURT: How does that relate to an
9 inconsistent theory of prosecution?

10 MR. AXELROD: Anything that was adjudicated
11 in the Marion case that was inconsistent, we would
12 ask to be kept out of this case.

13 THE COURT: They are two entirely different
14 cases.

15 MR. AXELROD: Well, they have all the same
16 players, though. One is going to be used in the
17 penalty phase against us, the Love murder is going
18 to be used against us. Right now the trial, it is
19 in a PCR right now in Marion county, we're trying,
20 we're trying to keep that evidence out. There
21 might be new evidence from that, new evidence keeps
22 appearing. It's to keep the Solicitor from
23 presenting an inconsistent theory regarding these
24 crimes and --

25 THE COURT: Solicitor, are they connected,

1 are they part of the same crime spree type theory
2 or is that kind of where you're going?

3 MR. HEMBREE: I believe they are related.
4 They are certainly related but here is, maybe this
5 will clarify it, we do not intend to introduce
6 evidence of the other murders in the guilt phase of
7 the McGarry trial.

8 THE COURT: There you go.

9 MR. AXELROD: And the reason I bring it up,
10 Your Honor, as the investigator told you, there is
11 evidence on my client's case that is actually in
12 all these other cases, in the other cases and our
13 case, that way it is just intermingled.

14 THE COURT: The Solicitor says he is not
15 going to mention it. If you bring it up, well, so
16 be it, but he says he is not going to mention it in
17 the guilt phase. Of course he's going to mention a
18 prior conviction for murder in the sentencing
19 phase. You wouldn't expect him not to. He's
20 telling you, "No, we're not going to get into
21 those." I'm not sure I know what you want on this
22 motion.

23 MR. AXELROD: Well, if we don't go there,
24 that would be fine, Your Honor.

25 THE COURT: Well, he says he's not going to

1 get into that.

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

3 THE COURT: Unless you put your client on the
4 stand and --

5 MR. HEMBREE: Certainly that would be a good
6 reason, right, Your Honor, a different situation.

7 MS. ARMSTRONG: Well --

8 THE COURT: Tell me.

9 MS. ARMSTRONG: Yes. There is one possible
10 scenario in which the other murders could be
11 brought out in the guilt phase and that would be,
12 for instance, if Mr. Holcomb were to testify. He
13 has been convicted.

14 THE COURT: Was Mr. Holcomb -- is it Holcomb?

15 MS. ARMSTRONG: Fred Holcomb, Your Honor.

16 THE COURT: Was he involved in both cases?

17 MR. HEMBREE: Here is how he was involved,
18 Your Honor. He was present when the McGarry murder
19 occurred. He was there. He wasn't involved in the
20 murder, he was not charged with the murder, he
21 didn't have anything to do with the murder other
22 than he was a partner in crime.

23 THE COURT: He liked doughnuts.

24 MR. HEMBREE: He was getting coffee.

25 THE COURT: Yes.

1 MR. HEMBREE: And he was a partner in crime,
2 in an ongoing criminal enterprise with Mr. Cottrell
3 but as far as the, as far as the McGarry murder, he
4 is not involved other than being a potential
5 witness. That being said, then the Jonathan Love
6 murder and the Richard Hartman murders, he was a
7 present and an active participant, he has been
8 convicted of the Jonathan Love murder along with
9 Mr. Cottrell, they were tried together.

10 MR. AXELROD: Sir, the point would be, Your
11 Honor, as an example, if Mr. Holcomb testified in
12 this trial for us I would want to limit, I would
13 not want the Solicitor to be able to say, "Haven't
14 you been convicted of a murder in Marion County
15 along with --"

16 THE COURT: My goodness, Mr. Axelrod, surely
17 you're not suggesting that you would be able to put
18 up Mr. Holcomb and the Solicitor not be able to
19 impeach him with a conviction for murder?

20 MR. AXELROD: What I'm asking for, that he
21 not be able to impeach him for a conviction for
22 murder along with my client.

23 THE COURT: Would you want him to say,
24 "You've been convicted of murder, hadn't you," and
25 not have him say, "You have been convicted of

1 murder along with the defendant, haven't you?" Is
2 that what you're getting at?

3 MR. AXELROD: That is one thing, yes, sir.

4 MR. HEMBREE: My problem, Your Honor, I see
5 the predicament but that would go directly to his
6 bias in testifying the way he testifies. I mean,
7 his relationship with Cottrell is going to, I mean,
8 there is no way around it. If they put Holcomb on
9 the stand that relationship is going to be the
10 subject, that is going to be what we're talking
11 about, because I'm going to, we're going to come
12 after him hard and it is going, we're going to show
13 these guys were involved, I mean, they were in the
14 business of covering for each other and that is
15 what they do.

16 MR. AXELROD: But the testimony that I would
17 elicit, Your Honor, for this trial would be what
18 Mr. Holcomb saw at the Dunkin Donuts and nothing
19 more and that is why I would say that under a 403
20 analysis --

21 THE COURT: Well, you may, Mr. Hembree may
22 not even want to touch Mr. Holcomb but if he gets
23 very controversial Mr. Hembree is going to have the
24 right to proceed with impeachment of Mr. Holcomb.

25 MR. AXELROD: And what I'm asking the Court

1 to do is limit that impeachment that he was
2 convicted of a murder but not allegedly with my
3 client.

4 THE COURT: But wouldn't that show he is
5 prejudiced or biased in favor of your client if he
6 could tie it in?

7 MR. AXELROD: No, sir, Your Honor. If he's
8 convicted of a murder with my client --

9 THE COURT: "You're friends. How good a
10 friend are you? Oh, commit murder together?"

11 MR. AXELROD: If the testimony was elicited
12 in a narrow manner, "You were at the Dunkin Donuts
13 that night with Mr. Cottrell, what did you see?"
14 If we go just to what he saw at that Dunkin Donuts,
15 but I think, I think it is prejudicial, his
16 testimony --

17 THE COURT: It absolutely is prejudicial but
18 every speck of evidence that comes in is
19 prejudicial to one side or another. I mean, we're
20 looking at a 403 type analysis but the difference
21 here is that you put him up and this goes to
22 whether or not he can impeach him, and I'm not
23 going to limit him on that impeachment, not in the
24 fashion you're asking me to limit him. That murder
25 comes in and the relationship, if any, between Mr.

1 Cottrell and Mr. Holcomb can be explored or at
2 least that is my position now. I am not going,
3 motions in limine, they are sort of a strange
4 animal, Mr. Axelrod, the trial judge can reverse
5 his position on a motion in limine at the trial and
6 I may very well do it but right now I'm certainly
7 not going to say to you, "Put him up, I'm going to
8 protect you." I'm just not going to do it. So, I
9 will deny that.

10 MR. AXELROD: I take exception.

11 THE COURT: All right.

12 THE COURT: Okay, I think that takes us to
13 the motions filed on October 28, 2011. We have a
14 motion for supersedeas which I think has already
15 been heard, is that correct?

16 MR. AXELROD: Yes, sir, Your Honor.

17 THE COURT: Is that the last motion?

18 MR. AXELROD: Your Honor --

19 MS. ARMSTRONG: I believe the only other
20 issue that we can resolve today will be the jury
21 questionnaire.

22 THE COURT: The jury questionnaire, where is
23 that?

24 MR. AXELROD: Your Honor, that is in the
25 second packet, Your Honor, second little piece of

1 paper, clocked September 16th.

2 THE COURT: I've got it.

3 Okay, Mr. Axelrod, you have provided me with
4 a proposed jury questionnaire that includes the
5 proverbial kitchen sink.

6 You have had an opportunity to review it,
7 have you not, Solicitor?

8 MR. RICHARDSON: Yes, sir,.

9 THE COURT: All right, Mr. Axelrod, you tell
10 me what you can in support of my issuing an order
11 approving a jury questionnaire that has 21, that is
12 21 pages long.

13 MR. AXELROD: Your Honor, we put, in the
14 motion we put the reasons. The proposed
15 questionnaire is the same questionnaire used in the
16 case of State of South Carolina versus Troy
17 Burkhardt, tried in Anderson County, South Carolina
18 before the Honorable Judge Nicholson in March of
19 2004.

20 Your Honor, the proposed jury questionnaire
21 is similar to standard jury questionnaires used in
22 in every federal case in the state of South
23 Carolina. Your Honor, we put in the proposed jury
24 questionnaire based on the jury questionnaire sent
25 to potential jurors in the federal death penalty

1 case United States versus Faulk, located at Tab C.

2 Your Honor, the questionnaire is designed to
3 help both sides and the Court with the necessary
4 information to obtain a fair jury. Questions that
5 have been proposed are based on questions that have
6 been propounded to state jurors in capital and
7 federal cases for any criminal charge. The
8 information contained in the questionnaire allows
9 both sides to focus their voir dire, allowing voir
10 dire to proceed more smoothly and quickly, to
11 ensure that all parties have sufficient information
12 to make informed decisions and to expedite the voir
13 dire procedure. The defense would respectfully
14 request the Court to provide the attached jury
15 questionnaire be used in the trial of the case.

16 Your Honor, it has been used in our state in
17 2004. A lot of times the Court asked me today,
18 "Can you provide me some type of case law or
19 something where it's been used," why we're not
20 going to go with I can't sit next to the jury box
21 because of, you know, what has happened in the
22 past. Here I'm saying to the Court we have used
23 this questionnaire, and Judge Nicholson did not
24 determine it to be burdensome in March of 2004 and
25 allowed it to be used and, you know, under the

1 heightened scrutiny the Court says I put
2 everything, including the kitchen sink in, Your
3 Honor, but my client's life is on the line and I
4 think he is entitled to this questionnaire. It has
5 been used, Your Honor, and whether the Solicitor
6 has used that before himself, I'm asking that the
7 Court use this questionnaire to allow us to have a
8 more in depth voir dire of the jury.

9 MR. RICHARDSON: Your Honor, a month or so
10 ago when we last met I also passed up a jury
11 questionnaire that is actually one that is most
12 often used in state courts. It consists of 42
13 questions covering a lot of the same issues Mr.
14 Axelrod has included but to a much lesser degree.
15 I have also passed up, Your Honor, one specifically
16 from the Steinham Williams case, I will pass those
17 up to you now. This is the one that has been used
18 most commonly, it is tried and true, throughout the
19 state, 42 questions on it. The 50 question
20 questionnaire that was provided to the Court by the
21 clerk's office --

22 THE COURT: Which questionnaire?

23 MR. RICHARDSON: Excuse me, the questionnaire
24 provided to the Court by the clerk's office, it has
25 always been used and it goes into a little bit more

1 detail. I believe I have provided it to the
2 defense team last time also.

3 Certainly, Your Honor, with those 42 or 50
4 questions it would certainly be a lot less
5 intimidating to any juror, much less burdensome. It
6 is the State's position when you get 120 or so
7 questions that, "Well, if this is the preliminary
8 stage, I'm just answering questions, how much worse
9 is jury duty going to be?" I mean, you almost
10 cripple a person with it. Ours has been used over
11 and over again. Like Mr. Axelrod would say, it is
12 tried and true. This is the one that the Supreme
13 Court has looked at time and time again and
14 affirmed it, basically saying, "This is the one
15 that we like." There is no reason to go to one
16 that was used in Anderson County seven or eight
17 years ago and used once, or to go to a federal type
18 questionnaire, when we have already got the golden
19 standard here in South Carolina.

20 THE COURT: Well, what I intend to do is
21 review this questionnaire that Mr. Axelrod has
22 presented, compare it to the jury questionnaire
23 that you have propounded and I may adopt one or the
24 other or I may do my own.

25 Madam Clerk, I know you're in a hurry for

1 this but I will have it to you around the first of
2 the week, okay?

3 THE CLERK: Yes, sir.

4 THE COURT: All right, thank you.

5 MR. RICHARDSON: Thank you, Your Honor.

6 THE COURT: All right, is that all?

7 MR. AXELROD: Your Honor, the only other
8 matter we need to take up is the exparte matter.

9 THE COURT: All right. We're going to take a
10 break and allow the Solicitor to withdraw, then.

11 MR. HEMBREE: Thank you, Your Honor.

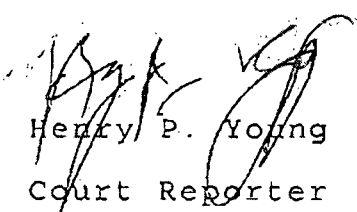
12 MR. AXELROD: Thank you Your Honor.

13 (Motions hearing recessed at 5:55 p.m.);
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3
4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Horry County, South
11 Carolina, on the 9th day of November, 2011.

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

14 November 23, 2011
15
16

17 
18 Henry P. Young
19 Court Reporter
20
21
22
23
24
25

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY)

2003-GS-26-0020

STATE OF SOUTH CAROLINA,)

Plaintiff,)

Transcript of Record

(Motion Hearing)

vs.)

December 7, 2011

LUZENSKI ALLEN COTTRELL,)

Defendant.)

B E F O R E:

Honorable Larry B. Hyman
Horry County Courthouse
Conway, South Carolina

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

Jimmy Richardson, II, Esquire
J. Gregory Hembree, Esquire
Attorney for Plaintiff

Stuart Axelrod, Esquire
Melissa R. Armstrong, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

I N D E XDecember 7, 2011Pg.

Motions	3
Certificate of Court Reporter	50

E X H I B I T SNo.IDEV

(No exhibits were marked during hearing.)

1 (DECEMBER 7, 2011)

2 MR. HEMBREE: Your Honor, while we're waiting, I've got
3 one housekeeping matter that won't require the presence of the
4 Defendant. It's just a matter of service and discovery on
5 defense counsel.

6 In response to Supplemental Discovery Motion (B), that
7 was sent to us November the 21st, we have responses to 11 and
8 12 and Number 13. Number 12 is all logs, records, calls,
9 tickets, reports, et cetera, in which Private First Class
10 Joseph J. McGarry was involved in while employed at the Myrtle
11 Beach Police Department from the dates of October 1st, 2001
12 through December 29th, 2002. We have that prepared and copied
13 and we will be delivering that as supplemental discovery
14 document (B). And then in question Number 13, a request for
15 all Internal Affairs Department files for PFC Joseph McGarry
16 while employed with the City of Myrtle Beach Police
17 Department. Those are also included in supplement (B) and,
18 Your Honor, we would just like to put on the record that we're
19 delivering those to Defense counsel and we'd ask that they
20 sign an acknowledgment of service on that, please.

21 MR. AXELROD: Your Honor, what I would like -- I have no
22 problem with that. I'd probably want my investigator to go
23 through almost page-by-page to make sure what they say is here
24 is actually here, at least count the pages.

25 THE COURT: All right. Let the record reflect that

1 they've been delivered.

2 MR. AXELROD: Once we go through that, if it's correct,
3 we'll sign -- we'll tell the State ---

4 MR. HEMBREE: And, Your Honor, as to response to question
5 Number Eleven, all the personnel files for Private First Class
6 Joseph J. McGarry while employed with the City of Myrtle Beach
7 Police Department.

8 And, Your Honor, we will likewise -- those were provided
9 in supplemental discovery documents, supplement C, and I am
10 now delivering those to Defense counsel. We also have an
11 acknowledgment but we can handle that in the same way as we do
12 with supplement B.

13 THE COURT: Very well. All right. The courtroom is
14 secure. All right.

15 All right. Anyone have an objection to the or people
16 present here. I don't think there is anyone other than
17 courtroom staff, corrections officers, law enforcement.

18 MR. AXELROD: He'll be fine, Your Honor ---

19 THE COURT: And we're here today for -- from the State?

20 MR. HEMBREE: Status conference, Your Honor, but we don't
21 have any matters to bring before the Court.

22 THE COURT: The Clerk tells me that she had some matters.
23 Do you want to address those for Ms. Huggins, I understand
24 that she's not well?

25 CLERK: Yes, sir. The Clerk wanted to know the

1 questionnaires that we're getting for the people over sixty-
2 five, we've always given that to the Sheriff's Office and they
3 did an affidavit but since we have their date of birth, can
4 she do an affidavit to cut down their work and would it be --
5 would y'all mind if she did that for those over sixty-five?

6 MR. HEMBREE: Let me just for purposes of clarification,
7 is -- are these folks that are over sixty-five that have
8 indicated they do not wish to serve based on their age?

9 CLERK: Right.

10 THE COURT: Were they informed that they still have the
11 option of serving?

12 CLERK: Yeah, they have the option of serving if they
13 want to.

14 THE COURT: Were they given that information though when
15 they requested that they not be allowed to serve?

16 CLERK: Yes, sir. Yes, sir, we've got some that have
17 sent theirs back in that's over sixty-five that want to serve.

18 THE COURT: Okay. All right. Then that obviously was
19 made clear to them then?

20 CLERK: Right, that they can.

21 THE COURT: But those that have informed the Clerk that
22 they are over sixty-five and wish to exercise their exemption,
23 the Clerk wants to know if she can certify that; is that
24 correct?

25 CLERK: Yes, sir.

1 MR. HEMBREE: The State has no objection.

2 MR. AXELROD: No objection, Your Honor.

3 THE COURT: All right. Okay.

4 CLERK: We also have some over-sixty-five people that
5 sent their form back in and they say they are not gonna fill
6 out the application or the questionnaire because they're over
7 sixty-five and they're not gonna serve, so they're not gonna
8 fill it out. How do y'all want us to handle that? Do you
9 want us to send the Sheriff out and get them to fill it out
10 anyway since they're gonna be excused or leave it as it is?

11 MR. HEMBREE: My concern, Your Honor, would be that they
12 -- they have to in some written form indicate that they do not
13 wish to serve.

14 CLERK: Right.

15 MR. HEMBREE: And once that's completed, I don't think --
16 I don't see any reason to have them fill out the rest of the
17 questions on the questionnaire, you know, you can kind of cut
18 to the chase and exercise that right.

19 THE COURT: How are they gonna do that?

20 CLERK: On the Summons, there's a section where if you're
21 over sixty-five, you can claim your exemption and they're
22 marking that.

23 THE COURT: If they're marking that, I don't see any
24 reason why -- if they are informed that they still have the
25 option to serve unless they chose to exercise their exemption.

1 If they chose to exercise their exemption, I see no problem
2 with the fact that they then say, well, I don't want to go to
3 the trouble to fill out the, the questionnaire, because I
4 don't want to serve. And we have a way of verifying their
5 age, it comes off their driver's license or their voter
6 registration. Okay. Let me hear from the Defense.

7 MR. AXELROD: Your Honor, I would not have an objection.

8 THE COURT: All right.

9 CLERK: The next thing is when we get them back in from
10 the post office, if they have moved out of state, there is a
11 sticker on there that gives their out-of-state address like
12 Ohio or wherever, can we ---

13 THE COURT: If they left a forwarding?

14 CLERK: Yeah, if they left a forwarding. Now, the ones
15 that we get in unable to locate, we give them to the Sheriff's
16 office to see if they can locate them. But if it has an Ohio
17 or whatever, is it okay if we do an affidavit for that rather
18 than submit to the Sheriff's office for them to do the
19 affidavit.

20 MR. HEMBREE: Yeah, we have no objection to that, there's
21 no reason to submit it to the Sheriff's office.

22 CLERK: Okay. Okay, now, usually in a death penalty
23 case, when we're doing all the paperwork, the ones that are
24 over sixty-five, we pull them out and separate them and have
25 them all in one stack. The ones that want to be excused, we

1 separate them and have them in one stack, and the ones with
2 preschool children, just the different things we have in one
3 stack. The last death penalty we did, the Judge wanted us to
4 put them all in numerical order and instead of going stack
5 through stack, we went numerical order. Do y'all want to do
6 it numerical order or may we put them in the stacks with the
7 excuses that they want to be excused.

8 MR. AXELROD: May I ask a question? What is the benefit
9 for you to put them in stacks versus keeping them in numerical
10 order?

11 CLERK: Well, it's just easier because if you have 200
12 that's coming in, if you do it numerically, you have to go
13 through every single one like, you have to say Number 1 come
14 in, Number 2 is coming in, Number 3 wants to be excused for
15 such and such a reason. It's just easier for us to keep up
16 with it but, I mean, we'll do it either way y'all want us to.

17 THE COURT: I mean the ones that chose to serve are still
18 going to be numerically in the ---

19 CLERK: Oh, yes, sir.

20 THE COURT: --- list of jurors, right?

21 CLERK: Yes, sir.

22 MR. AXELROD: So, what you're saying is the only ones in
23 the stacks will be the ones that don't want to serve, that you
24 think have school-aged children that aren't willing to serve?

25 CLERK: And we have affidavits on that they have school-

1 aged children because if they say that have preschool
2 children, the Sheriff will go out and get an affidavit and
3 he'll confirm it with an affidavit.

4 MR. AXELROD: So, what you're attaching would be all the
5 affidavits that they're not gonna serve for some reason. I
6 have no objection to that, Judge.

7 MR. HEMBREE: Your Honor, not to make it -- I've worked
8 it either way and it'll work out fine either way. Although I
9 do -- my recollection is we had them in numerical order avoids
10 any confusion because we were having to go to different piles,
11 you know, well, this if 42, 42 is over here instead of 42
12 being in this pile and we were shuffling a lot of paper
13 instead of one, you know, one after another because we really
14 did review all of them. We review and you know, we would sort
15 of confirm, Number 1 is coming in, you know, Number 2 is
16 coming in. And that was -- you know, that was important that
17 we were all on the same sheet of music with that. So, quite
18 honestly, I think that keeping them in numerical order was the
19 simplest, kind of cleanest way to do it but, either way, I
20 know, we're not ---

21 THE COURT: What's the Clerk's choice?

22 CLERK: It -- we don't really care, either way you want
23 it but we do have it to where when we put it on the computer,
24 we can separate it or we can do it -- ever how y'all want us
25 to do it, we don't care.

1 MR. AXELROD: If the Solicitor would want it numerically,
2 I would -- he has more experience there, I would be fine with
3 that.

4 THE COURT: Well, let's do it numerically then.

5 CLERK: Okay. And we have instructions also how to go in
6 -- the passwords and everything so y'all can go in and pull
7 off your copies. So, and I think that's -- yeah, that's all
8 she wanted? Yeah, I think that's all her letter states.

9 THE COURT: All right. All right. Is there anything
10 else that we're gonna need the Solicitor for, then?

11 I do have a sequestration order. Has everyone seen that?
12 Okay. I will have a pretty standard -- I'll have Taylor make
13 copies of it and provide each of you a copies of the order and
14 the sequestration order. Okay.

15 MR. HEMBREE: Thank you.

16 THE COURT: It has such things as how they are to provide
17 recreation for them, costs to be assessed to the County,
18 things of that nature. I say that for the benefit of Mr.
19 Axelrod. I think it's the first -- it's just an order that
20 requires me to address those things.

21 MR. HEMBREE: Your Honor, will a SLED sequestration team
22 be requested?

23 THE COURT: Yes. And that's the purpose of the order is
24 to request a sequestration team. SLED is set up for that and
25 SLED will be in charge.

1 MR. HEMBREE: Your Honor, I know that SLED has to --
2 logistically, it's kind of a challenge for them to make those
3 arrangements. Not that I'm trying to fuss but I know it's --
4 they just knew it was coming?

5 LAW CLERK: No one has been in contact with them.

6 THE COURT: We've already addressed those issues.

7 All right. I have a letter sending that order to Mark
8 Hill.

9 MS. ARMSTRONG: Your Honor, may we see the sequestration?

10 THE COURT: Yes. He's making copies for you right now.

11 Mr. Solicitor, I have a series of orders and a letter
12 from Mr. Axelrod dated the 5th of this month, orders in
13 reference to motion hearings that we held, I believe last
14 month. The order indicates that you've had an opportunity to
15 review the orders; is that correct?

16 MR. RICHARDSON: I did, Your Honor.

17 THE COURT: All right. Solicitor and the -- let the
18 record reflect that I have provided the Solicitor and the
19 Defense copies of the letter of sequestration.

20 All right. Have you had an opportunity to look at that?

21 MS. ARMSTRONG: We have, Your Honor. I don't think that
22 the Solicitor has made the motion for sequestration. The
23 Defense would request that the jurors not be sequestered.
24 I've been involved in cases in Lexington County where they
25 weren't sequestered. There haven't been any problems with an

1 unsequestered ---

2 THE COURT: This case has -- it's a high publicity case.
3 This case has been previously tried. In this case, I want to
4 make sure -- I'm sure there's gonna be a tremendous amount of
5 pretrial publicity in this case. I'm inclined to believe that
6 sequestration is certainly necessary. What does the State
7 say?

8 MR. HEMBREE: We strongly believe that sequestration is
9 necessary in this case precisely for the reasons that the
10 Court has just stated. It has -- because of the nature of the
11 case the media is going to be very, very interested and
12 there's gonna be a tremendous amount of discussion in the
13 community about it as the case goes on. I think it just -- to
14 not sequester just leaves us in a situation with the backdoor
15 wide open.

16 THE COURT: It's asking for trouble.

17 MR. HEMBREE: It's asking for trouble and it's a common
18 practice among death penalty defense litigators these days to
19 go -- to wait until the case has been heard and a death
20 verdict has been given, they'll wait a little while and then
21 Appellate Defense gets it, they start going around -- they go
22 around and they question these jurors and they isolate them
23 and they start asking them, they're very good at it, asking
24 them a lot of questions about, well, what did you see, what
25 did you hear, why did you do and to not sequester those folks

1 puts them in a really vulnerable position.

2 THE COURT: I think it's -- it's beneficial to the
3 Defendant and necessary to preserve and protect him during
4 this trial for me to sequester this jury and I'm going to
5 sequester the jury.

6 MR. HEMBREE: Thank you, Your Honor.

7 MS. ARMSTRONG: Your Honor, if I may add two things
8 simply to preserve our motion on this. This case involves the
9 alleged murder of a law enforcement officer. Sequestering the
10 jurors is going to basically have them, maybe not bonding with
11 but being surrounded by law enforcement 24/7.

12 THE COURT: They're going to be anyway during the trial
13 of this case. I have provide security and protection for
14 these jurors and that's the reason that I have asked the SLED
15 sequestration team to be in charge of all aspects of the
16 sequestration and in dealing with these jurors. That is an
17 agency that is removed from the local Myrtle Beach agency, the
18 county agency, the police department, as well as the Sheriff.
19 I think it's the appropriate thing to do and what we should do
20 in this case.

21 MS. ARMSTRONG: Thank you, Your Honor.

22 THE COURT: Thank you, ma'am.

23 All right. Anything further from the State? Do we need
24 you anymore?

25 MR. AXELROD: Yes, Your Honor.

1 THE COURT: All right.

2 MR. AXELROD: I believe, I believe Mr. Richardson, they
3 went over the orders to be signed. I believe Taylor sent us
4 an email this morning that you would review them because this
5 morning together ---

6 THE COURT: These orders? Yeah. And I just asked the
7 State if they had had an opportunity to review the order, they
8 tell me that they have. They agree that the order -- or do
9 you agree that the order is in line with my rulings?

10 MR. RICHARDSON: Yes, sir.

11 THE COURT: Okay. And I have reviewed the orders already
12 myself and I, as we speak, am finishing up the signing of
13 these orders. Okay. I was prepared to sign them but I wanted
14 to put on the record that the State has reviewed and agreed
15 with the wording of the orders. Okay. Anything further? Do
16 we need the State for anything else?

17 MR. AXELROD: No, sir, Your Honor.

18 THE COURT: Okay. Thank you. Mr. Hembree, Mr.
19 Richardson.

20 MR. HEMBREE: Thank you.

21 MR. RICHARDSON: Thank you.

22 (REPORTER'S NOTE: Mr. Richardson and Mr. Hembree exit the
23 courtroom.)

24 THE COURT: Mr. Axelrod, we have the order signed here
25 and you would -- I'm sure that you intend to file those with

1 the Clerk.

2 MR. AXELROD: Yes, sir, and provide copies to the State.

3 THE COURT: And I would like a copy as well.

4 MR. AXELROD: Yes, sir.

5 THE COURT: Thank you.

6 MR. AXELROD: And, Your Honor, on your order for the
7 sequestration, I'll clock that and provide copies to the
8 State.

9 THE COURT: All right. Very well. We have the original
10 here. I'll let Taylor take care of that. Okay?

11 MR. AXELROD: Okay. Your Honor, if you'd like, I will
12 clock the original if it's helpful to Taylor.

13 THE COURT: It doesn't make any difference, I just need
14 it back or copies as soon as possible.

15 MR. AXELROD: We'll give it back to the Court within the
16 hour this morning if possible.

17 THE COURT: All right. Good, because I want to provide
18 SLED with a copy of that as soon as possible.

19 MR. AXELROD: Yes, sir.

20 THE COURT: All right. Now, the other matters before the
21 Court.

22 MS. ARMSTRONG: Your Honor, the only motion that we have
23 is our motion for a continuance. We filed an amended motion
24 for continuance based on the affidavits that were submitted.

25 THE COURT: Ms. Armstrong, I got this case late 2009 from

1 Judge Manning who had several -- the Chief Justice assigned it
2 to me. At that time, I think the case was scheduled for
3 trial, if memory is correct, we were looking at April of 2010.
4 We went way past that. It got continued. The next date we
5 were looking at was April of 2011. We went way past that. We
6 then had it set for August -- I think it was in April, we set
7 it for August of 2011. We went past that date or before that
8 date came up, I think in July, we had another hearing, it got
9 continued until January with the Defense's consent. So, now
10 we're in January and that's -- I've had the case over two
11 years. What's the problem? I mean, this is a retrial and
12 it's been three years and you're telling me it's not ready for
13 trial?

14 MS. ARMSTRONG: Your Honor ---

15 THE COURT: Can't be ready for trial at the end of
16 January, which is another two months from now. What's the
17 problem?

18 MS. ARMSTRONG: Your Honor, I'll take this point by
19 point. We started out with what I believe was sort of the
20 baseline funding. We hired an investigator who'd been on the
21 case thinking that it was reasonable, given that it is a
22 retrial, that he could go and help us prepare this case. What
23 was tried the first go-round is not going to be what is tried
24 this go-round. Mr. Skidmore has worked numerous hours and has
25 found things -- discovered information that ties this case,

1 the one that we're trying with the other two cases that are
2 gonna come in -- I mean, I've never had a case where the so-
3 called character evidence, prior bad acts, adjudicated
4 criminal offenses ties into the case that you're actually
5 trying.

6 THE COURT: Yeah, but it's all been out there for three
7 or four years now, hadn't it? When was he first convicted in
8 this case?

9 MS. ARMSTRONG: 2005, Your Honor.

10 THE COURT: And the case was two years old when it was
11 tried then?

12 MS. ARMSTRONG: That sounds ---

13 THE COURT: That goes back to 2003? So, this case has
14 been eight years in the making?

15 MS. ARMSTRONG: Absolutely. And that's part of the
16 problem.

17 THE COURT: When do you intend to try this case? Didn't
18 you tell me that you're -- this case would be ready to go if
19 you will just continue it one more time, continue it one more
20 time and we'll be ready to go in January?

21 MS. ARMSTRONG: Your Honor, we've done everything we
22 could do. I mean there was not ---

23 THE COURT: Apparently not because the case is not ready
24 for trial.

25 MS. ARMSTRONG: Your Honor, also ---

1 THE COURT: I don't understand what the hold-up is or the
2 problem is to get this case on-line and ready for trial.

3 MS. ARMSTRONG: One the main hold-ups is the fact that
4 there were eyewitnesses that law enforcement never
5 interviewed, didn't take names, didn't take statements and Mr.
6 Skidmore has spent enumerable hours trying to get ---

7 THE COURT: How long has he known about those
8 eyewitnesses? A year?

9 MR. SKIDMORE: Well, I've known -- I'm sorry. I've known
10 from 2003 or when I -- the prior case, they didn't pursue that
11 avenue and Mr. Axelrod ---

12 THE COURT: If we had -- if we'd known about the
13 witnesses in 2003 -- what is there that -- if you've got the
14 witnesses, I'm sure you've interviewed them. Are they ready
15 to go?

16 MR. SKIDMORE: No, sir, I haven't -- as we spoke last
17 time, I located one in Poland and we've done what you've
18 asked. I've emailed, spoken by telephone to those -- those
19 individuals. Now, Mr. Axelrod, Mr. Helms, have been
20 communicating with that one witness in Poland, so, I'm kind of
21 -- I'm still trying to locate the other two witnesses, Your
22 Honor, and one of them ---

23 THE COURT: And what they're gonna testify to is that he
24 was of good temper and was nice in the store, in the doughnut
25 shop. That's what he's gonna testify to, isn't it?

1 MR. SKIDMORE: I believe that would be correct, Your
2 Honor.

3 THE COURT: Doesn't know him other than he came in and
4 was well-behaved customer and of good temper?

5 MR. SKIDMORE: No, I think that he would also say over
6 the course of a year that Mr. Cottrell came into Dunkin'
7 Donuts at least once or twice and they formed some kind of
8 relationship. There is one other individual that is
9 supposedly in Myrtle Beach that I am trying to locate. The
10 owners of the Dunkin' Donuts at the time now own a
11 establishment called the Apple Bagel over in Surfside and I've
12 been in contact with them several times. The last time,
13 before the last hearing, the wife was very adamant that she
14 had located the female that was in the restaurant but was not
15 gonna give me any information and we're trying to get records
16 as I understand it now so that I can have birth date, social
17 security number and try to locate that individual.

18 THE COURT: What I'm hearing is we've waited until it's
19 time to try to the case to locate these people. This --
20 you've known about these people for years, years, and now
21 we're getting on -- we're at the eleventh hour, we're ready
22 for trial after numerous continuances and tremendous funding
23 in this case and you're telling me it's not ready to go to
24 trial because you've got character witnesses that you're
25 trying to locate.

1 MR. AXELROD: Well, Your Honor, I think it goes beyond
2 the character witness. I think it's really interesting that
3 the State would -- if the Court would look at it -- that the
4 State -- that the Solicitor and the Assistant Solicitor, Mr.
5 Hembree and Mr. Humphries were at the scene of the Dunkin'
6 Donuts. They helped direct who was going to be interviewed,
7 who was going to be talked to. The police took all the
8 witnesses of the shooting, they took all the witnesses to the
9 police station. They took the customers, they took everybody.
10 But the people that were at the counter, that watched it all
11 happen, they didn't take those people.

12 THE COURT: It occurred outside, Mr. Axelrod. It
13 occurred out in the parking lot.

14 MR. AXELROD: But the people that they took -- they took
15 a statement from everybody that was a customer inside the
16 store even though it occurred outside. What happens is -- the
17 reasons for the investigation of Mr. Cottrell by the officer
18 was how he was acting in the store. And I think it's not a
19 character witness. They're saying that he was complaining
20 about his sugar, that they knew how much sugar to put into his
21 coffee. These are material pertinent witnesses because Allen
22 was upfront with this person when it all started.

23 THE COURT: Well, you know who the person is, you've two
24 months.

25 MR. AXELROD: Your Honor, I would like to put something -

1 --

2 THE COURT: You're telling me you can't talk to this
3 person in the next two months?

4 MR. AXELROD: Well, I'll address that, Your Honor, but
5 let me address something before that if I may.

6 THE COURT: I mean, how long do you think it's gonna take
7 you to talk to this person?

8 MR. AXELROD: And I talked to him but let me address
9 something first, I want the Court to have an understanding of
10 my involvement in this case. I received this discovery in
11 this case April the 15th, 2011, eight months ago, that's when
12 I received it. For whatever reason, that's when I got it.
13 That's when I had my investigator go and copy it in March of
14 2011. He copied it, he gave it to me in April when he got the
15 actual file as well.

16 THE COURT: Well, why hadn't he gone to get it earlier if
17 all you had to do was go get it?

18 MR. AXELROD: We had to get funding to get a copy.
19 Nothing had been done at that point for whatever reason. I'm
20 not here to point a finger at any reason, I'm just here to
21 tell the Court that I've had the case for eight months and
22 I've been diligently working for eight months on this case.

23 THE COURT: I've had you down for almost two years.

24 MR. AXELROD: I billed OID -- in the first twenty months
25 of this case, I billed them twenty hours for twenty months. I

1 billed them approximately one hour a month over that twenty-
2 month period. We had -- I had a death penalty case that
3 wrapped up in June of 2011, the Ard case in Lexington. That
4 was scheduled to go to trial in the summer ---

5 THE COURT: I know. And you volunteered for both of
6 them.

7 MR. AXELROD: Yes. And that was scheduled to go first
8 and they took death off the table in June. At that point in
9 June, I had the discovery for ninety days at that point and
10 that was when I moved full force onto this case. So, for the
11 Court to say that first of all that I've had it two and a half
12 years, that's not true. I've had it for eight months, Your
13 Honor.

14 THE COURT: You've had it for two and half years, Mr.
15 Axelrod. You've had it -- you had it -- I don't know how long
16 you had it before I got it.

17 MR. AXELROD: I was appointed, Your Honor, but I actually
18 got -- I physically got the discovery to start working on the
19 case in April of 2011. But for whatever reason, that's when I
20 got it, I started working on that case. I've been working
21 diligently on that case. We are not prepared to go to trial
22 at this point. I'll give the Court an example. I'm talking
23 with the forensic pathologist that we have. He wants the x-
24 rays of when Allen got shot in the leg to help him understand
25 what occurred that day.

1 THE COURT: Why does a forensic pathologist want Mr.
2 Cottrell's x-rays for?

3 MR. AXELROD: He wants a forensic radiologist to tell him
4 the angle of the bullet going in ---

5 THE COURT: Is there an entry wound and an exit wound?

6 MR. AXELROD: There is but they want to see ---

7 THE COURT: Why in the world does he -- I mean, does he
8 take -- what kind of dummy does it take not to understand the
9 trajectory when you've got an entry and an exit wound?

10 MR. AXELROD: We're attempting to establish that Officer
11 McGarry shot Allen while he was standing behind him.
12 Specifically, we need to know the angle of the going in, what
13 bones it hit when it came out. We need to know that. He said
14 he needs that to ---.

15 THE COURT: Well, did they x-ray him?

16 MR. AXELROD: He was x-rayed. In the 2006 ---

17 THE COURT: You want me give you \$7500 more to have him
18 x-rayed again?

19 MR. AXELROD: Your Honor, the x-rays were destroyed in
20 2006 by Grand Strand Hospital. Beyond my control. We called
21 them up and said, hey, send us the x-rays, that's all I wanted
22 was the x-ray. It was destroyed five years ago, five and a
23 half years ago. It was destroyed. I don't have access to
24 that. Yes, I do need that.

25 THE COURT: You've got an entry and an exit wound, can't

1 you look at the entry -- you've got a pathologist. That
2 pathologist can't look at an entry and an exit wound and tell
3 what the trajectory is?

4 MR. AXELROD: Well, no, he can't tell the angle of the
5 way it went in because he has to see how it went into the leg.
6 That's what he told me; he's the pathologist. He told me that
7 for him to be able to ---

8 THE COURT: The radiologist isn't gonna tell him that.

9 MR. AXELROD: A forensic radiologist will give an opinion
10 of the x-ray that he can go with but for him to tell me -- for
11 him to tell the jury, you know, to a reasonable degree of
12 medical certainty that he was shot by Officer McGarry while he
13 was standing behind Allen Cottrell, he needs that information
14 to assist him, that's what he has told us in the letter. You
15 know, he said -- I said to him, we discussed the way it went
16 in, he goes, I need the x-ray. We went to get the x-ray, the
17 x-ray doesn't exist. That's just one example there. Mr.
18 Skidmore, maybe has thirty to fifty more people that he needs
19 to interview. He found out discovery on the case that it was
20 intertwined with the Hartman case. So, he goes to the Laurie
21 Rabon over at Horry County M.L. Brown and he goes to the
22 Hartman case. And in the Hartman case he finds Cottrell's
23 case. He finds stuff, for whatever reason, that the police
24 stuck stuff -- it's stuck in all different cases. Hartman was
25 never tried; it was just sitting there. He's got all these

1 books, he's got fifty names, he has other people he needs to
2 see. His case is ongoing right now and with some of the
3 people that he's interviewed, it has allowed him to go further
4 down and to interview more people.

5 THE COURT: Well, you're telling me that maybe he needs
6 more time, maybe he does not. You're not giving me anything
7 specific. This case is scheduled for the 23rd of January and
8 that's when we're gonna try this case. We had a motion for
9 continuance last month and my ruling is the same. This case
10 is going to be tried January the 23rd. You've got two months
11 to wrap it up.

12 MR. AXELROD: We didn't have a motion on the record, Your
13 Honor, I take exception to that. We have the transcripts.

14 THE COURT: We argued it right in this courtroom and as
15 you requested, everything is on the record now, it's on the
16 record.

17 MR. AXELROD: Ms. Armstrong never actually made a full
18 motion for a continuance. Basically, the Court shut her down
19 when she was speaking about Poland -- we have it right here.
20 We have the full transcript. She didn't make a formal motion
21 for that. Your Honor, I'm saying to the Court that, Your
22 Honor, we're not ready. The investigator ---

23 THE COURT: Well, the Court is saying you get ready.
24 This case -- you've had ample time. This case is ready. You
25 haven't told me anything that can't be resolved or taken care

1 of in the next two months.

2 MR. AXELROD: Well, I don't think he's -- I don't think
3 he's gonna be able to see his witnesses. Concerning the
4 Poland issue -- I'll get back to the Poland issue. The man in
5 Poland tell me -- he's an engineer, he tells me he's not
6 coming over here ---

7 THE COURT: And he was working at the doughnut shop?

8 MR. AXELROD: Yes, sir, Your Honor. A lot of people that
9 come from Eastern Europe, I'm sure the Court is aware, they
10 come over here on some type of Visa just to come to America
11 and a lot of times they end up washing dishes in restaurants,
12 they work in Dunkin' Donuts and then they go back to their
13 country, or Poland in this example, and take back their life
14 of being an engineer. So, he's an engineer. He tells me he
15 does not want to come back to America unless he's compensated
16 for the money that he would lose from his pay in Poland that
17 he said he could substantiate -- he said, I think he makes --
18 he needs and \$117 U.S. dollars per day to come here. Now, I'm
19 not able to pay him that. I can't say to a witness, here, I'm
20 gonna pay you \$117 a day to come here to give me favorable
21 testimony. The State would eat me up. Ethically, I can't do
22 that. I'm in a quandary right now of how to get his
23 testimony. We've been trying to ---

24 THE COURT: And it doesn't seem like if it's tried in
25 January or it's tried next July, it's gonna make any

1 difference with that witness.

2 MR. AXELROD: It will make a difference because we might
3 be forced to go to Poland, I don't know. I need that witness'
4 testimony in Poland. I think in this case I need to establish
5 everything that can help my client. This is a death penalty.
6 If the reason they didn't do the interviews in the first place
7 -- I don't think Mr. Cottrell should be penalized for what the
8 State refused to do. And if it rings a bell with the
9 investigator and myself, why did they -- they were right
10 there, why didn't the police -- why didn't the Solicitor want
11 those people interviewed. I would have to say ---

12 THE COURT: Mr. Axelrod, I hope that you're not gonna
13 move this Court for funding to go to Poland to interview a
14 witness who's not gonna come anyway. He's a character
15 witness.

16 MR. AXELROD: Your Honor, he's not a character witness.
17 He's gonna say what occurred that day. He was in the Dunkin'
18 Donuts, he was getting his cup of coffee. He's gonna testify
19 to the facts that occurred. They put other people on the
20 stand to testify to the facts that occurred.

21 THE COURT: You told me he's gonna testify as to what a
22 nice guy your client was and that he was a good tipper.

23 MR. AXELROD: He's gonna testify that there was nothing
24 going wrong that evening. And that is not a character
25 witness. That's a fact witness for the jury.

1 THE COURT: You have no way of getting him here.

2 MR. AXELROD: We might have to go there to take the
3 testimony, I don't know, Your Honor.

4 THE COURT: It's not gonna be admissible in this court.
5 What rule are you gonna admit that under?

6 MR. AXELROD: Your Honor, I'm not sure on that, Your
7 Honor, but it's a witness that, you know, if we went and we
8 did a -- you know, a sworn deposition with the State present
9 and us present, maybe we can get that in. I'm not sure but we
10 shouldn't -- my client shouldn't be penalized for the
11 ineptness of the Solicitor or the -- or maybe he had a reason
12 for doing that.

13 THE COURT: Would it -- if they had interviewed him, if
14 the man left of his own volition, he goes back to Poland and
15 resumes his life there.

16 MR. AXELROD: What it would be is if they had taken that
17 statement, it would've been an unavailable witness and that
18 statement would've come in just based on the statement, we
19 could move to have that entered.

20 THE COURT: I don't think so, Mr. Axelrod. It's a
21 criminal matter and you're talking about introducing
22 affidavits?

23 MR. AXELROD: Your Honor, I would say -- you could argue
24 that it would be an excited utterance, you know, I've seen
25 courts that would take that as an excited utterance.

1 THE COURT: I've never seen one that would.

2 MR. AXELROD: Because -- what the Court is saying is it's
3 testimonial evidence but I would say that in the course of
4 business of a police officer interviewing somebody, that
5 becomes non-testimonial evidence that the courts have upheld
6 that an officer doing, you know, an investigation of normal
7 duties, if he asked somebody what somebody -- what they saw
8 and what they said, that comes in.

9 THE COURT: Have you ever heard of the *Crawford* case?

10 MR. AXELROD: Right. *Crawford* deals testimonial or non-
11 testimonial. And I've had a case in this court where Judge
12 Cottingham, and it was upheld by the Supreme Court that said
13 when a police officer does that type of investigation that is
14 non-testimonial evidence because it wasn't -- it was given --
15 it wasn't given with the threat of them going to jail or them
16 being guilty of anything and that's where you have the
17 truthfulness standard that they say under *Crawford*.

18 THE COURT: They didn't interview your client, you're
19 talking about interviewing someone else.

20 MR. AXELROD: Other witnesses, other eye witnesses. You
21 can ---

22 THE COURT: I'm not going to continue this case. This
23 case is gonna be for trial. You've got two months to get him
24 here. If you need him, get him here.

25 MR. AXELROD: Your Honor, I'm clearly not arguing with

1 the Court and if I please -- we're getting towards the end but
2 I'm telling this Court that we're not ready and ---

3 THE COURT: Well, the Court is telling you that I hope
4 that you will be ready because you're gonna have to try a
5 case, this case, beginning January 23rd of 2012.

6 MR. AXELROD: Your Honor, I believe that even Ms.
7 Armstrong, I don't think she even has her jury consultant yet.
8 She's been unable to get a jury consultant. There's other
9 issues and maybe she can address that issue now and I'll
10 continue, Your Honor. But there's other issues out there. We
11 are not prepared to go to trial at this point. I understand
12 the Court wanting to go. My investigator is ---

13 THE COURT: You've got two months and I even protected
14 you for the last thirty days of that.

15 MR. AXELROD: You protected me for the last fifteen days
16 of that, Your Honor. You protected me for fifteen days. I
17 have had five trials this past month already. My investigator
18 got this material in April of 2011 when he started working on
19 this case. This is -- you said this is a retrial, this is a
20 new trial. This is a new trial for me. This is a new trial.
21 We're going on a different avenue than was ever explored.

22 THE COURT: All right. Mr. Axelrod, I'm not continuing
23 the case. That motion is denied.

24 MS. ARMSTRONG: Your Honor, I would simply like to add
25 that there are three jury consultants that we have tried and

1 have been trying for many months to find someone to help us
2 with this case. They're gonna be 700 jurors I understand who
3 will receive notices. Jeff Bloom, Denise de La Rue and
4 Emerson Smith are the three that I'm aware of, none of them
5 are available. We've tried very hard to get one and that's
6 obviously something that we'll ---

7 THE COURT: Well, I suggest you look around a little
8 harder because this case is going to trial -- is gonna go to
9 trial the 23rd.

10 MR. AXELROD: Your Honor, a jury consultant is needed in
11 this case and without -- for whatever reason, she -- we
12 haven't gotten one, we need one, we're not prepared to go to
13 trial without a jury consultant for this case.

14 THE COURT: Then you need to find one, Mr. Axelrod.

15 MR. AXELROD: Your Honor, I believe that Caroline Graham
16 has given -- she did an affidavit -- Caroline Graham, our ---

17 THE COURT: What is she?

18 MS. ARMSTRONG: She's our mitigation specialist, Your
19 Honor.

20 THE COURT: And she's been onboard for how many months?

21 MS. ARMSTRONG: We received funding for Ms. Graham, I
22 think, it was submitted February the 21st and it was signed --
23 the funding for her was granted in June, June 3rd, 2011.

24 THE COURT: So, she will have seven months to have worked
25 on it.

1 MS. ARMSTRONG: That's correct.

2 THE COURT: Okay. That's adequate time.

3 MS. ARMSTRONG: Your Honor, I would simply note that we
4 rely on her affidavit, I'm sure you've seen it, it was
5 attached to our motion. And she believes that additional
6 time is necessary for her to be fully prepared. We would also
7 rely on the affidavit of Marjorie Hammock who is the social
8 worker. We believe that -- we just want to make sure that
9 everything is attached. There were three affidavits, Pete
10 Skidmore, Carolina Graham and Marjorie Hammock.

11 THE COURT: I understand. I've read the affidavits.

12 MS. ARMSTRONG: Thank you, Your Honor.

13 THE COURT: This case is going to trial.

14 MR. AXELROD: Your Honor, it's my understanding that Ms.
15 Graham ---

16 THE COURT: You told me you would be ready to try this
17 case in July. You asked that it be continued until January
18 and I did.

19 MR. AXELROD: I never told this Court that I would be
20 ready in July, sir. I never told this Court that. I
21 understand but I didn't because I ---

22 THE COURT: In January.

23 MR. AXELROD: I didn't get this material until April. I
24 would not have told this Court that I'm ready to go to trial
25 in July when I didn't ---

1 THE COURT: What you asked was -- you agreed to the date
2 it was set.

3 MR. AXELROD: Co-counsel might've said that but I did not
4 say that, Your Honor. It's my understanding Ms. Graham now
5 has informed co-counsel that Allen needs to be evaluated. On
6 this trial, Your Honor, I've been preparing on the guilt and
7 innocence phase and Ms. Armstrong is doing more of the
8 mitigation phase. I'm informed now that he needs to be
9 evaluated by the mitigation side in this case and I'm not sure
10 where that's gonna go. Ms. Graham is in this building and
11 we're looking for her right now to bring her in. She's in
12 another courtroom right now. But it's my understanding from
13 her ---

14 THE COURT: Has she submitted an affidavit? Was she --
15 wasn't she one of the ladies that submitted an affidavit?

16 MR. AXELROD: She submitted an affidavit that she's not
17 prepared to go forward at this time.

18 THE COURT: I understand.

19 MR. AXELROD: And I think that they just haven't had
20 enough time to work on the case. Nobody has had enough time
21 to work on this case. For whatever reason, most of the
22 experts that we have employed have not received this material
23 until the summertime. And we're -- and I understand the
24 Court's frustration, I'm not discounting that, but I think
25 that by not being prepared to go to trial at some point -- and

1 I'm gonna be quite candid with the Court, Your Honor, I knew
2 this hearing was coming up and I thought about it and I said,
3 okay, you know, first we asked for three months of protection
4 from November through January for sixty days and it was denied
5 and I thought to myself, all right, let's just say that we
6 have the trial in January and Allen gets convicted and let's
7 say worst case scenario, Allen gets the death penalty. At
8 some point, five or six or seven years from now, and I put --
9 I put Your Honor into my scenario in my head, I put you, Your
10 Honor, as the PCR judge, in my scenario and I envisioned you
11 speaking to me and saying -- I'm saying to -- you know, I'm in
12 a PCR eight years from now, I'm in the PCR and Judge Hyman is
13 looking at me and I say, Judge, you know, the PCR attorney is
14 questioning me and I'm gonna say, look, I wasn't ready. And
15 the attorney goes, Why didn't you tell somebody you weren't
16 ready? And I envisioned Your Honor looking at me from the
17 bench and saying, Mr. Axelrod, if you weren't ready, why
18 didn't you tell somebody before all this money was spent on a
19 trial that you weren't ready for?

20 THE COURT: I have heard you, Mr. Axelrod, and I have
21 denied the motion for continuance.

22 MR. AXELROD: I understand, Your Honor.

23 THE COURT: All right. All right. What else do you
24 have?

25 MR. AXELROD: We have some ex parte motions for funding,

1 Your Honor.

2 THE COURT: What do you have now?

3 MR. AXELROD: We have a funding request for \$10,000 for
4 Mr. Skidmore.

5 THE COURT: How much funding has already been given to
6 Mr. Skidmore?

7 MR. AXELROD: 25,000 so far, Your Honor -- 20,000 so far,
8 Your Honor.

9 THE COURT: How much of that has been exhausted?

10 MR. AXELROD: He's passed it, I believe. He's gone pass
11 the 20,000.

12 THE COURT: I'll grant it.

13 MR. AXELROD: I'm asking for another 10,000 for the
14 paralegal services.

15 THE COURT: I'll deny it.

16 MR. AXELROD: Asking for funding for expert witnesses for
17 a clinical psychologist.

18 THE COURT: What do you have so far?

19 MS. ARMSTRONG: Your Honor ---

20 THE COURT: You have a mitigation expert; is that
21 correct?

22 MS. ARMSTRONG: Yes, Your Honor. I think ---

23 THE COURT: Is she a psychologist?

24 MS. ARMSTRONG: She's the functional equivalent of Mr.
25 Skidmore but she does the life history in the mitigation

1 phase.

2 THE COURT: All right.

3 MS. ARMSTRONG: And she interviews all of the people who
4 will be testifying in the mitigation portion. She doesn't do
5 the rebuttal of bad character evidence or anything like that,
6 she deals with family -- she gets records and she helps us
7 develop what, you know, basically the factual basis for any of
8 our expert witnesses. So, she has been working with our
9 social worker. She's just -- she's an investigator, she's a
10 licensed ---

11 THE COURT: What's a psychologist needed for?

12 MS. ARMSTRONG: To do educational testing and that's
13 referenced in the social worker's affidavit. We've not asked
14 for very much funding in mitigation. I would point that out.
15 A lot of our penalty phase stuff, unfortunately ---

16 THE COURT: Who is the psychologist?

17 MS. ARMSTRONG: Dr. David Price, he's been involved in
18 numerous death penalty cases.

19 THE COURT: And his job is to do educational testing?

20 MS. ARMSTRONG: Psychological testing and also to test
21 for his educational ---

22 THE COURT: And he wants \$10,000?

23 MS. ARMSTRONG: That is what he estimates. If he goes in
24 and finds something and has to testify in court, that would be
25 what he estimates to be the maximum. He would bill by hour.

1 If it turns out that he can't offer us anything ---

2 THE COURT: How much is he an hour?

3 PARALEGAL: I think it's around 185, I'm not sure --
4 there's a lot of stuff that needs to be worked on but I
5 understand ---

6 MS. ARMSTRONG: We have a curriculum vitae that I can
7 get for you.

8 THE COURT: All right. I'll grant it.

9 MS. ARMSTRONG: Thank you, Your Honor. If I may
10 approach, I'll give you a curriculum vitae. I thought it was
11 attached. It was submitted. Thank you.

12 MR. AXELROD: Your Honor, on denying the paralegal funds,
13 Your Honor, what we -- we've got \$35 an hour, so basically,
14 they're getting three people in the place of one for me.
15 They've been doing a lot of the work under my direction.

16 THE COURT: And how much have you charged -- you billed
17 already for paralegal purposes?

18 MR. AXELROD: That was -- it was initially 10,000,
19 initial 10,000. We spoke with OID and OID says to one of my
20 paralegals -- they said they were much happier to see the
21 paralegal funding than to see the attorney funding.

22 THE COURT: You know, that it about 300 hours?

23 MR. AXELROD: Yes, sir, Your Honor, and we can
24 substantiate that. But what it's done is it's cut down on me
25 doing some of that work. It's just saving the State money. I

1 mean, it keeps my billing down. My billing is still low. I
2 think I'm the lowest of everybody at this point. I'm having
3 the paralegals do ---

4 THE COURT: The last I saw your billing was about 50
5 grand so far, wasn't it?

6 PARALEGAL: That 50 grand includes all of our experts
7 that we've already submitted to be funded. His actual
8 attorney fees are approximately \$20,000 at this point.

9 MR. AXELROD: So, my -- and I think if the Court is
10 forcing us to go forward in January for trial, and I accept
11 that, I'm just saying you're gonna tie my hands even further
12 by not allowing me to have that funding for the paralegals.
13 We have a tremendous amount of subpoenas that have to put out
14 all over the country and we've had all been working on
15 subpoenas as a paralegal for me and it's in involved process.
16 Each state has a different set of rules. He has to contact
17 people in the counties and they've been helpful to us and
18 we're moving on that but all our experts have been subpoenaed.
19 On the Ard case that we did in Lexington, they never
20 subpoenaed in the original trial twenty years ago, they never
21 subpoenaed the pathologist, the defense pathologist, and then
22 the pathologist was in another state that date of that trial
23 and the pathologist did not come and the Circuit Judge said,
24 well, you should've subpoenaed your pathologist. So, I
25 realize from that, we're gonna subpoena all our witnesses

1 whether they're willing to come or not, they're gonna be
2 subpoenaed so if something happens that the Court would not
3 say to me, why didn't you subpoena that person. So, we have
4 people, family people in Virginia. We have people all over
5 the state and in Poland that we're still looking for to get
6 that stuff. I just think it's gonna tie my hands even
7 further, Your Honor. I think it's appropriate to do it and
8 they've been quite beneficial. They've been preparing the
9 motions, they've been doing the subpoenas, they've been doing
10 all the leg work that has to be done, talking with the experts
11 and compiling everything. And the \$35 an hour, it beats me
12 doing it and with my schedule not being protected at all, I'm
13 unable to do some of those things. So, I would ask the Court
14 to reconsider that motion.

15 THE COURT: I'll fund it.

16 MR. AXELROD: Your Honor, also, I just want to put on the
17 record, I was speaking to Ms. Graham here, I'll put on the
18 record that the person that would testify, Ms. Armstrong's
19 affidavit, the person that would testify, Marjorie Hammock and
20 I believe that if she was here to testify today, she would
21 tell this Court that she herself is not prepared to go
22 forward. I just want to ---

23 THE COURT: Mr. Axelrod, I've ruled on that.

24 MR. AXELROD: Yes, sir, Your Honor. Your Honor, also,
25 we -- I'll let the Court read this if I may. We -- in the

1 Marion case, Allen was convicted of murder in the Marion case
2 along with Fred Holcomb. We interviewed Fred Holcomb and the
3 investigator, Mr. Skidmore, got some information from Mr.
4 Holcomb that would be beneficial for this case and we informed
5 Mr. Bailey that we were gonna subpoena Mr. Holcomb for this
6 case and the response from Mr. Bailey was, I am in receipt of
7 your letter dated November 28th where you intend to call as a
8 witness, Mr. Holcomb in the trial of Mr. Cottrell. I
9 appreciate your office providing me this advance notice.
10 However, please except this letter as notice Mr. Holcomb will
11 invoke his Fifth Amendment privilege and will not testify.
12 I'm certain you're aware the Supreme Court of South Carolina
13 has joint multiple jurisdictions upholding that neither the
14 State nor the Defendant can call as a witness someone that
15 they know will invoke the Fifth Amendment privilege. In light
16 of the fact that my client will not testify and the Supreme
17 Court's decision, I anticipate this matter will not be an
18 issue in the future. With regards, Mr. Bailey. Mr. Holcomb
19 has a pending PCR right now in Marion County that's scheduled
20 to go in February, according to Mr. Bailey. And Mr. Bailey
21 told me that until that PCR is finished, that he would not, he
22 would not -- he said he will not be able to testify here ---
23 THE COURT: I don't know what he's gonna testify to. I
24 don't know what you think he's gonna testify to or what
25 information he may have, if he has any.

1 MR. AXELROD: I could tell the Court what he would
2 testify to, what he would testify to is that when the shooting
3 occurred, Officer Guthinger, the other officer that was at the
4 scene, was at Mr. Holcomb's window -- there will clear
5 testimony that he was that window and he's gonna testify that
6 Officer Guthinger starting shooting at that point and then ran
7 over to McGarry and puts him in a different position. It puts
8 him in a position actually that would go along with the
9 casings. You know, Mr. Holcomb's testimony would dovetail to
10 the evidence that's at the crime scene and make it more
11 plausible that Mr. Guthinger, Officer Guthinger was not
12 telling the exact truth of his actions that evening or that
13 early morning. So, I think it's pertinent, it's important and
14 we need to have it. So, there's just one other issue right
15 there that he's saying that'll be precluded from his
16 testifying at this point.

17 THE COURT: All right. And if he is granted PCR, that
18 means he will never testify.

19 MR. AXELROD: Your Honor, that's not true and I'll tell
20 you why. He was never charged here. It would just be -- it
21 would be ---

22 THE COURT: Well, then if he's not in any jeopardy here
23 now, why would he be in jeopardy -- what's the PCR got to do
24 with it?

25 MS. ARMSTRONG: My understanding is that Mr. Bailey is

1 afraid if Mr. Holcomb comes and testifies that the State
2 essentially will retaliate and charge him. He was there, he
3 was convicted of this other murder and he just wants his
4 client ---

5 THE COURT: Well, that would be the case forever then,
6 wouldn't it?

7 MR. AXELROD: Well, Your Honor, if the Court remembers
8 its prior ruling, we made it -- we took exception to the
9 Court's ruling but the Court said in mitigation phase, if we
10 reached the aggravation mitigation phase, that you would allow
11 the State to say that -- if Mr. Holcomb was to testify, if he
12 was to come to testify for any reason, you were gonna allow
13 the State to say that he -- Allen had been convicted with Mr.
14 Holcomb of the Marion murder. Even if Mr. Holcomb was only
15 gonna testify to what occurred at Dunkin' Donuts, you said,
16 you based it on bias and I don't think that's correct because
17 bias would really go to, you know, whether they, you know,
18 whether they were ---

19 THE COURT: Mr. Axelrod, let's move on to something that
20 is before the Court. What's your point? Where are we going
21 with all this?

22 MR. AXELROD: Your Honor, I just want the Court to
23 understand for this record that we will follow the Court's
24 ruling but we are not prepared. I think I speak for my co-
25 counsel as well. She is not prepared and we're not prepared.

1 THE COURT: We're going to trial.

2 MR. AXELROD: Thank you.

3 THE COURT: For the fifth time, we are going to trial.

4 MR. AXELROD: Yes, sir, Your Honor.

5 THE COURT: All right. What other motions do you have,
6 Mr. Axelrod?

7 MS. ARMSTRONG: I beg the Court's indulgence.

8 MR. AXELROD: Your Honor, we still have the motion to ask
9 for the money for the funding for the radiologist.

10 THE COURT: No, you're gonna have to give me something
11 before I shell out \$7500 for a radiologist to x-ray his leg
12 and try to tell you five years later the path of a bullet.
13 I'm gonna have to hear something on that.

14 MR. AXELROD: We've provided ---

15 THE COURT: Why it's not better testimony for him just to
16 have your forensic pathologist look at it and said, here's the
17 entry wound, there's an exit wound. I can tell the path of a
18 bullet.

19 MR. AXELROD: Your Honor, I provided the Court an
20 affidavit of Leroy Reddick dated the 28th of November where he
21 said, I provided the support already. I've been retained to
22 assist the Defense in the case of South Carolina versus
23 Luzenski Allen Cottrell and have reviewed discovery material
24 provided to me. It would be of great benefit to defense
25 counsel to be afforded additional experts in the fields of

1 forensic radiology and radiology policy and procedure. This
2 expert can assist defense attorneys in the preparation and
3 presentation of their case in ways that would otherwise be
4 overlooked or omitted. For example, a forensic radiologist
5 can provide insight as to the specifics of wounds suffered by
6 all parties as well as wounds ballistics, trajectories and
7 bodily impairment. A forensic radiologist can provide insight
8 as to attainment and interpretations of x-rays and CT scans.
9 A forensic radiologist can provide visual aids detecting the
10 location of wounds, evidence and items from the scene. Expert
11 forensic radiology can be used to show whether or not the
12 actions of a participant were proper in the events that ---

13 THE COURT: He's speculating that it may be beneficial
14 and he doesn't specifically tell me what he needs. Now, if he
15 needs a forensic radiologist to assist him in formulating his
16 opinion, that might be different but that's not what I'm
17 seeing here. You want him to make charts and graphs, well,
18 you've got a pathologist. We have forensic pathologists that
19 come in here and testify every day. They do visual aids, they
20 make their own charts. You've got a forensic pathologist and
21 you're telling me he can't look at a leg and see an entry and
22 exit wound and tell you the trajectory of that bullet?

23 MR. AXELROD: Yes, that's -- we sent him the picture of
24 -- we photographed his leg last month and we sent it to ---

25 THE COURT: Well, he needs to give me that in an

1 affidavit why a forensic radiologist can.

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

3 THE COURT: If I were you, I would be very hesitate to
4 put up an expert who was gonna tell a jury that he can't tell
5 by looking at an entry and an exit wound what path a bullet
6 took.

7 MR. AXELROD: He can't tell the trajectory of how the
8 bullet went into the leg. I agree with the Court, yes, maybe
9 you can tell how it went in, but he can't tell the way it went
10 in, the angle it went in because he needs to see the entry
11 because he has -- it went in higher and it came out lower.
12 So, what we got to do, we need to know whether he was laying
13 on the ground as he was shot because that's gonna be a major
14 issue of this case is the position of Mr. Cottrell towards the
15 shooter.

16 THE COURT: And do you think that a forensic radiologist
17 can tell you that?

18 MR. AXELROD: That's what he told -- that's what the
19 pathologist told us, yes, it would assist ---

20 THE COURT: Get me something from the radiologist that
21 says he can do that.

22 MR. AXELROD: It would assist the pathologist to make a
23 statement to a reasonable degree of medical certainty that
24 perhaps -- that's what he said, he needs to see that to see
25 where he can go with that.

1 THE COURT: Well, that's \$7500 we're not gonna spend at
2 this time.

3 MR. AXELROD: And I would just ask the Court if the Court
4 would consider looking at the *Elmore* opinion that came down
5 out of the Fourth Circuit. It was -- it's a hundred-page
6 opinion but it comes down and says that, you know, sometimes
7 you have to allow the defense to have this type of ---

8 THE COURT: Well, what you're doing, you're on a -- your
9 pathologist is on a fishing expedition. I mean, he can say
10 that a nuclear physicist might help me but until he tells me
11 how that person is gonna do it and specifically why he needs
12 him, I'm not gonna fund him.

13 MR. AXELROD: Yes, sir.

14 THE COURT: All right.

15 MR. AXELROD: Your Honor, there's one other issue that
16 we're trying to find an expert for. We were looking for
17 constitutional law expert in criminal procedure because
18 basically it's our opinion that what Officer McGarry did was
19 illegal in his actions towards Mr. Cottrell that evening when
20 he went over and he grabbed him and he put him against the
21 car. We're gonna ask -- we're eventually gonna ask for a
22 self-defense charge, a voluntary manslaughter charge in this
23 case and I think that the jury needs to know that the actions
24 of Mr. McGarry were illegal and I think the only way that we
25 can bring out is an constitutional expert in criminal

1 procedure to say that he was without pause or even outside the
2 scope of his involvement because he didn't ---

3 THE COURT: Wasn't there a police procedure's expert in
4 the first trial?

5 MR. AXELROD: The police procedure's expert will be
6 stopped at the point of saying that he might be improper but I
7 think we're gonna have to get to the point to say that what
8 Mr. McGarry did was illegal. We have to go one step further
9 ---

10 THE COURT: So, you're gonna have someone testify as to
11 what the law is in South Carolina?

12 MR. AXELROD: Yes, sir, Your Honor. That it was illegal
13 ---

14 THE COURT: How is he gonna do that?

15 MR. AXELROD: He can testify -- he can testify that by
16 going up to Mr. Cottrell it was illegal because the case law
17 is to the extent that even if you have an articulate
18 reasonable suspicion that the crime is occurring, you no
19 longer -- you can't go up to somebody -- he had no reason to
20 go to him.

21 THE COURT: Well, that's for another day because that
22 motion is not before me.

23 MR. AXELROD: Because we're trying to locate one. That's
24 why we haven't -- I just want -- I'll put the Court on notice
25 that we're actually looking for that expert.

1 THE COURT: All right.

2 MS. ARMSTRONG: Your Honor, just one final motion. This
3 isn't in writing but I could certainly reduce it to it. But
4 we would ask the Court to reconsider allowing us an order of
5 protection for thirty days before trial. As it stands ---

6 THE COURT: All right. I'll extend your order to January
7 the 1st.

8 MS. ARMSTRONG: Thank you, Your Honor.

9 MR. AXELROD: Your Honor, we provided the Court with the
10 two originals for the paralegal services and for the
11 additional investigative expert on -- I have the originals on
12 the paralegal and the investigator funding.

13 THE COURT: It was the clinical psychologist and what?
14 Give the copies back the Taylor.

15 MR. AXELROD: Your Honor, after speaking with the
16 investigator, I believe Ms. Armstrong, spoke with Solicitor
17 Hembree and he was in agreement to unseal records that the
18 Clerk had sealed at the first trial. I think possibly we
19 might have to ask Mr. Hembree to come back because I don't
20 think -- even though he's acquiesced to the unsealing of it,
21 nothing has been done at this point and I'll let Ms. Armstrong
22 address that.

23 MS. ARMSTRONG: Thank you. Yes, Solicitor Hembree agreed
24 that we could do a consent to unseal Court Exhibit Five.
25 Those were personnel records of Joseph McGarry. I believe

1 they're about four hundred pages. It's a fairly thick ---

2 THE COURT: Just get me a consent order.

3 MS. ARMSTRONG: Yes, Your Honor.

4 MR. AXELROD: Okay. We'll do a consent order for that.

5 MS. ARMSTRONG: Thank you. Will Your Honor be here in
6 the Conway for the rest of the day?

7 THE COURT: Yes.

8 MR. AXELROD: Your Honor, I believe that's all I have
9 today. I don't know if Ms. Armstrong has ---

10 THE COURT: All right. Very well. Is that all Ms.
11 Armstrong?

12 MS. ARMSTRONG: At the moment, Your Honor. If we locate
13 an available jury selection expert, I ---

14 THE COURT: I'll hear from you. Okay.

15 MR. ARMSTRONG: Thank you, Your Honor.

16

17 (ADJOURNED - 10:13 A.M.)

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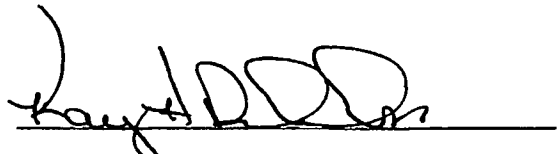
State v. Cottrell - 2003-GS-26-0020
CERTIFICATE OF COURT REPORTER

50

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus Luzenski Allen Cottrell, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on December 7, 2011.

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



Kay H. Richardson

Official Court Reporter

June 16, 2016.

1
2 STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS
2003-GS-26-0020

3 COUNTY OF Horry
4

5
6 THE STATE,

7)
8 -vs-)
9)

10 LUZENSKI ALLEN COTTRELL,

11 Defendant.)
12

January 6, 2012

13
14 B E F O R E:

15 HONORABLE LARRY B. HYMAN, JR.
16

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

18 GREG HEMBREE, Esquire
19 JIMMY RICHARDSON, Esquire
Attorneys for the State

20 STUART M. ALEXROD, Esquire
21 MELISSA AMRSTRONG, Esquire
Attorneys for the Defendant

22
23 Henry P. Young
24 Court Reporter
25

I-N-D-E-X

WITNESS:

PAGE:

Pete Skidmore

57

Dr. David Price

70

1 P-R-O-C-E-E-D-I-N-G-S

2 (Convened at 9:32 a.m., January 2, 2012).

3 THE COURT: All right, are we ready to
4 commence the proceedings?

5 MR. HEMBREE: The State is ready, Your Honor.

6 THE COURT: The defense, are you ready?

7 MR. AXELROD: Yes, Your Honor.

8 THE COURT: Okay. Let me see what we have to
9 do this morning. There is a scheduling order in
10 this case and this hearing is basically being held
11 in compliance with that scheduling order. I don't
12 know that's all we have to do but we need to be
13 getting close to taking care of any housekeeping
14 matters that are still out there.

15 I see we've got Mr. Cottrell in the courtroom
16 now, that's good.

17 All right, what do we have pending,
18 gentlemen?

19 MR. HEMBREE: Your Honor, I have two quick
20 housekeeping matters I can take up very, very
21 quickly.

22 THE COURT: Okay.

23 MR. HEMBREE: One is, I will submit this to
24 the Court, is an order certifying the indictment.
25 I have provided a copy to defense counsel. We had

1 discussed this issue with the Court previously,
2 Your Honor. As you know, the original indictment
3 in this case had four counts attached to it. When
4 the Supreme Court overturned the conviction they
5 only overturned one of the convictions, so by
6 operation of law the Count One of the original
7 indictment, the count for murder, returned to its
8 previous status as an active pending indictment.
9 The other three counts, of course, were adjudicated
10 as guilty. In order to just make this a cleaner
11 process for the jury, a cleaner process for the
12 Court --

13 THE COURT: I'm not going to mislead this
14 jury or confuse them in any form or fashion. I
15 understand everyone consents to redacting the other
16 three counts so that only one count goes to the
17 jury, that is all they see.

18 Is that correct, counsel?

19 MR. RICHARDSON: Yes, Your Honor.

20 THE COURT: We're all on the same page, all
21 consent, correct?

22 MS. ARMSTRONG: Yes, Your Honor.

23 MR. HEMBREE: Yes, sir.

24 THE COURT: All right. Attached to my order
25 is a copy of the indictment which would only show

1 just the indictment for murder.

2 Okay.

3 MR. HEMBREE: Your Honor, the other, the
4 second houskeeping matter is we have a process that
5 we use, as you know, in the death penalty
6 litigation for arraignment that is a little bit
7 different than the arraignments we use in the
8 normal course of business in General Sessions
9 Court. It's one that has been used in every death
10 penalty case, I fear not too use it out of concern
11 that it might, I can't imagine it would be an
12 appellate issue but we would like to go ahead and
13 arraign the defendant at this time.

14 THE COURT: All right, go ahead.

15 MR. HEMBREE: Thank you.

16 THE COURT: I think he needs to be placed
17 under oath, does he not?

18 MR. HEMBREE: Yes, Your Honor.

19 THE COURT: Okay, Madam Clerk.

20 (The defendant after being first duly sworn,
21 stated as follows)

22 THE COURT: Counsel.

23 MR. HEMBREE: Thank you, Your Honor.

24 Luzenski Allen Cottrell? If you will answer
25 by that name raise your quite hand.

1 May the record reflect he has answered
2 affirmatively by raising his right hand.

3 Your Honor, I now read from Indictment
4 2003-GS-26-0020, an indictment for murder, in that
5 Luzenski Allen Cottrell did in Horry County on or
6 about the 29th day of December, 2002, willfully,
7 feloniously and intentionally with malice
8 aforethought kill the victim Joseph J. McGarity,
9 Jr., a sworn law enforcement officer employed by
10 the Myrtle Beach Police Department and while on
11 active duty by means of shooting Private First
12 Class McGarity in the face with a .45 caliber
13 semi-automatic handgun and Private First Class
14 McGarity did die as a proximate result thereof in
15 Horry County on or about December 29th, 2002, in
16 violation of Section 16-310, South Carolina Code of
17 Laws 1966 as amended and the common law of South
18 Carolina.

19 What say you Luzenski Allen Cottrell, are you
20 guilty or not guilty of a felony wherein you stand
21 indicted?

22 THE DEFENDANT: Not guilty.

23 MR. HEMBREE: How shall you be tried?

24 THE DEFENDANT: By jury.

25 MR. HEMBREE: (Inaudible on tape) pass

1 between you and the State upon the trial of this
2 case you challenge them or any of them you will do
3 so as each is called to the bar to be sworn and
4 before he or she is sworn. May God grant you a
5 just deliverance.

6 THE COURT: Thank you, counsel.

7 MR. HEMBREE: Thank you.

8 THE COURT: All right. Does that take care
9 of the matters before the Court or brought by the
10 State, for this hearing?

11 MR. RICHARDSON: Yes, sir, Your Honor.

12 THE COURT: Okay. All right, let me turn to
13 Mr. Axelrod or Miss Armstrong, I will hear from you
14 on any matters.

15 MR. AXELROD: Your Honor, one matter I gave
16 the Solicitor this morning, I gave a copy to Your
17 Honor this morning, defense requests for racial
18 questioning during the voir dire, the initial voir
19 dire. We're asking the Court to say to the jury in
20 the vernire, "I need to inform you that the
21 defendant in this case is black and that the
22 deceased police officer is white. Would the fact
23 that the parties are of different races in any way
24 affect your ability to objectively listen to the
25 facts and decide the case based on the law?"

1 THE COURT: May I hear from you?

2 MR. HEMBREE: The State has no objection to
3 that question.

4 THE COURT: All right. I don't think it is
5 necessary but out of an abundance of precaution I
6 will certainly add that to my voir dire. I want to
7 make sure, Mr. Axelrod, you bring that to the
8 Court's attention when we're qualifying our jury, I
9 want to make sure, something could slip by all of
10 us and I don't want that to happen, okay?

11 MR. AXELROD: Yes, sir, Your Honor.

12 THE COURT: All right, anything further?

13 MR. AXELROD: Your Honor, we had, we had some
14 motions that had yet to be decided and the Court
15 deferred several months ago.

16 THE COURT: All right, what are those? I
17 don't recall.

18 MR. AXELROD: The first one would be, we
19 called it a toxic terms motion, that I asked that
20 we not use the word guilt phase or penalty phase,
21 not use the word phase because phase actually,
22 really refers to, if it is a first phase, then
23 there would be a second phase.

24 THE COURT: Aren't those the words used in
25 our statute?

1 MR. AXELROD: But --

2 THE COURT: What is your objection? What do
3 you propose that I use?

4 MR. AXELROD: The word trial, we're here for
5 the trial. I think when you say the first phase or
6 the guilt phase that is inferring to a jury that
7 they are going to find him guilty and then we're
8 going to have a second phase. If they come back
9 with a, if they come back with a self defense, if
10 they come back with a manslaughter charge there is
11 no other phase, it stops right there, and I think
12 that when we use the words --

13 THE COURT: If I say trial phase --

14 MR. AXELROD: We're okay with trial phase but
15 I'm not okay --

16 THE COURT: Trial phase?

17 MR. AXELROD: Or the trial, what is wrong
18 with just the trial, we're here for the trial?

19 THE COURT: Let me hear from the State.

20 MR. HEMBREE: Your Honor, our concern is that
21 it is confusing enough for a jury.

22 THE COURT: Anything else I can think to say,
23 Mr. Axelrod, would be even more confusing to this
24 jury. I don't think the use of the term phase in
25 any way prejudices your client.

1 MR. AXELROD: Well, I would ask that --

2 THE COURT: Isn't it the tradition of this
3 Court to use the term phase? This statute has been
4 looked at so many times by the Supreme Court and by
5 the U. S. Supreme Court, you know, we've got a
6 statute that we have traditions of the Court that
7 have passed muster and I just cannot see how that
8 has any significance whatsoever and I just believe
9 that it is going to be, for the Court to try to
10 dance around using the word phase throughout these
11 proceedings is going to make it more difficult, it
12 is going to make it more confusing for the jury.

13 MR. AXELROD: Then I would ask, I understand
14 the Court's position, I would ask the Court we not
15 use the word guilt phase, then. If we want to use
16 the phase, how about the innocence phase or the
17 guilt or innocence phase, but not just the guilt
18 phase. If we use the word phase I'm okay there,
19 Judge, but the word guilt in front of it --

20 THE COURT: But the jury is never going to be
21 asked to determine whether he is innocent. Doesn't
22 that imply to the jury that if you don't find him
23 guilty you've got to find him innocent? I wish
24 that we, and I said this to jurors a thousand
25 times, you know, probably the better verdict form

1 in this state or in any state would be proven and
2 not proven. I mean, that is what they are really
3 asked to do but --

4 MR. AXELROD: Well, if he is not found
5 guilty, then --

6 THE COURT: I don't want to imply -- they
7 don't have to find him innocent to find him not
8 guilty. You would agree with me on that, do you
9 not?

10 MR. AXELROD: Yes, sir, Your Honor.

11 THE COURT: I mean, to suggest this is an
12 innocence phase, doesn't that infer to the jury,
13 well, if we don't, if it is guilt or innocence,
14 don't we have to find him innocent if we don't find
15 him guilty? I mean, they don't have to do that.
16 The issue is whether or not they have to -- they
17 have to determine whether the State has proven
18 beyond a reasonable doubt that he is guilty,
19 nothing to do with whether they make a finding of
20 whether he is innocent. Don't you kind of agree
21 that if we talk in those terms we're suggesting to
22 the jury a verdict of not guilty is in fact a
23 verdict of innocent?

24 MS. ARMSTRONG: Your Honor, if I may be
25 heard, I think Mr. Axelrod's is in keeping somewhat

1 with your own, that if we say the guilt phase, then
2 that implies that he is therefore guilty and that
3 is why we're going through it only so we can get to
4 the point of sentencing. I would suggest, and this
5 certainly couldn't cause anybody any confusion, at
6 least I don't see how it could, just refer to the
7 first phase as the trial phase, then if we get to
8 the sentencing phase everybody knows they are there
9 to determine sentence, that is the only issue,
10 guilt, death or life. So, trial phase or --

11 THE COURT: Let me say this. I'm not going
12 to grant your motion but I will do my best in the
13 trial of this case, I don't think it is improper
14 for me to say guilt phase or penalty phase but I
15 will do my best to try to refer to it as trial
16 phase and sentencing phase, I think those terms are
17 kind of interchangeably used, but I don't want you
18 calling me on it if during my remarks to the jury
19 or in the presence of the jury I say guilt phase or
20 penalty phase. I don't think it makes any
21 difference but I'm telling you that I will do my
22 best.

23 You want me to use trial phase, and what was
24 the other word?

25 MR. AXELROD: Sentencing phase.

1 THE COURT: Sentencing phase. I will do my
2 best to try to use those terms but I think they
3 mean exactly the same thing, are interchangeable, I
4 don't believe there is any difference.

5 Do you, counsel? I don't think it makes any
6 difference.

7 MR. HEMBREE: Your Honor, guilt phase is what
8 the statute refers to, is what the precedence
9 refers to, our case law refers to guilt phase. I'm
10 not concerned about it because just in practice the
11 Court historically will instruct the jury, "We have
12 used the term guilt phase, that doesn't imply
13 guilt. That is just a way to describe it." The
14 only concern I have about using the term the trial
15 phase is both of them are trial phases.

16 THE COURT: Absolutely.

17 MR. HEMBREE: And like I say, it is very
18 confusing to a jury anyway, to start. You know, I
19 think it just helps them distinguish between the
20 two because there is a clear difference between
21 guilt or responsibility and penalty, but --

22 THE COURT: I'm going to, I would hope that
23 after going through all that we go through to
24 select a jury in a death penalty case that we're
25 going to get a jury intelligent enough to

1 understand the difference. It would be a sorry day
2 for this state if we seated jurors who are not, in
3 a death penalty case, that are not intelligent
4 enough to grasp the concept. I think most people
5 understand it and know it to begin with and I
6 believe that we are going to have a jury that can
7 understand what we're talking about and are not
8 going to be confused, regardless of what I say.

9 I will, Mr. Axelrod, try to refrain from
10 saying guilt phase, sentencing phase, I will try to
11 use trial phase. What was the other one?

12 MS. ARMSTRONG: Sentencing, Your Honor.

13 THE COURT: Sentencing phase. I will do my
14 best. I just don't see where is the significance.
15 What else do we have.

16 MR. AXELROD: Your Honor, another term I have
17 is first phase, because if we have a first phase
18 that is insinuating we have a second phase. I just
19 think if we stick with trial phase or sentencing
20 phase --

21 THE COURT: I have never, I don't know any
22 reason why I would use first phase. I have never
23 referred to it as first phase, I don't think
24 anybody does.

25 MR. AXELROD: I'm just bringing that out just

1 in case, Your Honor.

2 Now, Your Honor, also I think that the term
3 murderer, we would ask that not be used in the
4 trial because that is ultimately for the jury to
5 decide, whether or not Allen committed a murder.

6 THE COURT: Well, I think that is right. I
7 don't intend to use it, I refer to him as the
8 defendant, I'm not going to refer to him as
9 murderer but I'm not going to limit the State in
10 its closing and things of that nature, in its
11 opening and during the trial, from referring to
12 somebody as being the murderer. There is no
13 question there was a death or homicide here.
14 Whether it's a murder or not will depend on this
15 jury.

16 MR. AXELROD: I can understand that maybe in
17 closing but I think in the opening that would be
18 improper because I think it is improper in the
19 opening to refer to him as a murderer at that
20 point. I mean, there is a shooting, a homicide,
21 there was someone died and there was a killing.

22 THE COURT: Well, there is another side of
23 that, too. If they want to refer to him as
24 murderer and they can't meet muster during the
25 trial the jury is going to hold that against them.

1 I'm not going to grant that motion. I will
2 give him some leeway as I will give you leeway in
3 your trial of this case.

4 MS. ARMSTRONG: Your Honor, related to that,
5 I do believe there is some case law about the
6 Solicitor refraining from referring to, in this
7 case, Officer McGarity as a, quote, victim. I
8 could pull the case and get it.

9 THE COURT: Well, I would like to see the
10 case. Are you saying that there is case law that
11 you can't refer to the victim as the victim?

12 MS. ARMSTRONG: I don't think you're allowed
13 to refer to the person as -- I mean, that is a
14 question for the jury, and I will look for it.

15 THE COURT: I would certainly -- yes, that is
16 the ultimate question for the jury. There are
17 other terms that might be applied to him if you
18 prevail with your theory of the case, he may be
19 referred by the jury as things like aggressor. I'm
20 sure you're going to use that word. We'll have to
21 see.

22 MS. ARMSTRONG: Thank you.

23 THE COURT: But if you can give me a case
24 that says I should not refer to the alleged victim
25 as a victim, I don't know what else we can call

1 him. I mean, I'm not going to hamstring the State
2 with its use of terms that are in my view not
3 particularly inflammatory. They are just common
4 usage, we use that term in every, in trials every
5 day in this court. The Victims Rights Act, it
6 refers to them as victims, you know.

7 I'm going to deny it. What else do we have?
8 I'm going to deny it with the caveat if you provide
9 me some case law I may revisit it.

10 MS. ARMSTRONG: Thank you, Your Honor.

11 MR. AXELROD: Your Honor, that the Solicitor
12 not be able to use animal terms referring to my
13 client, whether they want to call him a hyena, a
14 great white shark, a wolf, any type of animal.

15 THE COURT: How do you know they are?

16 MR. AXELROD: I'm just asking that they not
17 because -- I'm not saying they would use it, I'm
18 just bringing it up today to have discussion about
19 that.

20 THE COURT: Let me hear from the Solicitor.
21 Are you going to call him an animal?

22 MR. HEMBREE: No, Your Honor.

23 THE COURT: He says he is not going to do it
24 to begin with. That is not his style, I don't
25 think he would.

1 MR. AXELROD: Well, Your Honor --

2 THE COURT: How about can you call him a
3 predator?

4 MR. AXELROD: It's been used in this
5 courthouse, Your Honor, they have used those terms,
6 that is why I bring it to the Court's attention.

7 THE COURT: He says he is not going to refer
8 to him as any kind of animal.

9 MR. AXELROD: I believe -- well, okay, I'm
10 fine with that.

11 Your Honor the motions yet to be decided, one
12 of them was the amount of uniformed police officers
13 allowed to be in the trial. I think the Court
14 might have said it was going to wait until the
15 trial on that point.

16 THE COURT: I am. I'm going to see how,
17 we're going to be in courtroom B, I want to look at
18 the courtroom, I want to find out what I've got to
19 do to establish a secure courtroom. I don't
20 usually use courtroom B but I know there are
21 several entrances. Does it have a lockup access
22 like we have in this current room?

23 MR. HEMBREE: Yes, Your Honor.

24 THE COURT: Courtroom B does?

25 MR. HEMBREE: Yes.

1 THE COURT: Where do you come in?

2 MR. HEMBREE: From the side, basically where
3 the bench is here and the door is right there.

4 THE COURT: Okay, all right.

5 MR. HEMBREE: The lockup is there.

6 THE COURT: I just couldn't remember. I'm
7 just going to see. You know, Mr. Axelrod, I want a
8 police presence in the courtroom, certainly, and I
9 understand SLED is going to have its team down
10 here. Most of those guys, or all those officers
11 are out of uniform, I think.

12 MR. AXELROD: Your Honor, we had, we
13 discussed a situation, I would like to revisit,
14 with Fred Holcomb testifying. Fred Holcomb, he was
15 convicted with Mr. Cottrell in the Marion case,
16 they were both convicted of murder. We were going
17 to have Fred Holcomb testify in this trial, it was
18 the Court's ruling at that time that if Mr. Holcomb
19 testified the State would be allowed to impeach Mr.
20 Holcomb through the conviction of the murder with
21 Allen, that the State would be allowed to say, "Mr.
22 Holcomb, isn't it true that you and Mr. Cottrell
23 were convicted of murder in Marion," and --

24 THE COURT: Doesn't it go to his credibility?

25 MR. HEMBREE: Prejudice, Your Honor.

1 MR. AXELROD: Well, Your Honor, I thought
2 about it and that is why I'm bringing it back up.
3 I think under a 403 analysis, I think it is
4 prejudicial. I think if they were on the same
5 bowling team together, if they went hunting
6 together it would go to the prejudice or bias.

7 THE COURT: Well, you know, the fact there is
8 prejudice is not controlling under 403. Under 403
9 the prejudice must substantially outweigh any
10 probative value. That is the rule, substantially
11 outweigh any probative value.

12 MR. AXELROD: Yes, sir, and I think it would,
13 for the jury to hear that he has been convicted of
14 another murder.

15 THE COURT: There is an exception to that. I
16 will look it up but generally that's the rule.

17 MR. AXELROD: Because my point to the Court
18 would be, and here is my point, I have no objection
19 to the State saying to Mr. Holcomb, "Isn't it true
20 you have been convicted of murder," I think that is
21 proper but I think that when you go, "Isn't it true
22 you have been convicted of murder with the
23 defendant --"

24 THE COURT: Solicitor, what if the defendant
25 does not take the stand, wouldn't we be getting

1 close to commenting on a prior conviction? I mean,
2 you know, if I allowed you to ask him if he had
3 been convicted of murder, which I certainly believe
4 is appropriate, and then I say, no, I'm going to
5 cut you off at a murder involving the defendant,
6 then the defendant takes the stand, of course you
7 could ask him at that point, you could ask him if
8 he committed a murder, if he had been convicted of
9 murder, I think he has opened himself up to that,
10 but you could also ask him if it was with Mr.
11 Holcomb. I'm trying to look at this thing from the
12 context of how much I should let Mr. Holcomb in and
13 whether or not you would be able to get the same
14 thing in if the defendant takes the stand where it
15 would be admissible.

16 Let me hear you on it.

17 MR. HEMBREE: Your Honor, the essence of
18 cross examining him is all about the relationship,
19 it is not the fact he committed a murder, that is a
20 fact and it is certainly subject, he is subject to
21 impeachment on that conviction as it stands alone,
22 whether he committed that murder in New York or --

23 THE COURT: I agree with you 100 percent.

24 MR. HEMBREE: -- or in South Carolina. That
25 is a different aspect of this, the reason to

1 cross-examine him on that. It is just the
2 impeachment piece. The other, the bigger piece,
3 the more important piece, more critical for the
4 jury to effectively assess Holcomb's credibility is
5 the longstanding relationship and just how deeply
6 involved they are in this series of crimes.

7 THE COURT: And you are admitting it for that
8 purpose but would you agree with me that, suppose
9 Mr. Holcomb had not been convicted of the murder
10 and you simply put him up and you asked him hadn't
11 Mr. Cottrell been convicted of a prior murder or
12 another murder, that clearly, I don't think would
13 be admissible.

14 MR. HEMBREE: That wouldn't be allowed, Your
15 Honor. It's the relationship that is the crux of
16 the question.

17 THE COURT: It is sort of a res gestae in the
18 sense it is part of the telling of the story, isn't
19 it, Mr. Axelrod?

20 MR. AXELROD: Not in this case, Your Honor,
21 no, sir. Fred Holcomb is not even charged with the
22 crime, they go in two separate cars, he is just in
23 another car and he can give testimony about what
24 happened that night from his vantage point, that is
25 critical for the defense. I think the issue of a

1 prior conviction goes clearly to the credibility of
2 the witness for the jury to decide the credibility
3 issue. It should have no bearing, you are pulling,
4 if he doesn't testify you are pulling in something
5 that shouldn't be in there.

6 I think if the Solicitor was to say, "Mr.
7 Holcomb, isn't it true you have been convicted of
8 murder, you're in a jump suit, you have been
9 convicted of murder in Marion County," he could say
10 yes. To then say, "Isn't it true that Mr. Cottrell
11 was convicted with you of the murder," is extremely
12 prejudicial. I agree with the Court to separate it
13 there and if Mr. Cottrell took the stand the
14 Solicitor could say, "Isn't it true you were
15 convicted of murder, in fact that murder was with
16 Mr. Holcomb?" I think he can get to where he wants
17 to go there but I don't think, I think if he
18 doesn't testify, I think on a balancing test, I
19 guess, I don't see how one would not be unduly
20 prejudicial. He is on trial for murder and now
21 we're telling the jury he has been convicted of
22 another murder and I would ask the Court to look at
23 it this way.

24 Let's just say that he was on trial for
25 trafficking cocaine. I think the Court might agree

1 with me that the Solicitor would not be able to say
2 to him, if he took the stand the Solicitor would
3 not be allowed to say to him, "Isn't it true you
4 have been convicted of trafficking cocaine last
5 year," because he might be able to say to him, I
6 have had Courts say it's okay to ask isn't it true
7 you have been convicted of a felony last year, but
8 not for a trafficking, because the Courts have said
9 that would be unduly prejudicial.

10 THE COURT: Let me tell you what my feeling
11 is, I may be right, I may be wrong, my feeling is
12 that the issue is the credibility of Mr. Holcomb,
13 okay? For that reason I'm going to allow the
14 Solicitor to ask him, "Weren't you convicted of a
15 murder," okay? If I allow the Solicitor to say, or
16 ask him, "Wasn't it true that that murder was
17 committed, or your co-defendant in the murder was
18 Mr. Cottrell," if I allow that, and the purpose is
19 for the impeachment of Mr. Cottrell, I would need
20 to give some sort of curative charge where I
21 instructed the jury that, "You may use that
22 information only for the purposes of determining
23 the credibility of Mr. Holcomb's testimony." I
24 think that I would need to do something like that.
25 However, I believe that the fact that he was with

1 Mr. Cottrell would be so prejudicial that, I'm not
2 sure that the jury could put that out of their
3 mind. I'm going to allow the Solicitor to inquire
4 as to whether Mr. Cottrell, I mean Mr. Holcomb has
5 been convicted of a murder himself, I think that
6 goes to his credibility, and I'm going to stop it
7 right there.

8 MR. AXELROD: Thank you, sir.

9 MR. HEMBREE: Your Honor, let me propose
10 another alternative.

11 THE COURT: Okay.

12 MR. HEMBREE: Because the fact it was a
13 murder is not as important to the State as the
14 relationship. I think that is more important, to
15 show that these two men, they are partners in
16 crime, they are literally, that is why he is up
17 here telling this story that he's telling us and to
18 cut us short on that, I think would be very
19 misleading to this jury. I think it is going to
20 take away an important aspect --

21 THE COURT: I'm just concerned about it being
22 a murder. If you want to say, "Have you engaged in
23 other criminal acts with Mr. Cottrell --"

24 MR. HEMBREE: I wouldn't have --

25 THE COURT: I think it lessens it.

1 MR. HEMBREE: My suggestion was going to be
2 that he has been convicted of a felony, he and Mr.
3 Cottrell were convicted of a felony together and
4 they have engaged in these other activities this
5 list this long. I'm going to explore that
6 relationship and go through all that conduct.

7 THE COURT: Mr. Axelrod, he's giving up the
8 murder --

9 MR. AXELROD: Clearly Mr. Holcomb wasn't
10 arrested that evening, so --

11 THE COURT: I understand but my concern is the
12 similarities between the two crimes, murder,
13 murder. That is what really bothers me. That is
14 the reason, I'm not saying that the fact that they
15 were convicted, both convicted of another murder is
16 not relevant, what I'm telling you is I think the
17 prejudicial effect of both being murders would
18 substantially outweigh the probative value it would
19 have in the context of impeaching Mr. Holcomb. I
20 think that sort of conduct by Mr. Holcomb in
21 conjuncton with Mr. Cottrell would be admissible
22 for impeachment purposes, I think it should be
23 admitted. What the Solicitor poses here, "Okay,
24 Judge, if the murder," murder is what bothers you,
25 we'll forget about the murder, we'll say you have

1 been, we'll ask him if he has been involved in
2 felonious activities, essentially, with Mr.
3 Cottrell, "Do you not have a relationship in which
4 you have engaged in criminal acts, felonies with
5 Mr. Cottrell?" Now, there you're doing away with
6 the part that really, really concerns me and what
7 we're talking about is solely the relationship,
8 which I believe is proper impeachment.

9 MR. AXELROD: Your Honor, if I may, and I
10 understand the Solicitor and your position there
11 and I'm somewhat in agreement. If the Solicitor
12 was to say to Mr. Holcomb, "Isn't it true that you
13 have been convicted of a felony with Mr. Cottrell,"
14 they have been convicted of one felony, I would ask
15 that they stop right there. That would allow them
16 to know there has been that relationship.

17 THE COURT: Well, what if they say, "Isn't it
18 true you and Mr. Cottrell have a history of
19 criminal acts"?

20 MR. AXELROD: I think --

21 THE COURT: I don't know whether they have
22 done other stuff or not. They may have done a
23 whole bunch of criminal stuff and Mr. Holcomb may
24 be willing to just say, "Yes, we have, we have been
25 partners in crime for awhile," and that

1 partnership, that relationship, I think is what
2 should be admitted.

3 MR. AXELROD: But you can only impeach with
4 convictions, you can impeach with convictions.

5 THE COURT: He is not a defendant, he's a
6 witness and we're talking about a relationship that
7 he may have with Mr. Cottrell that would cause him
8 to color his testimony in favor of Mr. Cottrell.

9 Isn't that where you're going, Solicitor?

10 MR. HEMBREE: Absolutely, Your Honor. That I
11 think is what the important thing is to establish.

12 THE COURT: What if he was Mr. Cottrell's
13 cousin, you know, and he would be able to explore
14 that fully, say, "Hey, he's your cousin and you
15 would do anything you could to help him, wouldn't
16 you," the question we hear asked all the time, I
17 think I have heard you ask similar questions, but
18 here we're saying, "He is your partner in crime, is
19 that true or not true, Mr. Holcomb?" Mr. Holcomb
20 may say, "We did one crime together and we both got
21 convicted," that's fine, if that is all he says he
22 did, fine, but if he says, "We have a history going
23 back ten years, we have been buds and we have been
24 hanging out doing crime for a long time, covering
25 each other's back," what if it goes to that, isn't

1 that something the jury should know in determining
2 whether or not to believe or disbelieve Mr.
3 Holcomb?

4 MR. AXELROD: I think --

5 THE COURT: You're getting the murder off.

6 MR. AXELROD: I think if the Solicitors says,
7 "Isn't it true you have been partners in crime your
8 whole life," I think it is just prejudicial.

9 THE COURT: Well, if Mr. Holcomb says no --

10 MR. AXELROD: Then he could only impeach him
11 with convictions.

12 THE COURT: Don't you think that's relevant
13 to his credibility?

14 MR. AXELROD: Not --

15 THE COURT: If the Solicitor asks that?

16 MR. AXELROD: No.

17 THE COURT: And he says, "Yep, we've been
18 buds and partners in crime for thirty years," would
19 that not be relevant?

20 MR. AXELROD: If he says no to that question,
21 the only impeachment he can do would be through
22 conviction, correct?

23 THE COURT: That is where he's left. The
24 Solicitor will agree with that, that is where he
25 is.

1 MR. AXELROD: I don't know if I will agree
2 with that.

3 THE COURT: Well, how could the Solicitor use
4 anything other than a conviction? Only if he
5 denies it, can he use extrensic evidence to prove
6 it.

7 MR. HEMBREE: Right, and there could be a
8 host of extrensic evidence that shows many, many
9 witnesses, there is a lot of information out there
10 that these men have been connected for many years,
11 have been working in a criminal, long time criminal
12 enterprise for many years.

13 THE COURT: Would that rule allow him to do
14 that if he denies it?

15 MR. AXELROD: If he denies it and says no he
16 would have to, he could only impeach by conviction,
17 though.

18 THE COURT: No. He could use other extrensic
19 evidence. If he admits it that's the end of it,
20 the question is answered.

21 MS. ARMSTRONG: Your Honor, if I understand,
22 Solicitor Hembree's main concern is he is concerned
23 the jury, if he just gets to ask, he has to stop
24 with, "You have been convicted of a felony, isn't
25 that true," and he says, "Yes, I have." "You're

1 doing life without parole?" "Yes, I am," if he has
2 to stop there, I think, as I understand it, he says
3 his concern is --

4 THE COURT: And if that is all he is going to
5 do --

6 MR. HEMBREE: I'm asking to ask him if it was
7 murder.

8 THE COURT: He says he wants to ask him his
9 relationship with Mr. Cottrell.

10 MS. ARMSTRONG: That is the point I'm getting
11 at. That doesn't require Mr. Hembree to be able to
12 cross-examine Mr. Holcomb on his criminal deals
13 with Mr. Cottrell. It requires him to show a bias
14 or a personal stake in what happens to Cottrell, it
15 requires him to show that there is a relationship,
16 a friendship that would cause him to be biased, he
17 can do that by other means like, "Is it true you
18 have been involved in petty and major thievery for
19 the last twenty years," he could say, "Isn't it
20 true you hung around with Mr. Cottrell? " Yes, it,
21 is." "Weren't you friends?" "Yes." "Weren't you
22 his best friend?" "Yes."

23 THE COURT: Isn't it important that they know
24 not only were you friends but you all engaged in
25 quite a bit of crime together?

1 MS. ARMSTRONG: Well, that is really where
2 the unnecessarily prejudicial part comes in. If
3 the real concern is that the jury needs to
4 understand Mr. Holcomb, a cousin or brother or best
5 friend, is going to come to bat and possibly
6 outright lie, then that can be gotten out without
7 going into all the other crimes.

8 THE COURT: He is not his brother.

9 MS. ARMSTRONG: No, best friend, that can be
10 brought out.

11 THE COURT: What he is possibly, I don't
12 know, but what it is, he may be his partner in
13 crime and, you know, if you will do crimes together
14 would you conspire to commit perjury? I don't
15 know.

16 MS. ARMSTRONG: He wasn't ever indicted for
17 these crimes, it's irrelevant they did all this bad
18 stuff together.

19 THE COURT: I understand but I think it goes
20 to the relationship between Mr. Holcomb and Mr.
21 Cottrell. The relationship between persons who are
22 willing to go out and engage in crime together, I
23 think it goes without saying that relationship is
24 unique, it is different from a relationship among
25 friends. There is a strong bond there among people

1 who would do that and I just think that the
2 Solicitor should be able to explore it.

3 As I said, I'm going to limit him, I don't
4 want him talking about murder, murder, because of
5 the similarities of the two offenses, I think that
6 prejudice exceeds or substantially outweighs any
7 probative value, but I will allow him to explore
8 the nature of the party's or the witness' and Mr.
9 Cottrell's relationships and if that goes to
10 committing crimes I'm going to allow him to do that.

11 MR. AXELROD: Your Honor, I would ask, when
12 you say committing crimes, what would be the line
13 of questions the Solicitor would ask in that
14 regard, because as I understand the Court's ruling,
15 when you say committing crime, then committing crime
16 is committing a murder? I mean, where is the
17 Solicitor going, I'm just asking for some
18 clarification --

19 MR. HEMBREE: We're not going to go into
20 murder because I understand the Court's concern and
21 appreciate Mr. Axelrod's concern or defense
22 counsel's concern that that may not, I do think I
23 would call for further analysis because the crimes
24 are so similar in nature that you may have to --

25 THE COURT: A crossing over of liability.

1 MR. HEMBREE: Yes, Your Honor, and an
2 excessive, you know, prejudice, prejudice outweighs
3 the probative nature. But this other crimes, this
4 drug business theory, if they planned an arson
5 together, they were involved in an arson together,
6 there is a host of long term criminal activity that
7 they were engaged in that is well below murder, it
8 is not that kind of things, and quite frankly I
9 don't believe that a jury is going to be, I don't
10 think a jury is going to say, "Well, he sold pot so
11 we're going to convict him of death penalty
12 murder." I think the jury sees that for what it
13 is. I do believe they see them selling pot
14 together, they are in this business together, they
15 see a relationship there that says, "We're not so
16 sure about Fred Holcomb, we need to question this
17 guy's credibility," because as you say, as you
18 mentioned, Your Honor, this relationship, the
19 nature of the relationship is essential to tell the
20 truth to the jury. It is not just, "We were
21 neighbors for awhile, we hung out for awhile, we
22 shared an apartment for a while, we were friends,"
23 this is something much deeper and much more
24 profound that exists between these two men. Not
25 only are they friends and colleagues but they are

1 in this business together, to make money off
2 criminal enterprises and look out for one another.

3 MR. AXELROD: So what the Solicitor is saying
4 he wants to use character evidence in the guilt
5 phase. Where I can see the argument that would be
6 used in the aggravation or mitigation phase but he
7 wants to use character evidence of non convictions,
8 just behavior to impeach Mr. Holcomb, that is what
9 I'm hearing right now.

10 MR. HEMBREE: Yes, sir.

11 MR. AXELROD: And I would think that, I would
12 think it is improper and I would any at some point
13 the Court could consider giving a curative
14 instruction and then I think the minute the Court
15 does --

16 THE COURT: I will still give a curative
17 instruction, I will tell the jury that that
18 information should be used only to determine the
19 credibility of Mr. Holcomb.

20 MR. AXELROD: And that is my reason for
21 saying it is overly prejudicial, because if the
22 Court would consider it needs to give the curative
23 instruction, therefore it sees, itself, the Court
24 sees the prejudicial effect that it is actually
25 having.

1 THE COURT: Certainly it has prejudicial
2 effect, but the prejudicial effect must
3 substantially outweigh the probative value and I
4 think it goes to, it is certainly relevant, it
5 meets the 403 standard, it is just something that
6 the jury, if you put Mr. Holcomb up and you're
7 offering him for whatever purpose, I don't know
8 what you're offering -- what are you offering him
9 for, a character witness?

10 MR. AXELROD: No, just for the events that
11 occurred that night, just fact pattern.

12 THE COURT: Well, if you put him up you're
13 running the risk that the State may, and I'm
14 telling you the State may explore the relationship
15 between Mr. Holcomb and Mr. Cottrell.

16 MR. AXELROD: And I understand that you're
17 going to allow the State to do that and I will just
18 make one more point and then I'll sit down, not
19 belabor the point. If Mr. Cottrell took the
20 witness stand they would not, I don't believe they
21 would be able to impeach him with his activities of
22 drug dealings. They could impeach him with
23 convictions, so I would say the same thing, we're
24 doing an impeachment through Mr. Holcomb of Mr.
25 Cottrell, which would not be able to be done if Mr.

1 Cottrell took the stand himself.

2 THE COURT: Well, what we're doing is doing
3 an impeachment of Mr. Holcomb and we're doing it by
4 showing the relationship between Mr. Cottrell and
5 Mr. Holcomb.

6 MR. AXELROD: Thank you, sir.

7 THE COURT: Okay.

8 All right, what else do we have?

9 MS. ARMSTRONG: Your Honor, I think at this
10 time we need to renew our motions that are ongoing
11 in nature for Brady as well as any impeachment or
12 evidence that is exculpatory or any evidence that
13 would be favorable to the defendant.

14 THE COURT: Certainly those motions are
15 always ongoing under the rule and the case law, the
16 Solicitor is aware of that.

17 Solicitor, you will continue to provide
18 evidence if any new evidence appears, I'm sure you
19 have already given them everything you have, is
20 that correct?

21 MR. HEMBREE: I know we have delivered
22 another load this week, so yes, sir.

23 MR. AXELROD: We were given discovery, we
24 haven't looked at it yet.

25 Where is it at? Pull it out.

1 We were given this this morning, I don't know
2 what it is, we were given this this morning.

3 THE COURT: You asked for it.

4 MR. AXELROD: Yes. We have got to find out
5 what it is.

6 MR. HEMBREE: Your Honor, I believe that is
7 in response to the request for the personnel
8 records and all the Myrtle Beach Police Department
9 information that was requested through discovery,
10 initially it had been requested by subpoena, we
11 obviously dealt with that issue and at the time way
12 back whack when, give it to us in a discovery
13 motion, we'll be glad to comply, we just recently
14 got it.

15 THE COURT: I'm aware of the fact that
16 personnel file information was delivered, the clerk
17 was fussing at me this week about having to make
18 copies.

19 MR. AXELROD: That was something else, that
20 was a different matter, Your Honor.

21 THE COURT: She said she was able to get it
22 all copied and turned over.

23 MR. AXELROD: For the court's record, we paid
24 the clerk \$239.50 for that.

25 THE CLERK: I appreciate it.

1 THE COURT: And I'm sure I funded it in this,
2 case.

3 What else do we have?

4 MR. AXELROD: Your Honor, I spoke with Deputy
5 Solicitor Jimmy Richardson, we talked about the
6 police officer having drugs in his system. He had
7 a minute amount of cocaine and marijuana in his
8 system and Deputy Solicitor Richardson in
9 conversation with me told me that they were going
10 to move to exclude that and I thought that it would
11 be something --

12 THE COURT: Well, they haven't.

13 MR. RICHARDSON: Your Honor, I don't believe
14 it's the proper time. I mean, if they can lay
15 forth the foundation and someone can say those are
16 in fact drugs, it would probably be a time to deal
17 with it maybe right before that person testifies
18 but we did receive this motion from Mr. Axelrod
19 which claims minute amounts of marijuana and
20 cocaine were in Mr. McGarity's system but I would
21 suggest a better time is when the doctor or whoever
22 they have got to put up to say that is in fact what
23 it purports to be.

24 THE COURT: Let me ask you, Mr. Axelrod. I
25 think you have provided me with, didn't you provide

1 me with a report?

2 MR. AXELROD: I did.

3 THE COURT: I frankly was not exactly sure
4 what the report said. I got the feeling from
5 reading it as best I could, looking at it, that
6 these were basically trace amounts --

7 MR. AXELROD: Yes, sir.

8 THE COURT: -- of -- was it cocaine and
9 marijuana?

10 MR. AXELROD: Yes, sir.

11 THE COURT: Is that the two?

12 MR. AXELROD: Yes, sir.

13 THE COURT: I think that's right. And I
14 looked at them and let me ask you first what your
15 purpose in offering that evidence is, where are you
16 going with that?

17 MR. AXELROD: You know, it could be going to
18 the mindset of McGarity at the time of the
19 shooting.

20 THE COURT: Let's deal with that, okay? You
21 had mentioned that this could become an issue in
22 this trial earlier and my feeling was and I have
23 sort of been under the impression that there would
24 be a significant indication of marijuana or illegal
25 drugs and I don't even think at that time I knew

1 what drugs you were discussing or talking about but
2 if you are talking about his mindset you're going
3 to have to have someone who can interpret the
4 findings and tell you whether or not those amounts
5 of cocaine or marijuana would be sufficient to
6 cause, or affect Mr. McGarity's judgment at the
7 time. I mean, aren't we going to have to go there?

8 I recall a case I had involving a homicide
9 some years ago and we went to great lengths to
10 determine the metabolytes, there were cocaine
11 metabolytes, the type of metabolytes, how old it
12 was, whether it was fresh, whether it would cause a
13 person to be under the influence of that drug. I
14 know that kind of information is available but
15 aren't you going to have to have someone, if your
16 purpose in putting it up is to show that his
17 judgment was impaired, don't you have to, sort of
18 like a DUI trial, you know, the fact that a person
19 had alcohol in his blood doesn't necessarily mean
20 it's affected him in any way. You have to have
21 legislative standards.

22 On the other hand, if we have a case where
23 they do a hospital blood, the State, if it wanted
24 to make a DUI case on it, would not be able to use
25 the statutory levels. In fact that was my case

1 that went to the Supreme Court, Johnny Cribb, what
2 the Supreme Court said there was no, it was
3 hospital blood, the State has got to bring in an
4 expert who can relate that level to some sort of
5 impairment. You can't use the legislative standard
6 because the legislative standard applies to a
7 breath test or an implied consent test of some
8 other sort, not a hospital blood test, and so
9 you're going to have to have an expert who can say
10 that it was at such a level that it would have
11 affected a person in this particular way, thus he
12 would have been under the influence. You are going
13 to have to do that if you want to show that it
14 affected him or affected his judgment.

15 MR. AXELROD: Yes, sir, I think --

16 THE COURT: For it to be relevant. I mean,
17 it is not relevant, I don't think, unless you can
18 show it affected his judgment. That's why I asked
19 you for what purpose you seek to introduce it.

20 MR. AXELROD: I think it goes to the
21 physiological effects of how Mr. McGarity, Officer
22 McGarity was acting.

23 THE COURT: You are going to have to have
24 someone who can say at these trace levels or at
25 these metabolyte levels or this type of metabolyte

1 that he would be -- I mean, it is testable for like
2 twelve days or two weeks, cocaine, isn't it,
3 doesn't it show up like ten or twelve days later?

4 MR. AXELROD: Cocaine might have a life of
5 four to five days, Your Honor, really.

6 THE COURT: Okay. Well, it could show up as
7 a trace level four or five days later but have
8 absolutely no effect on him or his judgment. Don't
9 you have to have someone who can say it was being
10 metabolized, "We identified these metabolytes,
11 these metabolytes would indicate that it was
12 freshly taken and cocaine has a tendency to make a
13 person more aggressive," don't we have to have that
14 kind of testimony?

15 MR. AXELROD: Yes, sir. I think on the flip
16 side you can have testimony saying somebody could
17 become more aggressive as well in withdrawal,
18 somebody could become more aggressive.

19 THE COURT: That, too, that is what I want to
20 know. Mr. Richardson's motion is based on the fact
21 he had some trace cocaine metabolytes. What's the
22 relevance of it?

23 Isn't that what you're saying.

24 MR. RICHARDSON: Yes, sir, Your Honor.

25 THE COURT: He is asking you what's the

1 relevance. Okay, if you've got witnesses who can
2 say this is why it's relevant, he could be in
3 withdrawal and it would make him aggressive or
4 whatever it does, or this metabolyte that we
5 identified, and that is what they identified is the
6 cocaine metabolytes, this metabolyte indicates that
7 he had probably taken it in the last four or five
8 hours and that it causes a person to act in a way
9 that is inappropriate.

10 Isn't that where we're going with this?

11 MR. AXELROD: Yes, sir.

12 THE COURT: Isn't that what you're going to
13 have to do?

14 MR. AXELROD: Yes, sir, that is what we have
15 to do.

16 THE COURT: That is what you've got?

17 MR. AXELROD: Yes, sir.

18 THE COURT: Okay. Well, if he's got that,
19 Mr. Richardson, I would let him put it in, if it
20 goes to that officer's judgment, if he's got that,
21 okay?

22 MR. RICHARDSON: And I agree, Your Honor. I
23 think that before we do any mention of that we need
24 to have a motion --

25 THE COURT: He's got to lay a foundation.

1 MR. RICHARDSON: And if we can do that,
2 question them and of course that would be a better
3 time to determine the toxicology. The motion
4 basically asks to be able to put in toxicology, but
5 you have relevance, you have chain, you know, some
6 sort of foundation, we're just not at that point
7 yet, so we're certainly not going to mention it
8 until that motion in limine and we just ask that,
9 especially during openings, until this comes up --

10 THE COURT: Well, until we see what is going
11 to be produced at trial I don't think it is
12 appropriate for me to rule on it. I'm not going to
13 rule on it, I'm just going to tell you what my
14 feelings are. Unless it is tied in, we're just not
15 going to throw this out there for no good reason,
16 you know.

17 MR. AXELROD: Yes, sir, Your Honor, we
18 appreciate that.

19 THE COURT: Okay.

20 MS. ARMSTRONG: Your Honor, I'm sort of --
21 were you finished?

22 MR. RICHARDSON: Yes.

23 MS. ARMSTRONG: I'm sort of going back to the
24 original, or the third motion that we discussed,
25 which was renewing our motion asking for Brady as

1 well as any exculpatory evidence because just
2 recently, and it's been nine years since this crime
3 occurred, through the effort of our investigator we
4 discovered the first statement that the State's key
5 witness Donnie Morgan gave to law enforcement and
6 it is clearly beneficial to the defense. It is
7 extremely alarming on the eve of trial to get this
8 information that we believe should have been
9 disclosed containing the internal affairs file of
10 Officer McGarity. We're grateful for it because it
11 helps us but we just would ask the Solicitor's
12 office to please be very thorough and make sure
13 your agency has given it to you because we're
14 getting stuff late.

15 THE COURT: I'm sure that they understand the
16 significance of not turning over anything or fail
17 to turn over anything.

18 Right, Solicitor?

19 MR. RICHARDSON: Yes, sir, and we made
20 available to the defense everything we could, not
21 just what we were bringing in, but to go over and
22 review the evidence at different sites, and we have
23 done that ourselves, so anything that hadn't been
24 turned over certainly is not purposeful and we
25 believe we have turned it all over with the

1 exception of a motion Mr. Axelrod served on us
2 December 30, I believe. Basically it deals with
3 personnel files from Joe McGarity's days as a clerk
4 in Rhode Island and in Connecticut, Cranston Police
5 Department, Cranston, Rhode Island. I believe that
6 he was an unpaid clerk at that point, dispatcher,
7 but we don't have those in our custody and control.

8 THE COURT: That is something you would have
9 to acquire by subpoena, I believe, Mr. Axelrod. I
10 don't think the Solicitor's office should be
11 required to go to Rhode Island and root around and
12 try to find them.

13 MR. AXELROD: Yes, sir, Your Honor.

14 THE COURT: They would have no more authority
15 in Rhode Island than you would.

16 MR. AXELROD: Yes, sir, Your Honor, thank you
✓17 you, sir.

18 MR. RICHARDSON: Your Honor, we would have no
19 objection, they are going to run across the same
20 thing but we would have no objection to a court
21 order allowing them to get that because our South
22 Carolina, even our search warrant wouldn't do any
23 good in Rhode Island, but certainly a subpoena, if
24 they wanted to get it ahead of time, of course Mr.
25 Axelrod could subpoena the people down here and to

1 bring the records with them. There is a system for
2 it but if he wanted to get it ahead of time maybe,
3 we would certainly have no objection to a court
4 order for them to turn those documents over.

5 MR. AXELROD: Thank you, sir.

6 MS. ARMSTRONG: Nothing further, Your Honor.

7 MR. RICHARDSON: Your Honor, the only thing
8 that, a couple things --

9 THE COURT: Excuse me.

10 Okay, Mr. Richardson.

11 MR. RICHARDSON: Your Honor, with regard to
12 housing Mr. Cottrell, I believe the trial starts on
13 the 23rd, we have been in contact with the
14 Department of Corrections, it would be their want
15 and desire to bring him to Horry County on the 22nd
16 so that he could be here to start the trial on the
17 23rd.

18 THE COURT: That would be Monday, right?

19 MR. RICHARDSON: The 22nd would be Sunday.

20 THE COURT: I was under the impression that
21 it was like Martin Luther King's birthday or
22 something. So, those are full weeks?

23 MR. RICHARDSON: Yes.

24 THE COURT: All right.

25 MR. RICHARDSON: If that is all right.

1 THE COURT: Why would there be a problem
2 bringing him the 22nd, it would make it easier for
3 counsel, wouldn't it?

4 MR. AXELROD: Yes, sir.

5 MS. ARMSTRONG: Yes, Your Honor. If it is
6 possible, I don't know if it is, but if it was
7 possible to get him here a few days earlier that
8 would be fabulous. There are a lot of things to go
9 over with him as we get closer to trial. I don't
10 know if Friday the 20th is possible.

11 MR. RICHARDSON: The problem, and we can
12 certainly try that, but the problem is J. Ruben
13 Long has to secure a special place for Mr.
14 Cottrell. They were planning on having that ready
15 by the 22nd so that he could be here for the term
16 of court.

17 THE COURT: Well, I have already discussed
18 housing and things of that nature with the sheriff
19 in anticipation of Mr. Cottrell's arrival. I would
20 guess that SCDC had as soon turn him over on Friday
21 as they had drive up on a Sunday, I would assume
22 that, or a Thursday or sometime during a regular
23 week and I don't have any objection to that being
24 done if we can work it out with the sheriff.

25 Mr. Johnson, would you check into that with

1 the sheriff and talk to Mr. Fox out at J. Ruben
2 Long to see if they're ready for Mr. Cottrell?

3 DEPUTY SHERIFF: You are talking about on
4 Friday?

5 THE COURT: Thursday or Friday.

6 MS. ARMSTRONG: Right along in there.

7 MR. AXELROD: Your Honor, I'm not sure but it
8 was my understanding from the past that SCDC
9 doesn't do any weekend transportation at all. I'm
10 not sure if that is the case.

11 SCDC OFFICER: No, we don't.

12 MR. AXELROD: So, it would have to be done
13 the week before.

14 THE COURT: Well, I bet I could get him here
15 if I needed to for something, send you to get him,
16 Mr. Axelrod.

17 MR. AXELROD: Absolutely, Your Honor, it
18 would be my pleasure.

19 THE COURT: I would put you and Mr. Hembree
20 in the car together.

21 MR. HEMBREE: It would be a fascinating trip,
22 Your Honor.

23 MR. AXELROD: Who gets to hold that little
24 machine that pushes that button for shocking
25 people?

1 THE COURT: If you would wear the belt I'm
2 sure that Mr. Hembree would.

3 MR. HEMBREE: I will be glad to hold the
4 button.

5 THE COURT: I would let Mr. Cottrell ride in
6 the back of the truck.

7 MR. AXELROD: He may let Mr. Cottrell drive.

8 Your Honor, I believe, unless co-counsel, we
9 have some exparte stuff, but I think that is what
10 we had for right now, sir, with the Solicitor's
11 office.

12 MR. RICHARDSON: At some point, from the
13 scheduling order, we were supposed to review
14 photographs, they are in the Clerk's office, Mr.
15 Hembree and I reviewed them just the other day to
16 make sure everything was there. Do you all want to
17 come down and see if we can stipulate any of those?

18 MR. AXELROD: I'm glad you raise that. That
19 would be fine but I have one other point I would
20 like to raise, Your Honor. The State, SLED, maybe
21 SLED did it, SLED did a drawing of the Dunkin Donut
22 scene, they say on their things it is not to scale
23 and it is Dunkin Donuts, the parking lot and stuff,
24 it is not to scale. Your Honor, I'm having
25 somebody mechanically draw the parking lot.

1 THE COURT: I invite you to do that. I'm
2 sure the Solicitor's office would be happy to make
3 it a joint exhibit, probably.

4 MR. AXELROD: I was going to talk to the
5 Deputy Solicitor about this, we're going to draw it
6 actually as best we can to scale and put the
7 numbers on it, maybe a little bit better than has
8 been drawn.

9 THE COURT: If there is no problem with it
10 and everybody can agree, then we don't have to even
11 worry about who drew it or how it was drawn, we can
12 just go ahead and say this is a scale drawing, that
13 is so easy to do now with our new county GSI
14 programs that are available.

15 MR. AXELROD: Yes, sir, Your Honor.

16 MR. RICHARDSON: And then I'm guessing Monday
17 we will start review of the jury information?

18 THE COURT: Okay. Now, let me bring up an
19 issue that I have, Miss Armstrong, Mr. Axelrod.

20 MS. ARMSTRONG: Yes, Your Honor.

21 THE COURT: I am at the, we're about to drop
22 off the cliff, so to speak, on the issue of
23 significant trial prep expense for the clerk. I
24 want to know, I want to just lay this to rest
25 today, I want to know are you going to be ready? I

1 want this case tried, there has certainly been
2 substantial time devoted to it, it should be ready
3 for trial but I don't want this case coming back on
4 a PCR, I want to know if counsel is going to be
5 ready to try this case, I want to know if Monday
6 morning I'm going to be struck with motions on the
7 record that we're not ready to go, we need a
8 continuance, we've got this problem, we've got that
9 problem, we can't go forward.

10 I want that aired today. I want to know
11 before the clerk reserves rooms, before the clerk
12 rents chairs, there is a significant amount of cost
13 that has to be committed to that if that is going
14 to be the case and if there is a justifiable
15 problem I want to know about it now.

16 MS. ARMSTRONG: Your Honor, I apologize, I'm
17 caught somewhat unprepared for this being raised
18 since we have addressed it before but let me just
19 reiterate that all the concerns we discussed with
20 you outside the presence of the Solicitor's office,
21 about Mr. Skidmore and the various witnesses he has
22 uncovered through his own efforts, that again we
23 think, though it has been nine years ago, they
24 didn't do anything about that, that he is still
25 working feverishly to try to track people down. It

1 is not through lack of diligence or commitment or
2 in any way intended to derail this train from
3 moving forward on January 23rd but he still has a
4 number of witnesses that aren't interviewed. We're
5 working as hard as we can because Your Honor ruled
6 and respectfully we took exception to it and went
7 ahead as we are expected to do but that is
8 obviously still a concern.

9 THE COURT: My intention and my hope is that
10 you would be ready to go but now I want to know if
11 you're going to be ready to go, that is the
12 question, I want to know if you're going to be
13 ready to go.

14 MS. ARMSTRONG: Your Honor, relying on Mr.
15 Skidmore's report, no, we will not be completely
16 ready, we will not be completely finished tracking
17 down witnesses due to lack of time.

18 THE COURT: Mr. Axelrod?

19 MR. AXELROD: Your Honor, my first chair has
20 done more trials like this than I have, I have
21 never done one, I agree with her, I talked with the
22 investigator, I talked with some of the experts,
23 the experts came on this case quite late, some of
24 the experts didn't come on the case until I think
25 September. For whatever reason, it is what it is,

1 experts came on the case in June, July, and we came
2 before the Court --

3 THE COURT: Do you have your expert reports?

4 MR. AXELROD: No.

5 THE COURT: Do you have your jury expert?

6 MR. AXELROD: Yes, sir, Your Honor.

7 THE COURT: Who did you get on board with
8 that?

9 MR. AXELROD: Your Honor, some of these
10 issues, we have asked they be kept a part --

11 THE COURT: I thought we addressed this,
12 though, in your last motion for continuance made in
13 the presence of the Solicitor.

14 MR. AXELROD: I don't believe so, Your Honor.

15 THE COURT: That was my understanding.

16 THE COURT: You talked about continuing the
17 case in the presence of the Solicitor.

18 MR. AXELROD: No, I don't think we did, sir.
19 I could be wrong but I thought --

20 THE COURT: Let me say this. If that is your
21 position, fine, I want to talk to you in chambers,
22 I want to talk to you, we'll do it right here on
23 the record, out of the presence of the Solicitor.
24 My point is, Mr. Axelrod, I want to know if you're
25 going to be able to put this case together and be

1 ready to go.

2 MR. AXELROD: Yes, sir, Your Honor, I guess,
3 Your Honor, I have no problem going back to
4 chambers. If it would be easier we will go back to
5 Chambers a few minutes and the Solicitor can stay
6 here.

7 THE COURT: Well, the Solicitor is done.

8 MR. HEMBREE: We'll be glad to step outside,
9 Your Honor.

10 THE COURT: The Solicitor says he's done.

11 MR. AXELROD: Yes, sir, Your Honor.

12 THE COURT: Okay.

13 MR. HEMBREE: We'll just hang around outside.

14 THE COURT: Yes, stay with me.

15 MR. HEMBREE: If you need us we'll be right
16 outside.

17 THE COURT: Stay with me, okay?

18 (Solicitors and office personnel were excused
19 from the courtroom and were not present for
20 the following proceedings).

21 MR. AXELROD: Your Honor --

22 THE COURT: Let me check around and make sure
23 who is in here you want in here and who you don't
24 want in here.

25 MR. AXELROD: I would just ask that the Horry

1 County sheriffs be excused.

2 THE COURT: All right.

3 THE COURT: Just step outside, if you would.

4 MR. AXELROD: I'm okay with the bailiff and
5 the SCDC officers.

6 THE COURT: Okay. How about my bailiff, how
7 about Bobby?

8 MR. AXELROD: Bobby is okay.

9 THE COURT: All right.

10 MR. AXELROD: Your Honor, at this time, if I
11 could just put Mr. Skidmore on the stand.

12 THE COURT: All right, go ahead.

13 PETE SKIDMORE, after being first duly sworn,
14 testified as follows:

15 EXAMINATION BY MR. AXELROD:

16 Q Mr. Skidmore, you are the investigator on
17 this case?

18 A I am.

19 Q And how long have you been a death penalty
20 investigator?

21 A For about nineteen years.

22 Q And approximately, just a little background,
23 how many death penalty cases have you been
24 investigator for?

25 A In different phases, PCR's, trials, probably

1 thirty plus.

2 Q And was that as a lead investigator?

3 A Yes.

4 Q When did you receive the information on this
5 case to start your investigation?

6 A The latter part of March or April.

7 Q Of which year?

8 A This year.

9 Q Eight months ago?

10 A Yes, sir.

11 Q And when did you actively start working on
12 the case?

13 A Actively, probably April but really got
14 cranked up around June.

15 Q Okay. And were you working on a prior death
16 penalty at that point?

17 A I was. That has been taken off the table
18 now.

19 Q Which case was that?

20 A The Jodi Ard case that you and Miss Armstrong
21 were involved in.

22 Q Do you remember when that came off the table?

23 A Sometime around June.

24 Q And at that point you stopped working on that
25 case?

1 A Yes, sir.

2 Q Are you still on that case?

3 A I'm still on that case.

4 Q But you're telling the Court that you started
5 to focus on this case in that time frame of June?

6 A Yes, sir.

7 Q And tell the Court, and I know this but I
8 want to put it on the record, you have had
9 frustration on this case unlike any other death
10 penalty case you have worked on?

11 A Yes, sir.

12 Q Can you tell the Court the frustration and
13 what you had and what caused you some difficulties?

14 A Well, I think as has been mentioned here
15 today there is a Marion case and there is also
16 another case by the name of Hartman was the victim
17 and then the case that we're working on now, the
18 McGarity case, there is still murders that
19 intertwine with one another. I had no idea that
20 the other two would come into play as much as they
21 have to this point and the reason that I say that
22 is typically when you have one case you go through
23 all the evidence in that case and that is the end
24 of it. What we have found the last several months,
25 some of the actual physical evidence in this case

1 has been put in the Hartman case and it is a very
2 critical part of this case, about people's
3 credibility, whether that be Donnie Morgan or
4 whether it be SLED, and so I have never been
5 involved where there have been evidence co-mingled
6 with other cases, and that is what has happened in
7 this case.

8 The other things that is frustrating is that
9 through the, I guess you would call it, I would
10 call it, being a lay person, the subpoena power
11 through the Solicitor's office. That we just
12 recently, as in the last several weeks, got a stack
13 of paperwork from internal affairs that I have
14 never seen before through, that I would call it
15 exculpatory evidence, through Donnie Morgan,
16 through an attorney that gave an actual signed
17 affidavit to the police department. I just can't
18 imagine that that didn't get passed on to the
19 Solicitor's office, and we have not received it
20 through Brady, and it would be very helpful to our
21 case and thank goodness we found it.

22 I was involved in the first trial and as we
23 have mentioned many times this is a much different
24 trial than the first trial and each day that I work
25 on this case I find that that is very much the

1 case. We were not provided that statement in the
2 first trial. The photographs that Donnie Morgan
3 took, that they turned over to the Solicitor's
4 office way back when, we weren't provided with. I
5 had to go out and get those and make copies and
6 return the negatives and the copy of the pictures
7 to Donnie Morgan. Donnie Morgan is a very
8 essential element in this case.

9 Also in the internal affairs file we found
10 where there were statements taken of the Dunkin
11 Donuts employees that to this day we have not
12 received and they were taped and we have not
13 received those tapes. The Dunkin Donuts employees
14 have been a huge contingency in this case, in my
15 opinion, and we have addressed it with the Court
16 and I have just found out that there were
17 statements taken by internal affairs or the police
18 that night that we have not received to this day
19 and they were taped. I think that could be very
20 crucial to Mr. Cottrell's case.

21 Q And for the Court's understanding, Donnie
22 Morgan, was he, we'll say, a star witness for the
23 State?

24 A Enough where his charges and two in two other
25 murder cases were done away with.

1 Q The Court asked us a straight question today,
2 I will ask you a question straight up here. Are
3 you ready to go forward on the 23rd?

4 A And honestly I have over the last month
5 worked diligently, I have had two or three other
6 investigators because it was my understanding that
7 we were going forward, from what the Court said, so
8 I have worked very diligently but as new
9 information continues to come in that could be very
10 beneficial to our client at no fault of ours, in my
11 opinion, I honestly cannot say until we receive
12 everything and I go through everything that we get,
13 and we just got another stack of discovery today,
14 and right now we still do not have those employees'
15 statements and the tapes, so I honestly cannot say
16 that we could be ready on the 23rd because we have
17 not received everything to this date.

18 MR. AXELROD: Thank you.

19 THE WITNESS: Can I add a couple other
20 things.

21 MR. AXELROD: Certainly.

22 THE WITNESS: We are, as we speak I have got
23 another investigator serving fifty to sixty
24 subpoenas that have to be done, I still have twenty
25 to thirty people that I'm trying to locate, they

1 are in various different states, that I have found
2 and could be very helpful with some of the issues
3 about Mr. McGarity's dealing potentially in drugs
4 and prostitution, which I think is the reason that
5 he acted so aggressively toward our client. This
6 was not the first contact that our client has had
7 with Mr. McGarity, and I just recently, by
8 canvassing the Booker T. Washington neighborhood, as
9 you know, found somebody else that said that they
10 had contact with one another, so it is an ongoing
11 issue.

12 MR. AXELROD: Thank you.

13 THE COURT: Mr. Skidmore.

14 THE WITNESS: Yes, sir.

15 THE COURT: There has to be an end to every
16 case.

17 THE WITNESS: I agree.

18 THE COURT: And in every case there is always
19 something else you can do. You tell me you have
20 significant concerns about this case being ready
21 for trial, I believe you have some 23 witnesses
22 you're still trying to locate and you just got a
23 bunch of other information, tell me realistically,
24 tell me how much more time would it take to have
25 this case in a comfort zone? I'm not talking about

1 having everything could possibly be done, there is
2 always something to be done.

3 THE WITNESS: Yes, sir.

4 THE COURT: And I want to know how long, in
5 your opinion, it would take to get this case where
6 this case is ready to be tried?

7 THE WITNESS: Your Honor, all I can say is
8 that every day since you said we were going forward
9 I have put all my resources with people and working
10 diligently toward the 23rd which, Your Honor is not
11 really my cutoff date. I will continue, I don't
12 need to be present during jury selection, so I have
13 another week there, but to be able to truthfully
14 answer your question to the best of my ability I
15 don't feel at this point in time I could even do
16 that because we just got more discovery and as I
17 pointed out, as we have raised a couple times about
18 the employees of the Dunkin Donuts, and it is not
19 just that Allen was a good guy and so on and so
20 forth, Officer McGarity came into the Dunkin Donuts
21 quite often, too, and that is important, as well as
22 the employees of Dunkin Donuts saying how Allen was
23 acting as a customer that night and so on and so
24 forth, and then just to be hit last week, or I
25 think last week, where we find that the police

1 actually did interview these people and we have not
2 received those statements and they were taped, Your
3 Honor --

4 THE COURT: Well, where are those statements?

5 THE WITNESS: We have not received them.

6 MR. AXELROD: They are in internal affairs,
7 we haven't received them at this point.

8 THE COURT: Have you requested them?

9 MR. AXELROD: We have.

10 THE COURT: Okay.

11 THE WITNESS: And it is my understanding that
12 through Attorney Axelrod's subpoena power through
13 the State that we requested items that would be
14 very helpful to me in locating those individuals
15 and to this day that has not been turned over.

16 THE COURT: Well, my problem, Mr. Skidmore,
17 is I cannot and will not just continue this case
18 forever and a day.

19 THE WITNESS: Yes, sir.

20 THE COURT: I can't do that. And if all I
21 can get is some vague statement that, "Well, we're
22 just not ready now," well, you may never be ready.
23 I want to know what it's going to take, reasonably
24 take to get this trial, you know, you said you have
25 other witnesses who you may, you may never find

1 these witnesses.

2 THE WITNESS: Yes, sir.

3 THE COURT: But there comes a time when you
4 say, "Well, I have exhausted everything I can do to
5 locate these witnesses, if I can't find them in the
6 next week I'm just not going to be able to find
7 them," and sometimes that's how it goes.

8 THE WITNESS: Yes, sir.

9 THE COURT: Sometimes you can't. But I need
10 to know, you know, how long will it take you to do
11 what you need to do to reasonably find them. I
12 want to know how much more time it would take for
13 you to investigate this case.

14 THE WITNESS: I've got three weeks left. I
15 just would say, you know, I would say a month or
16 two months, Your Honor, but I am continually doing
17 everything I can do.

18 THE COURT: I understand that.

19 THE WITNESS: I understand the Court's
20 position with this case but through no wrongdoing
21 of ours we continue to get stuff that is
22 exculpatory and maybe the Court needs to read
23 Donnie Morgan's affidavit that could have been used
24 in the first trial, and I know that we're not in
25 the first trial, to impeach him. It is very

1 critical that if there is more stuff that we have
2 not received and particularly with witnesses with
3 the Dunkin Donuts issue, and I guess counsel can
4 take that up with you about not having received
5 that yet, but it is just frustrating and I have
6 never been in this position where I have not, I
7 have found so many things that just aren't right
8 and that causes me great concern.

9 THE COURT: Okay.

10 MR. AXELROD: Your Honor, if I can add one
11 thing here. What is interesting is the Marion
12 case, they had a trial and Allen, Mr. Cottrell, was
13 convicted. The other murder, the other pending
14 murder, the Hartman case, that would have been
15 possibly the first or the second.

16 THE WITNESS: Yes, first.

17 MR. AXELROD: The first murder that is
18 intertwined, we believe intertwined with this case
19 extensively, that case for some reason, the
20 Solicitor's office never pursued. Now, Donnie
21 Morgan, Donald Gray Morgan the Third, he is a
22 witness, he's the State's star witness in this
23 case. He was a witness in the Marion case -- am I
24 correct, Mr. Skidmore?

25 THE WITNESS: He was a participant, possibly

1 his cell phone and automobile was used.

2 MR. AXELROD: Was he arrested for that one?

3 THE WITNESS: I can't remember off the top of
4 my head.

5 MR. AXELROD: But on the Hartman case, the
6 one that was never prosecuted he was arrested as --

7 THE WITNESS: Accessory.

8 MR. AXELROD: After the fact?

9 THE WITNESS: Yes.

10 MR. AXELROD: After the fact and that charge
11 was dismissed against him?

12 THE WITNESS: Yes, sir.

13 MR. AXELROD: It is just interesting that the
14 State's star witness in this case has been expunged
15 of his prior involvement in a case that is still
16 pending and then we get a statement we found
17 through internal affairs that it probably could be
18 exculpatory to our client's position.

19 Your Honor, Mr. Skidmore, and we're in
20 communication every day, keeps telling me he keeps
21 finding more stuff because all three murders, when
22 I got the photographs, Your Honor, I got
23 photographs from three murders just all together.
24 We go to one courthouse to look at evidence, we'll
25 say here, and then we find evidence from the other

1 murders. We go to Myrtle Beach, we find other
2 evidence. The Solicitor kept information in his
3 closet for six or seven years and then sends it
4 over to Horry County to Laurie Raybin, we go there,
5 we find evidence. It is not like just one set of
6 evidence for this case. I understand the Court's,
7 I absolutely understand the Court asking when he
8 could be ready, I think his frustration giving an
9 answer is that he is afraid that next week he'll
10 find something that might open a door to requests.

11 THE COURT: I understand that, Mr. Axelrod.

12 MR. AXELROD: I think the ultimate question
13 that the Court has asked today is, is he going to
14 be ready on the 23rd.

15 THE COURT: No, my question is whether you're
16 going to be ready.

17 MR. AXELROD: Well, if my investigator is not
18 going to be ready I will not be ready, and I have
19 been doing the trial phase, Miss Armstrong has been
20 doing the aggravation and mitigation phase. I have
21 another expert here to testify today, Dr. Price,
22 and we'll put him on the stand. He hasn't even --

23 THE COURT: Well, take Mr. Skidmore down,
24 let's put him up, then.

25 THE WITNESS: Thank you.

1 (Witness excused).

2 DR. DAVID PRICE, after being first duly sworn,
3 testified as follows:

4 THE CLERK: Please be seated, speak into the
5 microphone and spell your name for the record.

6 THE WITNESS: I'm David Price, D-a-v-i-d,
7 P-r-i-c-e.

8 EXAMINATION BY MR. AXELROD:

9 Q And, Dr. Price, tell the Court what you do
10 for a living.

11 A Your Honor, I'm a clinical psychologist,
12 neuropsychologist and forensic psychologist, I
13 practice out of Greenville and I have a national
14 practice consulting in civil and criminal cases.

15 Q Were you hired in this case?

16 A I was hired in this case, I think my funding
17 was originally approved in December, so I cleared
18 my schedule for January as much as I could to work
19 on this case.

20 Q And your purpose, what is your purpose in
21 this case? Did Miss Armstrong hire you?

22 A Yes, she did.

23 Q And what did she hire you for?

24 A As a mitigation expert.

25 Q And what do you do, as a mitigation expert

1 what do you do in relationship to Allen?

2 A Well, actually what I do in relationship to
3 any defendant in a mitigation case is to go through
4 the defendant's background, history, as much as I
5 can talk to other acquaintances or family members,
6 clinically interview them, look over all their
7 medical records and then subject them to a variety
8 of psychological and neuropsychological and
9 intellectual tests as deemed necessary to render a
10 full and accurate diagnosis of that individual.

11 Q Now, when were you funded?

12 A In December.

13 Q Of which year?

14 A 2011.

15 Q Last month?

16 A Yes, sir.

17 Q Okay. Normally when you come onto -- have
18 you been on death penalty cases before?

19 A I have and actually I have one that just, the
20 death penalty came off the table in Florence that I
21 have to testify on January 24th regarding the
22 Miranda rights, whether the retarded individual
23 understood those.

24 Q Now, normally is there a set time when you
25 come in on a case?

1 A Generally speaking I get involved in a case
2 six to eighteen months ahead of a trial date.

3 Q Was it strange you came on the case a month
4 before?

5 A It was unusual. I don't know that I would
6 use the term strange but not customary.

7 Q And have you had the opportunity yet to
8 examine or test Mr. Cottrell?

9 A No. I actually just started work on this
10 case a week ago when I met with the fact
11 investigator Mr. Skidmore and mitigation
12 investigator Miss Graham and then came down and
13 actually started working on the case full time
14 yesterday, met with you, Mr. Skidmore, started
15 reviewing the records, met with one of the former
16 acquaintances, one of the acquaintances of Mr.
17 Cottrell.

18 Q Were you able to look at the medical records
19 yesterday?

20 A I went through about two-thirds of the
21 medical records that were available at that point
22 in time, which is pretty voluminous records, Your
23 Honor, and saw a number of things there that
24 concern me, as did the first time I met with Mr.
25 Cottrell which was right before this hearing and

1 discovered some significant memory issues that he
2 has that has been causing a problem with he doesn't
3 remember what facts witnesses remember about things
4 from the past, which certainly indicates his memory
5 needs to be fully evaluated.

6 Q And were you able to, were you able to see
7 any records concerning his IQ level?

8 A I saw some. Actually there are some concerns
9 from the SCDC records that caught my attention.
10 One is on his intake they noted auditory and visual
11 hallucinations as well as having flashbacks related
12 to a prior motor vehicle accident. Also I'm not
13 sure, because I haven't been through all the SCDC's
14 records, but there was a record there where he had
15 a beta IQ of 70, which would cause me some concern.

16 Q Why would that cause you concern?

17 A Well, an IQ of 70 is right between the cutoff
18 between mild mental retardation and borderline
19 intellect. Generally speaking, mild mental
20 retardation goes to IQ 69, it can actually go up to
21 75, Your Honor, if there is also corresponding
22 functional impairment you look at in doing the
23 diagnosis.

24 Q Is that an important figure, that 69 to 75?

25 A Well, I have an obligation to both the State

1 and to Mr. Cottrell to verify exactly what his true
2 IQ is, and given the gold standard of Wechsler
3 Adult Intelligence Scale, which I brought with me,
4 which I will administer to him.

5 MR. AXELROD: The Court's indulgence, Your
6 Honor.

7 THE WITNESS: Your Honor, I apologize for my
8 dress, I wasn't expecting to testify this morning.

9 THE COURT: That's all right.

10 Let me ask you this, Miss Armstrong. You're
11 handling sentencing. Has there been an evaluation
12 or an investigation to determine whether or not Mr.
13 Cottrell meets criteria for retardation?

14 MS. ARMSTRONG: Your Honor --

15 THE COURT: This being a death penalty case?

16 MS. ARMSTRONG: Your Honor, the issue wasn't
17 really flagged until Marjorie Hammack brought it to
18 my attention, which is why Dr. Price was retained
19 as soon as she said she had concerns about it.
20 Until we got the case --

21 THE COURT: I mean, has anybody gone back and
22 looked at the other factors, whether or not it was
23 documented in childhood, whether he has had
24 difficulty adapting to life skills and that sort of
25 things?

1 MS. ARMSTRONG: Well, unfortunately Marjorie
2 Hamrick is not here right now. She's the social
3 worker hired to do those interviews.

4 THE COURT: I mean, are you exploring that?

5 MS. ARMSTRONG: Yes, Your Honor.

6 THE COURT: Has it been completed?

7 MS. ARMSTRONG: I'm sorry?

8 THE COURT: Has it been completed, that part?

9 MS. ARMSTRONG: She is still working on it.

10 THE COURT: All right, very good.

11 Okay. Any further questions for Dr. Price?

12 Dr. Price, how long, what really concerns me,
13 how long do you anticipate it would take you to
14 complete your work with this defendant? I know
15 sometimes it is done quickly and sometimes it is
16 not.

17 THE WITNESS: Well, to be fair, Your Honor,
18 it would depend on what other things might come up
19 in the case that I'm not aware of, such as the
20 memory issue today and the IQ of 70 yesterday. I
21 just came off, I'm still involved in the case, the
22 case in Florence that I will testify in, I got
23 involved in that case and identified that the guy
24 had an IQ of the State then had their own
25 evaluation and corroborated that IQ that had been

1 missed by earlier professionals. So, given that I
2 have spoken ten minutes to Mr. Cottrell and have
3 seen the State has that IQ of 70, I'm not sure what
4 that means. How long it would take would actually
5 be not only about the intellectual level but the
6 memory and psychological, other issues that there
7 might be.

8 Because of my schedule I have to be back in
9 Greenville for a deposition next week, I'm going
10 to, is it Lee Correctional Facility we're going to
11 go to to talk to talk to Mr. Wardlaw, his long time
12 associate, to evaluate him across a couple days,
13 while I also have that hearing on the 24th in
14 January, it would probably take me, I will be ready
15 when you tell me to be ready, I prefer to have
16 another month to six weeks.

17 One of the reasons I'm telling you that is
18 that I know that the social worker who is not here
19 is scrambling to do interviews in Atlanta and
20 Alabama with family members that have knowledge of
21 his developmental history, that she has not done
22 yet. I'm not privy to her schedule but if she
23 finds something that might affect my opinion or my
24 investigation, I can't forecast that at this time.

25 THE COURT: Okay. You're not going to be

1 ready on the 23rd, or you don't anticipate being
2 ready on the 23rd?

3 THE WITNESS: Your Honor, I will administer
4 his intellectual test by the 23rd. What I don't
5 know --

6 THE COURT: Can you do everything that you
7 would hope to do?

8 THE WITNESS: Based upon my knowledge of the
9 case right now I will have, I can see him while
10 you're selecting the jury but it is really hard for
11 me to answer because I don't know what Miss Hamrick
12 is going to find about other family members. I
13 mean, that is, I don't know, and I know there is
14 other work being done by the mitigation
15 investigator who is not here and I don't know what
16 she might uncover.

17 I also don't know what we will find when I go
18 with Mr. Skidmore and Mr. Axelrod to meet Mr.
19 Wardlaw and and I'm really concerned about what I
20 just found out this morning, he is not remembering
21 things that would be very helpful for his case,
22 that is pretty unusual. So, you know, I prefer
23 additional time but I will be ready on the 23rd the
24 best of my ability. I cleared my schedule. It is
25 very unusual for me to clear a schedule like I have

1 had to do in this case and come down here and spend
2 this much time.

3 THE COURT: All right, thank you, sir.

4 (Witness excused).

5 THE COURT: Mr. Axelrod, Miss Armstrong, I
6 want you to tell me as officers of the court, will
7 you be prepared to effectively provide a defense
8 for Mr. Cottrell beginning on January the 23rd?

9 MS. ARMSTRONG: Your Honor, based on what my
10 experts are telling me and their experience and the
11 fact I believe what they say and I believe they
12 worked as hard as they can, the answer is clearly
13 no.

14 THE COURT: Mr. Axelrod?

15 MR. AXELROD: Your Honor, my investigator has
16 told me, Mr. Skidmore, after working with Mr.
17 Skidmore, primarily I'm working on the trial phase,
18 the first phase, he is telling me he is not ready,
19 he says, and he uncovered something this past
20 couple weeks, he uncovered one witness that is
21 absolutely beneficial to us and he says he needs
22 more time to work through the stuff. He has been
23 trying, you know. To be quite candid with the
24 Court, Your Honor, this is a bad case, a police
25 officer was killed and on one side he was loved and

1 respected and honored as a police officer but it is
2 almost like he was a Dr. Jekyll and Mr. Hyde, there
3 was another side to Patrolman McGarity, there was a
4 bad side, and it is hard for him to find the bad
5 side because they are trying to cover it up, and
6 that is what we're trying to find and we have to
7 find it.

8 THE COURT: Are you going to be ready?

9 MR. AXELROD: My investigator tells, if my
10 investigator tells me he's not ready I can't be
11 ready. I can only be ready when he says he is. He
12 tells me he needs more time to prepare.

13 THE COURT: I want to know, then, it would
14 appear to me a lot of progress has been made in the
15 last thirty days and it is because I pushed you, I
16 want to know, I want you to tell me, I don't want
17 any beating around the bush, I want you to tell me,
18 you know what your investigator is doing, you know
19 what is realistic, you know what is not, I want to
20 know how much more time you would need to prepare
21 this case to effectively defend your client.

22 MR. AXELROD: Five months.

23 THE COURT: No, sir, I'm not doing that, Mr.
24 Axelrod. You're investigator says thirty days.

25 MR. AXELROD: Well, I don't believe my

1 investigator is saying thirty days. I think -- are
2 you asking me an opinion here and why I say that?

3 THE COURT: You tell me why five months, how
4 you came up with that, how you came up with that
5 number.

6 MR. AXELROD: I will, I will, sir. My first
7 recollection, my first thought was six months and I
8 backed off one month because he is telling me, Mr.
9 Skidmore is telling me that he needs to get into
10 that community, he needs to get more into his
11 files, he needs to find the stuff that we haven't
12 had, so --

13 THE COURT: If I give you five months that
14 means work stops on this case for three.

15 MR. AXELROD: Excuse me?

16 THE COURT: If I give you five months work
17 stops on this case for three. I said if I give you
18 five months that means works will stop the next
19 three.

20 MR. AXELROD: No, sir.

21 THE COURT: I want this case moving.

22 MR. AXELROD: No, sir.

23 THE COURT: Five months, it doesn't take five
24 months. If you're going, if you're going to find
25 something you're going to find it now.

1 MR. AXELROD: I would ask, I would ask that
2 Mr. Skidmore, can he come back up?

3 THE COURT: You put this case right dead in
4 the middle of summer, during the tourist season and
5 the cost increaes dramatically, the logistics
6 become much more difficult to handle.

7 I have General Sessions the weeks of April
8 2nd and April 9th.

9 MR. AXELROD: Anything the Court would give
10 us for an extension would be beneficial.

11 THE COURT: No, I want to know if you can be
12 ready to go on those days. I have continued it, I
13 have continued it and I have continued it. You're
14 talking about four more, well, not quite four,
15 three and a half months, I want to know if you can
16 be ready.

17 Dr. Price, you can be ready, you would be
18 ready in three more months, wouldn't you?

19 DR. PRICE: Yes, sir, I would, if you set a
20 date, I would prefer April 9th, I have a national
21 speaking engagement.

22 THE COURT: I have two weeks, this will be
23 two weeks, I always schedule these for full two
24 weeks.

25 DR. PRICE: I understand.

1 THE COURT: You can expect it to go over into
2 the 9th. The first half week we select a jury.

3 DR. PRICE: Yes.

4 THE COURT: Then the State's case will go
5 over.

6 DR. PRICE: Thank you, Your Honor.

7 THE COURT: I want to know -- if you're not
8 going to be ready let's go ahead and try it now,
9 you're as ready as you're going to be.

10 MS. ARMSTRONG: Your Honor, respectfully, we
11 would be very appreciative if Your Honor continued
12 the case until April 2nd.

13 THE COURT: The question was will you be
14 ready.

15 MS. ARMSTRONG: Yes, Your Honor.

16 THE COURT: Do you think reasonably you can
17 be ready to try this case? I have continued it
18 like four times. I want this case tried, you know,
19 they are putting one year limits on cases all over
20 the State now, you're aware of that, Miss
21 Armstrong.

22 MS. ARMSTRONG: Absolutely.

23 THE COURT: Death penalty first time trial we
24 want it tried in a year, that is what Justice Toal
25 is telling people. I don't know how long Judge

1 Manning had it but I have had it for over two
2 years. It just needs to be, it needs to be tried.
3 We need movement and it needs to be done. I am not
4 going to continue the case for whenever, sometime
5 down the road, I'm inclined to give you reasonable
6 extension if we can set a date which you tell me
7 you're going to be ready, you think you can
8 reasonably be ready to try this case and we can
9 look forward to trying it. Now, if that is the
10 case, I'm inclined to give you April 2nd and 9.

11 MS. ARMSTRONG: Yes, Your Honor, based on
12 everything we know standing here today as officers
13 of the Court, Mr. Axelrod and I believe that April
14 2nd, 2012, we will be able to effectively and fully
15 represent Mr. Cottrell.

16 THE COURT: Well, I'm going to hold you to
17 it.

18 MR. AXELROD: Thank you, Judge.

19 THE COURT: Let me -- well, I want to see the
20 Solicitor, I want to see counsel, I want to see the
21 clerk in my chambers for a moment, okay?

22 (Recessed at 11:22 a.m.).

23 (Resumed at 11:44 a.m.).

24 (Solicitors, defense counsel and the
25 defendant present in the courtroom).

1 THE COURT: Okay. The Court has determined
2 that this case cannot go forward as scheduled and I
3 have tentatively scheduled it to begin on the week
4 of March 22nd and going over into the week of April
5 the 2nd.

6 THE CLERK: 26th.

7 THE COURT: 26th, March 26th. That's
8 subject, I tried to contact the Chief Justice. The
9 week of the 26th is in fact a chambers week and I
10 have a phone call into the Chief Justice, I think
11 that I can get that full schedule, that full week
12 and go ahead and have it, but my scheduling order
13 is amended to reflect that subject to her approval,
14 all other orders will remain in effect, I will
15 issue an order for the clerk to issue additional
16 subpoenas now for the trial of the case. I intend
17 to also issue an order approving the same
18 questionnaire that, jury questionnaire that I have
19 previously approved. Okay?

20 All right. Thank you, gentlemen. I will be
21 in touch with all of you concerning --

22 MS. ARMSTRONG: Your Honor --

23 THE COURT: Yes.

24 MS. ARMSTRONG: I apologize, we did have some
25 exparte matters to bring up before we --

1 THE COURT: I'm sorry, I thought we were
2 through there. Okay.

3 MS. ARMSTRONG: I'm sorry.

4 THE COURT: All right, the Solicitor may
5 withdraw.

6 (The Solicitors were excused from the
7 courtroom).

8 THE COURT: Wire going to take a quick break
9 before we do that, we haven't had one yet.

10 (Recessed at 11:45 a.m.).

11 (Resumed at 12:01 p.m.).

12 THE COURT: Thank you. You all please be
13 seated.

14 What else do we have?

15 MS. ARMSTRONG: The only matter that we have
16 is about exparte funding. There are, I can, we
17 have a policy and procedures expert who is going to
18 testify basically about the lawfulness or
19 unlawfulness of Mr. McGarity's conduct. He is
20 going to be used at both the first as well as --

21 THE COURT: I thought I already funded him.

22 MR. AXELROD: We funded 4,000 already, Your
23 Honor, we're requesting, asking for another 4,000
24 possibly to be used because he is going to be in
25 both phases of it and his expenses are going to be

1 such that it is cheaper he go back to where he is
2 and come back here again.

3 THE COURT: Where is he from?

4 MR. AXELROD: Is it Alabama? I believe it's
5 Alabama, Your Honor.

6 THE COURT: All right.

7 MS. ARMSTRONG: Your Honor, we also have
8 prepared additional paralegal funding.

9 THE COURT: A month ago I granted that,
10 didn't I?

11 MR. AXELROD: You did, Your Honor. So far we
12 have --

13 THE COURT: An additional 10,000?

14 MR. AXELROD: We have, Your Honor.

15 THE COURT: That is twenty now?

16 MR. AXELROD: 20,000, Your Honor, and at this
17 point we're asking for 10,000 more.

18 THE COURT: I want to hear why.

19 MS. ARMSTRONG: Well, Your Honor, essentially
20 when we called OJD they said, "Listen, if you can
21 get your paralegal to do it at 35 an hour you're
22 saving us money, get them to do it rather than you
23 all keep billing it."

24 THE COURT: I mean, that is 300 hours since
25 our last funding.

1 MR. AXELROD: Your Honor --

2 THE COURT: How many days a week?

3 MR. AXELROD: They have been working, three
4 paralegals have been working for both sides, they
5 have been doing out of state subpoenas, been
6 working with Miss Armstrong and the mitigation
7 expert, we have been basically clearing house here
8 for everything that is going on in the case, it has
9 been going through her, her expert calls, we do the
10 work they need, that is just what has been
11 happening, we exhausted their fees probably last
12 week at some point and they are still working right
13 now.

14 THE COURT: Well, the subpoenas have already
15 been -- I will fund another 5,000.

16 MR. AXELROD: Yes, sir, Your Honor.

17 Your Honor, we ask for the toxicologist, so
18 far the toxicologist has been funded \$5,000. In
19 speaking with him he is asking for possibly
20 additional funding of \$3,500.

21 THE COURT: All right.

22 MR. AXELROD: He might have to, and he's, you
23 know, the toxicologist deals with the drugs in the
24 system.

25 THE COURT: Okay.

1 MR. AXELROD: Your Honor, we're asking for
2 Mr. Skidmore, Mr. Skidmore has already been granted
3 \$35,000, he has asked me to ask the Court for an
4 additional \$15,000.

5 THE COURT: Mr. Axelrod, \$35,000 already for
6 an investigator and you want 50,000?

7 MR. AXELROD: Yes, sir, Your Honor. You
8 asked that be broken down.

9 THE COURT: I want to know what we have to
10 do, another 15,000 for an investigator that we have
11 already approved \$35,000 for? I mean, what have we
12 approved already, eight or nine hundred hours?

13 MR. SKIDMORE: Yes, sir, and as of right now
14 I have used that because I have brought the other
15 people down to help me, so it is not just me the
16 past thirty days that was working on the case, it
17 was two other investigators. I tried to get
18 prepared for the 23rd and we were doing everything
19 in our power. Just the subpoenas alone, Your
20 Honor, the police department, Myrtle Beach Police,
21 typically we would go and serve fifteen police
22 officers there and one person could accept service.
23 Myrtle Beach has a policy in place that you have to
24 serve each person individually. Just the last two
25 days trying to get those people served my

1 investigator has burned up twenty hours just in
2 those, not --

3 THE COURT: Well, how much is that an hour?

4 MR. SKIDMORE: \$50 an hour. Typically, you
5 know, we go and it costs one hour to go serve all
6 those people, we have had to go to shift changes,
7 we have tried to locate people that are on vacation
8 for that and there again, we were diligently trying
9 to get prepared for the 23rd and as I stated
10 earlier, all this new information --

11 THE COURT: I will fund 10,000.

12 MR. AXELROD: Yes, sir, Your Honor. Your
13 Honor, LeRoy Reddick, he is our pathologist, we're
14 working diligently with him, he has been funded
15 \$5,000, he has asked for an additional \$5,000.

16 THE COURT: What for? I mean, why is it
17 double? I mean, he told us what it was going to
18 cost and now it has doubled.

19 MR. AXELROD: All right, Your Honor. I have
20 affidavits attached to these funding requests, let
21 me hand up to the Court the one for, for Mr.
22 Reddick. Your Honor, I will hand up to the Court
23 this affidavit on LeRoy Reddick, the forensic
24 pathologist, of why he needs additional funding.

25 THE COURT: This is the one who is going to

1 testify as to the angle of the bullet?

2 MR. AXELROD: Yes, sir. To make the Court
3 happy about at least one thing --

4 THE COURT: It is going to cost us \$10,000 to
5 have him come in and say the angle of the bullet?

6 MR. AXELROD: Your Honor, he is the forensic
7 pathologist that is going to deal with the gunshot
8 wound and stuff. We are not having a forensic
9 radiologist. To make the Court happy, the forensic
10 pathologist said he would be able to do it. He
11 reviewed the medical record again and said we would
12 not need the expense of a forensic radiologist, so
13 we have withdrawn that request, Your Honor, we have
14 saved the Court probably five or ten thousand
15 there.

16 That is just the affidavit from our expert
17 saying what he would request.

18 THE COURT: He says that he has expended
19 twelve hours and that has been \$5,000?

20 MR. AXELROD: No, sir, Your Honor. I'm not
21 sure how much he is paid per hour but he is
22 anticipating he will need an additional \$5,000.

23 THE COURT: He says four.

24 MR. AXELROD: None of their monies have been
25 exhausted yet, Your Honor, what they are asking for

1 is that they be granted more if they go over that.

2 THE COURT: Well, how much was he an hour?

3 \$200 an hour, twelve hours, that's \$2,400.

4 MR. AXELROD: Yes, sir, Your Honor.

5 THE COURT: And I did 5,000 already, right?

6 MR. AXELROD: Yes, sir, Your Honor. We're
7 not saying we have exceeded that money with the
8 expert but he is anticipating by the time he has
9 done the case and comes here to testify he will
10 exceed over the initial 5,000.

11 THE COURT: And he is wanting us to pay \$200
12 an hour for travel time?

13 MR. AXELROD: Yes, sir, Your Honor.

14 THE COURT: Why can't the sheriff's office
15 serve these subpoenas? I mean, they are charging,
16 you know, fifteen bucks, thirty bucks a pop to
17 serve them regardless of how much time it takes,
18 why can't they be serving them?

19 MR. AXELROD: Your Honor, I'm informed by one
20 of the paralegals that the sheriff's office will
21 serve them for fifteen dollars and then if they
22 don't show up, then --

23 THE COURT: Thirty.

24 MR. AXELROD: Then it is another fifteen
25 dollars, whatever it is, but it is not for the

1 ultimate service of it.

2 THE COURT: Well, aren't they all police
3 officers?

4 MR. AXELROD: A lot them are, yes, sir, some
5 are not, some are the ones that we are trying to
6 find out, that are, you know, the prostitutes and
7 stuff like that, some are police officers, yes,
8 sir.

9 THE COURT: Well, why aren't you trying to
10 use the sheriff for those? That should be easy
11 enough.

12 MR. AXELROD: If that is what the Court wants
13 me to do.

14 THE COURT: That is what I want you to do.

15 MR. AXELROD: Yes, sir.

16 THE COURT: I want you to keep these costs
17 down.

18 MR. AXELROD: Yes, sir.

19 THE COURT: I mean, I don't understand, thus
20 far you have spent a minimum of twelve hours
21 reviewing documents and photographs and consulting
22 by telephone and email. That is 2,400. And he
23 says he will need another, another twenty hours,
24 that is 4,000, that all comes to \$6,400.

25 MR. AXELROD: Plus the travel expenses, Your

1 Honor.

2 THE COURT: No, that is included. According
3 to this, he needs four more thousand and he spent
4 24, so that is 65, or 64. I'll approve another
5 \$2,000 for him. That is 7,000.

6 MR. AXELROD: Yes, sir, Your Honor.

7 And, Your Honor, I'm asking incremental
8 billing. I can bill another \$25,000, so far the
9 Court has ordered me 50,000, I think the next 25
10 will take me through the trial.

11 THE COURT: I'll do that after the trial, I
12 will look at it and see. You've got 50,000, we'll
13 look at that in a final bill, we're close to trial,
14 that is how we're going to do it. Intermittent
15 billing is at my discretion. I'm not going to
16 award another 25 at this juncture.

17 MR. AXELROD: Yes, sir.

18 THE COURT: All right.

19 MR. AXELROD: Thank you, sir.

20 THE COURT: All right, is that all we have?

21 MR. AXELROD: Yes, sir.

22 MS. ARMSTRONG: Yes, Your Honor.

23 THE COURT: Thank you.

24 (Concluded at 12:19 p.m.)

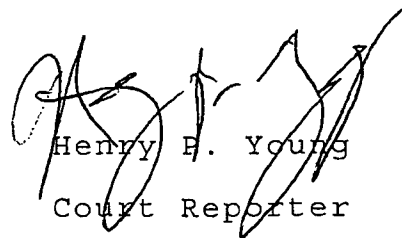
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Horry County, South Carolina, on the 6th day of January, 2012.

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

July 8, 2015



Henry P. Young
Court Reporter

COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
2003-GS-26-00020

PLAINTIFF,

TRANSCRIPT OF RECORD

DEFENDANT.

March 5, 2012
Conway, South Carolina

The Honorable Larry B. Hyman

BY: Stuart M. Axelrod, Esq.
Attorney for Luzenski Allen Cottrell

Brenda R. Babb
Circuit Court Reporter

2

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-1	Memorandum	3	
C-2	Memorandum	4	
C-3	State of South Carolina Witness List	25	

Motion Hearing - March 5, 2012

3

1 (Whereupon, Court's Exhibit Number 1 and Court's
2 Exhibit Number 2 marked for identification prior to the
3 commencement of the hearing.)

4 Mr. Richardson: Your Honor, from the State and
5 from the defense, I believe that Ms. Armstrong has filed a
6 Motion of Continuance so that'll need to be addressed.

7 Ms. Armstrong: May I approach?

8 The Court: All right. I have been in
9 Georgetown all last week and I haven't had a chance to
10 review it.

11 Mr. Richardson: Your Honor, from the State I
12 have marked Court's Exhibit 1 and 2 with regards to that
13 Motion.

14 The Court: All right, let me hear. Let's take
15 up this Motion. Ms. Armstrong, it's your Motion isn't it?

16 Mr. Richardson: You want to hear from me
17 first, Your Honor?

18 The Court: Yes. I read Ms. Armstrong's Motion
19 and I'm a little confused. My understanding is my ruling
20 stands, yes, or I agree with the State that the defense
21 does not have any statutory or rule authority for
22 justifying documents outside the court. You can
23 subpoena to the Court, you subpoena documents by Subpoena
24 Duces Tecum to the Court, okay? Now it's my understanding
25 that we had all this worked out that the Solicitor agreed

Motion Hearing - March 5, 2012

4

1 that if you'll just send us a notice of what you want we
2 will provide it for you. Wasn't that the ruling?

3 Ms. Armstrong: Your Honor, the last time -

4 The Court: We agreed to do all this, we're
5 going to do it.

6 Ms. Armstrong: My understanding in speaking
7 with Mr. Axelrod is that the documents that he requested
8 were per the order language, went back and forth and that
9 they were just picked up last Friday. I haven't seen the
10 information but my understanding is discovery was picked up
11 by Mr. Skidmore.

12 Mr. Richardson; And that's my understanding,
13 Your Honor. The items were prepared at Mr. Battle's
14 office.

15 The Court: Well, I'm just concerned by this,
16 this Motion saying that I have blended subpoena powers. I
17 haven't blended subpoena powers. I defined subpoena
18 powers, said, you know, this is what the rule says you can
19 do. But aside from that, my understanding is that that can
20 be produced has been produced, is that right?

21 Ms. Armstrong: As of Friday, Your Honor, I
22 don't know if everything has been produced but I do know
23 but a substantial number of documents were picked, Your
24 Honor.

25 The Court: Okay. All right, now let me hear

1 you. She's moving for a continuance.

2 (Whereupon, a power failure occurred in the
3 courtroom and the hearing was suspended until power was
4 restored. Upon the restoration of power the hearing
5 continued as follows:)

6 Mr. Richardson: Your Honor, the State's
7 position, first of all, the last status conference was held
8 in chambers. We talked about this very issue, told the
9 Court that we -

10 The Court: It had to be in chambers because it
11 was a chambers week and we had no court reporter.

12 Mr. Richardson: Exactly. We told the Court
13 that we had produced everything that, that we had. Mr.
14 Axelrod had asked for four, five, seven specific items, in
15 chambers, that we had not provided. He was trying to
16 subpoena those documents and we readdressed it probably for
17 the fifth or sixth time, that the subpoena would be great
18 if all he wanted was for the Myrtle Beach officers to show
19 up at trial with the documents, but he wanted them ahead of
20 time we would be certainly willing and able to produce
21 ahead of time if he would just ask us to get them. We had
22 all of those documents prepared. Your Honor, said, told
23 Mr. Axelrod to prepare a Order. A Order was prepared. We
24 went back and modified the Order slightly, but then
25 everything that he had asked for in chambers was ready,

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1 prepared, and it's my understanding that Mr. Skidmore went
2 and picked it up Friday. I believe you signed the Order on
3 Thursday allowing, basically working as a Court Order to
4 get those documents which apparently worked as about
5 subpoena would except it's a Court Order, which is the
6 proper way to get them. I think everything else you said
7 is then true. They were ready at his office. I checked
8 with Mr. Val today. He said that in fact Mr. Skidmore did
9 in go by and pick them up Friday.

10 With regard to the continuance motion based on
11 that, we have worked as quickly as we could. I believe
12 that's there's still three weeks for them to go through
13 that. If, I don't think it that should take anymore time
14 than that. We've got certainly three weeks to go until the
15 trial is to begin. So we would oppose the continuance
16 based on Ms. Armstrong's grounds.

17 The Court: All right. Ms. Armstrong, let m
18 hear from you.

19 Ms. Armstrong: I think Mr. Axelrod would like
20 to add something.

21 Mr. Axelrod: Your Honor, first of all, good
22 morning, sir, we submitted an Order to the Court originally
23 last week, or the week before, and we had added three extra
24 items to that Order. We added a catch-all for anything
25 concerning Luzenski Allen Cottrell the Myrtle Beach Police

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1 had that they would give to us and anything concerning the
2 case in general, concerning McGarrty to give to us and any
3 information concerning Dunkin Donuts they would give to us
4 that we did not already asked for. At some point the Court
5 signed my Order and before I could distribute it and get it
6 clocked the Solicitor objected and then they signed a
7 different Order. My concern is -

8 The Court: Let me say that what happened there
9 is that I was in a murder case with you, and I know you're
10 very busy and I was too, and when I signed the Order I
11 didn't realize that was three additional things. It was
12 brought to my attention by the Solicitor's office. I
13 withdrew that Order, I think immediately within a few hours
14 and re-issued the Order that's in place now and that's how
15 that came about.

16 Mr. Axelrod: Right. My concern is why those
17 three items were not okay with everybody. I'm just asking
18 for anything to deal with the shooting, McGarrty and Allen
19 to be given to us. I think they're fair to have and I
20 think that the Solicitor opposing it shows that there's
21 maybe something they don't want us to have because they
22 should, they should have been okay with those three catch-
23 alls. I'm not asking for anything -

24 The Court: Well what does a catch-all do?
25 Where does it stop? You know, that is the consummate

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1 fishing expedition.

2 Mr. Axelrod: Of this case.

3 The Court: I'm sure that there was a financial
4 log somewhere as to where these officers got paid on that
5 day. Technically I guess you could stretch it to say, you
6 know, that it could be a budget item in Myrtle Beach that
7 you need to show us because that's related to the Cottrell
8 case. I mean, where does it stop. That is just too broad,
9 Mr. Axelrod. I mean, it could cover any conceivable thing
10 in the world. It has absolutely no relevance whatsoever.
11 Everything we do is connected in some form or fashion to
12 something else.

13 Mr. Axelrod: Okay. The Solicitor stated that,
14 you know, they prepared everything for us and they
15 delivered it to us and we got it Friday but we've been
16 asking for that stuff since November. We, we did what the
17 Court asked us to do originally. The Court told me in
18 November that I have to ask the Solicitor for whatever
19 discovery I want that's in the possession of the Myrtle
20 Beach Police. So I did that in November -

21 The Court: Not necessarily. I told you you
22 could subpoena, you could subpoena the Court.

23 Mr. Axelrod: But originally the Court asked me
24 to ask the Solicitor -

25 The Court: And the Solicitor said he'd provide

1 it.

2 Mr. Axelrod: Right. And in November he did
3 not provide it and in December he did not provide it. Now
4 we have been asking for this stuff since November and since
5 December. Now the Solicitor's telling us it's been
6 provided on Friday. I would submit to the Court that I do
7 not think that everything we requested is in the discovery
8 that they gave us. I can't say it as an officer of the
9 court today because I haven't seen it but I talked to my
10 investigator over the weekend. He said there's still stuff
11 missing. Mr. Skidmore is not allowed to be here because
12 otherwise he said, you know, we have to cut our expenses.
13 So he's in Rock Hill with it right now looking at the
14 thousand pages they gave us and all the tapes. But I would
15 submit to the Court that I do not think that everything we
16 requested is there and I don't think the Solicitor himself
17 went through it to see if what I requested is in the
18 material. So I don't think it's fair for him to say that
19 it was ready, prepared and given to us, because I don't
20 believe that Mr. Richardson looked at the thousand pages,
21 the twenty hours of tapes to see if everything that we
22 specifically requested is there. So I would say it's not
23 there at this point, Your Honor.

24 Mr. Richardson: And again, Your Honor, it just
25 goes back to what you were talking about earlier. It's a

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1 fishing expedition. Mr. Axelrod is right but we went into
2 our last status conference, and I think you would agree, we
3 said we believe we have turned over everything that you've
4 asked for and Mr. Axelrod said no. We've asked for these
5 one thousand items. You have missed seven. He said, we
6 need a, b, c, d, e, f and g. And as soon as we found out
7 that, we said fine. Your Honor said, Mr. Axelrod, prepare
8 a Court Order, send it to the Solicitor's office. Let them
9 look over it and then I will make sure you get everything.
10 Just as soon as we knew that there was something out there,
11 else, that Mr. Axelrod needed, Mr. Battle, who represents
12 Myrtle Beach Police Department, prepared that stuff. He is
13 again right. I haven't gone through all of that one
14 thousand pages of discovery or twenty hours of tape. But
15 Mr. Battle said that everything that he has asked for is in
16 there. So I haven't looked at it but I know that whatever
17 Your Honor had turned, had signed on Order for them to turn
18 over, they believed that they have turned it over and if
19 there is some problem with that, and again, I know it's not
20 fair to Mr. Axelrod, but in truth he's speculating because
21 he said Mr. Skidmore would know, he doesn't know, so he's
22 assuming that it's not there. If he tells me I asked for
23 this and it's not there, we'll make every effort to get
24 that and we have tried to keep up with all of these
25 discovery requests and turn in as judiciously as possible -

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1 The Court: What more than that can he do, Mr.
2 Axelrod?

3 Mr. Axelrod: You're right, Your Honor. I
4 asked for it in November. I asked for it in December, they
5 didn't give it to us. They said, you know, they didn't
6 have it, they didn't give it to us. They clearly had it.
7 I say no. There's seven items we don't have all of them,
8 and I don't know -

9 The Court: Look at what you have. Tell me.

10 Mr. Axelrod: No one's looked, we haven't
11 looked at it yet. No one's looked at the discovery to see
12 if those seven items are in that.

13 The Court: What seven items?

14 Mr. Axelrod: The things that we requested, the
15 logs, the tapes, the radio transmission. I don't have the
16 list with me. But there were seven specific items. Do you
17 have a copy of --

18 Mr. Richardson: Mike Guthinger's internal
19 review, there was -

20 The Court: If your investigator's telling you
21 there's stuff missing, tell me what's missing. Tell me
22 what your investigator says is missing.

23 Mr. Axelrod: He's still going through the
24 material as of yesterday -

25 The Court: Well does he have a partial list.

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1 Mr. Axelrod: When I talked to him on Saturday
2 he said he was going through it. He thinks some of the
3 tapes are not there of what we've requested.

4 The Court: Does he know which ones he thinks?

5 Mr. Axelrod: I don't know at this point.

6 The Court: Well does he know for sure that
7 it's not all there?

8 Mr. Axelrod: I believe it's not all there from
9 conversations with him on Saturday. But, Your Honor, he
10 picked it up on Friday on his way back to Rock Hill. He
11 for here for a convention with private investigators. He
12 picked up the material Friday. I finished a murder trial
13 with Your Honor on Thursday. I haven't seen the material.
14 I have to go to Atlanta tomorrow and tomorrow he's going to
15 give me the material that he got and then I'll be able to
16 understand what's missing if anything. That's the best I
17 can tell right now because we had the asked for this in
18 November and December. All I -

19 The Court: What you're asking me to do is
20 continue it because you think it might not be there, or
21 something might not be there?

22 Ms. Armstrong: Your Honor, whether it's all
23 there or not, it a thousand pages and twenty hours of tape,
24 approximately, we got it three weeks before trial. I'm
25 willing to assume it's all there but that's a lot of

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1 information to get three weeks before trial to have to go
2 through it and try to see what's new, what needs to be
3 investigated, what we can use for our case, who we might
4 need as a witness, if there's anything new. If only thirty
5 percent of it is new, that's going to take a fair amount of
6 time. Getting it three weeks before trial, even if it's
7 all there, does not leave us much room at all -

8 The Court: Ms. Armstrong, do you know the
9 expense involved in subpoenaing all these, these jurors and
10 the work that's gone into getting this thing ready?

11 Ms. Armstrong: Yes, Your Honor, I'm sure it's
12 substantial. That's why, I mean, I quite frankly, I think
13 the information should have been provided a long time ago.
14 It's out there, we were entitled to it.

15 The Court: I mean, you haven't even told me if
16 there's anything there that's even relevant.

17 Ms. Armstrong: We just got it, Your Honor, I
18 can't tell.

19 The Court: When was this Motion filed?

20 Ms. Armstrong: This morning. I believe I sent
21 an email and I apologize that the motion reads that the
22 information has not been received but it was, in fact,
23 received by Mr. Skidmore on Friday. I drafted it prior to
24 learning.

25 The Court: Well, for me to continue it now

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1 would be absolute speculation on my part, and your part, as
2 to whether or not there was anything, anything new, or if
3 there's anything relevant, wouldn't it?

4 Ms. Armstrong: Well, Your Honor -

5 The Court: Wouldn't we just be saying, okay,
6 we're going to continue it because there might be
7 something? I mean, Mr. Axelrod is approaching it from the
8 point, it's not all there. You're approaching it from the
9 point that well if it is all there we haven't had time to
10 look at it all yet. But you may look at it and there's
11 absolutely nothing there new, nothing that you haven't had,
12 nothing that's relevant. Isn't that a real possibility?

13 Mr. Axelrod: Your Honor, that I, and the other
14 possibility there is that there is new material we haven't
15 seen. I agree with the Court, it could be either way. It
16 could be either way, sir. Now -

17 The Court: Well, let, let's wait and see.
18 Your got your Motion's filed. I could carry the Motion
19 over. Let's wait and see what's there.

20 Mr. Axelrod: Your Honor, and I'm going to ask
21 for the Court, now let's say that I talk to the
22 investigator and say on Tuesday or Wednesday and he's able
23 to get through the material and he says stuff new and
24 there's stuff missing. Would the Court want us to come
25 back for a hearing on Thursday? What would the Court want

1 from us at this point?

2 The Court: Well, how long is it going to take
3 for your guy to get through this -

4 Mr. Axelrod: Well -

5 The Court: --- and tell me what's not there?

6 Mr. Axelrod: I don't know how long it's going
7 to take for him to get all of it. He's working on it
8 diligently this week end. I know at some point he told me
9 he was through a couple hundred pages of it. He had to go,
10 it's eight hundred pages on disk and all these tapes. And,
11 and then another box, above that -

12 The Court: You want to come back Thursday, is
13 that what you want to do, come back Thursday?

14 Mr. Axelrod: Well, Your Honor, just so the
15 Court understands, I think there's eight hundred pages on
16 disk and two thousand pages of paper. So he's looking at
17 about twenty-eight hundred pages of paper and as many hours
18 of tape, I don't know.

19 The Court: He should recognize what he's
20 already been through.

21 Mr. Axelrod: He's just got to go piece by
22 piece. I agree with that, Your Honor, but he still has to
23 go through with that.

24 The Court: Well, what day so you want to come
25 back and tell me? What date can you come back and tell me?

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1 Mr. Axelrod: What about Thursday, Your Honor?

2 The Court: When on Thursday?

3 Mr. Axelrod: Whatever suits the Court, Sir.

4 The Court: I'm with you.

5 Mr. Richardson: 9:30?

6 Mr. Axelrod: 9:30.

7 The Court: 9:30 on Thursday. All right.

8 Mr. Axelrod: And Your Honor, if Investigator
9 Skidmore thinks that there is material that's not present
10 would you like for him to be at this hearing on Thursday?

11 The Court: Certainly.

12 Mr. Axelrod: Yes, sir, Your Honor.

13 The Court: All right, and if you have a list
14 of things you that feel aren't there and it's available for,
15 them, please, give it to the Solicitor. Give it to him and
16 let him know so he can respond on Thursday, if you have it.
17 If can you get it done before then, email it to him, do
18 something. Say look, this is what we don't, we don't have,
19 so he could say it doesn't exist or yes it was in there or,
20 okay, we'll get that. We'll try to fine that. He said at
21 the last status conference we had that, I remember
22 specifically the Solicitor saying, and Mr. Battle, who was
23 the representative of the City of Myrtle Beach, saying,
24 look, if there's something that you think that we're
25 supposed to have and it's not in here, in the materials you

1 get, let us know and we will try to find that item or
2 determine if there is such an item, remember that? They
3 said, just let us know because we go and we go to these
4 departments and we gather up all this stuff. If there's
5 something that you think is supposed to be there, it could
6 be anywhere and we don't know whether we've got everything
7 or not, we think we do. But if there's something you don't
8 have, let us know and we'll look for it somewhere else. I
9 mean, that was the way it was left. Wasn't that right, Mr.
10 Richardson?

11 Mr. Richardson: Yes, sir, Your Honor. That
12 was reason that we wanted to be specific about what was
13 being asked for. They, they've tried to comply with all of
14 the discovery requests but if they don't know specifically
15 what they're looking for there's no that they can go and
16 get it.

17 The Court: From what I gathered from the, from
18 Mr. Battle, there's not like a box down there at Myrtle
19 Beach and everything that would apply to Mr. Cottrell's
20 case is in that box. That's not how it works. You've
21 asked for personnel records, this, that and the other, and
22 there's all through the, the organization of the City and
23 they're trying to find it. If there's something that's not
24 there, if I recall, Mr. Battle says, let us know. We'll
25 try to figure out who might have that item and we'll go

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1 look for it.

2 Mr. Richardson: And Your Honor -

3 The Court: It could be collateral. You may
4 have one department that has Mr. McGarrty's personnel file
5 and there may a collateral department that may have
6 something else that's relevant to that, unless you think
7 about it before, unless you specifically ask for it, I
8 would they know that you want that particular item?

9 Mr. Axelrod: Well you know, Your Honor, I
10 asked for that stuff in November and December, specifically
11 I requested these items and never got them. And now, three
12 weeks before trial -

13 The Court: I understand.

14 Mr. Axelrod: --- and never got them. I want
15 the Court to just realize that that we had asked months
16 ago, we had asked for this stuff.

17 The Court: This case has been going on for
18 years though.

19 Mr. Axelrod: Fair deal but months ago we asked
20 it and now three weeks before trial miraculously this stuff
21 is beginning to appear. It just, that's what bothers me.
22 I would understand the Solicitor's position if I had never
23 asked for this material ever. But we did supplemental
24 requests for of B, C and D in November and December and we
25 specifically asked for it and they said it didn't exist and

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1 then now, it exists. So, I just want the Court to be aware
2 of my frustration on that matter. That's all, sir.

3 The Court: Okay all right. Well, we'll take
4 this back up on Thursday.

5 (Whereupon, hearing on the Motion for Continuance
6 was adjourned until Thursday, March 8, 2012 at 9:30 P.M.)

7 The Court: All right, Madam Clerk tells me
8 there are some other motions that are outstanding and this
9 is our last motion day. Is that right, Madam Clerk?

10 Madam Clerk: There was some other motions out
11 there unless you heard them in chambers and I didn't get
12 anything on it.

13 The Court: We haven't heard any motions in
14 chambers.

15 Madam Clerk: I have, this one was filed
16 February the 1st.

17 The Court: This is a Motion to Quash Subpoenas
18 by Mike Battle. I think we've dealt with that have we not?

19 Mr. Richardson: Yes, sir.

20 Madam Clerk: And hen I have February the 1st,
21 14th.

22 Madam Clerk: The Notice of Motion, Motion for
23 the Hearing to Continue Proceedings, which we dealt with
24 that today. Then I have another motion filed February the
25 14th to Recuse Solicitor Greg Hembree.

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1 The Court: Have we not heard that motion?

2 Mr. Axelrod: Your Honor, we dealt with that.

3 Madam Clerk: And I have one from 5/14 Motion
4 to Compel the City of Myrtle Beach.

5 The Court: I think the Motion to Recuse is
6 still pending. It was brought to my attention, I think,
7 in, in chambers.

8 Mr. Axelrod: Your Honor, we'll withdraw that
9 Motion to Recuse.

10 The Court: All right.

11 Madam Clerk: And this Motion to Compel the
12 City of Myrtle Beach Police Department?

13 The Court: This was something filed February
14 the 14th, Motion to Compel the Myrtle Beach Police
15 Department to

16 Completely and Fully Comply with the Court's Directive in
17 Response to Subpoena Ducas Tecum served on them September
18 the 1st. Haven't we pretty much taken care of that today?

19 Mr. Richardson: I believe so, Your Honor.
20 Actually on Friday we turned over everything.

21 The Court: Well we will have it taken care of
22 on Thursday.

23 Mr. Richardson: I believe so, Your Honor.
24 Actually on Friday we turned over everything -

25 The Court: Well we will have it taken care of

1 on Thursday.

2 Mr. Richardson: Yes, sir.

3 The Court: We will address anything that
4 hasn't been turned over, okay?

5 Madam Clerk: Those are all I have.

6 The Court: That's all I have.

7 Mr. Richardson: Your Honor, I have been told
8 in times past that when the group comes in and is broken
9 into panels that they would have several articles to look
10 over, one being basically are you a, b or c type juror and
11 also the potential witness list to make sure that they have
12 no conflicts with those. As part of today's scheduled
13 proceedings we are giving to the Court a copy of our
14 potential witness list but we also will send it to you by
15 email. That way, whatever the defense may send in you can
16 tailor some of them and mix their witnesses in with ours so
17 that they can look at all of those at one time. I'll pass
18 these up and then I'll also send it in a electronic form.

19 The Court: Very well.

20 Mr. Richardson: Is this thing to be marked as
21 a Court's exhibit or mine?

22 The Court: Court's.

23 (Whereupon, the Solicitor approaches the bench
24 with the State's witness list.)

25 The Court: Wow, a hundred and two witnesses.

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1 Yes, ma'am?

2 Ms. Armstrong: Thank you, Your Honor, quick
3 question about the witness list. Number one, as it stands
4 now our list of witnesses is still in the process of being
5 -

6 The Court: Certainly.

7 Ms. Armstrong: --- pared down. Typically in a
8 criminal case as well as in every capital case I've ever
9 been involved in, the witness list is not produced to the
10 other side until the day of the trial. So with Your
11 Honor's permission can we just forward it to you -

12 The Court: Certainly.

13 Ms. Armstrong: --- when we know what it is -

14 The Court: Certainly.

15 Ms. Armstrong: --- on the day of service?

16 The Court: Certainly.

17 Ms. Armstrong: Thank you, Your Honor.

18 The Court: Okay, thank you.

19 Mr. Axelrod: Your Honor, I have one more issue
20 I'd like to bring up.

21 The Court: Okay.

22 Mr. Axelrod: Two status conferences ago we
23 talked about having a real time court reporter.

24 The Court: Yes.

25 Mr. Axelrod: We actually spoke about having

1 Henry, have real time. Solicitor, everybody kind of agreed
2 that we would do that. Ms. Babb told me the other day that
3 she was scheduled for it. I think that it's imperative
4 that we actually have real time if we could. Henry's
5 available, he said he was available. That way the Court
6 would have real time on, on it's desk. We would each, the
7 Solicitor and the defense would be able to have real time
8 at their table for the testimony that's going on. I think
9 it's important for, at least specifically in the jury
10 selection, to be able see what each juror said, you know,
11 as we go through all the panels and be able to look back.
12 We'd actually have a printout, you know, each day of what -

13 The Court: I don't know if he's schedule
14 somewhere else. I don't know what the status of scheduling
15 the court reporters is. I don't usually get involved in
16 that. I will look into the matter for you.

17 Mr. Axelrod: Well, when we met, when Henry was
18 here at the last hearing we had he said he was available.

19 The Court: Maybe he is, maybe he's not. I
20 don't know. I will look at that issue. I'm not promising
21 you I will or I won't because I don't control that. What
22 you're asking me to do is make a request -

23 Mr. Axelrod: Yes, sir, Your Honor.

24 The Court: --- for him. Is that right?

25 Mr. Axelrod: Yes, sir, Your Honor.

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1 The Court: Well I don't have that will be
2 received. What do you say about that, Solicitor?

3 Mr. Richardson: The State takes, takes no
4 position on the court reporter.

5 The Court: I mean ---

6 Mr. Axelrod: I believe he's available, Your
7 Honor. You know, we go back to that level heightened of
8 scrutiny that, it's no other, it's no additional expense to
9 have a real time court reporter here. Court Administration
10 has several of them. It's no different expense. It's not
11 like we're asking the Court to do something that's going to
12 bust somebody a month.

13 The Court: I would look into that.

14 Mr. Axelrod: Thank you, sir.

15 The Court: I will make a call and see if he's
16 available, if he's been assigned somewhere else, if there's
17 another one available or if there are any available, or as
18 Court Administration said, Ms. Babb is going to do it. I
19 don't know how flexible they are on that, Mr. Axelrod.
20 Again, that's just not something we usually don't get into
21 but I don't mind checking on it for you.

22 Mr. Axelrod: Thank you, sir.

23 Mr. Richardson: Your Honor, we also have
24 several acknowledgments of receipts of discovery. We have
25 turned these over to Mr. Axelrod's office several times to

1 get signatures saying that they had received them. I'd
2 pass those over and ask that Mr. Axelrod sign these if he
3 has in fact received them, and you'll need to change the
4 date because some of them were back in December. I don't
5 want to have a -

6 The Court: Well if he's received them I'll
7 want him to sign and give you your receipt for them.

8 Mr. Axelrod: Your Honor, if it'll be all right
9 with the Court if I'd be able to bring them in Thursday?

10 The Court: That would be fine.

11 Mr. Axelrod: Thank you, sir.

12 The Court: All right.

13 Madam Court Reporter: Will the witness list be
14 marked as Court's exhibit also?

15 The Court: Right.

16 (Whereupon, Court's Exhibit Number 3 marked for
17 identification.)

18 Mr. Richardson: And Your Honor, the only other
19 thing I know of, of course I passed Court's Exhibit 1 and 2
20 and this will, of course be Court's Exhibit 3, I think it
21 dovetails into Ms. Armstrong's continuance motion. We of
22 course, oppose the continuance on those grounds but I do, I
23 don't know how the Court wants to address Court's Exhibit 1
24 and 2. Do you want to take it up now in our presence. We
25 could certainly put on the record more about Court's

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1 Exhibits 1 and 2. I'll just look to the Court on guidance
2 on that.

3 The Court: Well, what I'd like to do is I'd
4 like to speak to Ms. Armstrong privately and I'd like to
5 speak to Me. Axelrod privately.

6 Mr. Richardson: Yes, sir, Your Honor.

7 The Court: I'd like for you to remain here
8 while I do so, all right?

9 Mr. Richardson: Yes, sir.

10 The Court: Ms. Armstrong, let me see you in my
11 chambers.

12 Ms. Armstrong: Thank you, Your Honor.

13 (Whereupon, the hearing was adjourned.)

14 End of requested transcript.....

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CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, official court reporter the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina.

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

January 27, 2015
Brenda R. Babb
Brenda R. Babb, CVR
OFFICIAL REPORTER

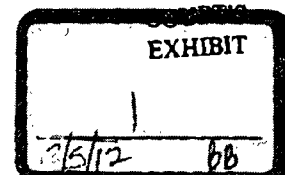
January 6th, 2012

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Stuart also said that he decided to storm ahead and take this case on himself. He realized he was second chair but that he was going to do the work because Armstrong was either incapable or too lazy to start.

I do not remember the first date that Stuart mentioned his problems with Armstrong to me but I know he has expressed concerns over her abilities more than a few times.

JAR



MEMORANDUM

TO: State v. Cottrell File
FROM: J. Gregory Hembree, Solicitor *JGH*
RE: Conversation with defense counsel
DATE: February 21, 2012

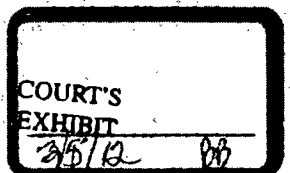
This morning we had a status conference scheduled for the case above referenced.

When I walked into my office at approximately 8:45 Lisa Armstrong was sitting in our lobby. Lisa asked me to confirm the time for our hearing and I advised her that it was scheduled for 9:30 and sat down for a minute to chat. We discussed a few of the things that we intended to cover at the hearing and then Lisa offered how sorry she was that my office had to work with her co-counsel, Stuart Axelrod, on a regular basis. I agreed with her that he was very difficult to work with and that his clients frequently received stiffer prison sentences due to his advice and approach.

Lisa then went into a rather lengthy discussion that in her career practicing law she had never worked with any lawyer more dishonest or unethical than Mr. Axelrod. She went on to say that they were not working together at all and that she could not wait to get this case concluded just to get away from him. From her demeanor it was clear that she strongly disliked her co-counsel.

Ms. Armstrong also stated that Mr. Axelrod was fixated on the wrong strategy for this type of case and that he wouldn't listen to her advice regarding guilt phase strategy. I agreed with her that what I perceived his strategy was not the strategy I would use if I were defending the case. She never specifically revealed any strategy and I made my judgment based upon what Mr. Axelrod has revealed to others along with what I anticipate his strategy to be based on the discovery he has requested.

After that conversation and knowing what Mr. Axelrod said to Deputy Solicitor Richardson about Ms. Armstrong, I became very concerned about the defendant's ability to be effectively represented by this defense team.



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
2003-GS-26-00020

State of South Carolina,)
)
 PLAINTIFF,)
 vs.)
)
 Luzenski Allen Cottrell,)
)
 DEFENDANT.)
 _____)

TRANSCRIPT OF RECORD

March 8, 2012
Conway, South Carolina

Before:

The Honorable Larry B. Hyman

Appearances:

BY: J. Gregory Hembree, Esq.
Attorney for State

BY: Jimmy A. Richardson, II, Esq.
Attorney for State

BY: Melissa R. Armstrong, Esq.
Attorney for Luzenski Allen Cottrell

BY: Stuart M. Axelrod, Esq.
Attorney for Luzenski Allen Cottrell

Brenda R. Babb
Circuit Court Reporter

2

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Argument by Mr. Hembree	5
Argument by Ms. Armstrong	7
Argument by Mr. Axelrod	8
Ruling of Court	12
Certificate of Reporter	15

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-1	January 6, 2012 Memorandum from JAR		14
C-2	January 6, 2012 Memorandum from J. Gregory Hembree		14

1 The Court: Ladies, gentlemen, we are here today
2 as a continuation of my hearing which was conducted on, a
3 status conference rather which was conducted on last
4 Monday. At that hearing I carried over a matter concerning
5 some discovery, however, a matter more pressing has, has
6 come to the Court's attention. At that hearing the
7 Solicitor handed up two, I guess we could refer to them as
8 memos, for my consideration. They were marked as Court's
9 Exhibits 1 and 2, I have the original exhibits which I have
10 retrieved from the Clerk of Court. I want them introduced
11 into this proceeding.

12 In that memorandum, or those memorandums, were
13 one from Deputy Solicitor Jimmy Richardson, one from the
14 Solicitor Mr. Greg Hembree. They were handed up to me
15 because the Solicitor's office had become aware of a
16 serious rift or problem developing in the defense team
17 which the Solicitor's office, according to the memorandum,
18 caused him, the Solicitor, concern about the defendant's
19 ability to be effectively represented by this defense team.

20 I have reviewed both of the memorandum in detail.

Motion Hearing - March 8, 2012

4

1 I met with both members of the defense team separately and
2 privately to discuss this. It would appear to me from my
3 discussions, or I am satisfied from my discussions with
4 counsel, that the memorandum which were provided to me are
5 correct. Each one contains allegations made by members of
6 the defense team against co-counsel alleging what I
7 consider to be serious misconduct.

8 I have made, let me make this clear, absolutely
9 no investigation to determine whether or not there was any
10 truth to the allegations. My only concern was whether the
11 allegations had been made. It became very clear that the
12 allegations had been made, that each of defense counsel
13 believed that the allegations were correct, and more
14 importantly, I inquired of each of the defense counsel
15 whether or not he or she felt that this problem that has
16 developed, or the issues that have developed between them,
17 was affecting Mr. Cottrell's defense, whether or not Mr.
18 Cottrell's defense was being, the word I use was
19 jeopardized. Both counsel told me that in their opinion
20 that was true, that his defense was being jeopardized.

21 It is this Court's responsibility to make sure
22 above all things that Mr. Cottrell is being effectively
23 defended in this case and that he is receiving, that he
24 will receive a fair trial, that is of the utmost importance
25 to me and, Mr. Cottrell, I want you to know that.

Motion Hearing - March 8, 2012

5

1 This case is scheduled to begin, after several
2 continuations, on March the 26th, the 26th day of this
3 month. Substantial effort has been put into preparing the
4 Court, Clerk's office, Sled, for the trial of this case,
5 however, I have grave concerns as to whether or not this
6 case can proceed.

7 I want to hear from counsel concerning this. My
8 inclination is, and I quite frankly feel that I have no
9 alternative but to continue this case and relieve one or
10 both counsel in this matter and hire a substitute. I
11 understand that that is going to result in a substantial
12 delay in this trial, probably a delay of a year or more,
13 but my concern that Mr. Cottrell receive adequate
14 representation in this matter and my duty to protect him in
15 that regard compels me to take that position.

16 Now first I would like to hear from the State of
17 South Carolina in this regard if the State chooses to make
18 any comment or to wade in on this issue. Mr. Hembree?

19 Mr. Hembree: Yes, Your Honor, very briefly.
20 You know the State's general feeling and desire to get this
21 case tried as soon as we possibly could. That's been our
22 position throughout, the Court's well aware of that,
23 however, I will tell the Court I, co-counsel and I,
24 understood that this was a distinct possibility that a
25 continuance was, and a lengthy continuance, was a distinct

Motion Hearing - March 8, 2012.

6

1 possibility when we began down this path and felt compelled
2 to submit our concerns to the Court and we understand that.
3 We, but we also, like the Court, have the responsibility to
4 ensure that Mr. Cottrell receive a fair trial, that he is
5 adequately represented, that he is effectively represented.
6 We have an interest as, as, as officers of the Court, as
7 prosecutors, but also from a selfish standpoint, if you
8 want to call it that, we've tried this case once already.
9 We don't want to try it a third time, and we firmly believe
10 that based on the, the circumstances that we find ourselves
11 in today that a, a post conviction relief would be granted
12 if we went forward with the trial, and because of that we
13 would rather do it right, absolutely do it right than do it
14 fast. It's a whole lot more important to do it right than
15 do it fast so we would, we would, we would request a
16 continuance in this case and in addition to, I understand
17 the Court's position, but our position would be that we
18 believe that a continuance is appropriate. We believe
19 that new defense counsel should be assigned. We would, we
20 would make that request to the Court based on the
21 circumstances that we find ourselves in.

22 It's an extreme situation. It's not one that we
23 took lightly or one that we felt good about. It's not a
24 situation where you want to go revealing private
25 conversations with other lawyers. I don't know that I've

Motion Hearing - March 8, 2012

7

1 ever done that in my whole career but it's a death penalty
2 case and because of the, you know, the magnitude of this
3 case and the seriousness of it, we just had no other choice
4 and we would, we would as I say, we would request that a
5 continuance be granted and new counsel be assigned.

6 The Court: All right, Ms. Armstrong, may I hear
7 from you?

8 Ms. Armstrong: Yes, Your Honor. I would defer
9 to the Court's judgment in this, however, I would like to
10 reiterate that as far as I'm concerned I can set aside my
11 personal misgivings about dealing with co-counsel and one
12 thing I have never questioned is his commitment to Mr.
13 Cottrell, notwithstanding some impressions that I've gotten
14 and may have been wrong about.

15 The Court: All right, and the thing that
16 concerns me mostly, Ms. Armstrong, is in our discussions, I
17 think you were very candid with me and I appreciate your
18 candor, when we, we discussed this issue, but what really
19 concerns me is that even though you assured me that you are
20 willing to soldier on with this matter and that you were
21 likewise committed to Mr. Cottrell, that in your opinion
22 the relationship has worked or will work to Mr. Cottrell's
23 detriment or the detriment of his defense; is that still
24 your position?

25 Ms. Armstrong: Your Honor, having a chance to

Motion Hearing - March 8, 2012

8

1 reflect and think about it a little more and knowing that
2 notwithstanding our differences, Mr. Axelrod wants to give
3 Mr. Cottrell the best possibly defense. I do believe that
4 it is possible for Mr. Axelrod and I to sit down face to
5 face and discuss it and see if we can set aside our
6 negative opinions and move forward. I think, I think it's
7 a possibility.

8 The Court: Ms. Armstrong, we're only two and a
9 half weeks from trial.

10 Ms. Armstrong: That's correct, Your Honor, and
11 no work has stopped. We may have to reschedule an
12 evaluation of Mr. Cottrell that was scheduled for today,
13 that would have to be rescheduled, and we would need for
14 the office that was subpoenaed for documents to provide
15 what Mr. Skidmore has found missing in a timely fashion.

16 The Court: All right, thank you. Mr. Axelrod,
17 I'll hear from you.

18 Mr. Axelrod: I think the Court's right that
19 what's most important is Allen's defense. I think that
20 Solicitor Hembree raises valid points. I think his memo
21 solidifies probably a PCR. I think it just does, I mean
22 reading what I read. I defer to the Court and I'll ask the
23 Investigator be here, I want Allen to be here, I think that
24 maybe the Court should inquiry of Allen. I don't know what
25 to say, Your Honor, I just say I would defer to what the

Motion Hearing - March 8, 2012

9

1 Court thinks is best, thank you.

2 The Court: Okay, Mr. Cottrell, you have heard
3 my concerns and I believe I've made my position clear to
4 you. I want you to receive the best defense possible. I
5 do not want to continue this case. If I replace your
6 attorneys it's going to result in a delay in this case and
7 it is a very important case, it's a capital case. It's
8 probably going to result in a substantial delay of this
9 case so I do not undertake this lightly; however, I am
10 really concerned that their differences of opinion as to
11 the way to proceed in this case and that perhaps the
12 theories shared by your co-counsel may be in conflict.

13 Tell me. Mr. Cottrell, if you have any comments
14 to make to the Court concerning this issue?

15 Defendant Cottrell: Your Honor, I know from my
16 knowledge from speaking with both my attorneys that I know
17 Mr. Axelrod's strategy. I know that he's been preparing
18 diligently for my trial. We've spoken on numerous
19 occasions about how he would like to proceed and I feel
20 confident in his ability to represent me as the attorney
21 for this trial.

22 I just became aware of this rift between the two
23 attorneys. I had no idea that it was there. It does cause
24 me concern as well but if I could I would like to speak
25 with both of them, you know. I haven't had a chance to do

1 that since I found out and if I could speak with both of
2 them?

3 The Court: All right, well we will take a brief
4 recess, will ten, fifteen minutes, is that how much time
5 you need?

6 Defendant Cottrell: That would be fine, Your
7 Honor.

8 The Court: Okay, we'll take a moment. There's
9 a place, I think, back here where you can speak to them.
10 We'll just be at ease for about fifteen minutes, okay.

11 (Whereupon, a recess was taken and the following
12 takes place on the record after the recess.)

13 The Court: Okay, Mr. Cottrell, have you had
14 adequate time to speak to your attorney? The sheriff's
15 deputy came out and told me that you were ready to come
16 back in, have you had all the time you need?

17 Defendant Cottrell: Yes, sir, I have.

18 The Court: Well would you like to say anything
19 else to me?

20 Defendant Cottrell: Just that I spoke with both
21 of them and they said that they would be able to work
22 together, you know, but ultimately it would up to you, Your
23 Honor.

24 The Court: All right.

25 Defendant Cottrell: I would just like to

Motion Hearing - March 8, 2012

11

1 reiterate that I do feel confident about the
2 representation.

3 The Court: Well you tell me that you even say
4 you still had some concern?

5 Defendant Cottrell: Right, because I had no
6 idea that this was going on between the two of them. So, I
7 understand that, you know, a case like this is stressful
8 for all parties involved and, you know, I know that the
9 work that Mr. Axelrod has done in the first part of the
10 trial of this case, I don't think it can be matched by
11 anybody else.

12 The Court: Well, Mr. Cottrell, as I told you
13 my, my main concern is that you receive an effective and
14 adequate defense and I also have a concern that that is
15 absolutely necessary in order to, for this case to survive
16 the ultimate review that it would be placed under if you
17 are convicted. The State has concerns, I am torn with
18 this, with this case. We have been struggling to get it to
19 Court to get it tried. There have been several
20 continuances granted. We have had status conferences,
21 motion hearings throughout the year towards that end,
22 however, and I understand your position, however, there are
23 serious allegations that have been made by your co-counsel
24 against the other co-counsel.

25 The Solicitor's job is to try this case but he

Motion Hearing - March 8, 2012

12

1 also has an ethical responsibility to bring allegations of
2 misconduct to the Court's attention and these are very
3 serious. There's always, in every substantial case, some
4 degree of friction between the Solicitor's office and the
5 defense. I am accustomed to having the Solicitors complain
6 what the defense counsel is doing and the same thing from
7 the defense counsel complaining about the Solicitors, but
8 those are usually just minor things having to do with
9 strategy and things of that nature. This goes beyond that.

10 The Solicitor has an ethical duty to bring it to
11 my attention. I am quite sure that he has complied with
12 his ethical responsibility. I am not certain what my
13 ethical responsibility is having had these matters brought
14 to my attention. I'm afraid I do know what my ethical
15 responsibility is and that's to report it and let it be
16 flushed out by someone else. As I've said I have been very
17 careful not to go into the specifics other than general
18 allegations, but there have been allegations involving
19 dishonesty, unethical conduct, personal problems that
20 should be addressed, all sorts of things that I believe on
21 review would be matters that would be of grave concern to a
22 PCR judge, and there again I'm not suggesting, Mr.
23 Cottrell, that there will be a conviction in your case, I'm
24 not telling you that I've prejudged your case. I'm telling
25 you that if it reaches that point that could certainly be a

Motion Hearing - March 8, 2012

13

1 problem.

2 I don't think that I have had, I have any
3 alternative than to relieve counsel in this matter, both
4 attorneys. I am going to appoint someone, I'm going to
5 give them adequate opportunity to pick up your defense and
6 they will, I'm sure, proceed in the same fashion or very
7 much the same fashion. You certainly have input into that.
8 They will have access to all the materials that have been
9 gathered so far. They have will have access to these two
10 attorneys to discuss strategy and make that type of
11 decision and they will discuss it with you, I'm sure. But
12 I am going to relieve counsel in this matter. I'm going to
13 continue this case until such time as the trial will be
14 appropriate.

15 I make no ruling at this point as to whether or
16 not I intend today or tomorrow to appoint new counsel. I'm
17 going to give some more thought to that as to who should
18 represent you. I am going, in that order, and I do so now
19 order that whoever is appointed that counsel cooperate with
20 them, turn over all the materials that have been gathered
21 so far and anything that they have, their complete files on
22 you to new counsel. That is my ruling, I will prepare an
23 order.

24 Gentlemen, I'm sorry, ladies, gentlemen, I'm
25 sorry, but that is just what I must do, thank you.

1 Madam Clerk: Sir, before everybody leaves
2 exhibits were picked up by the county police and your
3 investigator from our office and can they be returned back
4 now because the new parties are going to probably want to
5 see it at that time. Lorie Rabon and Carmen --

6 The Court: I would like to have the exhibits
7 placed in possession of the Clerk of Court so that they
8 would be available for new counsel. I'm going to make
9 copies, photostatic copies of the exhibits that, 1 and 2,
10 that were handed up last week, parts of this record. I
11 think that these Exhibits Number 1 and 2, which I have the
12 originals of, will, would be in the same record but I still
13 want to make sure that that becomes a part of this record.
14 Thank you very much, ladies and gentlemen.

15 (Whereupon, Court's Exhibits Numbers 1 and 2
16 marked for identification.)

17 Mr. Richardson: Your Honor, one other thing
18 we've got dealing with that discovery issue, we have turned
19 over supplement K, L, C, B, which is numerous reports. I
20 just would ask that either Ms. Armstrong or Mr. Axelrod
21 sign these originals so that we can know for whoever who is
22 going to take over this case what evidence has been given
23 out. We've got everything else signed.

24 The Court: They may, they may acknowledge
25 receipt of those matters, thank you.

End of requested transcript.....

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March 30, 2012

Brenda R. Babb

Brenda R. Babb, CVR
OFFICIAL REPORTER

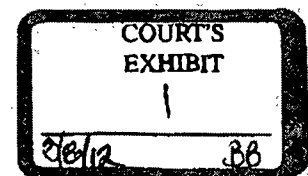
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DATE: February 21, 2012

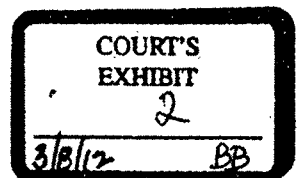
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STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

State of South Carolina)

vs.)

Luzenski Allen Cottrell)
_____)IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

INDICTMENT NO. 2003-GS-26-0020

**ORDER REMOVING DEFENSE
COUNSEL AND CONTINUING CASE**FILED
HORRY COUNTY
12 MAR 19 PM 12:10
HELANIE HUGHES-WARD
CLERK OF COURT

This matter comes before the court at a scheduled status hearing held on March 9, 2012. Jury selection in this capital murder case was to begin on March 26, 2012. The purpose of the hearing was to resolve any outstanding motions or discovery matters. At the end of the hearing Solicitor Gregory Hembree stated that he and his Deputy Solicitor James A. Richardson had recent conversations with the defense team which raised serious concerns about the defendant's ability to be effectively represented by defense counsel. After much consideration, I must agree.

Solicitor Hembree offered into the record two written statements by Deputy Solicitor Richardson and himself. The Solicitor's statement describes a lengthy conversation with defense counsel Lisa Armstrong, during which Mrs. Armstrong made serious allegations of dishonesty and unethical conduct against her co-counsel Stuart Axelrod. She further expressed her concerns about counsel's inability to coordinate trial strategy. Deputy Solicitor Richardson's statement referenced several conversations with Mr. Axelrod in which he made serious accusations against Ms. Armstrong. His accusations challenged her competence, work ethic, and personal life.

The court is now placed in the very uncomfortable position of complying with its ethical responsibility as to these accusations. Due to the serious nature of the allegations, I spoke to each of

the Defendant's attorneys privately in my chambers. Each acknowledged having made the statements against co-counsel and that they believed the statements to be true. On further inquiry, both advised that they were of the opinion that conduct of co-counsel had jeopardized the defense of this case.

I re-convened the hearing on March 8, 2012, during which I expressed my concern that the defendant could not be effectively represented by his present attorneys. Ms. Armstrong stated that since having last talked with me, she and Mr. Axelrod had determined that they could try to set aside their differences and continue to represent the defendant. This is a capital case two weeks from trial. I see no way to repair the relationship of co-counsel and the damage done to the defense.

I have carefully explained my concerns to the defendant. He stated that he thought his attorneys could resolve their problems and continue with his defense. However, my duty at this point is to protect this defendant by taking the course most likely to assure that he will be effectively represented and his constitutional rights will be preserved. I am not unaware of the delay and expense to be caused by my decision. Nevertheless, I must take the extreme measure of relieving counsel and appoint new counsel.

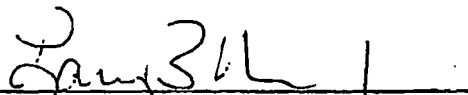
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that attorney Lisa Armstrong and Stuart Axelrod are relieved as counsel for the defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED upon notice of appointment of new counsel they shall turn over to new counsel all file-materials within 10 days.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Office of Indigent Defense Capital Case Division shall assume the duty of defense in this case. Upon assignment to specific attorneys the Office of Indigent Defense shall notify this court of such assignments to obtain formal appointment orders.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the trial of this case
is continued until further order of this court.

AND IT IS SO ORDERED.


Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina
March 13, 2012

MARCH 14, 2012

The Supreme Court of South Carolina
 Attn: Daniel E. Shearouse, Clerk of Court
 Post Office Box 11330
 Columbia, S.C. 29211

~~2012-13-16-18-8~~
~~2012-13-16-18-8~~

Re: State v. Luzenski Allen Cottrell
 2003-GS-26-0020

RECEIVED

MAR 10 2012

S.C. SUPREME COURT

Honorable Clerk of Court,

Enclosed please find the original of my PRO SE MOTION TO MAINTAIN PRESENT LEAD COUNSEL in the above-referenced case in Horry County. This MOTION is being filed subsequent to the hearing held in Horry County on Thursday, March 8, 2012.

By copy of this letter, I am informing this Court that I have forwarded copies of same to all parties:

Stuart AXELROD, Attorney for Defendant
 Lisa Armstrong, Attorney
 Horry County Solicitor, Mr. Hembree

Please file this original with the Court, and I, very respectfully, ask that you return a copy to me clock-stamped for my files.

Respectfully... I am,

Luzenski Allen Cottrell, Defendant - Pro Se
 Luzenski Allen Cottrell #6020
 Lieber C.I. (RB#219)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

DEATH PENALTY CASE, Horry County
Larry B. Hyman, Circuit Court Judge

STATE OF SOUTH CAROLINA,

VS.

LUZENSKI ALLEN COTTRELL,
DEFENDANT

Indictment No. 2003-GS-26-002D

PRO SE
MOTION TO MAINTAIN LEAD COUNSEL IN DEATH
PENALTY CASE

COMES NOW, Luzenski Allen Cottrell, Defendant in the above-captioned and referenced case, acting Pro Se, who moves this Most Honorable Court to Maintain Present Lead Counsel, Stuart Axelrod, in said case.

In the hearing convened on Thursday, March 8, 2012, Mr. Axelrod and 2nd counsel, Lisa Armstrong, were removed as Appointed Counsel. The Defendant, acting Pro Se, herein moves this Court to MAINTAIN Mr. Axelrod as LEAD COUNSEL. In support thereof, the Defendant would show the following:

(1) With trial less than two(2) weeks away, a hearing for preliminary matters was convened before the Honorable Judge Hyman, Circuit Court Judge, on Thursday, March 8, 2012;

(2) During said hearing, Lisa Armstrong, Attorney for the Defendant, made all parties in the Court aware of the fact that she had prior conversations with the Office of the Solicitor, unknown to the Defendant, Lead Counsel and/or the Court;

(3) Attorney Armstrong made further statements insinuating and/or alleging her own personal feelings and beliefs that LEAD COUNSEL Stuart Axelrod had acted unethically in this case;

(4) As a result of statements made by Attorney Armstrong, Judge Hyman removed both Attorneys for the Defense, Axelrod and Armstrong, from the case and continued the case until new counsel could be appointed on the Defendant's behalf;

(5) The Defendant, HEREIN PRO SE, now states that Attorney Armstrong has not acted with his best interest in mind. She knowingly and willingly spoke to the Office of the Solicitor outside of both his and LEAD COUNSEL's knowledge, understanding and approval. Attorney Armstrong further expressed views and opinions contradictory to that of the Defendant and had never discussed any of such prior to her statements before the Court; and

(6) The Pro Se Defendant herein states that Attorney Stuart Axelrod, to the best of Defendant's present knowledge and understanding, has prepared a viable defense and case on the Defendant's behalf to argue and rebut the charges filed by the State. The PRO SE Defendant presently believes that Attorney Axelrod has prepared a Defense based on the facts and evidence in his possession and has NOT acted contrary to any judicial ethics or standards.

THESE STATEMENTS MADE, the presently PRO SE Defendant, Luzenski Allen Cottrell, HEREIN REQUESTS that Attorney Stuart Axelrod remain as LEAD COUNSEL in the above-captioned and referenced case.

The PRO SE Defendant further requests that This Most Honorable Court remove Attorney Lisa Armstrong from the case.

IT IS SO MOTIONED AND REQUESTED.

Respectfully submitted,

Luzenski Allen Cottrell #6020
Luzenski Allen Cottrell, Pro Se Defendant
Lieber C.I. (RB#219)
P.O. BOX 205
RIDGEVILLE, S.C. 29472

Dated: March 14, 2012
RIDGEVILLE, S.C.

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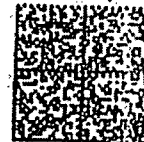
L. COTTRELL #6020

LIEBER C.I. (RB#219)

P.O. BOX 205

RIDGEVILLE, S.C. 29472

FIRST CLASS



The Supreme Court of S.C.
Attn: Daniel E. Sheanouse,
Clerk of Court
Post Office Box 11330
Columbia, S.C. 29211

REC
MAR 15
MAIL ROOM

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,
Plaintiff,
v.
LUZENSKI ALLEN COTTRELL,
Defendant.

)
)
)
)
) Ind. No.: 2003-GS-26-0020
)
) ORDER APPOINTING COUNSEL
)
)
)

FILED
HORRY COUNTY
12 MAR 19 PM 12:10
MELANIE HUGHES-WARD
CLERK OF COURT

This matter arises, and is properly within the Court's jurisdiction, pursuant to an order assigning the above captioned death penalty trial to this Court.

On January 29, 2009, the Honorable Casey L. Manning, then assigned to the instant case, appointed Melissa J. Armstrong and Stuart M. Alexrod as counsel for the Defendant regarding the impending capital trial. On March 8, 2012, this Court relieved both Ms. Armstrong and Mr. Alexrod of this appointment. The State of South Carolina has served a Notice of Intent to Seek the Death Penalty in the above captioned matter. This Court, pursuant to §16-3-26(B) of the S.C. Code of Laws, as amended, is required to appoint two death penalty qualified attorneys to represent Mr. Cottrell.

As first chair, this Court hereby appoints William S. McGuire. Mr. McGuire is certified by the South Carolina Supreme Court, pursuant to Rule 421 of the South Carolina Appellate Court Rules, to be lead counsel in death penalty cases. He has been a member in good standing with the South Carolina Bar and the Georgia Bar since 1995 and 2006, respectively. Currently,

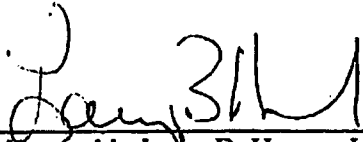
Mr. McGuire is the Chief Attorney of the Capital Trial Division of the South Carolina Commission on Indigent Defense. Mr. McGuire has fifteen (15) years of experience as a criminal defense trial lawyer. Mr. McGuire also has approximately ten (10) years of experience representing defendants facing the death penalty. Before returning to South Carolina to assume his current position, McGuire was a full-time capital defender in Atlanta, Georgia. Mr. McGuire has been lead counsel, or co-counsel, in over a dozen capital cases.

As second counsel, this Court hereby appoints Teresa L. Norris. Ms. Norris is also certified by the South Carolina Supreme Court, pursuant to Rule 421 of the South Carolina Appellate Court Rules, to be lead counsel in death penalty cases. She has been a member in good standing of the South Carolina Bar since November 1990. From November 1994 until April 1, 2006, she served as the Senior Staff Attorney and then Director of the Center for Capital Litigation (CCL) in Columbia. The CCL was a private non-profit corporation that, during that time period, provided direct representation to death-sentenced inmates and capital defendants and also consulted with other capital defense attorneys on both a pro bono and retained basis. Since April 1, 2006, Ms. Norris has been a partner in the firm of Blume Weyble & Norris, LLC, where she has continued capital defense work. She has directly represented approximately thirty-five (35) indigent capital defendants in various stages of court proceedings, including two (2) state capital trials through trial and sentencing, a federal death-eligible trial where the United States Attorney did not seek death, and five (5) other state capital trial cases that reached negotiated resolutions. She also routinely serves as a faculty member for state and national capital defense continuing legal education programs.

Both, Mr. McGuire and Ms. Norris, exceed the qualifications to be counsel in a capital case. Therefore, it is ordered that Mr. McGuire is appointed to be lead counsel and Ms. Norris is appointed as second counsel.

IT IS SO ORDERED.

3-15, 2012


The Honorable Larry B. Hyman Jr.
Circuit Court Judge

The Supreme Court of South Carolina

ORDER

The following matters are dismissed pursuant to *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991), because no extraordinary reason exists to entertain them in this Court's jurisdiction:

1. *William Broach v. State of South Carolina*. Petition for a Writ of Mandamus dated March 1, 2012. Case Tracking No. 2012209086.
2. *Danny Ray Stephens*. Letter to the Chief Justice dated March 8, 2012. Case Tracking No. 2012209406.
3. *Michael Perry v. Patricia C. Rivers*. Letter to the Clerk dated March 8, 2012; Complaint dated February 28, 2012; Motion for Leave in Forma Pauperis to Proceed Without Payment of Costs dated February 28, 2012. Case Tracking No. 2012209427.
4. *James Patrick Kelly v. State of South Carolina, County of Sumter*. Petition for a Writ of Mandamus received March 20, 2012. Case Tracking No. 2012209833.
5. *State of South Carolina v. Luzenski Allen Cottrell*. Motion to Maintain Lead Death Penalty Counsel dated March 14, 2012. Case Tracking No. 2012209728.
6. *Vernon Samuel Brown and Beaufort Unit Inmates of Ridgeland Correctional Institution v. Albert Housey, Dorm Lt., Warden Levern Cohen and Ridgeland Correctional Institution Administrator*. Petition dated March 19, 2012. Case Tracking No. 2012210167.

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b3d

Mr. Sereno A.C.J.
Donald W. Beatty J.
John K. Littrage J.
Kaye L. Pearson J.
Toal, C.J., not participating

Columbia, South Carolina

April 3, 2012

2
BJS

CERTIFIED TRUE COPY:
Sandra J. Shady
Chief Deputy Clerk, S. C. Supreme Court

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY)

2003-GS-26-0020

STATE OF SOUTH CAROLINA,)

Plaintiff,)

Transcript of Record

vs.)

June 18, 2013

LUZENSKI ALLEN COTTRELL,)

Defendant.)

B E F O R E:

Honorable Larry B. Hyman, Jr.
Horry County Courthouse
Conway, South Carolina

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

Scott Hixson, Esquire
Attorney for Plaintiff

William McGuire, Esquire
Theresa L. Norris, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

State v. Cottrell - 2003-GS-26-0020
MOTIONS

2

I N D E XJune 18, 2013Pg.

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Certificate of Court Reporter	10

E X H I B I T SNo.ID EV

(No exhibits were marked during hearing.)

State v. Cottrell - 2003-GS-26-0020
MOTIONS

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1 **(June 18, 2014)**

2 THE COURT: All right. What do we have today?

3 MR. HIXSON: Your Honor, my understanding was we're here
4 before the Court on State of South Carolina versus Luzenski
5 Allen Cottrell. That's 2003-GS-26-0020. We're here for a --
6 at the request of Defense counsel concerning a scheduling
7 order, I believe that Your Honor signed and is clocked April
8 15th of 2013. I have a copy and I have a copy for the Court.
9 I believe we're specifically referring to an objection counsel
10 had relating to motions -- in the forms of motions and things
11 like that is the best way to couch the proceedings today and
12 any other matters that Your Honor deems appropriate to hear in
13 this case.

14 THE COURT: All right. Let me hear from counsel.

15 MR. MCGUIRE: Thank you, Your Honor.

16 THE COURT: The State is correct and that is why we're
17 here. We had a status conference, the State -- I proposed a
18 scheduling order and we went back and forth a little bit.
19 We're in agreement with everything in the scheduling order
20 except for the provision that the State respond in writing to
21 motions recently filed. I actually put that language in there
22 and I got it from Judge John, of this circuit ---

23 THE COURT: It's not in the order I signed?

24 MR. MCGUIRE: No, sir, Your Honor.

25 THE COURT: And that's what you want?

State v. Cottrell - 2003-GS-26-0020
MOTIONS

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1 MR. MCGUIRE: Yes, sir.

2 THE COURT: Well, that's what I'm gonna put in. I think
3 that that is essential in cases of this magnitude and with the
4 scheduling order we have, it's unusual to see that except in
5 capital cases on the General Sessions side but I think the
6 Defense is entitled to a lot of objections or whether or not
7 the State would agree with the motions in this case.

8 MR. HIXSON: Yes, sir, Your Honor. May I address one
9 issue, Your Honor, but I understand the motion requirement,
10 the concern is that it's not a stipulation and we don't have
11 any idea what nature of evidentiary motions are made that
12 require a stipulation as to the case in chief when we get to
13 court. That's the one concern -- State has a concern over
14 automatic stipulation language, which is not reflected in any
15 case law in South Carolina or even the Court of Appeals, it's
16 a stipulation if you don't respond properly in writing.

17 THE COURT: And I have a problem with that. I'm just
18 gonna require you to respond within ten days. If he doesn't,
19 then you file a motion.

20 MR. MCGUIRE: Yes, sir.

21 THE COURT: Okay. But I don't want to have any automatic
22 stipulations or any language like that in that order. If
23 you'll prepare a brief order amending the scheduling order
24 then we can do that.

25 MR. MCGUIRE: Yes, sir.

State v. Cottrell - 2003-GS-26-0020
MOTIONS

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1 MR. HIXSON: Your Honor, if I may be heard on the timing
2 issue. In the case, prior to Mr. McGuire becoming involved in
3 it, there were hundreds, literally hundreds of motions that
4 were filed at the deadline, that the requirement be in
5 writing, give us ten days to respond. I believe that's kind
6 of the purpose of that, it's become extremely challenging or
7 ---

8 THE COURT: Are you relying on motions that have already
9 been filed?

10 MR. MCGUIRE: No, Your Honor.

11 THE COURT: Okay. He's not relying on those. We're
12 talking about motions Mr. McGuire and counsel filed. Do you
13 understand?

14 MR. HIXSON: I do. I don't ---

15 THE COURT: If there's an old motion out there, we'll
16 deal with that separately but this order doesn't pertain to
17 those motions.

18 MR. HIXSON: And all we would request is at least a month
19 or more time. We're looking to projecting this case out to
20 the scheduling order gets signed but we're dealing with a time
21 table of ---

22 THE COURT: You mean in order to respond?

23 MR. HIXSON: Yeah, in order to respond to the motion ---

24 THE COURT: Well, what's the deadline on the motions?

25 MR. HIXSON: As this currently is constituted, Your

State v. Cottrell - 2003-GS-26-0020
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1 Honor, let me take a look at this, the projected trial date we
2 have is September 15th of 2014. So, we're projecting out more
3 than a year. As it currently is scheduled March 27th, 2014 is
4 the deadline for filing all pretrial motions. So, that
5 triggers any timing ---

6 THE COURT: That's March when?

7 MR. HIXSON: March 27th, 2014.

8 THE COURT: Okay.

9 MR. HIXSON: So, that triggers motions, then the deadline
10 for opposition of the motions was June 30th. That's when we
11 would have to respond in writing to any. So, that at least
12 gives us several months to research and deal with what could
13 be a significant number of motions. We would just ask for
14 some time to respond ---

15 THE COURT: How much time do you need?

16 MR. HIXSON: I would just ask the Court that we maintain
17 the timetable that's in the current proposed order.

18 THE COURT: Is there a response time set forth in the
19 scheduling order?

20 MR. HIXSON: There is. The filing date is March 27th,
21 2014, deadline for filing all pretrial motions in this matter.
22 Then we have jury questionnaire June 26th to do, so we're
23 working on that. And then Monday, June 30th is the deadline
24 for us to respond in writing to the Court and Mr. McGuire on
25 the motions that he has filed. So, we would just ask the

State v. Cottrell - 2003-GS-26-0020
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1 timing components stay the same because it's ---

2 THE COURT: All right. That was the deadline for filing
3 opposition but I want a response filed by them. Let's do it
4 that way since you already have that scheduling order. Let's
5 just make sure that the filing, the response has to be in
6 writing, affirmatively or negatively, either way. Okay?

7 MR. MCGUIRE: Yes, sir.

8 MR. HIXSON: And then that provides, Your Honor, July
9 15th is free to deal with hearing dates on ones that you need
10 to hear oral arguments on.

11 THE COURT: Okay. All right. And that'll give us some
12 time to do that then. All right. Gentlemen...

13 MR. HIXSON: A couple of housekeeping matters, Judge,
14 just so we know we're progressing properly and are on the same
15 page. We had communicated back and forth, as Your Honor is
16 aware, there was former counsel involved with Mr. Cottrell and
17 Your Honor is very familiar with that, so we don't have to go
18 into more detail than that. You understand that.

19 THE COURT: Absolutely.

20 MR. HIXSON: We're trying to audit for the sake of
21 expense and everything what was provided for Defense counsel
22 and what was not and we came -- we've completed another
23 additional set of duplicate discovery which should take all
24 those issues out. And so, we'd hope that counsel would have
25 time to go down to the conference room and sign acceptance of

State v. Cottrell - 2003-GS-26-0020
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1 those and start dealing with that process. It's prepared for
2 them to take today.

3 THE COURT: Do it today, yeah.

4 MR. HIXSON: It's ready to go today.

5 Also, to make sure that we're clear on this. There is a
6 copy of the transcript that was outstanding. We're assured
7 and Mr. McGuire indicated that he has full copy of the trial
8 transcript that was ordered by Dennis Markley and he indicated
9 -- it's not in here but he already has a copy of it, so we're
10 on the same page with that.

11 THE COURT: All right. Since your acknowledgment list a
12 -- does it have a line item ---

13 MR. HIXSON: It has a line item for every ---

14 THE COURT: All right, then, I would suggest that you
15 have someone down there with counsel this afternoon so that as
16 you go through it, you can put your hands on it and show him
17 what it is.

18 MR. HIXSON: And if it's too much to go through, I just
19 want to know ---

20 THE COURT: Otherwise, I mean, I think it would be easier
21 if the person who prepared it went down this list and says,
22 okay, here's this and here's that.

23 MR. HIXSON: And we're prepared to do that, Your Honor.

24 THE COURT: All right. If you would, make sure there
25 someone down there to assist him.

State v. Cottrell - 2003-GS-26-0020

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MOTIONS

1 MR. MCGUIRE: Just, our practice is, to make sure that we
2 do have a good record, we'll scan all this in to a electronic
3 copy, and then we'll file a motion to have the State certify
4 the discovery is complete and that's the full content of
5 everything that we have so we'll have a good record.

6 THE COURT: Excellent.

7 MR. MCGUIRE: I think that's all I have. Any other
8 housekeeping stuff?

9 I think that's all we have, Your Honor.

10 THE COURT: Okay. All right. Thank you very much.

11 MR. MCGUIRE: Thank you, Judge.

12

13 (ADJOURNED.)

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State v. Cottrell - 2003-GS-26-0020
CERTIFICATE OF COURT REPORTER

10

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus Luzenski Allen Cottrell, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on June 18, 2013.

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


Kay H. Richardson
Official Court Reporter

March 4, 2015.

1
2 STATE OF SOUTH CAROLINA) PARTIAL TRANSCRIPT OF RECORD
3 COUNTY OF CHARLESTON) CASE NO: 2003-GS-26-0020
4

5 -----
6 B E F O R E: The Honorable Larry Hyman

7 June 12, 2014
8 -----

9 STATE OF SOUTH CAROLINA,

10 Plaintiff,

11 vs.

12 LUZENSKI COTTRELL,

13 Defendant.
14

 ORIGINAL

15 A P P E A R A N C E S

16 Scott Hixson, Esq.
17 Attorneys for the State.
18

19 Teresa Norris, Esq.
20 Attorneys for the Defendant.
21

22
23 Official Court Reporter
24 Natalie Dahl, RPR
25

P R O C E E D I N G S

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MR. HIXON: Scott Hixson on behalf of the State. Solicitor Richardson is at a funeral hall, so he was not able to be here today. Ms. Norris with defense is present.

MS. NORRIS: I'm here for Mr. Cottrell, and Mr. McGuire should be on his way.

THE COURT: And Mr. Cottrell, is he going to be here?

MS. NORRIS: He is not, Your Honor. Mr. McGuire had E-mailed a waiver that he has executed, and we have mailed the original of that to the --

MR. HIXSON: We have received that as well, Your Honor.

THE COURT: What do we have for today? A little housekeeping, the Clerk represented here -- you folks want to subpoena 700 jurors; is that right?

MR. HIXON: That is correct, Your Honor. We have proposed language and a proposed order to subpoena an additional 700 jurors for this prosecution, for this trial in September. Do you mind if I hand up the proposed language?

THE COURT: Yes. What do you think about that, Counsel?

MS. NORRIS: No objection, Your Honor.

1 THE COURT: Do you need this marked or anything?
2 Let's sign it right now.

3 MR. HIXON: I guess I'll take it back, if you want
4 to sign it.

5 THE COURT: Okay. You will have that filed with
6 the Clerk, please.

7 MR. HIXON: Yes, sir.

8 THE COURT: What else do we have this morning?

9 MR. HIXON: I think the substantive issue is
10 probably to finalize or place objections or come up
11 with the final juror questionnaire. I think that is --
12 we have one older scheduling matter we had, Judge,
13 indicating a time to present the issue of a Blair
14 hearing -- a necessity of Blair hearing before the
15 Court, yes or no as to whether we were going to do that
16 or not, and it seemed appropriate to address that
17 matter, and I mentioned that to Ms. Norris today.

18 There is a matter of consenting. As Your Honor is
19 aware, Mr. Cottrell is convicted of substantive
20 offenses, and those exhibits are held at the Clerk of
21 Court's Office of post-conviction. Prior counsel had
22 consented to allow the release of those exhibits to the
23 evidence custodian for the purposes of trial
24 preparation on the murder. We submitted consent
25 language to the Court to release those exhibits, and I

1 believe Your Honor has a package -- do you want to see
2 that?

3 THE COURT: Ms. Norris, how about that? We're
4 talking about the exhibits introduced in the prior
5 trial?

6 MS. NORRIS: Our only concern by that is, one, we
7 question whether we're releasing just hard copies or
8 whether we're releasing, for example, actual weapons.
9 I know they were admitted before with photographs and
10 with the actual weapon. Are we talking about releasing
11 all of that to the State?

12 MR. HIXON: The Clerk's Office would keep
13 photographs and, you know, certified copies of the
14 photographs of the shell casings, those types of
15 things. Those are evidence in the murder, and they
16 would be resubmitted to Lori Rabon (phonetic) at the
17 Clerk of Court's Office to re-present as evidence in
18 the murder trial, and then -- Lori with Horry County
19 Police Department, if I misspoke, I apologize. She
20 would take possession of the physical evidence that
21 can't be -- not just photographs. Documents can be
22 Xeroxed, and those types of things. Does that answer
23 your question? So they would take possession of
24 weapons --

25 THE COURT: And what access would the defense have

1 to those?

2 MR. HIXON: Complete access as to any other trial
3 preparation goes. Set up an appointment with Lori in
4 evidence to look at it. If they needed to test it --

5 THE COURT: There hasn't been any motions filed,
6 but I want to make certain that the defense has access
7 to those or any forensic testing or anything that might
8 be appropriate in this case.

9 MR. HIXON: Absolutely. That is the intention.
10 It would be like a first trial, the access to it, just
11 like anything else.

12 THE COURT: Have you shown this order to Counsel?

13 MR. HIXON: I have not, that is why I approached
14 Your Honor.

15 THE COURT: Well, let's hand it over. I want to
16 be sure that we have an agreement as to how that will
17 be handled.

18 MR. HIXON: Procedurally, what we had received
19 from Mr. McGuire was that he was just concerned that
20 that would appear -- if he was consenting to the
21 introduction of that evidence, and that is not our
22 issue.

23 THE COURT: No. No. No. No. No. That's not
24 what we're doing here. What we're trying to do is make
25 the accessibility to evidence for use during a trial or

1 other testing such that both the defense and the State
2 would have access.

3 MR. HIXON: And we're specifically referring only
4 to State's exhibits, Your Honor. We're not asking for
5 the defense exhibits, just State's.

6 MS. NORRIS: As long as we do have access to it,
7 we have no objection to that.

8 THE COURT: Okay. Counsel, you have read this
9 order? Do you have any objection to this order at all?

10 MS. NORRIS: I do not, Your Honor.

11 THE COURT: I see here that there are places for
12 consent, but you're consenting on the record to this?

13 MS. NORRIS: I'll be happy to sign consenting
14 if --

15 THE COURT: Let's do that. You tell me you are
16 consenting, but I'll hand it back and you can sign.

17 MR. HIXON: Thank you, Your Honor.

18 (A brief pause in the proceedings.)

19 THE COURT: All right. What else do we need to
20 address? Counsel, there were some orders that you had
21 submitted to me this week, and they have been signed.
22 I think there were two. I believe there were two.
23 Anyway, I will have to sign those orders, and they are
24 available.

25 MR. HIXON: The substantive issues relating to the

1 juror questionnaire, in your scheduling order, Your
2 Honor, that you had signed, you indicated that we would
3 submit the issues that we had consented to and our
4 proposed juror questionnaires. Looking at the time
5 line, I believe that was back in January. We had a
6 status conference, I believe, to address some of those
7 issues, and as you are well aware, we had weather
8 emergencies and such that that was postponed. I
9 believe court was closed during that period of time.
10 So we're here to finalize that so the Clerk can get
11 that final questionnaire out to the prospective jurors,
12 Your Honor.

13 THE COURT: All right. You have attached a
14 proposed questionnaire -- or you have attached actually
15 the juror questionnaire that I approved early on in
16 this case, and you seem to have some objection to that.
17 It involved, I think, some 48 questions. The defense,
18 I believe, should have a copy of that. Do you have a
19 copy of it?

20 MS. NORRIS: I do, Your Honor.

21 THE COURT: Okay. Let me first ask what is the
22 defense's position on the questionnaire that I had
23 originally approved?

24 MS. NORRIS: Your Honor, as such, it is adequate,
25 but we submit that the questionnaire that we proposed

1 is more expansive, and if we use that, we'll actually
2 save us time in the courtroom in conducting voir dire.

3 THE COURT: I'm sorry, I don't have your -- do you
4 have an extra copy of the one that you submitted?

5 MS. NORRIS: I don't have an extra one, but I can
6 hand you the one I have in my hand.

7 MR. HIXON: I have it.

8 THE COURT: Could you briefly tell me how it
9 expands the order that I previously -- or the
10 questionnaire that I previously approved?

11 MS. NORRIS: There are more background questions,
12 such as -- I think we go into more depth in terms of
13 the types of news and -- Mr. Hixson is helping me out,
14 actually. He has a copy of it. It goes into more
15 background about particularly the news sources,
16 Internet, magazines, et cetera that jurors follow.

17 THE COURT: Well, it's a 16-page questionnaire
18 involving some 68, 70 questions, something along there
19 that will require significantly more information from
20 the jurors. My concern is that we just have jurors
21 that are not going to do it and we'll have to deal with
22 that. I know you are concerned that it may expand the
23 time in which we are examining the jurors for trial,
24 and I can understand that. I can appreciate that, but
25 I think that is just something we will have to deal

1 with. Is there anything specific that you believe is
2 not covered in the jury questionnaire? And I
3 understand you want to be a little more expansive, but
4 we can do that in court. Is there any area of inquiry
5 that you have added to your questionnaire that was not
6 touched on in the -- Mr. Hixson, I assume, this is the
7 one I previously approved, is it not?

8 MR. HIXON: That is correct, and we resubmitted
9 it. I believe that comes from the Court Administration
10 from prior Horry County cases. Court Administration
11 has a model of jury instruction questions.

12 THE COURT: Isn't it expanded somewhat from the
13 model that the Court Administration had? I did that at
14 the -- when we first came involved in this -- or became
15 involved in it, it is more expansive, but, Counsel,
16 again, is there an area of inquiry that you feel is not
17 touched on in the proposed order or questionnaire that
18 you would specifically like to have addressed, and your
19 reasons?

20 MS. NORRIS: Specifically, Your Honor, that would
21 be on the last two pages, Question 67, 68 and 69 on our
22 form. 67 and 68 just give some background so we have
23 sort of a starting point of where they are on the death
24 penalty as a punishment.

25 THE COURT: Okay.

1 MS. NORRIS: No. 69 just asks for -- is just an
2 open question on whether they are aware of any other
3 reason.

4 THE COURT: Well, there again, those are matters
5 that we're going to have to go into during the voir
6 dire. I'm going to approve the questionnaire that I
7 had previously provided. I think it is adequate, and I
8 don't think it is so lengthy that jurors will be
9 discouraged from answering those questions. I'm going
10 to have that questionnaire issued by the Clerk.

11 Now, I will need an order concerning that.
12 Solicitor, will you prepare the appropriate order for
13 that?

14 MR. HIXON: Yes, Your Honor, and I'll forward it
15 to Mr. Norris and Mr. McGuire.

16 THE COURT: Make sure they see it, okay.

17 MR. HIXON: On my checklist that I thought we
18 needed to address, the last was the Blair hearing, and
19 just reading what the status is of this under your
20 scheduling order, and that is on Tuesday, January 28th,
21 the juror questionnaire. The Court will also address
22 whether or not it will be necessary to hold a Blair
23 hearing in this case, and if necessary, to schedule a
24 date for the hearing.

25 Your Honor, is well aware, as the prior issue, we

1 didn't get to that, so I thought we needed to probably
2 address that with Counsel if there is a necessity to
3 determine whether Mr. Cottrell is competent, or address
4 those issues in this hearing.

5 THE COURT: Counsel.

6 MS. NORRIS: Your Honor, at present, I don't
7 believe there is a need for that, but I would ask that
8 we hold that. I think we have --

9 THE COURT: I certainly would do it if there is
10 any kind of a question concerning his competency. I
11 will allow you to raise it at any time.

12 MS. NORRIS: Yes, sir.

13 THE COURT: And we'll go into that, okay.

14 MS. NORRIS: At this point, I'm not aware of any
15 competency issues.

16 THE COURT: All right. Mr. Hixson.

17 MR. HIXON: Yes, Your Honor. As Your Honor is
18 well aware, Mr. Cottrell was convicted of several
19 offenses. The indictment in that prior case was a
20 multi-count indictment, and as such, during the prior
21 run of the trial with Mr. Axelrod and Ms. Armstrong,
22 you signed an order certifying that the indictment
23 should be modified eliminating those other counts or
24 elements in it, and I want to be sure that we're clear
25 with current counsel to serve this copy on them and to

1 make sure there is no objections to the nature of this
2 redacted indictment going forward.

3 THE COURT: And you are serving it on them now?

4 MR. HIXON: That's correct. We just wanted to
5 clear that up.

6 THE COURT: Counsel, I'm sure you're aware of
7 that?

8 MS. NORRIS: Yes, Your Honor.

9 MR. HIXON: And we are providing a copy of the
10 order that Your Honor had signed, dated January 6,
11 2012, indicating that -- I think that was actually a
12 motion of defense counsel to redact that indictment to
13 reflect the fact that he's been convicted of some of
14 those underlying charges, and the only issue for the
15 jury in this one is the murder.

16 MS. NORRIS: We have no objection to the redacted
17 indictment. We believe that is appropriate for the
18 jurors.

19 THE COURT: Have we issued an order indicating,
20 Counsel, who will be lead counsel in this matter, first
21 chair?

22 MS. NORRIS: I believe the order indicates that
23 Mr. McGuire is lead counsel.

24 THE COURT: Okay. I just want to be sure that we
25 had done that. Is there anything else?

1 MR. HIXON: I believe those are the only issues we
2 have. I think you have addressed all of them at this
3 stage of the prosecution.

4 THE COURT: Okay. Counsel, did you have anything
5 that you needed to address with me, any funding issues
6 or anything?

7 MS. NORRIS: I do have one small funding issue,
8 but I don't have anything else for the record.

9 THE COURT: You want to take that up with me in
10 chambers?

11 MS. NORRIS: Yes, Your Honor.

12 THE COURT: Okay. Is it something that has
13 already been submitted?

14 MS. NORRIS: No, Your Honor.

15 THE COURT: Okay. All right. Anyone else need
16 anything?

17 MR. HIXON: Nothing further at this time, Your
18 Honor.

19 THE COURT: Okay.

20 MR. HIXON: We received another supplemental
21 packet from South Carolina Department of Corrections,
22 and this does not need to be on the record, but it is
23 the service of a new batch of SCDC -- I guess it
24 doesn't need to be on the record., Your Honor.

25 THE COURT: Okay. Counsel, if you would, they'll

1 let you come around and we'll discuss that matter.

2 (Whereupon, the proceedings concluded.)

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CERTIFICATE OF REPORTER

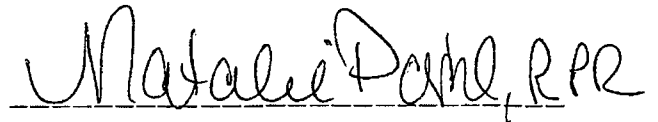
STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true and accurate Transcript of Record captioned on the 12th day of June 2014.

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

February 7, 2015

A handwritten signature in cursive script that reads "Natalie Dahl, RPR". The signature is written in dark ink and is positioned above a horizontal line.

Natalie Dahl, RPR

Court Reporter

STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

COUNTY OF HORRY) CASE NO: 2003-GS-26-0020

MOTIONS

B E F O R E: The Honorable Larry Hyman

July 17, 2014

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

LUZENSKI COTTRELL,

Defendant.

 **ORIGINAL**

A P P E A R A N C E S

Scott Hixson, Esq.
Jimmy Richardson, Esq.
Attorneys for the State.

William (Bill) McGuire, Esq.
Attorneys for the Defendant.

Official Court Reporter
Natalie Dahl, RPR

P R O C E E D I N G S

MR. MCGUIRE: Now that Mr. Cottrell is in the courtroom, if I could put on the record, Ms. Norris is not likely to be here this morning, but we'll waive her presence and we'll go forward.

THE COURT: Mr. Cottrell, you understand Ms. Norris will not be here, but your other counsel will be here?

MR. COTTRELL: Yes, sir.

THE COURT: Is that all right with you? Gentlemen, what do we have this morning that we need to do?

MR. RICHARDSON: Your Honor, it appears that we've got -- Mr. McGuire filed about 55 motions. Now, we've agreed to a bunch, and we'll go through those.

THE COURT: Let me -- before you do that, we do have some matters concerning jury selection that give the Clerk some concern, and if we could address those initially so we could let her get back to her duties, and we can handle those things. If you would, Madam Clerk, tell me your concerns.

THE CLERK: I'm really asking if I can have the authority to -- for all the ones that are over 65 years old that have asked to be excused, and the statute says they can if they have been asked to do so, and I have

1 verification from the Jurors Election Commission out of
2 Columbia what their date of birth and age they are,
3 that I have the authority to do the affidavits and sign
4 off that they've asked for excusal for this reason and
5 that I may go ahead and contact these individuals,
6 because I summoned 700 people, that I could go ahead
7 and contact these individuals and tell them they do not
8 have to appear that day. I can get those out of the
9 way, and then when we do go over the juror
10 questionnaires, I can go through the list at that time
11 and let you know which ones I have affidavits for,
12 which you'll already see. Because, as you are aware, I
13 have a site off of my Web page where you can go in and
14 print out all of this information with your passwords.
15 I assume you have your passwords?

16 MR. MCGUIRE: Yes, ma'am.

17 THE CLERK: We are compiling everything today to
18 get it together where you can see, but we will put it
19 on record as well, if I can have that authority to do
20 that and have those out of the way.

21 THE COURT: All right. Madam Clerk, we appreciate
22 this is a retirement community, and historically we
23 have generally had a greater number or percentage of
24 over 65 potential jurors, and what I usually encounter
25 when I travel about the State, we all appreciate that

1 fact. My concern is that I want to make certain that
2 each juror is aware of the fact that that is an
3 exemption which they may claim, they are not required
4 to claim. They are welcome to serve. I'm sure that
5 even so, we're going to have folks over the age of 65
6 that have not asked to be relieved. But is there some
7 way we can be assured that these potential jurors
8 understand that they are not excluded, they simply have
9 the right to claim an exemption if they are over 65? I
10 don't think that the verification of age is really a
11 big deal. I think we can all agree that the Election
12 Commission has that information and we know -- or can
13 easily confirm who is 65 years of age or older. But
14 you are telling me that you have people who have
15 already sent in requests to be --

16 THE CLERK: These are the only ones. I don't even
17 look at their date of birth unless they ask to be
18 excused because they are over 65. If they don't mark
19 that block, I'm assuming that they are coming in.

20 THE COURT: Counsel, let me hear from Mr. McGuire
21 in regard to that.

22 MR. MCGUIRE: Sure. We have no objection. In
23 fact, with regard to other exemptions where people have
24 travel plans and bought tickets, and those things, we
25 generally don't have any objection to let them go.

1 THE COURT: I think that was something else that
2 the Clerk was going to address as well. She spoke to
3 me a moment ago about these particular issues. Do you,
4 Mr. McGuire, believe that the jury questionnaires that
5 went out adequately informed the juror that they are
6 not excluded because of their age, but simply have the
7 right to claim an exemption?

8 MR. MCGUIRE: I would agree with that.

9 THE COURT: You agree. Very well. So do you want
10 to be heard on that, Mr. Richardson?

11 MR. RICHARDSON: We have no objection for excusing
12 65.

13 THE COURT: It is granted as to those. Now, it
14 raises the question about other jurors who have asked
15 -- well, we are sort of crossing over -- let's talk
16 right now about exemptions, not transfers. The example
17 you gave would make a juror at least eligible to have a
18 transfer, but let's talk about the exemptions. What
19 other exemptions do you feel that we could handle
20 without bringing in these jurors? What about jurors
21 that have criminal records?

22 MR. MCGUIRE: If the Clerk verifies by pulling the
23 sentencing sheet, we would have no objection.

24 THE COURT: Let me tell you what I would like to
25 do. The Clerk informs me that she would only be able

1 to bring up a criminal record from Horry County,
2 however, the Sheriff's Department could go nationwide,
3 and I think the Solicitor's Office as well. Why don't
4 we do it this way. If someone has a criminal record
5 verifiable by the Clerk, and that is a record that
6 would disqualify the potential juror, that those can
7 certainly be done. Now, it has been -- at least in my
8 experience -- the practice of the Solicitor's Office to
9 run every juror to see if there is a juror with a
10 disqualifying criminal record; is that correct?

11 MR. RICHARDSON: Yes, sir.

12 THE COURT: What I would like for you to do is
13 have the Clerk then provide you with a list of those
14 which she's been able to verify. If you could then
15 supplement that list and provide that list to counsel
16 as well saying that your search has determined that
17 these other witnesses as well have disqualifying
18 criminal records, and then perhaps if you have a
19 challenge, Mr. McGuire, to any of those, you could
20 bring it to my attention or to the Clerk's attention,
21 and we can deal with it. If there is any other
22 juror -- and I could tell you from my experience a lot
23 of jurors will not report it, it happens almost every
24 qualification where we end up having to bring up jurors
25 that have criminal records that don't tell us about it.

1 So at least if we can find the ones that there is no
2 question about, and those people have reported it, we
3 will excuse those. Those that have not, I think we
4 need to bring them in and verify whether or not that
5 is, in fact, the individual with the criminal record,
6 because that also comes up on a fairly regular basis
7 where a person has a similar name and, in fact, that
8 person does not have a criminal record. I even had one
9 occasion where he was given a pardon and was able to
10 come back.

11 So what we'll do is if they report it and they are
12 on the list, we can agree, we will excuse them. Those
13 other persons, I would like for everybody to know who
14 they are and we will -- if they do not add it in, we'll
15 bring them in and we will have to call them up and
16 verify whether or not they, in fact, have the criminal
17 record, okay? Fair enough?

18 MR. McGUIRE: No objection, Judge.

19 THE COURT: Is that policy all right with you?

20 MR. RICHARDSON: Yes, sir.

21 THE COURT: You understand what we're talking
22 about?

23 THE CLERK: Yes, sir.

24 THE COURT: So no problem?

25 THE CLERK: No, sir.

1 THE COURT: All right. Gentlemen, let's address
2 other disqualifications. If a person reports that he
3 has served in the Court of General Sessions or Common
4 Pleas within the last year, this Clerk should certainly
5 be able to verify that.

6 THE CLERK: Last three years?

7 THE COURT: Well, disqualification in the last
8 year, and an exemption in the last three years. There
9 is a difference.

10 THE CLERK: Okay.

11 THE COURT: I think it should be treated
12 differently. If it is a disqualification, you should
13 be able to determine whether or not a person has been
14 called for jury service in the last year, which is a
15 statutory disqualification. All right. Those persons
16 should be notified that they are excused. Any
17 disagreement, Mr. McGuire?

18 MR. MCGUIRE: No objection.

19 MR. RICHARDSON: No, sir.

20 THE COURT: Those persons who have notified you
21 that they would like to claim an exemption of service
22 within the last three years, you should be able to
23 verify that as well. Do you have any objection to
24 granting that exemption if the Clerk can verify it?

25 MR. MCGUIRE: No objection, Your Honor.

1 MR. RICHARDSON: None, Your Honor.

2 THE COURT: All right. What about persons who are
3 employed within the courthouse, Horry County officials?

4 MR. McGUIRE: No objection as long as they provide
5 that to the Clerk.

6 THE COURT: They can provide an affidavit and
7 verify it, okay. Is that correct? Any person who
8 works for the Department of Corrections?

9 MR. McGUIRE: We want them to come in.

10 THE COURT: All right. Then I'll require them to
11 come. I'm trying to think of all of the
12 disqualifications as I go through them in my mind. Is
13 there another disqualification?

14 MR. McGUIRE: There is read and understand the
15 English language, and I think you would have to bring
16 them up. There is child care under seven --

17 THE COURT: That would be an exemption. I'm
18 talking about disqualifications. Read, write and
19 understand the English language.

20 THE CLERK: I'll have them come in anyway.

21 MR. McGUIRE: Participate in the Grand Jury that
22 indicted Mr. Cottrell.

23 THE COURT: Anyone on the Grand Jury -- gentlemen,
24 normally the disqualification is -- as I do it -- is
25 usually within the last three years. This case

1 predates that, so I would like -- when was the
2 Defendant initially indicted?

3 MR. MCGUIRE: 2003.

4 MR. RICHARDSON: Yes, sir, 2003. 11 years.

5 THE COURT: All right. Why don't we say, If you
6 were on the Grand Jury -- the date of offense was?

7 MR. HIXSON: December 29, 2002.

8 THE COURT: 2002, 2003 and 2004, do you think that
9 would adequately cover it?

10 MR. MCGUIRE: I do.

11 THE COURT: And we would automatically exempt
12 anyone who served on the Grand Jury during those years,
13 2002, 2003 and 2004.

14 THE CLERK: You consider that like a
15 disqualification?

16 THE COURT: Disqualification. You agree?

17 MR. MCGUIRE: Yes, sir.

18 THE COURT: You agree, Mr. Richardson?

19 MR. RICHARDSON: Yes, sir.

20 THE COURT: Very well, gentlemen. I think we
21 discussed the statutory disqualifications, and we would
22 need to bring them in if they are, of course, any
23 mental or physical infirmity, we would need to talk to
24 them about that.

25 MR. RICHARDSON: One more question. I doubt it

1 would ever come up, but somebody under the age of 18
2 would be disqualified. Is the requirement that they
3 live in Horry County --

4 THE COURT: We could do that. If they could
5 verify by affidavit their place of residency, okay. If
6 they do not live or are not residents of Horry County.

7 THE CLERK: If we summoned them and they are not
8 residents, if we are able to get in touch with them, we
9 ask them to send a copy of their driver's license to
10 verify.

11 THE COURT: You agree that if the Clerk verifies
12 that they are not residents of Horry County, they would
13 be disqualified?

14 MR. McGUIRE: Yes, sir. And we would accept more
15 than just a driver's license; for instance, if they had
16 a lease to an apartment, a lot of people keep their old
17 driver's license.

18 THE CLERK: What if I could show on the Internet
19 they are that person and they have like a Zaba search,
20 or whatever, and print out their current address?

21 MR. McGUIRE: That's fine.

22 THE CLERK: Some of them I'll be unable to locate,
23 which I'll give to Oliver and the Sheriff's Office, and
24 then they will present me with an affidavit after they
25 do their search --

1 THE COURT: That will supplement everything else
2 then, okay.

3 MR. RICHARDSON: Just to make sure, is that being
4 a current address? We've all lived somewhere else in
5 another county at some point, but if it is a recent
6 address, we have no problem with it.

7 THE COURT: All right. If it is questionable, I'm
8 sure the Clerk will require them to come in.

9 MR. McGUIRE: The only demographic we have an
10 issue that comes up from time to time is college
11 students, people that move some place and don't
12 consider themselves a resident of that county because
13 they are still a resident of their home county, we want
14 them to come in.

15 THE COURT: Okay. All right.

16 THE CLERK: All right. People with doctor's
17 excuses that could provide me a doctor's excuse?

18 THE COURT: All right. Let's talk about -- you're
19 talking about disqualifying medical or mental
20 conditions?

21 THE CLERK: They are asking to be excused because
22 of some medical issue, that they have provided a
23 doctor's excuse from their doctor to me.

24 THE COURT: Well, I would think that, you know, we
25 are in a gray area. If someone's wife or husband sends

1 an affidavit saying that the person suffers from
2 Alzheimer's, say, obviously I would think that person
3 would be excused, but then there are people who simply
4 say my leg hurts, I think that they are probably going
5 to have to come in. Mr. McGuire?

6 THE CLERK: If it's okay, I'll ask that --

7 THE COURT: In a nursing home or --

8 THE CLERK: If they refuse, say, they are in a
9 nursing home and can't come, I'll present that at that
10 time.

11 THE COURT: Say this, anyone who is -- let's let
12 the Clerk excuse anyone who is a resident of a nursing
13 facility or anything of that nature, hospital, an
14 institution, any person institutionalized or in a home,
15 that sort of thing, but I think we need to draw the
16 line, because that person normally could not appear
17 anyway.

18 MR. MCGUIRE: I agree. I agree there is going to
19 be a sliding scale for medical hardships, some that do
20 render people completely unable to serve, and yet there
21 are some who, if the Court was to take more frequent
22 breaks, that sort of thing, we can accommodate. We
23 have no objection if it is clear on its face and a
24 doctor says they are clearly unable to serve as a
25 complete bar, we probably would have no objection to

1 letting them go. But it might be difficult --

2 THE COURT: All right. Let's do this. If we have
3 a doctor's letter that says that they are either
4 incompetent or physically unable to attend or they are
5 residents of a nursing facility or in-house care
6 facility, those persons would be -- you could excuse
7 them if they ask to be excused. Mr. Richardson?

8 MR. RICHARDSON: Yes, sir, that is fine.

9 MR. MCGUIRE: No objection.

10 THE CLERK: If I have any least bit of doubt, I
11 tell them, I'm sorry, you have to come in. You don't
12 have to worry about that.

13 THE COURT: Very well. Okay. What about
14 preschool aged children?

15 MR. MCGUIRE: That is one of those things, Judge,
16 the question that the Court asks somebody is who is
17 taking care of them today that allows you to come to
18 court, and you find out that people do have a network
19 of support where they are able to make it work for
20 them. This trial -- and I don't know if the jury is
21 going to be sequestered or not, we have a motion they
22 are not, obviously. I think the publicity is weighing
23 to a degree where we can do it without sequestering a
24 jury, but I think they do have to come in.

25 THE COURT: All right. We'll bring them in.

1 Anyone has an objection, we'll honor it and bring them
2 in. How about -- I guess your same objection would be
3 to caregivers?

4 MR. MCGUIRE: It would be the same.

5 THE COURT: Same as to caregivers, all right. For
6 age or incompetence?

7 MR. MCGUIRE: Yes, sir.

8 THE COURT: All right. And we've addressed the
9 issue of a person who has -- who wishes to be excused
10 because of the service in the last three years?

11 MR. MCGUIRE: Yes, sir.

12 THE COURT: Of course, if you've been on the Grand
13 Jury, in addition to those three years we said, been on
14 the Grand Jury in the last five years, you may claim
15 that as an exemption, but we'll disqualify 2002, 2003
16 and 2004. We're going to simply give them the option
17 if they've served in the last five, okay. All right.

18 THE CLERK: One more. School will be back at that
19 time, so we will have school employees.

20 THE COURT: All right. What about that? Full
21 time?

22 THE CLERK: Students and employees.

23 THE COURT: Students and employees at schools.

24 MR. MCGUIRE: Well, it will be September, early in
25 the year, and exams are towards the end.

1 THE COURT: But we can't take a student out for
2 two weeks.

3 MR. McGUIRE: It is a long time. When I was a
4 student at Coastal, I would have welcomed the break.

5 THE COURT: When I was at Carolina I probably had
6 two weeks where I probably didn't show up (laughing).

7 MR. McGUIRE: I understand the Court's concern.

8 THE COURT: I believe that if a student or an
9 employee of the school can provide verification
10 satisfactorily to you, and not just a note saying this
11 is what I do, we -- something like a student's schedule
12 or curriculum, what they are doing, or in the case of
13 an employee a letter from the principal or the dean, or
14 whoever might be in charge, saying what that person
15 does. If it is clear on its face and you have
16 acceptable verification, I would think that you could
17 excuse those, but anything in a gray area, anything you
18 are not sure about, I would like to have them come in;
19 is that fair, Mr. McGuire?

20 MR. McGUIRE: I think with regard to junior
21 college, technical or college, it would have to be full
22 time. If it is part time --

23 THE COURT: Yeah. And I know Phoenix on-line,
24 night classes.

25 MR. RICHARDSON: I have no problem with that. I

1 do -- I would rather have teachers, even though it is
2 the first week of school, I would like them to come in.
3 We're talking about one day, and you can hear it and we
4 would cover that, and then they very well may be
5 excused.

6 THE COURT: If you want them to come in, we will
7 bring them in. We'll only allow the Clerk to excuse
8 people that we can all agree on. I want everyone to
9 have a fair trial here. I'm trying to think of any of
10 the statutory -- what about medical procedures where a
11 person -- I'm usually very careful about that. I know
12 how difficult it is to have a specialist arranged for a
13 medical procedure, a surgery or something of that
14 nature. If a person can provide us with copies of his
15 orders, letter from his doctor saying that a surgical
16 procedure will be done and it is the middle of the
17 trial, it should not be delayed.

18 MR. MCGUIRE: No objection.

19 THE COURT: A person taking chemotherapy, person
20 on dialysis, something of that nature, I would
21 certainly think that we could excuse those persons;
22 would you agree?

23 MR. MCGUIRE: I agree, Judge.

24 MR. RICHARDSON: Yes, sir.

25 THE COURT: Madam Clerk, anything questionable

1 we'll have them come in. As I said, a dialysis patient
2 taking that three, four times a week, or chemo patient,
3 a person scheduled for a medical procedure during the
4 period that we'll be trying this case, get a letter
5 from the doctor saying it is necessary and should be
6 done as scheduled, we will -- they are eligible for
7 transfer, they should understand that transfer.

8 THE CLERK: I do -- if I do not have a
9 questionnaire, I will have an affidavit.

10 THE COURT: Of course all of these are going to be
11 made available to the defense and to the State prior to
12 trial, okay, if you want to visit and look at them.

13 THE CLERK: What about travel plans? They send me
14 the itinerary, the plane is taking off at 8 o'clock,
15 September 15th, Monday morning, I've already paid for
16 it. I've already gotten that, and I said, I'm sorry, I
17 cannot verify at this time.

18 MR. McGUIRE: Generally, if someone paid for a
19 plane, hotel, we have no objection.

20 THE CLERK: I have them provide me with any kind
21 of proof.

22 THE COURT: Mr. Richardson, you don't want me
23 telling them you made them come in, do you?

24 MR. McGUIRE: I would insist on that (laughing).

25 THE CLERK: The answer from this juror was, Well,

1 who is going to reimburse me for my plane ticket.

2 MR. RICHARDSON: If they were leaving on the 15th,
3 I see that. If they were leaving later and available
4 on the 15th so that they could come in and answer, say,
5 the same thing, we would end up excusing them. I don't
6 want to create a loophole.

7 THE COURT: Where everyone buys a plane ticket.

8 MR. RICHARDSON: Run off to Disney World. Because
9 it would cross my mind if I had to sit on a jury for
10 two weeks, Disney wouldn't look bad.

11 THE COURT: If their reservation was made and they
12 are going to have already left or leaving on the 15th,
13 could we set up those people to come in on the 15th?

14 THE CLERK: Yes. If they are -- like some people
15 may have left that Friday and they won't be back until
16 the 19th or 20th. Well, they are going to miss all of
17 the qualifications, unless I tell them they can't go on
18 their trip on that Friday before the 15th; understand
19 what I'm saying? Say the plane left on the 11th, they
20 won't be back until the 19th, I'm sorry, you can't go
21 because you have --

22 THE COURT: Well, if they already have it and made
23 the plans and already prepaid, that's fine. If they
24 are thinking about it later in the week and they are
25 going to be available to come on the 15th --

1 THE CLERK: I wouldn't go for that anyway.

2 THE COURT: Okay. That is how we'll handle that.

3 MR. RICHARDSON: Judge, just to point out, I
4 really forgot about this part, but we are going to
5 have -- on August 18th we are going to be able to
6 review these, and maybe we can cut some of the other
7 ones loose, too. On August 18th we're supposed to
8 review all of the excusal forms, so there is a good
9 chance that a bunch of those guys on the 18th will be
10 gone anyway.

11 THE CLERK: I'm hoping to be able to do a lot of
12 this so I might be able to say, Number 2, such-and-such
13 name, Number 4, such-and-such name, over 65 and I have
14 an affidavit, and you'll be able to go through it.

15 THE COURT: That's the purpose of today.

16 THE CLERK: Right. I'm just trying to help that.

17 THE COURT: Gentlemen, are there any other
18 exemptions that we haven't addressed?

19 MR. MCGUIRE: Just general hardship, business will
20 shut down if someone is not there, farmer with a crop.

21 THE COURT: I think we need to have them come in.
22 We have all sorts of stuff. Someone says I sell real
23 estate, I don't make my commission that week, that is
24 not closing business.

25 THE CLERK: My only other issue was -- he said he

1 had a motion about being sequestered. I would need to
2 know no later than August 1st on that, because if they
3 are, I have lots of things I have to do to make
4 arrangements and stuff, and I can't wait until the last
5 minute.

6 THE COURT: Let me hear you on the issue of
7 sequestration. I think you are moving forward, and,
8 Mr. McGuire, you oppose?

9 MR. MCGUIRE: Yes, sir.

10 THE COURT: Mr. Richardson, I'll hear from you.

11 MR. RICHARDSON: Out of an abundance of caution,
12 we ask that the jurors be sequestered. That has come
13 to be --

14 THE COURT: Have we ever tried one in this county
15 where they were not? Is it statewide or --

16 MR. RICHARDSON: I don't know about statewide.
17 I'm sure we have statewide, but in this county, you
18 know, it is always easier to do it once or a second
19 time right. You know, this did receive a good bit of
20 media attention, and I agree with Mr. McGuire that it
21 was a long time ago, but there are still a lot of
22 people that know about Joe McGarry.

23 THE COURT: And I'm concerned that -- there
24 certainly is going to be media coverage and that sort
25 of stuff, Mr. McGuire, and that is what bothers me

1 about it. Tell me what your thoughts are.

2 MR. McGUIRE: Judge, you know, I did research with
3 regard to publicity, and there was some publicity and
4 it was pretty intense when it happened, but it has been
5 -- it has been a dozen years -- over a dozen years. I
6 think it has reached a point where it is no longer a
7 high profile, high publicized case. I don't disagree
8 that when jury selection starts, it wouldn't be
9 uncommon for a news truck or paper here, and it is
10 going to crank back up to some extent, that is
11 obviously going to happen. I don't think it will
12 happen to the point where we have to take the citizens
13 of Horry County and strip them from their families,
14 jobs. You'll have wage earners where this will be an
15 extreme hardship to miss work.

16 THE COURT: If they are simply on the jury, that
17 will happen.

18 MR. McGUIRE: Exactly. But a lot of people
19 bartend at night, waitress.

20 THE COURT: You would hope they would not be
21 working all night after sitting in the courtroom all
22 day.

23 MR. McGUIRE: It is my experience that --

24 THE COURT: Maybe we need to prevent that.

25 MR. McGUIRE: There are some people that have to

1 pay bills, and they want to work. Some people can work
2 at home without regard to the hours. When it comes
3 down to having a jury fairly decide the case, we want
4 people well rested, not in the strain of trying to end
5 this early, under financial stress, under the strain of
6 not seeing their children and family. There is no
7 reason to do that.

8 The federal government tried the Masowie
9 (phonetic) case without sequestering the jury; we can
10 try this case without sequestering. Plus, it is an
11 extreme burden on the taxpayers and the Clerk of Court.
12 It is my understanding that two weeks of sequestration
13 with SLED details is about \$50,000.

14 MR. RICHARDSON: I agree, it will be expensive.
15 We don't try a lot of death penalty cases, and I don't
16 want to have this jury with even a remote possibility
17 of being tainted by news media. I agree it has waned a
18 good bit. I do also agree that it is going to rock
19 back up in the days and weeks right in the middle of
20 this trial, and I would rather be able to control what
21 they are watching and reading. I mean, it's not
22 California, not going to be six, eight months; at most,
23 about ten days. So with the probability, at least the
24 likelihood of there being a good bit of media coverage,
25 we ask that they are sequestered for these ten days.

1 THE COURT: Mr. McGuire, you know, I certainly
2 don't want to disagree that it might create some burden
3 or inconvenience -- additional inconvenience to be
4 sequestered for the jurors, but for a ten-day trial, to
5 have this jury going home, I can't think of a better
6 way to lose jurors. I'm concerned about that. I'm
7 concerned about the fact that the publicity in this
8 case is going to most assuredly crank back up. This
9 case keeps popping up in the news, and it's been 12
10 years and still pops up. I want to protect your
11 client's right to a fair trial. I want to be sure that
12 this jury is insulated from any inappropriate trial
13 publicity or any contacts.

14 I'm going to grant the motion to sequester. I
15 think that it's going to protect everyone's right to a
16 fair trial here. I understand it is going to be
17 expensive, and that concerns me, but it is just the
18 price that we have to pay. People who come to court as
19 potential jurors for a death penalty case understand
20 that it is going to be a long case, and I think, if
21 anything, they are going to be relieved that we try it
22 in two weeks or so here. It is not like a California
23 case that lasts six months or a year. I'll grant the
24 motion to sequester, okay.

25 What else?

1 THE CLERK: After this, I'll be excused. On the
2 15th, we also have another jury panel coming in, so I
3 think we have scheduled you to be in Courtroom B that
4 week. If it is okay, we'll send the jury panel
5 directly to Courtroom B to keep them separated from the
6 other jury I have coming in on the 15th, which will go
7 to the jury pool room.

8 THE COURT: What arrangements has the Sheriff made
9 to filter these jurors as they come in and get
10 everybody in the right place?

11 THE CLERK: I was proactive on that. I sent out
12 summons differently. The one for this case are printed
13 in green, and the ones in regular are printed in pink.
14 So when they hit the door, the sheriffs will know by
15 the color where to direct them. Plus, I'll have
16 members of my staff set up at tables for someone who
17 does not have their slip, then the Sheriff's Office can
18 send them to my table and I will direct them where they
19 need to go.

20 THE COURT: That sounds like a good plan,
21 Mr. McGuire.

22 MR. MCGUIRE: Now that I'm on notice of some of
23 these issues, I might have an objection to limit the
24 Sheriff's Office interaction with the jury pool and
25 just have the Clerk's staff interact.

1 THE COURT: We can do that. Of course they have
2 to go through security.

3 MR. McGUIRE: Of course. Of course. But
4 different courthouses are different, and I don't want
5 to give the jury the impression that they are in --

6 THE COURT: Let me tell you how this will work
7 out, understanding how the court has to set up. The
8 Courtroom B is our large courtroom, which would
9 accommodate a large jury pool. They will come in, of
10 course, through security. They will be in contact with
11 the security officers there, come through the elevator
12 or the stairs to the third floor.

13 THE CLERK: No, sir. We'll have a table set up on
14 the first floor. As they come through security, they
15 can walk straight to that table after security right
16 then. They never have to come upstairs if they are not
17 on this panel. They'll go straight to the jury pool or
18 send them up to the second floor --

19 THE COURT: Third floor.

20 THE CLERK: Third floor, I'm sorry.

21 THE COURT: So as soon as they come through
22 security, they are contacted by your staff, and your
23 staff will send them directly to the third floor and,
24 of course, there will be security outside of the
25 courtroom, but they don't need to interact with those

1 at all other than show them the door.

2 THE CLERK: That's correct.

3 MR. MCGUIRE: That's fine. No objection.

4 MR. RICHARDSON: Just a question. Melanie has
5 thought through this, certainly, but do you think about
6 300 people will end up showing out of the 700?

7 THE CLERK: It is a good possibility, 300 to 400.
8 I have Conway Rental bringing more chairs so the jury
9 can be set up in the courtroom.

10 THE COURT: How many people does Courtroom B
11 accommodate?

12 THE CLERK: 275, I think. I usually -- for the
13 last time, I think I rented a hundred chairs from
14 Conway Rental the Friday before and set them up.

15 THE COURT: Where do you put them?

16 THE CLERK: Everywhere. Down the aisles, in front
17 of the jury box, set them over to the side. We move
18 that table out over there on this side, we move them
19 out and set rows up over there. Yes, sir.

20 THE COURT: And when we get our jury, we'll take
21 them out, the extra chairs and all of that?

22 THE CLERK: Yes, sir.

23 THE COURT: Any problems, Mr. Richardson?

24 MR. RICHARDSON: Well, Scott just pointed out to
25 me, and this is sort of along the same lines of what

1 Ms. Huggins was talking about, but on Ms. Norris' --
2 her motion list, Number 60 is a motion to bar law
3 enforcement officers from participation in summoning a
4 petit jury. If you want to take that out of order, I
5 think it involves --

6 THE COURT: Mr. McGuire, we always are unable to
7 locate, and we don't have -- I can't think of anyone
8 else that can go out and try to find these jurors. I'm
9 sure you want them to come in. You have to understand,
10 we have a very unique situation in Horry County. We
11 have the county police, and they are responsible
12 primarily for county-wide law enforcement. Our
13 Sheriff's Department also engages in law enforcement to
14 some degree, but primarily their job is taking care of
15 the jail and providing courtroom security and civil
16 service, serving civil papers, things of that nature.
17 That is primarily what our Sheriff's Department does in
18 Horry County.

19 MR. MCGUIRE: I guess then -- I understand the
20 Court's concern, and very often that is the only
21 resort, to send a uniform deputy. I don't know if the
22 Court has a constable available or magistrate that
23 would have a constable.

24 THE COURT: They generally use the sheriff's
25 deputies.

1 MR. McGUIRE: I understand.

2 THE COURT: I mean, our magistrate -- if you go in
3 our magistrate's office, you'll see a sheriff's deputy
4 usually there, because they serve their civil process.
5 They are always there. In Horry County, we just don't
6 -- do we have any magistrate constable officers?

7 SHERIFF'S DEPUTY: We have very few, but as far as
8 civil processing...

9 MR. McGUIRE: The reason I bring that up is they
10 are often in plain clothes. Our alternative request is
11 that if the interaction could be with a plain clothes
12 officer in an unmarked car.

13 THE COURT: I don't know that the sheriff's
14 department has any of that, and certainly our
15 magistrates don't.

16 SHERIFF'S DEPUTY: No, sir.

17 THE COURT: I know in Marion County, and in some
18 of the smaller counties, all of the magistrates have
19 constables and they are in plain clothes and in cars,
20 but we just don't have that here.

21 MR. McGUIRE: Well, anything the Court could do to
22 lessen the -- the juror is going to feel like they've
23 done something wrong, scared, punished, anything the
24 Court can do to lessen that potential effect.

25 THE COURT: Well, I just don't know anything that

1 we have that we can do. Mr. Richardson.

2 MR. RICHARDSON: Bill doesn't have the advantage
3 of having done much here, but the Sheriff, his main
4 thing is friendliness, and they are not going to be
5 hassled by any of these guys.

6 THE COURT: Again, Mr. McGuire, our sheriff's
7 deputies don't provide the function that they do in a
8 lot of -- all the other counties where they are
9 arresting people and all. Our sheriff's deputies
10 certainly can, and I'm sure they have, but it is
11 unusual. They are not out there writing tickets on the
12 road; they can, but it is highly unusual to see that
13 happen.

14 THE CLERK: My understanding is when they come in
15 I give them all the packets, you know, with the
16 questionnaire and all of that, the ones that came back
17 from the post office as "unable to locate." I keep a
18 list of what I hand them, and my understanding from the
19 Sheriff is that they just go out and say, You were sent
20 this juror information, it came back to us unable to
21 locate, we have found you and the Clerk of Court's
22 Office needs you to complete this paperwork so I can
23 take it back to them. That's my understanding.

24 THE COURT: Well, I would issue an order that
25 limits the exchange between the officer and anyone they

1 locate. If you want to draft something along those
2 lines, Mr. McGuire, that they are simply to say we
3 could not find you, or the postal service could not
4 find you, I'm here to deliver your juror packet.

5 MR. MCGUIRE: I'll draft it and put it on like a
6 Miranda card, and I'll steal the Clerk's words, they
7 were pretty good.

8 THE CLERK: That's fine.

9 THE COURT: Mr. Richardson?

10 MR. RICHARDSON: That is fine.

11 THE CLERK: We ask them to complete it at that
12 time and for them to bring us back the completed
13 paperwork, because lots of times you are going to leave
14 it with people and they won't do it.

15 THE COURT: They don't stay there for an hour
16 while they fill it out?

17 THE CLERK: Yeah, they do. They wait there to
18 make them fill it out. You usually wait on them?

19 THE COURT: I will take that out. No. No. No.
20 We're going to deliver it and if they do not respond or
21 show up to court, the Court will deal with them, as we
22 do any juror.

23 THE CLERK: At that point, the type of affidavit
24 the Sheriff would do would be like, Deputy so-and-so
25 delivered the paperwork to such-and-such on this date,

1 and that will be sufficient, correct?

2 THE COURT: Mr. McGuire?

3 MR. MCGUIRE: Yes, sir, that is fine.

4 THE CLERK: With instructions to complete them?

5 THE COURT: I don't want law enforcement sitting
6 there over their shoulder helping them fill out a form.
7 It is limited to delivery. If you want to do Miranda
8 type of cards, I'm Deputy so-and-so and my purpose is
9 for undelivered mail from the Clerk's Office concerning
10 your service as a juror during the weeks of so-and-so
11 and so-and-so, September 15th and 22nd, thank you.

12 THE CLERK: And to be completed and mailed back to
13 the Clerk?

14 THE COURT: You must complete it and return it to
15 the Clerk of Court.

16 THE CLERK: In the self-addressed envelope.

17 MR. MCGUIRE: Yes, sir, I'll have it on there.

18 MR. RICHARDSON: The only other thing I'll ask,
19 and the reason is it's already been sent and we found
20 them and now delivering it, and Bill is drafting it for
21 them to tell them, but if they could be given a certain
22 number of days, whatever we agree to, to fill it out
23 and maybe send it back within two days?

24 MR. MCGUIRE: No objection.

25 THE COURT: We can do that with them. Just say

1 that you should return it within 48 hours, or mail it
2 within 48 hours, and have that in the little spiel.
3 Then, on the affidavit that the Sheriff returns say
4 that he located this person at such-and-such address
5 and had no further contact as authorized by the Court.
6 Suit you, Mr. Richardson, McGuire?

7 MR. MCGUIRE: We agree to that.

8 THE CLERK: We have 30 days from today so,
9 therefore, the Sheriff's Office -- and I have a stack
10 of unable to locate, so they are starting tomorrow.

11 THE COURT: Mr. McGuire, get it to me within 24
12 hours, the thing you want. Run it by Mr. Richardson,
13 bring it to me and I'll sign it and give it right to
14 the Clerk.

15 THE CLERK: The next thing as far as interaction,
16 the ones that do not have a ride or transportation that
17 Monday, the Sheriff's Office picks them up and brings
18 them in.

19 MR. MCGUIRE: I mean, if they are requesting a
20 ride.

21 THE COURT: That is the only way of getting them
22 here.

23 MR. MCGUIRE: That's fine. That's fine.

24 THE COURT: It's just been the policy here. We
25 have that all the time. I don't have a ride, we'll be

1 happy to provide it.

2 MR. McGUIRE: We have no objection. That doesn't
3 seem to be punitive or anything else.

4 THE COURT: All right. Is that it?

5 THE CLERK: I have nothing else at this time, I
6 think. May I be excused?

7 THE COURT: Thank you very much. You may be
8 excused. Anything you gentlemen have that concerns the
9 Clerk?

10 MR. McGUIRE: Judge, I just think that as
11 questionnaires come back and review them, and looking
12 towards the date, that is like 30 days from now, with
13 regard to going over the questionnaires, I think we can
14 agree to cut a lot of people loose. We're pretty
15 flexible.

16 THE COURT: I also would ask the Clerk, as an
17 accommodation to the Court, to try to be as proactive
18 as possible with these attorneys. If you see anything
19 unusual developing, a pattern or anything of that
20 nature as you get these returns, anything gives you
21 concern, that you let them know, okay.

22 THE CLERK: Usually what I do -- if you provide me
23 with it -- if something comes up that I am not sure
24 about, that I want to have it in order for the day we
25 go over it, I send the judge and both attorneys with a

1 an E-mail with a receipt so I have everything in
2 writing with your response. I don't do anything by
3 word of mouth; you have to put it in writing.

4 THE COURT: Good. We've taken care of the Clerk.
5 Okay.

6 THE CLERK: Thank you very much.

7 (Melanie Huggins, Clerk of Court, exits.)

8 THE COURT: Let's get into the meat of the story
9 now.

10 MR. RICHARDSON: Your Honor, I may be able to help
11 narrow these down. We've basically put a list together
12 of motions.

13 THE COURT: Do you have a list of the motions?

14 THE CLERK: Do you have an extra one?

15 THE COURT: I tell you what, you guys are kind of
16 dragging your feet this morning and you kept me back
17 there in my office for an extra hour, and during that
18 hour, I didn't do anything but drink coffee, so let's
19 take a break.

20 (A recess was taken.)

21 THE COURT: Mr. Richardson, I ruled on the bench,
22 is there a necessity for preparing individual orders on
23 all of these motions, Mr. McGuire? Do you want
24 individual orders?

25 MR. MCGUIRE: If something is important enough,

1 I'll let you know.

2 THE COURT: Let's do one on sequestration.

3 Mr. McGuire, let me tell you what I'll let you do..

4 I'll let you do an order concerning the Clerk excusing
5 certain jurors, okay, and get it to Mr. Richardson.

6 Let's make sure that that is a consent order that we
7 all agree. I think we agreed on everything. So let's
8 have that. Is there anything else that we've addressed
9 that would justify my separate order? Have we talked
10 about anything yet?

11 MR. RICHARDSON: Do you know of any?

12 MR. HIXSON: I think we were talking about law
13 enforcement participation.

14 THE COURT: If you will, do an order on that, too.

15 MR. HIXSON: Maybe by the end of the day we'll
16 have a better idea to address all of them.

17 THE COURT: I think that pretty much covers all
18 that we've talked about. Mr. Richardson.

19 MR. RICHARDSON: I'll go through these, and if we
20 need to have any discussion, certainly I'll stop.

21 Number One: Motion for order prohibiting Cottrell
22 from being exhibited in jail clothing. That was
23 granted the last time. It certainly was argued, and
24 we're fine with Your Honor's ruling.

25 THE COURT: Certainly. That is granted. Do we

1 need an order? I don't think so.

2 MR. HIXSON: We have a written order from the
3 prior time already in the file.

4 MR. McGUIRE: We wouldn't request a formal order
5 on that.

6 MR. RICHARDSON: The State is okay with Motions 2,
7 dealing with the Fourth Amendment.

8 THE COURT: Mr. McGuire, let me assure you that
9 we'll do everything we can to protect the Defendant's
10 Fourth, Fifth and Sixth Amendment rights, and we
11 acknowledge -- or the Court acknowledges his assertion
12 of those rights.

13 MR. McGUIRE: Thank you.

14 THE COURT: We don't need an order, do we?

15 MR. McGUIRE: No, sir. Those are primarily notice
16 pleadings.

17 THE COURT: And the Court acknowledges that Mr.
18 Cottrell has not only asserted his rights, he has
19 indicated his non-waiver of any such rights.

20 MR. McGUIRE: That's correct, Your Honor.

21 MR. RICHARDSON: Number 5 you had previously
22 granted, so we certainly will not argue that again.
23 Heightened scrutiny, you know, to some degree we have
24 always done that on death penalty cases anyway.

25 Number 6 was granted in the work-up for the

1 previous trial, and State doesn't wish to argue
2 anything about that.

3 Number 7: Motion to incorporate all federal and
4 state constitutional grounds in support of all motions.
5 That was granted before, and certainly we see no reason
6 to argue about that.

7 Number 8: Motion for complete recording and
8 transcript of pretrial proceedings. I think we've
9 complied with that already, but we'll continue to do
10 so.

11 Number 9 was granted previously with regard to
12 destruction of evidence without notice.

13 Number 10 was granted previously.

14 11, the State has no objection to.

15 THE COURT: Let's do this now, let's look at the
16 first ten motions. You tell me there is an agreement
17 as to all of them. Mr. McGuire, do you take issue with
18 anything stated by the Solicitor for Motions 1 through
19 10?

20 MR. MCGUIRE: No, sir.

21 THE COURT: Do you require a written motion on any
22 motion that has been heard in which no order has been
23 issued?

24 MR. MCGUIRE: No, sir.

25 THE COURT: Mr. Richardson, go through the next

1 ten.

2 MR. RICHARDSON: Thank you. Number 11, we are
3 fine with that regarding recordings of proceedings.

4 On 12, that motion was previously denied, which is
5 the motion for evidentiary matters to be heard
6 in-camera. We feel it would cause a delay. Certainly
7 we would go along with the standard rules of court with
8 regard to that, and certainly all evidentiary matters
9 will be heard outside of the presence of the jury, but
10 the State doesn't see the need to clear the courtroom
11 or any of those things for in-camera.

12 THE COURT: I'll hear you, Mr. McGuire.

13 MR. MCGUIRE: Yes, sir, Your Honor. I generally
14 file a motion as a matter of caution. You know, for
15 instance, if there is a piece of evidence that is not
16 competent and Your Honor suppresses it --

17 THE COURT: How about if I do it like this. I'll
18 preserve that motion for you throughout the trial. If
19 at any time during the trial you feel that there is a
20 sensitive matter that needs to be addressed in-camera,
21 I will allow you to approach the bench. If I agree
22 with you, I will certainly clear the courtroom or we'll
23 go into chambers and bring the court reporter, do
24 something to accommodate you to make sure that your
25 client has a fair trial and is not tainted by any

1 evidence that would not otherwise be admissible.

2 MR. MCGUIRE: I think the fact of the case is that
3 it is 12 years old now, and that is a protective
4 measure, that motion. I think it is probably less
5 necessary now. You know, the fear is that there is
6 some piece of evidence you would talk about in an
7 evidence hearing that gets in the paper or news and the
8 jurors hear about it before they come.

9 THE COURT: That is why I want to make sure that
10 doesn't happen.

11 MR. MCGUIRE: I would ask for an in-camera hearing
12 on the Jackson v. Denno matter.

13 THE COURT: As I said, I'll consider that as an
14 ongoing motion, and we will address it on an ad hoc
15 basis, okay.

16 MR. RICHARDSON: There is a written order there,
17 that written order was denying. Do we need another
18 order?

19 THE COURT: Do another one, and I'll amend my
20 prior order. I will allow you to continue to make that
21 motion throughout the trial.

22 MR. MCGUIRE: Yes, sir.

23 THE COURT: And I do that out of an abundance of
24 caution.

25 MR. MCGUIRE: Yes, sir.

1 MR. RICHARDSON: Number 13, it is a motion for
2 disclosure of favorable information.

3 THE COURT: Brady.

4 MR. RICHARDSON: Brady and Rule 5. We've turned
5 all of that over. I believe that "favorable
6 information" is a little broad.

7 THE COURT: That is under Brady, isn't it?

8 MR. RICHARDSON: We certainly are going to comply
9 with Rule 5 Brady and anything that is exculpatory. I
10 just don't want --

11 THE COURT: What is the difference in 13 and 14,
12 Mr. McGuire? Aren't there -- one is the penalty phase,
13 and the other is --

14 MR. MCGUIRE: One is more specific. Brady,
15 obviously -- the phrase in Brady that is at issue is if
16 it is material evidence with regard to being
17 exculpatory or material to punishment. So in a capital
18 case, generally you are not worried about the
19 punishment phase with regard to Brady information. So
20 14 is specifically putting that Brady applies to the
21 penalty phase, and it may not be traditional Brady in
22 terms of exculpatory evidence, it might be mitigation
23 evidence, but all of that if it is --

24 THE COURT: I'll grant that motion. I think Brady
25 extends to that.

1 MR. RICHARDSON: Yes, sir. I believe there is a
2 statute in regards to mitigation, so we'll do that.

3 THE COURT: So we're down to 15?

4 MR. RICHARDSON: I don't know when this would come
5 up, the confidential informants.

6 THE COURT: It is a retrial. Do we have any
7 confidential informants?

8 MR. RICHARDSON: I don't think that applies, but
9 it might be standard.

10 THE COURT: You will disclose if there are any?

11 MR. RICHARDSON: Yes, sir.

12 THE COURT: He agrees to disclose any confidential
13 informants, if there is any.

14 MR. McGUIRE: There is some evidence of a
15 confidential informant with regard to the prosecution
16 in Marion with regard to Mr. Love.

17 MR. RICHARDSON: Oh, okay.

18 MR. McGUIRE: There are three complex cases
19 combined in this one.

20 THE COURT: I understand.

21 MR. McGUIRE: There is a reference of a
22 confidential informant from an Horry County jail in the
23 Marion trial, and it does reference information
24 regarding this trial. Obviously, in the first trial of
25 this case there was no confidential informant used, so

1 I don't expect there to be one.

2 MR. RICHARDSON: Yeah. If it comes up, we'll
3 comply and turn it over certainly ten days before
4 trial.

5 MR. McGUIRE: If you have one, I want to
6 investigate them thoroughly, maybe 30 days before
7 trial.

8 THE COURT: All right. 30 days before trial.
9 Number 16.

10 MR. RICHARDSON: Motion of in-camera inspection of
11 files of all police witnesses. Certainly it is a
12 retrial, so for the most part not only will he have all
13 of our witnesses, but he'll have the transcripts of
14 them. I don't really see -- right, it is a Rule 5
15 matter, and certainly we've turned it over, but just
16 want to make mention, because this is one that we don't
17 see every day.

18 THE COURT: You haven't made a motion to send your
19 investigator to Romania, like Mr. Axelrod did?

20 MR. McGUIRE: The short answer is, no, I am not.

21 THE COURT: Thank you very much.

22 Number 17. So that one will be heard later, is
23 that right? Are you prepared?

24 MR. McGUIRE: That's fine. My understanding is
25 there was a statement made to law enforcement. It is

1 in a hospital setting after Mr. Cottrell was shot and
2 under emergency care.

3 MR. RICHARDSON: If we could step aside for a
4 second. When would we argue -- be ready to argue the
5 Jackson -- September 8th, is that okay with everybody,
6 September 15th start?

7 MR. HIXSON: You are on the general sessions
8 roster in Horry County the week of September 8th, and
9 that is one of the things I wanted to talk to you about
10 later on, if you want to prepare a trial docket for
11 this, or reserve the week of the 8th to do pretrial to
12 hit the September 15 -- you'll be assigned to general
13 sessions that week.

14 THE COURT: Do you know what Judge John has in
15 store for me that week?

16 MR. HIXSON: I have been assembling the August and
17 September trial rosters, projected, and I reserved that
18 for today so I can have a conversation about what you
19 want to do, because I can clear you from that.

20 THE COURT: I would think that if we were to
21 engage in sort of a clean-up on Wednesday -- that would
22 give us Wednesday, Thursday and Friday of that week,
23 and we could address any juror issues at that time.

24 MR. MCGUIRE: My understanding is we have court
25 August 25th.

1 THE COURT: Oh, you said August?

2 MR. RICHARDSON: We were talking about the Jackson
3 v. Denno for September 8th, a week before trial, but we
4 are coming back in August for another series of status
5 conferences.

6 THE COURT: When do you want to do Jackson v.
7 Denno?

8 MR. McGUIRE: I could do it this week, I'm ready.
9 The earlier, the better.

10 THE COURT: Why don't we do it in August. What
11 week is that in August?

12 MR. RICHARDSON: I think it is August 18th.

13 THE COURT: The 18th? Oh, I'm in chambers. Drew,
14 make sure I have -- I need a day, gentlemen, because I
15 have to make arrangements to have a court reporter,
16 preferably Natalie.

17 MR. RICHARDSON: Is one day any better for you
18 during that week?

19 MR. McGUIRE: I don't think so. I can get back to
20 the Court and the State.

21 THE COURT: All right. I'll rely on you both,
22 then, to firm that up in the very near future with
23 Drew, directly with Drew, and we can make sure I have a
24 court reporter available that chambers week.

25 MR. McGUIRE: Again, just for the record, that is

1 a motion I would request to be in-camera.

2 THE COURT: Again, it would be -- it would
3 probably be better for me -- I'll hear you any time,
4 better for me and the court reporter and court
5 administration if that could be done on, like, Monday.

6 MR. RICHARDSON: Yes, sir.

7 THE COURT: But check and please contact Drew
8 immediately, or as soon as you can, and firm that up so
9 I can make arrangements to have a court reporter here.

10 Okay. So 18 has been taken care of?

11 MR. RICHARDSON: Yes, sir.

12 THE COURT: Motion in limine held in disclosure of
13 -- I have essentially ruled on that because I have
14 required the Clerk to provide county-wide information
15 as she excuses jurors, and I have required the State to
16 then upgrade it concerning any other charges that they
17 may have as far as disqualifications that may be a
18 concern and provide it to you. I think we talked about
19 that a moment ago, did we not?

20 MR. McGUIRE: We did, but this motion goes beyond
21 that.

22 THE COURT: You want minor things as well?

23 MR. McGUIRE: More things that are dismissed.

24 THE COURT: Tell me about that, Mr. Richardson.
25 What do you have on these jurors, and why shouldn't he

1 get it?

2 MR. RICHARDSON: Criminal history?

3 THE COURT: Uh-huh.

4 MR. RICHARDSON: Well, I don't mind sharing
5 information with him, but there is a statute directly
6 on point with regard to sharing that information. Of
7 course, if the Court tells us to hand it over, we can
8 do that. 14-7-1020, Jurors can be examined by the
9 Court; if juror is not indifferent, he shall be set
10 aside -- but he's talking about NCIC.

11 MR. HIXSON: May I address the Court?

12 THE COURT: Yes, sir.

13 MR. HIXSON: Just relevant is the limit of the
14 scope of the inquiry. There is a significant number of
15 motions in here, Judge, relating to the duty of the
16 State to provide to the defense to expand the scope of
17 the inquiry, and the statute limits that inquiry to
18 bias and things like that. There is a lot of cases out
19 there that indicates that deadens a prospective juror's
20 interest in serving the community because of this --
21 specifically about inquiry into the personal lives of
22 the jurors and beyond the scope.

23 THE COURT: We're not going to do that. What I
24 think is fair is if you run a criminal history on these
25 jurors -- this is a capital case, gentlemen. If you

1 run -- you don't have to run them, I'm not going to
2 make you run it, but if you run it, I want you to give
3 it to him. Fair enough?

4 MR. McGUIRE: Yes, sir. And there are -- just
5 being candid with the Court and in being fair to the
6 prosecutor -- there are some statutes regarding
7 dissemination of records run by SLED. There is some
8 protective language, and the basis, obviously, is so
9 that people that are doing background checks for
10 childcare centers or something like that, that they are
11 not skirting the requirement to go to SLED to get it
12 and not having their buddy at the prosecutor's office
13 run it for them for free, because it is \$7 million a
14 year venture. There is an order that we got on the
15 issue in Beaufort from Judge --

16 THE COURT: Butler?

17 MR. McGUIRE: Carmen Mullins. And she ordered
18 what did you -- if they have it as a tool in jury
19 selection, we should have it.

20 THE COURT: Do her order.

21 MR. McGUIRE: I'll have her order, and that takes
22 care of the prosecution's obligation not to share it
23 beyond a court order. We can put in the order that it
24 be destroyed, one copy for the record.

25 THE COURT: I want a confidentiality clause put in

1 it. Make sure it is in there, that it is only for this
2 purpose, and then it is destroyed.

3 MR. MCGUIRE: Just one copy sealed for the record,
4 for purposes of appeal.

5 THE COURT: All right.

6 MR. RICHARDSON: Bill will prepare that order, and
7 we'll certainly comply with turning over all the NCICs.

8 THE COURT: Motion for an order directing the
9 State to provide dates of birth and Social Security
10 numbers of all State's witnesses. What about that,
11 Mr. Richardson?

12 MR. RICHARDSON: Of course it goes beyond the
13 scope that we usually turn over. We'll certainly give
14 them the witnesses. Plus, in this case we've already
15 given them a copy of all of the transcribed testimony.
16 There are ways --

17 THE COURT: Mr. McGuire, unless you tell me
18 something else or provide me a compelling argument --

19 MR. MCGUIRE: I can --

20 THE COURT: I'll require birthdates and names, and
21 I think that is enough to identify someone.

22 MR. MCGUIRE: I can tell you that -- at this
23 point, when I filed it, we didn't have some of the
24 information, but I can tell you it is moot at this
25 point; you don't need to rule on that.

1 THE COURT: All right. Motions 11 through 20,
2 Mr. McGuire, which motion do you feel that you need a
3 form order?

4 MR. MCGUIRE: With regard to sharing the SLED rap
5 sheets of the potential jurors, I'll provide the Court
6 an order on that. That's Number 19.

7 THE COURT: And Number 20?

8 MR. MCGUIRE: I do not need an orders on 20.

9 THE COURT: And Number 21?

10 MR. MCGUIRE: I'm sorry, I misheard. I think your
11 ruling on the record verbally is sufficient.

12 THE COURT: Very well. Number 21, any objection,
13 Mr. Hixson?

14 MR. HIXSON: Mr. Hixson is on the record on that
15 on. No, not on the face of it. The case he cites is a
16 federal standard, and we believe if we apply the state
17 standard, that is a Constitutionally adequate voir
18 dire, so we ask to follow state law, not the federal
19 model.

20 THE COURT: Mr. McGuire.

21 MR. MCGUIRE: Well, federal cases cite the United
22 States Constitution, so we stand on that as applying.

23 THE COURT: What is the difference, Mr. McGuire,
24 in the state case and the federal case?

25 MR. MCGUIRE: Essentially, there isn't. The

1 reasoning in all of the cases -- and the two primary
2 cases in South Carolina are Longworth and Davis, cited
3 in the brief. Essentially, the reasoning of the Court,
4 both federal and state, if there is something that is
5 so either aggravating or mitigating, whether it is
6 statutory or non-statutory, if that piece of evidence
7 or that factor could be so significant with a potential
8 juror where it would essentially control their vote,
9 where they would go straight into a position of life
10 without parole or the death penalty --

11 THE COURT: Or issue whether the victim was a
12 police officer.

13 MR. McGUIRE: Sure. Or multiple homicides, or
14 with regard to the State, the information in the
15 Longworth and Davis case involves non-trigger man
16 category, the youth of a defendant and the intellectual
17 capacity of a defendant. The State was able to ask are
18 these things so significant --

19 THE COURT: Well, it would be allowed under the
20 state statute.

21 MR. McGUIRE: Sure. They are essentially the
22 same. We have to determine if a juror is bias based on
23 these factors.

24 THE COURT: Well, apparently, Mr. Hixson thinks
25 there's a difference.

1 MR. HIXSON: The cases he cites -- we believe that
2 14-7-20 relating to the voir dire of the jury selection
3 process is upheld by the U.S. Constitution. South
4 Carolina's method of assembling a jury is proper and
5 Constitutional, and the only objection I have to the
6 motion is we're not trying to expand --

7 THE COURT: He's specially talking about the voir
8 dire itself, the questions, and that is the same. So
9 we all agree?

10 MR. MCGUIRE: I think we would all agree that if
11 there is something so aggravating, for instance, an
12 officer in the line of duty being a victim or multiple
13 homicides, these could be so significant with a juror
14 where it would take them straight to a position of the
15 appropriate penalty without fairly considering the
16 factors in aggravating mitigation.

17 I think it was Justice Toal that wrote one of the
18 opinions in either Longworth or Davis that essentially
19 it is a violation of the juror oath. They could not
20 comply with the juror oath to consider all the
21 mitigation, all the aggravation evidence and fairly
22 consider both penalties. Basically, some significant
23 factor could have the home-run weight of the decision
24 or verdict, so we have to ask about those significant
25 things.

1 THE COURT: Okay. 21, motion to engage in or
2 preserve comparative juror analysis.

3 MR. HIXSON: We consider it preserved.

4 MR. MCGUIRE: The reason I file it is comparative
5 juror analysis is something that is almost impossible
6 to do on the fly. For the record, so we're on the same
7 page, comparative juror analysis would be the State
8 strikes Potential Juror No. 10, who is a black
9 gentleman, and we lodge a Batson challenge. You know,
10 the State says something along the lines of, well,
11 these are the things we looked at in determining --

12 THE COURT: You are talking about potential strike
13 analysis under Batson, where you say you didn't strike
14 Juror C who was white and had the same thing?

15 MR. MCGUIRE: Exactly. In some of the same things
16 that we're looking for, when we talked to, say,
17 potentially 70, 80 jurors on the record, and the State
18 says, for instance, by way of example, we thought that
19 particular person, even though they were a part-time
20 student, they were paying attention to their exams and
21 would not be a good juror because they are distracted,
22 and 20 jurors before them said something similar, it is
23 almost impossible for us to be -- without a
24 transcript -- really competent enough to raise that
25 issue and preserve it. So what I'm asking for is if we

1 lodge a Batson challenge and there is a reason we would
2 have to go back and look at all of the jurors seated,
3 their responses for the voir dire questions, we would
4 ask to have the time to have a transcript, as fast as
5 the court reporter could do it; if not, say we don't
6 want to take that pause, that's too long and too
7 substantial of a pause, but I'll say that you are
8 protected, you can give us that protection.

9 MR. HIXSON: For the record, the difficulty is
10 that the State is striking the jury at the same speed
11 they are, so you can make a mistake like that. The
12 opportunity to develop a transcript and lodge an
13 objection is the ability the defense has that the State
14 does when we're spontaneously striking a jury and
15 making errors that are very consequential that are
16 simple mistakes.

17 THE COURT: But that doesn't excuse Batson.

18 MR. HIXSON: No, it doesn't.

19 THE COURT: I mean, in a Batson motion, we have
20 burdens that shift back and forth all during that
21 process. Mr. McGuire has the burden of establishing a
22 prima facie case of improper strikes, racially
23 motivated or motivated by some improper thought
24 process, the burden then shifts to you to determine or
25 explain in a non-racial fashion or give non-racial

1 reason for the strike. It doesn't even have to be a
2 reasonable one, but as long as it is non-racial, then
3 it shifts back to Mr. McGuire, and Mr. McGuire has to
4 show how that is pre-textual that you put someone else
5 in, and you either had a reason when you struck, or
6 not. He's asking for time to look and see whether or
7 not you really -- that really was your reason.

8 MR. MCGUIRE: That's a fair statement.

9 THE COURT: I don't know how I can rule on that
10 now, because there was no Batson challenge made. I
11 don't know how many witnesses we have or how much time
12 you will need or how long it took to select this jury.
13 I mean, if we select three, four days selecting a jury
14 and we've got 20 hours of tapes, I don't know how
15 quickly it can be done.

16 MR. MCGUIRE: I don't mean to suggest there is an
17 easy answer. I can tell you that the issue in Miller
18 L., when he was in the federal court system, one of the
19 main issues was the issue fairly before the Court to be
20 preserved for federal habeas.

21 THE COURT: I'll tell you what I'll do. I'll
22 reserve ruling on that or preserve my ruling on that.
23 I'm just not going to do it at this juncture. I'll
24 wait and see what you have. I'm not denying it, just
25 not granting it, and we'll look at it.

1 MR. HIXSON: Number 23, that was agreed to
2 previously. That is also -- we have a written order on
3 that that you issued.

4 THE COURT: All right.

5 MR. HIXSON: 24, same thing, adjourn at a
6 reasonable time, and that was agreed and in a written
7 order also.

8 THE COURT: I'm all for that.

9 MR. HIXSON: 25, maybe Mr. McGuire would oppose
10 this.

11 MR. MCGUIRE: I mean, I need to be candid with the
12 Court. That motion is quashing an indictment. It is
13 based on federal law. State case law is squarely
14 against me, but if I could be heard for the record,
15 briefly?

16 THE COURT: Go ahead.

17 MR. MCGUIRE: As the Court knows, there is
18 certain --

19 THE COURT: You are prepared to go to the Supreme
20 Court and argue against precedent?

21 MR. MCGUIRE: And come out with burned tail
22 feathers, yes, sir. But just for the record, as the
23 Court knows, through the doctrine of selected
24 incorporation there is certain Constitutional
25 amendments, Bill of Rights, that were made applicable

1 to the states through the Fourteenth Amendment. The
2 Fifth Amendment Right to Indictment is not one of
3 those, so we don't have a federal Constitutional right
4 to an indictment as a citizen of South Carolina. That
5 is an issue left to the states.

6 Now, our state constitution does give us a federal
7 right to indictment, and the logic and reason in
8 federal courts is if there is an element, a factor --

9 THE COURT: It is a state right.

10 MR. MCGUIRE: I may have misspoke. It is
11 Article 3. The reasoning of the federal courts,
12 through cases like Apprendi and Ring, are that if there
13 is a factor that can elevate punishment beyond the
14 customary maximum, then it becomes an element of the
15 offense, and in the federal system, the indictment is
16 where you have to lodge it, to give notice to the
17 defendant that he's to defend that issue. So that is
18 the holding in federal court.

19 We have the exact right to indictment in South
20 Carolina, it's just in our state constitution, and if
21 the same logic applies, then we should hold that that
22 factor -- and, obviously, in capital cases it's a
23 statutory obligator, and that would have to be found
24 within the indictment. We've just chosen -- even
25 though we have the exact system, we've just chosen to

1 say, This just doesn't apply. So there is a disconnect
2 of the rationale of logic. I'll tell you the cases in
3 South Carolina is squarely against us, but for the
4 record, I want to preserve that issue. You don't know
5 where it might go one day.

6 MR. HIXSON: Just a couple housekeeping things.
7 State versus Butler established the Constitutionality
8 basically of 16-3-20 and 16-3-26, which is our
9 statutory way that we have an element of capital murder
10 and have to prove the statutory aggravating
11 circumstances. In relation to the statutory
12 aggravating circumstances, we have put defense counsel
13 on notice previously with two statutory aggravators.

14 THE COURT: Haven't the federal courts many times
15 upheld the constitutionality of South Carolina's
16 capital statute?

17 MR. HIXSON: Of their scheme, absolutely.
18 Mr. McGuire takes exception to that, obviously, but we
19 believe we're squarely on all fours.

20 THE COURT: I mean, we're going back into '73,
21 '76, somewhere along there.

22 MR. HIXSON: They reduced the class of those
23 eligible for death penalty, and that is kind of the
24 concept of South Carolina statutory scheme. We had a
25 little housekeeping matter. Solicitor Richardson has

1 added a third statutory aggravator, and I've shown that
2 to Counsel, and that is the murder was committed by a
3 person with a prior conviction for murder. The prior
4 trial only had two statutory aggravators, and we served
5 a copy and it's already been filed. So the statutory
6 aggravators that we're dealing with is, one, the
7 murder -- Mr. Cottrell committed murder on Officer
8 McGarry, and that murder was committed by a person with
9 a prior conviction of murder, and Mr. Cottrell was
10 convicted of the murder of John Love in Marion County,
11 and there is case law on point that you can use a prior
12 murder -- a murder and then a --

13 THE COURT: Occurred first and was convicted
14 later.

15 MR. HIXSON: That's right. And we're not arguing
16 that point. The second statutory aggravator is the
17 offender by his act of murder knowingly created a great
18 risk of death to more than one person in a public place
19 by means of a weapon or device which normally would be
20 hazardous to the lives of more than one person. That
21 was presented to the jury in the first trial.

22 Third, the murder of a federal or state or local
23 law enforcement officer, peace officer, former peace
24 officer, corrections employee or former corrections
25 employee, fireman or former fireman during or because

1 of performance of official duties.

2 So we served that on defense counsel. The statute
3 requires 30 days. With the addition of that extra
4 aggravator, everything else is exactly the same.

5 MR. MCGUIRE: I think I'll reserve for the record.

6 THE COURT: Thank you. We're down to motion for
7 compensation at current wages for jurors. Glad we
8 don't have the jurors vote on that. Mr. McGuire.

9 MR. MCGUIRE: Judge, I have to tell you, I don't
10 know exactly what they pay jurors here, but my gut --

11 THE COURT: Not much.

12 MR. MCGUIRE: Probably between 10 to 15 dollars a
13 day?

14 THE COURT: I think it is 15.

15 MR. MCGUIRE: Judge, there is an old saying when
16 it comes to priorities: Don't tell me what your
17 priorities are, show me where you spend your money and
18 that will tell me where your priorities are. Our
19 priority is to take care of the jurors better. It is a
20 shame that we've been letting them come in for \$10, \$15
21 a day forever. I think we all agree it should be
22 changed. We joke about it in jury selection and when
23 they are charged in a case. We joke about don't spend
24 it all in one place. While it is sort of funny, it is
25 a shame as well if they are going to be able to

1 consider a human being's life, whether he should live
2 or die. I don't want them thinking they have to run
3 home to get back to stocking shelves at K-Mart or
4 bartending because they are only getting \$15 a day. If
5 the county hasn't acted, I'm asking you to act, Judge.

6 THE COURT: What you are asking me to do is
7 legislate for the county?

8 MR. McGUIRE: What I'm asking you, in the interest
9 of justice, pay a wage that is adequate.

10 THE COURT: What would make Mr. Cottrell's case
11 any different from cases being tried down the hall now?

12 MR. McGUIRE: Because he can die, that's why.

13 THE COURT: Mr. Hixson.

14 MR. HIXSON: We ask you to follow what we normally
15 do.

16 THE COURT: You know, the compensation of the
17 jurors, as I understand, is set by county ordinance. I
18 would certainly -- I don't know of any way I can compel
19 the county to pay them more unless the county were made
20 party to an action, could I, Mr. McGuire?

21 MR. McGUIRE: I think it is like ordering the
22 sequestration of the jury, you are taking an action
23 with regard to the jury to make sure that Mr. Cottrell
24 has a fair trial, and I don't see it as any different.
25 It is in your power and discretion, and while the

1 expense might be borne by the clerk and county, just
2 like sequestration of at jury, I think it is within
3 your power to do that.

4 Thomas Jefferson said that the two most important
5 things in this country are the ballot box and the jury
6 box. We don't treat it like that, and we need to. I'm
7 asking you to act in the interest of justice to do
8 that.

9 THE COURT: All right. Mr. McGuire, I
10 respectively deny your motion. I understand that
11 jurors are compensated at a very low rate, and it
12 certainly doesn't compensate them for their time, but
13 they are providing a community service. I would
14 suggest, Mr. McGuire, that you are not being adequately
15 compensated for your work, and I would suggest that
16 neither Mr. Richardson nor Mr. Hixson in the grand
17 scheme of things, but these jurors are not often called
18 upon to serve. It is very rare some would be called to
19 serve as a juror, and whether they are compensated --
20 if you come into magistrate's court, are you even
21 compensated? I think they might; I don't know.

22 MR. RICHARDSON: I don't know, Your Honor.

23 THE COURT: But at any rate, I believe that that
24 would be a matter that should certainly be addressed by
25 county council, but I am not going to invade their

1 province or the clerk's fundings, so I'll deny the
2 motion.

3 Now, Number 26. Have you given him all of the
4 discovery?

5 MR. HIXSON: Yes, Your Honor.

6 THE COURT: You understand your duty to continue
7 to supplement the discovery with new matters that
8 arise?

9 MR. HIXSON: Absolutely, Your Honor. Our only
10 objection is that the language of certify. The nature
11 of Rule 5 has lost perspective. We have fully
12 complied, we continue to comply and the section of the
13 statute is when we uncover information, we continue to
14 disclose it so we can never certify that everything has
15 been certified, that everything has been provided. As
16 we speak, Cottrell is in the Department of Corrections
17 and he's generating reports right now and will up to
18 the time of trial. So we will always do that. We are
19 in full compliance and will continue to be.

20 THE COURT: What more could you ask for,
21 Mr. McGuire?

22 MR. MCGUIRE: Again, Judge, that pleading is more
23 of a notice pleading.

24 THE COURT: I mean, if they say they certify, what
25 more certification do you have for an officer of the

1 court standing before me and saying I've done it?

2 MR. MCGUIRE: Oh, I think he's complied. I think
3 when he says we've given it, we're always giving it, we
4 are always in full compliance, I think that statement
5 as an officer of the court today is exactly the
6 certification I was looking for, so I'm satisfied.

7 THE COURT: Number 27 -- that was 27 that I just
8 did. All right.

9 MR. HIXSON: 28, we object. It is
10 straight-forward. Gray versus Jorley, the U.S. Supreme
11 Court says that our statutory scheme is Constitutional.
12 The sites are in response to pleadings back, State
13 versus Shawn Roach, et cetera. We believe that the
14 South Carolina scheme is appropriate.

15 THE COURT: Doesn't it mirror Georgia's?

16 MR. HIXSON: Correct.

17 MR. MCGUIRE: With some exception. Georgia does
18 require that -- in the proportionality review -- that
19 life without parole cases also be put into the mix. So
20 there is a comparison of similarly situated defendants,
21 and they look at both life without parole cases and --
22 life with parole, life without parole and death,
23 because Georgia has life with parole as a sentencing
24 option in a capital case.

25 We did primarily copy Georgia statute; however,

1 the holding in Greg and the holding in Furman -- when
2 you look at them together, the Furman case where the
3 United States Supreme Court declared the death penalty
4 to be un-Constitutional in the context of the Furman
5 case, and that was because the Furman case just had a
6 statute for murder, and the potential punishment was
7 basically at the will of the prosecutor; he could ask
8 for death or not.

9 The United States Supreme Court said that if you
10 leave it to the prosecutor, it is almost the same as
11 being struck by lightning, it's arbitrary and
12 capricious and, therefore, you have to have a narrowing
13 mechanism so that it is the most eligible, or the worst
14 of the worst, is the language that is most often thrown
15 around.

16 Now, the Georgia case of Greg, that United States
17 Supreme Court had such a narrowing statute -- though it
18 is a little bit different because they do compare life
19 without parole cases and the proportionality analysis
20 at the end of the case; however, our statute has -- and
21 it is obviously the aggravators that narrow the class,
22 and our statute has been expanded to the point where it
23 is almost impossible to imagine -- and there are 21
24 aggravators now in our statute, 21. When you read them
25 all, it is hard to imagine an allegation of murder that

1 doesn't fit one of the 21 aggravators. What that means
2 is, in a practical standpoint, we're back in Furman.
3 It is so expansive that now we're back to the whim of
4 the prosecutor. Our position is that the statute is
5 now so expansive that we're backing in the Furman
6 analysis, and it is a violation of Mr. Cottrell's --

7 THE COURT: I understand your argument. Mr.
8 Hixson.

9 MR. HIXSON: We have meaningfully narrowed the
10 class of those eligible for the death penalty,
11 specifically to three statutory aggravators of murder
12 of a police officer, prior conviction for murder and
13 the mechanism of death such that it could cause death
14 to multiple, and that significantly reduces the class
15 of Mr. Cottrell's case even in one. So, certainly, it
16 is proper and upheld, and we believe case specific. It
17 is proper and it has meaningfully narrowed the class.
18 It is not the whim of the prosecutor.

19 THE COURT: I'm going to respectfully deny your
20 motion in that regard, okay.

21 MR. McGUIRE: Yes, sir.

22 THE COURT: Motion to compel discovery necessary
23 for proportionality review and under statutory
24 constitutional issues.

25 MR. McGUIRE: So, Judge, you might decide that

1 this is not right at this point because there is not a
2 sentence of death. You might say this is something you
3 can preserve at the end of the trial, and I would say
4 it is not inappropriate, but we do seek information
5 from the prosecutor's office regarding how -- what
6 analysis they used to decide whether a person is going
7 to be selected for a death penalty case or not, and in
8 all of the cases that have been prosecuted in modern
9 history, an analysis of both race and gender of the
10 defendant and victim.

11 THE COURT: Again, I will reserve ruling on that.
12 Number 30.

13 MR. HIXSON: We'll absolutely comply with the
14 rules of evidence relating for admissibility of that.
15 I don't know that -- that is our position, we'll
16 comply. There are some cases, such as the Jackson v.
17 Denno that we'll need to take up at pretrial on the
18 admissibility of that, and we believe that's
19 appropriate, res gestae exceptions, but we're going to
20 put character in the guilty phase, and we'll follow the
21 Rules of Evidence about that.

22 THE COURT: I think he's moving to exclude any
23 victim impact or character evidence.

24 MR. HIXSON: That's right. As a result, we ask
25 the motion be denied. We will follow the Rules of

1 Evidence, and if it is appropriate and the Court rules
2 on it, then it is admissible --

3 THE COURT: Mr. McGuire, I mean, you made a broad
4 statement there in your motion. Tell me how you
5 justify that.

6 MR. MCGUIRE: If I could approach the bench, Your
7 Honor.

8 THE COURT: From what I have seen, I anticipate
9 you're challenging the victim's character.

10 MR. MCGUIRE: Well, yeah, Your Honor. With regard
11 to Officer Joseph McGarry, any evidence regarding his
12 character, who he is as a person, the impact that this
13 may have had on other people, that would all be
14 pertinent at the penalty phase.

15 Now, in the first trial there is information,
16 testimony, that is brought out by -- not these
17 prosecutors, the other prosecutor that tried the first
18 case, but the prosecutor in the first case, in his
19 opening statement, coming outside of the gate talks
20 about Joseph McGarry and his upcoming -- he was
21 planning to be married, and he's talking to an officer
22 the night of the incident about the logistics and the
23 wedding plans and whether he's going to wear his police
24 officer blues, and how proud he is of his police
25 officer blues, and we're coming out of the gate in

1 opening statement with victim impact evidence in the
2 first trial. It comes up again in the examination of
3 Officer Guthinger.

4 So in two instances in the first trial, clearly
5 victim impact evidence came in. It was not objected
6 to, should have been, but it wasn't. We have included
7 in this brief the pages of the transcript where that --

8 THE COURT: You are talking about on the guilt
9 phase?

10 MR. MCGUIRE: Yes, sir. This would be admissible
11 in the penalty phase, I don't disagree with that. It
12 is hard to keep it out then; it is coming in. But in
13 the guilt phase, it is not relevant. It is not
14 probative as to any fact in issue.

15 THE COURT: That gives me concerns, Mr. Hixson.
16 Where are we going with that?

17 MR. MCGUIRE: Judge, I'm not asking you to rule
18 today. We've put together the brief and we've given
19 you the pages of the transcript so you can read the
20 black and white what was put in evidence, and I think
21 it would be fair to give the prosecutor time to respond
22 in writing.

23 THE COURT: Is that what you want to do?

24 MR. HIXSON: No, I'm very comfortable relating to
25 the opening statement and the dress blues and all of

1 this stuff. I can understand Mr. McGuire's concern.
2 If it becomes an issue at trial relating to the nature
3 of Mr. Cottrell and Mr. McGarry's interaction, and
4 whether this is a police abusive situation, then the
5 reason why they are there may become relevant to that
6 issue, that is why I can't answer the question.

7 Certainly I agree and we agree to limit coming out
8 of the gate and saying this guy is getting married and
9 planning a wedding, but it may become more of an issue
10 about the nature of the law enforcement/Cottrell
11 interaction. That is why I don't want to say, sure, we
12 won't talk about it, but we won't talk about it in the
13 opening statement or anything.

14 THE COURT: I want to rule to some extent. First
15 of all, as to the guilt phase, I don't think that that
16 meets a 401 or 403 analysis. I don't think it is
17 relevant as to guilt. I don't think it is probative --
18 or that its probative value outweighs its prejudicial
19 effect out of the gate -- out of the gate.

20 Now, Mr. McGuire, I'm not saying -- that may
21 change. I'm simply saying that out of the gate, that
22 is my feeling, that it does not meet the requirements
23 of 401 and 403. I would order it suppressed in the
24 guilt phase at this juncture, but I want it very clear
25 that you may open that door. You understand?

1 MR. McGUIRE: I've read the transcript carefully,
2 I will not open the door.

3 THE COURT: I want you to understand you may do
4 that. Or, if other probative issues arise which make
5 it relevant under 401 and that probative value
6 increases such that it is no longer substantially
7 outweighed by the prejudicial effect, I will admit it.
8 Do you understand?

9 MR. HIXSON: Yes, sir.

10 THE COURT: So I'm ruling and saying, But I might
11 change my mind.

12 MR. McGUIRE: Your Honor, in that case, I think it
13 would be one of those situations where if the
14 prosecutor was to elicit that information, they would
15 have to approach and let the Court know that they are
16 at a stage where they believe it is probative, and they
17 want to get into it, and we'll take it up.

18 THE COURT: I'm telling them, on its face, I do
19 not believe that it has probative value or that it
20 meets the 403 test, but if circumstances arise where it
21 has been enriched by the testimony or the developments
22 that occurred during the trial, I would expect them to
23 say, Your Honor, we have a matter and we want to
24 discuss this issue of the wedding, and those sorts of
25 things. I'm not going to bar it. I just don't want

1 anyone standing up in opening remarks and going into
2 that. That is clearly going to inflame this jury. It
3 has no probative value as to the guilt. We get over to
4 the punishment phase, Mr. McGuire, you have a problem,
5 okay.

6 MR. MCGUIRE: Yes, sir.

7 THE COURT: Okay. Now, Mr. McGuire.

8 MR. MCGUIRE: Yes, sir.

9 THE COURT: Do you want formal orders on anything
10 from 21 to 30?

11 MR. MCGUIRE: Only on Pleading Number 30.

12 THE COURT: The one we just discussed?

13 MR. MCGUIRE: Yes, sir. I'll draft the order.

14 THE COURT: Pass it over to Mr. Hixson before you
15 submit it to Drew.

16 MR. MCGUIRE: Of course.

17 THE COURT: Number 31, didn't we do that?

18 MR. HIXSON: This is very similar. Our only
19 objection is to specific requests that seem expansive.
20 We're obviously providing exculpatory impeachment
21 information, but there are a multitude of specific
22 requests we think are probably outside the scope of
23 what we believe at this stage, but we'll comply and
24 turn it over and comply with statutory --

25 THE COURT: What are you specifically wanting,

1 Mr. McGuire, that you feel that you haven't or might
2 not receive? What are you fishing for?

3 MR. MCGUIRE: I'm not actually fishing. There is
4 a particular witness, Donald Morgan the Third, who
5 seems to have gotten some pretty special treatment from
6 the former prosecutors that tried the case, and I think
7 he may have gotten a little more special treatment than
8 I'm --

9 THE COURT: Comfortable with?

10 MR. MCGUIRE: That I received proof of.

11 THE COURT: Mr. Morgan was an inmate, I believe,
12 at the --

13 MR. MCGUIRE: No. He was a witness at the scene
14 and a civilian who drove Mr. Cottrell and two females
15 to the Dunkin' Donuts where the incident occurred.

16 THE COURT: Now I recall.

17 MR. MCGUIRE: He, obviously, was -- it is a fair
18 statement to say that he has substantial involvement
19 with at least one of the other murders, and his actions
20 would certainly constitute accessory after the fact,
21 and he's out. He got a free pass. He also had some
22 run-ins with the law after this, and he still seems to
23 be under the protection of either law enforcement or
24 the former prosecutors, and I want that whatever
25 benefit he's received by continuing --

1 THE COURT: The former prosecutors are now defense
2 lawyers; are they not?

3 MR. MCGUIRE: One is -- well, I suppose both. You
4 automatically are, I guess, once you leave. I know
5 Fran Humphries is. But, yeah, that is -- I'm on
6 notice --

7 THE COURT: It is a reveal-the-deal motion; is
8 that what it is?

9 MR. MCGUIRE: You could say that.

10 MR. HIXSON: He's entitled to that, and I'll find
11 anything out. I'm not privy to anything beyond that
12 through his interviews, but I will certainly comply
13 with my obligations.

14 THE COURT: Tell him what he's been charged with,
15 what was investigated and what was the outcome. Is
16 what you want?

17 MR. MCGUIRE: I'll put on the record that it
18 involves Mr. Morgan's efforts to obtain a pardon, and I
19 believe that Solicitor Hembree was involved in that.

20 THE COURT: Is he still -- was he Solicitor
21 Hembree then?

22 MR. MCGUIRE: He was.

23 THE COURT: Well, Mr. Hixson, Mr. Richardson, let
24 him know what you know.

25 MR. HIXSON: Indeed, Your Honor. I certainly

1 will. I know he was charged with accessory after the
2 fact in this. I'll certainly -- he's entitled to
3 impeachment, and I can consider that impeachment
4 information to cross-examine on.

5 THE COURT: I don't know what more impeachment
6 information you want other than he was charged with
7 accessory after the fact and you got to walk. What
8 else could they have done? I mean, bought him a new
9 suit or what?

10 MR. MCGUIRE: Based on what I heard, it wouldn't
11 surprise me, but I'll tell you this. There is also an
12 issue that Mr. Morgan -- I believe Mr. Morgan purged
13 himself at the first trial with regard to his education
14 and employment history.

15 THE COURT: That wouldn't have anything to do with
16 the Solicitor's Office.

17 MR. MCGUIRE: If they knew it was perjury.

18 THE COURT: If they knew. But it was reversed
19 already, so it is moot; isn't it?

20 MR. MCGUIRE: If there is any evidence in the
21 possession of the prosecutor, if they could find it --

22 THE COURT: That he perjured himself?

23 MR. MCGUIRE: That he perjured himself, we're
24 entitled to it.

25 THE COURT: Obviously, you have information.

1 MR. McGUIRE: I do.

2 THE COURT: You already know?

3 MR. McGUIRE: I know some of it.

4 THE COURT: Okay. Turn over anything like that.

5 You have a witness that you think or you believe or

6 know perjured himself, I think that is impeachment

7 evidence and certainly should be turned over. Do you

8 want an order on that, Mr. McGuire?

9 MR. McGUIRE: I'll draft it, yes, sir.

10 THE COURT: All right. Motion to order

11 defendant's proposed juror questionnaire be mailed with

12 the summons. Isn't that already done?

13 MR. HIXSON: That is resolved.

14 MR. McGUIRE: There was an earlier hearing, and

15 you decided that. I just need to reserve the record

16 and provide the Clerk a copy of the our proposed

17 questionnaire, which I'll do.

18 THE COURT: How about Number 33: Appointment Of

19 Impartial Witness Monitor. What does that mean?

20 MR. HIXSON: We oppose that. We run trials here

21 all the time and the bailiffs and court staff --

22 THE COURT: What is wrong with the bailiffs?

23 MR. McGUIRE: I'm not opposed to having the

24 bailiff. Very often it is a sheriff's deputy.

25 THE COURT: You are talking about a monitor when

1 we take a break in the jury room, that sort of thing?

2 MR. McGUIRE: I mean, everything is different in
3 every county I go to. Some courthouses have a room
4 where all the witnesses gather. We necessarily would
5 have to put a bailiff or someone in there, non-law
6 enforcement. Some people use hallways, prosecutor's
7 office, but whatever the mechanism is where people
8 gather, I think as soon as they walk in the door of the
9 courthouse they are a potential witness and they need
10 to -- if the Court is going to invoke the rule of
11 sequestration, which --

12 THE COURT: Sequestering witnesses?

13 MR. McGUIRE: Yes, sir.

14 THE COURT: Impartial witness monitor.

15 MR. McGUIRE: There are a number of witnesses who
16 could testify.

17 THE COURT: I mean, the way it's always worked, in
18 every trial I've been involved in, usually the
19 solicitor has a witness handler who goes in -- we have
20 two rooms on each side. We can make those available.
21 The Solicitor's witnesses are over in a room, and they
22 have a person whose job it is is to handle them and
23 make sure they are back in a room. They bring them
24 into the courtroom back and forth, and the defense
25 usually does the same thing.

1 My concern is we put a bailiff back there with
2 witnesses, or whatever, and those witnesses are going
3 to be scattered to the wind. You're not going to be
4 able to find them. The bailiff is not going to know
5 who they are. They are not going to know in what order
6 they'll be called, how they will be called. It is just
7 so much more efficient. The Solicitor's Office has had
8 much access to them, and you have had much access to
9 your witnesses, so what's the harm?

10 MR. MCGUIRE: The only harm --

11 THE COURT: You handle your witnesses, and they
12 handle theirs.

13 MR. MCGUIRE: My only real concern is having a
14 witness testify, or sit in court for some reason, and
15 have to go back out and sit in a room where they can be
16 recalled and they discuss the court proceedings with
17 potential witnesses. Right now all the civilian
18 witnesses can go to dinner and talk about the case, for
19 all I care. Police officers can interview and
20 reinterview them as many times as they want, but the
21 one thing I want to insulate them from is things that
22 happen in court. They are not entitled to know who
23 testified about what, who testified to what earlier.

24 THE COURT: Do you simply want me to instruct the
25 witness as the witness -- if the witness is an

1 unexcused witness, to instruct the witness not to
2 discuss their testimony with the other witnesses?

3 MR. McGUIRE: Yes. And I would like an impartial
4 witness monitor, such as a bailiff, to make sure that
5 that happens.

6 THE COURT: My problem is the availability of
7 plain-clothes bailiffs. I mean, we have two, three
8 that are left. The Sheriff's Office is in the process
9 of essentially phasing them out, non-law enforcement
10 bailiffs. As I said earlier, the primary job of the
11 Sheriff's Office here in Horry County is security and
12 assisting the courts; that is what they do. They are
13 not out doing law enforcement as traditional law
14 enforcement would.

15 THE COURT: I just don't know if we have enough,
16 and I know we don't. We have a total of two on this
17 floor -- three total. I mean, that's all we got. Who
18 do you propose to do this?

19 MR. McGUIRE: Well, you could hire them.

20 MR. HIXSON: Your Honor, perhaps it is instructive
21 as to the next motion, Number 34. It kind of
22 incorporates this, because Counsel moved to sequester
23 all the witnesses prior to the voir dire process also.
24 That argument helps support that. You know, we have an
25 obligation and duty to talk to our witnesses throughout

1 this process. We can't tell them -- if you issue a
2 sequestration order in the trial, which I assume you
3 will -- that is a trial testimony protection. That is
4 not witness preparation or discussion protection. So
5 you are putting a lay and partial witness that may not
6 understand the rules and think we're talking to our
7 witness during the course of this trial and think
8 there's a problem, when there's not. That is one of
9 the concerns I have with a witness monitor, that it
10 creates this unnecessary burden when we do this all the
11 time without witness monitors. Witnesses can't tell
12 them what they testified to, and everyone understands
13 that, and why there is a necessity here to make a step
14 beyond that.

15 THE COURT: All right. Mr. McGuire, one last shot
16 at it.

17 MR. MCGUIRE: Please. I don't know what I can do
18 to change your mind. I mean, I would hate to have
19 somebody participate in court, deliver their testimony,
20 be subject to recall, go back out and nobody is doing
21 anything sinister, but have a layperson, civilian
22 witness asks questions and they start talking about the
23 trial, what's going on. That happens. That does
24 happen.

25 THE COURT: I understand that. What I will do is

1 whoever the handlers are -- I'm sure you're going to
2 have somebody back there to make sure that your
3 witnesses are available?

4 MR. MCGUIRE: Yes, sir.

5 THE COURT: And I'm sure Mr. Hixson is. I will
6 meet with those persons prior to trial. I will
7 instruct them that I am going to tell each witness as
8 he testifies not to discuss his testimony with other
9 witnesses or in the presence of other witnesses, and I
10 will ask the handlers to please let the Court know
11 should that occur, or to caution the witnesses that
12 they should not do it. That -- I will go that far, but
13 I won't limit you from going back -- you know,
14 gentlemen, this is how it works. You get a witness and
15 you put him up and he doesn't do the job you think he
16 was going to do, and you have another witness back
17 there that you think can fix -- you might not be doing
18 anything unethical, you might be saying, look, I need
19 you to address this issue if you recall this, or
20 whatever, and you talk to the witness and you know what
21 the witness is going to say; there is nothing wrong
22 with that.

23 MR. MCGUIRE: There is no objection.

24 THE COURT: You are not putting words in the
25 witness' mouth. You say I'll have to address 'this

1 issue with you. I didn't plan on it, I thought I was
2 going to do it with another witness, I have to do it
3 with you, and the solicitor needs to do that. Those
4 things arise during the trial of the case. I won't
5 limit that.

6 I'm simply going to have your handlers -- I will
7 talk to both of them, tell them to please advise
8 witnesses not to go back if the witnesses is not
9 released. If the witness is released, I'm not going to
10 send them back in the room; they can stay in the
11 courtroom or leave. If they are required to return to
12 the witness holding rooms, they are not to discuss
13 their testimony with any of the other witnesses or in
14 the presence of those witnesses. They can discuss it
15 with the attorneys all they want or the investigators
16 all they want. I'll ask him to report it to the Court
17 if they persist in doing it, okay.

18 MR. McGUIRE: Yes, sir.

19 MR. HIXSON: Does that also address 34? I
20 mentioned it, but I didn't know if -- that's defense --

21 THE COURT: You are talking about not allowing
22 witnesses --

23 MR. McGUIRE: If the State, for instance, has 15
24 law enforcement witnesses, eyewitnesses to the incident
25 or the circumstances right after the incident, they

1 would not all 15 be able to sit here and listen to the
2 prior 15 testify before they took the stand.

3 THE COURT: You know, I'm going to sequester
4 witnesses. It is appropriate in a capital case. It is
5 appropriate in a lot of cases, particularly in a
6 capital case. I won't let the solicitor have 15 law
7 enforcement witnesses standing out here and listen to
8 each other testify. He obviously has to have his lead
9 detectives involvement. In fact, I may let him have
10 more than the lead detective. If he has a couple that
11 worked on this, I may let them be there together, but
12 I'm not going to have a herd of law enforcement. I'm
13 not going -- they are going to get sequestered like the
14 others. Is that your concern?

15 MR. McGUIRE: Yes, sir, just a basic witness
16 sequestration.

17 THE COURT: This voir dire thing --

18 MR. McGUIRE: That, I mean, I can just tell you
19 it's come up in the course of voir dire and jurors
20 present in the courtroom, we've had a dozen officers
21 show up just to watch voir dire and talk about the
22 case; I think that is inappropriate. I think voir dire
23 is voir dire.

24 THE COURT: If the officer --

25 MR. McGUIRE: If he's off duty, he can do